



***SLAPPS IN EUROPE: HOW  
THE EU CAN PROTECT  
WATCHDOGS FROM ABUSIVE  
LAWSUITS***

***JOINT SUBMISSION TO THE  
EUROPEAN COMMISSION  
PUBLIC CONSULTATION ON EU  
ACTION AGAINST SLAPPS***

## **Key points**

### ***A wide range of public watchdogs are targeted by SLAPPs***

SLAPPs are abusive lawsuits filed with the purpose of shutting down acts of public participation, including public interest journalism, peaceful protest or boycotts, advocacy, whistleblowing, or simply speaking out against abuse of power. SLAPPs target anyone who works to hold the powerful to account or engage in matters of public interest: so-called “public watchdogs”. This includes journalists, activists, rights defenders, whistleblowers, civil society organisations, trade unions and professional associations, and academics.

### ***SLAPPs are on the rise across the EU***

As part of a global trend, the use of SLAPPs to intimidate and silence public watchdogs is on the rise in the EU. While defamation law is the most common vehicle for SLAPPs, a number of different laws are weaponised for the purpose of shutting down critical speech, including EU rules in the area of data protection and the protection of intellectual property. SLAPPs themselves are the “tip of the iceberg” of broader, more insidious patterns of legal intimidation, such as the use of aggressive legal threats, which usually go unreported.

### ***SLAPPs are a threat to democracy and the enjoyment of fundamental rights, and thus have serious implications on the EU legal order***

The use of SLAPPs and legal intimidation chills the speech of those working to hold the powerful to account, blocking the ability to expose wrongdoing and shutting down publication on matters of public interest. SLAPPs weaken democracy by preventing individuals and civil society organisations from engaging in public debate and impeding the exercise of rights to free speech, assembly, and association.

As such, SLAPPs go against the values on which the EU is founded, including democracy, the rule of law and respect for human rights. But SLAPPs have a broader, detrimental impact on the EU legal order. By impairing public watchdogs from doing their job, SLAPPs are a threat to the effective enforcement of EU law and hinder the effective legal protection of rights under EU law. As SLAPPs distort and abuse judicial remedies, they may also undermine the trust between the EU Member States’ legal systems, posing a threat to access to justice and judicial cooperation. SLAPPs are also a threat to the freedom of

movement as they discourage potential targets from confidently operating in jurisdictions where the risk of such abusive litigation is higher than elsewhere in the EU.

## **Protective measures are needed for SLAPP victims and punitive measures are needed for SLAPP litigants**

Non-governmental actors have been investing resources to expose legal harassment and intimidation, protect the rights of those who speak out, and advocate for comprehensive protective measures and reform on behalf of journalists, activists, whistleblowers, rights defenders, civil society organisations, and other watchdogs targeted by SLAPP tactics. However, this is not enough to counter the harmful effects of SLAPPs, provide victims with the necessary protection, and discourage the further use of this abusive practice. Insofar as states are committed to the respect and protection of human rights and fundamental values of democracy and rule of law under international and regional human rights instruments, as well as the EU Treaties, they have a positive obligation to counter and provide protection against SLAPPs.

SLAPPs operate through the litigation process whereby the outcome is generally of less importance to the filer. As such, anti-SLAPP measures need to be introduced to ensure this process causes as little harm to the victim as

possible. This means accelerated proceedings that can filter out SLAPPs as quickly as possible, sanctions to punish SLAPP litigants and deter further SLAPPs, and financial support and compensation to enable SLAPP victims to fight off SLAPPs on an equal footing without being drained of resources and morale in the process. These protective measures should go hand in hand with steps to bring laws criminalising speech, such as defamation, in line with human rights standards, with awareness-raising and capacity-building initiatives, and with reflections on how to address SLAPPs in legal ethics.

## **Untapping the role of the EU: key recommendations**

Given the scale and nature of the problem, the EU has the responsibility, and enjoys the necessary power and competences, to set standards and measures to inform and improve actions taken by the Member States. The scope of EU action needs to be as wide as possible so as to provide effective protection against the range of tactics used by SLAPP litigants. To that effect:

- EU anti-SLAPP measures must extend to all forms of public participation (including peaceful protest, activism, and whistleblowing, as well as journalism) and must cover cases filed on a domestic as well as cross-border level.
- Should the EU legislator come to the conclusion that its legislative intervention

may only be limited to SLAPP cases with cross-border implications, the proposed EU anti-SLAPP law should build on a broad interpretation of the notion of “cross-border implication” – including a reference to cases where there is a close factual connection between the action and the legal system of another Member State.

- The legislative intervention should be accompanied by a strong recommendation calling on Member States to, at the minimum:
  - › ensure that the procedural and other safeguards included in the EU legislative intervention apply to all SLAPP cases
  - › take steps to bring laws criminalising speech, such as defamation, libel and slander, in line with international human rights standards
  - › promote a discussion on legal ethics and professional standards
  - › promote and support awareness-raising initiatives and training
  - › engage with and aid actors that can provide support and assistance to targets.
- The EU should effectively monitor and proactively support Member States in their implementation of legislative and non-legislative measures included in the EU anti-SLAPP initiative.



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## ***About this paper***

This policy brief has been drafted by member groups of the Coalition Against SLAPPs in Europe (CASE).<sup>1</sup> Founded in 2021, CASE is a coalition of non-governmental organisations from across Europe united by the recognition of the threat posed to public watchdogs by Strategic Lawsuits Against Public Participation (SLAPPs).<sup>2</sup>

This policy brief constitutes CASE's official joint submission to the public consultation launched by the European Commission to inform its upcoming initiative on SLAPPs.<sup>3</sup> It reflects the views of a wide range of non-governmental organisations, associations, legal experts, and practitioners active both at national and EU level. These groups represent, assist, and advocate for those exposed (or potentially exposed) to SLAPPs. CASE members work in support of a range of societal actors – such as journalists, media, rights defenders, civil society organisations and academics – threatened by SLAPPs and in defence of the right to democratic participation more broadly, including the rights to freedom of expression, peaceful assembly, and freedom of association.

The brief is structured on the basis of the European Commission's public consultation

and reflects CASE member groups' research and views on the incidence of SLAPPs across the EU, the problem definition and its consequences. It also provides information about existing initiatives of non-governmental actors to counter SLAPPs and support victims, and formulates recommendations addressed to Member States and EU institutions on effective legislative and non-legislative measures needed to tackle SLAPPs in the EU.

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1 The list of member groups who contributed and endorsed this policy brief is enclosed at the bottom of the document.

2 For more information, visit <https://www.the-case.eu/about>

3 [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders/public-consultation_en)

## What is a SLAPP?

A Strategic Lawsuit Against Public Participation (SLAPP) is an abusive lawsuit filed with the purpose of shutting down or otherwise impeding acts of public participation.

‘Public participation’ should be understood broadly as engagement on any matters of public interest. While the definition of “public interest” varies from state to state (with the European Court of Human Rights [ECtHR] granting a margin of appreciation to Member States to define the term), it can be helpful to refer to the succinct definition used by the two academics who coined the word “SLAPP”, George Pring and Penelope Canan, after noting a surge in lawsuits filed to silence public criticism by citizens. In their 1996 book, *SLAPPs: Getting Sued for Speaking Out*, Pring and Canan discussed their focus on “issues of societal and political significance”, as opposed to those concerned with matters “beyond simple self-interest”.<sup>4</sup>

‘Public participation’ can encompass a range of activities – public interest journalism, peaceful protest, boycotts, activism, whistleblowing, advocacy, and more. As such, SLAPPs target a range of societal actors, united by a common function of holding the powerful to account and exposing wrongdoing: in the words of the ECtHR, “public watchdogs”. Some of the public watchdogs most frequently targeted by SLAPPs include:

- Journalists, particularly investigative reporters
- Activists, particularly environmental and transparency/anti-corruption activists
- Human Rights defenders
- Civil society organisations, in particular NGOs and campaigning organisations
- Academics
- Whistleblowers
- Trade unions and professional associations

While the process of defining a SLAPP is straightforward, the process of identifying a SLAPP is more complicated. SLAPPs masquerade as run-of-the-mill civil disputes and so the intent of the filer can only ever be inferred. To do this, we rely on a number of indicative qualities which provide ‘clues’ on the presence of a SLAPP. These qualities can be found in the diagram below:

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4 George Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, Temple University Press 1996, p9

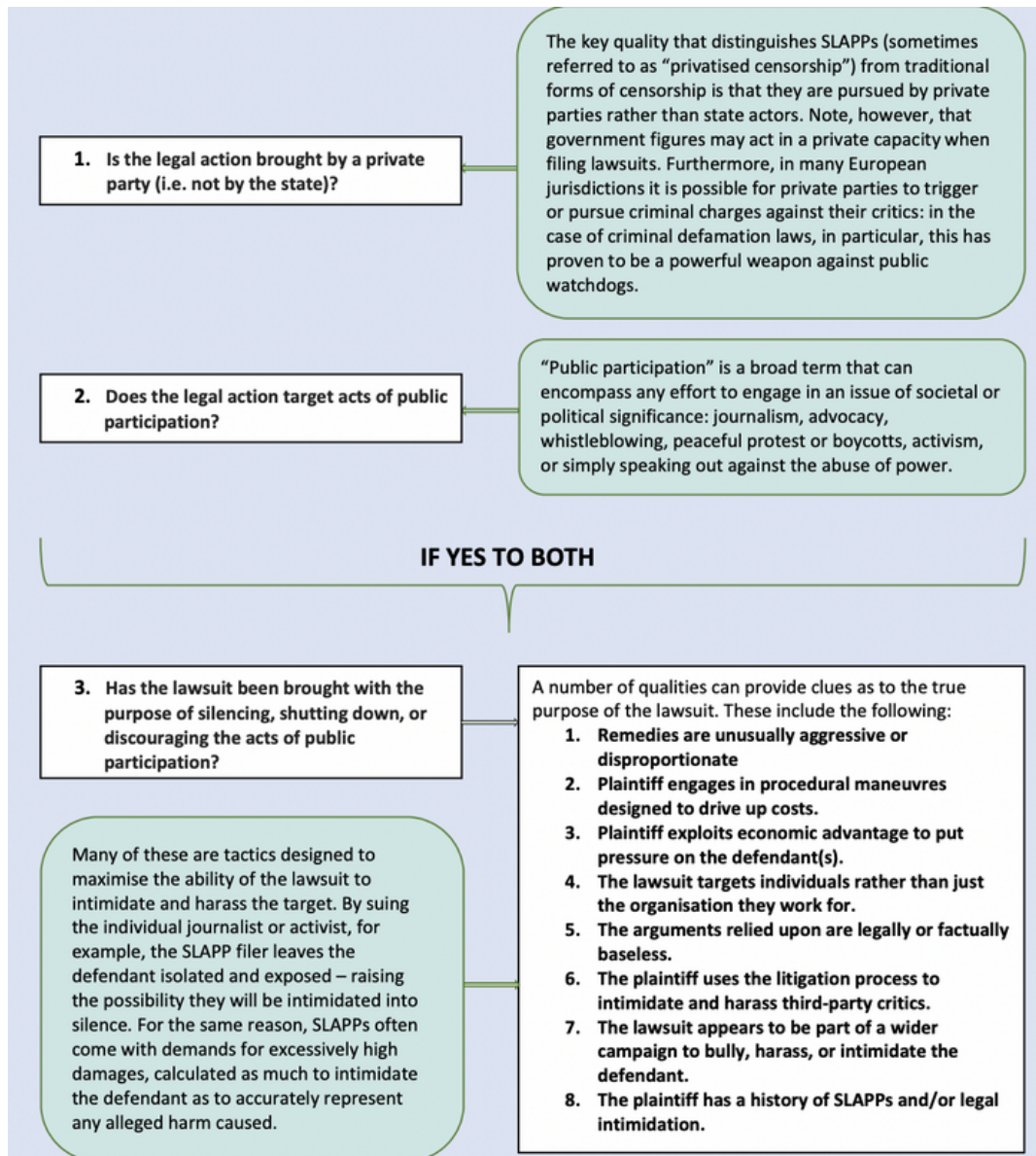


Figure 1: Identifying a SLAPP<sup>5</sup>

These qualities indicate that the court process is being used for a purpose significantly different from the “ordinary and proper” use of the court process. The lawsuit can,

