Chapter 14

Case Law of the European Court of Human Rights on Freedom of Expression in the Online environment with Special Regard to Central Europe

János Szinek

Abstract

The online space raises trending issues related to freedom of expression, such as fake news, radical and extremist content, hate speech, and even excessive limitations imposed by the platforms. This new digital environment poses several unique challenges for the European Court of Human Rights: it is exceedingly complicated to consider all the specific features of the digital realm alongside the basic principles outlined in the Article 10 of the European Convention on Human Rights. Since the European Court of Human Rights serves as the most important interpreter of human rights standards in Europe, it plays a vital role in interpreting the right to freedom of expression in the digital environment. The case law of the European Court of Human Rights also affects its territorial jurisdiction, making the court an influential norm entrepreneur. This paper aims to analyse three crucial cases of the European Court of Human Rights concerning liability for comments and hyperlinking in the online space.

Keywords: online platforms, freedom of expression, liability for comments, liability for hyperlinking, European Court of Human Rights

János Szinek (2025) 'Case Law of the European Court of Human Rights on Freedom of Expression in the Online environment with Special Regard to Central Europe'. In: Nóra Béres – Renáta Hrecska-Kovács (eds.) *The ECHR at 70: The Central European Narrative*, pp. 327–344. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2025.nbrhkechr_14

1. Introduction

Article 10 of the European Convention on Human Rights[1] (hereinafter referred to as the ECHR) declares that "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] Nowadays, complying with this declaration in the online era is not easy, especially for online platforms, including news agencies and social media. While online platforms have undoubtedly enhanced democracy on the internet, they have also given rise to new, unprecedented threats that also challenge traditional doctrines of freedom of expression in complex ways.[3]

The European Court of Human Rights (hereinafter referred to as the ECtHR) has repeatedly affirmed that online platforms serve as a means of exercising freedom of expression. It has held that the protection of Article 10 of the ECHR applies not only to the content of the information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to know and communicate information.[4,5] A substantial portion of global social discourse now unfolds online. These platforms wield significant influence over the exercise of fundamental rights, including freedom of expression, through actions such as comment deletion, moderation, user bans, or repositioning of comments within discussion threads.[6] There is an urgent need to safeguard the freedom of online media, establish comprehensive regulations, and address the considerable power they currently hold in shaping democratic processes.

The online sphere confronts the ECtHR with novel challenges concerning the right to freedom of expression. The ECtHR has consistently affirmed that the fundamental principles and standards articulated in Article 10 of the ECHR are fully applicable to the online environment. However, it is worth noting that the internet represents a unique tool within the information and communication framework, with vastly greater capacities for storing and disseminating information and expressions compared to traditional media. In numerous cases, particularly those involving hate speech, the ECtHR has acknowledged that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press, as unlawful speech, including hate speech and calls to violence, can be disseminated as never before,

1 The Convention for the Protection of Human Rights and Fundamental Freedoms
2 The Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 (1) and (2).
3 See Pew Research Center 2020, Chapter 3.
4 For more, see Cengiz and Others v Turkey (Applications nos. 48226/10 and 14027/11.), and Ahmet Yildirim v Turkey (Application no. 3111/10.) cases.
5 For more on this topic, see Jørgensen, 2019, pp. 191–316.
6 Balkin, 2009, pp. 427–444.

worldwide in a matter of seconds, and sometimes remain persistently available online."[7]

The online space also raises new issues related to freedom of expression, such as fake news, radical and extremist content, hate speech, and even overboard limitations. The new environment also poses several unique challenges for the ECtHR: it is very complicated to consider all of the specific features of the digital environment along with the basic principles formulated in the Article 10 of the ECHR. As the ECtHR is the most important interpreter of the human rights standards in Europe, the court plays a vital role in interpreting the right to freedom of expression in the digital environment. It can be seen that the case law of the ECtHR impacts its territorial jurisdiction, and as a result, it can be said that the court acts as an 'influential norm entrepreneur'.[8,9]

The ECtHR has consistently recognised that the internet dramatically supports freedom of expression and is a complementary tool to traditional media. Examining the case law of the ECtHR, we can see that the court tries to limit the authorities' possibilities to interfere with the freedom of expression, as the internet is of public-service value, and it adherently supports the enjoyment of human rights. In its case law, the ECtHR found many times that the interference with internet content related to explicit sexual content, even child pornography, copyright infringements, breach of privacy law, and hate speech were in line with Article 10 (2) of the ECHR, as they were found ultimately necessary in the democratic discourse in a democratic society, and the right to freedom of expression in the digital environment was justified to a pressing social interest.[10]

