

CASE STUDY

SLAPP IN SLOVAKIA



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1. INTRODUCTION

The subject of this analysis is the issue of so-called SLAPP actions in Slovakia and the possibilities of effective defense against them. The term SLAPP refers to manifestly unfounded or abusive legal proceedings against entities interested in public interest topics, usually also referred to as Strategic Lawsuits Against Public Participation, or "SLAPPs". This name originated in the United States in the late 20th century, where it came to refer to specific types of lawsuits against the public's interest in matters of public concern. They differed from legitimate lawsuits in that they were used to suppress public interest activities - by shifting legitimate public debate to private decision-making, in which the plaintiff usually has substantially better resources than the defendant.

SLAPPs are a new but increasingly common phenomenon in the European Union as well. They are an extremely damaging form of harassment and intimidation used against both legal entities and individuals involved in the protection of public interests. In essence, they can be described as unjustified or exaggerated legal proceedings, which are usually initiated by financially powerful individuals (businessmen, oligarchs), financial groups, commercial companies, but also by state bodies or public officials. Lawsuits are also brought by companies owned by the state or local government.

They are directed against parties that express criticism in relation to matters of public interest or disclose information that is embarrassing to the plaintiffs. SLAPPs usually target journalists and human rights defenders, targeting not only individuals but also publishers and NGOs; e.g. those involved in public sector transparency, anti-corruption, environmental activism, etc. SLAPPs can also target others involved in public participation, such as researchers and academics. In Slovakia, we have experience of SLAPPs being filed against local activists, e.g. members of municipal and city councils, or bloggers, or operators of websites and social networking sites such as Facebook.

The goal of SLAPPs is to censor, intimidate, and silence critics by burdening them with legal defense costs until the plaintiffs drop their criticism or stop covering and

reporting on a particular topic or person. The ultimate goal is to achieve a deterrent effect, to silence the defendants and discourage them from doing their work or volunteer and non-profit initiatives for the benefit of the community or the public.

Unlike ordinary proceedings, SLAPPs are not initiated to enforce the right of access to justice, nor are they initiated to win a lawsuit or to obtain redress and remedy any unlawful interference with the rights of plaintiffs. Their purpose is to intimidate defendants and drain their resources (financial and time). The essence of SLAPP suits is either a single proceeding with a large and exorbitant claim (e.g. compensation for non-pecuniary damages of EUR 100,000 in a personality protection proceeding for the publication of an article) or the initiation of multiple proceedings, e.g. in the form of criminal complaints and personality protection suits, which require not only significant legal costs on the part of the defendant, but also a lot of time spent on the preparation of pleadings, attendance at police interrogations or hearings in courts of law.

A frequent feature of SLAPP cases is also the imbalance of power between the parties to the detriment of the defendants. The plaintiff is usually a powerful entity with considerable financial backing and influence whose goal is to silence criticism of itself and prevent public scrutiny by coercive action in the form of SLAPP suits. The defendant, on the other hand, is often an entity with limited financial resources and no legal support with which to balance the plaintiff's claims and initiatives in court and other litigation.

SLAPPs are thus also capable of undermining the fundamental rights of defendants in another respect, namely by failing to respect their right to a fair trial, on the ground of violation of the principle of equality of arms arising from Article 47(3) of the Constitution of the Slovak Republic and Article 6 of the Convention for the Protection of Fundamental Rights and Human Freedoms (hereinafter 'the Convention').

In SLAPP lawsuits, the public interest issues at stake are, for example, corruption, the handling of public funds, migration, the fight against disinformation, and the proper functioning of all branches of the justice system, which are the police, the prosecution, the courts, and the bar.

The danger of SLAPP suits lies in their *chilling effect* on plaintiffs' critics, where defendants, fearing the consequences of legal or criminal proceedings, stop reporting on an important topic of public interest, curtail their investigative activities, or succumb to self-censorship and limit their output in ways that no longer bother the plaintiffs. At the same time, SLAPPs constitute an abuse of the judicial process and unnecessarily burden the courts.