therefore, be characterised as abusive.<sup>6</sup> Far from impeding the ability to assert legitimate rights, disposing of these lawsuits in a timely and decisive fashion can help promote justice and protect the integrity of the courts.

<sup>5</sup> [CASE method on how to identify a SLAPP](#)

<sup>6</sup> See Lord Bingham, *Her Majesty’s Attorney General v Barker* [2000] 1 FLR 759, at paragraph 19



## **How big of a problem are SLAPPs in Europe?**

### **An increased awareness by international and regional monitoring bodies**

SLAPP suits are not a new phenomenon, although awareness of the problem has increased significantly in recent years.

In his recent report on the rights of freedom of assembly and of association in the context of the climate justice movement, meanwhile, UN Special Rapporteur Clement Nyaletsossi Voule referred to the targeting of climate defenders with SLAPPs by companies.<sup>7</sup> Numerous other UN special procedures – including the UN special rapporteur for human rights defenders – have identified a growth in SLAPPs over the last 10 years.<sup>8</sup>

At regional level, in its 2021 Annual Report, the Council of Europe Platform to promote the protection of journalism and safety of journalists observed “a notable increase of SLAPP-related alerts over the previous year, both in numbers of alerts and jurisdictions concerned”.<sup>9</sup> This was echoed in a comment issued by Dunja Mijatović, Council of Europe Commissioner for Human Rights, who noted that SLAPPs “pose a significant and growing threat to the right to freedom of expression in a number of Council of Europe member states, perverting the justice system and the rule of law more generally”.<sup>10</sup>

Similarly, in its special report on legal harassment and abusive litigation, the OSCE Representative on Media Freedom indicates that many journalists and other media workers in the OSCE region face a genuine risk of being targeted with legal harassment and abusive litigation, with the law being misused to prevent them from doing their work, or as a means of

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7 [Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice](#), Note by the Secretary-General.

8 [Protect the Protest Task Force Submission to the UN Human Rights Committee on US Compliance with the ICCPR](#).

9 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, *Wanted! Real Action for Media Freedom in Europe*, 2021.

10 Dunja Mijatović, [Time to take action against SLAPPs](#), Council of Europe Commissioner for Human Rights, 27/10/2020

retaliation for their unwanted investigations or reporting.<sup>11</sup>

A recent study commissioned by the European Commission confirmed that SLAPP suits are “increasingly used across EU Member States, in an environment that is getting more and more hostile towards journalists, human right defenders and various NGOs”.<sup>12</sup>

## Existing monitoring of SLAPPs across Europe

While an insufficient awareness of the issue among policymakers has prevented a regular and comprehensive mapping of SLAPP suits, and their effects, across the EU, a rising number of SLAPP suits or threats thereof have been exposed in recent years by civil society organisations.<sup>13</sup>

In addition to the focused mapping exercise undertaken by CASE (see below), several press freedom and journalists’ organisations have joined forces to monitor and report media freedom violations on two complementary platforms:

- The Council of Europe platform to promote the protection of journalism and safety of journalists brings together 14 organisations that draft, verify and submit alerts about a wide range of violations, including judicial intimidation (“arbitrary or vexatious use of legislation”).<sup>14</sup> The platform has documented several cases of SLAPPs since February 2017 across the CoE region.<sup>15</sup>
- The Mapping Media Freedom platform of the Media Freedom Rapid Response monitors media violations in all EU Member States and candidate countries based on contributions from a wide network of experts, journalists, and organisations.<sup>16</sup> The platform regularly documents cases of SLAPPs.

Civil society organisations are also monitoring SLAPP cases against other watchdogs, including rights defenders and environmental activists.<sup>17</sup>

11 OSCE Representative on Media Freedom, *Special Report: Legal harassment and abuse of the judicial system against the media*, 23 November 2021

12 Judit Bayer, Petra Bárd, Lina Vosyliute, Ngo Chun Luk, *SLAPP in the EU context* (May 2020.)

13 See a compilation of recent reports on CASE website: <https://www.the-case.eu/resources>

14 <https://www.coe.int/en/web/media-freedom>

15 <https://go.coe.int/nzTX2>

16 <https://www.mappingmediafreedom.org/>

17 See for example the [report](#) recently published by the NGO Oko Press in Poland.

## CASE mapping of SLAPPs

Between 2019 and 2021, CASE collected data from its members and from other civil society groups on apparent SLAPPs filed between 2010 and 2021. On the basis of this data, CASE has identified 539 legal cases from across Europe as SLAPPs on the basis of the indicative qualities described in Figure 1.<sup>18</sup>

While this data can help illustrate the nature of SLAPPs in Europe and identify the conditions that give rise to SLAPPs, for a number of reasons it cannot fully represent the full scale of the problem:

- Given the sheer quantity of legal threats received by media outlets and other public watchdogs – and the practical difficulties involved in cataloguing these threats – our data only looks at court-recorded lawsuits, and does not therefore consider the extent to which an aggressive legal threat can itself shut down acts of public participation.
- More broadly, any efforts to collect cases of SLAPPs are impeded by the chilling effect such lawsuits create, with many SLAPP victims preferring not to draw attention to their lawsuit out of fear of further retaliation or reputational damage. Any effort to map out the number of

SLAPPs in a region can only ever therefore scratch the surface of the problem.

- Nonetheless, by analysing these 539 cases we have identified a number of trends and patterns. Most notably:
- **Growth:** we have seen an increasing number of SLAPPs filed every year, as can be seen in the below graph:

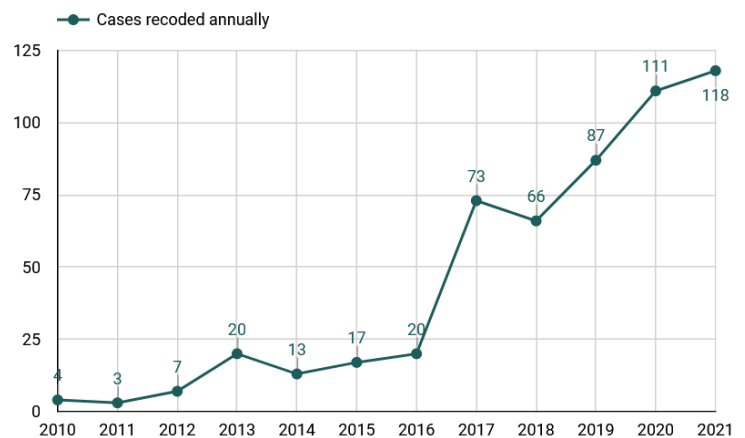


Figure 2: CASE-recorded SLAPP legal cases from 2010 – 2021<sup>19</sup>

In some EU jurisdictions this has been particularly notable. For example:

- › **Croatia:** data compiled by the Croatian journalists’ association (HND) found 905 active court cases against

18 The full list of these cases can be found here: <https://docs.google.com/spreadsheets/d/1-yVc4jceEDR8KBstTG-jtWEQsrabgucZJtLBqNRMbjnQ/edit?usp=sharing>

19 CASE collected data from SLAPP legal cases across Europe from 2010 – 2021

journalists and media outlets in 2020 and at least 924 cases in 2021.<sup>20</sup> According to Mapping Media Freedom platform, online media outlet Index.hr and its journalists are facing 65 active lawsuits.<sup>21</sup> While it is not clear how many of these are SLAPPs, data from previous years showed that only one in ten journalists were eventually convicted or found liable for damages.

- › **Italy:** SLAPPs have proliferated in Italy to the point that Carlo Verna, president of the Order of Journalists, has referred to them as a “democratic emergency”.<sup>22</sup> The number of criminal defamation cases filed under the country’s Press Law doubled between 2011 and 2017,<sup>23</sup> and in 2018 Italy registered the sharpest increase in the number of media freedom alerts, according to a report by the Council of Europe.<sup>24</sup>
- › **Poland:** the biggest daily newspaper, *Gazeta Wyborcza*, has been targeted by a string of more than 60 civil and criminal cases over the last few years,

many of which were initiated by Law and Justice Party (PiS) politicians.<sup>25</sup> Individuals and groups associated with PiS, including party chairman Jarosław Kaczyński, have also targeted investigative journalists and academics. The Polish far-right legal foundation *Ordo Iuris* has also been a prolific SLAPP litigant in recent years, suing activists, NGO employees, and MEPs.

