***OOO Memo v. Russia*: ECtHR prevents defamation claims by executive bodies**

The European Court of Human Rights (ECtHR) has recently delivered a judgment in which, for the first time, it refers to the notion of SLAPP (Strategic Litigation Against Public Participation). In its judgment of 15 March 2022 in the case of *OOO Memo v. Russia* the ECtHR expresses its concerns about the risk for democracy of court proceedings instituted with a view to limiting public participation, interfering with the freedom of expression by media, journalists, or other public watchdogs.

Summary and relevance

The case concerns a civil defamation suit brought by a Russian regional state body against a media company. The media company was ordered to publish on its website a retraction to the effect that it had published false statements, tarnishing the claimant's business reputation. The ECtHR found that although civil defamation proceedings were open to private or public companies to protect their reputation, this could not be the case for a large, taxpayer-funded, executive body like the claimant in this case. It decided that the interference with the media company's right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) was not justified by a "legitimate aim", as the Russian regional state body could not rely on the "protection of reputation and rights of others" as listed in Article 10 § 2 ECHR. The ECtHR found that allowing executive bodies to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog.

The judgment in the case of *OOO Memo v Russia* is a new alert signal that SLAPPs as a form of abusive litigation are endangering the right to freedom of expression in a democratic society, as recently also highlighted in policy documents, action plans and recommendations by the European Commission (link and link) and the European Parliament (link), and as documented in the Annual reports of the Council of Europe Platform to promote the protection of journalism and safety of journalists (link and link). Most recently the reports by Article 19 (link) and CASE, the Coalition Against SLAPPs in Europe (link) give evidence that SLAPP cases are on the rise across Europe. SLAPPs occur in various types of legal action, defamation being the primary law of choice by the claimants, followed by claims taken under privacy and data protection laws. One of the first European institutions to highlight the worrying phenomenon of SLAPPs in Europe was the Council of Europe Commissioner for Human Rights. In her Human Rights Comment of 27 October 2020 "Time to take action against SLAPPs" the Commissioner, Dunja Mijatović, called for effective action to be taken against SLAPPs as a matter of urgency (link).

It is this statement by the Commissioner for Human Rights that is now extensively quoted in the European Court's judgment as part of the relevant legal framework (par. 23):

"*SLAPPs: lawsuits with an intimidating effect*

The Annual Report of the Council of Europe Platform to promote the protection of journalism and safety of journalists highlights groundless legal actions by powerful individuals or companies that seek to intimidate journalists into abandoning their investigations. In some cases, the threat of bringing such a suit, including through letters sent by powerful law firms, was enough to bring about the desired effect of halting journalistic investigation and reporting.

This problem goes beyond the press. Public watchdogs in general are affected. Activists, NGOs, academics, human rights defenders, indeed all those who speak out in the public interest and hold the powerful to account

might be targeted. SLAPPs are typically disguised as civil or criminal claims such as defamation or libel and have several common features.

First, they are purely vexatious in nature. The aim is not to win the case but to divert time and energy, as a tactic to stifle legitimate criticism. Litigants are usually more interested in the litigation process itself than the outcome of the case. The aim of distracting or intimidating is often achieved by rendering the legal proceedings expensive and time-consuming. Demands for damages are often exaggerated.

Another common quality of a SLAPP is the power imbalance between the plaintiff and the defendant. Private companies or powerful people usually target individuals, alongside the organisations they belong to or work for, as an attempt to intimidate and silence critical voices, based purely on the financial strength of the complainant.

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Member states therefore have a positive obligation to secure the enjoyment of the rights enshrined in Article 10 of the Convention: not only must they refrain from any interference with the individual's freedom of expression, but they are also under a positive obligation to protect his or her right to freedom of expression from any infringement, including by private individuals. ...".

This highlighting of the SLAPP-issue by the Commissioner for Human Rights makes the ECtHR refer to "the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy" (par. 43). In combination with the power imbalance between the claimant and the defendant in this case the ECtHR found therein the reason to evaluate thoroughly whether the claimant in the domestic proceedings had a justified claim on the right to protect its reputation as an executive body. Before explaining how the ECtHR reached the conclusion that the interference with the right to freedom of expression of the applicant media company did not meet the requirement of a "legitimate aim" under Article 10 § 2 ECHR, a brief introduction is needed on the facts and domestic proceedings.