The individual right to free speech and the public right to information are two sides of the same coin; they are intertwined. This is confirmed by the fact that they are guaranteed together in one article of the Constitution, namely Article 26(1). Therefore, restricting or intimidating an individual's critical expression on matters of public interest does not only restrict the rights of the individual concerned, but also of the potential recipients of his or her ideas (their right to receive information).

It is indisputable that without the necessary information, people cannot make informed decisions, engage in meaningful democratic debate or properly exercise their rights (e.g. the right to vote in elections).

For the above reasons, it is necessary for states, including the Slovak Republic, to take the necessary measures to protect defendants from SLAPP suits. It is also desirable that the courts reflect on these practices and not allow the prolongation of manifestly unfounded proceedings whose sole purpose is apparently to create pressure on the defendant.

2. Case Study [Administrator Of *Hlavnespravy.Sk* Website Vs *Konšpiratori.Sk* Project]

FACTS OF THE CASE

The *Konšpiratori.sk* project was established in 2016 with the primary goal of protecting advertisers from having their ads appear on disinformation sites. On the website www.konspiratori.sk, the initiators of the *Konšpiratori.sk* project have created a list of websites that, in the opinion of the members of the independent evaluation committee, have unserious, deceptive, fraudulent, conspiratorial or propagandistic content. The initiative also called its list a "list of sites with questionable content" and nowhere does it state that their operators disseminate illegal content or carry out illegal activities.

The inclusion of websites on the list is decided by an independent expert committee composed of teachers, historians, doctors, journalists and social media specialists. They evaluate the reported sites based on published and clearly defined criteria. The project currently has more than 250 Slovak and Czech websites in its database and allows downloading an automated script (a spreadsheet with a list of listed websites) to exclude disinformation websites from advertising campaigns.

The project is supported by dozens of advertising and media agencies, and the founders of the project, who work in the field of Internet marketing, come from their ranks. **Their primary motive for founding the *Konšpiratori.sk* project was to protect the reputation of their clients, whose advertisements were also published on websites with dubious content.**

The list on the site is intended for the general public, but also for commercial companies, advertisers, and warns about sites whose content could harm their brands. By placing ads on such websites, advertisers would be directly contributing to their funding through payment for advertising, and they may not agree with the views that are spread there; for example, baking soda cures for cancer, racist, xenophobic and hate speech, or

support for the violent annexation of Crimea by the Russian Federation, or the recent Russian military aggression against Ukraine. Advertisers may inadvertently "help" such websites without proper information by paying for advertising, and at the same time may be associated against their will with content (opinions or articles of conspiracy websites) that is capable of seriously damaging their reputation.

Due to the listing on konspiratori.sk, several lawsuits have been filed against the operator of the project by the operators of these websites.

The applicant is a legal entity which operates the internet news portal www.hlavnespravy.sk. That portal is generally perceived in the Slovak Republic as one of the most widely read disinformation (conspiracy) news portals. The articles published on this portal are often written in such a way as to artificially portray the pro-Western world in a negative light. On the contrary, the portal exaggerates and often contradicts the state of objective reality by adoring the Russian Federation, its political representatives or the country's activities in relation to foreign countries. Recently, information has been published on several occasions about the portal's links to the convicted mafioso Marian Kočner and to Russian intelligence agencies, when the portal's correspondent personally accepted money from an employee of the Russian embassy in the Slovak Republic at a monitored meeting.

1. Protection of unfair competition rights

(i) Urgent Injunction

In October 2018, the administrator of the hlavnespravy.sk website filed an application for an urgent injunction requesting the court to order the defendants to:

- i. obligation to remove word designation of the claimant's website/domain www.hlavnespravy.sk and its subdomains, if any, from the website www.konspiratori.sk and the list of pages with disputed content published on it, including the script for automated exclusion of pages, until a final decision on the merits of the case;

- ii. prohibition of the insertion of advertising restrictions on the domain hlavnespravny.sk into any programs;
- iii. prohibition of actions leading to the inclusion of the website hlavnespravny.sk in the list of websites on www.konspiratori.sk;
- iv. prohibition of public information about the inclusion of the website hlavnespravny.sk among the sites with questionable content on the website www.konspiratori.sk.