This paper delves into the liability of online media platforms and internet intermediaries concerning user-generated content like blog posts, comments, and hyperlinks. It places a particular emphasis on Central Europe and scrutinises the case law of the European Court of Human Rights. In the upcoming chapters, following a concise introduction to intermediary liability on online platforms, three significant cases from the ECtHR[11] – one from Estonia and two from Hungary – will be introduced and analysed to demonstrate how the court has contributed to guaranteeing the right to freedom of expression in the digital era under Article 10 of the ECHR.[12]

7 Delfi AS v Estonia, application no 64569/09. See O'Boyle, 2020, pp. 10–11.

8 About the concept of a 'norm entrepreneur', see Oster, 2020, pp. 165–184.

9 It is worth mentioning that the ECtHR find the first violation of freedom of expression in Sunday Times v United Kingdom in 1979. The ECtHR found 925 violations of Article 10 ECHR in the period 1979–2020. For further information, please refer to the European Court of Human Rights Annual Report 2021, where you can find additional details and insights on this topic.

10 Voorfoof, 2020, p. 11.

11 For more relevant cases concerning freedom of expression in the digital world outside the European Union, see: 21-1333 Gonzalez v Google LLC (18/05/2023) and 21-1496 Twitter, Inc. v Taamneh (18/05/2023).

12 See also Benedek & Ketterman, 2020.

2. Directive on Electronic Commerce

As online platforms and social media platforms provide their services remotely, electronically, and at the individual request of the service user, they are considered information society services. According to the regulatory framework of the European Union, their activity is governed by the Directive on Electronic Commerce (hereinafter referred to as the e-Commerce Directive).[13] Analysing the key elements of the definition one by one, the e-Commerce Directive defines a service as being provided at a distance if the parties are not simultaneously present at the same time of the provision of the service; it is provided by electronic means if the communication between the origin and the destination is by wire, radio, optical, or other electromagnetic means; and it is provided at the individual request of the recipient of the service in a non-linear, continuous manner.[14] Consequently, online platforms are considered information society services.

Within this legal framework, Member States of the European Union are prohibited from requiring prior authorisation for online services. They can, however, request service providers to offer general information.[15] According to the e-Commerce Directive and its Hungarian transposition,[16] hosting providers bear no liability for infringing content or information as long as they are unaware of any unlawful conduct or infringement on the rights or legitimate interests of any party regarding the content or information. However, once the provider becomes aware of such conduct, they must immediately take measures to remove the information (content) or terminate access to it. The hosting provider is also obligated to notify the content uploader about the removal request within three days. The uploader can object to the removal; if the uploader objects, the hosting provider will reinstate the content, and only the court can order its removal. Therefore, the obligation to remove the infringing content falls on the hosting provider when it becomes aware of it. This so-called 'notice and take-down' procedure essentially focuses on the legal relationship between the user and the platform, with the courts only intervening if the content is not removed or if the content previously removed is restored by the provider based on the user's objections.[17]

It is essential to emphasise that, according to the e-Commerce Directive, service providers are not generally obligated to monitor content, and Member States cannot impose mandatory rules requiring them to do so. In itself, the notice and take-down procedure cannot provide a complete solution, as it forces online platforms to make decisions that often lead to severe dilemmas of human rights and other rights,

13 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)

14 Hernández Sánchez, 2005, p. 21.

15 e-Commerce Directive, Sections (4) and (5).

16 Act CVIII of 2001 on Electronic Commerce and on Information Society Services

17 Julià-Barceló & Koelman, 2000, pp. 231–239.

including freedom of expression. In these matters, a platform operator cannot be expected to apply a comprehensive human rights assessment to decide on issues that often give rise to interpretative disputes between judges in an international or constitutional court.[18] In addition to the current procedural principles, there is a need for more detailed and robust legislative action, considering local cultural and legal contexts, to make it much more straightforward for platforms to determine exactly what kind of content is believed to be infringing in their country and under what conditions they can be held liable for the opacity or error of their moderation decisions. The current uncertainty poses challenges for online platforms, placing them in an almost impossible situation. Establishing an appropriate legal framework is not only in the best interest of the state and users but also ultimately beneficial for the platforms themselves.[19]

In conclusion, as per the e-Commerce Directive, platforms enjoy immunity from liability, provided they remove defamatory content as soon as they receive notice. It is only if they fail to act upon notice that they become liable for third-party content. The shortcomings of this system are well-known. In order to avoid liability, intermediaries tend to remove legitimate content. That was the situation in the Delfi case, analysed below in the following chapters. As the UN Special Rapporteur noted in his 2011 report, this has a serious chilling effect on freedom of expression.[20] This shows that determining the liability for comments and hyperlinking is a very sensitive question.