- **Legal basis:** While most of these are based on national defamation laws, or similar provisions on insult or honour, a number of other legal grounds were relied upon as a vehicle for SLAPPs:

20 <https://europeanjournalists.org/blog/2021/04/19/croatia-924-active-lawsuits-against-journalists-and-media-outlets/>

21 [Index.hr and its journalists face 65 active legal actions](#)

22 See <https://journals.sagepub.com/doi/10.1177/0306422020917084>

23 <https://www.rcmediafreedom.eu/Dossiers/Thematic-factsheet-SLAPP-in-Italy-a-democratic-emergency>

24 <https://www.rcmediafreedom.eu/Publications/Reports/Democracy-at-Risk-Threats-and-Attacks-Against-Media-Freedom-in-Europe.-Annual-Report-2019>

25 See <https://www.mapmf.org/alert/23957/> and <https://europeanjournalists.org/blog/2021/03/24/defamation-law-suit-against-gazeta-wyborcza-editor-in-chief-by-polish-justice-minister-must-be-dropped/>

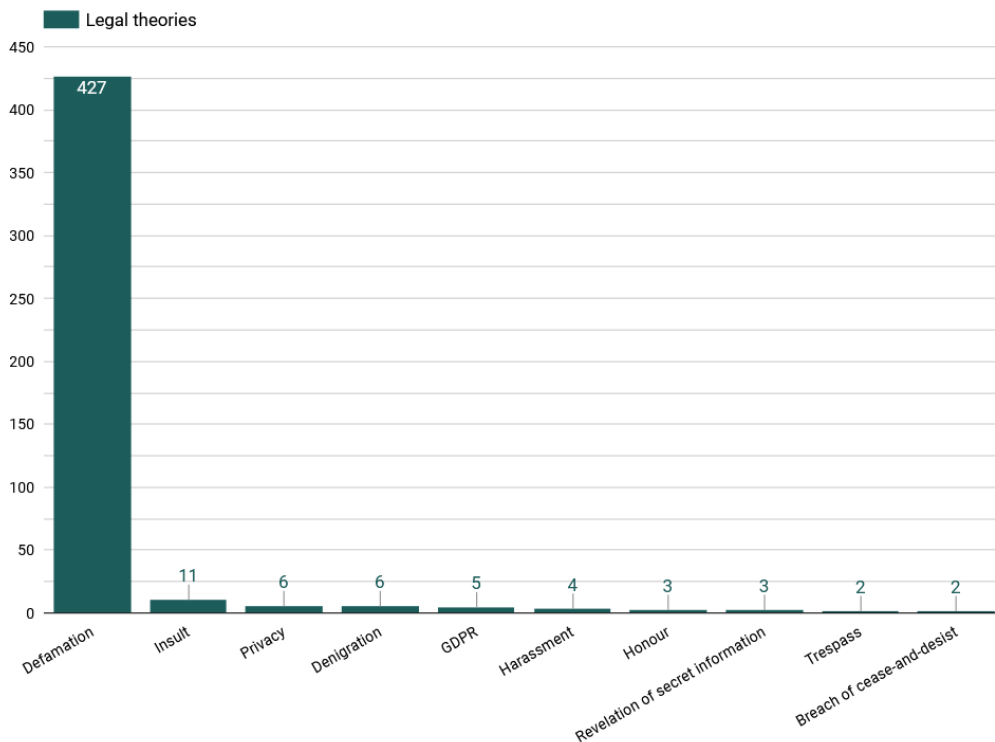


Figure 3: CASE-recorded SLAPP legal cases from 2010 - 2021, legal theories<sup>26</sup>

An increasing number of cases have recently been brought under privacy and data protection claims, notably using the relatively new EU General Data Protection Regulation (GDPR). Such claims allow public interest defences generally available in defamation claims to be circumvented,<sup>27</sup> though court praxis have yet to be seen. An example of this GDPR abuse can be found in the case

filed by energy drink company Hell against the Hungarian weekly Magyar Narancs, for displaying the names of the company’s owners in an article about the business conduct of the company. Previously, the same owners sued Forbes and successfully achieved the removal of their names from the public list of the 100 wealthiest Hungarians.<sup>28</sup>

26 Certain legal theories are specific to the jurisdiction. For example, insult includes cases of insult to the constitutional organ (Poland) and to the President (Turkey). Denigration refers to anti-competition laws in France and breach of cease-and-desist cases only occurred in Germany. The divulging state secrets data point is a Finnish case while the people smuggling claim was made in Greece. Both cases were initiated by the state. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

27 “SLAPPs: Sued into silence”, Greenpeace, July 2020.

28 <https://ipi.media/in-hungary-gdpr-is-the-new-weapon-against-independent-media/>

- Geographical Spread:** The data collected covers 31 jurisdictions. These were: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Kosovo,

Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom, and Ukraine.

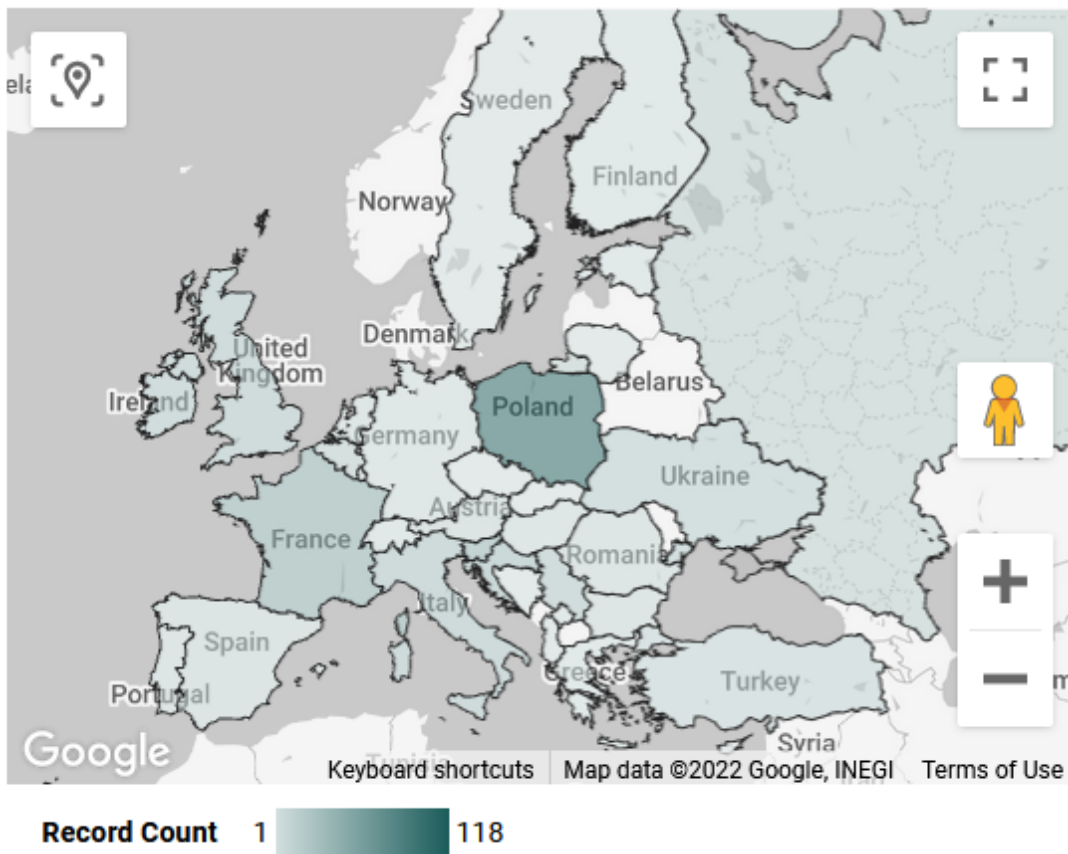


Figure 4: CASE-recorded SLAPP legal cases per jurisdiction from 2010 - 2021<sup>29</sup>

The darker gradient in the map above indicates more SLAPP cases recorded in that jurisdiction. The figure below illustrates the

number of cases recorded per jurisdiction for every 100,000 people in the population.

29 The colour gradient illustrates the number of cases identified in each country in absolute terms. The darker the shade, the more cases recorded. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

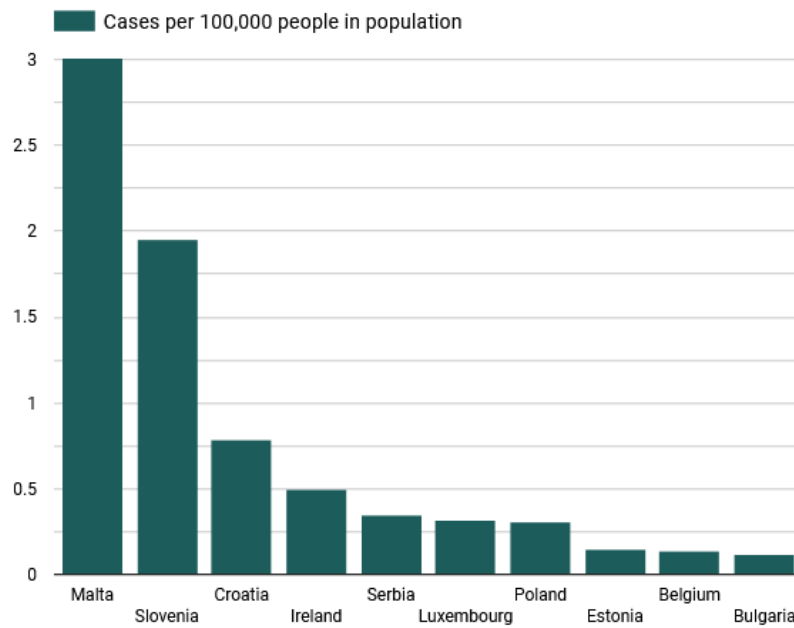


Figure 5: CASE-recorded SLAPP legal cases per jurisdiction per 100,000 people in population from 2010 - 2021<sup>30</sup>

- Relevance of cross-border cases:** 60 out of the 539 cases we recorded (11.1%) were cross-border cases. Most of these cases (36.7%) were recorded in the United Kingdom, followed by France (18.3%). In these SLAPP lawsuits, the complainant filed complaints in jurisdictions with

a link to the case and where they were more likely to achieve the desired result.

30 This graph conveys the number of cases per country per 100,000 people in the population. The value for Malta is reduced for the ease of illustration, and is valued at 8 per 100,000 people. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

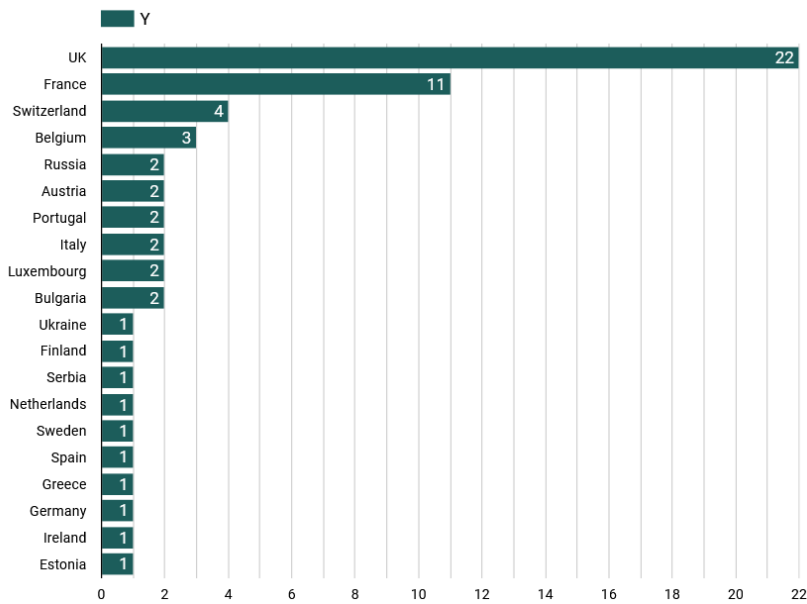


Figure 6: CASE-recorded SLAPP legal cases per jurisdiction from 2010 – 2021, cross-border cases<sup>31</sup>

