HUNGARIAN STATE PRACTICE

Hungarian Digital Media Cases Before Supranational European Courts

*Gergely Gosztonyi, Daniella Huszár & Gergely Ferenc Lendvai**

Abstract

The last decade brought turmoil in the media field in Central Eastern Europe. Hungary, although a member of the EU since 2004, is a country where concerns about media freedom were growing in the last decade. Taking account of the country as a prominent player in the illiberal regimes, it is not surprising that famous media-related cases could be found in front of different international courts. Cases before the ECtHR like Magyar Kétfarkú Kutya Párt versus Hungary, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt versus Hungary, Magyar Jeti Zrt versus Hungary, or Herbai versus Hungary show new ways to treat questions concerning digital media. The same is applicable to Ker-Optika, Artisjus or Telenor Magyarország cases before the CJEU. The article explores those landmark Hungarian digital media cases before supranational European courts and shows that although Hungary's internal regulation has been the subject of much criticism, the country has made a significant contribution to clarifying the details of European digital media regulation.

Keywords: digital media, Hungary, Magyar Kétfarkú Kutya Párt, Herbai, Telenor, Magyar Jeti.

1. Introduction

In Hungary, currently 7.1 million persons use Facebook (74%[1] of the country's total population), and 2.9 million are on Instagram (30% of the total population). The country's media landscape underwent complete reform in recent years following the first two-thirds victory of the leading political party, Fidesz-KDNP in 2010. In 2012 new media acts came into force,[2] and a heated debate ensued which

* Gergely Gosztonyi: associate professor of law, ELTE Law School, Budapest. Daniella Huszár: Ph.D. student, ELTE Law School, Budapest; junior associate, CMS Budapest TMT. Gergely Ferenc Lendvai: Ph.D. student, Pázmány Péter Catholic University, Budapest.

1 By comparison: 70.2% of the total population in the US use Facebook, while 51.8% in Germany, 58% in Poland and 59.7% in Slovakia. *See* at https://napoleoncat.com/stats.

2 About the new media regulation, *see e.g.* András Koltay (ed.), *Magyar és európai médiajog*, Third Edition, Wolters Kluwer, Budapest, 2019.

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still persists today – which seems to echo the Polish situation. The COVID-19 pandemic put an extra twist on the situation.[3]

The governing political parties stated that there is nothing wrong with the legislation. Meanwhile, an advocacy group noted in its annual report that "authoritarians in Hungary, Poland, and Slovenia abused the pandemic to continue eroding democratic standards."[4] Selam Gebrekidan labelled this a 'parallel epidemic',[5] where some governments use the COVID-19 pandemic as a pretext to undemocratically consolidate political power or to impose undue restrictions on the exercise of civil and political rights. As stated in a report on Hungary:

> "During the COVID era, freedom of information was further restricted. The centralized online public reporting itself made it significantly more difficult, if not impossible, for non-government news outlets to ask real questions about the outbreak."[6]

On 10 March 2021, at a plenary session of the European Parliament, European Commission's Vice President, Věra Jourová warned of "worrying developments" for media freedom in Hungary, Poland, and Slovenia.[7] The MEPs emphasized that free and independent media are vital for democratic societies and called upon European Commission and European Council to defend them vigorously.[8]

One has to agree with the ECtHR which stated in *Cengiz and others* that the Internet "has now become the primary means by which individuals exercise their freedom to receive and impart information and ideas".[9] Tech companies also perceived the recently changed worldwide political climate, and they took small but

3 Gergely Ferenc Lendvai, '"Of Covid, [say] nothing but the truth." – New scaremongering rules in the Hungarian Penal Code during the pandemic', *in* Gergely Gosztonyi & Elena Lazar (eds.), *Media Regulation during the Covid-19 Pandemic. A Study from Central and Eastern Europe*, Ethics Press, Cambridge, 2023, pp. 241-260.; Lucia Bellucci, 'Media law, illiberal democracy and the Covid-19 pandemic: The case of Hungary', *in* Mathieu Deflem & Derek M. D. Silva (eds.), *Media and law: between free speech and censorship*, Emerald Publishing, Bingley, 2021.

4 Civil Liberties Union for Europe, '*EU 2020: Demanding on democracy. Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union*', March 2021, at https://dq4n3btxmr8c9.cloudfront.net/files/AuYJXv/Report_Liberties_EU2020.pdf.

5 Selam Gebrekidan, 'For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power', *The New York Times*, 30 March 2020, at www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html.

6 Ildikó Kovács *et al*., *Media Landscape After a Long Storm: The Hungarian Media Politics Since 2010*, Mérték Médiaelemző Műhely, Budapest, 2021, p. 64.

7 RFE/RL, 'EU Lawmakers Debate 'Worrying Developments' For Media Freedom In Hungary, Poland, Slovenia', 10 March 2021, *RadioFreeEurope*, at www.rferl.org/a/hungary-european-parliament-media-freedom-debate-orban-poland-slovenia/31143267.html.

8 *See* at www.europarl.europa.eu/news/en/press-room/20210304IPR99220/meps-express-concerns-over-attacks-on-media-in-poland-hungary-and-slovenia.

9 *Cengiz and others v Turkey*, Nos. 48226/10 and 14027/11, 1 December 2015, para. 49. *Cf*. Gergely Gosztonyi, 'The European Court of Human Rights and the access to Internet as a mean to receive and impart information and ideas', *International Comparative Jurisprudence*, Vol. 6, Issue 2, 2020, pp. 134-140.

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significant steps to change course.[10] In a conference held in February 2020, the CEO of Facebook, Mark Zuckerberg, said that he understood that there is frustration surrounding how tech companies are taxed in Europe.[11] As a consequence, Facebook paid HUF 3.8 billion (EUR 10.6 million) in advertisement tax to the Hungarian budget – as announced by Justice Minister Judit Varga on 12 February 2021, ironically, on her Facebook page.[12] She also noted that it is an "important step towards a good direction in lawful and arranged cooperation with big technological companies."[13] She also added that although the Ministry of Justice started drafting a new bill that aims to make big technology companies comply with the law and operate transparently, "we keep participating in the preparation of similar regulations in the EU."[14]

Similar to what one could see worldwide, there is a growing criticism in Hungary that more and more government officials are complaining that their Christian, conservative, right-wing opinions views are not reaching enough audience. Their answer to that is what they call 'Facebook censorship'.[15] They say those big tech giants – because of their 'liberal roots' and their own business interests – shadow-ban users for political purposes.[16] They add that tech firms violate democratic legal norms and favor certain political figures and views. Although it is never underlined, it fits perfectly with the above-mentioned changed political climate.

The public knows little about the draft legislation to regulate giant social media companies' operation in the country. Attila Péterfalvi, Head of the National Authority for Data Protection and Freedom of Information, suggested in August 2020 that the government should pass a legislation on social media, on which profiles may only be suspended with a legitimate cause.[17] Since then, the only source of information on the new law is the Facebook page of the Minister of Justice herself.[18] She called for legal, transparent and controllable operation, and added that "recent events have shown that we need to act faster to defend people." On 26 January 2021 that meant that the Hungarian government wanted to

10 Daniella Huszár, 'A véleménynyilvánítás és kifejezés szabadsága a közösségi média platformjain'. *Média – Kábel – Műhold*, Vol. 25, Issue 7-8, 2021, pp. 32-34.

11 'Facebook boss 'happy to pay more tax in Europe', 14 February 2020, *BBC News*, at www.bbc.com/news/business-51497961.

12 *See* at www.facebook.com/VargaJuditMinisterofJustice/photos/a.202525972415964 0/4118386184846973/.

13 Id.

14 Id.

15 Alexandra Béni, 'Hungarian government preparing ground for 'censoring' Facebook?' 4 April 2019, *Daily News Hungary*, at https://dailynewshungary.com/hungarian-government-preparing-ground-for-censoring-facebook/.

