

# Opportunities for the Protection of Freedom of Expression at the EU Level arising from Real Madrid vs Le Monde Case

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## The Ball is in the Game

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In 2017, after the assassination of the Maltese journalist Daphne Caruana Galizia, strategic lawsuits against public participation (SLAPPs) became an important topic on the EU level. As a result, the EU adopted the anti-SLAPP Directive, which shall protect journalists from abusive lawsuits that do not serve justice but only the sinister aim of silencing free press. Days from now, that directive will enter into force. Member States have two years for implementation. Nevertheless, the Directive is not the EU's only SLAPP-related legal project at the moment. There is important litigation as well. This litigation originates, of all places, from the equally flashy and dirty world of professional football. In February 2024, Advocate General Maciej Szpunar delivered his opinion on the Real Madrid Club de Fútbol vs Le Monde case (C-633/22). The case addressed the problem of exorbitant damages targeting press and introducing a deterrent effect on freedom of speech in transnational cases. It is the Court of Justice of the European Union's (ECJ) first opportunity to address the vastly growing problem of SLAPPs.

From a rule of law and, especially, freedom of the press angle, the case is of paramount importance as it forwards, supported by the Advocate General Szpunar, a simple but groundbreaking argument: two of EU law's most fundamental principles, mutual recognition and freedom of speech, are a strong basis to fight SLAPPs. This is crucial as the above mentioned SLAPP Directive will yield results only two years down the road.

After giving some context, this blog posts develops the abovementioned argument that fighting SLAPPs requires, or rather operationalizes, not only a very specific directive that will yield first results only two years from now but may utilize the most fundamental principles of EU law: mutual recognition and freedom of speech (and the press!).

## Facts of the case and the opinion of Advocate General

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So, first a few words to context. SLAPPs are lawsuits that are issued by powerful plaintiffs, such as politicians, business people and corporations, against those who speak up in the public interest, usually journalists, media outlets, academics and activists. The aim of the plaintiff is to silence the speaker and introduce a chilling effect, winning the case not that important. SLAPPs are abusing mainly, but not exclusively, civil law (e.g. defamation). The imbalance of power is an important part of the SLAPP cases – while plaintiff has unlimited resources for legal endeavors, the defendant is struggling with finances. This creates an economic and psychological burden on the victim.

Going back to the case – more than a decade ago, the Spanish football club Real Madrid became an anti-hero for, apparently, hiring a “doping doctor”. The story broke in an article by the French newspaper *Le Monde*. Real Madrid and a member of its medical team brought legal action in front of the Spanish court against *Le Monde* and the journalist who wrote the piece. Real Madrid and said doctor claimed reputational damage. The Spanish courts agreed with the football club and ordered *Le Monde*’s owner, the newspaper company *Société Éditrice du Monde*, to pay a fine of €390,000. Moreover, the courts ordered €33,000 to be paid jointly by the journalist personally and the company.

Real Madrid applied for enforcement of these judgments in France, resulting in the Paris Court of Appeal dismissing its application in 2020. The decision was based on the public policy clause, i.e. the French court held that the Spanish motion potentially interferes with freedom of expression. This Franco-Iberic judicial impasse culminated when the French Court of Cassation referred seven questions to the ECJ with a request for a preliminary ruling under Art. 267 TFEU. In EU legal terms, the key issue is whether, in the EU legal order, “the freedom of the press guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) constitutes a fundamental principle the breach of which can justify recourse to the public policy clause.”

In his February 2024 opinion AG Maciej Szpunar underlined that a Member State court should refuse or revoke enforcement if proceeding would manifestly breach freedom of expression. He underlined that freedom of expression is an essential principle of the European Union’s legal order due to its importance for any democratic society. In cases where damages might be seen as exorbitant, hence leading to a deterrent effect on the freedom of expression, the refusal of enforcement should be seen as justified. According to the AG the damages should be considered manifestly unreasonable when: 1) a natural person would have to pay a sum which is several dozen times the standard salary in the Member State where the case takes place or when the person would struggle for years to cover the damages; 2) a legal entity would have its existence threatened by paying the damages. Furthermore, he states the recourse to the public policy is justified only in exceptional cases.

## Chance for strengthening the protection of freedom of media?

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But what to make of this case?