3. The Digital Services Act

In 2020, as part of the Digital Agenda for Europe for the period 2020–2030, the European Commission announced two key legislative initiatives: the Digital Services Act[21] (hereinafter referred to as the DSA) and the Digital Markets Act[22] (hereinafter referred to as the DMA), as components of the Digital Services Package. These acts were designated to fulfil the objectives set out in the Commission's previous resolution, which included maintaining competitiveness and unifying digital markets. The need for the DSA was also prompted by the issue of the exponential speed at which online platforms are developing and expanding, the complexity of their

18 Bartóki-Gönczy & Pogácsás, 2019.
19 Ibid.
20 See OHCHR 2011, 8.
21 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).
22 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

organisational structures, the complexity of their technological operations, and the speed with which infringements can be detected in large and complex companies operating globally in an online space. Following extensive negotiations, the DSA officially came into effect in November 2022. The DSA relies on the principles of the e-Commerce Directive.[23]

The prevailing legal structure for digital services has primarily been outlined in the e-Commerce Directive up to this point.[24] The regulation is of general application, binding and directly applicable in the member states of the European Union. The DSA creates numerous new obligations for service providers; however, the providers still do not have a general monitoring obligation, and one of the exculpatory grounds for liability for illegal content is that they have no knowledge of infringing content. Several times, the court has declared certain obligations in the event that the provider has been notified of infringing content or has not removed the content in question after having specific knowledge of it.[25]

The DSA enables content moderation for the purpose of content removal while also emphasizing the importance of legal assurance in questioning the motives and effectively probing the operational methods of the online platforms. However, for example, the very large online platforms deal with millions of posts and user profiles per year, and it will be extremely expensive for the platforms to operate an entire contact centre to which users can refer their requests.[26] The recently introduced legislation from the Digital Services Package establishes a broad legal framework that operates independently from, and does not conflict with, the existing laws.[27] As can be seen, by adopting the DSA, it seems that the European Union made a step forward in strengthening the system established by the e-Commerce Directive.

As a result, the intermediary service providers are still not obliged to actively monitor transmitted or stored information, and the current 'notice and takedown' principle is preserved. It means that a hosting service provider must expeditiously remove or disable access to hosted content when notified of any alleged illegality; if a hosting service provider fails to remove or disable access to the content expeditiously, the provider becomes liable for the respective allegedly illegal content.

23 For more information, see the European Parliament 2024.

24 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on electronic commerce), OJ L 178 2000, 1–16.

25 E.g., Judgment of the Court of 22 June 2021, YouTube and Cyando, C-682/18, EU:C:2021:503.

26 Opinion of Advocate General G. Pitruzzella, delivered on 7 April 2022, C-460/20, para.3, EU:C:2022:271.

27 See the European Commission 2024.

4. Delfi AS v Estonia

The Delfi AS v Estonia[28] decision is of significant importance as it addresses issues related to responsibility for online comments.

Delfi is one of Estonia's most popular online news portals. The website allows comments to be automatically published without prior moderation. However, the portal operates automated comment moderation in three ways. The first method is the so-called 'notice and take-down' system inspired by the e-Commerce Directive, whereby anyone can report an offensive comment to the editors, which is then investigated and removed if necessary. The second way is a direct notification of the person whose rights have been infringed, and the third method is an automatic filtering system that deletes comments containing certain vulgar words. The news portal has stated on its website in a disclaimer, that Delfi is not responsible for third-party comments and reserves the right to delete offensive comments. In January 2006, Delfi published an article on its website entitled SLK destroys planned ice road. The article attracted numerous comments, of which about 20 contained personal threats and abusive language against the owner and operator of the ferry company. Among the comments were several that called for the owner's death, in addition to a number of very rude and highly offensive comments. In March 2006, the ferry company owner's lawyer asked Delfi to remove the offensive comments and demanded compensation of around 32,000 euros. The offensive comments were deleted by Delfi on the same day, at which point they replied to the owner's lawyers confirming that the comments had been removed but rejecting the claim for damages. Subsequently, the owner filed a lawsuit against Delfi.[29]

The first instance county court found that the site could not be considered as the publisher of the comments and was therefore not obliged to moderate them. However, following an appeal by the owner, the county court ultimately held that the company itself should be considered the publisher of the comments and could not avoid liability by posting a disclaimer. The county court also found that the article itself was balanced but that many of the comments were vulgar and defamatory. The judgment ruled that freedom of expression did not extend to the protection of the comments concerned and awarded the owner damages of 320 euros.

