STRATEGIC LAWSUITS AGAINST JOURNALISTS - AN UNCONVENTIONAL WAY TO ENACT CIVIL LIABILITY

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Abstract

In the last decade, a new way of bringing journalists to civil liability has gained momentum, which is also a form of intimidation in carrying out their activity, namely SLAPP (strategic law-suit against public participation) trials.

This paper analyses the essential elements necessary to qualify a trial filed against a journalist as a slap-trial, starting from two relevant European acts: the Proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings („strategic lawsuits against public participation") and the Commission Recommendation (EU) 2022/758 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('strategic lawsuits against public participation').

As it has been pointed out, there are at least two essential elements that qualify a law-suit as a SLAPP-trial and identifying them is only a prerequisite of the correct qualification, that may also imply subjective elements as bad faith, or abuse of law.

Keywords: *SLAPP, intimidation trial, public communication, abuse of law, bad faith, communication law.*

1. Introduction

Today, freedom of the press is one of the most important guarantees of democracy, being a universally recognized value worldwide. Although this is not equivalent to freedom of expression, it is, in our opinion, the most important form of its manifestation.

Although freedom of expression has been recognized internationally since the time of the French Revolution in 1789[1], its regulation has evolved substantially with the emergence of mass media, both in the form of print media and radio and television.

The last decades have surprised by the development of a new form of public communication, namely the online press, which was characterised by a heterogeneous editorial rigor, journalists having both the opportunity to write for formidable publications, with a consistent editorial policy, and the opportunity to publish materials on their own pages, either on social media platforms or on blogs.

Although the regulation dates back to 1950, ECHR recognized in art. 10 para. 1, the importance of freedom of expression[2] in any democratic society based on European values, always updating its content through the ECtHR jurisprudence. Under these conditions, the press has earned its reputation as the „watchdog" of democracy, a term repeatedly used by the European court. In this sense, in the Case *Axel Springer AG v. Germany*[3], the Court reiterated the essential role of the press in a democratic society, that of disseminating information and ideas in all areas of public interest, a fact to which the public's right to receive said information corresponds.

In the last decade, the evolution of content-sharing software led to new specialised channels, in various fields of journalism, in which the publication of materials did not know limitations or restrictions, thus, any

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[1] When was the Declaration of the Rights of Man and Citizen adopted; according to art. 11: „The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this freedom in the cases determined by Law".

[2] According to art. 10 para. 1 ECHR: „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 borders. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

[3] Grand Chamber, Case no. 39954/08, dec. of 07.02.2012, para. 79, available online at *https://hudoc.echr.coe.int/fre?i=001-109034*, last consulted on 17.03.2024.

journalistic investigation, any finding of irregularities in public institutions, could be brought to the attention of society almost effortless.

If society gained by the uncovering of incorrect practices, in administration, justice and even in the private sector, there were still certainly people directly harmed by these disclosures, whose interests required the denial of the facts and the possible discrediting of the journalist.

In specialized literature[4] it was shown that for effective citizen participation in government, anti-SLAPP laws should also protect the media.

In this material, we will follow the analysis of particular elements regarding lawsuits brought against journalists by people directly subjected to press investigations. These types of lawsuits usually take the form of civil litigation in which defamation of the person by the journalist is invoked, but in certain situations, there may even be criminal lawsuits brought against journalists for how they obtained the information published.

Tortious civil liability is recognized by the unanimity of European legal systems and constitutes the mechanism by which the author of an illegal act is held responsible by the injured person, in order to obtain compensation. This mechanism, originating from Roman law[5], acts, in the field of public communication, as a double-edged sword.

As long as the journalist exceeds the limits of freedom of expression, therefore, when he commits an illegal act, the injured person can obtain compensation for the injuries suffered, but when the injured person acts in bad faith, without the journalist having committed an illegal act, the civil process will produce a different effect: that of harassing the journalist.

2. SLAPP-type lawsuits against journalists

Against the background of an increasingly important concern, a series of regulations have been developed at the European Union level regarding strategic processes directed against public participation, in which sense Commission Recommendation (EU) 2022/758 was adopted on the protection journalists and human rights defenders involved in public mobilisation actions against patently unfounded or abusive judicial procedures[6] and a proposal for a directive of the European Parliament and the Council of 27.04.2022 on the protection of persons involved in public mobilisation actions against patently unfounded or abusive legal proceedings[7].