- **Targets:** The main targets of SLAPPs are journalists (32.7%) and media outlets

(21.3%), but activists, NGOs and academics are also commonly targeted.<sup>32</sup>

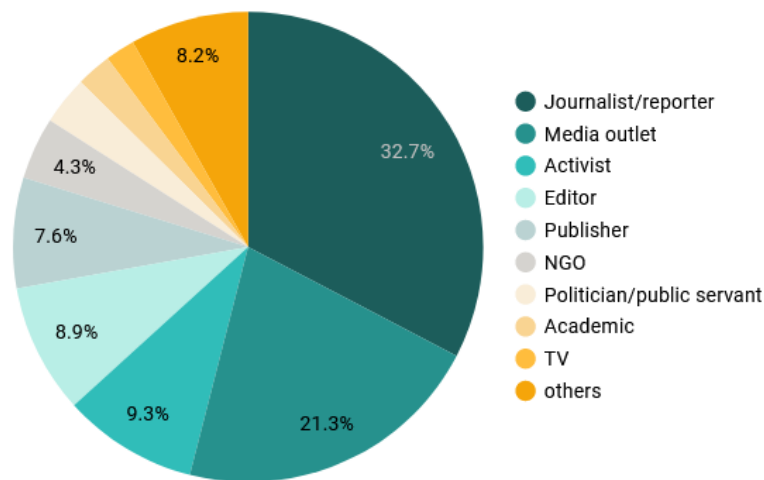


Figure 7: CASE-recorded SLAPP legal cases from 2010 – 2021, most-targeted groups<sup>33</sup>

31 Complainants in SLAPP cases may decide to file the lawsuit in the jurisdiction in which they are more likely to achieve the desired result for cases that can be linked to two or more countries or legal systems. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

32 For more case studies and first-hand stories of the impact of SLAPPs on different public watchdogs, please see the CASE Testimonial page at <https://www.the-case.eu/testimonials>.

33 CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.



- Main perpetrators:** As highlighted in CASE's European SLAPP contest,<sup>34</sup> the most common SLAPP litigants are those in positions of power: businessmen, politicians, public figures, corporations, among others. The great disparity of power and resources between the parties is often used by the SLAPP

plaintiff to exhaust the resources of the target. Our data found that the most common perpetrators were businesses and businesspersons (34%), politicians or people in the public service (24.1%), and state-owned entities and the state, the judiciary, and security services.

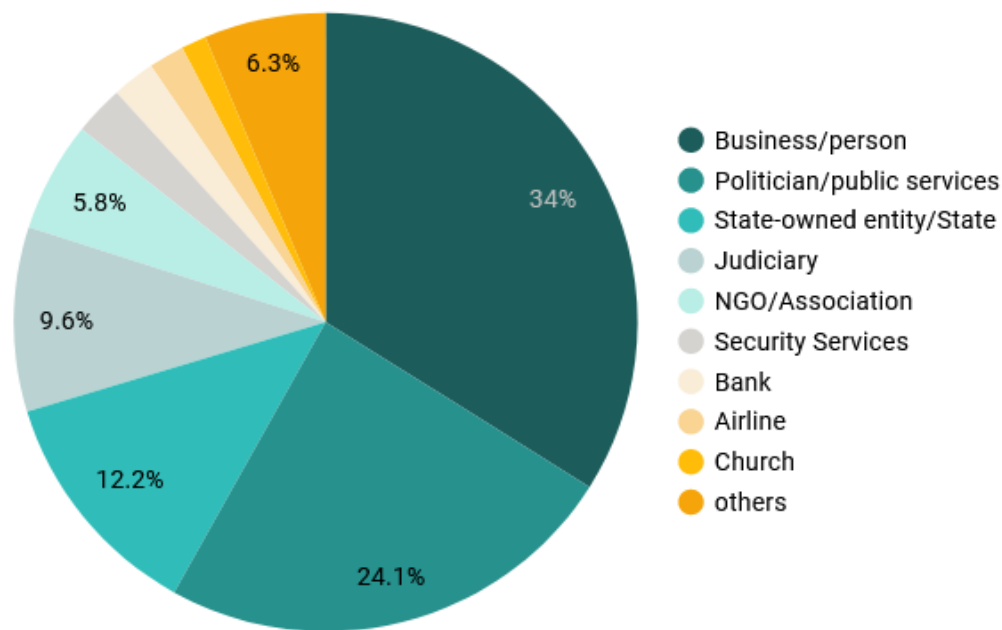


Figure 8: CASE-recorded SLAPP legal cases from 2010 - 2021, most-frequent complainants<sup>35</sup>

34 <https://www.the-case.eu/campaign-list/the-european-slapp-contest>

35 We note with concern that businesses, business persons, politicians and state-owned entities most frequently file vexatious and/or frivolous complaints against public participants. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

Public watchdogs focussing on crime, environment or corruption are typical targets, and sometimes facing multiple cases at the same time. Our research showed that the issues/

sectors most concerned with SLAPPs include the following:

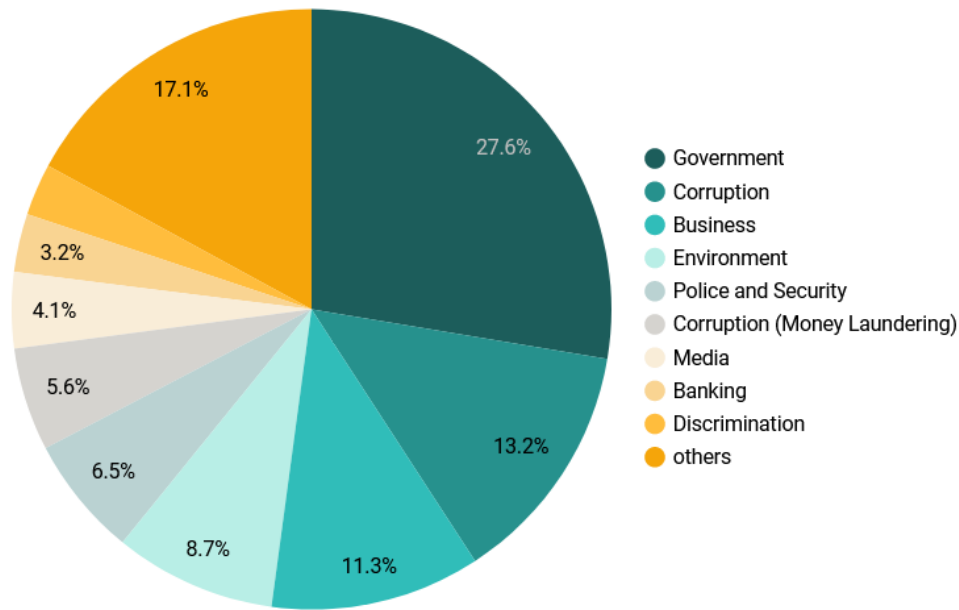


Figure 9: CASE-recorded SLAPP legal cases from 2010 – 2021, sectors/issues most threatened with SLAPPs<sup>36</sup>

- Outcomes:** The outcomes of SLAPP legal cases in the ten European countries we identified as having the highest absolute number of cases from 2010 to 2021

shows that cases are more often won by the defendant, settled, or withdrawn than they are won by the complainant.

36 In the graph, Corruption refers to SLAPP cases targeting public participants that questioned close relations, e.g. between business and politicians and nepotism. Police and Security refer to any cases started by the police, army, or any intelligence firms. Media focuses on cases started when public participants shared an opinion (e.g. through a tweet) or published articles quoting or paraphrasing public persons. Discrimination cases were those that starting following the marginalisation of a group based on the group’s views that the public participant shared. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

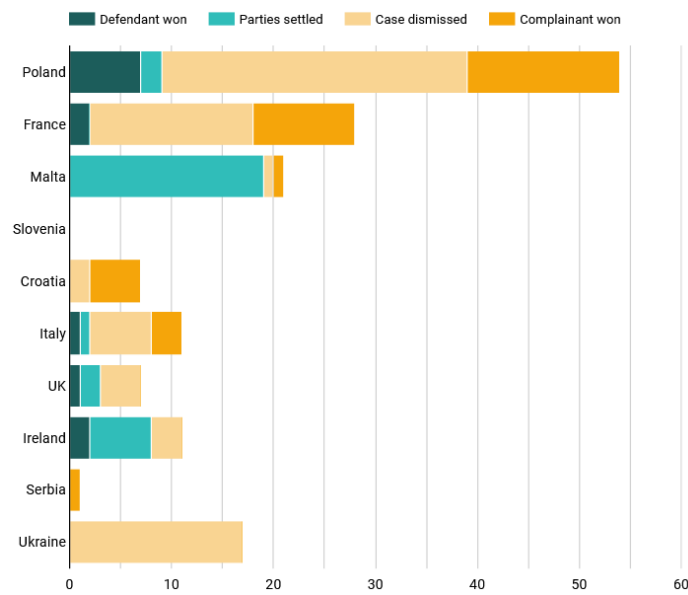


Figure 10: CASE-recorded SLAPP legal cases from 2010 - 2021, outcome of cases from 10 EU countries<sup>37</sup>

The figure below compares documented SLAPP cases won by the defendant, dismissed by the courts or withdrawn (yellow circle) and

those that were successful for the complainant (green circle).

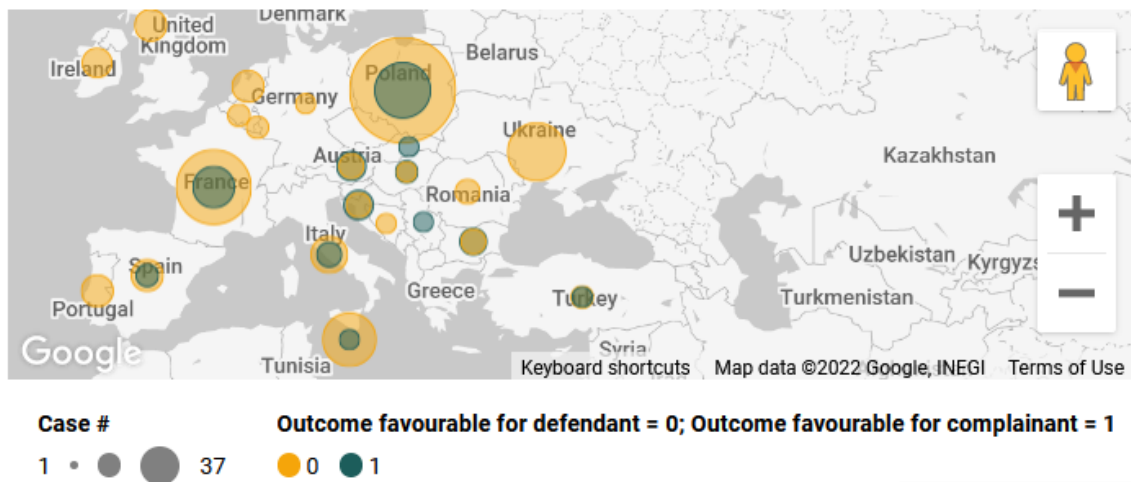


Figure 11: CASE-recorded SLAPP legal cases from 2010 - 2021, outcome of cases<sup>38</sup>

37 Kindly note that no information is displayed for cases that were still ongoing at the time of writing. For this reason, no data is displayed for Slovenia. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

38 SLAPPs are more often won by the defendant, dismissed by the courts or withdrawn than they are successful for the complainant. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

That most SLAPP cases are lost in court does not, of course, diminish the harm they cause to the targets: it's the litigation process that causes the most harm, and this harm – whether represented by the financial costs of prolonged litigation, the psychological harm caused to the defendant, or its ability to distract attention and derail capacity – is therefore most acute where the process is stretched out over a long period of time.