In December 2008, the Court of Appeal of Tallinn upheld the judgment of the county court. The Court of Appeal stressed that the company was not obliged to exercise prior control over the comments published on its news portal, but having decided not to do so, it should have put in place some other effective system to ensure that unlawful comments were quickly removed from the portal. The Court of Appeal noted that the applicant company was not a technical intermediary for comments and that its activities were not merely technical, automatic and passive; instead, it invited users to add active comments. Thus, the applicant company was a content

28 Delfi As v Estonia, application no. 64569/09.
29 Ibid., para. 18.

provider rather than a technical provider. In June 2009, the Supreme Court rejected the appeal of the company. It upheld the judgement of the Court of Appeal but partially modified its reasoning. According to the Supreme Court, the number of comments had an impact on the number of visits to the portal and the company's revenue from the advertisements published on the portal, so the applicant company had an economic interest in publishing comments. The fact that the applicant company did not write the comments itself does not mean that it did not have control over them. Therefore, the applicant company had the right to control which comments would remain available and which would not. In addition, the Supreme Court held that in the present case, both the applicant company and the authors of the comments should be considered as the publishers of the comments. The applicant was free to choose against whom to file a lawsuit, while the owner chose the company operating the portal.[30]

Delfi referred the case to the ECtHR, arguing that the decision holding Delfi liable for the period during which the comment was available on its portal violated its right to freedom of expression under Article 10 of the ECHR. Delfi also argued that it should have been exempted from liability under EU rules on hosting providers. The key issue in the application to the ECtHR was whether holding Delfi civilly liable for the defamatory remarks disproportionately infringed its right to freedom of expression. The court concluded that the findings of the national court justified the restriction of Delfi's right to freedom of expression.

The ECtHR found that, as Delfi is a professional news publisher and operates one of the largest news portals in the country, it should have been aware of the legal context and practice regarding offensive comments. The ECtHR held that it was not disputed that the comments made by readers in response to the news published on the applicant company's internet news portal were clearly unlawful. In order to resolve the issue of balance, the ECtHR analysed four salient factors.[31]

The ECtHR first looked at the context of the comments and found that the article on the news portal Delfi dealt with a matter of public interest. The portal should have been aware that the article could provoke negative reactions and that "there was a greater than average risk that the negative comments might go beyond the limits of acceptable criticism and rise to the level of unjustified offensive statements or hate speech".[32] Secondly, the ECtHR examined the measures taken by the applicant company to prevent or remove the defamatory remarks. It concluded that, although it could not be said that Delfi had not taken steps to prevent offensive remarks, they were inadequate.[33] The court then went into more detail on the notice and take-down system applied by the applicant company, mainly because the main point of disagreement between the parties was whether the applicant company had exercised due

30 Pinto, 2015.
31 Nádori, 2015, p. 227.
32 Delfi As v Estonia, para. 156.
33 Nádori, 2015, p. 230.

diligence in applying the system.[34] The ECtHR had previously stated that it agrees with the national courts that the notice and take-down procedure applied did not ensure adequate protection of third parties' rights and, in determining the proportionality of the interference with the applicant company's freedom of expression, it also took into account the interest of the news portal in the high number of comments as this contributed to the increase in its advertising revenues. According to the court, the company must have anticipated that the comments received might include offensive remarks and could have prepared in advance to prevent this. As an alternative to the liability of the applicant company, in relation to the liability of the actual authors of the comments, the court noted that it is very difficult for an individual to establish the identity of the persons being sued and that it seems disproportionate to place the burden of doing so on the injured party. Finally, as regards the consequences of the legal proceedings for the applicant company, the court held that the fine of 320 euros awarded as damages was not disproportionate, given that Delfi is one of the largest operators of an internet news portal in Estonia.[35]

The judgment also clarifies somewhat what can be expected of a large, commercial online news portal in terms of tackling hate speech: "If accompanied by effective procedures that allow for a rapid response, the notice and take-down system may in many cases work and be an appropriate means of balancing the rights and interests of all concerned." However, in cases where a third party's comment takes the form of hate speech and direct threats to the physical safety of individuals, the rights and interests of others and of society as a whole may entitle Contracting States to hold internet news sites liable, without violating Article 10 of the ECHR, if they fail to take measures to remove clearly unlawful comments without delay, even without notifying the alleged victim or third parties.[36] According to the court, "given the specific nature of the internet, the obligations and liabilities which can be transferred to online news portals for the purposes of Article 10 may differ to some extent from those of traditional publishers in respect of third-party content."[37] At the same time, the court stressed that "the case does not concern other internet forums where third-party comments may be distributed, such as an internet forum or bulletin board where users are free to share their ideas on any topic without the discussion being in any way controlled by the platform operator; or a social media platform where the platform provider does not offer any content and where the content provider may be an individual who runs the platform or blog as a hobby."