The claimant brought the action against the then registered holder of the www.konspiratori.sk domain, a limited liability company providing internet marketing services, which had cooperated in the creation of the initiative and had temporarily registered the domain in its name until the initiative was transformed into a civil association with legal personality. At the same time, the proposal was also filed against another company, which is a partner of the project and is one of the most renowned agencies in the field of communication and public relations in the Slovak Republic.

The applicant's main grounds for its application are that the defendants are allegedly unfairly restricting the market for advertising on the internet and are causing serious harm to the applicant by their conduct. The defendants' conduct is alleged to have the effect of reducing the traffic to the www.hlavnespravny.sk portal, advertising revenue and the applicant's reputation.

In November 2018, the Court of First Instance by order dismissed the application for urgent injunction in its entirety. The applicant appealed against that decision. In March 2019, the Regional Court of Appeal amended the contested order by granting the application in part (i) and ordered the defendant company - the holder of the domain www.konspiratori.sk - to remove the word designation of the plaintiff's website www.hlavnespravny.sk and its subdomains, if any, from the list on www.konspiratori.sk as well as from the script for the automated exclusion of pages from advertising, pending a final decision on the merits of the case.

Since the beginning of February 2019, the administrator of the www.konspiratori.sk website has been the civic association Konšpirátori.sk (CA Konšpirátori.sk), which is also duly registered in the official domain database at sk-nic.sk. Nevertheless, the mentioned Court of Appeal issued an urgent injunction against the company, which was no longer registered as the administrator of the website in the public database and was not responsible for its content.

The decision of the Court of Appeal was final, i.e. it was not subject to appeal. In August 2019, the defendant (the former administrator of the website www.konspiratori.sk) filed an application for annulment of the urgent injunction ordered by the Court of Appeal on the ground that the grounds on which it was ordered had ceased to exist.

The disappearance of the grounds for ordering an urgent injunction may also consist in the fact that the substantive situation between the parties concerned has changed or a new substantive situation has arisen, as a result of which the need for an immediate adjustment of the situation has ceased to exist. Since the defendant company no longer had passive legal standing after the transfer of the domain (it was no longer the holder and administrator of the domain), the urgent injunction was not enforceable and the conditions for its annulment pursuant to Article 334 of the Civil Procedure Code (CPC) were fulfilled. The applicant opposed the application for annulment and argued that the defendant was still under an obligation to comply with the urgent injunction and that it was not doing so. The claimant also argued that the defendant had not refuted the grounds for the urgent injunction and that those grounds continued to exist.

It was only after almost three years (!) that the court of first instance decided on the application of the defendant - the former administrator of the www.konspiratori.sk website - by granting the application in its entirety in March 2022 and holding that the defendant was not entitled to dispose of the www.konspiratori.sk domain name and was not liable for its content. Throughout this three-year period, the plaintiff achieved its goal and the

www.hlavnespravy.sk website was not included in the list of sites with objectionable content.

(ii) The Lawsuit

After the Court of Appeal issued a final urgent injunction (in March 2019), the plaintiff in April 2019 filed a lawsuit for protection of unfair competition rights, in which he extended the circle of defendants to include the CA Konšpirátori.sk. Thus, he sued a total of 4 defendants.

By the action, the plaintiff sought a public apology from all defendants, as well as refraining from the conduct that was the subject of the application for urgent injunction. The applicant's substantive arguments were virtually identical to those presented in the application for urgent injunction.

The applicant alleges that the defendants are committing unfair competition (i) within the meaning of the general clause defined in Article 44(1) of Act No 513/1991 Coll. on the Commercial Code, and (ii) making light of the provisions of Article 50(1) of the Commercial Code. At the same time, the applicant submits that the defendants restrict the applicant's constitutional right to freedom of expression by preventing him from freely disseminating alternative information to the mainstream. This argument is highly paradoxical, since it is precisely the plaintiff who seeks to restrict the freedom of expression of the members of the evaluation committee, who, on the basis of agreed and transparent criteria, present on the website konspiratori.sk their opinions on the seriousness and credibility of news websites. Another argument put forward by the applicant in the application is that the operation of the www.konspiratori.sk website is contrary to fair commercial practices and does not enjoy legal protection under Article 265 of the Commercial Code.