The two regulations, although lacking binding legal force, represent the most important legislative steps taken at European level for the protection of journalists against abusive processes, intended to intimidate and harass them, in order to gain their silence. In legal literature[8] it has been shown that the purpose of the anti-Slapp measures is to protect people who became targets of SLAPP-type trials or, moreover, those who have ceased their civic or journalistic activity precisely for fear of becoming a target of a judicial process of this kind. Obviously, such trials constitute a violation of the principle of exercising rights in good faith[9] and, at the same time, it represents a hidden form of intimidation by generating responsibilities for the journalist to carry out the process.

A concrete definition of SLAPP-trial does not result from the content of the previously mentioned acts, but can be derived from a previous act, namely the Resolution of the European Parliament from November 11, 2021 regarding the consolidation of democracy, media freedom and pluralism in the EU: the unjustified recourse to civil law actions and criminal to silence journalists, NGOs and civil society[10]. Letter „e" in its preamble states: „lawsuits or other legal actions (*e.g.*, injunctions, asset-freezing) brought forward by private individuals and entities, and also by public officials, public bodies and publicly controlled entities, directed at one or more individuals or groups, using a variety of legal bases mostly in civil and criminal law, as well as the threats of such actions, with the purpose of preventing investigation and reporting on breaches of Union and national law, corruption or other abusive practices or of blocking or otherwise undermining public participation".

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[4] S. Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, in Valparaiso University Law Journal, vol. 41, no. 3/2007, p. 1283.

[5] The *Lex Aquilia*, which first regulated tortious civil liability, dates from the 3rd century BC.

[6] Available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022H0758*, last consulted on 19.03.2024.

[7] Available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0177*, last consulted on 19.03.2024.

[8] C.H. Barylak, *Reducing uncertainty in Anti-Slapp protection*, in Ohio State Law Journal, vol. 71, no. 4/2010, p. 869.

[9] Qualified as a general principle of law, also relevant in the field of public communication. See S.Al. Vernea, *Dreptul comunicării*, Hamangiu Publishing House, Bucharest, 2021, p. 11.

[10] OJ C 205/2/20.05.2022.

As shown in the first paragraph of the proposed Directive of 27.04.2022 of the European Parliament and the Council's preamble, in recent years, the phenomenon of SLAPP trials has become a common reality, increasingly widespread in the EU. Against this background, it is necessary to adopt a uniform regulation at the European level, precisely because in the sphere of public communication, the existence of online platforms has determined the effective lack of borders both between states and between civilizations. Thus, on 27.04.2022, the two reference normative acts were adopted, respectively Recommendation (EU) 2022/758 of the Commission and the previously mentioned directive proposal.

For the correct understanding of the specifics of the regulations, we consider it necessary to analyse each one under the aspect of the definition of SLAPP trials, of characteristic features and remedies.

3. The proposal for a directive of 27.04.2022 regarding the protection of persons involved in SLAPP-type processes

We note that the statement of reasons of the proposed directive begins with a characterization of SLAPP-type legal proceedings: "a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. They are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations and state organs against parties who express criticism or communicate messages that are uncomfortable to the claimants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition".

Although the text is meritorious in terms of description, it is also of particular importance in terms of the characteristics of this type of trial. Synthesizing the features, the EU act considers the following to be the defining factors: (i) they are clearly unfounded or exaggerated legal proceedings, (ii) they are initiated by influential persons or their associates against those who criticised the activities of the former by uncovering illegal acts or facts and (iii) the aim is to reduce to silence the critics.

In the content of the directive proposal, in art.3, point 3, the notion of *"abusive court proceedings against public participation, mean court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalise public participation. Indications of such a purpose can be: (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof; (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; (c) intimidation, harassment or threats on the part of the claimant or his or her representatives".*

From the previous text, we note that the legislator did not aim to expose some essential elements of this type of procedure, but made an example of the features, these not being mandatory in all SLAPP-type processes.

In our opinion, the technique used by the European legislator is relatively deficient, on the one hand, because it does not allow the correct delimitation of this type of procedure, and on the other hand, because the qualification of the process as SLAPP-trial is the only reason to ensure the remedies of preventive nature regulated in Chapter III of the proposed directive, thus it is necessary to establish the determination criteria a priori.

Regarding the remedies available to the journalist for such actions, we note that in the proposed directive there are three different categories of measures: (i) remedies of preventive nature, (ii) remedies of reparatory nature and (iii) remedies of protective nature.

The first category, of preventive remedies, includes the measures stipulated in art. 9-13, which aim to establish an abbreviated judicial procedure[11], with the reversal of the burden of proof, in which strictly the clearly unfounded character of the action will be judged. The judgment of the main dispute will be suspended until the final resolution of this abbreviated procedure.

