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Countering SLAPPs: an imperative for a democratic society

Report¹

Committee on Culture, Science, Education and Media

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Summary

Strategic lawsuits against public participation (SLAPPs) are a manipulation of the judicial system and undermine its inherent protective role by misusing it. SLAPPs disrupt investigations and reporting work by the media, but also seek to silence civil society organisations and activists; they impede the exercise of the right to freedom of expression and the right of citizens to receive information on matters of public interest.

The report calls on Council of Europe member States to ensure robust procedural protections against SLAPPs, making provisions for: an early dismissal of manifestly unfounded or abusive lawsuits; full and timely compensation of damages suffered by the victims, including non-patrimonial ones; punitive damages or fines applicable to the SLAPP initiator; avoiding forum shopping, including by the determination of the court with territorial jurisdiction on the basis of the defendant's domicile; and the establishment of legal, financial and psychological assistance for the victims of SLAPPs.

The report also underlines the need to act together. It commends the ongoing drafting of a recommendation of the Committee of Ministers intended to counter SLAPPs, and it calls on the Committee of Ministers to maintain a bold position and to enshrine in the forthcoming recommendation a wide range of safeguarding mechanisms and remedies.

1. Reference to committee: [Doc. 15419](#), Reference 4625 of 24 January 2022.



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A. Draft resolution²

1. In recent years, there has been a steady increase in the number of Strategic Lawsuits Against Public Participation (SLAPPs). The term refers to abusive litigation and legal tactics designed to prevent, hinder or sanction public participation, that is the dissemination of information on sensitive issues and contributions to public debate on “matters of public interest”, including a wide range of journalism, advocacy, communication and speech. In this respect, all matters where the public has a legitimate interest, including issues which affect the public and those which inspire controversy, but not issues of a purely private nature, must be considered of “public interest”.
2. The Platform to promote the protection of journalism and the safety of journalists of the Council of Europe describes SLAPPs as a form of “harassment and intimidation of journalists” or “acts having a chilling effect on media freedom”, depending on the source of the threat and the legal approach taken by the claimant. But while this worrying phenomenon seriously undermines media freedom, journalists are not the only victims, as such lawsuits may also target, for example, activists, whistle-blowers, human rights or environmental groups, trade unions, and any other individual or entity raising issues of public interest.
3. Although no European country has defined SLAPPs in law, they systematically present the following common features: i) they consist in legal actions, legal proceedings or other litigation that are initiated or pursued, or threatened to be, as a means of intimidating, harassing and silencing an individual or a legal person wishing to inform the public on a matter of public interest and/or to participate in a public debate on such a matter or in public affairs; and ii) they are a frivolous, vexatious or malicious – thus abusive – use of legal proceedings and legal guarantees with an aim or a concrete risk of preventing, hindering or sanctioning public participation.
4. There are other typical characteristics of SLAPPs, which however are not necessarily all simultaneously present in each case. Claimants are usually in a position of (economic and often political) power and have considerably more resources than the defendants they seek to intimidate and silence (journalists, media or activists). The claimants or their lawyers often advance aggressively framed or spurious arguments. Despite the weakness of their legal arguments, the claimants demand exorbitant amounts of damages and ramp up and draw out legal proceedings so as to force defendants to spend significant amounts of time and money defending their case. Sometimes, many co-ordinated legal actions related to the same event, and which can also have a cross-border element, are initiated by the claimants or their associated parties. The claimants may also orchestrate denigratory public relations campaigns against the defendants, to humiliate and delegitimise them. This is largely a matter of threats and the desire to intimidate and bully them into self-censorship, not so much to avert the risk of conviction, but to avoid the certainty of having to make considerable sacrifices for justice to be served.
5. SLAPPs may thus be regarded as a form of “lawfare”, a way of manipulating the judicial system and undermining its inherent protective role by misusing it to inhibit the right to freedom of expression and the right of citizens to receive information on matters of public interest. They prosper in jurisdictions which lack robust procedural guarantees to counter abusive lawsuits.
6. National authorities as well as international organisations have noted that measures are needed to combat this phenomenon the need to take action. In its January 2020 report entitled “Threats to media freedom and journalists’ security in Europe”, the Parliamentary Assembly identified several countries where this phenomenon has reached worrying proportions. In October 2020, the Commissioner for Human Rights of the Council of Europe called on States to tackle the problem. The Committee of Ministers of the Council of Europe is also in the process of adopting a recommendation on the issue.
7. Moreover, the European Union institutions are drawing up a directive to protect victims of SLAPPs or abusive court proceedings with cross-border implications and anti-SLAPP laws have recently been adopted or are being drawn up in some Council of Europe member States.
8. The Assembly recalls that under Article 10 of the European Convention on Human Rights (ETS No. 5) member States not only must refrain from interfering with the right to freedom of expression, but they also have a positive obligation to ensure a safe and favourable environment for participation in public debate by everyone, without fear, even when their opinions run counter to those defended by official authorities or significant parts of the public.

2. Draft resolution adopted unanimously by the committee on 10 October 2023.

9. The Assembly also refers to Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, whereby “[m]ember States must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors”.

10. Similarly, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries calls on national authorities to consider adopting “appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression”.

11. The Assembly considers that there is now an urgent need for all Council of Europe member States to act in a co-ordinated manner to successfully combat the phenomenon of SLAPPs and calls on them to strengthen their legislation to enable judges to effectively punish the perpetrators of such abusive litigation.

12. To this end, where legal action is directed against a form of expression or public participation on a matter of public interest and has the effect of preventing, hindering or sanctioning it, national authorities should provide for:

12.1. a procedure for the early dismissal of manifestly unfounded or abusive litigation, within a given time limit and based on specific criteria clearly defined in national legislation, including an appeal process conducted under an accelerated procedure;

12.2. the burden of proof on the claimant to prove that their lawsuit is not a SLAPP, where the court considers it established that the case concerns a form of participation in public affairs or expression on a matter of public interest;

12.3. the consolidation of proceedings concerning the same publication or a substantially similar element of the same publication, to avoid exhausting the defendant with multiple procedures the main objective of which is to paralyse the dissemination of information of public interest;

12.4. a stay of proceedings and claims for compensation in the event of the defendant’s death;

12.5. determination of the court with territorial jurisdiction on the basis of the defendant’s domicile when the defendant is a private individual, and in any case, the defendant’s access to appropriate remedies before the courts of the State where the action is brought;

12.6. a maximum limit on the financial guarantees that may be required and imposed on the defendant, which must remain reasonable in the light of his or her actual means, precluding in principle the total freezing of his or her bank accounts;

12.7. legal, financial and psychological assistance for victims of SLAPPs, including where the defendant is a legal entity;

12.8. the right of the defendant to be fully and promptly reimbursed for all costs and expenses incurred in defending the case, as well as the right to be awarded, in addition to ordinary pecuniary damages, a reasonable compensation of non-pecuniary damages for the emotional distress and punitive damages of a sufficiently substantial amount where the abusive nature of the claimant’s action is established;

12.9. a fine or financial penalty to be paid by the claimant and to be collected by the State, for the damage caused to the judicial system by the bringing of abusive litigation; the amount of this financial penalty should be determined by the court, taking due account of the claimant’s financial situation, in order to ensure that it has a genuine deterrent effect.

13. The Assembly notes that while SLAPPs are frequently civil lawsuits, they can also be in the form of administrative and criminal procedures. Therefore, it calls on member States to:

13.1. review administrative and criminal procedures which may have a chilling effect on the freedom of expression and public participation, in order to offset or at least reduce such an effect, and, in particular, decriminalise defamation, as criminal prosecution on this basis constitutes the main threat for people reporting on matters of public interest;

13.2. encourage administrative courts, public prosecutors and criminal jurisdictions to make use of the procedural powers they have to reduce the impact on public participation of administrative and penal lawsuits, namely fast-tracking criminal and administrative procedures which may hinder public participation, managing them to avoid useless delays and closing them as rapidly as possible;

13.3. provide for rapid and full compensation of the defendant's costs and damages (including non-pecuniary ones) also in the framework of criminal procedures or administrative procedures which are eventually dismissed;

13.4. provide that the defendant is eligible for (financial and other) support mechanisms also in case of criminal or administrative procedures, when public participation is at stake.