For the next 3 years, i.e. until the end of 2022, the court of first instance did not act, did not set a hearing and did not rule on the case. The legal uncertainty and threats against the defendants thus continue.

2. Proceeding for the protection of the reputation of the administrator of hlavnespravy.sk

After being denied in November 2018 an application for urgent injunction by court of first instance in the first trial described above, the applicant in January 2019 filed the same application with the same claim in another court. This time, he filed it together with a claim on the merits, which concerned the protection of the reputation of a legal entity - the administrator of the hlavnespravy.sk website.

(i) Urgent Injunction

The lawsuit, together with the motion, was directed against the then-registered administrator of the konspiratori.sk website, as well as against all members of the project's evaluation committee, which numbered up to 19 in total. The court hearing the motion was unaware of the fact that the motion had already been decided negatively by another court, and this time it issued an urgent injunction.

The defendant raised the *plea of lis pendens* (an obstacle of an earlier proceedings, according to Article 159 of the CPC) against the urgent injunction, on the ground that it had previously brought an action in the first unfair competition proceeding. The validity of that objection was confirmed by the Regional Court of Appeal, which finally dismissed the proceeding by order in November 2020. The Court of Appeal based its decision on the plea of *res iudicata* (final conclusion of the case), since in the meantime the proceedings for urgent injunction in the first court (concerning the protection of unfair competition rights) had already been finally concluded by the Court of Appeal's granting of urgent injunction in March 2019.

However, in the proceeding, the claimant again filed a motion for an urgent injunction against CA Konšpiratori.sk, which acquired the rights to the domain www.konspiratori.sk in February 2019 and is its administrator. A new urgent injunction was ordered by the court in June 2021.

By application of March 2022, OZ Konspiratori.sk, as defendant in the 21st row, sought the annulment of the urgent injunction, on the ground that the grounds on which it was ordered had ceased to exist.

The application was based, inter alia, on the fact that, on the basis of an instruction from the National Security Office (*Národný bezpečnostný úrad - NBÚ*), the web portal hlavnespravy.sk has been completely blocked since 2 March 2022 due to the harmfulness of its content, in accordance with the procedure under Section 27b of Act No. 69/2018 Coll. on Cyber security.

In May 2022, the court issued an order lifting the urgent injunction. The court justified its decision in particular on the conduct of the National Security Office. In the decision, it stated that: *"The NBÚ itself has established the harmfulness of the content of this portal, based on the documents supplied and evaluated by the security forces of the State. Therefore, in so far as the applicant's website is currently blocked and non-functional, in those circumstances there is no danger of imminent harm or interference with the applicant's rights and legitimate interests, since the relevant factual circumstances under which the urgent injunction, in the wording in question, was ordered have changed to such an extent that its continued existence is no longer meaningful"*.

The essence of the dispute, the assessment of the defendant's right to freedom of expression - i.e. the right to publish an opinion on the credibility of news websites - was also completely avoided by the court in this proceeding.

The aforementioned order of the Court of First Instance was upheld on appeal by the Regional Court in Bratislava by order from October 2022. It also found that the information on the website konspiratori.sk did not constitute an unjustified or unlawful exercise of the right of criticism and did not cause unjustified interference with the applicant's reputation. The decision to lift the urgent injunction is thus final and the website hlavnespravy.sk was reinstated in December 2022 on the list of websites published on www.konspiratori.sk.

(ii) The Lawsuit

On the merits, i.e., the plaintiff's reputation suit, the court has not held a hearing in four years, since January 2019. This is despite the fact that the 21 defendants have duly pleaded to the suit and have had themselves represented by one law firm to simplify and expedite the proceedings.

