



***SHUTTING OUT CRITICISM:  
HOW SLAPPS THREATEN  
EUROPEAN DEMOCRACY***  
***A REPORT BY CASE***

**THE COALITION AGAINST SLAPPS IN EUROPE**  
**MARCH 2022**

# Shutting Out Criticism: How SLAPPs Threaten European Democracy

A report by The Coalition Against SLAPPs in Europe (CASE)

March 2022

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# Acknowledgements

This report would not have been possible without the Amsterdam Law Clinics (ALCs), which established the methodology used in this report and compiled the primary data set that is fundamental to this report.

During the course of several years, different groups of ALCs' students mapped cases that potentially amounted to SLAPP suits in the European context. In their research they identified common conditions that give rise to SLAPPs across Europe. This data set serves as a basis for the analysis of the report. The ALCs are part of the Law Faculty at the University of Amsterdam (UvA). The ALCs' primary mission is to provide law students with an opportunity to participate in real cases on legal questions in the public interest under the supervision of professionals and other academics of the Law Faculty at UvA.

Special thanks goes to Sophie van Dongen who reviewed most of the legal cases included in the study and validated them as SLAPPs. Thanks also to Linde Bryk, who managed the ALCs, and to all of the groups of students of the ALCs that helped develop the foundation of the methodology used in this report.

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Finally, we would like to acknowledge all of the SLAPP targets who, directly or indirectly, were involved in this study. We hope that this report serves to remind you that you are not alone and that advice and support are available.

# Executive Summary

In the last years, there has been an escalation of assaults on freedom of expression and the right to public participation, such as reporting violations of the law or ethical norms, writing to government officials or corporate customers, circulating petitions, being parties in litigation designed to advance social change, engaging in peaceful protests or boycotts, or simply speaking out against abuse/corruption etc. Journalists, activists, whistleblowers, advocacy groups, and other “public watchdogs,”<sup>1</sup> have long been the target of various forms of abuse. Strategic Lawsuits Against Public Participation (SLAPPs), however, represent a growing - and often unreported - threat to these actors. 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. 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.

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<sup>1</sup> ‘About’. CASE. Retrieved from: <https://www.the-case.eu/about>

In recent years, important steps have been taken in Europe to improve the protection of watchdogs against SLAPPs: the European Parliament adopted a report proposing measures to counteract the threat of SLAPPs,<sup>2</sup> the European Commission is working on an initiative to fight such abusive litigation against public participation,<sup>3</sup> and the Council of Europe’s Committee of Ministers (consisting of the foreign ministers of the 47 Member States) agreed in late 2021 to establish a Committee of Experts on Strategic Lawsuits against Public Participation, to draw up a recommendation on combating SLAPPs.<sup>4</sup> The Council of Europe itself publishes alerts on several cases, and the Council of Europe’s Commissioner for Human Rights has called for action against SLAPPs.<sup>5</sup> The focus in this report is on

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<sup>2</sup> (11 November 2021). Press Release. ‘EU rules needed against abusive lawsuits targeting critical voices’. *European Parliament*. Retrieved from: <https://www.europarl.europa.eu/news/en/press-room/20211108IPR16838/eu-rules-needed-against-abusive-lawsuits-targeting-critical-voices>.

<sup>3</sup> (26 October 2021). Speech. ‘Remarks of Vice-President Jourova at the meeting of the European Parliament’s Committee on Culture and Education (CULT)’. *European Parliament*. Retrieved from: <https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/remarks-vice-president-jourova-meeting-european-parliament-committee-culture-and-education-cult-eu>.

<sup>4</sup> See MSI-SLP Committee of Experts on Strategic Lawsuits against Public Participation; <https://www.coe.int/en/web/freedom-expression/msi-slp>.

<sup>5</sup> See (27 October 2021). Press release. ‘Time to take action against SLAPPs’. *Council of Europe*. Retrieved from: <https://www.coe.int/en/web/commissioner/-/tim>

the European continent, as the region woke up to the threatening reality of SLAPPs following the assassination of the Maltese journalist Daphne Caruana Galizia, who was facing almost fifty SLAPP cases at the time of her death. Urgent action is required to roll back such abuses since, as the data available demonstrates, SLAPP cases are on the rise across Europe.

SLAPP lawsuits are usually initiated by individuals in powerful positions, including members of the government or leading political parties, wealthy businesspersons, and at times even judges<sup>6</sup> and the clergy<sup>7</sup>. Given the positions typically occupied by the plaintiffs, the issues that are most commonly at the forefront of SLAPP cases include allegations of corruption (e.g. rule of law concerns and nepotism), illicit financial gains (e.g. money laundering and bribery), and criminal wrongdoing (e.g. sexual abuse) by people in powerful positions with the resources and connections to hide such misdeeds. The litigants attack the public watchdogs for speaking or protesting against them, with protracted legal proceedings intended to bury them with paperwork and high financial costs, cast doubt on their allegations, and, ultimately, bury the story.

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[e-to-take-action-against-slapps](https://fom.coe.int/recherche:motCle=SLAPP); See also Council of Europe Safety of Journalists platform: <https://fom.coe.int/recherche:motCle=SLAPP>.

<sup>6</sup> Consuelo Scerri Herrera & Robert Musumeci v. Daphne Caruana Galizia [2010, Malta] <https://timesofmalta.com/articles/view/herrera-withdraws-case-against-caruana-galizia.395159>.

<sup>7</sup> Cardinal Angelo Becciu v L'Espresso [2020, Italy] <https://www.balkanicaucaso.org/eng/Areas/Italy/MFRR-condemns-absurd-10-million-lawsuit-against-L-Espresso-magazine-by-sacked-Vatican-Cardinal>.

A SLAPP can be based on a range of legal theories - including defamation, data protection, privacy, business torts and data protection - and exploit gaps in procedural protections that are often highly specific to the jurisdiction in question. Nonetheless, certain common conditions can be identified which give rise to SLAPPs across Europe, regardless of the different jurisdictions in which the lawsuit is initiated. It is, therefore, important to analyse these patterns to be able to identify the most effective solutions to tackle the scourge of SLAPPs.

The data collected for this report highlighted that, while journalists are the most likely to be targeted, activists, human rights defenders, and academics are also high on the list of those who are faced with SLAPPs. Journalists are targeted with SLAPPs because they bring information to light while activists, civil society organisations, and academics are confronted with SLAPPs because they challenge the *status quo*. Additionally, given that the aim of SLAPPs is to stifle public participation, the targets are not strictly confined to the professional realm. Ordinary citizens could also be victims of SLAPPs, so long as they are critical of those with power and access to ample resources.

The data highlights how these vexatious lawsuits are a growing tendency within the European continent, and that claimants are becoming increasingly creative. SLAPPs find a particularly fertile ground in jurisdictions which lack robust procedural protections to tackle abusive lawsuits. Unfortunately, some laws and legal systems are more amenable to abuse than others - and some jurisdictions

where the rule of law and human rights are seriously threatened are, therefore, more exposed to SLAPPs.

Given the wide range of those who can be subject to SLAPPs, it is crucial to humanise the discussion. Many of the defendants who were interviewed emphasised the loneliness and fear they felt when challenging the abusive lawsuit. A prevalent theme in the research was the chilling effect that SLAPPs bring about, which did not stop at the financial burden of fighting such cases. The effect also extended to the time defendants spent to prepare for the legal cases and show up in court, the effort to remember details of events that took place years previously, and the mental and emotional strain of getting oneself to combat a SLAPP. Many described the process of dealing with the SLAPP as more taxing and intimidating than actually receiving the legal threat.

For this report, NGOs, media outlets, journalists, activists, politicians, and others around Europe contributed information on SLAPP cases filed in over 30 European jurisdictions from 2010 to 2021. The Coalition Against SLAPPs in Europe (CASE) and the Amsterdam Law Clinics (ALCs) surveyed **570 cases** to identify the full scale and nature of the SLAPP problem in the continent, which covers a wide range of legal theories, defendants, and claimants. This is only a fraction of the reality of SLAPPs in Europe. The majority of the defendants do not report that they have been victims of SLAPPs due to, among other reasons, the fear of further retaliation from the claimant.

It is also important to differentiate between SLAPPs and other forms of legal

intimidation. Legal intimidation can take various forms - including the use of legal threats that do not proceed to lawsuits, or the use of other legal and non-legal means to harass and intimidate - and the scale of this problem cannot be accounted for here. When aggressive legal threats are used, very often the acts of public participation are shut down even before a lawsuit is initiated and the victims are so fearful that they do not speak about it. SLAPPs, on the other hand, are more easily documented as court documents are more readily accessible. Both SLAPPs and other forms of legal intimidation are a menace to societies' right to know, to freedom of expression, and to the right to public participation. They are, therefore, an anti-democratic threat that needs to be properly addressed.

The principal purpose of this report is for advocacy and campaigning efforts, both nationally and at the European level, to better inform legislators who are exploring the introduction of measures with the aim of effectively redressing the spread of SLAPPs. It also serves to inform the public watchdogs affected by SLAPPs that they are not alone.