14. The Assembly considers that members of the judiciary and bar associations have a central role to play in combating SLAPPs. Accordingly, it calls on member States to:

14.1. raise awareness among all judicial authorities of the phenomenon of SLAPPs, in particular by stepping up monitoring of the number and nature of SLAPP cases brought before the courts;

14.2. include specific training in the curricula of judicial training institutions to make judges aware of the abusive nature of SLAPPs and the various strategies that claimants may employ so that they can detect and counter them;

14.3. encourage the regulatory authorities of the legal profession to include the fight against SLAPPs explicitly in their codes of ethics, to improve the training of their members to make them aware of the phenomenon and to require them, on pain of disciplinary action, to refrain from knowingly participating in the actions of clients who are clearly seeking to abuse the legal system by bringing SLAPPs and deliberately prolonging such proceedings.

15. The Assembly stresses that developing multilateral co-operation at European level is key to countering SLAPPs effectively and calls on member States to strengthen judicial co-operation with a view to:

15.1. develop smart procedural rules to avoid multiple SLAPPs in different States;

15.2. ensure mutual recognition of decisions establishing that a lawsuit was a SLAPP, also to secure the implementation of dissuasive measures;

15.3. set safeguards against judgments in favour of SLAPPs, in particular those issued in jurisdictions outside Council of Europe member States, to deny recognition and enforcement of these judgments.

16. The Assembly finally encourages media and watchdog organisations to adopt measures such as establishing an insurance mechanism or collective defence funds, pooling of resources for pre-publication legal review and the reporting of SLAPPs, especially in countries where journalists themselves are not yet sufficiently aware of the phenomenon.

B. Draft recommendation³

1. The Parliamentary Assembly, referring to its Resolution ... (2023) "Countering SLAPPs: an imperative for a democratic society", recalls that under Article 10 of the European Convention on Human Rights (ETS No. 5) member States not only must refrain from interfering with the right to freedom of expression, but they also have a positive obligation to ensure a safe and favourable environment for participation in public debate by everyone, without fear, even when their opinions run counter to those defended by official authorities or significant parts of the public.
2. Recommendation CM/Rec(2016)4 of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors calls on member States to "exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors".
3. Similarly, Recommendation CM/Rec(2018)2 of the Committee of Ministers on the roles and responsibilities of internet intermediaries calls on member States to consider adopting "appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression".
4. However, SLAPPs are prospering in the jurisdictions of too many Council of Europe member States because of the lack of adequate procedural mechanisms to prevent, remedy and sanction abusive lawsuits which hinder the right to freedom of expression and public participation.
5. The Assembly is concerned by this phenomenon and warmly welcomes the initiative taken by the Committee of Ministers to entrust its Steering Committee on Media and Information Society (CDMSI) to draw up a draft recommendation of the Committee of Ministers to member States on countering the use of SLAPPs.
6. The Assembly commends the work accomplished by the CDMSI and its Committee of Experts on Strategic Lawsuits against Public Participation (MSI-SLP), to which the Assembly's rapporteur on this issue also contributed.
7. Therefore, the Assembly recommends that the Committee of Ministers:
 - 7.1. adopts a bold recommendation on countering the use of SLAPPs following CDMSI proposals;
 - 7.2. encourages and monitors the prompt and effective implementation by the member States of the guidelines set forth by the recommendation, including the wide range of safeguards mechanisms and remedies therein.

3. Draft recommendation adopted unanimously by the committee on 10 October 2023.

C. Explanatory memorandum by Mr Stefan Schennach, rapporteur

1. Introduction

1. Strategic Lawsuits Against Public Participation (known as SLAPP lawsuits or SLAPPs for short) are lawsuits brought against a person or a group with the aim of silencing that person's or group's public participation. The phrase "public participation" comes from the US constitutional context, where it refers to petitions and interactions with public authorities, but it has since come to be understood as "speaking out" in the broader sense of raising public awareness about an issue.⁴ For the purpose of this report, "public participation" will refer to any contributions to public debate on matters of public interest, including a very wide range of journalism, advocacy, communication and speech. In this respect, matters of "public interest" are all matters where the public has a legitimate interest, including issues which affect the public and those which inspire controversy, but not issues of a purely private nature.

2. Journalists and publishers have always been targets of legal action and SLAPPs are part of a broader trend that usually begins with verbal intimidation, which is the most prevalent aspect, before moving on to threats of a legal nature and possibly also to physical attacks.⁵ However, today all social watchdogs are under threat and SLAPPs are also initiated against individuals for their comments on social media.

3. SLAPPs are particularly burdensome and dangerous because they force defendants to expend time, money and other resources on defending themselves unnecessarily. The process itself is intended as a punishment, with the aim of silencing journalists and media outlets. It is a system of censorship through the threat of litigation. From the point of view of the claimants, even if they lose, they have still won.

4. No European country has defined SLAPPs in law. Many academics, courts, legislators and members of civil society have ultimately concluded that SLAPPs are not a single type of legal action, but rather a class of lawsuits that can be identified by a set of defining characteristics.

5. The claimant:

- brings the case in response to a publication, or an intended publication, by the defendant (often a journalist, a media outlet, an activist or a campaigning organisation) to stop it;
- frequently targets individuals rather than the organisations (legal entities) they work for (for example, a journalist rather than their newspaper) because individuals are financially more vulnerable;
- is often in a position of relative power vis-à-vis the defendant, whether financially, economically, or politically, or through a combination of these factors;
- advance aggressively framed or spurious arguments but has, in general, weak legal or factual arguments;
- seeks an exorbitant amount of damages, a public apology, or both;
- seeks to prolong the litigation, drive up costs and force the defendant to spend time, money and other resources defending the case;
- has sent aggressive letters threatening litigation;
- has engaged in other forms of intimidation, harassment or threats against the defendant;
- has pursued similar cases in the past;
- has initiated, directly or through associated parties, different co-ordinated legal actions related to the same event, sometimes with a cross-border element, seeking to make litigation complex and endless;

4. The academics who coined the phrase – Penelope Canan and George W. Pring – did so in a 1988 article in the journal *Social Problems* in which they studied 100 cases in the United States from the 1950s onwards where legal action had been taken or threatened, with the ostensible aim of silencing the targets. See <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1535&context=pehr>. One of the cases in their study was that of the environmental activist Rick Webb, who was sued for US\$200 000 in defamation damages by a coal mining company which he had accused of polluting a river, causing extensive damage to the trout population. Webb eventually won the case in the West Virginia Supreme Court of Appeals in 1981.

5. According to a 2017 Council of Europe survey, 27% of the journalists who participated in the survey had experienced threats of prosecution or actual prosecution; and a 2022 study by the European Federation of Journalists found that 40% of those who responded had faced at least one form of threat or incident against them in the six months preceding the survey. See "Safety4Journalists Risk perceptions and safety concerns of journalists in Europe", 2021.

- may orchestrate denigratory public relations campaigns against the defendants, to humiliate and delegitimise them.

Not every case will possess all of these characteristics, but the more it does, the more likely it is to be a SLAPP lawsuit.⁶

6. While this list is certainly useful, we still need a proper legal definition. In a report published in March 2022,⁷ the Coalition against SLAPPs in Europe (CASE) describes the phenomenon as follows: “The objective of a SLAPP is not to redress the plaintiff’s breached legal rights but to intimidate and harass the target into silence. For the SLAPP litigant the outcome of the lawsuit is therefore generally beside the point, as the litigation process is enough to advance the goals of the lawsuit.” It then adds that “SLAPPs are an abuse of the legal system by wealthy and powerful individuals, who initiate lengthy, expensive, and commonly baseless litigation aiming to shut down criticism and efforts to advance accountability. Although SLAPPs seriously harm the targets both financially and psychologically, the damage extends to the general public, who are denied the right to know whenever a critical voice is chilled”. Then, the report gives the following definition: “abusive lawsuits filed to shut down acts of public participation, including public interest journalism, peaceful protest or boycotts, advocacy, whistle-blowing, academic comments, or simply speaking out against the abuse of power. SLAPPs target anyone who works to hold the powerful to account or engage in matters of public interest”.⁸

7. The European Parliament report on “The Use of SLAPPs to Silence Journalists, NGOs and Civil Society”⁹ proposes another definition: “a claim that arises from a defendant’s public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right”.