3. Foreclosure proceedings

Despite the fact that the defendants have complied with the obligations imposed by the urgent injunctions and removed the name of the website hlavnespravysk.sk from the list on the project website and from the script (in March 2019), the plaintiff filed a court motion for foreclosure seeking permanent injunctive relief throughout the pendency of the litigation. He reasoned that the subject matter of the enforceable court order was a non-monetary obligation and therefore it was necessary to conduct the foreclosure proceeding in a preventive manner. According to the applicant, the defendants (both the original and the current holder of the domain konspiratori.sk) may at any time decide to breach the obligation imposed by the court in the urgent injunction. Thus, even though the company in whose name the konspiratori.sk domain was registered immediately complied with the obligation and removed the hlavnespravysk.sk website from the list, it faced foreclosure proceedings for several years. The plaintiff opposed all motions to stay the execution and appealed against the court's decisions to stay the execution. Thus, the termination of foreclosure proceedings against CA [Konšpirátori.sk](http://konspiratori.sk) occurs only after the final annulment of the urgent injunctions and only three years after they were initiated.

4. Criminal proceeding

In July 2019, the legal representative of the administrator of hlavnespravysk.sk filed a criminal complaint alleging that hlavnespravysk.sk is a well-known objective news media outlet that was included in the list of websites on konspiratori.sk without its consent, as a result of which it should have experienced a decline in readership and should have had its access to Google's advertising campaign and other advertising networks restricted. The

listing is alleged to have damaged the reputation of the administrator of hlavnespravy.sk, resulted in a loss of advertising revenue and also damaged readership.

According to the complainant, the actions of the representatives of the [Konšpirátori.sk](http://Konspiratori.sk) project led to the commission of the following offences: defamation of another's rights, damage to another's property and contempt of court.

The first two offences were allegedly committed by damaging the reputation of the administrator of hlavnespravy.sk and by listing the website in question.

The contempt of court should have been committed by CA [Konšpirátori.sk](http://Konspiratori.sk) by disregarding an enforceable urgent injunction. The complainant did not specify what the disrespect of the court's decision was supposed to consist of. As stated above, the removal of hlavnespravy.sk from the list of sites with disputed content maintained on konspiratori.sk took place immediately after the court decision was delivered (in March 2019) and, although it was addressed to a passively non-litigant person (the original holder and administrator of the konspiratori.sk domain), CA [Konšpirátori.sk](http://Konšpiratori.sk) respected the decision.

The police summoned the director of CA [Konšpirátori.sk](http://Konšpiratori.sk) for questioning in this matter, at which he had to comment on the presented allegations of criminal activity. At the same time, he explained the method of functioning of the expert evaluation committee and also the non-binding and recommendatory nature of the list. Subsequently, CA [Konšpirátori.sk](http://Konšpiratori.sk) did not receive any further information about the course and procedure of the law enforcement authorities. It is therefore reasonable to assume that the police, pursuant to Section 197(1)(d) of the Criminal Procedure Code, rejected the criminal complaint because it was unfounded.

Nevertheless, there was a long-standing fear among the project leaders and the members of the expert evaluation committee that criminal prosecution or even charges might be brought. In a position of suspects, the police is not obliged to inform them of their decision concerning a criminal complaint.

Applicable Laws

Pursuant to Section 44(1) of the Commercial Code: *Unfair competition is an act in competition which is contrary to the good morals of competition and is capable of causing harm to other competitors or consumers. Unfair competition is prohibited.*

According to Article 50(1) of the Commercial Code: *Understatement is an act by which a competitor gives or disseminates false information about the conditions, products or performance of another competitor which is likely to cause harm to that competitor.*

Article 50(2) of the Commercial Code also defines: *The making or dissemination of false statements about the circumstances, products or performance of another competitor as an understatement in so far as they are likely to cause injury to that competitor. However, it is not unfair competition if the competitor has been forced to do so by circumstances.*

Pursuant to Article 265 of the Commercial Code: *The exercise of a right that is contrary to the principles of fair commercial practices does not enjoy legal protection.*

Pursuant to Article 19b(2) of the Civil Code: *In the case of unauthorised use of a legal entity's name, the unauthorised user may be required to refrain from using it and to remedy the defective condition; appropriate compensation may also be sought, which may also be in the form of monetary damages.*

Paragraph (3) of the abovementioned Article 19b states that: *Paragraph (2) shall also apply mutatis mutandis to unjustified interference with the reputation of a legal person.*