CASE emphasises that this study is not an exhaustive survey of SLAPP cases around Europe. For a number of reasons, a scoping exercise such as this can only ever scratch the surface of the SLAPP problem in Europe. As is discussed in more detail in Chapter 2 of this report, the data was gathered through desk research, interviews, and snowball sampling techniques. What is presented hereunder is only a snapshot of the issue of SLAPPs in Europe. It is intended to give a general overview of the nature of

SLAPPs in Europe and the common trends and patterns identifiable in the documented cases.

## Outline of the report

**Section I** of this report provides an in-depth background on SLAPPs in Europe and outlines the methodology used in this report, along with its limitations. Finally, it breaks down the objectives of this report.

**Section II** summarises the data referred to in the previous section. The cases that were submitted to us show that the most affected defendants in SLAPP cases are journalists (34.2%) and media outlets (23%), followed by activists (9.8%) and editors (9.5%). We also found a general growth in the number of cases: an increase of 43.5% in 2019, 15.2% in 2020, and a slight decline of 2.6% in 2021.

This section also shows that the conditions that give rise to European SLAPPs include the following identifying characteristics.

1. **Power imbalance:** SLAPPs are often vexatious or frivolous complaints by people in positions of power against those speaking or acting out against an injustice.
2. **Legal basis:** SLAPPs tend to be civil cases filed by complainants who are wealthier and/or more powerful than the targets, who are most frequently individuals (rather than the organisations that they work for or represent). These frivolous legal actions aim to professionally discredit their

targets, drain their financial resources, and dissuade journalists and watchdogs from investigating abuse of power.

3. **Chilling effect:** SLAPPs are different to other intimidatory legal actions because their intent is to silence critical voices from raising matters of public interest to encourage public debate. As a consequence, those targeted and those who might have also expressed themselves are stopped from speaking out in fear of the high financial costs and emotional drain involved.
4. **Cross-border element:** Some cases involve a cross-border element whereby complainants choose to file the complaint based on where they perceive they would have the best chance to achieve the desired outcome and exhaust the resources, time, and energy of their targets.

**Section III** explores various thematic areas that comprise the conditions which lead to SLAPPs. It focuses on the who, what, where, why, and how of SLAPPs and shows that there are particular commonalities between various SLAPP cases around Europe which lead to their chilling effect. This section explains the statuses of the defendants and the plaintiffs in SLAPP cases, the legal theories most commonly used, the most frequent outcomes of these cases, and the financial and psychological burden experienced by the defendants. Most notably, this section points out the jurisdictions in which SLAPPs are most frequently filed, as well as those jurisdictions in which the judiciary is



least likely to treat the cases as vexatious litigation.

Bearing all of this in mind, **Part IV** spotlights how the law must be reformed so that public watchdogs are protected globally. It offers recommendations to policymakers designing, deciding on, or implementing legislation to protect public watchdogs and curb the spread of SLAPPs in Europe. A number of suggestions to legislators include the following.

#### **1. The early dismissal of SLAPPs.**

It is important that SLAPPs not only misfire in court, but that they backfire. A requisite in the law must be that the plaintiff shows that the complaint meets a merit test for it to be filed in court.

#### **2. Coalition-building must be at the core of any anti-SLAPP strategy.**

The very existence of coalitions can act as a deterrent. SLAPPs work to marginalise public watchdogs and, therefore, a unified network supporting watchdogs disincentivises potential SLAPP litigants from filing baseless complaints.

#### **3. Put SLAPPs on the political radar.**

National governments and politicians need to be open to recommendations and advice from NGOs, media outlets, lawyers, and others committed to reversing the threats imposed by SLAPPs.

#### **4. EU anti-SLAPP legislation needs to be harmonised.**

SLAPPs are an EU-wide issue since they not only affect most Member States across the EU, but they also have a detrimental impact on the EU legal order, the respect for EU values and the health of EU Member States' democracies.

## **CASE**

CASE is a broad coalition of NGOs from across Europe united in the recognition of the threat that SLAPPs pose to public participants. In a matter of three years, CASE has achieved the following.

#### **1. EU legislation.**

Managed to convince the EU to propose Anti-SLAPP legislation and the EU Anti SLAPP expert group.

#### **2. The Council of Europe (CoE).**

The CoE set up the Anti-SLAPP expert group after our call and we will have a recommendation in two years' time.

#### **3. The European Parliament.**

Parliament voted to request the EU to act on SLAPPs.

#### **4. Documenting SLAPPs.**

Documented more SLAPPs than ever before on various platforms.

#### **5. Victim support.**

Provided financial support and advocacy for those facing SLAPPs.



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# Introduction

The Coalition Against SLAPPs in Europe (CASE) is made up of NGOs that have come together in response to the rising threat of SLAPP suits in Europe. The perils of SLAPPs came to wide public attention following the assassination of the Maltese investigative journalist, Daphne Caruana Galizia, in October 2017. At the time of her death, Daphne was facing 47 libel cases, including one that had been filed in the United States (US), and had received multiple threats from the UK law firm *Mishcon de Reya* on behalf of its client, passport sales firm *Henley & Partners*. For the past four years, various NGOs around Europe, particularly members of CASE, have been more vociferously advocating for anti-SLAPP legislation throughout the continent.

SLAPPs are a menace to societies' right to know, to freedom of expression, and to the right to public participation and, therefore, an anti-democratic threat that needs to be properly redressed.

## 1.1 Overview of existing literature

The scope of this study is to add to the existing literature due to its uniquely in-depth detailed analysis of SLAPP cases in Europe. It contributes to the growing literature on SLAPPs in Europe by analysing the trends and patterns of SLAPP cases in countries across Europe, including those outside the European Union (EU), from 2010 to 2021. It analyses the various types of SLAPP cases (i.e. criminal, civil, or, at times, constitutional), the legal basis, the characteristics of the complainants and defendants, the jurisdictions in which SLAPPs are more commonly filed, and the outcomes of such cases in the different jurisdictions. Additionally, this report gives due attention to the psychological burden imposed on anyone who has faced, or is facing, a legal case that is vexatious, frivolous, and aims to silence them.

The term 'SLAPP' was first coined in a 1988 study by American scholars George W. Pring and Penelope Canan. They distinguished SLAPP suits from other retaliatory lawsuits based on "the single element of reaction to political action"<sup>8</sup> through legal means. SLAPPs target public participation to silence dissent and criticism. They are an abuse of the law and legal process since they are filed with the improper purpose of shutting down acts of public participation.

While the definition of a SLAPP is clear, the main problem is identifying this improper purpose. Even once these problems of identification are overcome, it remains difficult to identify the full impact of legal intimidation - not least because more often than not, a legal *threat* has the same effect as a full lawsuit. Most lawsuits follow a legal threat, yet a legal threat is at times enough to intimidate the target so that they retract their statements or do

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<sup>8</sup> Pring G. and Canan P. (1988). *Strategic Lawsuits Against Public Participation*. 35 Soc. PROBS. 506.

not publish information that is important to the public interest. While a legal threat can be just as coercive as a lawsuit, this report only focuses on legal complaints filed in court against public participants. This limitation is necessary because it would not have been possible to locate and gather a broad enough database of frivolous legal threats throughout Europe to fairly represent the situation.

This study is unique for two key reasons: firstly, there is no existing literature analysing the patterns and trends of SLAPPs across European jurisdictions from the years 2010 to 2021; and, secondly, it documents over 550 SLAPP cases and analyses the patterns and trends which give rise to SLAPPs in the European context. To understand the contribution of this study to what has already been studied and recorded on SLAPPs in Europe, the existing literature must, firstly, be reviewed.

The Council of Europe (CoE) 2021 annual report on media freedom, ‘Wanted! Real action for media freedom in Europe’, defines a SLAPP as:

**“(typically civil) lawsuits brought by powerful individuals or companies that have little legal merit and are designed to intimidate and harass the target - especially through the burden of legal costs - and not be won in court”<sup>9</sup>**

While the above definition is considered to be fairly narrow - as the definition on SLAPPs below will illustrate - it is important because it emphasises the intention of the claimant. What differentiates a SLAPP from other lawsuits is the vexatious and frivolous nature of the complaint. The intention of the claimant is not to win the case and defend their right, but to exhaust the financial and psychological resources of the target.

As one might imagine, an increased burden is placed on the target when a claim is made in a country other than the one where they reside. In its 2021 report on media freedom, the Council of Europe (CoE) explains the peculiarities of forum shopping: the practice of strategically choosing to file a complaint in a country where the complainant believes the laws or other aspects of litigation are more favourable to their intentions. Those cross-border elements are taken advantage of, as plaintiffs make use of applicable rules of private international law to select the jurisdiction with the greatest likelihood of achieving the desired result rather than the one with the closest connection to the dispute.

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<sup>9</sup> 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, p. 30.