8. Article 3 of the Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) defines the “abusive court proceedings against public participation” as “court proceedings, brought in relation to public participation that are either fully or partially unfounded and have as their main purpose to prevent, restrict or penalize public participation”.¹⁰ Indications of such a purpose can be:

- a. the disproportionate, excessive or unreasonable nature of the claim or part thereof;
- b. the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
- c. intimidation, harassment or threats on the part of the claimant or his or her representatives.”¹¹

9. The explanatory memorandum of this proposal explains that SLAPPs “are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations and state organs against parties who express criticism or communicate messages that are uncomfortable to the claimants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition. Unlike regular proceedings, SLAPPs are not initiated with a view to exercising the right of access to justice and the purpose of winning the legal proceedings, or obtaining redress. Instead, they are initiated to intimidate the defendants and to drain their resources. The ultimate goal is to achieve a chilling effect, silence the defendants and deter them from pursuing their work.”

6. For discussion on the defining characteristics of SLAPPs in different countries and contexts, see also the flowchart devised by the Coalition against SLAPPs in Europe (CASE): “[How to identify a SLAPP](#)”.

7. “[Shutting out Criticism: How SLAPPs Threaten European Democracy](#)” (March 2022).

8. The same definition also appears in the updated CASE 2023 report “[SLAPPs: a threat to democracy continues to grow](#)” (July 2023). The report can be downloaded [here](#).

9. Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka: “[The Use of SLAPPs to Silence Journalists, NGOs and Civil Society](#)” (June 2021). Study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs (JURI).

10. [COM/2022/177](#), 27 April 2022.

11. *Ibid.*

10. Building on the above-mentioned descriptions, SLAPPs are in essence abusive litigation and legal tactics designed to prevent the dissemination of information on sensitive issues and to silence those wishing to report on a matter of public interest. To be more precise, I would insist on two features and say that SLAPPs:

- i. consist in legal actions, legal proceedings or other legal remedies that are initiated or pursued, or threatened to be, as a means of intimidating, harassing and silencing an individual or a legal person wishing to inform the public on a matter of public interest and/or to participate in a public debate on such a matter or in public affairs;
- ii. are a frivolous, vexatious or malicious – thus abusive – use of legal proceedings and guarantees with an aim or a concrete risk of preventing, hindering or sanctioning public participation. In this respect, SLAPPs not only discourage and silence those that are their direct victims (the defendants), but also have a chilling effect on others, and deter them from speaking out on the same or similar issues, making “examples” of what could happen to them too.

11. However, it would be counterproductive to qualify a lawsuit as a SLAPP only when it appears that the claimant’s “main” aim or purpose is to prevent or hinder public participation. On the one hand, it can be hard to prove that a given claimant’s aim (amongst different ones that may coexist) is the main one; on the other hand, what matters is the combination of an abuse of legal procedures and the chilling effect on freedom of expression, public debate and public participation, even assuming that the claimant’s main aim is safeguarding his or her own interests.

12. Moreover, in a statutory definition to be enshrined in anti-SLAPPs national legislations I would neither include the reference to a legal action which is fully or partially unfounded or that lacks legal merit,¹² nor the circumstances where the claimant may eventually exploit imbalances in political, financial or societal power. These are, however, good “indicators”, that is concrete elements which must be assessed and taken into consideration with others by the competent courts to establish the frivolous, vexatious or malicious use of legal proceedings and legal guarantees.

13. The number of SLAPPs has increased over the years with the active help of law firms. Journalists’ organisations are no longer able to handle all the cases, especially in Poland, Serbia, Italy and Croatia. SLAPPs have an enormous impact, particularly in terms of self-censorship, and the phenomenon constitutes a form of white-collar misconduct against journalists and other targets.

14. The experts we heard pointed out that in recent years, and particularly since the beginning of the Covid-19 pandemic, there has been a noticeable rule of law backsliding throughout Europe, not least because of certain restrictive measures taken by the authorities. There is also an increasing polarisation of politics and public life in general, marked by verbal attacks by politicians on journalists that go beyond mere “freedom of expression”. Against this backdrop, SLAPPs have proliferated, abusing and misusing legal procedures that are intended to serve a legitimate purpose, such as protecting privacy or reputation.

15. What all SLAPPs have in common is not so much the threat of litigation, but the misuse and abuse of that right. SLAPPs may thus be regarded as a form of “lawfare”, a way of manipulating the judicial system and undermining its inherent protective role by misusing it to inhibit the right to freedom of expression and the right of citizens to receive information on matters of public interest.

16. My report looks at trends in the type and number of cases being brought and their impact on defendants and examines the laws and procedures that appear to facilitate such litigation. It then reviews measures currently being considered to address the problem, including by the media and civil society, and assesses the effectiveness of anti-SLAPP legislation in countries outside Europe that have already taken action in this regard.

17. My analysis is based on the expert report by Mr Peter Noorlander, consultant on human rights and media law, to whom I would like to express my sincere gratitude for his expertise and willingness to assist. It also draws on the hearings held in the course of the work of the Committee on Culture, Science, Education and Media¹³ and the contributions of the experts who participated in these hearings.

12. A claim can eventually be founded, but there could be other elements which allow for consideration of the whole legal action as a SLAPP. The opposite can also be true: an action can be partially unfounded, and can, at least to some extent, hinder public participation, without eventually being frivolous, vexatious or malicious in essence.

13. On 21 November 2022, in Vilnius, the Sub-Committee on Media and Information Society held a hearing with the participation of Meaghan Fitzgerald, Head of the Election Department, Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR); Ricardo Gutierrez, General Secretary,

18. I particularly commend and thank the Commissioner for Human Rights of the Council of Europe for taking a very strong stand against SLAPPs, both at the conference co-organised by the Council of Europe and CASE in Strasbourg on 20 October 2022 and when she spoke at our hearing. She rightly reminded us that parliamentarians can make a difference in the Parliamentary Assembly of the Council of Europe and in their own countries and I hope that this report will help us to achieve that.

2. SLAPPs: trends and impact

2.1. Trends in SLAPP cases

19. In the absence of a precise legal definition, there are no official statistics on the number of SLAPP cases, neither at national level nor in the work or decisions of international organisations. The European Court of Human Rights used the term SLAPP for the first time in a judgment of 15 March 2022.¹⁴ The situation could change if States adopted anti-SLAPP measures; this would also make it easier for international organisations, including the European Commission for Democracy through Law (Venice Commission), to monitor the implementation of such measures.

20. There is, however, evidence gathered by civil society organisations that strongly suggests that the number of SLAPPs is high and that it is growing. In its report of March 2022,¹⁵ CASE identified 570 SLAPP cases in 29 European countries between 2010 and 2021, noting an increase in the number of cases of 43.5% in 2019, 15.2% in 2020 and a slight decrease of 2.6% in 2021. The report draws the following conclusions: the number of SLAPPs is increasing; the main targets are journalists and media outlets followed by activists; most cases are based on national defamation laws; litigants are in a position of power; cases are most often won by the defendants or dropped but this does not diminish the harm they cause. In another report published in 2022, the freedom of expression organisation, ARTICLE 19, examined laws and cases in Belgium, Bulgaria, Croatia, France, Hungary, Ireland, Italy, Malta, Poland, Slovenia and the United Kingdom and found a large number of SLAPP cases.¹⁶

21. CASE has now published its 2023 report,¹⁷ according to which “[y]ear after year, SLAPPs are increasingly a worrying threat to democracy across Europe”. This report lists over 820 SLAPPs, compared with 570 in the previous year. Poland appears as the European country with the highest absolute number of SLAPPs recorded, but in 2022 a notable number of lawsuits were also recorded in Malta (which is the country with the highest number of cases recorded for every 100 000 people), France, the United Kingdom, Croatia, Greece, Türkiye and Georgia.¹⁸

European Federation of Journalists (EFJ); Krisztina Rozgonyi, Senior Scientist, Institute for Comparative Media and Communication Studies (CMC), Austrian Academy of Sciences; and Boris Bergant, Consultant, European Broadcasting Union.

On 6 December 2022, in Paris, the committee held a hearing with the participation of Dunja Mijatović, Commissioner for Human Rights of the Council of Europe; Peter Noorlander, Consultant and Adviser on Human Rights and Media Law and Policy; and Ricardo Gutierrez, General Secretary, EFJ.

On 27 April 2023, in Strasbourg, the committee held a hearing with the participation of Christos Giakoumopoulos, Director General, Directorate General - Human Rights and Rule of Law, Council of Europe (DGI); Jean-Paul Marthoz, Journalist and media expert, Coordinator of the 2023 Report of the Platform to promote the protection of journalism and safety of journalists Council of Europe; and Maja Sever, President of the EFJ.

On 1 June 2023, the committee held a hearing with the participation of Beatriz Brown, Policy Lead, SLAPPs, Ministry of Justice, United Kingdom.