16 Gergely Ferenc Lendvai, 'Recenzió Papp János Tamás A közösségi média platformok szabályozása a demokratikus nyilvánosság védelmében című könyvéről', *Infokommunikáció és Jog*, Vol. 19, Issue 2, 2022, p. 27.

17 'Nonsense: Attacks on the government for defending freedom of speech', 4 August 2020, *Magyar Nemzet*, at https://magyarnemzet.hu/english/nonsense-attacks-on-the-government-for-defending-freedom-of-speech-8470329/.

18 *See* at www.facebook.com/VargaJuditMinisterofJustice/photos/a.202525972415964 0/4072305249455067/.

legislate faster than even the EU. The reasoning behind the proposal was that "Today, everyone can be arbitrarily switched off from the online space without any official, transparent and fair proceeding and legal remedy." One could know from the Justice Minister's Facebook page that on 5 March 2021, Thierry Breton, European Commissioner for Internal Market "asked for […] patience before submitting a Hungarian law."[19] Meanwhile, the EU's Digital Service Act (DSA)[20] was adopted, tackling the same issue,[21] with the Hungarian government giving up its plans to enact the relevant legislation.[22]

2. Hungarian Digital Media Cases Before the Supranational European Courts

In a contemporary take on Monty Python's well-known aphorism "What have the Romans ever done for us?", it is worth examining how and in what sense the Hungarian media situation played a role in shaping the DSA – besides the Digital Markets Act (DMA)[23] and other European digital media regulations. The article analyses Hungarian digital media cases that were brought before of two most important international courts, the CJEU in Luxembourg and the ECtHR in Strasbourg. As Oreste Pollicino notes,

> "The ECtHR and the CJEU have protected freedom of speech in a very different manner. Whereas the former does actually work as a constitutional court of fundamental rights, the latter has been more influenced by the original economic nature of the European Community."[24]

Since the legislator has not been sufficiently careful and precise in formulating its intentions with respect to several issues concerning the digital media, an assessment of the problematic points appears necessary.

19 *See* at www.facebook.com/VargaJuditMinisterofJustice/photos/a.202525972415964 0/4183135275038730/.

20 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); Zsolt Ződi, *Platformjog*, Ludovika Egyetemi Kiadó, Budapest, 2023, pp. 181-201.

21 DSA, Recital (54): "provider should inform in a clear and easily comprehensible way the recipient of its decision, the reasons for its decision and the available possibilities for redress to contest the decision, in view of the negative consequences that such decisions may have for the recipient, including as regards the exercise of its fundamental right to freedom of expression."

22 Ondřej Moravec *et al*., 'Digital Services Act Proposal (Social Media Regulation)', *Studia Politica Slovaca*, Vol. 14, Issue 2-3, 2021, pp. 166-185.

23 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).

24 Oreste Pollicino, 'Judicial protection of fundamental rights in the transition from the world of atoms to the word of bits: the case of freedom of speech', *European Law Journal*, Vol. 25, Issue 2, 2019, p. 168.

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2.1. ECtHR: Magyar Kétfarkú Kutya Párt versus Hungary

The *Magyar Kétfarkú Kutya Párt versus Hungary*[25] case set an important precedent regarding online communication during an election. According to the case facts, during the Hungarian referendum in 2016, the political party named *Magyar Kétfarkú Kutyapárt* ("Hungarian Two-Tailed Dog Party", MKKP), a satirical party (often described as a joke-party[26]) developed a mobile application called *'Szavazz érvénytelenül'* ('Cast an Invalid Vote') which allowed users to share pictures of their invalid ballot paper. The referendum concerned the migration crisis of 2015, particularly the relocation to Hungary of 1294 asylum seekers from other Member States proposed by the EU's interior ministers in September 2015. Viktor Orbán, the incumbent Prime Minister of Hungary, announced six months later that the Hungarian government was proposing a referendum on 'migrant quotas'. The question to which Hungarian citizens were to respond was the following: "Do you want the European Union to have the right to order the mandatory settlement of non-Hungarian citizens in Hungary without the Parliament's consent?"[27] A plethora of opposition parties and political parties expressed their concerns over the referendum, deeming it a form of disinformation or misrepresentation of facts, a disregard for European norms and values or a form of politically motivated xenophobia.[28] MKKP, which was known for its humorous, virulent and often provocative political campaigns and actions,[29] urged its voters and supporters to take part in the voting on the referendum question. At the same time, they encouraged supporters to cast an invalid ballot as a way to express their political opinion, namely, that the subject of the referendum is an abuse of a democratic legal institution. MKKP also emphasized that casting an invalid is also a forge-proof solution for boycotting the vote, since invalid votes are physically incapable of being taken into account (as opposed to, for instance, casting empty ballot papers, which can be forged and then considered as valid votes). The app developed by MKKP, therefore, served multiple purposes: *(i)* MKKP supporters could share images of invalid ballot papers, and *(ii)* the identity of voters could not be identified as the app was developed in a way which did not allow others to trace the original poster of the content ('hashing technique').[30] The app was launched and was first made available in the App Store on 29 September 2016. On the same day, a private individual lodged a complaint against the app at the National Election Committee. The following day, the National Election Committee (NEC) found that the app breached the provisions of the Hungarian Electoral Procedure Act and the Fundamental Law. The NEC argued that the fact that voters could post pictures of

25 *Magyar Kétfarkú Kutya Párt v Hungary*, No. 201/17, 20 January 2020.

26 Annamária Sebestyén, 'The Mobilization Potential of Political Parties among Hungarian Students', *Intersections*, Vol. 6, Issue 4, 2020, p. 114.

27 *Magyar Kétfarkú Kutya Párt v Hungary*, paras. 10-11.

28 *Cf*. Attila Juhász *et al*., *Menekültügy és migráció Magyarországon*, Heinrich Böll-Stiftung Publishing, Prague, 2017.

29 *Magyar Kétfarkú Kutya Párt v Hungary*, para. 8.

30 János Tamás Papp, 'Can a Two-Tailed Dog Be Allowed into a Polling Booth? The Case of Magyar Kétfarkú Kutya Párt versus Hungary before the ECtHR', *Hungarian Yearbook of International Law and European Law*, Vol. 9, 2021, pp. 400-407.

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their ballot paper anonymously violated the law for two reasons. *(i)* Firstly, relying on relevant provisions, the NEC concluded that ballot papers are not private property, therefore, they cannot be taken out of the ballot booth, nor can pictures be taken of them. *(ii)* Secondly, the NEC stated that using the app may amount to voter fraud, an is capable of discrediting the work of electoral bodies and tallying systems in the eyes of the public. The case was brought before the *Kúria* (the Supreme Court of Hungary). The *Kúria* agreed partly with the NEC. The *Kúria* dismissed the NEC's arguments concerning voter fraud; however, it stressed that the sharing of photos of invalid ballot papers as a means of expressing political opinions constituted an violation of the fundamental purpose a ballot paper, which is to express one's opinion on a question put to vote and any use of ballot papers contrary to this purpose infringes the principle of the exercise of rights in accordance with their purpose.[31] MKKP lodged a complaint before the Constitutional Court of Hungary for violation of the right to freedom of expression. The Constitutional Court deemed the complaint inadmissible as it found that MKKP's rights were not affected, nor did the party suffer direct harm from the potential violation of the right to freedom of expression. After exhausting all domestic legal remedies, the case was brought before the ECtHR.