An important element of the judgment is that the ECtHR based Delfi's liability mainly on the fact that the portal was operated for commercial purposes and that the publication of the article was justified by economic objectives. The court stressed that the judgment is not applicable to social networking sites, but it is not clear why

34 Delfi As v Estonia, para. 157.
35 Delfi As v Estonia, para. 160.
36 Delfi As v Estonia, para. 159.
37 Delfi As v Estonia, para. 113.

not. The difference may be that the offending comments in this case are not generated by the content produced by the social networking site, but social networking sites are nevertheless one of the most important means of distributing content from news portals online. However, many news sites now allow comments only on articles shared on social networking sites.

The decision imposes liability on a news portal for the comments of its users, which not only flies in the face of regulation on intermediary liability but is likely to discourage news portals from maintaining comments sections in which users can post freely or anonymously. This would interfere with a valuable forum for expression, discussion, and engagement with issues online and constitutes a significant limitation on the freedom of expression online.

---

5. Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary

This case is of significant importance because it clarified that internet content providers are not objectively liable for potentially infringing content of comments posted by users on their websites. Additionally, it provides clear guidance on the actions content providers should take to avoid liability for user-generated content that may infringe on rights or regulations.

In 2010, the Association of Hungarian Content Providers (MTE)[38] expressed its opinion regarding the advertising practices of a real estate company on the company's website. In the article, the MTE criticised the company for its unethical and misleading practices, namely that the originally free real estate advertising service became a paid service after 30 days without notifying and providing clear and adequate information to users. The resolution was also published on vg.hu and on a consumer protection blog site, named 'Tékozló Homár', which was managed by the Index.hu news portal. While the article generated comments that were predominantly critical of the company and its practices, some comments used very vulgar language, including phrases like "Let them shit hedgehogs and spend all their earnings on their mothers' graves until they die [...]". It is important to note that both websites included disclaimers stating that the comments did not necessarily represent the views of the website operators. Additionally, a notice and take-down system was operating, allowing users to report comments for removal. Furthermore, Index.hu engaged in partial moderation and occasionally deleted comments, and

38 Magyar Tartalomszolgáltatók Egyesülete (MTE)

both websites had publicly available codes of ethics that explicitly prohibited users from posting comments that violated the rights of others.[39]

The case was referred to the ECtHR, which found that the freedom of expression guaranteed by Article 10 of the ECHR had been violated.[40] In this case as well, the ECtHR had to determine whether the restriction was imposed by law, whether it had a legitimate aim and whether it was necessary in a democratic society.[41]

Regarding the first criterion, the court determined that the operators of the website had the capacity to evaluate the risks linked to their operations and, to a reasonable degree, anticipate the outcomes of their conduct. As a result, the court concludes that the interference in this instance violated Article 10 of the ECHR. The court accepted the Hungarian Government's view that the interference carried out served the legitimate aim of protecting the rights of others,[42] and the only question was whether the measure was necessary in a democratic society.[43] The ECtHR, referring to the Delfi case, reiterated that internet news portals provided a forum for the exercise of the right to freedom of expression, allowing the public to communicate information and ideas, and thereby assumed certain obligations and legal responsibilities.[44] However, the court stressed that the present case must be assessed differently. This is because, while the criticised comments are offensive and vulgar, they do not qualify as unlawful expressions and certainly do not constitute hate speech or incitement to violence. Furthermore, while the second applicant is a media service provider – which is to be regarded as a company with a commercial interest – the first applicant is a self-regulatory body set up by internet content providers, which has no such known interest'.[45]

According to the ECtHR, the criteria set out in the Delfi Decision are applicable in cases where a news portal does not immediately remove content that is manifestly seriously infringing. Referring to its previous case law,[46] the court identified five factors to be applied in assessing whether a balance of competing interests has been struck.[47] These are: the context and content of the contested comments; the legal liability of the authors of the comments; the actions taken by the defendants and the conduct of the injured party; the consequences of the comments for the injured party; and the consequences for the defendants.

Regarding the context of the comments, the court found that the original article concerned a matter of public interest and could not be considered provocative.

39 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary (hereinafter referred to as MTE-Index v. Hungary)
40 MTE-Index v Hungary, para. 45.
41 Ibid., para. 46.
42 Ibid., para. 52.
43 Ibid., para. 53.
44 Ibid., paras. 60. and 61.
45 Ibid., para. 64.
46 Delfi v Estonia, Von Hannover v Germany (no. 2), Axel Springer v Germany, Couderc v France.
47 MTE-Index v Hungary, para. 71.