On 22 June 2023, the committee held a joint hearing entitled “SLAPPs as a threat to media pluralism and measures implemented to counteract them” with the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), with the participation of Pier Luigi Parcu, Director, Centre for Media Pluralism and Media Freedom, European University Institute, Florence, Italy, and Giulia Lucchese, Media and Internet Governance Division, Information Society Department, Directorate General - Human Rights and Rule of Law, Council of Europe.

14. *OOO Memo v. Russia*, Application no. 2840/10, judgment of 15 March 2022.

15. “Shutting out Criticism: How SLAPPs Threaten European Democracy”, March 2022.

16. ARTICLE 19, “SLAPPs against journalists across Europe”, March 2022.

17. “SLAPPs: a threat to democracy continues to grow”, July 2023.

18. Amongst the newly reported SLAPPs, 161 were lawsuits filed in 2022, a significant jump compared to the 135 filed in 2021. The number of lawsuits from previous years has been updated, as additional cases were reported. Notwithstanding these appalling figures, the study is not an exhaustive survey of SLAPP cases around Europe. CASE emphasises that “for a number of reasons, including the limitations of the nature of the research, a scoping exercise such as this can only ever scratch the surface of the SLAPP problem in Europe” and that the report presents “only a snapshot of the issue of SLAPPs in Europe between 2010 till 2022”. This is particularly true for some countries where the number of lawsuits mapped by

22. It should be noted that in Europe, many SLAPP cases are brought in the United Kingdom because of the very high cost of litigation, which acts as a strong deterrent to defending a case, and because it is easy to bring an action, as the law allows foreign claimants. The procedures are complex, making it hard for targeted journalists from the Russian Federation, Sweden, Ukraine, Malta, the Netherlands, etc to defend a legal action. This is also why there are so many UK law firms specialising in this type of case.

23. The phenomenon is however Europe-wide and not limited to a few countries.¹⁹ There are literally no countries that are immune and those that claim to have none or only a handful of cases are likely in a situation of under-reporting. For example, until recently, there were no reports of SLAPP cases in Georgia. This was because no organisation had been reporting on them, however, and when the NGO Georgia Democracy Initiative researched the issue in 2022, it found that there were in fact many SLAPP cases, such as the complaints brought by 11 different municipal mayors against the TV channel “Mtavari Arkhi”, copying and pasting the same text and claiming the same amount of money (GEL 55 555).²⁰

24. According to the CASE 2023 report, the targets of SLAPPs tend to be independent media outlets, journalists working for them who are liable to be sued individually, fact-checking organisations, academics, citizen groups and civil society organisations reporting on issues of public interest. The data published by CASE show that journalists (248 lawsuits, that is 30.2%) and media outlets (203 lawsuits, that is 24.7%) are most likely to be sued, followed by editors (98 lawsuits, that is 11.9%) and activists (80 lawsuits, that is 9.7%). Corruption, government, business and environmental issues are the topics that are most frequently at the origin of SLAPPs. Claimants are often businesses or businesspersons (335 lawsuits, that is 40.8%), politicians or people in the public service (227 lawsuits, that is 27.6%) or state-owned entities (113 lawsuits, that is 13.7%), but also NGOs, members of the judiciary and security services.²¹ Most cases are based on defamation laws and regulations but other laws are also invoked, particularly data protection and privacy laws.

25. While SLAPPs largely target the media, human rights defenders, NGOs and activists are also affected, mainly in three fields: migrants’ rights, LGBT rights and environmental advocacy. In Poland, for example, LGBT rights defenders who were raising awareness about anti-LGBT statements and family charters that had been adopted by some local governments were sued for defamation by ultra-conservative groups and some municipalities.²² For this reason, ILGA-Europe, an organisation defending LGBTI rights in Europe, has called on the European institutions to also consider how to combat SLAPPs against LGBTI activists.²³ Environmental activists have been particularly targeted by SLAPPs. In June 2021, Kelkos Energy, a large Austrian-based hydropower management company with operations in Kosovo*, used defamation lawsuits and threats of such lawsuits to target activists who had spoken out publicly about the environmental impact of hydropower plants operating in the country’s natural protected areas and the lack of scrutiny by the Kosovo authorities in the process of issuing operating licences for such plants.²⁴ In Serbia, environmental organisations campaigning to protect the Fruska Gora National Park accused the owners of the Galens Invest company of trying to intimidate them by bringing five lawsuits worth around 2 million dinars (€17 000).²⁵

26. Regarding harassment and SLAPPs in Hungary, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, issued a statement on 11 May 2022, expressing serious concerns about recurring campaigns of hate speech, harassment or stigmatisation of journalists and human rights defenders working on migrant, refugee and LGBTI rights. Ms Khan called on the Hungarian Government “to promote and recognise the important contributions that these individuals make in building a more just and inclusive society”, and to “introduce legislation to counter strategic lawsuits against

CASE is largely below the actual number of cases filed. For example, in Croatia, over 245 new lawsuits were initiated against journalists in 2022, according to the data of the Ministry of Justice and Public Administration. In Poland, activists facing several lawsuits did not have the resources to compile the necessary documents required for their verification.

19. CASE has now identified SLAPP lawsuits in 35 Council of Europe member States, as well as in Kosovo and the Russian Federation.

*All reference to Kosovo, whether to the territory, institutions or population shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

20. “[Report on SLAPP cases in Georgia](#)” (September 2022).

21. See also News Media Europe, “[The impact of strategic lawsuits against public participation \(SLAPPs\) on the news media sector](#)” (October 2021).

22. In 2021 and 2022, the creators of the “[Atlas of Hate](#)”, which tracks anti-LGBTI resolutions, were sued for defamation by several local authorities. Some municipalities withdrew their cases (Gromadka), others were dismissed by the courts (Opoczynski, Tarnów). Other cases are pending (Przysucha, Tatra, Łowicki) and up to three appeals are expected in 2023.

23. www.ilga-europe.org/report/2022-rule-of-law-report/.

24. www.amnesty.org/fr/documents/eur73/4350/2021/en/.

25. <https://n1info.rs/english/news/serbias-environmentalists-galens-trying-to-intimidate-us-with-slapp-lawsuits/>.

public participation ... and repeal the provision in the Criminal Code relating to defamation as a criminal offence".²⁶ In the case of Serbia, the Council of Europe Commissioner for Human Rights noted "the prevalence of smear campaigns, threats and intimidation and the growing problem of strategic lawsuits against public participation (SLAPPs) targeting journalists, human rights defenders and civil society organisations" and urged the authorities to "spare no effort to create a safe and conducive environment for the work of the media and civil society".²⁷ In March 2023, she also called on Bosnia and Herzegovina not to recriminalise defamation as that would "strengthen the trend of stifling freedom of expression",²⁸ and the Assembly cannot but endorse this call.

27. In the media and journalism sector, SLAPPs tend to target those perceived as critical voices. Lawsuits may be brought by claimants in the public or private sector, which may also work in tandem. The most notorious example of this is the litigation against Daphne Caruana Galizia, who had 47 defamation cases pending against her not only in Malta, but also in the United States and the United Kingdom. Another typical example is the litigation against the Polish daily *Gazeta Wyborcza*, which had more than 60 defamation lawsuits pending against it by the end of 2021.²⁹ In France, companies affiliated with the Bolloré group have filed more than 20 defamation suits against journalists, lawyers, activists and NGOs investigating allegations of human rights abuses on palm oil plantations in Africa.³⁰ In Serbia, at the beginning of 2022, the investigative media outlet KRIK had 10 ongoing lawsuits against it and its journalists: eight civil lawsuits, one criminal lawsuit and one misdemeanour procedure, seeking a total of nearly US\$1 million in damages – three times its annual budget.³¹ In Croatia, a survey carried out by the Croatian Journalists' Association in April 2021 identified 924 pending lawsuits against journalists and media in Croatia. It is not uncommon for cases to be initiated by senior politicians, members of the government or civil servants.³²

28. Not all SLAPP suits end up in court, but the anticipated burden of defending a case can be such that the mere threat of litigation is enough to make an activist or media outlet desist. The number of letters threatening litigation is far greater than the number of cases brought before the courts and their impact on freedom of expression is just as damaging.