The European Parliament analysed the legal definitions of SLAPPs in the EU in its report “The Use of SLAPPs to Silence Journalists, NGOs and Civil Society”.<sup>10</sup> The report analyses the development of anti-SLAPP legislation in third countries, such as the US and Canada, that can assist EU anti-SLAPP legislation. In particular, the report emphasises that “reforms which recognise the central role of journalists, NGOs and civil society in safeguarding the rule of law would constitute a meaningful contribution to the advancement of democratic values where so much else has failed.”<sup>11</sup> The report focuses on various human rights issues around SLAPPs, such as the obstacles to freedom of expression and freedom of assembly, on which it bases its suggestions for an EU anti-SLAPP directive.

The European Parliament report emphasises that SLAPPs are generally characterised by two core elements: a claim arising due to public participation on a matter of public interest and the claim’s lack of legal merit. This is echoed in the European Commission study into the state of play of SLAPPs across the EU. The scope of this paper is to assess SLAPP cases in relation to media freedom and freedom of expression. It explains that the procedure of SLAPPs is an “attempt to intimidate, tire out, and consume the financial and psychological resources” of the target.<sup>12</sup>

The Index on Censorship report “A gathering storm: The laws being used to silence the media”, researches the scope and scale of SLAPPs against journalists and media outlets in EU States, the UK, and Norway to provide a concise, country-by-country snapshot of the legal systems that are being abused in favour of the powerful. The report’s central argument is that the law is essential to understanding how journalists are vulnerable to legal threats, but that “culture, which shapes the law but is also separate from it, should also be taken into account.”<sup>13</sup> The report explains the legal tools used in SLAPP cases, such as the defamation laws in each country, typical claims for damages in civil cases, and other types of intimidation through legal means.

The report focuses solely on SLAPPs against journalists. While this is the largest target group, SLAPPs target other public participants, including activists, academics, trade unionists, and even ordinary citizens. The Business & Human Rights Resource Centre focuses on human rights defenders speaking out against businesses related to human rights and/or environmental abuses in its report, “SLAPPED but not silenced: Defending human rights in the face of legal threats”.<sup>14</sup> Among various observations, it notes the imbalance of

<sup>10</sup> Borg-Barthet, J., Lobina, B. and Lazaruk, M. L. (2021). ‘The Use of SLAPPs to Silence Journalists, NGOs and Civil Society’, *European Parliament*. Retrieved from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL\\_STU%282021%29694782\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU%282021%29694782_EN.pdf).

<sup>11</sup> *ibid.*, p. 6.

<sup>12</sup> Bard, P. et al. (2020). ‘SLAPPs in the EU context’, *EU-CITIZEN*, p. 4. Retrieved from: [https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf).

<sup>13</sup> Ní Mhainín, J. (1 June 2020). ‘A gathering storm: the laws being used to silence the media’. Index on Censorship, p. 3. Retrieved from: <https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf>.

<sup>14</sup> (June 2021). ‘SLAPPED but not silenced: Defending human rights in the face of legal risks’. Business & Human Rights Resource Centre. Retrieved from: [https://media.business-humanrights.org/media/documents/2021\\_SLAPPs\\_Briefing\\_EN\\_v657.pdf](https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf).

power between large corporations and civil society organisations. It notes that this is made possible by “law firms and lawyers agreeing to represent companies” and exhaust human rights defenders by draining their resources and diverting their efforts from their core work to defending themselves in court against frivolous claims.<sup>15</sup>

The Business & Human Rights Resource Centre report was the first-ever analysis of the lawsuits brought or initiated by business actors globally, comprising 355 cases filed since 2015. The study of the Coalition builds on this approach by also documenting a large number of SLAPP cases across various countries. However, while the scope of the Business & Human Rights Resource Centre report is global, CASE’s report limits its scope to countries in Europe.

This report is not the first publication by CASE on SLAPPs in Europe. In the report “Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law”,<sup>16</sup> CASE submitted a proposal for legal remedies to the SLAPP problem in the EU. The report proposes necessary changes for protections from SLAPPs and makes recommendations for strengthening the internal market by protecting natural and legal persons targeted by SLAPPs. It also proposes its minimum harmonisation EU anti-SLAPP Directive model that introduces appropriate safeguards against SLAPPs, provides for supportive and protective measures for SLAPP targets, and includes deterrents and awareness-raising measures.

## 1.2 Relevant definitions

Since this report aims to build on the existing literature, it is necessary to define various elements of SLAPPs, and what a SLAPP is, before explaining the methodology of this study.

**Legal theory:** i.e., legal bases of SLAPPs. SLAPP cases are typically based on defamation but can also concretise on other legal grounds, including torts, labour law, and injunctions. Research shows that SLAPP suits brought in the EU Member States are mostly civil and commercial lawsuits, including actions for damages brought in connection with criminal defamation complaints.<sup>17</sup>

**Forum shopping:** 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.<sup>18</sup>

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<sup>15</sup> *ibid*, p. 5.

<sup>16</sup> ‘Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-Slapp Law’, CASE/ Retrieved from: [https://dq4n3btxm8c9.cloudfront.net/files/zkecf9/StopSLAPPs\\_04Dec.pdf](https://dq4n3btxm8c9.cloudfront.net/files/zkecf9/StopSLAPPs_04Dec.pdf).

<sup>17</sup> *ibid.*, p. 9.

<sup>18</sup> *ibid.*, p. 13.



**Public interest:** This report maintains a broad interpretation of the public interest. It includes all that can be related to a shared political, social, economic, environmental, or other, concern, also having regard to the potential or actual impact on the welfare of society or part of it. This may include matters affecting particular communities or minorities.<sup>19</sup>

**Public participation:** Any behaviour of a natural or legal person directed at engagement on a matter of public interest through the disclosure, dissemination or promotion to the public in any form of information, findings, ideas, opinions or testimonies, and any preparatory action thereof. This should include the exercise of freedom of expression and information, assembly, association and other rights relevant to participation, such as access to justice.<sup>20</sup>

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 public and competent national and regional authorities.

Based on these definitions, SLAPPs are defined as follows.

**SLAPPs:** abusive lawsuits filed to shut down acts of public participation, including public interest journalism, peaceful protest or boycotts, advocacy, whistleblowing, 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: so-called “public watchdogs”. This broad category includes journalists, activists, rights defenders, whistleblowers, campaigning organisations, unions or trade associations, and academics. Ultimately, the categorisation of a case as a SLAPP is a value judgement, since one can only ever *infer* an improper purpose from the circumstances of the case as outlined below [Chapter 1, Figure 1].

**Public watchdog:** SLAPPs target a range of societal actors, united by a common function of holding the powerful to account and exposing wrongdoing. 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, and
- trade unions and professional associations.

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<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*, p. 17.

**SLAPP tactics:** can take various forms, for example, legal threats that do not proceed to lawsuits, and the number of these cannot be accounted for here. When SLAPP tactics are employed, very often the acts of public participation are shut down even before a lawsuit is initiated and the victims are so fearful that they do not speak about it, especially since a SLAPP threat routinely includes a ban on publication or public discussion of the threat.

## 1.3 Methodology

The total population size of SLAPP cases throughout Europe from 2010 to 2021 was unknown and could not be reasonably determined, given the extent of the data required to be collected and the resources available. Therefore, this report opted to collect data through a “snowball sampling” method.<sup>21</sup> A cloud-based *Google Sheet*<sup>22</sup> was distributed among members of CASE, who then entered information on SLAPP cases they knew of. The members were encouraged to share this publicly-accessible document with other stakeholders who would have information on SLAPP cases in Europe. This report employed an “exponential non-discriminative” sampling method, whereby “every recruited participant in the research work recruits [more] participant[s]” to contribute data to the sample size.<sup>23</sup>

The majority of cases were compiled, assessed, and verified by researchers at the Amsterdam Law Clinics. NGOs, media outlets, journalists, activists, politicians, and others around Europe helped to contribute information on SLAPP cases filed in 30 European jurisdictions from 2010 to 2021, namely Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Kosovo, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom, and Ukraine. Based on this data, CASE identified 570 legal cases from across Europe as SLAPPs, as assessed against the indicative qualities described in Figure 1. An amendment was made to the flowchart below, whereby legal action against private persons initiated by a State was classified as a SLAPP. An example of this is the Kingdom of Morocco that filed various defamation suits in France against journalists from *Forbidden Stories*, *Amnesty International* and other journalists/NGOs who worked on the Pegasus Project.<sup>24</sup> The reason for this is that these are multiple legal actions filed against individuals and organisations with the intent to silence them and cast doubt on their journalistic investigations involving the claimant.

<sup>21</sup> Snowball sampling refers to a method of chain referral sampling that involves “collecting a sample from a population in which a standard sampling approach is either impossible or prohibitively expensive, for the purpose of studying characteristics of individuals in the population.” See more in: Handcock, M. S. and Gile K. J. (2011). “On the Concept of Snowball Sampling”. *Sociological Methodology*, 41(1), p. 368. Retrieved from: <https://arxiv.org/pdf/1108.0301.pdf>.

