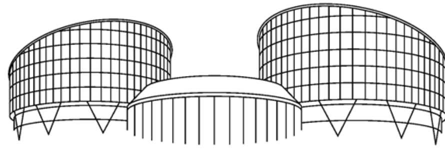

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MAGYAR JETI ZRT v. HUNGARY

(Application no. 11257/16)

JUDGMENT

STRASBOURG

4 December 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Magyar Jeti Zrt v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 4 September 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11257/16) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a private limited company registered under Hungarian law, Magyar Jeti Zrt ("the applicant company"), on 23 February 2016.

2. The applicant company was represented by Ms V. Vermeer, a lawyer practising in London. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicant company complained under Article 10 of the Convention that, by finding it liable for the posting of a hyperlink leading to defamatory content on its website, the domestic courts had unduly restricted its freedom of expression.

4. On 26 May 2016 the Government were given notice of the application.

5. On 1 July 2016 under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court, the Vice-President of the Section granted the European Publishers' Council, The Media Law Resource Center Inc., the Newspaper Association of America, Buzzfeed, Electronic Frontier Foundation, Index on Censorship, Professor Lorna Woods, Dr Richard Danbury and Dr Nicole Stremlau, jointly; European Information Society Institute; Article 19; the European Roma Rights Centre; Mozilla Foundation and Mozilla Corporation; and Access Now, the Collaboration on International ICT Policy in East and Southern Africa and European Digital Rights, jointly, leave to intervene as third parties in the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant company operates a popular online news portal in Hungary called 444.hu, which averages approximately 250,000 unique users per day. The online news portal has a staff of twenty-four and publishes approximately seventy-five articles per day on a wide range of topics, including politics, technology, sport and popular culture.

7. On 5 September 2013, a group of apparently intoxicated football supporters stopped at an elementary school in the village of Konyár, Hungary, while travelling by bus to a football match. The students at the school were predominantly Roma. The supporters disembarked from the bus, and proceeded to sing, chant and shout racist remarks and make threats against the students who were outside in the playground. The supporters also waved flags and threw beer bottles, and one of them reportedly urinated in front of the school building. To protect the children, the teachers called the police, took the children inside and made them hide under tables and in the bathroom. The football supporters boarded the bus and left the area only after the police arrived.

8. On 5 September 2013, J.Gy. the leader of the Roma minority local government in Konyár gave an interview, in the company of a pupil of the elementary school and his mother, to Roma Produkciós Iroda Alapítvány, a media outlet with a focus on Roma issues. While describing the events, and referring to the arrival of the football supporters in Konyár, J.Gy. stated that "Jobbik came in[1]" (*Bejött a Jobbik*). He added: "They attacked the school, Jobbik attacked it", and "Members of Jobbik, I add, they were members of Jobbik, they were members of Jobbik for sure." On the same day the media outlet uploaded the video of the interview to Youtube.

9. On 6 September 2013 the applicant company published an article on the incident in Konyár on the 444.hu website with the title "Football supporters heading to Romania stopped to threaten gypsy pupils", written by B.H., a journalist of the Internet news portal. The article contained the following passages:

> "By all indications, a bus full of Hungarian football supporters 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 witnesses' statements, the bus arrived in the village Thursday morning. The supporters 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 J.Gy., president of the local gypsy [cigány] municipality, talked to us about the incident. A phone conversation with Mr Gy. and a parent has already been uploaded to Youtube."

1. *Jobbik* is a right-wing political party, at the material time having the third largest representation in Hungarian Parliament.

The words “uploaded to Youtube” appeared in green, indicating that they served as anchor text to a hyperlink to the Youtube video. By clicking on the green text, readers could open a new web page leading to the video hosted on the website of Youtube.com.

10. The article was subsequently updated three times – on 6 and 12 September and 1 October 2016 – to reflect newly available information, including an official response from the police.

11. The hyperlink to the Youtube video was further reproduced on three other websites, operated by other media outlets.

12. On 13 October 2013, the political party Jobbik brought defamation proceedings under Article 78 of the Civil Code before the Debrecen High Court against eight defendants, including J.Gy., Roma Produkciós Iroda Alapítvány, the applicant company, and other media outlets who had provided links to the impugned video. It argued that by using the term Jobbik to describe the football supporters and by publishing a hyperlink to the Youtube video, the respondents had infringed its right to reputation.

13. On 30 March 2014 the High Court upheld the plaintiff’s claim, finding that J.Gy.’s statements falsely conveyed the impression that Jobbik had been involved in the incident in Konyár. It also found it established that the applicant company was objectively liable for disseminating defamatory statements and had infringed the political party’s right to reputation, ordering it to publish excerpts of the judgment on the 444.hu website and to remove the hyperlink to the Youtube video from the online article.

14. The judgment of the High Court contains the following relevant passages:

> “...
>
> The Court established that first defendant J.Gy. violated the plaintiff Jobbik Magyarorszagért Mozgalom’s inherent right of protection against defamation by falsely claiming in his statements given to the second defendant on 5 September 2013 and uploaded to youtube.com, and to the sixth defendant on 7 September and uploaded to haon.hu that the events that had taken place on 5 September 2013 in front of the primary school of Konyár, had been done by the plaintiff party, and that the people who had taken part in it were individuals associated with the plaintiff party. The Court established that the second defendant, Roma Produkcios Iroda Alapitvany; the fourth defendant, I.V., the fifth defendant, Magyar Jeti, the sixth defendant. Inform Média Kft; and the eighth defendant HVG Kiadó Zrt. also violated the plaintiffs inherent right to be protected against defamation as the second defendant uploaded the first defendant’s false statement to youtube.com, and the fourth defendant made it available and disseminated it on romaclub.hu, the fifth defendant on 444.hu, the sixth defendant on haon.hu. and the eighth defendant on hvg.hu.
>
> ...
>
> The Court obliges the first and second defendants to make the first and second paragraphs of this judgment publicly available within 15 days and for a period of 30 days on youtube.com at their own cost, and for the fourth defendant to make it publicly available on romaclub.hu, the fifth defendant on 444.hu, the sixth defendant on haon.hu, and the eighth defendant on hvg.hu.
>
> It also obliges the fifth defendant to delete the link to the first defendant’s statement uploaded to youtube.com in its article "Supporters on their way to Romania stopped by to threaten gipsy students" published on 6 September 2013, within 15 days.

Defamation can be realised not only by the stating of a falsehood but also by the publication and dissemination of a falsehood that pertains to another person (see Article 78 § 2 of the Civil Code). When establishing the occurrence of an infringement, it does not matter whether the persons concerned acted in good or bad faith, [but] whether the infringement can be imputable to them or not.

With regard to the above mentioned, the Court established that the second, fourth and fifth [the applicant company], sixth and eight defendants also violated the plaintiff's inherent right to be protected against defamation by publishing and publicly disseminating the first defendant's defamatory statement.

...

The objective sanctions for the violation of inherent rights:

Pursuant to Paragraph 1 of Section 84 of the Civil Code, a person whose inherent rights have been violated shall have the following options under civil law, depending on the circumstances of the case:

a) demand a court declaration of the occurrence of the infringement;

c) demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution;

d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature.

The above cited sanctions [Article 84 § 1 of the Civil Code] for the violation of inherent rights are objective in nature, [and] therefore are independent from the imputability of the perpetrator or the lack of it. The violation itself forms the basis for the application of an adequate objective sanction. With regard to the above mentioned, the Court established that the defendants violated the plaintiff's Inherent rights, based on Paragraph 1 a) of Section 84 of the Civil Code.

With regard to the restitution in accordance with Paragraph 1 c) of Section 84 of the Civil Code, the Court ordered the defendants - pertaining to the infringement they have realized by their proceedings - to make public in the affected websites the first and second paragraphs of the judgment that contain the establishment of the infringement and at the same time affect the plaintiff and declare the falseness of the statement that was made publicly available. Just as they did so with the first defendant's declaration that contained untrue statements. Since the plaintiff's harm can be repaired in the objective sanctions' circle with the given provision, the Court rejected that part of the plaintiff's claim that referred to the public dissemination of a declaration with a different content.