A good example of this can be found in Italy. According to the Italian Journalists' Union FNSI, more than 90% of defamation lawsuits against journalists are dismissed within the first instance of a trial, a number confirmed by data of the National Institute of Statistics ISTAT, according to which only 6.6% go to trial.<sup>39</sup> But dismissals can take years, as in the case of Nello Trocchia, sued by an online training centre for damages to the reputation for 38 million euros in April 2018: the claim was rejected by the civil court of Naples in December 2021, three years and a half later.<sup>40</sup>

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39 <https://www.balcanicaucaso.org/eng/ECPMF/ECPMF-news/SLAPPS-Strategic-Lawsuits-Against-Public-Participation-198695#5>

40 <https://www.articolo21.org/2021/12/nello-trocchia-e-lespresso-non-danneggiarono-la-pegaso-chiusa-con-un-rigetto-lazione-bavaglio-record-fnsi-ora-la-riforma/>

## ***SLAPPs as a “modern wave of censorship-by-litigation”***

SLAPPs obviously have a dire impact on the financial and psychological situation of the victims, as well as their family members.<sup>41</sup> But the threats that SLAPPs pose are not limited to the effects on the defendants alone. Insofar as they allow an affluent minority to hold public dialogue hostage, SLAPPs have an impact on society and democracy as a whole, in what has been defined as a “modern wave of censorship-by-litigation.”<sup>42</sup> This is reflected in the way SLAPPs affect the enjoyment of fundamental rights, weaken the justice systems, intimidate those who speak up, block accountability and impede access to information.

### ***Impact on the enjoyment of fundamental rights***

According to a joint report of 2016 by two UN special rapporteurs, “states have an obligation to ensure due process and to protect people from civil actions that lack merit”, noting the

specific impact of SLAPPs on the right to peaceful protest.<sup>43</sup> Other UN special procedures and resolutions have noted the impact of SLAPPs on rights to free assembly and association, free expression, and the ability of human rights defenders to discharge their functions without impediments.

Insofar as they constitute an abuse of the law and of the courts, SLAPP suits also undermine the rule of law and hinder the enjoyment of the right to an effective remedy for defendants in such disputes. In blocking the ability to advance accountability for human rights violations, SLAPPs threaten the obligation state parties have to guarantee the enjoyment of human rights to all without discrimination.

### ***Right to freedom of expression***

The ECtHR has made it very clear: unreasonably high damages for defamation claims can have a chilling effect on freedom of

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41 SLAPPs can even be transferred to family members: when investigative journalist Daphne Caruana Galizia was murdered, she was already facing over 40 civil and criminal defamation suits in Malta, some of which have continued posthumously against her family.

42 [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL\\_STU\(2021\)694782\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf)

43 [Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 2016.](#)

expression.<sup>44</sup> There must therefore be adequate domestic safeguards so as to avoid disproportionate awards being granted. This means that the states are required to create a favourable environment for participation in public debate by all, enabling everyone to express their opinions and ideas without fear.<sup>45</sup> Not only must they refrain from any interference with an 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.

It is especially noteworthy that the availability of the mosaic approach could constitute a breach of the right to freedom of expression. In *Ali Gürbüz v Turkey*, the ECtHR held that the initiation of multiple proceedings constituted a violation of Article 10 of the ECHR. This case concerned criminal proceedings, and is therefore distinguishable from civil defamation suits which would fall within the scope of the Brussels Ia Regulation. Nevertheless, the reasoning of the ECtHR, which focuses on the chilling effect of multiple proceedings, can be transposed readily to a situation in which a claimant brings several potentially ruinous proceedings in a number of jurisdictions. While the respondent is not faced with potential deprivation of liberty, the opportunity cost of time and money invested in defending a plurality of civil suits has the same effect on

the attractiveness of the exercise of free speech. The mischief of a chilling effect on freedom of expression therefore remains, and, it is submitted, equally constitutes an infringement of Article 10 ECHR.

### ***Right to privacy***

The right to privacy of journalists subjected to SLAPP is protected by Article 8 of the ECHR which guarantees the right to private life, family life, correspondence and home. The claimants' rights to privacy and often family life are engaged in defamation claims.

A well-known journalist from Azerbaijan, Khadija Rovshan qizi Ismayilova, who has conducted journalistic investigations into high-level corruption cases in Azerbaijan alleged in her application to the ECtHR to have been subjected to a campaign of intimidation because of her journalistic activity. In her case,<sup>46</sup> the ECtHR found a breach of the state's positive obligations inherent in the right to private life under Article 8 of the European Convention on Human Rights because of the respondent state's failure to fulfil its positive obligations arising from the right to respect for private or family life, which involves the adoption of measures designed to secure respect for

44 ECtHR judgment of 15.06.2017, case of *Independent Newspapers (Ireland) Limited v. Ireland* (application no. 28199/15)

45 ECtHR's judgment of 14.09.2010, case *Dink v. Turkey* (cases nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)

46 *Khadija Ismayilova v. Azerbaijan* (no. 3), application no. 35283/14

private and family life even in the sphere of the relations of individuals between themselves.<sup>47</sup>

### **Right to information**

The task of the press, to impart information and ideas on all matters of public interest, is connected to the public's right to receive them.<sup>48</sup> This is why SLAPPs also impair the right to information. Access to information is important for making informed choices and for making debates meaningful in a deliberative democracy. Further, the ECtHR also held that refusal of a request for information in the public interest constituted an unjustified breach of the applicant's rights to freedom of expression<sup>49</sup> as "the notion of 'freedom to receive information' embraces a right of access to information".<sup>50</sup>

### **Freedom of assembly and of association**

It is crucial in a democratic society that individuals exercising the right to freedom of association are able to operate freely, without fear that they may be subject to any threats, acts of intimidation, or violence. The fact that NGOs are often targets of SLAPPs induces a fear among other public watchdogs of setting up an association or getting involved in existing ones. Taking into account the watchdog function of NGOs, this can lead to an erosion of democratic standards.

47 There is also a well-established case law of the ECtHR on the relationship between Article 8 and Article 10, according to which when balancing these rights, the Court applies several criteria, such as the contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed: *Axel Springer AG v. Germany* [GC], § 89-95

48 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 126; *Bédat v. Switzerland* [GC], § 51; *Axel Springer AG v. Germany* [GC], § 79; *The Sunday Times v. the United Kingdom* (no. 2), § 50; *Bladet Tromsø and Stensaas v. Norway* [GC], §§ 59 and 62; *Pedersen and Baadsgaard v. Denmark* [GC], § 71; *News Verlags GmbH & Co.KG v. Austria*, § 56; *Dupuis and Others v. France*

49 *Magyar Helsinki Bizottság v Hungary* (Application no. 18030)

50 See *Youth Initiative for Human Rights v. Serbia*, paragraph 20. The Court is of the opinion that as Youth Initiative for Human Rights was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. In the present case the European Court found that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed

## Impact on the justice system

The abusive nature of the SLAPPs rests in its lack of legal merits, in its manifestly unfounded nature or in the claimant’s abuse of rights or of process laws. This exposes the use of the judicial process for purposes other than genuinely asserting, vindicating or exercising a right, but rather of intimidating, depleting or exhausting the resources of the defendant. Consequently, SLAPPs pervert the justice system, turning it into a tool of harassment by the wealthy and powerful.

SLAPPs may also be used in retaliation to attempts to get justice for wrongs, and thus have a direct detrimental impact on access to justice and the right to an effective remedy. General Comment No. 24 of the UN Committee on Economic, Social and Cultural Rights, for example, highlighted the need for sanctions where business activities undermine the rights guaranteed under the International Covenant on Economic, Social and Cultural Rights – including where “the introduction by

corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation’s reputation” is “abused to create a chilling effect on the legitimate exercise of such remedies”.<sup>51</sup>

## Chilling effect

Beyond the censoring effect on the targets of specific SLAPP actions, SLAPPs have a chilling effect on others who report on or draw attention to the same or similar issues. The perspective of disproportionate damage claims and very high litigation costs driven up by SLAPPs not only can reduce targets to silence, but can also intimidate other watchdogs who may refrain from investigating, publishing or speaking out on issues of public concern or other activities because they fear being sued as well.

The essential role played by the press as a “watchdog” in a democratic society has been recognised in a well-established case law of the ECtHR.<sup>52</sup> The ECtHR has recognised that NGOs equally play the role of public

51 United Nations Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, UN Doc E/C.12/GC/24, at 44 a

52 See, among others, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 126; *Bédat v. Switzerland* [GC], § 51; *Axel Springer AG v. Germany* [GC], § 79; *The Sunday Times v. the United Kingdom* (no. 2), § 50; *Bladet Tromsø and Stensaas v. Norway* [GC], §§ 59 and 62; *Pedersen and Baadsgaard v. Denmark* [GC], § 71; *News Verlags GmbH & Co.KG v. Austria*, § 56; *Dupuis and Others v. France*, § 35; *Campos Dâmaso v. Portugal*, § 31.



watchdogs,<sup>53</sup> as well as academic researchers, authors of literature and even bloggers and popular users of the social media.<sup>54</sup> In the Court's view, these public watchdogs are likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally, and deserve as such an increased protection connected to their functions.<sup>55</sup>

By targeting the media, SLAPP can be a tool to reduce media pluralism at the systemic level, by exercising a chilling effect on independent media and journalists. Journalists and editors can be forced to abstain from reporting on specific issues in the public interest and articles or parts of articles can be taken down in response to spurious legal threats.<sup>56</sup>

As the examples illustrated above show, CASE member groups' research and mapping efforts have also revealed the use of SLAPPs as a means to silence and intimidate NGOs and rights defenders, in particular those active in

fields like the protection of the environment, anti-corruption, women's rights and LGBTI rights.