<sup>22</sup> The full list of these cases can be found at: <https://bit.ly/CASESLAPP>.

<sup>23</sup> Anieting, A. E. and Mosugu, J. K. (2017). “Comparison of Quota Sampling and Snowball Sampling”. *Indian Scholar*, 3(3), p. 35. Retrieved from: <http://www.indianscholar.co.in/downloads/5-a.e.-anieting.pdf>.

<sup>24</sup> (30 July 2021). “Morocco Sues Several Media Outlets in France Following Pegasus Revelations”. *Council of Europe Safety of Journalists Platform*. Retrieved from: <https://go.coe.int/D8NU7>.

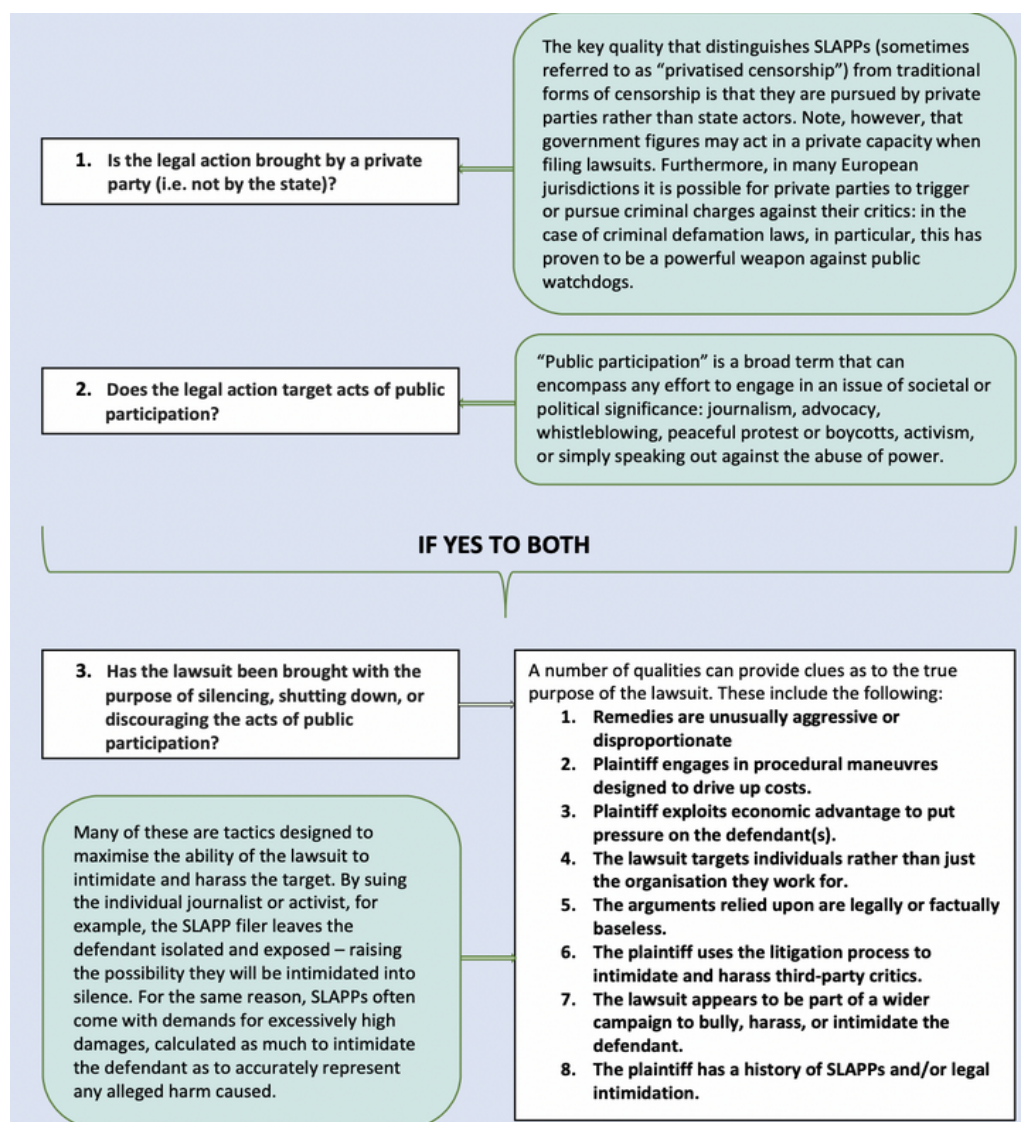


Figure 1: Identifying a SLAPP<sup>25</sup>

Nonetheless, by analysing these 570 cases, various aspects of SLAPPs have been identified: a number of trends and patterns concerning the status of the parties involved, the legal theories on which SLAPPs are based, the outcomes of SLAPPs in the different countries, and the chilling effect that these lawsuits have on their targets. These trends and patterns are further explored in the chapters that follow.

Other methods of assessing the data included the following:

- **Assessing publicly-available information.** Research was conducted through the use of online materials, including media and academic articles, court judgements, reports by NGOs and international organisations, and domestic legislation.
- **Emails and interviews.** These were conducted with various CASE members, as well as journalists, academics, lawyers, and other stakeholders in the respective

<sup>25</sup> CASE method on how to identify a SLAPP, available at: <https://www.the-case.eu/about#block-b1b01b79fa1caf24f59f>.

jurisdictions. The emails included an explanation of the intent and purpose of this report and briefly introduced the implications of SLAPP cases on advocates and the media. During the phone/virtual interviews, the interviewee's experiences of SLAPPs were discussed as well as their knowledge of the concept.

## 1.4 Limitations

While this data helps to illustrate the nature of SLAPPs in Europe and identify the conditions that give rise to SLAPPs, there are several reasons why it cannot fully represent the full scale of the problem, including the following:

- Given the sheer quantity of legal threats received by media outlets and other public watchdogs - and the practical difficulties involved in cataloguing these threats - the data gathered for this report only covers court-recorded lawsuits, and does not therefore consider the extent to which the act of issuing an aggressive legal threat can itself shut down acts of public participation (i.e. by causing an immediate retraction).
- More broadly, any efforts to collect examples of SLAPPs are impeded by the chilling effect such lawsuits create, with many SLAPP victims preferring not to draw attention to their case out of fear of further retaliation or reputational damage. Any effort to map out the number of SLAPPs in a region can only ever scratch the surface of the problem.
- No interviews with complainants, and their lawyers, prosecutors, or judges were conducted for this study. This is a possible line of future research on SLAPPs.
- Most of the existing literature on SLAPPs focuses on journalists as the targets, leaving out important discussions on the effects of SLAPPs on other groups such as human rights defenders and activists, as well as the adverse impact that they have on freedom of association and assembly.

# Presenting the data

## 2.1 Definitions

Between 2019 and 2021, ALCs and CASE collected data from its members and other civil society groups on apparent SLAPPs filed between 2010 and 2021. On the basis of this data and the indicative qualities described in Figure 1,<sup>26</sup> CASE has identified 570 legal cases from across Europe as SLAPPs.

Prior to presenting the data, it is necessary to establish various definitions of terminology that will be repeated throughout this chapter when presenting the data gathered.

**Cross-border cases:** In the European Union, cross-border cases are possible under the Brussels Ia Regulation,<sup>27</sup> which allows libel proceedings to be brought in a jurisdiction in which the harmful event occurred or may occur.<sup>28</sup> A cross-border case is classified as such when the case is brought in a Member State that is not the domicile of the defendant.

**Politicians/public services:** This category refers to any holder of an elected office, as well as individuals who are professionally involved in politics and/or the civil service. Members of the judiciary are not included in this category.

**State-owned entities:** This includes entities that are state-owned and state-controlled, as well as those that are substantially state-funded.

**Public participant:** A more extensive definition of public participation is included in Chapter 1, and so a public participant is any natural or legal person engaged in matters of public interest.

**Population:** This refers to the data collected for the purpose of this research, which is a sample size of the total number of SLAPP cases filed throughout Europe from 2010 and 2021. The population size was determined through snowball sampling, as explained in Chapter 1.

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<sup>26</sup> The full list of these cases can be found here: <https://bit.ly/CASESLAPP>.

<sup>27</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. The Brussels Ia Regulation affords the claimant extensive choice of venues in which to initiate litigation, as well as a choice of litigation strategies. This means that the claimant can sue in a place or places which have little connection to the dispute, and which is most inconvenient to the respondent. The cost of a defence in a foreign court is often prohibitive to the defendant.

<sup>28</sup> Borg-Barthet, J., Lobina, B., Zabrocka, M. (2021). 'The Use of SLAPPs to Silence Journalists, NGOs and Civil Society'. *European Parliament*, p. 14. Retrieved from: [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).

## 2.2 Quantitative data

By analysing the 570 cases gathered, this report has identified a number of trends and patterns, most notably the following.

- **Growth:** there has been an increasing number of SLAPPs filed every year, as can be seen in the graph below.