As regards their content, it considered that, although they were sometimes offensive and vulgar, they were, in fact more likely to express value judgments and opinions prompted by personal disappointment.[48] The court deems that, despite the coarse language employed in the comments, these terms are commonly found in online portal discussions, a factor that may diminish the significance ascribed to such expressions.[49]

The ECtHR noted that the national courts had not taken sufficient account of the responsibility of the authors of the comments. The national courts were convinced that the defendants were liable to a certain extent because they had 'disseminated' defamatory statements without a proportionate analysis of the liability of the actual authors of the comments.[50] The court criticised the reasoning of the domestic courts that by allowing unfiltered comments, the defendants should have expected that some of them would be in breach of the law. The court also noted that the offending company never asked the applicants to remove the comments, instead seeking redress directly through the courts, although the Hungarian courts did not assess this. In fact, the Hungarian courts found the applicants objectively liable, based on the fact that they had given space to comments that were seriously offensive to the applicant and degrading, and did not examine the conduct of either the applicants or the applicant.[51]

In relation to the fourth criterion, the ECtHR stated that the domestic courts also failed to take into account whether the comments reached a sufficient level of seriousness and whether they were made in a manner that might actually infringe a legal person's right to professional reputation. However, according to the court, the contested comments were unlikely to have had a significant impact on consumers' attitudes towards the companies in question.[52] As regards the last factor, the court found that the Hungarian courts had not paid attention to what was at stake for the applicants as key players in the free electronic media. According to the court, such objective liability could have negative consequences for the comment environment of an internet portal in the future, for example by forcing them to ban commenting altogether.[53]

According to the court, the notice and take-down procedure is an appropriate and rapid measure to balance the competing rights and interests of the parties concerned. The court sees no reason why this procedure could not have provided adequate protection for the victim's reputation. It is true that, in cases where "comments posted by third-party users take the form of hate speech and pose a direct threat to the physical integrity of individuals, the rights and interests of others and society as a whole, the Contracting States would be justified in imposing liability on internet

48 For further information, see Angelopoulos 2016, pp. 582–584.
49 MTE-Index v Hungary, para. 77.
50 Ibid., para. 79.
51 Ibid., para. 83.
52 Ibid., para. 85.
53 Ibid., para. 86.

news portals if they failed to take measures to remove the manifestly offensive comments, even without notice from the alleged victim or third parties. However, in the present case, no such communications have been made."[54]

The Strasbourg ruling shows that, if effective procedures allow for a rapid response, the notice and take-down system can be an appropriate means of balancing the rights and interests of all concerned. However, where a comment is hateful and directly threatens the physical safety of individuals, service providers may be held liable if they fail to take measures to remove clearly unlawful comments without delay, even without notice or request from the victim or a third party. The decision leaves the application of the criteria to the courts. However, individual discretionary decision-making does not necessarily provide a predictable legal and liability framework. One solution could be for the legislator to follow the logic of the Strasbourg ruling and supplement the rules on liability for comments. Such a solution, while not ruling out subjective application of the law, could certainly reduce the number of potentially conflicting individual judgments that unduly restrict freedom of expression.

6. Magyar Jeti Zrt. v Hungary[55]

Magyar Jeti Zrt. is the managing operator of the Hungarian online news portal 444.hu, with 250,000 unique visitors per day, on average. The site has a staff of 24 people and publishes 75 articles per day in a wide range of topics, including politics.[56] The news portal, like many online news sites, often uses hyperlinks or embeds videos via hyperlinks in the content published on its website. By clicking on the anchored (embedded) link, the site navigates the reader to an external page that is different from the online portal.

In September 2013, a group of football fans travelling from Hungary to Romania stopped at a primary school in Konyár, Hungary. The pupils were predominately of Roma origin. The supporters disembarked from the bus and proceeded to sing, chant and shout anti-racist, mostly anti-Roma remarks and make threats against the students who were playing outside of the building. The supporters also waved flags and threw beer bottles. To protect the children, the teachers called the police, took the children inside the building and made them hide under tables and in the bathroom. After the police arrived, the football supporters boarded the bus and left the area.[57]

54 Ibid., para. 96.
55 Magyar Jeti Zrt. v Hungary, application no. 11257/16 (hereinafter referred to as Magyar Jeti Zrt. v Hungary)
56 Ibid, para. 6.
57 Ibid, para. 7.