Based on Paragraph 1 d) of Section 84 of the Civil Code, the Court ordered the fifth defendant to deprive its related report of its injurious nature, but it rejected the same claim the plaintiff submitted against the eighth defendant, since it can be established by the facts of the case that the eighth defendant's report available on hvg.hu merely links to the report that appeared on the website 444.hu maintained by the fifth defendant, therefore the latter's deprivation of its injurious nature effectively results in the deprivation of the report on hvg.hu of its injurious nature.

The subjective sanctions of violation of inherent rights:

Based on Paragraph 1 e) of Section 84 of the Civil Code, a person whose inherent rights have been violated shall file charges for punitive damages in accordance with the liability regulations under civil law.

Based on Paragraph 1 of Section 339 of the Civil Code, a person who causes damage to another person in violation of the law shall be liable for such damage. He

shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation. Based on Paragraphs 1 and 4 of Section 355 of the Civil Code, the person responsible for the damage shall indemnify the aggrieved party for non-material damages. The four conjunctive conditions of indemnification of non-material damages are; 1) the violation of law in the violation of inherent rights; 2) imputability; 3) non-material disadvantage; 4) causal link between the violation of inherent rights and the non-material disadvantage.

With regard to legal persons, the non-material damage is non-material disadvantage or loss manifested in the assessment of the legal person, and in the adverse changes in its business turnover, in its participation in other relations and in the situation and quality of its existence and operations.

The occurrence of the disadvantage can be established not just on the basis of evidence but by publicly known facts as well, based on Paragraph 3 of Section 163 of the Code of Civil Procedure (BH.2001.178.)

In the case in question, the Court established it as a publicly known fact that the first defendant's statement, which presented the plaintiff political party as such that committed an aggressive, threatening and racist event, and which was later on publicly disseminated by the other defendants, caused non-material damage in the assessment of the plaintiff political party. This circumstance is rejected and regarded with disdain by a wide layer of society, and it forces the legal person "associated" with such events to explain and clarify its role (or in this case, the lack of its role). In the case of a political party with parliamentary representation, this kind of non-material damage can especially be caused by such violation of inherent rights committed nearly six months prior to the parliamentary elections.

With regard to the first defendant, the Court established the fact of imputability out of the conditions of indemnification for non-material damages....

In the case of the other defendants, the Court did not establish their imputability with regard to the violation of law, and consequently, the Court rejected the plaintiff's claim for indemnification for non-material damages against the other defendants, as follows:

In their own online news websites maintained by the fifth [the applicant company], sixth and eight defendants, the defendants in question published reports that presented the events of 5 September in the most realistic way, and they used the available information channels and forms of control in the expected manner. They presented contradictory information and opinions in an objective manner, remained true to the information and the given opinions. The fact that the defendants also included [Mr J.Gy.'s statements] does not violate the procedure expected from the staff of the press in such a situation [is] not regarded as a deliberately false publication, and therefore does not call for the establishment of whether the employees of the given defendants failed to examine the veracity of the facts, and in relation to this, failed to act with the precision necessary for the responsible practice of the constitutional right to freedom of expression. In contrast with this, it can explicitly be established based on the content of the testimonies and the submitted reports that the employees of the affected defendants acted with the precision necessary for the responsible practice of their work[:] they examined, exposed and presented the veracity of the facts[;] therefore they acted in a manner that would generally be expected from them in the given situation.

...”

15. The applicant company appealed arguing that public opinion associated the notion of “Jobbik” not so much with the political party but with anti-Roma ideology, and the name had become a collective noun for anti-Roma organisations. According to the applicant company, the statement

had not had an offensive content regarding the political party, since it had been publicly known that Jobbik had been engaged in hatred-inciting activities. The applicant company also emphasised that by making the interview with the first defendant available in the form of a link but not associating the applicant company with the video's content, it had not repeated the statements and had not disseminated falsehoods.

16. On 25 September 2014 the Debrecen Court of Appeal upheld the first-instance decision. It held that the statement of J.Gy. had qualified as a statement of facts because it had given the impression to the average audience that the football supporters had been organisationally linked to the political party. The court found that the statement had been injurious to the political party since it had associated the latter with socially reprehensible conduct. As regards the applicant company in particular, it held:

> "... With regard to the fifth defendant's [the applicant company's] reference in its appeal, the court of first-instance correctly established that making a false statement available through a link, even without identifying with it, qualifies as the dissemination of facts.
>
> Dissemination (or circulation) is the sharing of a piece of news as a content of thought and making it available for others. Contrary to the fifth defendant's viewpoint expressed in its appeal, the infringement of law by dissemination occurs even if the disseminator does not identify with the statement, and even if their trust in the veracity of the statement is ungrounded. Making lawful content available in any form qualifies as dissemination; and the disseminator bears objective responsibility for sharing another person's unlawful statement owing to the occurrence of the sharing.
>
> Based on the grammatical and taxonomical interpretation of dissemination defined in Article 78 § 2 of the Civil Code, it occurs by the sharing of information, which makes the given content accessible to anyone. The essence of dissemination is the sharing of information, and owing to the objective legal consequence, it does not matter what the goal of the sharing was, whether the disseminator acted in good or bad faith, nor do the scope of publicity or the gravity of the infringement have any relevance.
>
> ..."

17. The applicant company lodged a constitutional complaint under Act no. CLI of 2011 on the Constitutional Court ("the Constitutional Court Act") on 1 December 2014, arguing in essence that under the Civil Code, media outlets had objective liability for dissemination of false information, which according to judicial practice meant that media outlets were held liable for the veracity of statements that clearly emanated from third parties. Thus, even if a media organ prepared a balanced and unbiased article on a matter of public interest, it could still be found to be in violation of the law. This would result in an undue burden for publishers, since they could only publish information whose veracity they had established beyond any doubt, making reporting on controversial matters impossible. It argued that the judicial practice was unconstitutional since it did not examine whether a publisher's conduct had been in compliance with the ethical and professional rules of journalism, but only whether it had disseminated an untrue statement. In the area of the Internet where the news value of

information was very short, there was simply no time to verify the truthfulness of every statement.

18. Two of the defendants also lodged a petition for review with the *Kúria.* The applicant company argued that the second-instance judgment restricted the freedom of the press in a disproportionate manner, as it had only reported on an important issue of public concern, in compliance with its journalistic tasks. It emphasised that, as established by the lower-level courts, its report on the issue had been balanced. It further maintained that the statement of J.Gy. qualified as an opinion rather than a fact. In any event, it had not been engaged in the dissemination but had merely fulfilled its journalistic obligation of reporting.

19. The *Kúria* upheld the second-instance judgment on 10 June 2015 (served on the applicant company on 4 September 2015), reiterating that J.Gy.'s statements were statement of facts and that the defendants had failed to prove their veracity. Although the term *jobbikos* was used in colloquial language, in the case at issue J.Gy. had explicitly referred to the political party and its role in the incident. As regards the question of whether the applicant company's activity constituted dissemination of information the *Kúria* found:

> "Both in criminal law and other cases of civil law, the *Kúria* has taken the legal standpoint ... that dissemination is carried out by sharing or making public any information, as a result of which anyone can have access to the given content. The Internet is only one possible alternative for publishing, it is the forum of dissemination, meaning that information and facts are shared through a computer network. Internet link to one's own publication serves an appendix; it becomes accessible and readable with a single click. The Civil Code established objective responsibility for the dissemination, irrespective of the good or bad faith of the disseminator. In the *Kúria*'s view, requiring media outlets not to make injurious statements accessible does not constitute a restriction of freedom of the press or freedom of expression, nor was it an obligation on them which cannot in practice be met."

20. On 19 December 2017 the Constitutional Court dismissed the constitutional complaint. It emphasised the second-instance court's finding that providing a hyperlink to content qualified as dissemination of facts. Furthermore, dissemination was unlawful even if the disseminator had not identified itself with the content of the third-party's statement and even if it had wrongly trusted the truthfulness of the statement.

21. The Constitutional Court also reiterated its previous case-law concerning reporting about public figures' press conferences, stating that such conduct did not qualify as dissemination if the report was unbiased and objective, the statement concerned a matter of public interest, the publisher provided the source of the statement and gave the opportunity to the person concerned by the potentially injurious statement a possibility to react. In such cases, according to the Constitutional Court, journalists neither made their own statements nor did they intend to influence public opinion with their own thoughts. Therefore, the liability of the press for falsehoods was to be distinguished from situations where the media content was merely defined by the own choices and decisions of the editors and journalists.