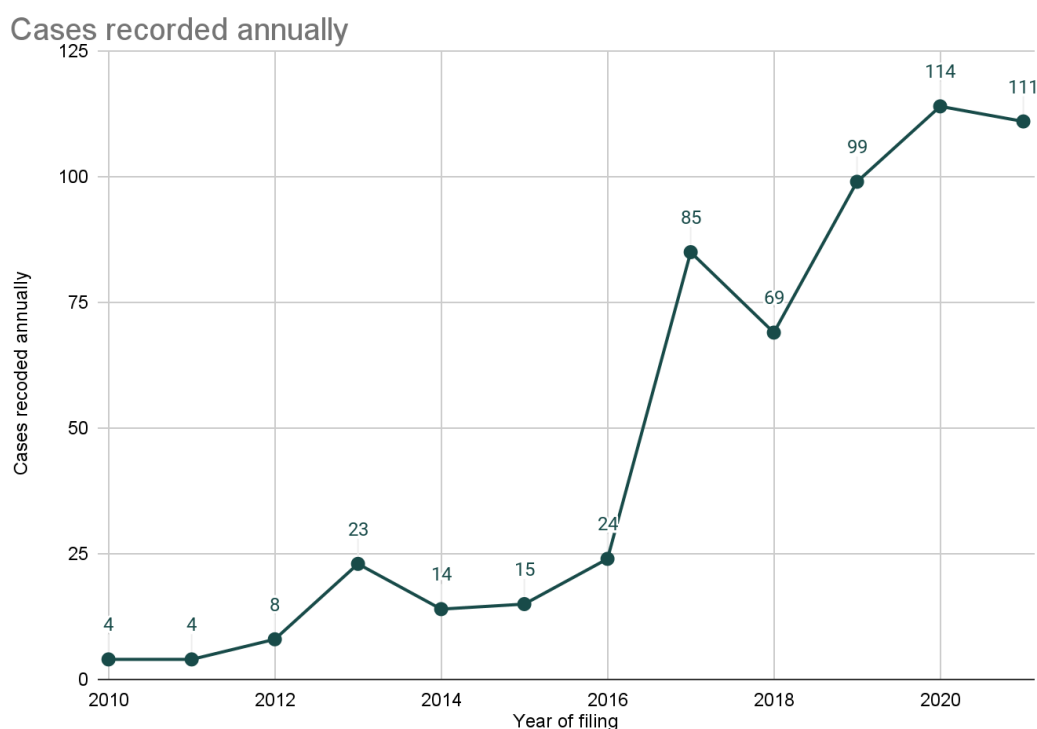


Figure 2: CASE-recorded SLAPP legal cases from 2010 - 2021<sup>29</sup>

In some EU jurisdictions, this has been particularly notable, as the following examples show:

- **Croatia:** data compiled by the Croatian Journalists' Association (HND) found 905 active court cases against journalists and media outlets in 2020 and at least 924 cases in 2021.<sup>30</sup> According to the Mapping Media Freedom platform, online media outlet Index.hr and its journalists are facing 65 active lawsuits.<sup>31</sup> While it is not clear how many of these are SLAPPs, data from previous years showed that only one in ten journalists was eventually convicted or found liable for damages.

<sup>29</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>30</sup> (19 April 2021). 'Croatia: 924 active lawsuits against journalists and media outlets'. European Federation of Journalists. Retrieved from: <https://europeanjournalists.org/blog/2021/04/19/croatia-924-active-lawsuits-against-journalists-and-media-outlets>.

<sup>31</sup> Index.hr and its journalists face 65 active legal actions: <https://www.mapmf.org/alert/24231>.



- ***Italy***: SLAPPs have proliferated in Italy to the extent that Carlo Verna, the president of the parastatal Order of Journalists organisation, has referred to them as a “democratic emergency”.<sup>32</sup> The number of criminal defamation cases filed under the country’s Press Law doubled between 2011 and 2017,<sup>33</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>34</sup>
- ***Poland***: the biggest daily newspaper *Gazeta Wyborcza* has been targeted by a string of more than 60 civil and criminal cases over the past few years, many of which were initiated by Law and Justice Party (PiS) politicians.<sup>35</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, as illustrated in the figure below.

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<sup>32</sup> See <https://journals.sagepub.com/doi/10.1177/0306422020917084>.

<sup>33</sup> (31 March 2021). ‘Thematic factsheet: SLAPP in Italy, a democratic emergency’. *Resource Centre on Media Freedom in Europe*. Retrieved from: <https://www.rcmediafreedom.eu/Dossiers/Thematic-factsheet-SLAPP-in-Italy-a-democratic-emergency>.

<sup>34</sup> (January 2019). ‘Democracy at Risk: Threats and Attacks Against Media Freedom in Europe. Annual Report 2019’. *Resource Centre on Media Freedom in Europe*. Retrieved from: <https://www.rcmediafreedom.eu/Publications/Reports/Democracy-at-Risk-Threats-and-Attacks-Against-Media-Freedom-in-Europe.-Annual-Report-2019>.

<sup>35</sup> See (2 November 2015). ‘The Gazeta Wyborcza newspaper received 63 lawsuits and legal threats’, *Mapping Media Freedom*. Retrieved from: <https://www.mapmf.org/alert/23957/>; See also: (24 March 2021). ‘Defamation lawsuit against Gazeta Wyborcza editor-in-chief by Polish Justice Minister must be dropped’. *Resource Centre on Media Freedom in Europe*. Retrieved from: <https://europeanjournalists.org/blog/2021/03/24/defamation-lawsuit-against-gazeta-wyborcza-editor-in-chief-by-polish-justice-minister-must-be-dropped/>.



## Legal theory

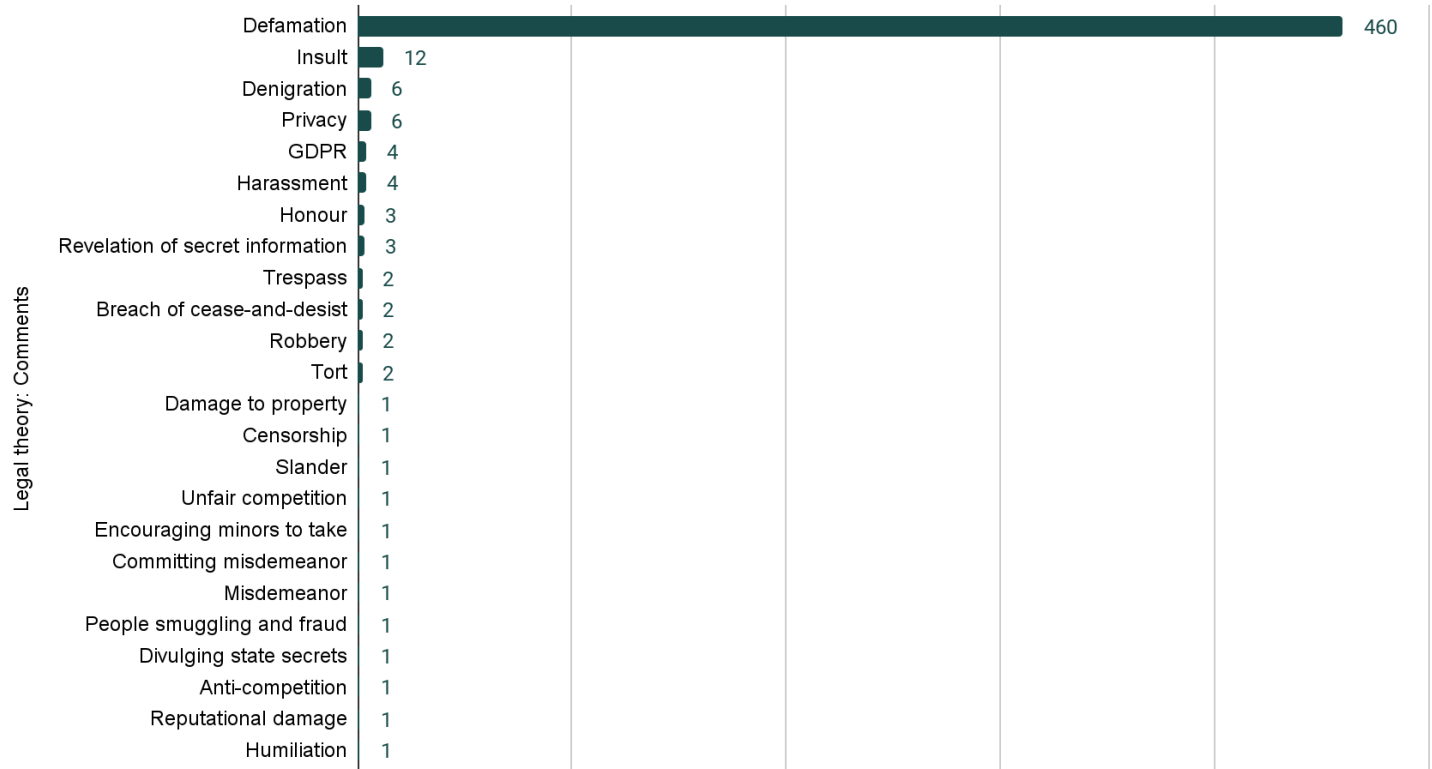


Figure 3: CASE-recorded SLAPP legal cases from 2010 - 2021, legal theories<sup>36</sup>