Later that day, the leader (J. Gy.) of the Roma minority local government in Konyár gave an interview to Roma Produkciós Iroda Alapítvány. J. Gy. stated that the political party Jobbik 'came in' and attacked the school. Many times J. Gy. referred to Jobbik, which is a right-wing political party in Hungary that had previously been criticised for its anti-Roma and anti-Semitic stance. On the same day, the media outlet uploaded the video of the interview to YouTube. The next day, the Magyar Jeti Zrt. 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'. In the article, the Jobbik political party was not mentioned or even referred to by the 444. news portal: however, the interview made with J. Gy. by the Roma Produkciós Iroda Alapítvány, which was uploaded to YouTube, was linked (anchored) in the article. The link, which led to YouTube, was in a green colour, indicating that it 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 youtube. com video-sharing social media website. 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. The hyperlink to the YouTube video was further reproduced on three other websites operated by other online media outlets.[58]

In October 2013, the Jobbik political party brought defamation proceedings under Article 78 of the Hungarian Civil Code before the Debrecen High Court against eight defendants, including J. Gy., the Roma Produkciós Iroda Alapítvány, the applicant company, and other media outlets which 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 defendants had infringed its right to reputation, which is a particularly sensitive matter in political life.[59] In 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.[60] The Magyar Jeti Zrt. appealed against the decision, 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. 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

58 Ibid, paras. 8–11.
59 Ibid., para. 12.
60 Ibid., para. 13.

applicant company with the video's content, it had not repeated the statements and had not disseminated falsehoods.[61]

In December 2014, the applicant company filed a constitutional complaint to the Constitutional Court. They argued that, under the Civil Code, media outlets assumed 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. Consequently, 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 stablished beyond any doubt, making reporting on controversial matters impossible. The applicant company argued that the judicial practice was unconstitutional since it did not examine whether a publisher's conduct had been following 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-lived, there was simply no time to verify the truthfulness of every statement. In December 2017, the Constitutional Court dismissed the applicant company's constitutional complaint. It reiterated 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.[62]

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 the company had only reported on an important issue of public concern in compliance with its journalistic duties. The Kúria upheld the second-instance judgment in a judgment, reiterating that J. Gy.'s statements were statements of fact 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 Civil Code has established objective liability for dissemination, irrespective of the good or bad faith of the disseminator. In the view of the Kúria, requiring media outlets not to make injurious statements accessible does not constitute a restriction of freedom of the press or freedom of expression; nor is it an obligation on them which in practice cannot be satisfied.[63]

In the Magyar Jeti Zrt. v Hungary case, the ECtHR opted for a different approach. Summarising the above mentioned, Magyar Jeti Zrt. published an article on the incident that included a hyperlink in the text to the interview on YouTube, but

61 Ibid., para. 15.
62 Ibid., paras. 17 and 20.
63 Ibid., paras. 18 and 19.

the article itself did not refer to Jobbik. Jobbik subsequently filed a defamation suit against Magyar Jeti Zrt. and others (including operators of other Hungarian news portals and the mayor). The first instance court held that in making the YouTube video available through the hyperlink, Magyar Jeti Zrt. had disseminated the defamatory statements. This decision was upheld on appeal all the way to the Hungarian Supreme Court before the case was taken to the ECHR.

The ECtHR found that making a media company automatically liable for defamatory content hyperlinked on their websites violates their right to freedom of expression under Article 10 of the ECHR. The court referred to the purpose of the hyperlinks to allow users to navigate online material and to contribute to the operation of the internet by making information accessible through linking information to each other.[64] The ECtHR did not accept the objective liability for media platforms embedding a hyperlink to defamatory or other illegal content in their editorial content. The court found that the strict or objective liability applied in the case "may have, directly or indirectly, a chilling effect on freedom of expression on the internet." According to the case law of the ECtHR, inserting a hyperlink into a news article is not the same as publishing or endorsing what is said on the hyperlinked website. Nobody should be liable for using a hyperlink where they did not know or had no reason to believe that they technically contributed to the dissemination of unlawful content.[65]

The ECtHR, however, did not exclude that in certain particular constellations of elements, the posting of a hyperlink may potentially raise liability questions, for instance, in a case where a journalist does not act in good faith and their action is not in line with the diligence expected in responsible journalism. The following aspects were identified by the ECtHR as relevant while analysing the liability of the publisher of a hyperlink: (a) did the journalist endorse the impugned (unlawful) content; (b) did the journalist repeat the impugned content without endorsing it; (c) did the journalist merely insert a hyperlink to the impugned content without endorsing or repeating it; (d) did the journalist know or could reasonably have known that the impugned content was defamatory or unlawful; (e) did the journalist act in good faith, respect the ethics of journalism, and perform the due diligence expected in responsible journalism?[66]

64 Ibid., para. 73.
65 Ibid., paras. 50–51.
66 For more detailed approach, see Council of Europe 2013.

7. Conclusions

In its case law, the ECtHR has expanded the scope of Article 10 of the ECHR to protect the integrity of online media platforms within the digital environment. The court generally accepted court-ordering anonymisation of additional qualifications and removing comments was taken only in exceptional cases.

