„El clásico“ of Recognition and Enforcement – A Manifest Breach of Freedom of Expression as a Public Policy Violation: Thoughts on AG Szpunar 8.2.2024 – Opinion C-633/22, ECLI:EU:C:2024:127 – Real Madrid Club de Fútbol

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Introduction

On 8 February 2024, Advocate General (AG) *Szpunar* delivered his Opinion on C-633/22 (AG Opinion), submitting that disproportionate damages for reputational harm may go against the freedom of expression as enshrined in Art. 11 Charter of Fundamental Rights of the European Union (CFR). The enforcement of these damages therefore may (and at times *will*) constitute a violation of public policy in the enforcing state within the meaning of Art. 34 Nr. 1 Brussels I Regulation. The AG places particular emphasis on the severe deterring effect these sums of damages may have – not only on the defendant newspaper and journalist in the case at hand but other media outlets in general (AG Opinion, paras. 161-171). The decision of the Court of Justice of the European Union (CJEU) will be of particular topical interest not least in light of the EU’s efforts to combat so-called “Strategic Lawsuits Against Public Participation” (SLAPPs) within the EU in which typically financially potent plaintiffs initiate unfounded claims for excessive sums of damages against public watchdogs (see COM(2022) 177 final).

The Facts of the Case and Procedural History

Soccer clubs *Real Madrid* and *FC Barcelona*, two unlikely friends, suffered the

same fate when both became the targets of negative reporting: The French newspaper *Le Monde* in a piece titled "Doping: First cycling, now soccer" had covered a story alleging that the soccer clubs had retained the services of a doctor linked to a blood-doping ring. Many Spanish media outlets subsequently shared the article. *Le Monde* later published *Real Madrid's* letter of denial without further comment. *Real Madrid* then brought actions before Spanish courts for reputational damage against the newspaper company and the journalist who authored the article. The Spanish courts ordered the defendants to pay 390.000 euros in damages to *Real Madrid*, and 33.000 euros to the member of the club's medical team. When the creditors sought enforcement in France, the competent authorities were disputed as to whether the orders were compatible with French international public policy due to their potentially interfering with freedom of expression.

The *Cour de Cassation* referred the question to the CJEU with a request for a preliminary ruling under Art. 267 TFEU, submitting no less than seven questions. Conveniently, the AG summarized these questions into just one, namely essentially: whether Art. 45(1) read in conjunction with Arts. 34 Nr. 1 and 45(2) Brussels I Regulation and Art. 11 CFR are to be interpreted as meaning that a Member State may refuse to enforce another Member State's judgment against a newspaper company and a journalist based on the grounds that it would lead to a manifest infringement of the freedom of expression as guaranteed by Art. 11 CFR.

Discussion

The case raises a considerable diversity of issues, ranging from the relationship between the European Convention on Human Rights (ECHR), the CFR, and the Brussels I Regulation, to public policy, and the prohibition of *révision au fond*. I will focus on whether and if so, under what circumstances, a breach of freedom of expression under Art. 11 CFR may lead to a public policy violation in the enforcing state if damages against a newspaper company and a journalist are sought.

Due to the Regulation's objective to enable free circulation of judgments, recognition and enforcement can only be refused based on limited grounds – public policy being one of them. Against this high standard (see as held recently in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 32), AG *Szpunar*

submits first (while slightly circular in reasoning) that in light of the importance of the press in a democracy, the freedom of the press as guaranteed by Art. 11 CFR constitutes a fundamental principle in the EU legal order worthy of protection by way of public policy (AG Opinion, para. 113). The AG rests this conclusion on the methodological observation that Art. 11(2)CFR covers the freedom and plurality of the press to the same extent as Art. 10 ECHR (ECtHR, Appl. No. 38433/09 – *Centro Europa and Di Stefano/Italy*, para. 129).