The second category includes remedies of reparatory nature, regulated by art. 14-16, which include the stipulation of the plaintiff's obligation to pay all the court costs of the defendant, including the costs of legal representation, unless the latter are excessive. Equally, the right of the person injured by being sued in such a process to claim and receive compensation for the damage caused was provided for. Equally, states will have

[11] In specialized literature, it was noted that following the abbreviated procedure produces a „chilling effect", which results in either giving up the procedure or disinterest in it. See S.P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, in Duquesne Law Review, vol. 44, no. 4/2006, p. 642.

the obligation to impose a series of effective, proportionate and dissuasive sanctions on the person who initiated such a trial procedure, with the aim of discouraging him from resorting to similar actions in the future.

The third category concerns protective measure in favor of a person convicted in a SLAPP trial in another European Union member state. In this sense, art. 17 of the proposed directive provides a reason for refusing to recognize the judgment pronounced in a member state, to the extent that the respective action would have been considered manifestly unfounded or abusive if it had been brought before the courts from the Member State where recognition or enforcement is sought, and the respective courts would have applied their own legislation.

4. Commission Recommendation (EU) 2022/758 on the protection of persons involved in SLAPP-type processes

Unlike the proposal for a directive, the Recommendation does not contain a definition of this type of litigation, but it captures their characteristics through point 9, the second thesis, of the Preamble: „These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalise public participation".

Then, in sentence II, point 11 of the Preamble, it was shown that such procedures „They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically".

Under these conditions, the main characteristics of the SLAPP-type processes, as it results from the previously reproduced texts, consist in (i) the clearly unfounded character, in whole or in part, of the action, (ii) the purpose of the procedures is to prevent or limit the mobilisation public, and (iii) the litigating parties are placed in a power imbalance.

We note that, despite the different terminology, the three features are conceptually identical to the defining features retained from the analysis of the directive proposal.

Under these conditions, we note that the European legislator was consistent in determining the essential conditions, even if the regulatory manner was exemplary, by listing some conduct specific to plaintiffs in these types of processes.

As for the remedies, we note that the recommendation provides substantially more complex solutions than the directive proposal, starting from the training of legal practitioners and the persons affected by such procedures, up to actions to raise awareness of civil society and the public in the respective field.

Equally, the recommendation established support mechanisms, namely the identification and support by the member states of organisations that provide guidance and support to people sued in such trials. Concretely, all these measures must lead to the provision of effective legal assistance to the persons concerned, regardless of whether they can afford to cover the cost of legal services from their own sources.

In addition, the recommendation proposes the establishment of a data collection, reporting and monitoring mechanism, useful both for the organisation of member states' efforts to ensure protection of journalists and public activists against this type of litigation, and for interstate cooperation for the same purpose.

5. Delimitation criteria of SLAPP-type processes

From the two European acts, we noticed that there are three defining characteristics of SLAPP-type procedures: (i) the clearly unfounded or exaggerated nature of the action, (ii) imbalance of power or status between the parties involved in the litigation and (iii) the purpose of the procedure is to prevent or reduce public mobilisation.

Analysing their content, we appreciate that only two can be considered essential for any SLAPP-type process, respectively: (i) the subjective character - the purpose of the procedural approach is to prevent or limit the criticism brought, or public mobilisation and (ii) the objective character - the disproportion of economic power or social position between the litigating parties.

As for the manifestly unfounded or exaggerated character of the action, we note that this can constitute a reference element only with regard to civil actions resulting from accusations of defamation. In the hypothesis that the action addressed to the judicial bodies has a criminal or even administrative nature, the analysis of the

manifestly unfounded character becomes impossible to achieve in practice, it being necessary to administer evidence and go through some steps inherent in any process.

Moreover, we consider that even the terminology used by the European legislator is inconsistent in this aspect, in the directive proposal the phrase „groundless or exaggerated" was used, while in the recommendation the phrase „manifestly unfounded or fully or partially unfounded" was used. In this situation, we appreciate that a request addressed to the judicial bodies can be considered unfounded, groundless or exaggerated only *a posteriori*, after going through the stages of the process, especially the evidence administration procedure. Equally, the manifestly unfounded character of some claims is contradicted by the possibility that they may be founded only in part.

For these reasons, we appreciate that the inclusion of the clearly unfounded or exaggerated character of the action among the defining elements of this type of process cannot be unanimously accepted. We appreciate, however, that most cases of this nature will have a predominantly unfounded, even abusive character, but this majority feature is not defining.