SLAPPs are often filed by big corporations or businesspeople. However, in countries experiencing democratic backsliding, such as Poland, SLAPPs are being used by entities close to the government as a tool for targeting political opponents, thus affecting democracy more broadly.<sup>57</sup> Targets can include independent media and journalists, as shown by the abusive lawsuits brought against *Gazeta Wyborcza*, mentioned above, but also critical academic figures, such as the defamation lawsuits filed against law professor Wojciech Sadurski for defamation in response to the professor's criticism of the ruling party.<sup>58</sup>

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53 *Animal Defenders International v. the United Kingdom* [GC], § 103; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], § 86; *Cangi v. Turkey*, § 35

54 *Magyar Helsinki Bizottság v. Hungary* [GC], § 168.

55 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], § 87

56 See by way of examples recent cases concerning the [EU Observer](#) and the news [website Apache](#).

57 <https://ruleoflaw.pl/strategic-lawsuits-against-public-participation/>

58 <https://www.theguardian.com/world/2020/oct/04/long-arm-of-law-and-justice-the-sydney-professor-under-attack-from-polands-ruling-party>

## ***SLAPPs as a threat to the EU legal order***

Insofar as, as explained above, SLAPPs are a direct attack to the exercise of fundamental rights and restrict the democratic debate, they go against the values which lie at the foundation of the EU in accordance with Article 2 of the Treaty on the European Union (TEU), which include democracy, the rule of law and respect for human rights.

But SLAPPs have a broader, detrimental impact on the EU legal order. Public participation is a key tool to help rights holders to exercise vigilance to protect their rights, and demand legal protection in case of breach. This is also true for rights individuals derive from EU law. By impairing public watchdogs from doing their job, SLAPPs are a threat to the effective enforcement of EU law, including in connection with the internal market and protection of the EU budget.<sup>59</sup>

As already recognised by the EU legislator in relation to the protection of whistleblowers,<sup>60</sup> publicly exposing threats or harm to the public interest is one upstream component of enforcement of EU law and policies. Similar to

whistleblowers reports, the disclosure, dissemination and promotion of information, ideas and opinions on matters of public interest by individuals or organisations engaging in public participation contributes to the detection, investigation and prosecution of breaches of the law, including EU law. Their aim and effect being primarily that of dissuading engaged individuals and organisations from freely expressing views on matters of public interest, SLAPP suits frustrate the flow of information which can serve to inform the enforcement of EU rules by the European Commission and competent national authorities. For the same reason, SLAPP suits hinder the effective legal protection of rights under EU law, which Member States shall ensure pursuant to Article 19 TEU.<sup>61</sup> Indeed, public participation is a key tool to help rights holders to exercise vigilance to protect their rights, and demand legal protection in case of breach. The European Union Agency for Fundamental Rights (FRA) identifies protection against SLAPPs as an urgent and necessary measure to ensure an effective access to a remedy for victims, given the role of individuals and NGOs in

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59 [Strategic Lawsuits Against Public Participation threaten human rights and democracy. The EU must act – Rule of Law](#)

60 [Directive \(EU\) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law](#) (2019).

61 This is also one of the findings of the recent report by the EU Agency for Fundamental Rights (FRA), [Business and human rights – access to remedy](#), where FRA identifies protection against SLAPPs as an urgent and necessary measure to ensure an effective access to a remedy for victims, given the role of individuals and NGOs in bringing cases against or monitoring business activity and its impact on fundamental rights.

bringing cases against or monitoring business activity and its impact on fundamental rights. In the area of environmental policy, the EU is also bound by additional international obligations of the Aarhus Convention to safeguard public participation without persecution or harassment.<sup>62</sup>

SLAPPs are also a threat to the effectiveness of EU law: research shows that SLAPPs in the EU are also construed on abusive interpretations of EU provisions, such as rules on data protection and intellectual property.<sup>63</sup> Such SLAPP suits therefore undermine the correct and uniform application of EU law across the Member States. SLAPPs further hamper the enjoyment of internal market freedoms by journalists, media outlets and civil society organisations.

As SLAPPs distort and abuse civil law remedies, they may undermine the trust between the EU Member States' legal systems, posing a threat to access to justice and judicial cooperation.<sup>64</sup> On the one hand, they undermine mutual trust as they give rise to abusive proceedings that hinder access to justice and the right to an effective remedy of SLAPP targets. This can give rise to situations where courts refuse the enforcement of rulings issued by other Member States' courts based on their own national standards on what constitute abusive claims. On the other hand, they

overburden national justice systems through an improper use of the judicial process, and foster libel tourism. Indeed, SLAPP suits in the EU can easily be construed as cross-border disputes. Those cross-border elements are taken advantage of forum shopping, as plaintiffs make use of applicable rules of private international law to select the jurisdiction where the likelihood of achieving the desired result is the greatest instead of the one that has the closest connection to the dispute.

SLAPPs are also a threat to the freedom of movement, as they discourage potential targets from confidently operating in jurisdictions where the risk of such abusive litigation is higher than elsewhere in the EU. A uniform protection from strategic lawsuits against public participation also would have a direct beneficial impact on the enjoyment of internal market freedoms by individuals and organisations most vulnerable to such claims: journalists, media outlets and civil society organisations would in fact be able to operate more confidently across the EU if the same level of protection against SLAPP suits were provided in all Member States' jurisdictions.

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62 Article 3(9) 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

63 See Index on Censorship, *A gathering storm - The laws being used to silence the media*, cited.

64 See for example this [case](#) reported by the French newspaper Capital.

## **Countering SLAPPs and supporting victims: non-governmental actors in the lead**

CASE member groups have been working on behalf of journalists, activists, whistleblowers, rights defenders and other watchdogs targeted by SLAPP tactics to expose legal harassment and intimidation, protect the rights of those who speak out, and advocate for comprehensive protective measures and reform.

### **Advocating for anti-SLAPP measures at national and EU level**

ARTICLE 19 and ECPMF analyse new draft anti-SLAPP legislation as it is proposed and review existing problematic laws, for example in Poland, Spain and Greece.

Justice and Environment ran a brief survey on anti-SLAPP measures in six EU jurisdictions (Austria, Estonia, Greece, Spain, Croatia and Hungary) and also conducted a questionnaire-based survey of six countries and territories of the Western Balkan region (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia and Kosovo [UNMIK]) regarding the status of environmental human rights defenders.

At the European level, the NGO members of CASE commissioned and published the EU Model Anti-SLAPP Directive, which has been endorsed by more than 80 NGOs and base our EU institutions Anti-SLAPP advocacy on the provisions the Model Directive elaborates.<sup>65</sup> In addition, the CASE coalition members advocated for a Council of Europe self-standing recommendation on SLAPPs, supported by 106 NGOs.<sup>66</sup> In December 2021, an Expert Committee on SLAPPs (MSI-SLP), subordinated to the Steering Committee on Media and Information Society (CDMSI), was established within the Council of Europe to develop and publish a self-standing recommendation by the end of 2023.

### **Providing reporting channels**

From the 539 legal cases CASE identified on the basis of data and information collected from its members, partners, and other individuals and entities, 299 lawsuits – more than half of the cases (55.5%) – were targeted at individuals.

65 [Protecting public watchdogs across the EU: a proposal for an EU anti-SLAPP law \(2020\)](#).

66 <https://www.the-case.eu/campaign-list/the-need-for-a-council-of-europe-recommendation-on-slapps>

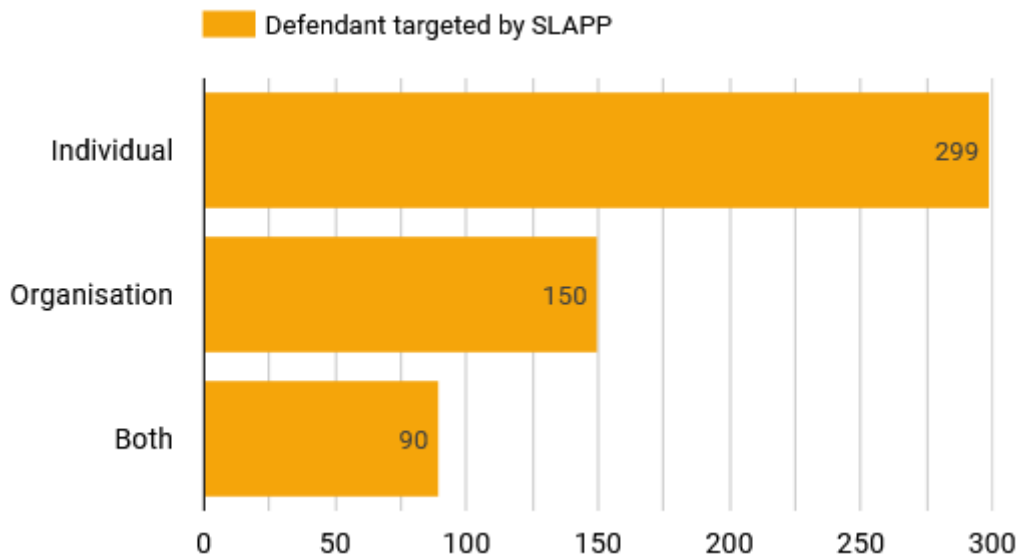


Figure 12: CASE-recorded SLAPP legal cases from 2010 - 2021, category of targets<sup>67</sup>

This shows how critical it is that reporting channels are easily accessible so that individuals facing SLAPP cases receive the necessary support.

Several CASE members including ARTICLE 19, the European Centre for Press and Media Freedom (ECPMF), the European Federation of Journalists (EFJ), the International Press Institute (IPI), OBCT, Greenpeace, Index on Censorship, and others actively receive alerts, map and regularly report about SLAPP cases across Europe. CASE is also piloting the use of a general reporting form made available on its website.<sup>68</sup>

## Mapping support networks and providing legal support to victims

CASE has been working to map out lawyers, legal services, and funds that exist to support public watchdogs facing SLAPPs across Europe. This map can be found on CASE website<sup>69</sup> and includes support offered by CASE members, such as the funding for legal assistance to journalists who are fighting SLAPPs provided by the Legal Affairs Committee of ECPMF.<sup>70</sup> While a number of funds exist to support journalists and media

67 CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

68 <https://docs.google.com/forms/d/e/1FAIpQLSfAHCLT8F7FnhJ2H8ATEp3kSLzrnXDvQFYHmwctKQeKI-yrSIQ/viewform>

69 <https://www.the-case.eu/legal-support>

70 <https://www.ecpmf.eu/support/legal-support/>

organisations, we are not aware of any such funds set up to assist activists or human rights defenders. A number of organisations, including ARTICLE 19 and Index on Censorship, also observe SLAPPs trials in court and in online proceedings, providing crucial scrutiny of legal processes.

## ***Raising awareness***

CASE member groups work together to raise awareness about SLAPPs. These efforts include initiatives directed at the general public – such as the European SLAPP contest<sup>71</sup> – and joint statements to draw attention to individual cases. Raising awareness is also important to those targeted, as in many cases victims of SLAPPs do not identify their case as such and so do not report it, which makes it difficult to monitor the phenomenon. CASE members and partner organisations have also made efforts to feature SLAPPs in relevant training programmes for legal professionals, including training courses on freedom of expression offered by the Council of Europe, and some organisations are exploring opportunities to offer tailored trainings at national level.