29. Among the most egregious SLAPPs are those that have a cross-border aspect, forcing defendants to defend themselves in a foreign country, in a foreign language and in a legal system that they do not understand. According to CASE, about 10% of SLAPPs have a cross-border aspect.³³ Most of these cross-border lawsuits are brought in the United Kingdom,³⁴ which is really unique in this respect in Europe. ARTICLE 19 stated that "several law firms, most notably in the United Kingdom but also in other countries, have developed very aggressive tactics to essentially bully journalists and media outlets into self-censorship, usually on behalf of wealthy clients."³⁵ When a journalist reaches out to a politician or business entity to ask questions in the course of writing a potentially critical article about them, the response they receive back is often from a law firm threatening legal action. The Guardian receives two to three such letters per week – designed to intimidate and to stop the newspaper from publishing certain articles.³⁶ The situation in the United Kingdom is all the more worrying as law firms continue to work for Russian oligarchs who have been subject to international sanctions as a result of the Russian Federation's war of aggression against Ukraine, the most notorious one being the founder of the Wagner mercenary group, the recently deceased Yevgeny Prigozhin.³⁷

26. See [A/HRC/50/29/Add.1](#).

27. www.coe.int/en/web/commissioner/-/serbia-more-efforts-needed-to-face-the-past-increase-safety-of-journalists-and-human-rights-defenders-and-protect-women-from-violence.

28. <https://sarajevotimes.com/commissioner-for-hr-of-the-coe-calls-for-withdrawal-of-the-amendments-to-the-rs-criminal-code/>.

29. <https://rm.coe.int/platform-protection-of-journalists-annual-report-2022/1680a64fe1>.

30. See the "We will not be silenced" campaign website.

31. www.ecpmf.eu/serbia-wave-of-lawsuits-against-investigative-portal-krik-chills-media-freedom/.

32. <https://balkaninsight.com/2021/04/16/croatian-journalists-union-deplores-intimidating-rise-in-lawsuits/>.

33. The CASE report 2023 indicates that, in 81 (that is 9.5%) of the cases recorded from 2010 to 2022, the plaintiff and the defendant are domiciled in different countries. See also: <https://europeanjournalists.org/blog/2023/03/14/letter-to-the-swedish-presidency-anti-slapp-compromise-proposal-raises-serious-concerns/>.

34. <https://pressgazette.co.uk/uk-slapp-libel-tourism-capital-europe/>.

35. "SLAPPs against journalists across Europe", op. cit., p. 6.

36. At the conference organised jointly by the Council of Europe and the CASE coalition on 20 October 2022, The Guardian's in-house lawyer stated that the newspaper routinely receives two or three such letters a week and can even get dozens for an article on a potentially "big story".

37. www.theguardian.com/law/2023/jan/31/russia-ukraine-war-reveals-englands-draconian-libel-laws-says-lawyer.

2.2. The democratic, financial and personal impact of SLAPPs

30. The study of 2021 by the European Parliament³⁸ neatly sums up the fact that SLAPPs are filed to intimidate, silence and drain the defendant's financial, economic and psychological resources and to send a signal to others. For those who initiate such proceedings, "success" means their threats had the desired effect and does not necessarily imply victory in court. Success may be claimed when a defendant issues an apology or withdraws a publication before the case comes to trial, when a media outlet's insurance premiums go up because it has been sued or when it has been forced to spend large sums defending a case. Success is also diverting defendants' resources and time from the coverage of important issues of public interest. Therefore, SLAPP claimants may even claim success when they lose in court. Former US President Donald Trump's words about the trial he lost against a journalist speak volumes: "I spent a couple of bucks on legal fees and they spent a whole lot more. I did it to make his life miserable, which I'm happy about."³⁹

31. This kind of "bullying" approach to litigation is characteristic of SLAPPs. Some journalists have testified about the impact of such lawsuits on their work: it affects their livelihood, their ability to work, their financial and economic situation and even their family life. Well documented books and publications have been withdrawn for fear that defending a meritless legal claim would bankrupt the publisher.⁴⁰

32. Given the important role in society of the media and other watchdogs who are silenced by abusive lawsuits, SLAPP suits not only harm journalists and the media; they deprive citizens of information about potentially important issues and ultimately undermine democracy, which cannot function without freedom of expression and independent media able to report without fear of reprisal. Snezana Green, senior legal counsel at the Media Development Investment Fund, a US-based NGO providing financing for independent media, has witnessed dozens of SLAPP cases. She notes that "[t]he practice of abusing legal systems by those in power to silence critics has reached global proportions. Its damage is far-reaching and curbing it is an imperative for democracy and maintaining peace."⁴¹

33. Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, has rightly stated that SLAPPs "pose a significant and growing threat to the right to freedom of expression" and that they have the effect of "perverting the justice system and the rule of law more generally".⁴² CASE argues that 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".⁴³ This applies not only to political expression, but also to all reporting and forms of expression on issues of public interest, including the activities of companies. As the UK House of Lords observed in relation to a SLAPP case, "[t]he power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government".⁴⁴

2.3. Striking the necessary balance between access to justice and freedom of expression

34. I would like to stress that, since SLAPPs constitute an abuse of legal process, measures to tackle the phenomenon do not restrict access to justice: the justice system is not intended to be used by claimants who wish to bring a lawsuit for the sole purpose of harassing a defendant. As the General Secretary of the European Federation of Journalists, Ricardo Gutierrez, rightly pointed out at the hearing on 22 November 2022, "journalists are not above the law and they can be sued on motivated grounds. But journalism should not be criminalised, especially by SLAPPs or defamation laws".

35. It is crucial that anti-SLAPP measures do not undermine access to justice for those with legitimate claims. The European Convention on Human Rights (ETS No. 5) requires States to protect the right to privacy, which includes protection against genuine invasions of privacy and serious attacks on reputation, as well as other rights. However, this only applies to claims with merit⁴⁵ and even then, the European Court of

38. "The Use of SLAPPs to Silence Journalists, NGOs and Civil Society", op. cit.

39. Donald Trump, as quoted in Paul Farhi, «What really gets under Trump's skin? A reporter questioning his net worth», *The Washington Post*, 8 mars 2016. With reference to Trump v. O'Brien, Time Warner Book Group, Inc., and Warner Books, Superior Court of New Jersey, Appellate Division, 7 September 2011.

40. <https://insights.doughtystreet.co.uk/post/102hqb5/the-costs-themselves-are-the-chill-slapps-and-the-case-for-a-media-and-commun>.

41. www.mdif.org/slapps-and-legal-harassment-a-scourge-that-must-be-stopped/.

42. Council of Europe Commissioner for Human Rights: Time to take action against SLAPPs, 27 October 2020: www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps.

43. "Calling for an Ambitious EU Anti-SLAPP Initiative".

44. Jameel & Ors c. Wall Street Journal Europe Sprl, 11 October 2006, [2006] UKHL 44, paragraph 158.

Human Rights has made it clear that such protection must not undermine the exercise of the right to freedom of expression. Moreover, following the case law in *Lingens v. Austria*⁴⁶ and in many subsequent cases, the limits of acceptable criticism are wider as regards a politician, a public figure or a large public company.

36. As the European Court of Human Rights pointed out in one of the first SLAPP cases to come before it, concerning two environmental activists sued by McDonald's: "in a democratic society even small and informal campaign groups ... must be able to carry on their activities effectively and ... there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."⁴⁷

37. Moreover, States have a duty to ensure that defendants in privacy and defamation cases, and in litigation affecting the exercise of their rights generally, receive a fair trial that respects the principle of equality of arms. In the case involving McDonald's referred to above, the Court found that the severe inequality of arms between the parties constituted a violation of the applicants' right to a fair trial and their right to freedom of expression.⁴⁸ The decision came after a trial that lasted 313 days, the longest in English legal history, and involved 40 000 pages of documents and 130 witnesses. McDonald's is thought to have spent more than £10 million on defending the case.⁴⁹ Fair trial and access to justice arguments are therefore equally relevant for defendants in SLAPP cases.