The facts and domestic proceedings

The applicant company, *OOO Memo,* is the founder of *Kavkazskiy Uzel*, an online media outlet registered under Russian law which is devoted to the political and human rights situation in the south of Russia, including the Volgograd Region. In 2008 *Kavkazskiy Uzel* published an article criticizing the executive authority of the Volgograd Region for suspending the transfer of funds allocated as a subsidy to the Town of Volgograd. The Volgograd Region commenced civil defamation proceedings against *OOO Memo*, seeking the retraction of a series of statements in the article at issue. The Ostankinskiy District Court of Moscow found that the statements were damaging for the reputation of the Administration of the Volgograd Region, as they could make numerous Internet users believe that the Administration has been involved in unclean and unethical - even if not unlawful and criminally punishable - activity condemned by society. It also found that *OOO Memo* had failed to provide any evidence to prove that the events referred to in the article did take place. Therefore *OOO Memo* was ordered to publish on the *Kavkazskiy Uzel* website a retraction to the effect that the statements at issue were false and tarnished the Administration of the Volgograd Region's business reputation. The District Court also ordered *OOO Memo* to publish the operative part of its judgment on the website. This judgment was upheld on appeal by the Moscow City Court in 2009.

The judgment

It was not in dispute before the ECtHR that the order by the domestic courts was an interference with the applicant's right to freedom of expression as guaranteed by Article 10 ECHR. The ECtHR

accepted that the interference was prescribed by law, based on Article 152 of the Russian Civil Code, as in force at the material time, conferring the right to bring civil defamation proceedings *inter alia in* order to protect the business reputation of a legal person. The ECtHR reiterated that the ambit of the "protection of the reputation ... of others" clause of Article 10 § 2 is not restricted to natural persons, as it has recognised in other judgments that there can exist a legitimate "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good". The ECtHR added that "these considerations are inapplicable to a body vested with executive powers and which does not engage as such in direct economic activities". However, in several judgments, the ECtHR has earlier accepted that also public bodies can pursue a legitimate aim by seeking legal protection of their reputation by way of defamation proceedings. In such cases, the ECtHR focussed on the assessment of the proportionality of the interference as part of the test of necessity in a democratic society. Referring to the statement by the Council of Europe Commissioner for Human Rights highlighting the "growing awareness" about the dangers of SLAPPs for democracy and the power imbalance between the claimant and the defendant in this case, the ECtHR found nevertheless it apt to establish in this case whether the interference complained of by *OOO Memo,* was in pursuance of the legitimate aim of "protection of the reputation of others" within the meaning of Article 10 § 2 ECHR.

First, the ECtHR considered that bodies of the executive vested with State powers are essentially different from legal entities, including public or State-owned corporations, engaged in competitive activities in the marketplace as the latter rely on their good reputation to attract customers with a view to making a profit and the former exist to serve the public and are funded by taxpayers. To prevent abuse of powers and corruption of public office in a democratic system, a public authority's activities of all kinds must be subject to close scrutiny not only of the legislative and judicial authorities but also of public opinion.

The ECtHR next referred to the so-called Mc Donalds-case (*Steel and Morris v. UK*), subsequently emphasizing that "shielding bodies of the executive, which have the ability to respond to any adverse allegations in the "court of public opinion" through their public relations capabilities, from media criticism by way of according them protection of their "business reputation" may seriously hamper freedom of the media". The ECtHR found that allowing executive bodies to bring defamation proceedings against members of the media "places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog". By virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace.

This leads the ECtHR to the conclusion that civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation ... of others" under Article 10 § 2 ECHR. The ECtHR added a disclaimer by noticing that this does not exclude that individual members of a public body, who could be "easily identifiable" in view of the limited number of its members and the nature of the allegations made against them may be entitled to bring defamation proceedings in their own individual name (as in *Thoma v Luxembourg*, and in *Lombardo and Others v Malta).*

Turning to the present case, the ECtHR noted that the claimant in the domestic defamation proceedings is the highest body of the executive of the Volgograd Region, while "it is hardly conceivable that it had an "interest in protecting its commercial success and viability", be it for "the

benefit of shareholders and employees" or "for the wider economic good". Its members were neither "easily identifiable", and in any event, the defamation case was brought on behalf of the legal entity as such, not any of its individual members. On this basis, the ECtHR reached the conclusion that the proceedings and the consequent interference with the right to freedom of expression of the applicant media company did not meet the requirement of a "legitimate aim" under Article 10 § 2 ECHR. Accordingly, there has been a violation of Article 10 ECHR.

Comment

Apart from the fact that it is only in very exceptional cases that the ECtHR has decided that an interference with the right to freedom of expression had no legitimate aim (see e.g. *Bayev a.o. v Russia,* 20 June 2017 (link and link), the reference in paragraph 43 to the "growing awareness" about the risk of SLAPPs for democracy makes the ECtHR depart from its traditional approach in cases where it balances the right to reputation with the right to freedom of expression. In such cases the ECtHR evaluated the justification of the interferences under the third condition of Article 10 § 2, being the test of necessity (and proportionality) in a democratic society, applying therein the balancing of the right to reputation as guaranteed by Article 8 ECHR and the right to freedom of expression as guaranteed under Article 10 ECHR (link and link). By finding that the claimant as a public body had no legitimate aim to justify an interference with the rights of the media company, the ECtHR in *OOO Memo v. Russia* takes a more categorical approach, with general consequences excluding (similar) public bodies to have a justified claim in defamation proceedings.