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71 <https://www.the-case.eu/campaign-list/the-european-slapp-contest>

## ***Calling on states to take action against SLAPPs as part of their commitment to democracy, rule of law and fundamental rights***

As explained above, SLAPPs constitute a significant threat to freedom of expression and can impair the enjoyment of several other human rights such as the right to freedom of assembly and association or the right to privacy. This is contrary to states' obligations under human rights law. Insofar as they constitute an abuse of the right to access courts and the justice system, and they produce a chilling effect on public watchdogs and on public debate on matters of public interest, they weaken the rule of law framework and are at odds with democratic principles.

States, including all EU Member States, are committed to the respect and protection of human rights and fundamental values of democracy and rule of law under international and regional human rights instruments as well as the EU Treaties.<sup>72</sup> As stated by international and regional human rights bodies, including the UN Human Rights Council,<sup>73</sup> Council of Europe Commissioner for Human Rights<sup>74</sup> and the OSCE Representative on Freedom of the Media,<sup>75</sup> international human rights

standards on freedom of expression and information, as well as on the right to a fair trial, impose a positive obligation on states to provide protection against SLAPPs. The Council of Europe and other international bodies have issued guidance on how to ensure domestic law properly balances free expression against rights of others, such as privacy or protection of reputation. Indeed, under those human rights standards, SLAPP claims, considering their abusive nature, are not protected by the right to access to a court. This is reflected, among others, in relevant jurisprudence of the ECtHR. For example, the Court made it very clear that unreasonably high damages in relation to defamation claims can have a chilling effect on the freedom of expression and, therefore, there must be adequate domestic safeguards to avoid disproportionate awards being granted.<sup>76</sup> It also pointed to the need for states to deter abuses of judicial process through vexatious litigation and to support the targets, also as a means to safeguard the principle of equality of arms.<sup>77</sup>

72 See in particular Article 2 and Article 6 of the Treaty on European Union.

73 <https://undocs.org/A/HRC/47/39/Add.2>

74 <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>

75 <https://www.osce.org/representative-on-freedom-of-media/505174>

76 ECtHR, *Case of Independent Newspapers (Ireland) Limited v Ireland*

77 ECtHR, *Steel and Morris v UK*, Application no. 68416/01.

As illustrated in recent studies commissioned by the European Parliament<sup>78</sup> and by the European Commission,<sup>79</sup> however, current legislation and judicial procedures in EU Member States often fail, in practice, to give effect to the principles enshrined under international human rights instruments and jurisprudence.

As already recommended by CASE member groups,<sup>80</sup> a comprehensive response made of legislative and non-legislative measures should be devised by states for them to abide by their positive obligation to provide protection against SLAPPs. These measures should be directed at ensuring that the use of SLAPPs is deterred, plaintiffs are penalised, cases are

quickly dismissed from court and defendants and their families are given the necessary support.

## Bringing laws criminalising speech in line with human rights standards

Among the 539 SLAPPs studied by CASE, a number of cases made use of criminal complaints:

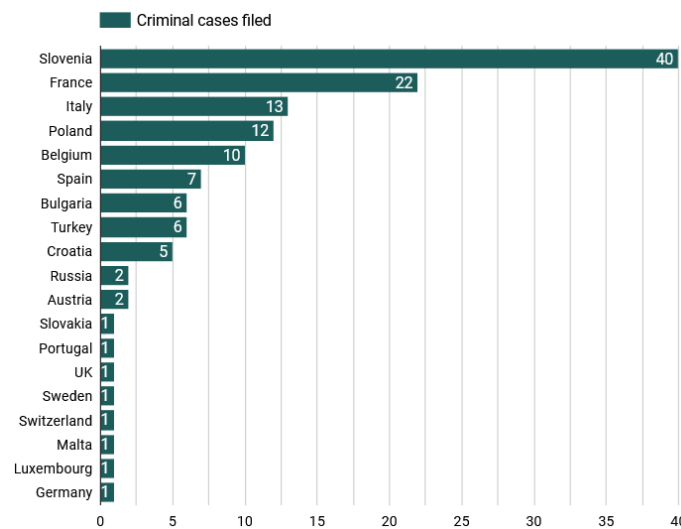


Figure 13: CASE-recorded SLAPP legal cases from 2010 – 2021, criminal complaints filed against public participants<sup>81</sup>

78 Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* (June 2021).

79 Judit Bayer, Petra Bárd, Lina Vosyliute, Ngo Chun Luk, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study* (June 2021).

80 Policy paper, *Ending Gag Lawsuits in Europe Protecting Democracy and Fundamental Rights*

81 Although a number of EU countries have made it illegal, we found various cases of criminal complaints filed against public participation. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, avail-



Many documented SLAPP cases are grounded in defamation, libel and slander provisions, whose very nature easily lends itself to a SLAPP case, also due to the shift in the burden of proof to the defendant to defend the contested statements or allegations.<sup>82</sup>

Defamation, libel and slander still constitute criminal offences in most Member States, despite repeated calls for decriminalization by international and regional bodies including the Council of Europe.<sup>83</sup> Consequently, SLAPP cases can be brought under both criminal and civil law – and, at times, are filed in parallel.

Case law from the ECtHR exposes how, in a number of countries, substantive national law on defamation, and its application, do not align with requirements under human rights standards on freedom of expression.<sup>84</sup> In particular, the Court's case law has pointed at the chilling effect that the threat of disproportionate sentences under many of these laws, including imprisonment or defamation awards in the hundreds of thousands and even millions of euros, has on the exercise of freedom of expression and information.<sup>85</sup>

Against this background, a comprehensive response to SLAPPs should include a revision of laws criminalising speech, and in particular

criminal defamation laws – including insult, libel, or slander – aimed at ensuring full compliance with international human rights standards, as recommended on numerous occasions by international bodies and in particular the Council of Europe.

## **Procedural safeguards**

Safeguards should be built into national legal and procedural frameworks in order to dissuade plaintiffs from bringing SLAPPs, counter the harmful effects of SLAPP suits, and redress the imbalance between parties in such cases. Such safeguards should provide to defendants procedural tools to stop such lawsuits and avoid them being dragged on for years, as well as measures to support them when facing such a threat. Key safeguards should include:

- Procedural rules on the early dismissal of SLAPP suits
- Rules setting deadlines to bring cases under provisions vulnerable to be abused to bring SLAPPs
- Favourable rules on discovery and burden of proof in SLAPP cases

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able at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>

82 ARTICLE 19, SLAPPs against journalists across Europe, forthcoming.

83 <https://www.coe.int/en/web/freedom-expression/defamation>

84 See the statistics published by the ECtHR, which show a violation of the right to freedom of expression in the majority of defamation cases brought before it

85 [https://www.echr.coe.int/Documents/FS\\_Reputation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf)

- Rules to impede plaintiffs from bringing multiple SLAPP suits regarding the same, or a substantially similar, matter
- Rules to effectively bar the enforcement of judgments that have been obtained in other jurisdictions in clear contravention of the defendant's rights, including cases where the defendant has not been, and could not reasonably have been, able to defend themselves
- Caps on damages or other rules to ensure that the amounts for awards for damages that may be claimed in cases that arise from public participation on matters of public interest are reasonable and proportionate
- Rules to ensure a fair award of costs in cases that arise from public participation on matters of public interest, including the possibility for defendants in such cases to obtain interim cost awards and the ruling out of requests for surety payments into courts or freeze of bank accounts for defendants
- Rules to allow defendants in SLAPP cases to file incidental claims for damages
- Rules providing for the possibility of penalties and/or punitive damages being imposed on plaintiffs when the case is dismissed as a result of the courts' finding of abuse of the process or a SLAPP-type case
- Rules allowing third parties, in particular non-governmental actors, to intervene in court proceedings in cases that arise from public participation on matters of public interest
- Rules allowing the defendant to be substituted in proceedings by a third party bearing responsibility for the behaviour at the origin of the claim (such as it would be, for example, the editor or publisher for a journalist) in cases that arise from public participation on matters of public interest

## ***Victims' support***

States should set in place measures to ensure that SLAPP targets can be provided with assistance, support and protection both within and outside the judicial process. These should at least include:

- assistance to enable effective exercise of the right of defence, such as free legal aid and advice
- the provision of support services, including against the risk of emotional or psychological harm
- measures to protect targets and their closed circles from further intimidation and retaliation
- political and financial support to strengthen and fund civil society organisations, professional

associations and networks providing support and assistance to SLAPP targets

## **Professional standards for lawyers**

CASE member groups have identified a number of the same lawyers or law firms representing SLAPP plaintiffs. Some of these cases are transparently abusive and the role of the lawyers in facilitating these SLAPPs has been called out by civil society.<sup>86</sup> Others are currently subject to complaints to regulators.

While legal ethics regulation generally holds lawyers to integrity principles, and puts them under a duty to respect the courts and uphold the rule of law and administration of justice, currently, there are no legal ethics regulations that explicitly address SLAPPs or the role of lawyers in facilitating them across the EU. At the same time, the general principles recalled above are not, to our knowledge, used to sanction lawyers for pursuing abusive tactics or undertaking SLAPP lawsuits. At present, there is thus very little to hold lawyers to account for SLAPPs or SLAPP tactics (i.e. efforts to use the legal process to harass or intimidate).

In addition to the recommendation, set out above, of imposing punitive damages or penalties on SLAPP filers, states should therefore also invite their national legal regulatory bodies to explore the extent to which legal ethics should address SLAPPs and treat them as sanctionable disciplinary offences.

## **Creation of and/or support to independent bodies**

Independent authorities like ombudspersons or press councils have a role to play in hearing complaints from and providing assistance to persons threatened or faced with SLAPP suits, and even assessing and acting upon such complaints through investigative and corrective powers. They could even act as a filter of claims related to public participation on matters of public interest, before these reach the courts. States should explore this possibility and take measures to create or support independent bodies playing such a role.

## **Awareness raising & trainings**

Raising awareness on SLAPPs is key to sensitising both the public and legal professionals,

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86 [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_pos=2&p\\_p\\_col\\_count=3&sojdashboard\\_WAR\\_coesojportlet\\_alertId=101756636](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3&sojdashboard_WAR_coesojportlet_alertId=101756636)

in particular judges and lawyers, to the issue. States should therefore facilitate the provision of both general and specialist training to judges and lawyers to increase their awareness of SLAPP suits.

At the same time, training can substantially contribute to building knowledge and capacity in targets and potential targets on how to deal with such lawsuits, and the threat thereof. States should therefore promote and support training on SLAPPs for targets and potential targets, such as journalists and civil society actors.