The ECtHR examined the possibility of a potential violation of MKKP's freedom of expression enshrined under Article 10 ECHR.[32] The ECtHR concluded that the party's right to freedom of expression was violated and interfered with. The focal point of the argumentation of the ECtHR was a detailed analysis of whether the interference was prescribed by law. Furthermore, significant principles were also formulated in the decision. The ECtHR noted that sharing photos and developing and using a photo-sharing app, which may encourage voters to cast their votes, is a form of exercising one's freedom of expression. The ECtHR revisited many cases where visual and digital media were central to disseminating information and political opinions.[33] Though MKKP was not the author of the photos shared,[34] nonetheless, it served as a platform for disseminating content.[35] This way, the ECtHR also emphasized that in a political or electoral context, mobile applications must be treated in the same way as Google website-facilitator services or video hosting services. As such, the posting of invalid ballots on the app were qualified as an exercise of freedom of expression.[36]

As for the restriction being prescribed by law, the ECtHR reiterated an exceedingly profound and thorough examination of what the standard 'prescribed by law' means. The ECtHR recalled that the instrumental requirement for a restriction to be prescribed by law is the quality of law as well as the foreseeability

31 *Magyar Kétfarkú Kutya Párt v Hungary*, para. 26.
32 Id. para. 63.
33 *Ashby Donald and others v France*, No. 36769/08, 10 January 2013, para. 86; *Ahmet Yıldırım v Turkey*, No. 3111/10, 18 December 2012.
34 *Magyar Kétfarkú Kutya Párt v Hungary*, para. 87.
35 *Öztürk v Turkey*, No. 22479/93, 28 September 1999, para. 49; *Bédat v Switzerland*, No. 56925/08, 29 March 2016, para. 58.
36 *Ahmet Yıldırım v Turkey*, para. 49; and, with regard to video-hosting services, *Cengiz and others v Turkey*, para. 88.

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and the formulation obligation related thereto. The ECtHR concluded that the reliance on Constitutional Court and *Kúria* decisions, which were vaguely articulated, were insufficient from the perspective of foreseeability requirements. Moreover, the ECtHR underlined the relevance of the political context in the instant case and the context of the electoral referendum. On this point, the ECtHR drew attention to the fact that, ultimately, political opinions were restricted, which is not in line with the democratic values of the rule of law and political pluralism.

This decision is of utmost importance from the perspective of digital media. Technology-wise, the ECtHR opted for an extremely inclusive approach, meaning that sharing themed photos on an app can be considered a form of exercising freedom of expression. From a political standpoint, the ECtHR made the similarly open-minded decision to review a political party's application during a referendum. The authors note that the acceptance of media use and the support of political pluralism were also preferable and desirable, especially in the heated and dynamic political environment surrounding the referendum's topic and questions. In conclusion, the case may be considered a landmark case for its approach to digital media, its legal reasoning and the articulation of the prescribed by law standard applicable to interferences with freedom of expression.[37]

2.2. ECtHR: Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. versus Hungary

Presumably, the most widely-known and researched case involving Hungary concerning media and freedom of expression before the ECtHR[38] is the *Magyar Tartalomszolgáltatók Egyesülete* (Hungarian Association of Content Providers, MTE) and *Index.hu Zrt. versus Hungary (MTE case)*.[39] The case principally concerned the right to reputation and freedom of expression with regard to a real estate company. The case is also of paramount importance in the context of platform liability,[40] owing to its effect refining *Delfi AS versus Estonia*.[41]

According to the facts of the *MTE case*, the applicants were prominent and widely known websites in Hungary. On these websites, users could occasionally share, create and disseminate content and, more importantly, they could place comments under selected articles. The websites also indicated that comments were not a reflection of the editors' opinions. Under an article published in 2010 with

37 Following the MKKP case, the Hungarian Parliament wanted to amend the law on electoral procedure in line with the ECtHR ruling, but human rights NGO opposed is strongly. *See e.g.* 'Elemzésünk az egyes választási tárgyú törvények módosításáról szóló T/13679. számú törvényjavaslatról', Társaság a Szabadságjogokért (TASZ), at https://tasz.hu/elemzesunk-az-egyes-valasztasi-targyu-torvenyek-modositasarol-szolo-t-13679-szamu-torvenyjavaslatrol/.

38 *See* Dirk Voorhoof, 'European Court of Human Rights: Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v. Hungary', *IRIS*, 2016/3, pp. 2-3; Jurate Sidlauskiene & Vaidas Jurkevičius, 'Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi as v. Estonia and MTE & Index v. Hungary', *Baltic Journal of Law & Politics*, Vol. 10, Issue 2, 2017, pp. 46-75.

39 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, No. 22947/13, 2 February 2016.

40 Gergely Gosztonyi, 'How the European Court of Human Rights Contributed to Understanding Liability Issues of Internet Service Providers', *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica*, Vol. 58, 2019, pp. 127-128.

41 *Delfi AS v Estonia*, No. 64569/09, 16 June 2015.

the title "Another Unethical Commercial Conduct on the Net" on Index, i.e. one of the most popular news media outlets then and now, some users published defamatory comments concerning a real estate management websites' business practice. The article highlighted that the real estate management company's website automatically charged subscription fees after the free trial they offered for the use of services. Two comments, in particular, were highlighted in the *MTE case*, both of them expressing dissatisfaction with the company, calling the company a "sort-of sly, rubbish, mug company". The article was shared on another news website where users were also giving input on the subject. Comments were even more vivid there. Next, the real estate management company lodged a civil action against MTE and Index, claiming that the comments violated the company's good reputation. After having received the application, the news websites removed the comments concerned. The first instance Hungarian court ruled that Index had an objective liability in respect of the unlawful comments left by its readers.[42] Hungarian domestic courts, including the *Kúria* ruled against the applicants, deciding that the applicants assumed objective liability for any injurious or unlawful comments made by readers by reason of enabling commenting under the problematic opinion piece. The case was brought before the ECtHR, with a particular focus on platform liability and freedom of expression.

The ECtHR overruled the domestic courts' decision and held that Hungary violated the applicants' rights stipulated under Article 10 ECHR. The ECtHR found that while Hungarian civil law enabled the filing of a civil lawsuit against the websites, freedom of expression, the cornerstone of a democratic society[43] must be analyzed in the same context as defamation – or rather third party reputation. Relying on *Delfi*, where clearly unlawful speech had been expressed and for which the Internet news portal had had to assume liability, in the *MTE case*, comments merely considered offensive and provocative speech. The ECtHR set forth that in the present case, a plethora of factors must be considered, adding two additional elements to the test down in *Delfi*: *(i)* the context of the comments, *(ii)* the measures applied by the applicant company in order to prevent or remove defamatory comments, *(iii)* the liability of the actual authors of the comments as an alternative to the intermediary's liability, *(iv)* the consequences of the domestic proceedings for the applicant company, *(v)* the conduct of the injured party and *(vi)* the consequences on the injured party.[44] Contrary to the ruling in *Delfi*, in the *MTE case*, the ECtHR stated that the alleged unlawful misconduct of larger real estate companies had been a part of the public debate. Furthermore, while the ECtHR did not question that some comments were vulgar, it could not be determined that the sole intent behind the comments was to insult the third party.[45] Moreover, the ECtHR revisited the principles laid down in *Delfi*[46] and *Uj versus Hungary*,[47] noting

42 Gosztonyi 2019, pp. 127-128.

43 *Handyside v The United Kingdom*, No. 5393/72, 7 December 1976, para. 49; *Olmedo-Bustos and others v Chile*, IACtHR, 5 February 2001, para. 68.

44 Gosztonyi 2019, p. 127.

45 *Skałka v Poland*, No. 43425/98, 27 May 2003, para. 34.

46 *Delfi AS v Estonia*, para. 147.

47 *Uj v Hungary*, No. 23954/10, 19 July 2011, para. 23.

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that a lower register of style is a specificity of communication on the Internet. The ECtHR underlined that rendering websites liable for all comments would amount to an excessive and impractical obligation hindering the freedom of the right to impart information. In this respect, the ECtHR held that imposing such rigid liability standards is capable of causing a chilling effect on online freedom of expression.[48] The ECtHR therefore arrived at the conclusion that the Hungarian courts did not consider all facts of the case thoroughly, which resulted in the violation of the applicants' right to freedom of expression.