Specifically, in these situations the aim of a publication was neither to enrich nor to influence public debate with the journalists' own arguments, but to provide an up-to-date and credible report on the statements of third-parties participating in public debates. The interest of a public debate required accurate reporting about press conferences.

22. Concerning the present case, the Constitutional Court found that the dissemination of a falsehood did not concern a statement expressed at a press conference. The statement in question had related to a media report about an event which the press had presented according to its own assessment. The press report had summarised information concerning an event of public interest. A press report fell outside the definition of dissemination only if the aim of the publication was to provide a credible and up-to-date presentation of statements of third parties of a public debate. However, in the present case the *Kúria* found that the aim of the publication had not been the presentation of J.Gy.'s statements, but the presentation of the contradictory information concerning the event. Thus the press report qualified as dissemination.

II. RELEVANT DOMESTIC LAW

23. The relevant provisions of the Fundamental Law read as follows:

Article VI

"(1) Everyone has the right to have his or her private and family life, home, communications and reputation respected.

..."

Article IX

"(1) Everyone shall have the right to freely express their opinion.

(2) Hungary shall recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion."

24. The Constitutional Court Act provides as follows:

Section 27

"Any individual or organisation involved in a case may lodge a constitutional complaint with the Constitutional Court against a court decision which is contrary to the Fundamental Law within the meaning of Article 24 § 2 (d) of the Fundamental Law, if the ruling on the merits or another decision terminating the court proceedings

a) violates the complainant's rights enshrined in the Fundamental Law, and

b) the complainant has already exhausted the available legal remedies or no legal remedy is available.

..."

Section 29

"The Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.

..."

17. Legal Consequences of the Decisions of the Constitutional Court
Section 39

"(1) Unless provided for otherwise by this Act, the decisions of the Constitutional Court are binding on everyone.

(2) There shall be no remedy against the decisions of the Constitutional Court.

(3) The Constitutional Court shall establish itself the applicable legal consequences within the framework of the Fundamental Law and of this Act."

Section 43

"(1) If the Constitutional Court, in the course of its proceedings specified in Section 27 and on the basis of a constitutional complaint, declares that a judicial decision is contrary to the Fundamental Law, it shall annul the decision.

(2) For the procedural legal consequences of the Constitutional Court's decision annulling a judicial decision, the provisions of the codes on court procedures shall be applicable.

(3) In the court proceedings following the annulment of a judicial decision by the Constitutional Court, the decision of the Constitutional Court shall be binding as regards the issue of constitutionality.

(4) The Constitutional Court, when annulling a judicial decision, may also annul judicial decisions or the decisions of other authorities which were reviewed by the given decision.

..."

25. Act no. IV of 1959 on the Civil Code, as in force at the material time, provides:

Article 75

"(1) Personality rights shall be respected by everyone. Personality rights are protected under this Act.

(2) The rules governing the protection of personality rights are also applicable to legal personalities, except in cases where such protection can, owing to its character, only apply to private individuals.

(3) Personality rights will not be violated by conduct to which the holder of rights has given consent, unless such consent violates or endangers an interest of society. In any other case a contract or unilateral declaration restricting personality rights shall be null and void."

Article 78

"(1) The protection of personality rights shall also include the protection of reputation.

(2) In particular, the statement or dissemination of an injurious falsehood concerning another person, or the presentation with untrue implications of a true fact relating to another person, shall constitute defamation."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

26. The Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet provides:

> “29. At their 1010th meeting on 7 November 2007 the Ministers’ Deputies considered essential aspects of the use of new information and communication technologies and services, in particular the Internet, in the context of protection and promotion of human rights and fundamental freedoms. They acknowledged the increasingly important role the Internet was playing in providing diverse sources of information to the public and people’s significant reliance on the Internet as a tool for communication.
>
> 30. It was noted however that the Internet could, on the one hand, significantly enhance the exercise of human rights and fundamental freedoms, such as the right to freedom of expression, while, on the other hand, the Internet might adversely affect other rights, freedoms and values, such as the respect for private life and secrecy of correspondence and for the dignity of human beings.
>
> 31. The Ministers’ Deputies adopted recommendations to the Council of Europe’s member states with regard to the governance of the Internet. These included recommendation to elaborate a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies and to encourage the private sector to develop open and transparent self- and co-regulation on the basis of which key actors in this field could be held accountable.”

27. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media (adopted on 21 September 2011) reads as follows:

> “...
>
> The Committee of Ministers, under the terms of Article 15. b of the Statute of the Council of Europe recommends that member states:
>
> – adopt a new, broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents;
>
> – review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people’s right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship;
>
> – apply the criteria set out in the appendix hereto when considering a graduated and differentiated response for actors falling within the new notion of media based on relevant Council of Europe media-related standards, having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in a democratic society;
>
> ...

Appendix to Recommendation CM/Rec(2011)7

Criteria for identifying media and guidance for a graduated and differentiated response

Introduction

7. A 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.

...”

28. The Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted on 21 December 2005, states the following:

“No one should be liable for content on the Internet of which they were not the author, unless they had either adopted that content as their own or refused to obey a court order to remove that content.”

29. In Case C-160/15 *GS Media BV v. Sanoma Media Netherlands BV, Playboy Entreprises International Inc., Britt Geertruida Dekker* the Court of Justice of the European Union (“the CJEU”) considered whether, and in what circumstances, posting on a website a hyperlink to protected works, which are freely available on another website without the consent of the copyright holder, constitutes “communication to the public” within the meaning of Article 3 § 1 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. The CJEU found that:

“45. In that regard, it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.

...

47. For the purposes of the individualised assessment of the existence of a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder.

48. Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C‑466/12, EU:C:2014:76, paragraphs 18 to 23) does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet . In addition, where the work in question was already available with unrestricted

access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention.

49. In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29."

30. In the judgment no. 1 BvR 1248/11 of 15 December 2011 the German Federal Constitutional Court pointed out that the provision of a link in an online article was protected under the German Basic Law. The discussion process necessary for the formation of opinion, protected by the Basic Law, included private and public information about third-party statements, and also therefore the purely technical distribution of such statements, regardless of any associated expression of opinion by the distributor itself. It stressed that by placing a hyperlink leading to another website, the person or organisation doing so did not automatically make the content of the website its own opinion. Lastly, it pointed out that the German Federal Court had correctly balanced the conflicting rights when it had found that the placing of the link did not further encroach on the rights of others (that is to say the claimant's copyright) since a website with the unlawful content could very easily be found via an Internet search engine anyway.

31. In *Crookes v. Newton* (2011, SCC 47, [2011] 3.S.C.R. 269) the Supreme Court of Canada considered the issue of whether creating a hyperlink to defamatory material constituted publishing the defamatory statements. It held that a person cannot defame someone merely by publishing a hyperlink to a third-party website or document containing defamatory material. It stated, in particular, that:

"Hyperlinks are in essence references, which are fundamentally different from other acts of 'publication'. Hyperlinks and references both communicate that something exists, but do not themselves communicate its content.

...

A hyperlink, by itself should never be seen as 'publication' of the content to which it refers. ... Only when the person or organisation doing so presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be 'published' by that person or organisation."

32. On 26 July 2012 the United States Court of Appeals for the Third Circuit held in *Philadelphia Newspapers, LLC* (No. 11-3257, 2012 U.S. App. Lexis 15419 (3d Cir. July 26, 2012) (precedential)) "that providing a link on a website to an allegedly defamatory article [was] not republication for purposes of the single publication rule or the statute of limitations". Rather, the court found that the principles of traditional publication, according to which a mere reference to an article did not republish the material, as long as it did not restate the defamatory statement, were also applicable to internet publication. It held that "[t]aken together, though a

link and reference m[ight] bring readers' attention to the existence of an article, they d[id] not republish the article".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant company complained that the rulings of the Hungarian courts establishing objective liability on the part of its Internet news portal for the content it had referred to via a hyperlink had amounted to an infringement of freedom of expression as provided in Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

34. The Government argued that the applicant company had failed to exhaust domestic remedies since it had not challenged the final judgment before the Constitutional Court.