## **Data collection**

States should compile comprehensive statistics on SLAPP suits to contribute to the phenomenon being accurately mapped and assessed. This should include qualitative and quantitative data that is gathered and made public on an annual basis. The data should include SLAPP legal cases arising from public participation and matters of public interest, their related court decisions, and the application of any preventive, supportive and deterrent measures. Any data collection exercise could build upon the data collected by CASE on SLAPP cases from 2010 to 2021.<sup>87</sup>

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87 CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

## Untapping the key role of the EU

As illustrated in previous sections, SLAPPs are an EU-wide issue since, on the one hand, they affect most Member States across the EU, and, on the other hand, have a detrimental impact on the EU legal order, the respect for EU values and, the health of EU Member States' democracies.

Given the scale and nature of the problem, the EU has the responsibility and the necessary power and competences to champion standards and measures that inform and improve actions taken by the Member States, along the lines of what this consultation's recommendations. While the Whistleblower Directive sets an important precedent for protecting those who report a breach of Union law in a work-related context, a strong EU response to SLAPPs is a further necessary step to protect public participation. As the European Parliament also recommended,<sup>88</sup> such a response should consist of a combination of ambitious legislative and non-legislative measures.

The anti-SLAPP initiative by the EU should also champion and drive progress in the rest of Europe and beyond as part of the EU's efforts to promote human rights and democracy in candidate, neighbourhood and third countries.

### An EU anti-SLAPP Directive

Based on the EU's competences as established by the Treaties, the EU legislator can introduce harmonised rules to guarantee a high and uniform standard for the protection of natural and legal persons targeted by SLAPP suits brought on civil and commercial matters across the EU, and thus preserve the internal market from its harmful effects. Such rules would respond to the objective of promoting the proper functioning of the internal market<sup>89</sup> by means of ensuring effective access to justice and promoting the compatibility of the rules on civil procedure applicable in the Member States to eliminate obstacles to the proper functioning of civil proceedings.<sup>90</sup>

The introduction of such harmonised rules would be in accordance with the principle of subsidiarity, as the objective of ensuring a high and uniform standard for the protection of persons targeted by SLAPP suits across the EU may only be achieved at EU level. Indeed, individual or uncoordinated initiatives at national level would likely perpetuate fragmentation of protection and the related

88 [https://www.europarl.europa.eu/doceo/document/A-9-2021-0292\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-9-2021-0292_EN.pdf)

89 As allowed by Article 114 of the Treaty on the Functioning of the European Union.

90 As allowed by Article 81 of the Treaty on the Functioning of the European Union.

negative impact of such fragmentation on the EU legal order.

Such harmonised rules would need to be implemented in accordance with national judicial systems, leaving to Member States the possibility to introduce or retain provisions more favourable to SLAPP targets. This would guarantee high level standards of protection, while ensuring respect for the principle of national procedural autonomy and differences in Member States' legal and judicial traditions and thus secure the proportionate nature of the EU legislative intervention. To that effect, a Directive appears as the most appropriate instrument to achieve the objectives pursued.

CASE member groups have published in December 2020 a model EU anti-SLAPP directive to inform the EU's reflections and influence its action.<sup>91</sup> The text was drafted and reviewed by a wide group of high-level experts and is the result of an intense collective effort of research and analysis of cases and gaps in the existing legal framework. It has been already endorsed by more than 70 media freedom and human rights groups.

In line with proposals made in the model directive, CASE member groups recommend the Commission to come forward with a proposal for an EU anti-SLAPP Directive based on a sound and comprehensive understanding of SLAPPs. As illustrated above, this should build on:

- a broad, non-exhaustive definition of public participation, including any forms of expressive conduct and linked to the inherently connected element of public interest;
- a broad, non-exhaustive identification of SLAPP plaintiffs and targets, including both natural and legal persons irrespective of their role, status, function or activities. These shall include, in particular as regards the former, government authorities or agencies or public officials, whose position of power, as stated by the ECtHR, makes it necessary for them to “display restraint” in resorting to libel or criminal proceedings<sup>92</sup>;
- a broad, non-exhaustive identification of SLAPP suits, which shall include any type of legal claim, including actions to obtain interim, precautionary or other prior restraint measures.

The EU anti-SLAPP Directive shall oblige Member States to adopt, as a minimum, the following measures, building on the proposals made in the model directive:

- procedural rules to allow courts to early dismiss SLAPP claims
- procedural rules ensuring a fair award of costs and relief to rebalance the position of the parties

91 See more information and a link to the [document](#).

92 See, for example, [ECtHR, Dyuldin and Kislov v. Russia](#), Application no. 25968/02.

- rules providing for the possibility to impose penalties and/or punitive damages as deterrent, also to counter libel tourism inside and outside the EU
- provisions on assistance, support and protection for SLAPP targets, including legal advice free of charge
- measures to promote awareness raising, training and data collection

The EU anti-SLAPP directive should also address issues raised by SLAPPs brought in third countries against defendants who are domiciled or habitually resident within the territory of the Union, as a minimum by ensuring that, when SLAPP cases are brought before courts of third countries against defendants domiciled in Member States although a Member State's court would have had jurisdiction to hear the claim, defendants have access to appropriate remedies before the courts of the Member State where they are domiciled, such as the possibility to obtain a summary award of damages and the imposition of penalties.

Harmonised rules put forward in the EU anti-SLAPP Directive should be applicable to both cross-border and domestic SLAPP cases. To that effect, the EU legislator should carefully consider and assess all the possibilities offered

by the EU Treaties in terms of legal basis for the adoption of such a legislative instrument.

Should the EU legislator come to the conclusion that its legislative intervention may only be limited to SLAPP cases with a cross-border implication pursuant to Article 81 of the Treaty on the Functioning of the European Union, the proposed EU anti-SLAPP directive should build on a broad interpretation of the notion of “cross-border implication”, going beyond the reference to the place of domicile or habitual residence of the parties contained in existing EU instruments. In particular, the EU legislator should include in the notion of “cross-border implication” for the purpose of the EU anti-SLAPP Directive, a reference to cases where there is a close factual connection between the action and the legal system of another Member State. Such factual connection should be identified by reference to:

- the place(s) in which the allegedly harmful public participation act was committed or may be committed or its effects were manifested, or, as regards a claim for damages or restitution based on an act giving rise to criminal proceedings, the place of those proceedings (mirroring applicable private international law rules on the choice of jurisdiction<sup>93</sup>), and

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93 See in particular Article 7 of Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Criteria considered in an EU anti-SLAPP instrument based on Article 81 should be revised in accordance with possible future revisions of the private international law framework, especially as regards defamation.

- the relevance to more than one Member State of the public interest matter at stake, including situations where the subject matter raised by the contested public participation act:

(i) relates to persons or legal entities domiciled or habitually resident in more than one Member State – including in the case of participation acts tackled simultaneously through multiple lawsuits filed in different jurisdictions by the same plaintiff or associated entities (including multinational corporations or members of a cross-border business conglomerate);

(ii) relates to actual or potential breaches of Union law or to acts affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures (mirroring relevant provisions on scope contained in the Whistleblower Protection Directive (EU) 2019/1937).

Such a solution would make sure the instrument offers meaningful protection while not going beyond the scope of Article 81 TFEU and ensuring consistency with relevant private international law rules on the choice of jurisdiction.

An EU anti-SLAPP Directive tackling cross-border cases should, in any event, include strong provisions explicitly inviting the Member States to expand the scope of its provisions to domestic cases, too.

## **A reform of the EU private international law framework**

As already recommended in the recent study commissioned by the European Parliament,<sup>94</sup> in addition to the adoption of an anti-SLAPP Directive, CASE member groups recommend the EU legislator to propose a targeted reform of the EU private international law framework. Such reform should, in particular:

- recast the Brussels Ia Regulation to distinguish jurisdiction in defamation cases from ordinary torts, and grounding jurisdiction in such cases in the forum of the defendant's domicile
- include a new rule in the Rome II Regulation to harmonise national choice of law rules in defamation cases. Such a rule should focus on the closest connection with the publication and its audience, namely the law of the place to which the publication is directed.

94 Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka, *The Use of SLAPPS to Silence Journalists, NGOs and Civil Society*, cited.



## **A strong recommendation to drive further progress at national level**

CASE group members also call on the European Commission to put forward, as part of its anti-SLAPP initiative, a strong recommendation calling on Member States, as a minimum, to:

- Ensure that the procedural and other safeguards contained in the EU anti-SLAPP Directive also apply to domestic cases that do not have cross-border implications
- Take steps to bring laws criminalising speech, and in particular defamation, libel and slander, in line with international human rights standards
- Promote a discussion on legal ethics and professional standards
- Promote and support awareness raising initiatives and trainings, in particular of judges and legal professionals
- Engage with and support independent bodies, civil society organisations, professional associations and networks to provide support and assistance to SLAPP targets
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## **EU level guidance and support**

On its side, the European Commission should support the implementation by Member States of these recommendations, including by:

- Providing guidance on the interpretation and application of EU anti-SLAPP rules as well as any other EU legislation relevant to SLAPPs (such as, for example, data protection rules, to minimise their abuse by SLAPP litigants)
- Maintaining in place the EU expert group on SLAPPs with a view to:
  - provide technical assistance to the authorities
  - ensure close monitoring of the implementation of EU rules and recommendation
  - ensure an evaluation and possible review of EU measures
- Engaging and stimulating contributions to these efforts by relevant EU level bodies, including the EU Agency for Fundamental Rights, Council of Bars and Law Societies of Europe, the European Judicial Training Network and the European Network on Victims' Rights
- Cooperating with the Council of Europe to provide capacity building for legal

professionals on freedom of expression  
and media freedom

- Earmarking funding under the Citizens, Equality, Rights and Values Programme and under the Justice Programme to support awareness raising initiatives, trainings programmes and programmes to provide SLAPP targets with support and assistance, including by civil society organisations



## ***List of contributing member groups***

Aditus foundation

ARTICLE 19

Blueprint for Free Speech

Civil Liberties Union for Europe

Civil Society Europe

Committee to Protect Journalists

Environmental Paper Network

European Center For Not-For-Profit Law  
(ECNL) Stichting

European Centre for Press and Media Free-  
dom (ECPMF)

European Environmental Bureau (EEB)

European Federation of Journalists (EFJ)

European Trade Union Confederation  
(ETUC)

Global Forum for Media Development  
(GFMD)

Greenpeace European Unit

Helsinki Foundation for Human Rights

Human Rights House Foundation (HRHF)

ILGA-Europe – the European Region of the  
International Lesbian, Gay, Bisexual, Trans  
and Intersex Association

Index on Censorship

International Media Support

International Press Institute (IPI)

Justice for Journalists Foundation

NGO Shipbreaking Platform

OBC Transeuropa (OBCT)

Organized Crime and Corruption Reporting  
project (OCCRP)

PEN International

Reporters Without Borders (RSF)

Sherpa

Terra Cypria-The Cyprus Conservation  
Foundation

The Daphne Caruana Galizia Foundation

Transparency International EU

Umweltinstitut München