It is obvious that this approach by the ECtHR will have an impact on the future handling of defamation cases initiated by executive bodies, as such cases will no longer have to be evaluated on their merits, but shall be dismissed in an early stage of the proceedings or as (manifestly) inadmissible due to the fact that such claims do not pursue a legitimate aim as required under Article 10 § 2 ECHR. At least in as far as the executive bodies are not competing in the marketplace being engaged in direct economic activities.

This impact and importance of the new approach by the ECtHR handling interferences on the basis of defamation proceedings initiated by public entities can also be derived from the concurring opinion in the annex to the judgment, describing this new approach by the ECtHR as a radical deviation from its case-law. The concurring opinion states: "Notwithstanding the policy considerations that prompted the majority's novel approach (paragraph 43 of the judgment), we are not convinced that there were good reasons for the Chamber to deviate in such a radical way from numerous previous judgments that had accepted the applicability of the aforementioned legitimate aim to various public entities and authorities in different countries, in both criminal and civil contexts". The concurring opinion also states that while it cannot be excluded "that defamation proceedings could be intended to have a chilling effect on those who criticise the authorities' activities, the existence of such an illegitimate aim cannot be presumed, let alone taken for granted, without tangible evidence to that effect. In any event, the determination of the limits of acceptable criticism lends itself to be assessed through the balancing exercise under the proportionality test, in line with the Court's established case-law". Insisting on the interest of preserving the Court's case-law consistency, the concurring opinion clarifies that where "a public authority (and not its individual officials) resorts to defamation proceedings in relation to criticism by the media, it is incumbent on the domestic courts examining institutional defamation claims to provide compelling reasons capable of demonstrating convincingly that members of the media acted in bad faith or in flagrant disregard of the tenets of responsible journalism when making allegedly defamatory statements. Any failure to do so would run contrary to the positive obligations under Article 10 of the Convention requiring States to create a favourable environment for participation in public debate by

all persons concerned, enabling them to express their opinions and ideas without fear". As the domestic authorities failed to demonstrate that there was a reasonable relationship of proportionality between the interference in question and the legitimate aim pursued, also the concurring judges agree with the finding of a violation of Article 10 ECHR in the present case.

Although all seven judges finally reached the conclusion of a violation of Article 10 ECHR, the importance of the particular approach by the majority in this case is that it creates an extra obstacle for defamation claims by executive bodies. As such it contributes to preventing SLAPPs initiated by such bodies and it paves the way, if such claims are initiated, for early dismissal of such claims as obviously violating Article 10 ECHR in the absence of a legitimate aim. With the judgment in *OOO Memo v. Russia* the ECtHR itself has contributed to the "growing awareness" of the dangers of at least one type of SLAPPs, and it created an additional possibility and even a compelling reason to have defamation claims by executive bodies dismissed.

Toward a referral to the Grand Chamber?

As the judgment in *OOO Memo v. Russia* dates from 15 March 2022 it will become final within three months, unless there is a request for a referral to the Grand Chamber within that period, in accordance with Article 43 ECHR. As the judgment reflects a "radical deviation" from the Court's traditional approach, and as the "growing awareness" about SLAPPs seems only to be a pertinent argument for four of the seven judges, there might be reasons to refer the case to the Grand Chamber if the Panel would find that it raises a serious question affecting the interpretation or application of the Convention or relates to a serious issue of general importance. As a number of other applications are pending before the ECtHR concerning defamation proceedings taken by State authorities in Russia, a request for referral by the Russian government is plausible, although also very delicate both from the perspective of the deplorable reputation of Russia with regard to the right to freedom of expression and information, and in particular in the actual situation with regard the status of the Russian Federation and its membership of the ECHR (see the resolution of the ECtHR of 22 March 2022 declaring that the Russian Federation will cease to be a High Contracting Party to the ECHR on 16 September 2022 (link)).

Although not final yet, the judgment in *OOO Memo v. Russia* makes clear that the problem of SLAPPs has also come on the radar of the ECtHR. The message from the ECtHR about the growing awareness of the dangers of SLAPPs in our democracies will certainly also be integrated into the work of the Council of Europe Expert Committee on SLAPPs (MSI-SLP) which has its first meeting on 4 and 5 April 2022 (link). Under the authority of the Committee of Ministers, and of the Steering Committee on Media and Information Society (CDMSI), the MSI-SLP is instructed to complete a draft Recommendation on SLAPPs before the end of 2023 (link). The Expert Committee's task is to produce a solid, self-standing draft recommendation, taking into account the ECHR, the relevant Council of Europe's standard-setting instruments and the (dynamic) case-law of the ECtHR.

Judgment by the European Court of Human Rights, Third Section, in the case of OOO Memo v. Russia, Application no. 2840/10, 15 March 2022 (link)

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