35. The applicant company argued that it had exhausted all available remedies.

36. The Court notes that on 15 January 2018 the applicant company's representative submitted to it the Constitutional Court's decision of 19 December 2017 (no. 3002/2018.(I.10.)AB) (see paragraph 20 above). The Court is therefore satisfied that the applicant company has in fact demonstrated that it availed itself of the remedy alluded to by the Government.

37. The Court accordingly concludes that the applicant company has complied with the obligation to exhaust domestic remedies and that the Government's objection must be dismissed. It also notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

38. The applicant company argued that the interference with its freedom of expression had not been prescribed by law. It submitted that although Article 78 § 2 of the Civil Code had established liability for dissemination of injurious falsehoods, there had been no legislation or case-law stating that hyperlinking was to be considered dissemination of information.

39. In its view the Hungarian courts' decisions had failed to account for the specific features of hyperlinks and had applied to its case the standards of more traditional forms of sharing actual content, which had not been reasonably foreseeable. It explained that hyperlinking in itself did not convey or communicate any information but merely pointed to its existence. Furthermore, the standard applied by the domestic courts, would have entailed its liability even if the owner of the hyperlinked website modified the webpage to include defamatory material, originally not present.

40. The applicant company disputed that the protection of the reputation of a political party could serve as a legitimate aim for the interference. Relying on the Court's case-law, it maintained that the limits of acceptable public scrutiny are wider in relation to politicians who had to have a greater degree of tolerance to criticism.

41. According to the applicant company, the interference had not been necessary in a democratic society. It argued that the objective liability standard as applied by the domestic courts had excluded any balancing between the two protected values. Amongst other actions, by the application of the objective liability rule, the domestic courts had not been able to consider whether the applicant company had acted in good or bad faith or what the purpose of the dissemination had been. In any event, the objective liability standard was incompatible with the Court's case-law.

42. The applicant company argued that had the domestic courts undertaken a proper balancing exercise, they would have concluded that its right to freedom of expression should have prevailed over Jobbik's right to reputation.

43. Firstly, the hyperlink had appeared in a balanced news report on a matter of public interest. In its view, including the hyperlink in the article in question had been a technique of reporting that the press should remain free to opt for. Moreover, it had been established by the domestic courts that the journalist who had written the article involving the hyperlink had acted in accordance with his professional obligations, amongst others, by verifying the information available on Youtube. The applicant company also pointed out that Jobbik had had the choice of bringing a claim against the author of the comments. Lastly, while providing access to the Youtube video through a hyperlink had not had a significant impact on Jobbik's reputation, the domestic court judgment finding the applicant company liable for third-party statements had had far-reaching implications for the press when

producing online journalistic content. Concerning this latter aspect, the applicant company noted that given the chilling effect caused by automatic liability for defamation based on the use of hyperlinks, journalist and online news portals would refrain from including hyperlinks in their publications, restricting the cross-referential structure of the Internet and users' access to information.

(b) The Government

44. The Government conceded that there had been an interference with the applicant company's right to freedom of expression, albeit one prescribed by law and pursuing the legitimate aim of the protection of the rights of others. In their view, the authorities had also acted within their margin of appreciation.

45. Firstly, under Articles 75 § 1 and 78 §§ 1 and 2 of the Civil Code, the statement or dissemination of an injurious falsehood concerning another person, or the presentation with untrue implications of a fact relating to another person constituted defamation. Furthermore, the protection of the personality rights of others, that is to say the right to reputation, constituted a limit to the right to freedom of expression

46. The Government were of the opinion that the court judgments against the applicant company could have been avoided had the applicant company acted with due care and had it not published the hyperlink leading to the video recording. The statement of J.Gy. had been expressed in definite terms and could not be viewed as an expression of an opinion but rather as a statement of facts. It had not reflected objective reality and had been capable of negatively affecting society's opinion of the defendant, and irrespective of the applicant company's good or bad faith their release had infringed the political party's right to reputation.

47. The Government asserted that publishers of recordings should have foreseen that they would have been held liable for the content which they had failed to verify. Otherwise, serious human-rights violations could be committed without any sanctions. In their understanding, distribution of information meant transmitting or communication of information as thought which could infringe the rights of others even if the distributer did not agree with the content of the third-party statement or if he or she wrongfully relied on the veracity of the statement. Reiterating the arguments of the domestic courts, the Government emphasised that making unlawful content accessible in any way constituted distribution of information, for which the distributer should hold objective liability, irrespective of his or her good or bad faith or the seriousness of the infringement of others' rights. Furthermore, this standard did not entail a limitation of freedom of expression and did not impose an undue burden on publishers.

48. The Government also pointed out that the applicant company is a professionally operated for-profit Internet portal which could easily have foreseen the legal consequences of making accessible the video-recording in question. It could reasonably have been expected to act with due care and could have removed the hyperlink without any difficulty.

49. Thus, in the Government's opinion the domestic courts had struck a fair balance between the competing interest of the applicant company and that of the political party, in particular regard being had to the insignificant consequences of the final judgment on the applicant company of paying the court fees and publishing the relevant parts of the judgment.

(c) The third-parties

50. Article 19 argued that there was a fundamental difference between the use of a hyperlink to another webpage and the publication of the content on the linked webpage, since hyperlinks were only referring readers to content that had already been published elsewhere. Without hyperlinks, most of the information on the Internet would be difficult or impossible to find and accessibility of information on the Internet would be reduced. Article 19 referred to comparative-law material concerning judicial decisions in Canada, the United Kingdom, Australia, and the United States, in particular, showing that hyperlinks alone did not constitute publication but were merely reference tools, similar to footnotes, offering readers the possibility to pursue further reading of separate publications. Another reason, in the intervener's opinion, to exclude liability for hyperlinking was that the linked content was liable to change over time without the person who used the hyperlink being made aware of it. Furthermore, according to Article 19, no liability should be imposed unless the person who used the hyperlink was aware that the linked content was unlawful and where the hyperlink was presented in such a way as to expressly endorse the linked content. Lastly the intervener emphasised that holding someone who uses a hyperlink liable for third-party content would have the far-reaching consequence that a wide range of groups could be penalised for the content of websites over which they have no control, resulting in a chilling effect, limiting Internet users' access to information.

51. The European Publishers' Council, The Media Law Resource Center Inc., the Newspaper Association of America, Buzzfeed, Electronic Frontier Foundation, Index on Censorship, Professor Lorna Woods, Dr Richard Danbury and Dr Nicole Stremlau jointly submitted that hyperlinking had a number of public interest benefits, including facilitating the journalistic process by enabling content to be delivered more swiftly and facilitating journalists in reporting in a more concise and readily accessible manner, enabling readers to check for themselves the original sources of the journalistic content and thereby to verify the veracity of the publication. Hyperlinking also promoted diversity within the media and facilitated an informed public debate by allowing information and opinions to be more freely expressed and accessed. According to the interveners, the imposition of strict liability for hyperlinking had a chilling effect, since journalists were not in the position to verify themselves the legality of the content on any linked pages and as a consequence would rather refrain from this reporting technique in favour of a more traditional approach. They also pointed out, that in practice hyperlinked content could itself be changed so that it ceased to be lawful by the entity which controlled the relevant webpage, for which

it would be unreasonable to hold the journalist responsible. The imposition of strict liability did not meet a pressing social need because any person whose rights have been adversely affected by the placing of the unlawful content online were able to seek adequate protection by suing the person who placed the unlawful content online and requesting the injurious content to be removed. The interveners accepted that there could be situations where a journalist's or journalistic organisation's liability arose, for example when they proclaimed the specific unlawful content to be true or when they refused to remove a hyperlink to a webpage which had been found by a court judgment to contain a lot of illegal content.

52. Access Now, the Collaboration on International ICT Policy in East and Southern Africa and European Digital Rights in their joint observation submitted that the design of Internet was premised on the idea of free linking of information. They argued that hyperlinks were not in themselves intended to constitute editorial statements and did not necessarily imply, in particular, that one publication endorsed the other. Hyperlinks merely pointed to other pages or web resources, whose content, conversely, could change following the first hyperlink being posted.

According to the interveners an imposition of an objective liability standard was unworkable, requiring individual users to assume that any hyperlink they posted pointed to content they could verify.

