Europa

Computerrecht 2019/92

Europees Hof voor de Rechten van de Mens 4 december 2018, nr. 11257/16
(Mrs. Ganna Yudkivska, Paulo Pinto de Albuquerque, Faris Vehabović, Egidijus Kūris, Carlo Ranzoni, Marko Bošnjak, Péter Paczolay)
m.nt. mr. A.J. Tromp[1]

(Art. 10 EVRM)

NJB 2019/369
ECLI:CE:ECHR:2018:1204JUD001125716

Het EHRM heeft in dit arrest een gezichtspuntencatalogus geformuleerd voor de beoordeling van de rechtmatigheid van het plaatsen van hyperlinks in een journalistiek artikel. De rechtmatigheid van dergelijke hyperlinks is onder meer afhankelijk van de bewoording die de journalist bij de hyperlink plaatst en van de wetenschap die de journalist had van de onrechtmatigheid van de informatie waarnaar hij linkte.

arrest in de zaak van:
Magyar Jeti Zrt ("the applicant company")
en
The Hungarian Government ("the Government").

(...)

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" (*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."

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

1 Bart Tromp is advocaat bij Brinkhof te Amsterdam.

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.

(…)

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. (…)

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.

(…)

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.

(…)

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.'

(…)

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 de-

cisions 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 ma-

terial 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-genera-

ted 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.

(…)

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;

(…)

Noot

1. Het EHRM oordeelt unaniem dat het uitgangspunt van objectieve aansprakelijkheid van een *online news portal* voor het plaatsen van een hyperlink naar een video die pas later onrechtmatig werd bevonden een schending is van artikel 10 EVRM. Het EHRM classificeert het arrest als een *key case*,[2] waarschijnlijk omdat het duidelijkheid geeft over de beoordeling van de rechtmatigheid van het plaatsen van hyperlinks. Daarnaast komt het Hof terug op een eerder arrest, waarin het *content* waarnaar werd verwezen wél rechtstreeks meenam bij zijn beoordeling van de rechtmatigheid van een poster met daarop een webadres.[3] Twee rechters die een *dissenting opinion* bij dat arrest schreven, maakten ook bij deze zaak deel uit van de Kamer.
2. De zaak draait om volgende feiten. Magyar Jeti Zrt ("Magyar Jeti") beheert het *online news portal* 444.hu. Het portal publiceerde op 6 september 2013 een artikel waarin stond dat een groep dronken voetbalsupporters een dag eerder een basisschool had belaagd. De leerlingen van die basisschool waren voornamelijk Roma. Het artikel bevatte een hyperlink, die verwees naar een interview met een Romaleider, J. Gy. In dat interview beweerde Gy dat de voetbalsupporters aanhanger waren van Jobbik, een Hongaarse politieke partij. Jobbik spande een rechtszaak aan tegen onder andere Magyar Jeti en Gy vanwege smaad. De nationale Hongaarse rechters oordeelden dat Magyar Jeti objectief aansprakelijk was voor de onrechtmatige uitingen van Gy, omdat Magyar Jeti de hyperlink naar het interview met Gy geplaatst heeft. De objectieve aansprakelijkheid voor het plaatsen van een hyperlink lijkt op een risicoaansprakelijkheid. Volgens de hoogste Hongaarse rechter geldt het delen van een link als het verspreiden van informatie, ongeacht de intentie van degene die de hyperlink plaatst. Als de content waar de hyperlink naar verwijst onrechtmatig blijkt te zijn, is het verwijzen naar die content dat ook. Magyar Jeti werd verplicht om een rectificatie in het artikel te plaatsen en de hyperlink te verwijderen. Na de veroordeling diende Magyar Jeti op 23 februari 2016 een verzoekschrift in bij het EHRM.
3. Het EHRM verwijst naar zijn eerdere rechtspraak ten aanzien van onder meer journalisten,[4] de belangenafweging bij bescherming van reputatie[5] en de aansprakelijkheid van internet portals.[6] Vervolgens identificeert het Hof vier eigenschappen van hyperlinks. Daarbij is het opvallend dat de classificatie grotendeels overeenstemt met de inzending van non-profit organisatie *Article 19*, één van de 13 interveniërende partijen:

1) hyperlinks dragen bij aan de soepele werking van het internet doordat ze het navigeren van en naar *content* mogelijk maken;
2) hyperlinks verschillen van traditionele publicaties door hun verwijsfunctie, ze dienen voornamelijk om lezers op andere *content* te wijzen;
3) degene die hyperlinks gebruikt heeft meestal geen controle over de website waar die hyperlinks naar verwijzen; en
4) informatie waarnaar een hyperlink verwijst is al toegankelijk gemaakt door de initiële uitgever, waardoor het publiek al onbeperkte toegang tot de publicatie had.