The *MTE case* is often considered an attempt to mitigate the rather controversial decision rendered in *Delfi*.[49] In his concurring opinion, Judge Egidijus Kūris highlighted that internet providers, especially those providers who benefit financially from allowing users to comment, shall not employ the findings of the *MTE case* as a shield or safeguard against liability concerns. Judge Kūris draws attention to an important issue: should the *MTE case* be used maliciously, the judgment essentially "becomes an instrument for whitewashing the Internet business model, aimed at profit at any cost." It is also critical to stress that the *MTE case* is not an absolute derivation of *Delfi*; as a matter of fact, the *MTE case* does not depart from the principles set forth in *Delfi*; *MTE* merely gave a more profound, contextualized and nuanced detailing on issues, principles and findings laid down in *Delfi*.[50] As observed by Ombelet and Kuczerawy, the conclusion of the *MTE case* is that when it comes to online intermediaries, Articles 14 and 15 of Directive 2000/31/EC on Electronic Commerce[51] (ECD) offer greater protection than Article 10 ECHR.[52]

2.3. ECtHR: Magyar Jeti Zrt. versus Hungary

A landmark judgment on online liability and freedom of expression, *Magyar Jeti Zrt. versus Hungary*[53] set forth the principles crucial for understanding hyperlinks under Article 10 ECHR.

The facts of the case mainly concern the legal interpretation of a hyperlink linking to a far-right, extremist video. The applicant, Magyar Jeti Zrt., is an operator of the popular independent news website 444.hu on which the allegedly problematic article was posted. The article contained a thorough overview of the

48 Kristina Cendic & Gergely Gosztonyi, 'Freedom of expression in times of Covid-19: chilling effect in Hungary and Serbia', *Journal of Liberty and International Affairs*, Vol. 6, Issue 2, 2020, pp. 14-29.

49 Tamás Szigeti & Éva Simon, 'A hozzászólás szabadsága: a közvetítő szolgáltatói felelősség aktuális kérdéseiről', *Fundamentum*, Vol. 20, Issue 2-4, 2016, p. 113; Daphne Keller, 'Policing online comments in Europe: New Human Rights Case in the Real World', *inforrm*, 21 April 2016, at https://inforrm.org/2016/04/21/policing-online-comments-in-europe-new-human-rights-case-in-the-real-world-daphne-keller/.

50 'Delfi revisited: the MTE-Index.hu v. Hungary case', *LSE blog*, 19 February 2016, at https://blogs.lse.ac.uk/medialse/2016/02/19/delfi-revisited-the-mte-index-hu-v-hungary-case/.

51 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)

52 Aleksandra Kuczerawy, 'Delfi revisited: the MTE & Index.hu v. Hungary case', *Reveal*, 1 March 2016, at https://revealproject.eu/delfi-revisited-the-mte-index-hu-v-hungary-case/.

53 *Magyar Jeti Zrt. v Hungary*, No. 11257/16, 4 December 2018.

racist and xenophobic actions of Hungarian football fans while travelling to Romania. According to the facts of the case, in 2013, a group of intoxicated football fans travelled to Romania and stopped at an elementary school in Hungary predominantly attended by Roma students, chanting racist slurs, threatening students, waving flags, and throwing beer bottles. A local Roma leader gave an interview on the incident, alleging that the football fans who attacked the school were members of Jobbik, a political party in Hungary with a history of racism and far-right radicalism.[54] An article about the incident was reported on 444.hu, including a hyperlink to the Roma leader's interview. Despite not being mentioned in the article *per se*, Jobbik sued the local Roma leader, Magyar Jeti, and six other media companies that shared hyperlinks to the interview, alleging defamation. In March 2014, the Debrecen Regional Court found the Roma leader guilty of defamation and held Magyar Jeti strictly liable for defamation for disseminating the interview through 444.hu, without considering the media company's intent or balancing the freedom of expression with the right to reputation. The court ordered Magyar Jeti to remove the hyperlink to the interview and publish sections of its judgment explaining the falsity of the claims made on its website. Magyar Jeti appealed, but the Debrecen Regional Court of Appeal upheld the decision, and in 2015, the *Kúria* also upheld the ruling. The Constitutional Court of Hungary dismissed Magyar Jeti's constitutional complaint in 2017, concluding that the Roma leader's statement qualified as a statement of fact and that media outlets were legally responsible for any content they made accessible to the public under strict liability, irrespective of good or bad faith. The court held that the Civil Code enabled media outlets to restrict access to injurious statements without violating others' freedom of expression.

The ECtHR ruled that the imposition of strict liability on Magyar Jeti for hyperlinking defamatory content was disproportionate and constituted a violation of its freedom of expression. In addition, the imposition of strict liability on Magyar Jeti was not necessary in a democracy and constituted a disproportionate restriction on its right to freedom of expression. The ECtHR applied the so-called three-part test to determine whether the interference with Magyar Jeti's freedom of expression was lawful, served a legitimate aim, and was necessary in a democratic society.[55] It was noteworthy, however, that the ECtHR mainly focused on the necessity part of the aforementioned test. In fact, the judges did not elaborate in detail on the lawfulness and legitimacy issues. The ECtHR began its analysis of necessity by outlining the relevant general principles. It noted that protections afforded by Article 10 to journalists were subject to the condition that the journalists acted in good faith and on an accurate factual basis.[56] The ECtHR emphasized the importance of compliance with journalistic ethics in the current

54 *See* András Biró Nagy & Dániel Róna, 'Rational Radicalism: Jobbik's Road to the Hungarian Parliament', *in* Ralf Melzer & Sebastian Serafin (eds.), *Right-Wing Extremism in Europe: Country-Analyses, Counter-Strategies and Labour-Market Oriented Exit Strategies*, Friedrich Ebert-Foundation Publishing, Berlin, 2013, pp. 229-253.

55 *Sunday Times v the United Kingdom*, No. 6538/74, 26 April 1979; Jan Oster, *Media Freedom as a Fundamental Right*, Cambridge University Press, Cambridge, 2015, pp. 123-124.

56 *See e.g. Bédat v Switzerland*.

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age of vast quantities of information in traditional and electronic media. Within the context of digital media and communication, the ECtHR noted that the Internet played a significant role in facilitating the freedom of expression and information, however, news portals must assume responsibility and liability in case terms apply for comments generated and shared on their platforms.[57]

The ECtHR highlighted that hyperlinks play an important role in sharing and disseminating content and information. Nonetheless, assuming liability for hyperlinks which direct to a different website is unnecessary, as those who share hyperlinks of content on another online surface are not in control over the content itself. The ECtHR introduced a 5-part test to assess the hyperlink polemic. Hence, Magyar Jeti's liability was examined via the following criteria: whether the journalist *(i)* endorsed the content to which the hyperlink led, *(ii)* repeated it, or *(iii)* simply put a hyperlink directing to the content without the actions mentioned under points *(i)* and *(ii)*, and if the journalist *(iv)* was aware of the defamatory nature or essence of content, and *(v)* was acting in good faith. As the journalist in question had merely put a link in the article leading to the defamatory content, the ECtHR found that since the journalist had not endorsed, supported or in any way repeated the unlawful content embedded in the video, the interference with Magyar Jeti's rights was unnecessary. The ECtHR also recalled that though strict liability regulations apply to journalists, one of the principal functions of the press is to report on current and actual issues.[58] Furthermore, since the defamatory content concerned a political party, it should be noted that the range of acceptable criticism in a political context is wider.[59]

That hyperlinks would play a central role in a case is not unprecedented. As Judge Pinto De Albuquerqe noted in his concurring opinion, there is an international principle supported by German, Canadian and American rulings that hyperlinks are neutral.[60] However, the *Magyar Jeti case* was the first instance before the ECtHR where the correlation between the linked content and the article containing the hyperlink was analyzed. As for the analysis over control of the content to which the hyperlink is directed, Vander Maelen suggests that it would have been preferable to elaborate more on the nuances as to what control entails in the case of hyperlinks.[61] The *Magyar Jeti case* is of utmost significance for freedom of expression in digital media and a progressive step towards a deeper understanding of online forms of expression.