53. Mozilla Foundation and Mozilla Corporation (collectively Mozilla) argued that the sole purpose of hyperlinks was to allow readers to navigate to and from information. Hyperlinks were technical and automatic means for users to access information located elsewhere and could not be considered as the publication of that information. A restriction on the use of hyperlinks would undermine the very purpose of the world wide web to make information accessible by linking it to each other. The intervener expressed doubts how people would be able to convey information across the uncountable number of webpages in existence today, if hyperlinking could impute liability. Without hyperlinks, publishers would have to provide alternative instructions for readers to find more information.

54. The European Information Society Institute submitted that hyperlinks were a primary tool of digital navigation: they allowed immediate access to other texts, unlike traditional citation. They also had impact on social interactions, which can easily be repressed by a restriction on their use. Hyperlinks contributed to the development of new media providing more a) interactivity between journalists and readers, b) credibility, by giving context, facts and sources to support the information, c) transparency by allowing readers to trace back the reporting and news gathering process and d) critical reading by allowing journalists and readers to compare contrasting sources. Hyperlinks allow non-editorial decentralised speech that supplements the watchdog role traditionally associated with the mainstream media. Applying strict liability rules for hyperlinking would inevitably lead to self-censorship.

55. The European Roma Rights Centre maintained that when minorities targeted by hate crimes or hate speech associated those acts with politicians

or political parties, they engaged in expression for which Article 10 provided a high level of protection. According to the intervening NGO it was a severe interference with the rights of the Roma, especially having regard to the long-term exclusion faced by them, to be prohibited from expressing the link between racist speech and act and the politicians or political parties they perceived as promoting an environment of racial hatred. Using defamation laws to prevent the Roma minority from articulating the racially-motived practices of political parties would only protect those political parties against the minority group. The intervener also argued that exposing online publishers to liability for the content of linked material would have a chilling effect and unduly burden civil society's and minorities' work against racism.

2. *The Court's assessment*

(a) Whether there has been an interference

56. The Court notes that it was not in dispute between the parties that the applicant company's freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions. The Court sees no reason to hold otherwise.

57. Such an interference with the applicant company's right to freedom of expression must be "prescribed by law", have one or more legitimate aims within the meaning of paragraph 2 of Article 10, and be "necessary in a democratic society".

(b) Lawfulness

58. In the present case the parties' opinion differed as to whether the interference with the applicant company's freedom of expression had been "prescribed by law". The applicant company argued that it had not been foreseeable under domestic law that the posting of a hyperlink would qualify as dissemination of untrue or defamatory information. The Government referred to Article 75 § 1 and 78 §§ 1 and 2 of the Civil Code and argued that the applicant company had been liable for imparting and disseminating private opinions expressed by third-parties.

59. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see *Karácsony*

and Others v. Hungary [GC], nos. 42461/13 and 44357/13, §§ 123-125, ECHR 2016 (extracts), and the cases cited therein).

60. The Court observes that the domestic courts found that the posting of a hyperlink had amounted to the dissemination of defamatory statements and chose to apply Article 78 of the Civil Code. It also notes that there was neither explicit legal regulation nor case-law on the admissibility and limitations of hyperlinks.

61. However, given its conclusion below about the necessity of the interference (see paragraph 84 below), it considers that it is not necessary to decide on the question whether the application of the relevant provisions of the Civil Code to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

(c) Legitimate aim

62. The Government submitted that the interference pursued the legitimate aim of protecting the rights of others. The Court accepts this.

(d) Necessary in a democratic society

(i) General principles

63. The fundamental principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, ECHR 2015, and the cases cited therein).

64. The Court reiterates that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see *Bédat v. Switzerland* [GC], no. 56925/08, § 58, ECHR 2016). In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance (see *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V).

65. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 84, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, and the cases cited therein).

66. As regards the importance of Internet sites in the exercise of freedom of expression the Court has found that in the light of its accessibility and its

capacity to store and communicate vast amounts of information, the Internet has played an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, was certainly higher than that posed by the press (see *Egill Einarsson v. Iceland*, no. 24703/15, § 46, 7 November 2017). Because of the particular nature of the Internet, the "duties and responsibilities" of Internet news portals for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content (see *Delfi*, cited above, § 113). Although Internet news portals are not publishers of third-party comments in the traditional sense, they can assume responsibility under certain circumstances for user-generated content (see *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 62, 2 February 2016).

67. Concerning information society service providers ("ISSPs") which are storing information provided by a recipient of their services, the Court indicated in respect of an Article 8 complaint that in line with the standards on international law, ISSPs should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality (see *Tamiz v. the United Kingdom* (dec.), no. 3877/14, 19 September 2017).

68. Lastly, the Court held that the policies governing reproduction of material from the printed media and the Internet might differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned (see *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts)). The absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog" (ibid., § 64).

(ii) Application of those principles to the present case

69. The Court considers that the case concerns the "duties and responsibilities" of an Internet news portal, for the purposes of Article 10 of the Convention, in the particular situation where in an online article it included a hyperlink leading to contents, available on the Internet, which later were held to be defamatory. The domestic courts found that the posting of such a hyperlink automatically qualified as the publication of the defamatory statement, which finding entailed the objective liability of the journalist and the news portal run by the applicant company. The question before the Court is therefore whether the ensuing interference with the applicant company's rights under Article 10 of the Convention was, in the particular circumstances, based on relevant and sufficient reasons and consequently necessary in a democratic society.

70. The Court observes that the Internet news portal in question is professionally run, publishes some 75 articles in a wide range of topics every day, and attracts a readership of about 250,000 persons per day.

71. The Court notes that the practice of the domestic courts exempted publishers from civil liability for reproduction of material published in press conferences, provided that they reported on a matter of public interest in an unbiased and objective manner, distinguished themselves from the source of the statement and gave an opportunity to the person concerned to comment on the statement (see paragraph 21 above). However, no such immunity existed for the dissemination of false or defamatory information falling outside the scope of press conferences, where the standard of objective liability applied, irrespective of the question of whether the author or publisher acted in good or bad faith and in compliance with their journalistic duties and obligations.

72. The Court reiterates that it has previously noted with approval that the differentiation as regards third-party content between an Internet news portal operator and a traditional publisher was in line with the international instruments in this field, which manifested a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audiovisual media on the one hand and Internet-based media operations on the other (see *Delfi*, cited above, §§ 112-113).

73. Furthermore, bearing in mind the role of the Internet in enhancing the public's access to news and information, the Court points out that the very purpose of hyperlinks is, by directing to other pages and web resources, to allow Internet-users to navigate to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other.

74. Hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet. They do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website.

75. A further distinguishing feature of hyperlinks, compared to acts of dissemination of information, is that the person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link – a natural exception being if the hyperlink points to contents controlled by the same person. Additionally, the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public.

76. Consequently, given the particularities of hyperlinks, the Court cannot agree with the approach of the domestic courts consisting of equating the mere posting of a hyperlink with the dissemination of the defamatory information, automatically entailing liability for the content itself. It rather considers that the issue of whether the posting of a hyperlink may, justifiably from the perspective of Article 10, give rise to such liability

requires an individual assessment in each case, regard being had to a number of elements.

77. The Court identifies in particular the following aspects as relevant for its analysis of the liability of the applicant company as publisher of a hyperlink: (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?

78. In the present case the Court notes that the article in question simply mentioned that an interview conducted with J.Gy. was to be found on Youtube and provided a means to access it through a hyperlink, without further comments on, or repetition even of parts of, the linked interview itself. No mention was made of the political party at all.

79. The Court observes that nowhere in the article did the author allude in any way that the statements accessible through the hyperlink were true or that he approved the hyperlinked material or accepted responsibility for it. Neither did he use the hyperlink in a context that, in itself, conveyed a defamatory meaning. It can thus be concluded that the impugned article did not amount to an endorsement of the incriminated content.

80. In connection to the question of repetition, the Court reiterates that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III § 62; and Novaya Gazeta *and Milashina v. Russia*, no. 45083/06, § 71, 3 October 2017). A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see *Thoma*, cited above § 64). With these principles in mind, the Court would not exclude that, in certain particular constellations of elements, even the mere repetition of a statement, for example in addition to a hyperlink, may potentially engage the question of liability. Such situations can be where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism dealing with a matter of public interest (see in this respect, for example, Novaya Gazeta *and Milashina,* cited above, § 72). However, this was not the case in the present application, where, as observed above, the article in question repeated none of the defamatory statements; and the publication was indeed limited to posting the hyperlink.