4. Vervolgens formuleert het Hof zijn gezichtspuntencatalogus. Het gebruikt vijf relevante aspecten, die uiteenvallen in twee onderdelen. Het eerste onderdeel betreft het inkleden van de hyperlink door de journalist. Het Hof maakt onderscheid tussen het eenvoudige plaatsen van een hyperlink, het onderschrijven van de informatie waar de hyperlink naar verwijst en het herhalen van die informatie.
5. Het tweede onderdeel betreft een subjectieve toets: de vraag of de journalist wist dat de informatie onrechtmatig was of dit behoorde te weten[7] en de vraag of de journalist te goeder trouw handelde, in overeenstemming met de journalistieke normen en of hij het benodigde onderzoek heeft gedaan. Het Hof legt de feiten vervolgens langs die lat. Daarbij overweegt het Hof dat de objectieve aansprakelijkheid die de nationale rechters als uitgangspunt namen een belangenafweging van de botsende grondrechten uitsloot. Dit heeft volgens het Hof negatieve consequenties voor de uitwisseling van informatie via internet en dus een *direct of indirect chilling effect* op de vrije meningsuiting via internet. Het is na deze afwegingen weinig verrassend dat het Hof unaniem oordeelt dat artikel 10 EVRM is geschonden.
6. Zoals genoemd komt het Hof met deze beslissing terug op een eerdere beslissing met betrekking tot hyperlinks.[8] In de eerdere zaak ging het om een poster waarop

2 Het EHRM hanteert drie significantieniveaus, waarbij zaken die een significante bijdrage aan de rechtsontwikkeling in niveau 1 worden geplaatst, en zaken waarin alleen bestaande rechtspraak wordt toegepast niveau 3 krijgen. Elk jaar publiceert het Hof een lijst met ongeveer 30 key cases van het voorgaande jaar.

3 EHRM 13 juli 2012, nr. 16354/06, ECLI:CE:ECHR:2012:0713JUD001635406 *(Mouvement Raëlien Suisse/Zwitserland).*

4 EHRM 29 maart 2016, nr. 56925/08, ECLI:CE:ECHR:2016:0329JUD005692508 (*Bédat/Zwitserland*) en EHRM 23 september 1994, nr. 15890/89 ECLI:CE:ECHR:1994:0923JUD001589089 (*Jersild/Denemarken*).

5 EHRM 7 februari 2012, nr. 39954/08, ECLI:CE:ECHR:2012:0207JUD003995408 (*Axel Springer/Duitsland*) en EHRM 7 februari 2012, nrs. 40660/08 en 60641/08, ECLI:CE:ECHR:2012:0207JUD004066008 (*Von Hannover/Duitsland II*).

6 EHRM 16 juni 2015, nr. 64569/09, ECLI:CE:ECHR:2015:0616JUD006456909 (*Delfi AS/Estland*) en EHRM 2 februari 2016, nr. 22947/13, ECLI:CE:ECHR:2016:0202JUD00229471 (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt/Hongarije*).

7 Vgl. de interventie van Article 19, samengevat in § 50.

8 EHRM 13 juli 2012, nr. 16354/06, ECLI:CE:ECHR:2012:0713JUD001635406 (*Mouvement Raëlien Suisse/ Zwitserland).*

een webadres stond. De pagina waarnaar dat webadres verwees, bevatte een hyperlink naar een andere pagina. De inhoud van de webpagina op de poster en van de pagina waarnaar verwezen werd speelde een rol bij de beoordeling door de nationale rechters. Met een meerderheid van 9 tegen 8 achtte het Hof artikel 10 EVRM toen niet geschonden. Dit arrest leidde tot 3 *dissenting opinions*, waarvan één door rechter Pinto de Albuquerque, die ook deel uitmaakte van de Kamer in de zaak van Magyar Jeti. Een aantal punten die hij daar benoemde, komt terug in het arrest.[9]

7. Diezelfde rechter schreef een lezenswaardige *concurring opinion* bij Magyar Jeti. Deze opinion geeft met name achtergrondinformatie bij de beslissing van het EHRM. Hij brengt de beoordeling van het Hof, zowel de gezichtspuntencatalogus als de verdere overwegingen, terug tot 7 principes (§ 20). Daarnaast stelt hij dat het in veel gevallen voor personen onmogelijk is om te bepalen of content waarnaar een hyperlink verwijst onrechtmatig zou zijn. Afsluitend verwijst hij naar tekst van Berners-Lee, de grondlegger van het web, en parafraseert *"hyperlinks are critical not merely to the digital revolution but to our continued prosperity — and even our liberty. Like democracy itself, they need defending."*