57 *Cf. Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, No. 22947/13.

58 *Magyar Jeti Zrt v Hungary*, para. 62.

59 Id. para. 81; *Lindon, Otchakovsky-Laurens and July v France*, Nos. 21279/02 and 36448/02, 22 October 2017, para. 46.

60 *Magyar Jeti Zrt v Hungary*, concurring opinion, para. 3.

61 Carl Vander Maelen, 'Magyar Jeti Zrt v. Hungary: The Court provide legal certainty for journalists that use hyperlinks', *Strasbourg Observers*, 18 Jan 2019, at https://strasbourgobservers.com/2019/01/18/magyar-jeti-zrt-v-hungary-the-court-provides-legal-certainty-for-journalists-that-use-hyperlinks/.

2.4. ECtHR: Herbai versus Hungary

The *Herbai versus Hungary*[62] case is notable for applying freedom of expression in the context of the narrow interpretation of public issues.[63] The case is strongly connected with digital media, as the case related to a personal blog started by a bank employee.

The applicant, Csaba Herbai was an employee at the human resources (HR) department of a renowned bank in Budapest, Hungary. The applicant had been working for the bank since 2006. In 2011 the applicant and a co-author created a blog where the two of them shared their common experiences, expertise and commentaries on HR-related matters in relation to activities conducted by the bank. The blog posts concerned managerial and organizational questions such as timelines, strategic decisions, and salary-related comments.[64] After only 2 posts/articles were published on the blog, the applicant's employment status was unilaterally terminated by the bank on the basis that the applicant breached the bank's confidentiality standards and provisions by starting a blog and sharing his experiences influenced by his job, arguing that the applicant possessed information (and shared them) that could interfere with the bank's business interests. The applicant filed a suit with the Labour Court of Budapest challenging the termination's lawfulness. The Labour Court dismissed the applicant's lawsuit because sharing the information in the blog posts constituted a breach of professional standards, which endangered the bank's interests. The applicant challenged the first instance judgment at the Budapest-Capital Regional Court, where the judgment was overturned. The case was referred to the *Kúria* which overturned the second instance judgment of the Regional Court, confirming the decision of the first instance Labor Court. The *Kúria* concluded that the applicant has indeed violated the bank's business interests and breached the employer's code of ethics.

Herbai lodged an application before the ECtHR. The legal basis of the application was the breach of Article 10 ECHR, claiming that the applicant's right to freedom of expression had been violated. The ECtHR concluded – unanimously – that this was indeed the case.

The main issue at hand was understanding and deciding the limits of freedom of expression in an employment relationship.[65] The ECtHR highlighted that the state has a positive obligation to protect the right to freedom of expression, even in private labor relations.[66] Underlining the importance of the margin of appreciation doctrine,[67] the court noted that certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate

62 *Herbai v Hungary*, No. 11608/15, 5 November 2019.

63 Gergely Gönczi, 'A szakmai vélemény is védett, akár a munkáltató érdekével szemben is', *Átlátszó*, 19 November 2019, at https://ejeb.atlatszo.hu/2019/11/19/a-szakmai-velemeny-is-vedett-akar-a-munkaltato-erdekevel-szemben-is/.

64 *Herbai v Hungary*, paras. 10-11.

65 *Cf*. Fuentes Bobo v Spain, No. 39293/98, 29 February 2000.

66 *Palomo Sánchez and others v Spain*, Nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011, paras. 60-62.

67 *Herbai v Hungary*, para. 37.

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in the context of labor relations, where mutual trust is essential. The ECtHR applied a four part test to examine the permissible scope of a restriction of freedom of expression in an employment relationship which consisted of the following factors: *(i)* the nature of the speech, *(ii)* the motives of the author, *(iii)* the damage caused to the employer, and *(iv)* the severity of the sanction imposed. The ECtHR found that the applicant's intent did not encompass purely private interests or to air a personal grievance, but much rather wished to share knowledge with the audience. The ECtHR ruled, in contrast with the *Kúria*'s findings, that comments made by an employee – or in the present case, by the applicant – fall within the scope of protection of the right to freedom of expression as they are of professional nature, even without having a public link which "would enable to clearly characterize them as part of a discussion on matters of public interest."[68] It was also determined that the blog posts could not have affected the bank's business interests negatively or detrimentally. In conclusion, the ECtHR found that the termination of employment by the bank was not the least intrusive measure, and that the Hungarian courts failed to balance the rights of the employee and the employer effectively. Moreover, the ECtHR awarded EUR 4,800 to the applicant to cover the litigation costs and a further EUR 10,000 plus taxes as non-pecuniary damage.[69]

2.5. CJEU: Ker-Optika Bt versus ÁNTSZ Dél-dunántúli Regionális Intézete

The *Ker-Optika*[70] case concerns a reference for a preliminary ruling for the interpretation of ECD and of Articles 34 and 36 TFEU regarding the sale of contact lenses via the Internet.

Ker-Optika Bt. sold contact lenses via its internet site until the local office of the ÁNTSZ[71] prohibited that activity by decision of 2008. The ÁNTSZ relied in its decision on the provisions of the Order of the Ministry of Health, under which contact lenses can only be sold either in a shop specializing in the sale of medical devices or by delivery to the final consumer; therefore, selling contact lenses via the internet falls outside the permitted scope. Ker-Optika brought an action against that decision claiming that the sale of contact lenses via the Internet cannot be subject to restrictions in the light of the ECD, which safeguards the right of an information society service provider to pursue that activity freely.

Within this context, the national court referred questions to the CJEU for a preliminary ruling to decide whether EU law precludes national legislation, such as that at dispute in the main proceedings, which authorizes the sale of contact lenses only in shops which specialize in the sale of medical devices and which prohibits, consequently, the sale of contact lenses via the internet.[72]

68 Id. para. 43.

69 As a side-note, it is also worth noting that *Herbai* was previously examined by the Hungarian Constitutional Court [Decision No. 14/2017. (VI. 30.) AB], which came to a different conclusion than the ECtHR.

70 Judgment of 2 December 2010, *Case C-108/09, Ker-Optika*, ECLI:EU:C:2010:725.

71 *Állami Népegészségügyi és Tisztiorvosi Szolgálat* – National Public Health and Veterinary Service. Terminated its work in late 2018.

72 Lilla Nóra Kiss, *Belső piaci jogesetgyűjtemény*, Miskolci Egyetem, Állam- és Jogtudományi Kar, Miskolc, 2017, p. 29.

In its procedure, the CJEU firstly noted in relation to internet sales, that such sales comprise the act of selling, which consists of making a contractual offer online and the conclusion of a contract by electronic means. The ECD applies to services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services; therefore, information society services defined in the ECD, cover the selling of goods online. The ECD provides that each Member State must systematically adjust its legislation which contains requirements likely to curb the use of contracts by electronic means and which covers all the necessary stages and acts of the contractual process of selling goods online, such as the contractual offer, the negotiation, and the conclusion of the contract by electronic means.[73]

At the same time, the CJEU pointed out that activities which, by their nature, cannot be carried out remotely or electronically, such as medical advice requiring a physical examination of the patient, cannot be considered as information society services and therefore do not fall within the scope of the ECD. Consequently, if medical advice requiring a physical examination of the customer proves to be inseparable from the sale of contact lenses, the mere fact that advice is required means that the ECD does not cover these sales. However, the CJEU ruled that this examination is not inseparable from the selling of contact lenses, since it can be carried out independently before the act of sale, and the sale can be concluded, therefore, even at a distance, following the examination of the customer based on a prescription made by the ophthalmologist. Accordingly, a national provision prohibiting the sale of such lenses over the Internet constitutes an infringement of the ECD.