As for the subjective nature, looking at the purpose of the approach, we appreciate, in accordance with the perspective of the European legislator, that in order to qualify a judicial process as SLAPP, it is strictly necessary that the goal pursued by the plaintiff is that of reducing the defendant to silence, through intimidation or exhausting its resources. Equally, the purpose pursued cannot be dissociated from the plaintiff's intention to retaliate[12] for the previous conduct of the defendant, which would have led to the disclosure of illegal acts, of any nature, committed by the plaintiff or his associates.

An interesting problem exists in the matter of proof, since proving the intention with which the plaintiff sued the defendant is difficult to achieve, being a subjective component. In our opinion, proving the purpose pursued by the plaintiff can only be done by identifying some related elements (previous correspondence, offer to end the litigation under certain conditions, etc.), which can be explained, mainly, by the truthfulness of his purpose. As long as the motivation for starting the process is in the nature of a legal fact, we appreciate that it can be proven by any means of evidence.

We do not exclude that other elements of subjective nature can be found in the vast majority of SLAPP-type processes, such as the bad faith of the plaintiff at the time of the start of the process or the abuse of rights, but these are not defining, essential elements for qualifying the act as such.

Regarding the objective character, namely the disproportion of economic power or social position between the litigating parties, we consider that this inequality between the parties can take multiple forms, being specific both to the relationship between the employee and his current or previous employer, in the conditions where between them there is or there was a dependency relationship during the duration of the employment relationship, or between a student and his teacher, regardless of whether the student took or is going to take an exam with that teacher.

A similar situation also exists in the relationship between a dignitary, or other person representing the public authority, and a person towards whom his authority was, at a given moment, exercised.

Beyond the previously mentioned hypotheses, there are undoubtedly SLAPP-type lawsuits initiated by corporations against journalists or legal entities operating in the media field, and between them the imbalance is of purely economic nature, being determined by the budget likely to be allocated by each, for the dispute in question.

In support of the previously mentioned, we note that in November 2023 a study prepared at the initiative of the European Parliament - Committee on Civil Liberties, Justice and Home Affairs was published[13], according to which, 42.6% of the plaintiffs in SLAPP-type lawsuits are represented by public figures from among politicians and civil servants, 21.3% by companies, including entities owned by them.

The defendants in such lawsuits are, in 44.7% of the cases, journalists - natural persons and in 28.4% of the cases are legal persons carrying out activity in the field of media.

In these conditions, according to our assessment, the objective criterion referring to the imbalance of an economic nature or social position between the parties constitutes a defining element for SLAPP trials.

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[12] A.L. Roth, *Upping the ante: Rethinking anti-SLAPP laws in the age of the internet*. BYU Law Review, 2016, p. 741.

[13] J. Borg-Barthet, F. Farrington, *Open Slapp Cases in 2022 and 2023 – The incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union*, p. 30, available online at: *https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf*, last consulted on 19.03.2024.

6. Conclusions

Strategic, fictitious processes designed to intimidate and reduce criticism are unacceptable tools in a democratic society. These can be included in the concept of judicial bullying[14], in a broad sense that includes harassment through the courts, carried out by the parties.

Obviously, taking measures to prevent these practices is increasingly important, with the increase in the number of cases of such type throughout the EU.

Although the beginning of regulation at the EU level is commendable, we believe that, in the absence of normative acts with binding legal force, the taking of concrete measures is left to the discretion of the member states.

At national level, we consider it necessary to adopt a minimum standard and some internal remedies, starting from the model of the directive proposal, divided into preventive measures, reparatory measures and protective measures.

In the absence of the adoption of a basic normative framework, with binding legal force, processes of this kind will hinder the activity of the judiciary and will endanger freedom of the press and even freedom of speech.

We consider that the application of an elementary filter, composed of the analysis of the two defining features (i) the subjective character - the purpose of the procedural approach is to prevent or limit the criticism brought, or the public mobilisation and (ii) the objective character - the disproportion of economic power or social position between the litigating parties, would allow the quick identification of processes in this category and would justify the defendant's appeal to institutions and organisations capable of providing legal and financial assistance in such cases.

Normally, the journalist can be obliged to pay compensation for his work, only to the extent that he has impermissibly violated the limits of freedom of expression. By leaving this type of process unregulated at national level, the journalist is exposed to a new, non-conventional form of civil liability, contrary to any limit provided by the European Convention on Human Rights for freedom of expression - the trial costs.

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[14] M. Kirby, *Judicial stress and judicial bullying*, QUT Law Review, vol. 14, no. 1/2014, p. 10.