3. Legal analysis of SLAPPs

3.1. SLAPP lawsuits use a wide range of laws and procedures

38. Typical abuse of law by SLAPP claimants are those which make it relatively easy to bring claims and which place the burden of proof on the defendant. Defamation laws are by far the most abused: claimants need only submit that an article or report damages their reputation and the burden of proof shifts to the defendant to mount a defence.⁵⁰ Related laws on "insult" and "honour" are also easily abused: a claimant merely needs to allege that a statement affects their honour or that it is insulting, and the burden shifts to the defendant to either disprove that or mount a defence. But other laws are also easily abused. When media reporting or articles allege corruption, financial irregularities or other wrongdoing and include aspects that relate to the personal sphere (such as financial affairs or family relations), a claimant can abuse privacy laws to bring a SLAPP claim. In a growing number of countries, data protection laws are also being abused, allowing claimants to sue for any inaccuracy in personal information, even if the information is not defamatory. For example, a family of Hungarian entrepreneurs was able to use data protection laws to prevent reporting on certain aspects of their business activities.⁵¹

39. In many countries, privacy and defamation claims may be brought under both civil and criminal law, and civil and criminal cases are often brought concurrently. Other laws reportedly abused for SLAPP purposes include copyright and trademark laws, anti-harassment laws and those governing various minor criminal offences including, during the Covid-19 pandemic, alleged breaches of lockdown rules.⁵² A study carried out on behalf of the European Union in 2021 showed that the range of laws that could be abused for the purpose of SLAPPs includes legal provisions on taxation, social protection, use of personal data, maritime safety, juvenile protection, urban planning and civil society organisations.⁵³

45. *Axel Springer AG v. Germany*, Application no. 39954/08, judgment of 7 February 2012; *Pfeifer v. Austria*, Application no. 12556/03, judgment of 15 November 2007. On access to justice, see, *inter alia*, *Neves e Silva v. Portugal*, Application no. 11213/84, judgment of 27 April 1989.

46. *Lingens v. Austria*, Application no. 9815/82, judgment of 8 July 1986. See in particular paragraphs 41 and 42. Unfortunately, this principle is often not operationalised in national law as its implications are not entirely clear. This is in contrast to the United States, for example, where there is a clear principle that a public figure who sues for libel must prove "actual malice", meaning that the defendant either made a deliberately false statement or showed reckless disregard for the truth of the statement.

47. *Steel and Morris v. the United Kingdom*, Application no. 68416/01, 15 February 2005, paragraph 89.

48. *Ibid.*

49. [case.eu+campaign+list+the+need+for+a+council+of+europe+recommendation+onslapps](#).

50. Canan and Pring identified defamation laws as among those most abused in their original research on SLAPPs. This has been confirmed by others since.

51. "SLAPPs against journalists across Europe", p. 30.

52. *Ibid.*

53. "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study", 30 June 2021.

40. One of the most striking features of SLAPP cases is the length of time that they take. While legal cases can often drag on for various reasons, SLAPP claimants typically exploit legal procedures to spin out a case over years purely so as to drive up costs and force the defendant to expend time, resources and emotional energy. ARTICLE 19's analysis of SLAPP cases found that most cases were pending for around three years, and in many countries some cases were pending for up to 10 years.⁵⁴ There is no single procedural feature that is conducive to SLAPP suits taking such an inordinate amount of time; it is a combination of factors, including, importantly, the willingness of judges, insensitive to the burden that defending a SLAPP imposes on persons concerned, to grant time extensions and to repeatedly postpone court hearings at short notice.

3.2. Disproportionate legal costs

41. Because SLAPP cases typically take so long, legal costs can mount fast. While for claimants this is a trivial matter, for defendants it can become an issue of financial survival. Lawyers' bills can quickly run into tens or hundreds of thousands of euros. This is a problem particularly in Ireland and in the United Kingdom.

42. The British Royal Institute of International Affairs, Chatham House, was recently forced to drop the name of a Russian banker from a report after he threatened to sue for defamation and the organisation was advised that legal costs would come to £500 000 even before the case was heard.⁵⁵ In her intervention at the hearing held on 1 June 2023, Ms Beatriz Brown, who is leading the team working on SLAPPs at the UK Ministry of Justice, stressed that costs could even go beyond £1 000 000 and that the uncertainty of mounting costs was particularly concerning. In Ireland, the costs for the initial stage of a case are estimated at €250 000;⁵⁶ between 2010 and 2015, it is estimated that Irish media spent €30 million defending themselves against SLAPPs.⁵⁷ The publication openDemocracy has written of the chilling effect of a defamation case that was threatened against it by a politician: "We were advised that if we went to court to defend our reporting, we risked bankrupting openDemocracy. We had staff worrying they would lose their homes. [The claimant] dragged the ordeal out over two years [which] cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism. The psychological toll was even higher ... Experts speak of the 'chilling effect'. These are the stories that go unwritten, the leads left unpursued, while the fear of being put out of business hangs over you."⁵⁸

43. Costs are a serious issue in other European countries as well.⁵⁹ In Belgium, news website Apache ran up legal costs of €125 000 in several cases brought against it by a property developer who admitted to the journalists, in a WhatsApp message, that suing them had become "his hobby".⁶⁰ In Italy, legal fees typically run into tens of thousands of euros;⁶¹ one journalist who lost a case and crowd-funded €18 000 to pay the award and legal fees did not appeal for fear of incurring more costs.⁶² In Malta, Daphne Caruana Galizia had her bank account frozen when two government officials demanded €47 000 in defamation damages.⁶³ These are huge sums of money for a small media outlet or for an individual journalist. Journalists and media outlets who defend a case take on a significant financial risk, and even if they win, they do not always recoup their money.⁶⁴ In a report on SLAPP cases in Ireland, the authors explained that the relatively low number of court cases in that country was directly related to costs. Given the near impossibility of budgeting for defamation litigation and the unpredictable nature of jury trials, press publishers are faced with the dilemma of whether to carry on or settle to avoid the cost of litigation. As a result, there are relatively few SLAPP cases to report on, as most are settled out of court as a precaution.⁶⁵

54. Ibid.

55. www.theguardian.com/politics/2022/oct/18/tory-donors-name-removed-from-kleptocracy-report-after-meritless-libel-threat.

56. "A Gathering Storm: The laws being used to silence the media", Index on Censorship, 2020.

57. NewsBrands Ireland, Submission on Review of Defamation Act 2009, January 2017.

58. www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/.

59. "The impact of strategic lawsuits against public participation (SLAPPs) on the news media sector", October 2021, page 9.

60. "SLAPP by construction promoter already cost Apache 70 000 euros", 9 June 2022" (in Dutch).

61. As per the cost calculations imposed by the Ministry of Justice: Decree of the Ministry of Justice No. 55/2014.

62. "FNSI and SUGC stand in solidarity with journalist Giuliana Covella after former Mafia boss asks her for 100 000 euros in damages" (in Italian), 15 December 2016.

63. "Court freezes Maltese blogger's bank accounts on libel accusations", 10 February 2017.

64. For example, in an unsuccessful case in France brought by the media multinational Vivendi against journalists, the latter recovered only €3 000 of the legal costs they had paid, and received no compensation for damages: Court of Appeal of Paris, 26 February 2020, No. 19/05620, www.doctrine.fr (subscription only).

65. "The impact of strategic lawsuits against public participation (SLAPPs) on the news media sector", October 2021, page 9.

44. These examples show that if a media outlet simply cannot afford to defend potential litigation, it will not publish. The result is that reports on matters of public interest go unpublished or are withdrawn.

3.3. Defendants currently have few options to have cases dismissed

45. Laws that are abused for SLAPP purposes must strike an appropriate balance between the right to freedom of expression and the interest that the law seeks to protect (for example, reputation). Thus, appropriate public interest defences must be available under defamation and insult laws, privacy and data protection laws and the various other laws mentioned above. The European Court of Human Rights has developed a clear body of case law on these defences.⁶⁶ However, while these defences are important, they do not address the two most pernicious features of SLAPP lawsuits: the costs and the time it takes for a SLAPP case to be finally defeated. The Court has clearly stated that both of these issues may infringe the right to freedom of expression,⁶⁷ but the response at the national level lies in laws and procedural rules.

46. A key feature of effective anti-SLAPP laws in some countries is the ability to have the cases dismissed at the earliest possible stage. By keeping such a procedure as simple as possible, costs are minimised and defendants are able to obtain justice swiftly. For example, under California's anti-SLAPP law, a defendant can file a motion to have a case dismissed if it was brought in response to "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" unless the plaintiff can establish that the action is likely to succeed.⁶⁸ This puts the burden of proof on the claimant and is a key safeguard. In most European countries, however, while early dismissal is theoretically possible, in practice there is a high threshold for such early dismissal, meaning that a case has to be heard on the merits before a defendant can prevail. This is expensive and burdensome for the defendant.