Firstly, and quite remarkably given at least the Luxembourg judges' tense relationship with the Strasbourg court, the *Real Madrid vs Le Monde* case gives a chance to apply the European Court of Human Rights (ECtHR) principles concerning freedom of expression in the ECJ ruling. Such cooperation between courts is desirable and the opinion delivered by the AG already leads into this direction. The AG uses a robust ECtHR judicature in order to define terms such as "public participation", "deterrent/chilling effect" or issues of "public interest". Even though, these terms are defined now in the anti-SLAPP Directive, the terms delivered in the ruling in the Real Madrid case can grant a further clarity on them. In the end the ECtHR is deciding on issues concerning freedom of expression for decades, while it is fair to argue that ECJ is rather new in the game.

Secondly, under the Brussels I regulation, mutual recognition of judgments issued in a different Member States is a rule. Such a solution stems from the principle of mutual trust, according to which values on which the EU is founded are observed in all Member States. Non-recognition is allowed only exceptionally, namely by recourse to the public policy clause (Article 34 (1) of the Brussels I regulation). According to long standing ECJ case law, such recourse is possible if the recognition of a judgment was to constitute a manifest infringement of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognized as being fundamental. It seems that the freedom of expression and freedom of the press should be considered such a rule, as it constitutes a fundamental right guaranteed by the Charter.

On the other hand, ECJ is reluctant to a broad interpretation of exceptions to the principle of mutual trust, such as the recourse to the public policy clause. According to the ECJ, if a Member States were to check that another Member State has observed fundamental rights, the underlying balance of the EU would likely be upset. Until no more than a decade ago, the ECJ was actively using what Dean Spielmann calls the *pro-integration approach to human rights*. The protection of fundamental rights was aimed at facilitating the flow of capital and goods between Member States and not an end itself.

Then, again, the principles are written in a stone only to some extent. The rule of law crises in Hungary and Poland showed that the presumption upon which the principle of mutual trust is based must be rebutted in certain situations. It can be argued that breaches of human rights or rule of law occur from time to time in all of the Member States. Nevertheless, in some Member States these breaches are manifested and systematic to the extent that ECJ had to revisit its approach to the principle of mutual trust. In this context, the ECJ ruled, in *Aranyosi and Căldăraru* case and reinforced it in LM case, that court of a Member State can suspend the execution of European Arrest Warrant on the basis of systemic deficiencies of human rights protection in the issuing Member State and taking into account the individual

circumstances of the case. The CJEU will inevitably comment on the principle of mutual trust in *Real Madrid v. Le Monde*, and adopting an approach similar to that in ECtHR jurisprudence will be useful from the accession perspective.

As noted by Gráinne de Búrca and Claire Kilpatrick, the international framework for protecting human rights necessitates not just holding duty-bearers accountable to rights-holders, but also ensuring mutual accountability among duty-bearers. The ECJ has an opportunity to ensure just that by allowing for non-recognition of a judgment on the basis of infringement of a fundamental right. It also has to be stressed that the issue of mutual trust was one among the two problems signaled by the ECJ in the *Opinion 2/13* on draft agreement providing for the accession of the EU to the European Convention of Human Rights. A clear stance on the primacy of protection of human rights over the principle of mutual trust could be of great importance in the context of the reopened accession negotiations. The ECtHR gave its view on this principle in the *Avotiņš v. Latvia* judgment. According to the long-standing Bosphorus presumption, state action taken to fulfill an obligation arising from membership in an international organization and leaving no discretion to the state should be considered compatible with the Convention. However, if during the enforcement proceedings a serious and substantiated complaint that the protection of a Convention right has been manifestly deficient. The court cannot dismiss the examination of that complaint solely based on the fact that they are applying EU law.

Lastly, it should be noted that the case can be considered within the broader discussion on the protection of values enshrined in Article 2 TEU on the ECJ level. By defining the relation between freedom of expression and public policy, the ECJ has a chance to grant a tool for a protection of human rights (namely freedom of expression) to Member States. It can be said that sometimes for the EU, a crisis is an opportunity to further define its principles, and the emerging threats to freedom of expression and public debate, such as the case of *Real Madrid v. Le Monde*, should be seen as precisely such an opportunity.

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