In examining the rules governing the conditions of supply of contact lenses, the CJEU held that it was not the provisions of the ECD which were applicable, since the relevant rules were set out in the TFEU.[74] In this respect, the CJEU, referring to its case law, stated that where a national provision relates both to the free movement of goods and another fundamental freedom, the CJEU, as a general rule, examines the provision in relation to only one of those two fundamental freedoms if it is shown that one freedom is wholly secondary to the other freedom or is capable of being linked to it.[75] Moreover, a national provision on a selling arrangement characterized by the sale of goods on the Internet and delivery of the goods to the consumer's home should be examined in the light of the rules on the free movement of goods and, consequently, in light of Articles 34 and 36 TFEU.[76]

In this context, the CJEU considered whether the national legislation applies to all relevant traders operating within the national territory and whether it affects the selling of domestic products and those from other Member States in the same way. In the course of its proceedings, the CJEU found that the first condition was met, *i.e.* the legislation applies to all relevant traders involved in selling contact

73 *Case C-108/09, Ker-Optika*, para. 23.

74 Kiss 2017, pp. 33-34.

75 Judgment of 24 March 1994, *Case C-275/92, Schindler*, ECLI:EU:C:1994:119, para. 22; Judgment of 26 May 2005, *Case C-20/03, Burmanjer and others*, ECLI:EU:C:2005:307, para. 37.

76 Judgment of 11 December 2023, *Case C-322/01, Deutscher Apothekerverband*, ECLI:EU:C:2003:664, paras. 65, 76, and 124.

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lenses.[77] As regards the second condition, the CJEU pointed out that the prohibition of the sale of contact lenses by mail order deprives traders of other Member States of a particularly efficient way of selling and consequently makes it considerably more difficult for those products to enter the market of the Member State concerned.[78] Because of the above, the CJEU confirmed that the Hungarian legislation does not affect the sale of contact lenses by Hungarian operators in the same way as by operators in other Member States.

In its assessment of the case, the CJEU found that the Hungarian legislation went beyond what is necessary to attain the aim of ensuring the protection of the health of contact lens wearers. It noted that this could be achieved by less restrictive measures than those resulting from the legislation at dispute in the main proceedings, consisting only in certain restrictions on the first sale of contact lenses and in the obligation on the traders concerned to make a qualified optician available to the customer.[79] The CJEU thus concluded that national legislation which restricts the selling of contact lenses solely to shops specializing in medical devices and prohibits the online sale of contact lenses is precluded by Articles 34 and 36 TFEU and the ECD.[80]

2.6. CJEU: Artisjus Magyar Szerzői Jogvédő Iroda Egyesület versus European Commission

The *Artisjus case*[81] concerns the challenging of a decision of the European Commission regarding the conditions of the management and licensing of copyright in relation to the public performance rights of musical works, exclusively for exploitation via the internet, satellite and cable. The decision was addressed to 24 collecting societies established in the European Economic Area (EEA), which are members of the International Confederation of Societies of Authors and Composers (CISAC). In this case, the applicant was *Artisjus Magyar Szerzői Jogvédő Iroda Egyesület* (Society Artisjus Hungarian Bureau for the Protection of Authors' Rights), also a member of the Collecting Societies.[82]

The Commission's decision is based on a case involving a CISAC member who refused to grant RTL Group SA a Community-wide music license for its broadcasting activities in 2000. Two years later, Music Choice Europe Ltd. contested the non-binding model contract prepared by CISAC, specifically regarding its definition of territories of operation. The model contract led to reciprocal representation agreements (RRAs) among Collecting Societies, which delegate the right to grant licenses to each other, including for online applications. The Commission found

77 Nicolas Rennuy & Ellen Van Nieuwenhuyze, 'Arrêt 'Ker-Optika': nouvelle étape dans la jurisprudence sur la libre circulation des marchandises?', *Journal de droit européen*, Vol. 176, Issue 2, 2011, pp. 36-38.

78 *Case C-322/01, Deutscher Apothekerverband*, para. 74.

79 Jelena Madir (ed.), *Healthtech. Law and Regulation*, Cheltenham, Edward Elgar Publishing, 2020.

80 András Osztovits (ed.), *Az Európai Unió jogának alkalmazása: az előzetes döntéshozatali eljárások kezdeményezésének tapasztalatai elnevezésű joggyakorlat-elemző csoport összefoglaló véleménye*, Budapest, Kúria, 2013, p. 123., at https://kuria-birosag.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf.

81 Judgment of 12 April 2013, *Case T-411/08, Artisjus v Commission*, ECLI:EU:T:2013:172.

82 Anikó Grad-Gyenge, *Egy modern szerzői jog*, Budapest, Médiatudományi Intézet, 2022.

that based on the observations received in the procedure, the presented commitments were inappropriate for responding to competition concerns.

The Commission examined the Model Contract from several aspects, including the membership of right holders in Collecting Societies (membership clause), and the exclusive nature and territorial scope of the mandates granted (exclusivity clause) by Collecting Societies to each other in the RRAs. With regard to the membership clause, the Model Contract provided that Collecting Societies could not admit as a member an author who was already a member of another Collecting Society or an author who was a national of a country in which another Collecting Society was operating. As regards the exclusivity clause, the Model Contract provided that one Collecting Society would grant to another the exclusive right, in the territories in which the latter operated, to grant the necessary licences for all public performances.[83] The Model Contract also provided that Collecting Societies should refrain from interfering in the territory of the other society with its exercise of the mandate conferred on it (non-interference clause). According to the Commission, the Collecting Societies applied territorial restrictions whereby the geographical coverage of the licences granted by the Collecting Society was limited to the territory of the EEA country where the company in question was established (national territorial restrictions).

After examining the exclusivity clause and the non-interference clause, the Commission concluded that the exclusivity clause had a foreclosing effect on the domestic market of the exclusive Collecting Societies, since no Collecting Society could grant a licence in the territory of another collecting society. As for the non-interference clause, it was noted that the clause essentially reinforces the exclusivity clause; however, since the non-interference clause does not prevent the granting of direct licences and given that some RRAs have been amended to remove this clause, the Commission decided not to take action on this provision of the Model Contract.[84]

The Commission found that national territorial restrictions resulted from a concerted practice that restricted competition. Collecting Societies cooperated to ensure that these restrictions were mutually accepted and applied in all RRAs, substituting competition with cooperation. This made each Collecting Society dependent on the others for licensing rights and collecting royalties and at risk of disciplinary action if they refused to maintain market segmentation in online rights. The Commission concluded that the lack of change in conduct after the termination of the exclusivity clause indicated concerted practice, unless there were other reasons that showed the market segmentation was the result of individual conduct.

In the procedure, the Commission noted that although copyright and its scope of protection are determined by national law, this does not mean that the National Collecting Society should grant licences for a particular country. The Commission

83 István Harkai, 'Új üzleti modellek az audiovizuális művek nyilvánossághoz közvetítésében – II. rész', *Iparjogvédelmi és Szerzői Jogi Szemle*, Vol. 15, Issue 3, 2020, pp. 8-35.

84 Mihály Ficsor, *Collective Management of Copyright and Related Rights, Third edition*, Geneva, World Intellectual Property Organization, 2022, p. 60.

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also pointed out that Collecting Societies differ considerably in terms of their efficiency, administrative costs and repertoire. They may therefore have an interest in entrusting a particularly well-performing Collecting Society with the task of granting licences for a larger territory than the one in which it is established, or in entrusting more than one Collecting Society in certain regions to increase the distribution of their repertoire and thus the remuneration of authors.

However, the Commission recognized that in some cases, a decision not to grant a license outside the territory where a Collecting Society is established may be due to technical capacity limitations or legal system characteristics favoring the national Collecting Society. Such territorial restrictions may not constitute a restrictive concerted practice. The Commission concluded that the practice ensures that each Collecting Society is the only one that may grant licences to users for several repertoires for the EEA country in which it is established. As a result, each Collecting Society may charge administrative costs for the administration of rights and the granting of licences without facing competitive constraints on these costs from other Collecting Societies. The lack of competition may even have negative consequences at the level of authors, whose revenues may vary depending on the Collecting Society managing their rights.