Pursuant to Article 334 of Act No. 160/2015 Coll., the Civil Procedure Code: *The court shall, on application, revoke an urgent injunction if the reasons for which it was ordered no longer exist.*

Pursuant to Article 245 (1) of the Criminal Code (Damage to another's rights): *Whoever destroys, damages or renders useless another's property and thereby causes minor damage to another's property shall be punished by imprisonment for up to one year.*

According to Article 375 of the Criminal Code (Damage to another's property): *Whoever causes serious damage to the rights of another by misleading or taking advantage of someone else's mistake shall be punished by imprisonment for up to two years.*

According to Article 343 (c) of the Penal Code (Contempt of Court): *Whoever, by repeated acts, despite prior warning, without sufficient excuse, disobeys an order of the court or its summons, shall be punished by imprisonment for up to two years.*

Defense Strategy

As is apparent from the facts described above, the defendants had to file numerous written submissions with the courts in an attempt to prevent the ordering of urgent injunctions or to have them set aside, to explain the lack of grounds for foreclosure proceedings and to defend themselves against the obligation to pay the costs of the foreclosure proceedings. They also have to submit pleadings and attend future court hearings in the two actions brought against 4 and 21 defendants respectively. Further, they had to prepare defence tactics in the criminal proceedings initiated against them by the lawyer of the administrator of the website hlavnespravny.sk.

All the defendants used for their legal defence the services of a law firm with a long-standing specialisation in media litigation and the protection of personality and freedom of expression. Without a competent legal defence, the risk of losing such sophisticated, but especially opaque, court proceedings is considerable.

Part of the defendants' defense strategy is to publicize the litigation, primarily through blogs and press releases. Given the obvious public interest in the litigation, the media cover and comment critically on these proceedings.

It was equally important to explain the substance of the applicant's submissions to all the public authorities (courts, execution courts, bailiffs and the police in criminal proceedings) adjudicating in those proceedings. In their submissions, the defendants described in detail the plaintiff's apparent abuse of rights and the aim pursued - to restrict the defendants' right to

freedom of expression and, in particular, the public's right to be informed about the nature of the hlavnespravny.sk website operated by the plaintiff.

In the case of urgent injunctions, an application for annulment of the urgent injunction on account of a change of circumstances appears to be an effective remedy. However, a detailed and convincing legal reasoning on the primacy of the right to freedom of expression in an appeal against an urgent injunction order is crucial.

In civil court proceedings, an important argument is the presentation of the case law of the highest judicial authorities of the Slovak Republic and the ECtHR on freedom of expression, the proportionality test carried out between the plaintiff's right to protection of personality and the defendant's right to freedom of expression. In disputes concerning the protection of personality, the burden of proof is on the defendant, who must prove that the factual assertions disseminated by him are true or that his evaluative judgments have a real factual basis. It is therefore important to secure and produce documentary evidence corroborating the defendant's allegations.

In criminal proceedings, it should be argued that the means of criminal law are to be used only as a last resort by the state to protect certain social relations, exhaustively defined by criminal law, in the event that the means of other branches of law are ineffective to protect such relations (the *ultima ratio* principle). In other words, criminal law in the case under examination should have been used only if civil law was unable to resolve the situation in question. However, the provisions of the Civil Code on the protection of the reputation of a legal person and the provisions of the Commercial Code on unfair competition were sufficient to protect the applicant's allegedly infringed rights against CA Konšpirátori.sk.

The argument of slight seriousness (material corrective) under Article 10(2) of the Criminal Code is also relevant. This condition for criminal prosecution was clearly absent in the actions against the administrators of the www.konspiratori.sk project.

Although the defendants have been successful in the urgent injunction proceedings after many years of proceedings, the lawsuits (proceedings on the merits) themselves are still at an early stage. It appears that in Slovakia, SLAPP actions can be successful not because of



their merits, but because of unreasonably slow court procedure, delays in the proceedings or unnecessary evidence and formalism. The presented case raises questions as to how a civil association established to alert the public and business community to conspiracy websites can face numerous court proceedings for already four years. It would not have been able to manage the enormous legal expenses without contributions, and the possibility of disabling or even liquidating a project carried out in the public interest through SLAPP suits was thus more than real.