An increasing number of cases have recently been brought under privacy and data protection provisions, 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>37</sup> though court practice is yet to be seen. An example of this GDPR abuse can be found in the case filed by the Hungarian energy drink company Hell Energy Magyarország Kft 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 obtained the removal of their names from the public list of the 100 wealthiest Hungarians.<sup>38</sup>

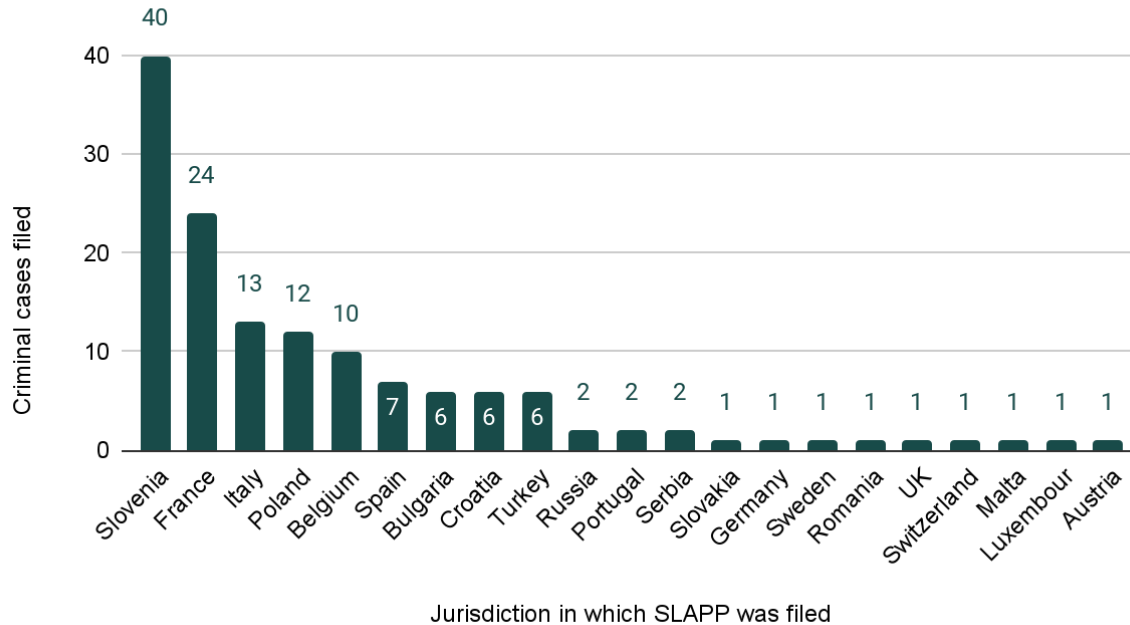
<sup>36</sup> Certain legal theories are specific to the jurisdiction. For example, insult includes cases of insult to the constitutional organ (Poland) and to the President (Turkey). Denigration refers to anti-competition laws in France and breach of cease-and-desist cases only occurred in Germany. 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>.

<sup>37</sup> "SLAPPs: Sued into silence", Greenpeace, July 2020: <https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>.

<sup>38</sup> (3 November 2020). 'In Hungary, GDPR is the new weapon against independent media'. *International Press Institute*. Retrieved from: <https://ipi.media/in-hungary-gdpr-is-the-new-weapon-against-independent-media/>.

Among the 570 SLAPPs studied by CASE and ALCs, a number involved the use of private prosecution:

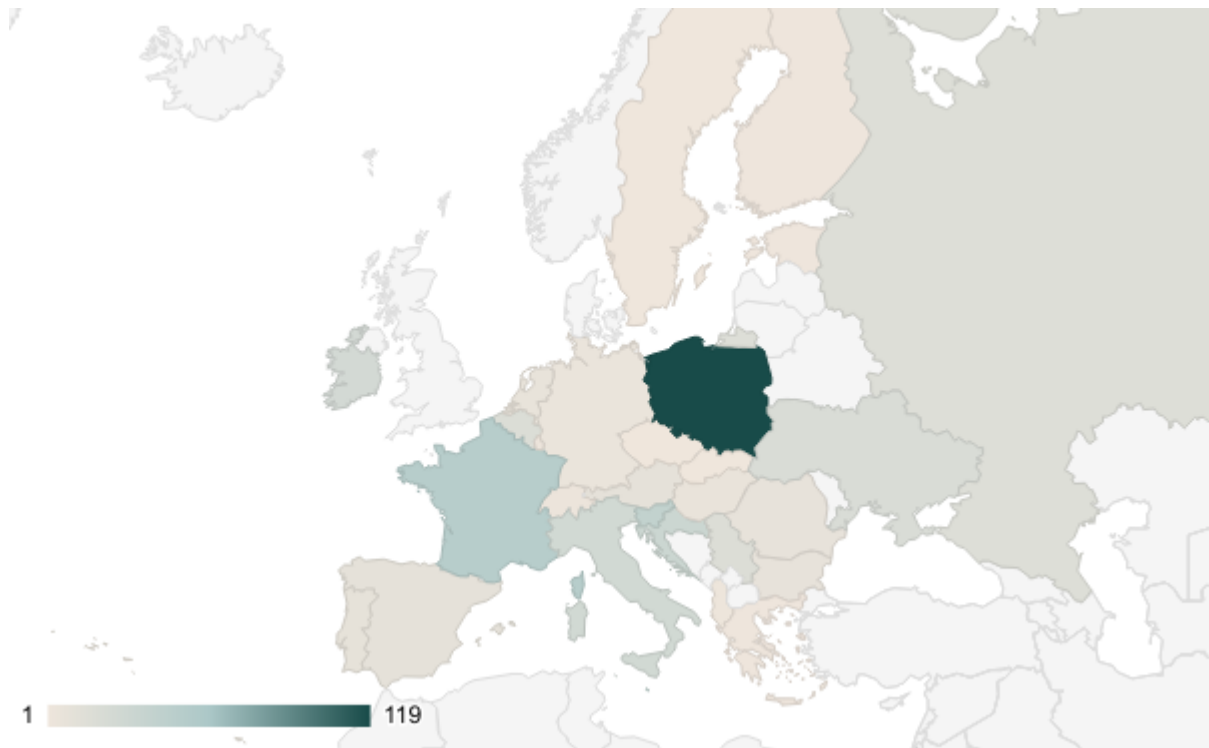
### Private Prosecutions



*Figure 4: CASE-recorded SLAPP legal cases from 2010 - 2021, private prosecutions<sup>39</sup>*

- **Geographical Spread:** The data collected covers 29 countries. These are Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Kosovo, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom, and Ukraine.

<sup>39</sup> Although a number of EU countries have struck criminal libel laws off the books, this report found various cases of criminal complaints filed against public participation. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