The ECtHR confirms that online media platforms are not obliged to proactively seek out unlawful content, meaning that there is no prior monitoring obligation for user-generated content. Making online media strictly liable for user-generated content (comments) is considered excessive and impracticable, undermining the freedom of the right to impart information on the internet. Moreover, the court held that strict liability for commenting or hyperlinking may negatively affect the free flow of information, as online media have no control over the content of comments or hyperlinks. It is also essential that the ECtHR, in several cases, based its finding of a violation of Article 10 of the ECHR on the risk of a chilling effect.

Enforcing principles of free speech online differs significantly from offline contexts. Agreeing with Oster, the right to freedom of speech on the internet appears to be entering a new phase of development. The legal framework needs to adopt a systemic approach that takes into account the distinctive features of online activities, keeps track of their changes, and provides an accurate definition of what online platforms are expected to do and what they might expect from the law. Recent case law addressing freedom of expression in the online era indicates that the mission of the ECtHR, as a norm entrepreneur for online freedom of expression, will introduce numerous novel interpretations in the near future.

Studying the latest case law, it can be seen that the dilemmas outlined in the three cases still persist and remain absolutely valid today. In 2023, in the Sanchez v France case, the ECtHR found that prosecuting a local councillor for not deleting the comments posted by users on Facebook under his post did not violate the councillor's right to freedom of expression. This case highlights exactly the same problems as the cases analysed in the study. The Court based its conclusions on the fact that, although Sanchez's original post was not at issue, he lacked 'vigilance' and failed 'to react in respect of comments posted by others'. Allowing states to hold individuals liable for online comments is very shaky ground and it will have negative effect on freedom of expression online by preventing users to write comments. As a result, robust discussions and democratic discourse will be endangered. This uncertainty obviously has a negative effect on freedom of expression, and the ECtHR should reconsider its approach.

References

Angelopoulos, C. (2016) 'MTE v Hungary: A new ECtHR judgment on intermediary liability and freedom of expression', *Journal of Intellectual Property Law & Practice*, 11(8), pp. 582–584.; https://doi.org/10.1093/jiplp/jpw081;

Balkin, J. M. (2009), 'The Future of Free Expression in a Digital Age', *Pepperdine Law Review*, 36(2), pp. 427–444;

Bartóki-Gönczy, B. And Pogácsás, A. (2019) 'A médiatartalom-szolgáltatásnak nem minősülő internetes tartalomszolgáltatások szabályozása', in Koltay, A. (ed.) *Magyar és európai médiajog*. Budapest: Wolters Kluwer;

Benedek, W. and Ketterman, M. (2020) *Freedom of Expression and the Internet*. Strasbourg: Council of Europe;

Hernández Sánchez, C. A. (2005) *The Meaning of the Information Society Servicices in the e-Commerce Directive* [Online]. Available at: https://www.duo.uio.no/bitstream/handle/10852/20433/MeaningxofxInformationxSocietyxServicesxinxthexE-commercexDirective.pdf%3Fsequence%3D2;

Jørgensen, R. F. (ed) (2019) *Human Rights in the Age of Platforms*. Cambridge: The MIT Press.

Julià-Barceló, R. and Koelman, K. (2000) 'Intermediary Liability: Intermediary Liability in the E-Commerce Directive: So Far So Good, but It's Not Enough', *Computer Law & Security Review*, 16(4), pp. 231–239.; https://doi.org/10.1016/S0267-3649(00)89129-3;

Koltay, A (ed.) (2015) *Comparative Perspectives on the Fundamental Freedom of Expression*. Budapest: Wolters Kluwer;

Koltay, A. (ed.) (2019) *Magyar és európai médiajog*. Budapest: Wolters Kluwer;

Nádori, P. (2015) 'Anonymous mass speech on the Internet', in Koltay, A (ed.) *Comparative Perspectives on the Fundamental Freedom of Expression*. Budapest: Wolters Kluwer;

O'Boyle, M. (ed.) (2020) *Human Rights Challenges in the Digital Age: Judicial Perspectives*. Strasbourg: Council of Europe;

Oster, J. (2020) 'On "Balancing" and "Social Watchdogs". The European Court of Human Rights as a Norm Entrepreneur for Freedom of Expression', in Bollinger, L. and Callamard, A. (eds.), *Regardless of Frontiers*, New York: Columbia University Press, pp. 165–184.; https://doi.org/10.7312/boll19698-010;

Pinto, T. (2015) *Liability for online comments: chilling decision or storm in a teacup?* [Online]. Available at: http://uk.practicallaw.com/4-617-5303?q=&qp=&qo=&qe=;

Voorfoof, D. (2020) 'Same standards, different tools? The ECtHR and the protection and limitations of freedom of expression in the digital environment', in O'Boyle, M (ed.) *Human Rights Challenges in the Digital Age: Judicial Perspectives*, Strasbourg: Council of Europe, 2020, pp. 11–46.