81. As to whether the journalist and the applicant company knew or could have reasonably known that the hyperlink provided access to defamatory or otherwise unlawful content, the Court notes at the outset that the domestic courts, with the exception of the first instance court, did not find this aspect relevant, and therefore did not examine it. The Court also considers that this issue must be determined in the light of the situation as it presented itself to the author at the material time, rather than with the benefit of hindsight on the basis of the findings of the domestic courts' judgments. At this juncture, the Court restates that an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life (see *Delfi*, cited above, § 137, and *Axel Springer AG*, cited above, § 83). Furthermore, the limits of acceptable criticism are wider as regards a politician – or a political party – as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his or her every word and deed by both journalists and the public at large, and he or she must consequently display a greater degree of tolerance (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV).

82. Relying on these principles, the Court considers that the journalist in the present application could reasonably assume that the contents, to which he provided access, although perhaps controversial, would remain within the realm of permissible criticism of political parties and, as such, would not be unlawful. Although the statements of J.Gy. were ultimately found to be defamatory because they implied, without a factual basis, that persons associated with Jobbik had committed acts of a racist nature, the Court is satisfied that such utterances could not be seen as clearly unlawful from the outset (see, *a contrario*, *Delfi,* cited above, §§ 136 and 140).

83. Furthermore, it must be noted that the relevant Hungarian law, as interpreted by the competent domestic courts, excluded any meaningful assessment of the applicant company's freedom-of-expression rights under Article 10 of the Convention, in a situation where restrictions would have required the utmost scrutiny, given the debate on a matter of general interest. Indeed, the courts held that the hyperlinking amounted to dissemination of information and allocated objective liability – a course of action that effectively precluded any balancing between the competing rights, that is to say, the right to reputation of the political party and the right to freedom of expression of the applicant company (see, *mutatis mutandis, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt,* cited above, § 89). For the Court, such objective liability 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. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.

84. Based on the above, the Court finds that the domestic courts' imposition of objective liability on the applicant company was not based on relevant and sufficient grounds. Therefore the measure constituted a disproportionate restriction on its right to freedom of expression.

85. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

87. The applicant company did not submit any claim in respect of non-pecuniary damage. However, it claimed 597.04 euros (EUR) in respect of pecuniary damage. This sum corresponded to the amount which the applicant company was ordered to pay in respect of court fees and to the plaintiff political party in respect of the latter's legal costs in the domestic proceedings.

88. The Government contested this claim.

89. The Court accepts that there is a causal link between the violation found and the pecuniary damage alleged; it therefore awards the sum claimed in full.

B. Costs and expenses

90. The applicant company also claimed EUR 1,792.20 for the costs and expenses incurred before the domestic courts, which comprised EUR 1,451.91 for lawyers' fees equal to 100 hours at an hourly rate of 16 United States dollars (USD) and EUR 340.29 for lawyer fees equal to fifteen hours at an hourly rate of USD 25. The applicant company also claimed EUR 2,357.19 for costs and expenses incurred before the Court, which comprised of EUR 2,060 for translational costs and EUR 297.19 for organisational costs.

The applicant company's total claim for costs and expenses came to EUR 4,149.39.

91. The Government contested these claims.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,149.39 covering costs under all heads.

C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 597.04 (five hundred and ninety-seven euros and four cents), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 4,149.39 (four thousand one hundred and forty-nine euros and thirty-nine cents), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 4 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Ganna Yudkivska
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

G.Y
A.N.T.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. European human rights law has developed strongly in favour of including the Internet within the ambit of internationally protected human rights, particularly the rights to free expression and a free press, and has specifically indicated that imposing liability for third-party content published on the Internet can seriously affect these protected rights. The new legal question posed by this case is whether a standard of objective liability for posting hyperlinks is compatible with these rights. The outcome of the present proceedings has implications for the everyday functioning of the Internet, given the importance of hyperlinks. The relevance of this case does not need to be further enhanced. This is the reason why, although in full agreement with the finding of a violation of Article 10 of the Convention, I would like to elaborate on the reasoning of the Court, in order to highlight its underlying principles as regards liability for the use of hyperlinks.

The "distinguishing features" of hyperlinks

2. It has been the position of the Court that "the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned"[1]. The present judgment reaffirms this principle[2]. But the Court goes a step further in the characterisation of the "distinguishing features"[3] of hyperlinks, stating that "[h]yperlinks, as a technique of reporting, are essentially different from traditional acts of publication ..."[4]. Three convincing reasons are invoked for this conclusion.

3. Firstly, hyperlinking does not convey "the linked statements to the audience or communicate its content"[5]. Instead, it merely communicates the existence of such information. This is also the position of the German Federal Constitutional Court, the Canadian Supreme Court, in *Crookes v. Newton*, and the United States Court of Appeals for the Third Circuit, in

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[1] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011.

[2] Paragraph 72 of the judgment.

[3] The expression "distinguishing feature" is used in paragraph 75 of the judgment while the word "particularities" is used in the following paragraph.

[4] Paragraph 74 of the judgment.

[5] Paragraph 74 of the judgment. The point was also made in my dissenting opinion in *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012, under the heading "The form of the speech", as well as in point III of the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the same case.

Philadelphia Newspapers, LLC, whose jurisprudence the Court cites and adopts[6]. Accordingly, referencing via hyperlink "by itself, is content-neutral – it expresses no opinion ..."[7].

4. The design of the Internet with the evolution of the World Wide Web was premised on the idea of the free linking of information. Indeed, as Tim Berners-Lee indicated early on:

> "The intention in the design of the web was that normal links should simply be references, with no implied meaning. A normal hypertext link does not necessarily imply that one document endorses the other; or that one document is created by the same person as the other, or that one document is to be considered part of another."[8]

Two system design principles are fundamental to the Web's structure and operational mode, which make freedom of expression possible:

> "The primary principle underlying the Web's usefulness and growth is universality. When you make a link, you can link to anything. That means people must be able to put anything on the web, no matter what computer they have, software they use or human language they speak and regardless of whether they have a wired or wireless Internet connection ... Decentralisation is another important design feature. You do not have to get approval from any central authority to add a page or make a link. All you have to do is use three simple, standard protocols: write a page in the HTML format, name it with the URL naming convention, and serve it up on the Internet using HTT. Decentralisaton has made widespread innovation possible and will continue to do so in the future."[9]

Berner-Lee's comments on the importance of the need for prolific, universal linking of information should guide the Court's assessment:

> "The Web was designed to be a universal space of information, so when you make a bookmark or hypertext link, you should be able to make that link to absolutely any place of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you can't link ..."[10].

Hyperlinks are the glue that holds the Web together in so far as they enable people to easily and quickly navigate to other webpages to retrieve, view, access and re-share information. Without hyperlinks, publishers would have to provide alternative instructions for readers to find more

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[6] Paragraphs 30, 31 and 32 of the judgment.

[7] *Crookes v. Newton,* [2011] 3 R.C.S. 269, 286. Hence, a hyperlink is not akin to a publication because "though a link and reference may bring readers' attention to the existence of an article, they do not republish the article". In re *Philadelphia Newspapers*, LLC, 690 F.3d 161, 174-75 (3d Cir. 2012).

[8] Tim Berners-Lee, *Commentary on Web Architecture: Links and Law*, April 1997.

[9] Tim Berners-Lee, *Long Live the Web* (2010), Scientific American.

[10] Tim Berners-Lee, *Weaving the Web: The original design and Ultimate Destiny of the world Wide Web by its Inventor*, 1999, as quoted in Mark Sableman, "Link Law Revisited: Internet Linking Law at Five Years" (2001) 16 *Berkeley Technology Law Journal* 1273, 1275.

information. For most ordinary people, this would be difficult, if not impossible, to execute without a strong technological background.

5. The above-mentioned principles of universality and decentralisation, which are especially important to the field of journalism, are bolstered by the Court's view that domestic laws should allow "journalists to use information obtained from the Internet without fear of incurring sanctions"[11]. As a technique of reporting, hyperlinking facilitates and improves the journalistic process by enabling content to be delivered more swiftly to users and enabling journalists to convey information that is more readily accessible and digestible. It also promotes diversity and pluralism in the media, which is substantively in the public interest, since through hyperlinking large and small media organisations are able to work together in a mutually beneficial manner to provide enriched content to users. Typically, journalists and journalistic organisations are not in a position to reassure themselves as to the legality of the content on any linked pages. Even if it were assumed for the sake of argument that larger media organisations may to a certain extent be able to weather the legal risks attendant on hyperlinking, it is plainly the case that smaller journalistic organisations, with far more limited resources, would have no choice but to abandon hyperlinking.