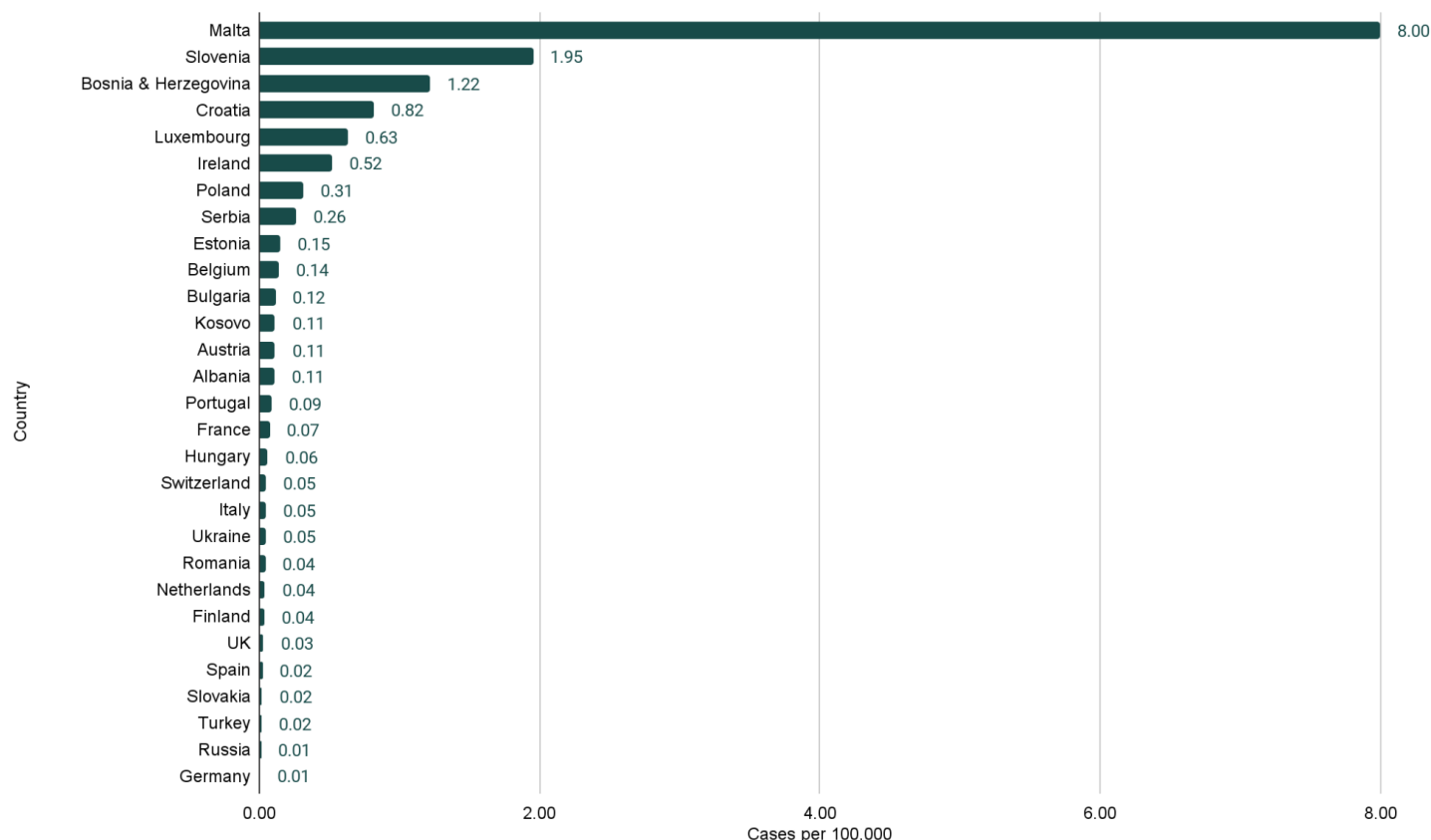


*Figure 5: CASE-recorded SLAPP legal cases per jurisdiction from 2010 - 2021<sup>40</sup>*

The darker gradient in the map above indicates more SLAPP cases recorded in that country. The figure below illustrates the number of cases recorded per country for every 100,000 people.

<sup>40</sup> 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, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

### Cases per 100,000 people in population

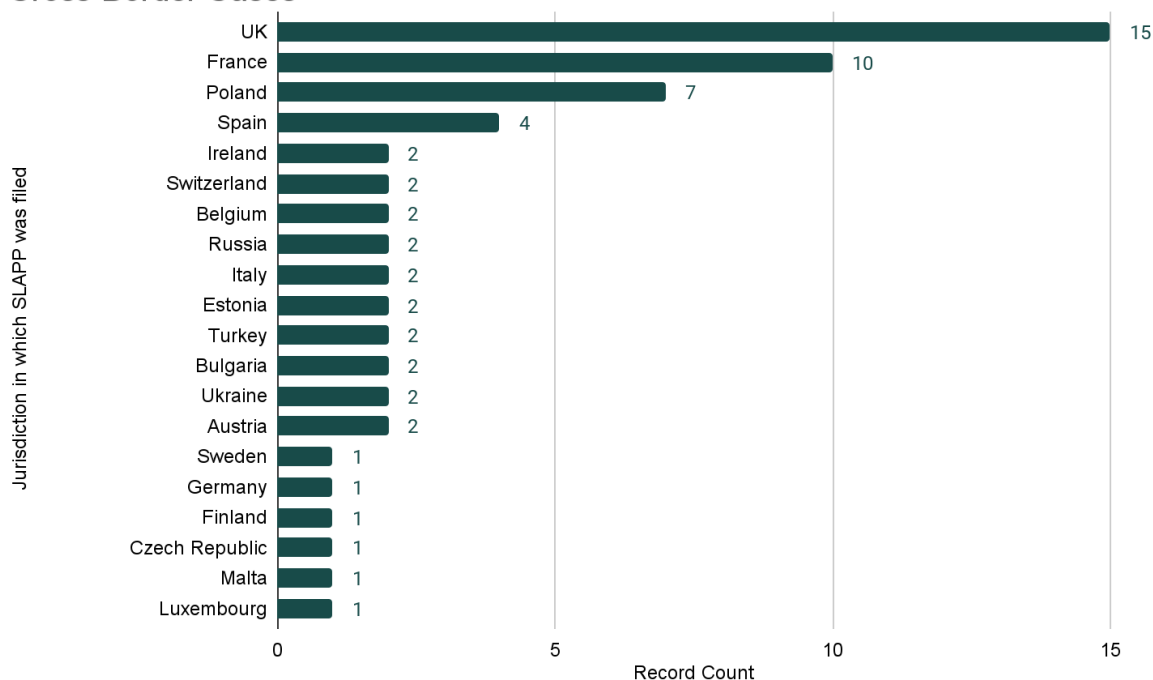


*Figure 6: CASE-recorded SLAPP legal cases per jurisdiction per 100,000 people from 2010 - 2021<sup>41</sup>*

- **Relevance of cross-border cases:** 62 out of the 570 cases recorded (10.9%) were cross-border cases. Most of these were recorded in the United Kingdom (24.2%), followed by France (16.1%). In these SLAPP lawsuits, the claimants filed complaints in jurisdictions with a link to the case and where they were more likely to achieve the desired result.

<sup>41</sup> 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>.

### Cross-Border Cases



*Figure 7: CASE-recorded SLAPP legal cases per jurisdiction from 2010 - 2021, cross-border cases<sup>42</sup>*

- **Targets:** The main targets of SLAPPs are journalists (**34.2%**) and media outlets (**23%**), but activists, NGOs, and academics are also commonly targeted.<sup>43</sup>

<sup>42</sup> 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>.

<sup>43</sup> 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>.

## Status of defendant

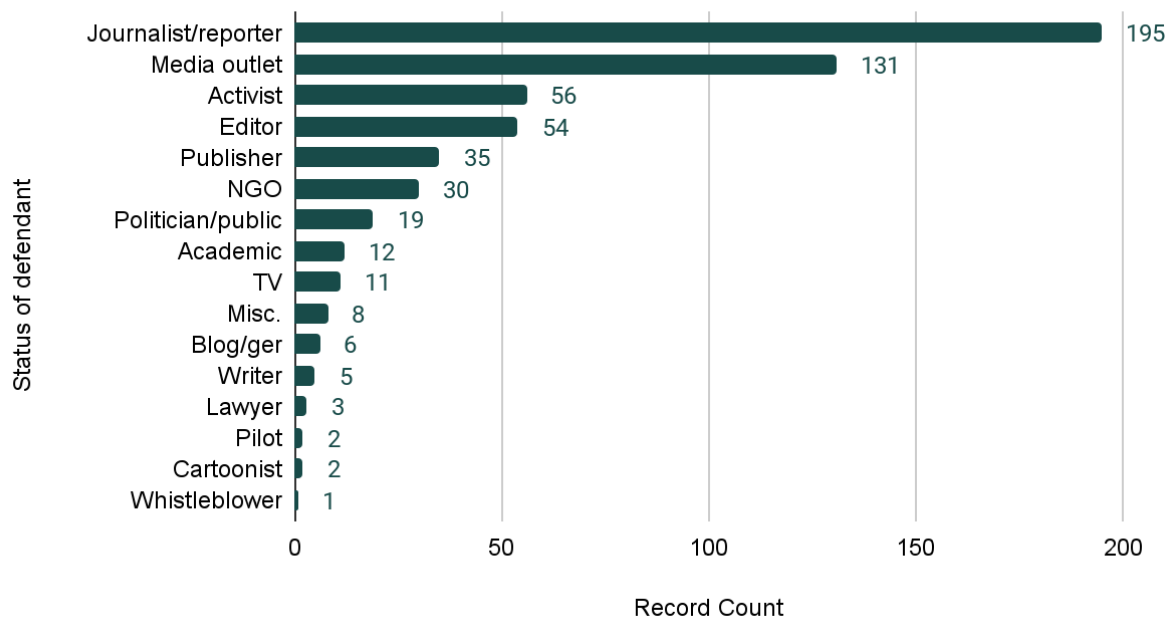


Figure 8: CASE-recorded SLAPP legal cases from 2010 - 2021, most-targeted groups<sup>44</sup>

From the 570 legal cases the ALCs and CASE identified on the basis of data and information collected from its members, partners, and other individuals and entities, 312 lawsuits - more than half of the cases (54.7%) - targeted individuals.