Given the above, the Commission found that Artisjus, as a member of the Collecting Society, had infringed the EC and EEA Agreements by applying Membership Restrictions under the Model Contract in their RRAs, by aligning territorial delimitations in such a way as to restrict the licence to the national territory of each collecting society. The Commission ruled that Artisjus is required to bring those infringements to an end immediately.[85]

Artisjus challenged the decision before the Registry of the General Court, seeking partial annulation of the ruling. In its procedure, the CJEU first pointed out that the decision of the Commission only covers the exploitation of copyright by internet, satellite and cable. By contrast, the Model Contract and the RRAs also cover traditional 'offline' exploitation. The CJEU pointed out that the Commission did not challenge the national territorial restrictions contained in the RRAs before the emergence of new technologies and were therefore part of the context of collective management in which Collecting Societies operated as new technologies gradually developed. Moreover, the Commission did not object to the national territorial restrictions regarding exploitations involving new technologies, but only to the fact that they appear in all the RRAs, which, in the Commission's view, is inevitably the result of coordination.[86]

According to the established case law of the CJEU in the field of competition law, where the existence of an infringement is contested, the Commission is obliged to prove the infringement it has established and to adduce evidence capable of proving the existence of the circumstances giving rise to the infringement in a

85 Varga 2017, p. 124.

86 *Case T-411/08, Artisjus v Commission*,

legally correct manner.[87] In that context, the CJEU cannot conclude that the Commission established the infringement in question to the requisite legal standard where there are still doubts in that regard, particularly in proceedings for annulment of a decision.[88]

The CJEU also pointed out that account must be taken of the fact that being found to have participated in a breach of competition rules creates a stigma for a legal person,[89] the Commission must therefore adduce precise and consistent evidence to establish the existence of an infringement[90] and to support a firm conviction that the alleged infringement constitutes a restriction of competition within the meaning of Article 81(1) EC.[91]

The CJEU held that RRAs could be considered to be restrictive of competition agreements if they establish an exclusivity under which collecting societies commit not to grant direct licences to users established abroad; however, CJEU noted that (at the Commission's request) such clauses had been removed from the RRAs. The CJEU examined whether the removal of the clauses resulted in a change in the conduct of the Collecting Societies and whether their behavior indicated a concerted practice to maintain exclusivity. In that regard, the Court pointed out that a mere parallel conduct may, in certain circumstances, be strong evidence of concerted practice if it leads to conditions of competition which do not correspond to normal conditions of competition. It stressed, however, that such coordination cannot be presumed where the parallel conduct can be explained by reasons other than the existence of coordination and that such a case may arise where the Collecting Societies would be obliged to organize their own management and control system in another territory to grant direct licences.

Finally, the CJEU found that the Commission had failed to prove to the requisite legal standard the existence of concerted practice in relation to national territorial restrictions, as it could not prove that the Collecting Societies had acted in a concerted manner in this respect. The CJEU annulled the contested decision in so far as it concerned the applicant.

2.7. CJEU: Telenor Magyarország Zrt versus Nemzeti Média- és Hírközlési Hatóság Elnöke

The following joined cases[92] concerned requests for a preliminary ruling of the CJEU in relation to the interpretation of Article 3 of Regulation (EU) 2015/2120

87 Judgment of 17 December 1998, *Case C-185/95 P, Baustahlgewebe v Commission*, ECLI:EU:C:1998:608; Judgment of 8 July 1999, *Case C-49/92 P, Commission v Anic Partecipazioni*, ECLI:EU:C:1999:356, para. 86; Judgment of 25 October 2011, *Case T-348/08, Aragonesas Industrias y Energía v Commission*, ECLI:EU:T:2011:621, para. 90.

88 Judgment of 27 September 2006, *Joined Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02, Dresdner Bank v Commission*, ECLI:EU:T:2006:271.

89 Judgment of 18 April 2012, *Case E-15/10, Posten Norge v ESA*, para. 62.

90 *Joined Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02, Dresdner Bank v Commission*, para. 62.

91 Judgment of 21 January 1999, *Joined Cases T-185/96, T-189/96 and T-190/96, Riviera Auto Service v Commission*, ECLI:EU:T:1999:8, para. 47; Judgment of 5 October 2011, *Case T-11/06, Romana Tabacchi v Commission*, ECLI:EU:T:2011:560, para. 129.

92 Judgment of 15 September 2020, *Joined Cases C-807/18 and C-39/19, Telenor Magyarország*, ECLI:EU:C:2020:708.

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(Net Neutrality Regulation),[93] which lays down measures governing open internet access. These requests were brought in the context of two pending disputes between Telenor Hungary Zrt. (Telenor) and *Nemzeti Média- és Hírközlési Hatóság* (National Media and Infocommunications Authority, NMHH) relating to two decisions of the President of the NMHH ordering Telenor to terminate certain internet-access services.

Telenor, an information and communication technology provider in Hungary, offered two packages called MyChat and MyMusic for Internet access. MyChat allowed customers to purchase 1 GB of data for unlimited use, except for six specific online communication applications that were considered 'zero tariffs'.[94] After exhausting the data limit, customers could continue to use these six apps without any data deduction while other applications were subject to traffic slowdown measures. MyMusic was a similar package for listening to music online, with four music streaming apps and six radio services also included as 'zero tariffs' and not deducted from the data volume. After using up the data limit, customers could still enjoy unlimited use of these apps while other services suffered traffic slowdown measures.

The NMHH initiated two procedures concerning the packages' compatibility with the Net Neutrality Regulation. The NMHH found that these packages implemented traffic-management measures that violated the obligation of equal and non-discriminatory treatment under the Net Neutrality Regulation and ordered Telenor to end this practice.[95] Telenor challenged these decisions and claimed that the packages fall within the scope of Article 3(2) of the Net Neutrality Regulation and not within the scope of Article 3(3), which only applies to traffic regulation measures unilaterally applied by internet-access providers. Telenor also argued that the impact of the packages on the rights of end-users must be considered, not just the fact that they establish traffic-management measures, as stated by the President of the NMHH. In response, the President of the NMHH argued, inter alia, that the determination of which provision of Article 3 of the Net Neutrality Regulation should be used to assess particular conduct did not depend on the form of the conduct but on its content and that Article 3(3) prohibited all unequal or discriminatory traffic-management measures, without it being relevant to distinguish between measures taken by the end-user based on an agreement with the service provider and measures based on the commercial practice of the

93 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Net Neutrality Regulation).

94 Gergely Gosztonyi, 'The contribution of the Court of Justice of the European Union to a better understanding the liability and monitoring issues regarding intermediary service providers', *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica*, Vol. 59, 2020, pp. 133-144.

95 Andrzej Nałęcz, 'Comment to the Judgement of EU Court of Justice in Joined Cases C-807/18 and C-39/19 Telenor Magyarország Zrt v Nemzeti Média- és Hírközlési Hatóság Elnöke', *Polish Review of International and European Law*, Vol. 10, Issue 2, 2021, pp. 109-120.

service provider.[96] The national court stayed the proceedings and referred them to the CJEU for a preliminary ruling to decide whether Article 3 of the Net Neutrality Regulation must be interpreted as meaning that packages used by an internet-access provider through agreements with end-users, *(i)* under which end-users can purchase a tariff package entitling them to unlimited use of a certain amount of data, without counting the use of certain applications and premium services included in the 'zero tariffs', and *(ii)* which, after exhausting that data allowance, allow the continued unlimited use of those applications and premium services while applying traffic blocking or slow down measures to other available applications and services, are incompatible with Article 3(2) and, alternatively or cumulatively, with Article 3(3) thereof.