6. Secondly, as also stressed by the Canadian Supreme Court, inserting a hyperlink gives the author "no control over the content in the secondary article to which he or she has linked"[12]. The content of the destination can change, even radically so, from the point in time when the hyperlink is first posted, without the hyperlinker having any control over it[13]. This line of argument is shared by the Court's reasoning, which nevertheless introduces a caveat: the "natural exception being if the hyperlink points to contents controlled by the same person"[14]. In that case, however, liability is not vicarious[15]. Furthermore, hyperlinking can often involve limited or no human editorial action, since most modern Web publication services, content management systems and social media applications include tools which enable automated or otherwise machine-assisted hyperlinking.

7. Thirdly, the Court adds that "the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public"[16]. In so far as a

[11] *Editorial Board of Pravoye Delo and Shtekel*, cited above, § 64.

[12] *Crookes v. Newton*, [2011] 3 R.C.S. 269, 285. See the references to this argument in both my dissenting opinion and the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the case of *Mouvement raëlien suisse*, cited above.

[13] The Court of Justice of the European Union also addressed this argument in *GS Media BV v. Sanoma Media Netherlands BV and Others*, Case C-160/15, paragraphs 45-46.

[14] Paragraph 75 of the judgment.

[15] The argument was also made in point III of the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the case of *Mouvement raëlien suisse*, cited above.

[16] Paragraph 75 of the judgment.

hyperlink is a mere reference to already existing content, it does not create new content. Since the hyperlink is normally far removed from the actual content, a user facing a hyperlink is free to decide whether or not to move to the next website[17]. If the user does not make the independent choice to follow the link, the content will never be displayed to him or her. This freedom of choice is crucial for media users. Hyperlinking enables users more readily to access and check for themselves the original sources of the journalistic content and to have a large measure of control over how they consume the content: they can either go no further than the journalistic content proffered to them or they can selectively look behind that content as they see fit. Hence, hyperlinking empowers the user in a manner that strongly serves the public interest.

The Court's criteria for assessing liability for the use of hyperlinks

8. In view of these distinguishing features, the Court refers, in general terms, to the relevant criteria for assessing the liability of natural and legal persons for the use of hyperlinks. The criteria are the following:

> "(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 [*sic*] 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?" [18]

9. The first thing to be noted is that the Court sets out to describe exhaustively the objective and subjective criteria for assessing all possible scenarios involving the use of hyperlinks by journalists. Although the Court considers hyperlinks "essentially different from traditional acts of publication"[19], it refers to criteria applicable to traditional acts of publication, like the print media, in order to deal also with those scenarios in which the use of hyperlinks equates to acts of publication[20].

10. As a matter of fact, the Court identifies three types of conduct (*actus reus*) on the part of journalists using hyperlinks: hyperlinks with endorsement of the content to which they lead, hyperlinks with repetition of the content to which they lead, and mere hyperlinking without any

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[17] The argument comes up also in the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the case of *Mouvement raëlien suisse*, cited above.

[18] The Court refers to "a number of elements" in paragraph 76 and to the "following aspects as relevant for its analysis" in paragraph 77.

[19] Paragraph 74 of the judgment.

[20] For example, paragraph 80 of the judgment, while referring to the liability of the hyperlinker, refers explicitly to the liability criteria set out for the traditional print media in *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, § 72, 3 October 2017.

endorsement or repetition of the linked content. These different factual situations call for different liability principles.

11. In addition, the Court refers to three types of subjective standard (*mens rea*)[21]: good faith, knowledge that the content to which the hyperlink makes reference is defamatory or otherwise unlawful, and constructive knowledge that it could be so. It is important to underscore that for the Court, as a matter of principle, liability for the use of hyperlinks is always subjective, even in the case of corporate liability. Moreover, the *mens rea* of the journalist must be determined "in the light of the situation as it presented itself to the author at the material time, rather than with the benefit of hindsight on the basis of the findings of the domestic courts' judgments"[22]. This means that the journalist's knowledge of the defamatory or otherwise unlawful nature of the content to which the hyperlink leads cannot be assessed according to the findings of the domestic courts delivered after the material time. I will return to this point below.

12. In order to impute liability to a journalist who uses hyperlinks it does not suffice to prove positive and actual knowledge ("Did the journalist know ...?")[23] of the unlawfulness of the content to which the hyperlink leads; there must be proof of bad faith on the part of the journalist. The Court's mentioning of the general clause of "good faith" ("Did the journalist act in good faith ...?")[24] encapsulates an additional ground for exculpation with regard to respect for the ethics of journalism and the performance of the due diligence expected in responsible journalism. As a subjective requirement for liability, bad faith is the obverse of the exculpatory clause of "good faith".

13. In view of the above, neither the mere use of a hyperlink nor the repetition of its content can be understood as a tacit expression of approval, adoption, ratification, promotion or condoning of the content to which it leads[25]. In order to impute liability, be it civil or criminal, there must be concrete evidence of endorsement by the journalist, who knowingly assumed the unlawful content as his or her own by means of explicit and unequivocal language. This endorsement corresponds to the publication or dissemination of the defamatory or otherwise unlawful content, which is equated to traditional forms of publication. When such endorsement is the expression of bad faith on the part of the journalist, the use of the hyperlink entails his or her liability, as well as that of his or her media company[26].

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[21] This subjective requirement follows the suggestion made in my dissenting opinion in *Mouvement raëlien suisse*, cited above.
[22] Paragraph 81 of the judgment.
[23] Paragraph 77 of the judgment.
[24] Ibid.
[25] See my separate opinion in *Mouvement raëlien suisse*, cited above, under the heading "The form of the speech".
[26] Paragraphs 28 and 30 of the judgment. The German Federal Court also held that "it is generally permitted to report on statements that illegally impair third parties' rights of

14. The repetition by a journalist of defamatory or otherwise unlawful content, accompanied by a hyperlink to the source of the content, is also equated to traditional forms of publication. Where the journalist acted in good faith and in accordance with professional ethics and the due diligence expected in responsible journalism, such repetition does not make him or her liable for that content[27]. By contrast, where the journalist acted in bad faith, breached professional ethics and did not perform the aforementioned due diligence, he or she is liable for the defamatory or otherwise unlawful content. This means that the obligations incumbent on a journalist who posts the hyperlink are obligations of means and not of result.

15. All defences available to primary publishers[28] should be available to the creators of the hyperlink if they are subject to liability in respect of linked content. The logic underlying equal treatment is that, as the United Nations Human Rights Council states, "the same rights that people have offline must also be protected online"[29].

16. In cases where the journalist repeats the content to which the hyperlink leads, the Court does not impose an obligation for the journalist to distance him or herself formally from that content. The same applies *a fortiori* where the journalist simply creates the hyperlink without endorsing or repeating the content to which it leads.

17. The simple use of a hyperlink, without endorsing or even repeating the unlawful content to which it leads, is not equated to traditional forms of publication. Hyperlinking in this case does not make the journalist liable for that content, save in the very exceptional circumstance of non-compliance with a binding judicial decision[30]. In this specific situation of

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personality, despite the perpetuation or even amplification of the initial violation by means of the dissemination, if there is a predominant interest in the information and the disseminator does not appropriate the reported statements as his/her own" (German Federal Court, I ZR 191/08, 14 October 2010). That was also my point in the dissenting opinion annexed to *Mouvement raëlien suisse*, cited above.

[27] Paragraph 80 of the judgment.

[28] See, for example, Article 19, *Defining Defamation: Principles on freedom of expression and prevention of reputation*, Second, revised edition, 2017.

[29] United Nations Human Rights Council, "The promotion, protection and enjoyment of human rights on the Internet", 27 June 2016, A/HRC/32/L20.