8. Al met al is dit arrest van het Hof een welkome verduidelijking voor de beoordeling van het plaatsen van hyperlinks in journalistieke publicaties. Daarnaast is het opvallend hoeveel het Hof van de interveniërende organisaties heeft overgenomen. Gelet op de verdere beoordeling door het Hof, lijkt het erop dat het deze zaak heeft willen aangrijpen om een aantal criteria te formuleren. Toch laat het arrest nog ruimte voor toekomstige verduidelijking, bijvoorbeeld ten aanzien van de inschatting van de onrechtmatigheid van content waarnaar een journalist verwijst of welke mate van controle over de content waarnaar door middel van een hyperlink wordt verwezen wél voor aansprakelijkheid zou zorgen.[10]

Mr. A.J. Tromp

Nederland

Computerrecht 2019/93

Rechtbank Den Haag 7 maart 2019, nr. 09-767145-17
(Mrs. A.M. Boogers, S.W.E. de Ruiter, M. van Loenhoud)
m.nt. mr. dr. J.J. Oerlemans[1]

(Art. 138ab, 138b, 139d, 161sexies, 312, 317, 350c en 350d Wetboek van Strafrecht)

ECLI:NL:RBDHA:2019:2116

In deze uitspraak is een verdachte veroordeeld die gebruikmaakte van het beruchte 'Mirai-botnet'. Het Mirai-botnet is het eerste succesvolle botnet die bestond uit gehackte 'internet of things'-apparaten. De uitspraak is interessant, omdat de rechtbank hier het begrip 'geweld' op een discutabele manier en zeer extensief uitlegt.

De rechtbank Den Haag heeft op de grondslag van de tenlastelegging en naar aanleiding van het onderzoek ter terechtzitting het navolgende vonnis gewezen in de zaak van de officier van justitie tegen [verdachte], geboren op [geboortedatum] te [geboorteplaats], BRP-adres: [woonadres].

1 Het onderzoek ter terechtzitting

Het onderzoek is gehouden ter terechtzitting van 21 februari 2019.

De rechtbank heeft kennis genomen van de vordering van de officier van justitie mr. K. Hermans en van hetgeen door de verdachte en zijn raadsman mr. R.T. Schrama naar voren is gebracht.

2 De tenlastelegging

De volledige tekst van de tenlastelegging zoals deze luidt na toewijzing van de vordering tot wijziging van de tenlastelegging ter terechtzitting, is opgenomen als bijlage I bij dit vonnis en maakt daarvan deel uit.

3 Bewijsoverwegingen

3.1 *Inleiding*

De verdachte wordt – kort gezegd en in verschillende ten laste gelegde varianten – verweten dat hij een Mirai botnet voorhanden heeft gehad, daarmee heeft geadverteerd en dat hij daarmee en met andere botnets, al dan niet samen met anderen, DDoS-aanvallen heeft uitgevoerd op verschillende websites. Daarbij zou de verdachte in sommige gevallen deze websites ook, samen met anderen, hebben geprobeerd af te persen door van hen bitcoins te eisen om de DDoS-aanvallen te stoppen. Ook zou de verdachte zich nog schuldig hebben gemaakt aan het hacken van de server van zijn school. De verdachte heeft bij de politie en ter terechtzitting een bekennende verklaring afgelegd.

3.2 *Het standpunt van de officier van justitie*

De officier van justitie heeft gerekwireerd tot bewezenverklaring van alle ten laste gelegde feiten.

3.3 *Het standpunt van de verdediging*

De verdediging heeft zich ten aanzien van de feiten 1 en 2 op het standpunt gesteld dat voor de DDoS-aanvallen op [website 1] en [website 2] onvoldoende bewijs zou zijn en dat de verdachte daarvan zou moeten worden vrijgesproken. Ten aanzien van de feiten 4 en 5 heeft de verdediging bepleit dat de verdachte zou moeten worden vrijgesproken van een gedeelte van de ten laste gelegde periode, te weten de periode

9 Zie met name zijn opmerkingen onder "the form of the speech".
10 Zie daarover de blog Strasbourg Observers: strasbourgobservers.com/2019/01/18/magyar-jeti-zrt-v-hungary-the-court-provides-legal-certainty-for-journalists-that-use-hyperlinks/.
1 Jan-Jaap Oerlemans is als onderzoeker verbonden aan eLaw, het centrum voor Recht en Technologie van de Universiteit Leiden.