The CJEU highlighted that pursuant to Article 3(2) of the Net Neutrality Regulation, agreements between internet access service providers and end-users, as well as commercial practices of providers, must not restrict the exercise of end users' rights to use content, applications, and services, or provide such content, applications, and services.[97] In this regard, the first subparagraph of Article 3(3) of the Net Neutrality Regulation declares that providers of internet-access services must treat all traffic equally without discrimination, restriction or interference, irrespective, inter alia, of the applications or services used.[98] However, the Net Neutrality Regulation states that this provision must not prevent providers from implementing reasonable traffic-management measures. It clarifies that, in order to be deemed reasonable, such measures must be transparent, non-discriminatory and proportionate, and in addition, must not be based on commercial considerations but on objectively different technical requirements of specific categories of traffic, without the monitoring of content[99] or must not be maintained for longer than necessary.[100]

The Regulation also prohibits internet access providers from taking measures such as blocking, slowing down, alerting, restricting, interfering with, degrading, or discriminating against certain applications or services, except in cases where necessary to comply with Union legislative acts, national legislation in line with EU law,[101] or measures implementing such legislative acts or national legislation, or to preserve network integrity, security, or prevent network congestion, and only for the time necessary to achieve those objectives.[102]

In the context of bilateral agreements, the CJEU highlighted that the Net Neutrality Regulation refers to 'agreements' by which a provider and an end-user

96 Jason A. Biros, 'Telenor Magyarország Zrt v. Nemzeti Média- És Hírközlési Hatóság Elnöke (C.J.E.U.)', *International Legal Materials*, Vol. 60, Issue 4, 2021, pp. 653-666.

97 Net Neutrality Regulation, Article 3(2).

98 Id. Article 3(3).

99 Dorina Gyetván, 'Az általános nyomon követési kötelezettség mint a közvetítő szolgáltatók felelősségének jövője?', *in* Marianna Fazekas (ed.), *Jogi Tanulmányok 2021*, ELTE Állam- és Jogtudományi Kar Állam- és Jogtudományi Doktori Iskola, Budapest, 2021, pp. 299-315.

100 Net Neutrality Regulation, Article 3(3).

101 Justine N. Stefanelli, 'First CJEU Decision on Net Neutrality', *International Law in Brief*, 16 September 2020, at www.asil.org/ILIB/first-cjeu-decision-net-neutrality.

102 *Joined Cases C-807/18 and C-39/19, Telenor Magyarország*, para. 26.

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agree on the commercial and technical conditions and the characteristics of the internet-access services to be provided, such as the price and corresponding data volume and speed.[103] The Regulation states that agreements must respect end-users' freedom to choose the services they wish to use to exercise their rights under the Net Neutrality Regulation based on the characteristics of those services. However, these agreements must not restrict the exercise of end-users' rights or circumvent the provisions that aim to ensure open Internet access.[104] The CJEU concluded that the term 'commercial practice' presumably does not reflect the unity of intent between the service provider and the end user. In this context, the CJEU ruled that such commercial practices may include, but are not limited to, the conduct of the provider in offering specific versions or combinations of these services to potential customers in order to meet the expectations and preferences of each customer and, where appropriate, entering into agreements with each of them that may; as a result, a greater or lesser number of agreements of the same or similar content are put in place.[105] At the same time, it is important to keep in mind that commercial practices cannot limit the exercise of the rights of end-users and, therefore, cannot lead to the circumvention of the provisions of this regulation, which are intended to ensure open internet access.[106]

The CJEU held that when examining whether there is a prohibited restriction on the rights of end-users, it is important to consider the impact of agreements or commercial practices of an internet-access service provider on not only the rights of consumers and professionals who use internet access services, but also on the rights of those who provide content, applications, and services that rely on internet access services. The CJEU also emphasized that the intention of the EU legislature was not to limit the assessment of a provider's agreements and commercial practices to individual agreements but to conduct an overall assessment of the provider's agreements and commercial practices as a whole.

The CJEU ruled that packages offered by an internet-access provider through agreements with end-users, where customers can purchase a tariff package for unlimited use of a specific data volume that exempts certain applications and premium services from counting towards data usage, and allows continued unlimited use of these applications and premium services while applying traffic blocking or slowing measures to other applications and services after data allowance exhaustion, are incompatible with Article 3 of the Net Neutrality Regulation.

3. Conclusion – What Have the Hungarians Ever Done for Us?

Although the international press does not, to put it mildly, have a particularly good view of Hungary's press and media situation, in the background the country has

103 Net Neutrality Regulation, Article 3(2).

104 Id. Recital 7.

105 Amaryllis Müller & Koo Asakura, 'The Telenor Case: The (In)compatibility of Zero-rating with the Net Neutrality Principle (C-807/18 and C-39/19 Telenor Magyarország)', *CoRe*, Vol. 5, Issue 1, 2021, pp. 59-63.

106 *Joined Cases C-807/18 and C-39/19, Telenor Magyarország*, paras. 34-35.

made a significant contribution, perhaps even unconsciously, to the more satisfactory functioning of European media regulation. Hungary often appears to be engaged in a kind of 'freedom struggle' against the EU, which it would like to reform from within.[107] The two European supranational courts have established several basic principles in Hungarian cases that have contributed to increasing our knowledge and legal certainty about digital media in Europe.

In *Magyar Kétfarkú Kutyapárt*, the ECtHR contributed to the statutory part of the famous three-part test of freedom of expression by taking a highly inclusive approach in terms of technology, *i.e*. the sharing of thematic photos on an app can be considered as an exercise of freedom of expression and, consequently, the right to political expression. On the issue of platform liability, the ECtHR made a minor shift in what is arguably the most notable and widely researched case concerning media and freedom of expression. In comparison to *Delfi*, with the addition of the two new aspects to be examined, in *MTE* the ECtHR has taken a step towards formulating "the universal criteria for internet news portal managers' liability", instead of examining all "*ad hoc* in each case."[108]

A slightly different question arose in 2013 concerning a hyperlinked content in *Magyar Jeti*. According to the ECtHR's summary opinion, the objective liability for hyperlinking established by the Hungarian court may have foreseeable negative consequences for 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[109] on freedom of expression on the Internet."[110]

Herbai is notable in its application of freedom of expression to a narrow interpretation of public affairs, with the ECtHR finding that the termination of employment by the bank was not the least intrusive measure and that the Hungarian courts had failed to effectively balance the rights of the employee and the employer.

Hungarian digital media-related cases have also been significant before the CJEU, with the CJEU concluding in *Ker-Optika* that national legislation allowing the sale of contact lenses exclusively in shops specializing in medical devices and prohibiting the online sale of contact lenses should be interpreted as contrary to Articles 34 and 36 TFEU and the ECHR. In *Artisjus*, the CJEU held that RRAs can be considered as restrictive of competition agreements if they establish exclusivity whereby collecting societies undertake not to grant direct licences to users established abroad; however, the CJEU noted that such clauses had been removed from RRAs. And in *Telenor*, probably the most important case analyzed here, the

107 '325 új javaslat született az Európai Unió megreformálására', *Infostart*, 3 May 2022, at https://infostart.hu/kulfold/2022/05/03/325-uj-javaslat-szuletett-az-europai-unio-megreformalasara.

108 Sidlauskiene & Jurkevičius, 2017, p. 49.

109 *Khadija Ismayilova v Azerbaijan*, No 30778/15, 27 February 2020, para. 83.

110 *Magyar Jeti Zrt v Hungary*, para. 83.

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CJEU handed down the first important ruling on net neutrality rules, holding that packages offered by an internet access provider through agreements with end-users, whereby customers can purchase a tariff package for unlimited use of a specified amount of data, which exempts certain applications and premium services from being counted as data traffic and allows the continued unlimited use of those applications and premium services, while applying traffic limiting or throttling measures to other applications and services once the data allowance is exhausted, are incompatible with the Net Neutrality Regulation.

All of this suggests that, although Hungary's internal regulation has been the subject of much criticism, the country has made a significant contribution to clarifying the details of European digital media regulation.