European Court of Human Rights: Magyar Jeti Zrt v. Hungary

IRIS 2019-2:1/1

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On 4 December 2018 the European Court of Human Rights (ECtHR) issued, unanimously, another landmark judgment on freedom of expression in the digital world (see also IRIS 2015-7/1, IRIS 2016-2/1, IRIS 2016-3/2, IRIS 2018-8/1 IRIS 2018-10/1). In the case of Magyar Jeti Zrt v. Hungary the ECtHR made clear that automatically holding media companies liable for defamatory content hyperlinked in their reports violates the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). In its judgment the ECtHR emphasised that the very purpose of hyperlinks was to allow Internet users to navigate to and from online material and to contribute to the smooth operation of the Internet by rendering different pieces of information accessible by linking them to each other. Accordingly, the ECtHR cannot accept the strict or objective liability of media platforms that embed, in their editorial content, a hyperlink to defamatory or other illegal content. The ECtHR found that such an 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". The ECtHR did, however, not exclude the possibility that, "in certain particular constellations of elements", the posting of a hyperlink could potentially engage the question of liability - for instance, where a journalist does not act in good faith and in accordance with the ethics of journalism and with the diligence expected in responsible journalism.

In September 2013 the Hungarian media platform 444.hu, which is operated by the company Magyar Jeti Zrt, published an article about an incident in which a group of apparently drunk football supporters had made racist remarks in front of an elementary school in Konyár, whose pupils are predominately of Roma origin. In an interview later that day, the head of a local Roma organisation asserted that the football supporters were associate with Jobbik, a right-wing political party in Hungary which has been criticised in the past for its anti-Roma and anti-Semitic stance. The interview was uploaded to YouTube.com by another media outlet. The article on 444.hu included a hyperlink to that interview on YouTube. Jobbik brought proceedings against eight defendants, including the Roma community leader, Magyar Jeti Zrt and other media outlets who had provided links to the impugned video. Jobbit argued that by using the term "Jobbik" to describe the

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football supporters and by publishing a hyperlink to the YouTube video, the defendants had infringed its right to reputation. The Hungarian courts upheld the plaintiff's claim, finding that the statements in the video had indeed falsely conveyed the impression that Jobbik had been involved in the incident in Konyár. Magyar Jeti Zrt was considered "objectively liable" for disseminating defamatory statements, having infringed the political party's right to reputation, and was ordered by the court to publish excerpts of the judgment on the 444.hu website and to remove the hyperlink to the YouTube video from the online article. This finding was finally confirmed by a judgment issued by the Hungarian Constitutional Court on 19 December 2017.

Magyar Jeti Zrt complained under Article 10 ECHR that the Hungarian courts had unduly restricted its freedom of expression by finding it liable for the posting of a hyperlink leading to defamatory content. The application lodged with the ECtHR was supported by an impressive group of third-party interveners, including the European Publishers' Council, the Newspaper Association of America, Index on Censorship, Article 19 and European Digital Rights.After referring to the general principles related to interferences with the right freedom of expression that are upheld by the Court's case law, the ECtHR scrutinised the question of whether or not the interference at issue had been necessary in a democratic society. The ECtHR explicitly referred to the importance of online freedom of expression and to the important role of the Internet in enhancing the public's access to news and in facilitating the dissemination of information in general, without neglecting "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", which includes the right to reputation. The ECtHR is of the opinion that hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication. Indeed, hyperlinks 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. Another distinguishing feature of hyperlinks, compared to acts involving the dissemination of information, is that a 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. 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. Given the particularities of hyperlinks, the ECtHR cannot agree with the approach of the Hungarian courts, which consists of equating the mere posting of a hyperlink with the dissemination of the defamatory information, thus automatically giving rise to liability in respect of the content itself. The ECtHR considers that the issue of whether the posting of a hyperlink may give rise to such liability requires an individual assessment in each case, regard being had to a number of elements.

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The ECtHR identified he following questions as relevant to an analysis of the liability of the publisher of a hyperlink: (i) Did the journalist endorse the impugned content? (ii) Did the journalist republished the impugned content (without endorsing it)? (iii) Did the journalist merely put a hyperlink to the impugned content (without endorsing or repeating it)? (iv) Did the journalist know (or could he or she have reasonably known) that the impugned content was defamatory or otherwise unlawful? (v) Did the journalist act in good faith, respect the ethics of journalism and undertake the due diligence expected in the practice of responsible journalism?

After assessing these aspects, the ECtHR considers that 444.hu has embedded a hyperlink without repeating or endorsing the content of the interview on YouTube. 444.hu could reasonably assume that the contents, to which it 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 in the interview on YouTube were ultimately found to be defamatory, the ECtHR is satisfied that such utterances could not be seen as clearly unlawful from the outset. Finally the ECtHR criticised the relevant Hungarian law, as interpreted by the competent domestic courts, excluding any meaningful assessment of the Magyar Jet Zrt's freedom of expression rights under Article 10 ECHR, precisely in a situation where restrictions would have required the utmost scrutiny, given the debate on a matter of general interest. Indeed, the Hungarian 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 Magyar Jeti Zrt. According to the ECtHR such objective liability for hyperlinks could have, directly or indirectly, a chilling effect on freedom of expression on the Internet. For these reasons, the ECtHR found that the Hungarian courts' imposition of objective liability on Magyar Jeti Zrt had not been based on relevant and sufficient grounds. Therefore, the measure had constituted a disproportionate restriction on its right to freedom of expression, thus violating Article 10 of the ECHR.

Judgment by the European Court of Human Rights, Fourth Section, case of Magyar Jeti Zrt v. Hungary, Application no. 11257/16, 4 December 2018

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