47. Even in those European countries like France or Belgium where a defendant can "countersue" for vexatious litigation, such cases are rarely successful and require the defendant to go through another lengthy court case, which is precisely the constraint that a SLAPP lawsuit seeks to impose. On the very rare occasions when counterclaims have been successful, the penalty imposed on the party bringing the original lawsuit has been modest (approximately €10 000 in France) and unlikely to deter multinationals or billionaires from bringing claims in the future.⁶⁹

4. Overview of current and proposed anti-SLAPP measures

4.1. Anti-SLAPP measures taken or being considered at international level

48. The European Commission has made tackling SLAPPs a priority in its work under the European Democracy Action Plan. It has announced two initiatives: (1) a proposal for a directive on SLAPP cases in civil matters with cross-border implications,⁷⁰ and (2) a recommendation to provide guidance to member States on how to take action against SLAPP cases that only fall under national law.⁷¹ The draft Directive proposes that courts should be empowered to decide on the early dismissal of "manifestly unfounded" court proceedings against public participation, with the burden of proof being on the claimant to show that the claim is not unfounded, and that claimants should bear all costs and be subject to penalties and damages where proceedings are found to be "abusive".⁷² The proposal distinguishes between "manifestly unfounded" and "abusive" court proceedings and, although widely welcomed, it has been suggested that all "abusive" lawsuits should be dismissed early.⁷³ I regret to note, however that some EU member States are trying to water down

66. See the latest version of 31 August 2022: www.echr.coe.int/documents/guide_art_10_eng.pdf.

67. *Mosley v. the United Kingdom*, Application no. 48009/08, judgment of 10 May 2011; *Steel and Morris v. the United Kingdom*, Application no. 68416/01, judgment of 15 February 2005.

68. California Civil Procedure Code, § 425.16(e)(1-4): <https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-425-16.html>.

69. See the examples set out in the ARTICLE 19 report quoted above.

70. Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), quoted above.

71. Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), [EU\(2022\)58](https://eur-lex.europa.eu/eli/reg/2022/58/20220427), 27 April 2022.

72. Proposed Directive, Chapters III and IV.

73. See <http://eulawanalysis.blogspot.com/2022/04/daphnes-law-european-commission.html>; <https://europeanjournalists.org/blog/2022/04/28/eu-anti-slapp-initiative-encouraging-all-eyes-on-member-states/>; www.article19.org/resources/eu-anti-slapps-initiative-landmark-step-in-the-right-direction/.

the scope of the future directive, to the dismay of journalists' organisations.⁷⁴ The recommendation, which is addressed only to EU member States, recommends that similar safeguards should be available in cases that do not have any cross-border implications.

49. The other key text being considered at international level is the recommendation on strategic lawsuits against public participation (SLAPPs) of the Committee of Ministers of the Council of Europe. A Committee of Experts has been set up to draft this recommendation by the end of 2023.⁷⁵ My report has been drawn up in parallel with these recommendations, and I commend the constructive manner in which the Parliamentary Assembly and the Council of Europe's Directorate General - Human Rights and Rule of Law have worked together to achieve an outcome that will have a far-reaching impact in the Organisation's member States.

4.2. Anti-SLAPP measures taken or being considered at national level

50. At national level, anti-SLAPP legislation is under consideration or has been announced in Malta, Lithuania, Ireland and the United Kingdom.

51. In Ireland, a formal review of the Defamation Act was published in March 2022 and the Irish Government subsequently announced its intention to enact legislative reform focused on bringing down legal costs, limiting the high levels of damages, setting a higher threshold for claimants' ability to sue and providing clearer protection for public interest journalism.⁷⁶

52. In Malta, legislative and constitutional amendments were published which together seek to tackle SLAPPs by limiting the execution of disproportionate judgments obtained in foreign jurisdictions and enabling early dismissal for cases that are *prima facie* manifestly unfounded. The proposals have been criticised by civil society organisations and by the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), both of whom have stated that the recommendations did not go far enough and that a comprehensive anti-SLAPP regime was needed instead.⁷⁷

53. In the United Kingdom, the government has announced that it will introduce a mechanism to allow for the early dismissal of SLAPPs and measures to limit legal costs. To this end, it launched a "Call for Evidence" in 2022.⁷⁸ Under the announced reforms, a court will apply a three-part test to determine whether a case should be dismissed early. First, it will assess whether the case is against activity in the public interest; in this respect, the case should relate to a large-scale public interest issue (such as corruption) to distinguish a SLAPP from a run-of-the-mill defamation action which would concern issues of smaller significance. The court will then consider whether there is evidence of abuse of process and lastly, whether the case has sufficient merit.⁷⁹ These measures should be introduced in parliament as a matter of urgency.⁸⁰ In addition to these legislative measures, the UK Solicitors Regulatory Authority updated its guidance, urging members not to represent clients in SLAPP cases and to report any colleagues who do so; more than 20 investigations have since been launched.⁸¹

54. I would also like to draw attention to the situation beyond Europe's borders. The United States is the legal "birthplace" of SLAPPs, so it makes sense that the first legislation to counter them was passed by US states.⁸² There are, broadly speaking, two approaches: (1) anti-SLAPP legislation which focuses on "public participation" in the narrow sense of protecting only speech that is related to "procuring favourable government action"; (2) broader protection against lawsuits that are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech".⁸³ The second approach is considered to be the

74. <https://europeanjournalists.org/blog/2023/06/09/eu-council-adopts-watered-down-position-on-anti-slapp-directive/>.

75. Committee of Experts on Strategic Lawsuits against Public Participation (MSI-SLP), whose terms of reference may be found at: www.coe.int/en/web/freedom-expression/msi-slp.

76. "Report of the Review of the Defamation Act 2009", 1 March 2022. For the subsequently announced law reform, see, *inter alia*, "Plans for defamation law reform in Ireland unveiled as proposals published", *Irish Mirror*, 1 March 2022.

77. "OSCE Representative on Freedom of the Media calls for participatory public discussions on Malta's draft media legislation", 1 March 2022; ARTICLE 19: "Malta: Comprehensive reforms still needed to protect journalists", July 2022.

78. www.gov.uk/government/consultations/strategic-lawsuits-against-public-participation-slapps/outcome/strategic-lawsuits-against-public-participation-slapps-government-response-to-call-for-evidence#foreword.

79. Ms Beatriz Brown explained that SLAPP cases will be allowed to proceed if there is a likelihood that they may succeed at trial; but at that point, a cost-protection regime would kick in, to insulate the defendant, usually an investigative journalist, from that threat of huge costs, which today made it rashly unwise to proceed with the defence of a SLAPP.

80. "Crackdown on corrupt elites abusing UK legal system to silence critics", 20 July 2022.

81. "Conduct in disputes", 4 March 2022. Investigations were reported in June 2022: Law Gazette, "SRA reveals number of open SLAPPs investigations", 24 June 2022.

82. There are anti-SLAPP laws in 32 US states and in the District of Columbia.

most effective.⁸⁴ Courts have held that the two defining characteristics of a SLAPP are the chilling effect of the action and the public interest involved.⁸⁵ The burden is on the claimant to show a likelihood of success, otherwise the court must dismiss the case. There is currently no federal anti-SLAPP law.⁸⁶

55. In Canada, too, a few provinces have introduced anti-SLAPP measures. Quebec, which like most European countries has a civil law tradition, provides in its Code of Civil Procedure that the courts may declare that a judicial application or pleading is abusive if it is “clearly unfounded, frivolous or intended to delay” or because of “conduct that is vexatious or quarrelsome”; it may also consist in a “use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person’s freedom of expression in public debate”.⁸⁷ Ontario also has effective anti-SLAPP legislation: once a defendant establishes that the matter relates to an issue of public interest, the claimant must demonstrate that the case has “substantial merit”, that the defendant has “no valid defence”, and that the harm suffered from an early dismissal would outweigh the public interest in protecting the freedom of expression. The Law Reform Commission recently reviewed the law and found it to be working well; it has also been endorsed by the Supreme Court.⁸⁸

56. In Australia, legislation in the Australian Capital Territory provides protection against SLAPPs but requires the defendant to demonstrate an “improper purpose”. In practice, this is a high threshold and does not provide effective protection.⁸⁹

4.3. Measures taken by the media and civil society stakeholders

57. SLAPPs are a problem caused by the exploitation of laws and procedural rules by claimants with malicious intentions. The media and civil society cannot tackle the root causes of SLAPPs, but they can take some steps to build resilience to them.

58. Civil society organisations have a vital role to play in monitoring the phenomenon of SLAPPs in Europe in order to assess the extent of the problem and to raise awareness among potential victims and judicial authorities. Currently, the Council of Europe’s Platform tracks the most significant SLAPP cases against journalists and media outlets, but other organisations also fulfil this task, such as the CASE coalition, the European Centre for Press and Media Freedom’s (ECPMF) Mapping Media Freedom⁹⁰ and SafeJournalists⁹¹ in the Balkans. It is important to support these organisations so that they can extend their work to countries where SLAPPs are still under-documented.