Under the principle of mutual trust, the Regulation contains a prohibition of *révision au fond*, Art. 45(2) Brussels I Regulation, i.e., prevents the enforcing court from reviewing the decision as to its substance. Since the assessment of balancing the interests between the enforcement creditors and the enforcement debtors had already been carried out by the Spanish court, the AG argues that the balancing required in terms of public policy is limited to the freedom of the press against the interest in enforcing the judgment.

Since the Spanish court had ordered the defendants to pay a sum for damages it deemed to be *compensatory* in nature, in light of Art. 45(2) Brussels I Regulation, the enforcing court could not come to the opposing view that the damages were in fact *punitive*. With respect to punitive damages, the law on enforcement is more permitting in that non-compensatory damages may potentially be at variance, in particular, with the legal order of continental states (*cf.* Recital 32 of the Rome II Regulation). In a laudable overview of current trends in conflict of laws, taking into account Art. 10(1) of the 2019 Hague Judgments Convention, the Résolution de L'Institut de Droit International (IDI) on infringements of personality rights via the internet (which refers to the Judgments Convention), and the case law of the CJEU and the ECtHR (AG Opinion, paras. 142-158), AG *Szpunar* concludes that, while generally bound by the compensatory nature these damages are deemed to have, the enforcing court may only resort to public policy as regards compensatory damages in exceptional cases if further reasons in the public policy of the enforcing Member State so require.

The crux of this case lies in the fact that the damages in question could potentially have a deterring effect on the defendants and ultimately prevent them from investigating or reporting on an issue of public interest, thus hindering them from carrying out their essential work in a functioning democracy. Yet, while frequently referred to by scholars, the CJEU (see e.g., in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 27), and e.g., in the preparatory work for

the Anti-SLAPP Directive (see the explanatory memorandum, COM(2022) 177 final; see also Recital 11 of the Anti-SLAPP Recommendation, C(2022) 2428 final), it is unclear what a deterring effect actually consists of. Indeed, the terms "deterring effect" and "chilling effect" have been used interchangeably (AG Opinion, para. 163-166). In order to arrive at a more tangible definition, the AG makes use of the ECtHR's case law on the deterring effect in relation to a topic of public interest. In doing so, the deterring effect is convincingly characterized both by its *direct effect* on the defendant newspaper company and the journalist, and the *indirect effect* on the freedom of information on society in the enforcing state as a whole (AG Opinion, para. 170). Furthermore, in the opinion of the AG it suffices if the enforcement is likely to have a deterring effect on press freedom in the enforcing Member State (AG Opinion, para. 170: "*susceptible d'engendrer un effet dissuasif*").

As to the appropriateness of the amount of damages which could lead to a manifest breach of the freedom of the press, there is a need to differentiate: The newspaper company would be subject to a severe (and therefore disproportionate) deterring effect, if the amount of damages could jeopardize its economic basis. For natural persons like the journalist, damages would be disproportionate if the person would have to labor for years based on his or her or an average salary in order to pay the damages in full. It is convincing that the AG referred to the ECtHR's case law and therefore applied a gradual assessment of the proportionality, depending on the financial circumstances of the company or the natural person. As a result, in case of a thus defined deterring effect on both the defendants and other media outlets, enforcing the decision would be at variance with public policy and the enforcing state would have to refuse enforcement in light of the manifest breach of Art. 11 CFR (AG Opinion, para. 191).

Conclusion

The case will bring more clarity on public policy in relation to freedom of expression and the press. It is worth highlighting that the AG relies heavily on principles as established by the ECtHR. This exhibits a desirable level of cooperation between the courts, while showing sufficient deference to the ECtHR's competence when needed (see e.g., AG Opinion, para. 173). These joint efforts to elaborate on criteria such as "public participation" or issues of "public interest" – which will soon become more relevant if the Anti-SLAPP Directive

employs these terms –, will help bring legal certainty when interpreting these (otherwise partially ambiguous) terms. It remains to be seen whether the CJEU will adopt the AG's position. This is recommended in view of the deterrent effect of the claims for damages in dispute – not only on the defendants, but society at large.