[30] Paragraphs 28 and 81 of the judgment. A delicate situation may obtain in the case of illegal use of copyright-protected music, films and computer games by means of links to the copyrighted materials. In *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013, the Court held that there were weighty reasons for the restriction of the applicants' freedom of expression, because the applicants' activities within the commercially run website "The Pirate Bay" amounted to criminal conduct requiring appropriate punishment. The aforesaid website made it possible for users to come into contact with each other through torrent files, which in practice function as Internet links. The Court had regard to the domestic courts' finding that the applicants had not taken any action to remove the torrent files in question, despite having been urged to do so. This is not an undisputed view. The Supreme Court of Korea, in its judgment of 12 March 2015, decided that "even if users clicking on the link are forwarded to such web pages, etc.,

non-compliance with a domestic court order declaring such content unlawful and prohibiting its use, the journalist can be said to have deliberately contravened the ethics of responsible journalism and acted in bad faith[31].

18. The Court accepts that in exceptional cases there may also be liability in a situation of constructive knowledge ("could reasonably have known")[32]. For the assessment of constructive knowledge, the Court uses the due diligence obligations of responsible journalism which are based on the rules of ethics of journalism[33]. It can be said that a journalist could reasonably have known of the defamatory or otherwise unlawful content of the hyperlinked message where he or she did not respect the ethics of journalism and did not comply with the due diligence obligations of responsible journalism. Any lower subjective standard for liability would inevitably lead to self-censorship.

19. Finally, liability must be assessed by reference to the specific facts of the case rather than on a strict, blanket basis. Any regime of objective or strict liability for the use of hyperlinks is *per se* contrary to the above-mentioned Convention principles[34]. It could result in an infinite regress of liability whereby authors could be held liable for content on websites that may be accessed through a sequence of hyperlinks beginning with the author's website. This is not a merely hypothetical scenario, as this case shows.

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which may infringe a copyright holder's right to reproduction or public transmission by posting copyrighted materials or transmitting copyrighted materials to Internet users without having obtained any license or permission of the copyright holders, the act of linking cannot by itself facilitate commission of infringement. As such, it shall not be deemed as aiding and abetting an act of copyright infringement" (Decision 2012 DO13748).
http://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=934&pageIndex=1&mode=6&searchWord=).

[31] Paragraph 28 of the judgment. This standard was also established by the Supreme Court of India in the landmark judgment of *Shreya Singhal v. Union of India*, where the court ruled that Internet intermediaries should not be required to exercise their own judgment as to whether content was unlawful and that the "actual knowledge" standard of liability could only be triggered after a party received knowledge through the medium of a court order or a notification from the appropriate government agency acting under the law ((2015) 5 SCC 1, at paragraphs 138-140, 180, 181).

[32] Paragraph 77 of the judgment. The exceptional character of this subjective ground for liability is made clear in the Court's reasoning, when paragraph 80 states that "[t]he Court would not exclude that, in certain particular constellations of elements, …".

[33] This is also the case in the traditional print and audiovisual media, since the Court acknowledges that journalists should be protected even in cases where they publish information that is subsequently revealed to be inaccurate, so long as they have made sufficient efforts to confirm the veracity of the information at the time (see *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, §§ 49-52, 21 September 2010).

[34] Paragraph 84 of the judgment.

The Court's principles as regards liability for the use of hyperlinks

20. On the basis of the above-mentioned objective and subjective criteria, the Court's principles regarding liability for the use of hyperlinks can be summed up as follows:

Principle 1: Where a journalist endorses, by means of explicit and unequivocal language, or repeats defamatory or otherwise unlawful content to which the hyperlink leads, the use of the hyperlink is equated to traditional forms of publication.

Principle 2: Liability should be imposed only where a journalist knows (actual and positive knowledge) that the content to which the hyperlink leads is unlawful, and acts with bad faith. Exceptionally, liability may also be imposed where the journalist could reasonably have known (constructive knowledge) that the content was unlawful, in the light of professional ethics and the due diligence obligations of responsible journalism.

Principle 3: Where a journalist uses a hyperlink and does not endorse or repeat the defamatory or otherwise unlawful content to which it leads, the use of the hyperlink is not equated to traditional forms of publication and does not entail liability, save in the case of non-compliance with a court order declaring such content unlawful and prohibiting its use.

Principle 4: All defences available to primary publishers should be available to the journalist if he or she is subject to liability in respect of linked content. The journalist does not have an obligation to distance him or herself from the defamatory or otherwise unlawful content to which the hyperlink leads.

Principle 5: The above-mentioned Convention principles require an individual assessment in each case, in the light of the situation as it presented itself to the author at the material time, rather than with the benefit of hindsight on the basis of the findings of the domestic courts' judgments.

Principle 6: Any regime of objective or strict liability for the use of hyperlinks is *per se* contrary to the above-mentioned Convention principles.

Principle 7: These principles apply both to natural persons (the journalists) and legal persons (the media companies).

Application of the Court's principles to the case at hand

21. The Hungarian courts held the applicant company liable for defamation for "dissemination" of false statements regarding Jobbik under Section 78(2) of the Civil Code. Section 78(2) defines defamation as "the statement or dissemination of an injurious and untrue fact concerning another person, or the presentation with untrue implications of a true fact relating to another person". The domestic courts did not find the applicant

company liable for the article on the Konyár incident, but specifically for the fact that the journalist Mr Horváth had used a technique of hyperlinking to a video already available online. Oddly enough, the domestic courts' removal order targeted the hyperlink, but not the other references to the existence of the video in the article.

22. The applicant company claimed that it could not have foreseen that the Hungarian courts would consider hyperlinking to constitute dissemination. Accordingly, the applicant company could not have foreseen that, by including the hyperlink in the article, it would be found liable for defamation and ordered to remove the hyperlink, publish excerpts of the judgment and pay legal costs. The Government conceded that there had been interference with the applicant company's freedom of expression, but argued that this interference had been lawful and proportionate in the light of the prevailing doctrine of objective liability in this field of law in Hungary.

23. By equating hyperlinking to "dissemination" in four consecutive instances[35], the Hungarian courts disregarded the fundamental distinction between content and communicating the existence of content (hyperlinking). The application of objective liability to any form of hyperlinking precluded the balancing of interests required under the Court's case-law and the individual assessment of the applicant company's situation, and resulted in truly draconian interference with the applicant company's Article 10 rights. This criticism of the Hungarian courts is not new. In another case, the Hungarian courts' application of an objective liability interpretation of Article 78 of the Civil Code was already found to be incompatible with the Convention[36]. In the present case, the Court reiterates this finding with regard to hyperlinks.

24. As a matter of law, the domestic courts failed to consider that the journalist simply posted the link in his article, without endorsing or even repeating the content to which the hyperlink led, and that the content referred to (namely Mr Gyöngyösi's comments on the Konyár incident) had not been declared unlawful and had its use prohibited by any court decision prior to the creation of the link. Furthermore, the domestic courts also disregarded the fact that the content in question appeared in the context of a news report on a matter of public interest, as it related to threats against Roma schoolchildren and could be perceived as statements made within the "permissible criticism of political parties"[37].

25. Worse still, this case highlights how objective liability for hyperlinking may lead to an infinite regress of liability. In fact, the domestic courts held a website (hvg.hu) liable for hyperlinking to the article on the

[35] Paragraphs 14, 16, 19 and 20 of the judgment.

[36] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 89, 2 February 2016.

[37] Paragraph 83 of the judgment.

applicant company's website because that article itself included a hyperlink to the allegedly defamatory video.

Conclusion

26. In sum, the Web is not intended, as a technology, to function in the way the respondent Government states, where spreading information via a hyperlink is itself always a "thought-content"[38]. This approach begs the question of how people are to convey information across the estimated trillions of webpages in existence today and countless future pages if doing so can give rise to liability. It is too burdensome, and in many cases impossible, for people to make a legal determination as to whether each and every hyperlinked content is defamatory or otherwise unlawful. If such a burden were to be imposed automatically on journalists, by way of an objective liability regime, it would stifle the freedom of the press. To paraphrase the words of Berners-Lee, hyperlinks are critical not merely to the digital revolution but to our continued prosperity – and even our liberty. Like democracy itself, they need defending[39]. It is indeed remarkable that, by finding a violation of Article 10 of the Convention, the present judgment has done just that.

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[38] Observations of the respondent Government, paragraph 20.

[39] Tim Berners-Lee, *Weaving the Web*, cited above: "The Web is critical not merely to the digital revolution but to our continued prosperity – and even our liberty. Like democracy itself, it needs defending".