59. With donor support, civil society has begun to address the costs of defending SLAPP cases by establishing an insurance mechanism. Insurance is often unavailable or unaffordable for smaller outlets and freelance journalists and to remedy this, seed funding for a global “Reporters Mutual” insurance fund was announced in June 2022.⁹² The goal is for the fund to become a viable, self-sustaining, non-profit entity that is expected to be operational soon.⁹³ Another way of ensuring the availability of low-cost or even free defence lawyers is through legal defence funds or in-house lawyers working for journalists’ associations. The ECPMF runs a legal defence fund and several other organisations have pooled their resources in the Legal Network for Journalists at Risk.⁹⁴ Pooling legal support resources for pre-publication vetting is also an effective way to build media resilience. Examples of such efforts can be found in Bosnia and Herzegovina, where Vaša prava BiH provides legal services including pre-publication vetting, and in Malta, where the Daphne Caruana Galizia Foundation has engaged one of the country’s leading media lawyers to provide pre-publication vetting to independent media.⁹⁵

83. For an example of the former, see the anti-SLAPP legislation in Minnesota, Chapter 554.01 (www.revisor.mn.gov/statutes/cite/554.01); for the latter see California Code of Civil Procedure, Chapter 425.16 (<https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-425-16.html>).

84. “Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant” (2007).

85. *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449-50 (Cal. Ct. App. 1994).

86. There have been various campaigns and a bill was introduced most recently in September 2022: EFF, “It’s Time For A Federal Anti-SLAPP Law To Protect Online Speakers”, 15 September 2022.

87. Quebec Code of Civil Procedure, Article 51.

88. Law Commission, Report on Defamation Law in the Internet Age, March 2020; Supreme Court, 1704604 Ontario Ltd v. Pointes Protection Association, 2020 SCC 22.

89. Protection of Public Participation Act 2008.

90. www.mappingmediafreedom.org/.

91. <https://safejournalists.net/>.

92. “Reinventing the Playbook to Strengthen Global Democracy”, June 2022.

93. “Fighting SLAPPs: What Can Media, Lawyers, and Funders Do?”, December 2022.

94. See www.medialegalhelp.org/.

60. Speaking out and showing solidarity are also important. For many journalists, getting sued is a nerve-wrecking and frightening experience, and the support of colleagues is very important, whether formally through journalists' associations or informally through networks and groups of journalists. This eases the emotional burden and may help in accessing financial support, whether through crowd-funding or through a special defence fund. When journalists speak out, both in support of each other and when they receive threatening letters, it will also help raise awareness of the problem and build broader public support for anti-SLAPP measures. Lastly, greater awareness of SLAPP cases will help profile claimants who are particularly litigious, which can assist courts in identifying SLAPP cases.

61. These various forms of support (legal, financial, psychological and logistical) are currently provided by professional associations, NGOs and independent legal aid organisations.⁹⁵ However, it would be advisable to develop public structures – linked to the State – or at least to invite States to guarantee access to these forms of support under favourable conditions, in order to provide tailor-made legal services to SLAPP victims.

5. Conclusions

62. Taking action against SLAPPs or enacting legislation to combat them is not a question of granting “privileges” to journalists or activists but of defending the right of citizens to free and independent information. At present, only a handful of countries in Europe are considering legislative action and the proposed EU directive will only apply to a narrow category of cases with cross-border implications. Given the damage that SLAPPs do to democracy, however, the need for effective countermeasures is clear.

63. One of the first ways to combat SLAPPs is to publicly denounce perpetrators. This is happening with increasing frequency in Europe, at least in countries where defendants have sufficient confidence in their judicial system. CASE, for example, runs an annual SLAPP competition to “name and shame” the worst offenders. The second way is to let justice take its course, provided that all guarantees of judicial independence are respected. The third is to enact specific legislation to prevent SLAPPs as such, either in the courts or through independent regulatory bodies.

64. In particular, I hope that the Assembly will focus its attention on anti-SLAPP legislation and encourage States to take action in this regard. The root cause of the SLAPP phenomenon is the existence of legislation that is too easily abused. Measures should therefore be taken to prevent claimants from misusing the judicial process to bring SLAPP actions. To this end, the draft resolution sets out a number of guiding principles. I wish to insist here on some of them.

65. First, the frivolous, vexatious or malicious nature of a legal action, once determined (by courts), not only is a key element to qualify it as a SLAPP but should also be the grounds on which the Legislature and the Judiciary should justify adequate responses/countermeasures namely (though not only) in terms of early dismissal, remedies and dissuasive measures.

66. Ideally, procedural rules in place should provide for the request for an early dismissal being introduced before the court where the case is pending. In more concrete terms, when the right to freedom of information and public participation are at stake, procedural rules should compel the claimants to introduce their demands and their legal justification in the initial application, and to list all means of proof within a strict deadline after the case is registered. The defendant should have the possibility to react to the initial application and demands by the claimant, requesting an early dismissal. The same judge (tribunal or court) who has jurisdiction over the main application should have jurisdiction to assess the counterarguments raised by the defendant for an early dismissal and either declare the application inadmissible or dismiss it early. The claimant should not have the possibility to modify the initial pleadings. This should not exclude, however, the possibility to present arguments in response to the pleadings of the defendant and to the request for an early dismissal.

67. Concerning remedies, full compensation of damages for SLAPP victims is, of course, key. Full compensation of damages is a general principle of civil law, and the issue is more how to ensure its effective implementation. It is important that the payment of damages is “prompt”, and a delay in payment should entail an automatic increase in the amount which is due. Moreover, damages allocated to the defendant because of

95. See <https://pravnapomoc.app/ba> and www.daphne.foundation/en/.

96. See www.ecpmf.eu/support/legal-support/ and www.the-case.eu/legal-support.

the moral prejudice he or she suffered should never be symbolic when an action is qualified as a SLAPP; in this respect, anti-SLAPP legislation should clarify how the immaterial damage (namely resulting from the psychological/emotional distress) should be established, taking account, among others, of:

- the amount of damages requested by the claimant;
- financial guarantees which the defendant had to offer;
- power imbalances and pressure exerted before and during the litigation procedure (including via media and social media campaigns targeting the defendant);
- the length of the procedure.

68. Member States should establish effective, proportionate and dissuasive penalties to deter SLAPPs, and anti-SLAPP legislation should provide for punitive damages and fines. Many legal systems do not have punitive damages and might find it difficult to establish them. However, this is a political decision, and we must encourage it. By the way, I would urge decision makers who prefer not to set “punitive damages” to consider at least the possibility to establish an absolute presumption that a minimal amount of immaterial damage is always present, where the frivolous, vexatious or malicious nature of the claimant’s action is established. Fines should not be so difficult to introduce: a court which ascertains the frivolous, vexatious, or malicious nature of the claimant’s action should be entitled to sentence the claimant to pay a fine to the State because of an abusive use of the legal system. In addition to punitive damages and fines, I also consider that “naming and shaming” the authors of SLAPPs, by making court decisions on SLAPPs public would be useful.

69. The media and civil society should also be encouraged to adopt measures such as establishing an insurance mechanism or collective defence funds, pooling of resources for pre-publication legal review and the reporting of SLAPPs, especially in countries where journalists themselves are not yet sufficiently aware of the phenomenon. Raising public awareness would also help to shed light on how SLAPPs threaten democracy.

70. Lastly, I would like to stress that SLAPPs are a pan-European phenomenon that should be faced regionally, addressing in a coherent manner both domestic and cross-border cases. Developing multilateral co-operation at European level is key to countering SLAPPs effectively. There is a need to strengthen judicial co-operation, consider smart procedural rules to avoid forum shopping and multiple SLAPPs in different States, set safeguards against judgments in favour of SLAPPs, provide for mutual recognition of decisions which establish that an action was a SLAPP and apply dissuasive measures.

71. To conclude, this report is being considered at a time when political awareness of SLAPPs is maturing, both in member States and in international organisations. The European Union is discussing a directive on this subject and a recommendation of the Committee of Ministers to member States on countering the use of SLAPPs is under preparation. The Assembly’s work is part of this political momentum and I hope that this report will add weight to the efforts of all international institutions, as well as to those of our national parliaments, to put an end to this particularly insidious type of threat to freedom of expression. In this perspective, we must call on the Committee of Ministers to adopt a strong recommendation, in line with expectations.