## SLAPP Targets

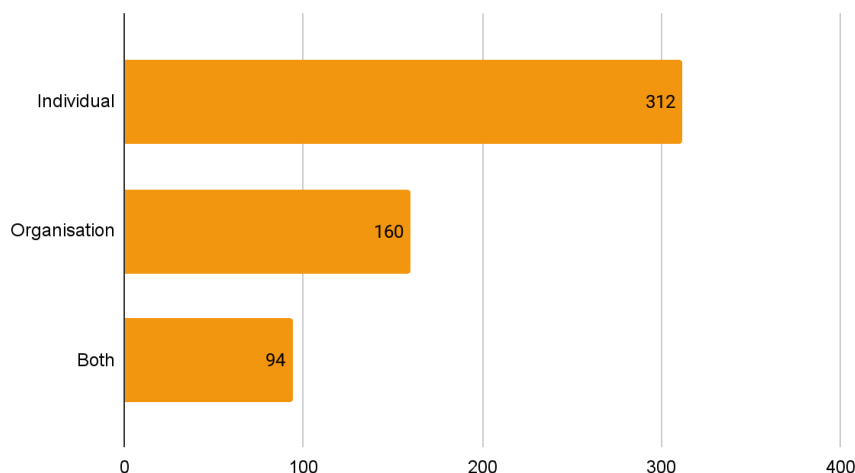


Figure 9: CASE-recorded SLAPP legal cases from 2010 - 2021, category of targets<sup>45</sup>

<sup>44</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>45</sup> *ibid.*

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

- **Main perpetrators:** As highlighted in CASE's European SLAPP contest,<sup>46</sup> the most common SLAPP litigants are those in positions of power: businesspersons, politicians, public figures, and corporations, among others.

By interpreting the data, this report established that the most common perpetrators were businesses and businesspersons (31.9%), politicians or people in the public service (23.3%), and state-owned entities and the state, members of the judiciary, and security services.

### Status of Complainant

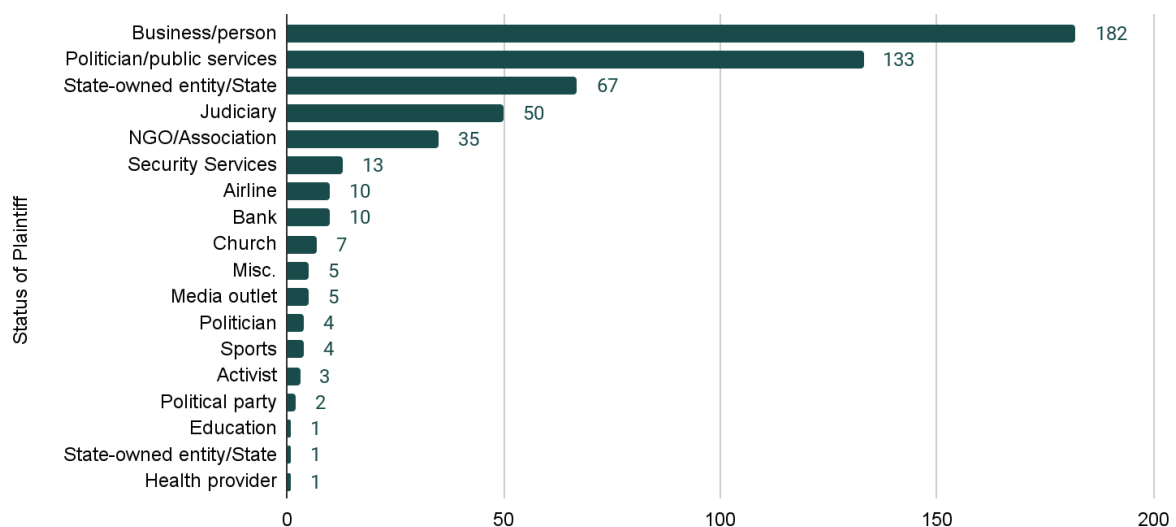


Figure 10: CASE-recorded SLAPP legal cases from 2010 - 2021, most-frequent complainants<sup>47</sup>

At a glance, there is a disparity of power and resources between the parties that is often exploited by the complainant to exhaust the resources of the target.<sup>48</sup> In order to test this hypothesis, a sample size of 10% of the cases was randomly selected.<sup>49</sup> This was done to avoid biases as much as possible and maintain a sample that is representative of the cases. This sample reflected the following:

<sup>46</sup> 'THE EUROPEAN SLAPP CONTEST'. CASE, Retrieved from: <https://www.the-case.eu/campaign-list/the-european-slapp-contest>.

<sup>47</sup> This report notes 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>.

<sup>48</sup> Bayer, J. et al. (2021). 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study', *EU-CITIZEN*, p. 20.

<sup>49</sup> The database was randomised by using the spreadsheet command '=RAND()' in the *Google Sheets* document with the 570 cases. The first 57 different cases were selected. Of these 57 cases, there were certain repetitions of legal complaints, since the same complainant/s would have filed more than one complaint against the same target/s. Therefore, in the interest of representing a sample size without replacement, the duplicates were filtered out.



- **51 instances** of complainants with greater wealth or power than the targets;
- **3 instances** of complainants with lower power or wealth than the targets;
- **2 instances** included unclear results.<sup>50</sup>

Of the cases in this sample, **89.5%** were instances of complainants with greater wealth or power than the targets, confirming the power imbalance within SLAPPs.

- **Sectors/issues:** Public participants focusing on crime, environment or corruption are typical targets and sometimes face multiple cases at the same time. The research showed that the issues/sectors most concerned with SLAPPs include the following:

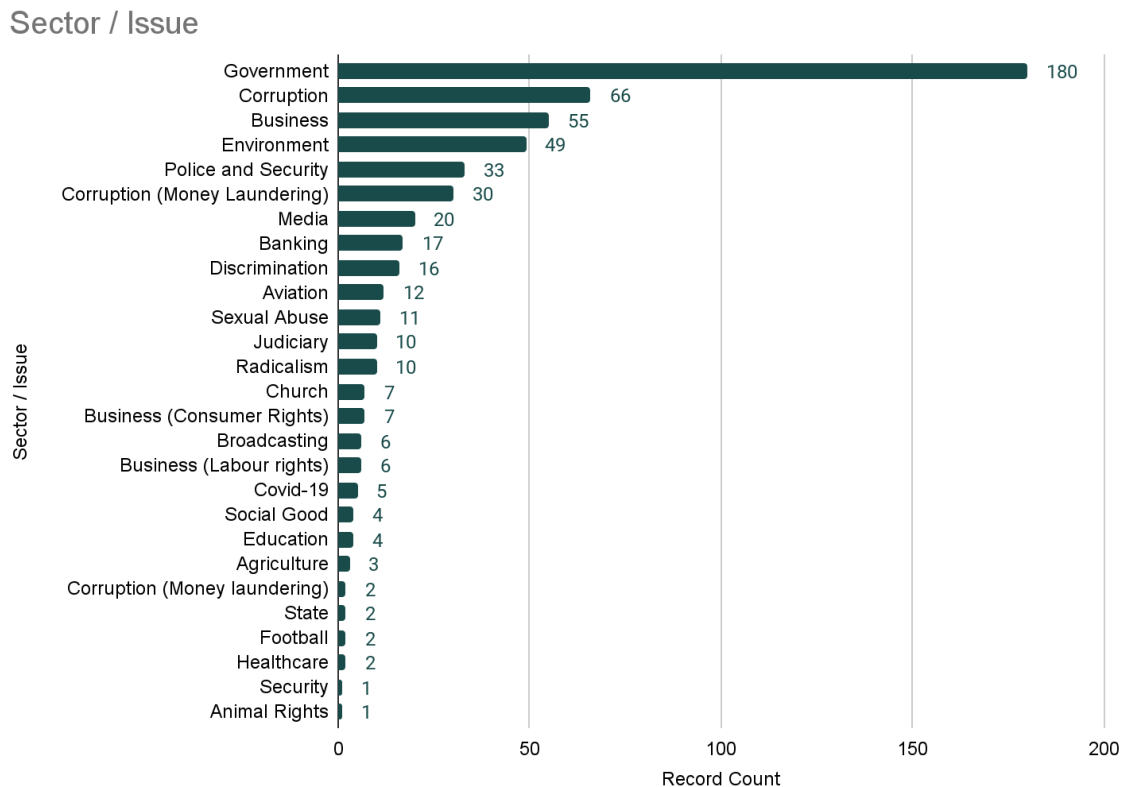


Figure 11: CASE-recorded SLAPP legal cases from 2010 - 2021, sectors/issues<sup>51</sup>

<sup>50</sup> The data compiled for this hypothesis test can be accessed here:  
<https://docs.google.com/spreadsheets/d/1A0EFUaDVRtj0GF96iI2qk7sRjGlgXdpC0BWa0j6w2d8/edit?usp=sharing>.

<sup>51</sup> In the graph, “Corruption” cases refer to those SLAPP cases targeting public participants that questioned close relations between business and politicians. “Police and Security” cases refer to any SLAPP cases initiated by the police, army, or any intelligence firms. “Media” cases are those that targeted public participants who shared an opinion (e.g. through a tweet) or published articles quoting or paraphrasing public persons. “Discrimination” cases refer to those SLAPP cases that were initiated against individuals that represented or shared the views/beliefs of a marginalised group. CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

- **Outcomes:** The outcomes of SLAPP legal cases in the ten European countries this report 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.

### Outcome of SLAPP Cases

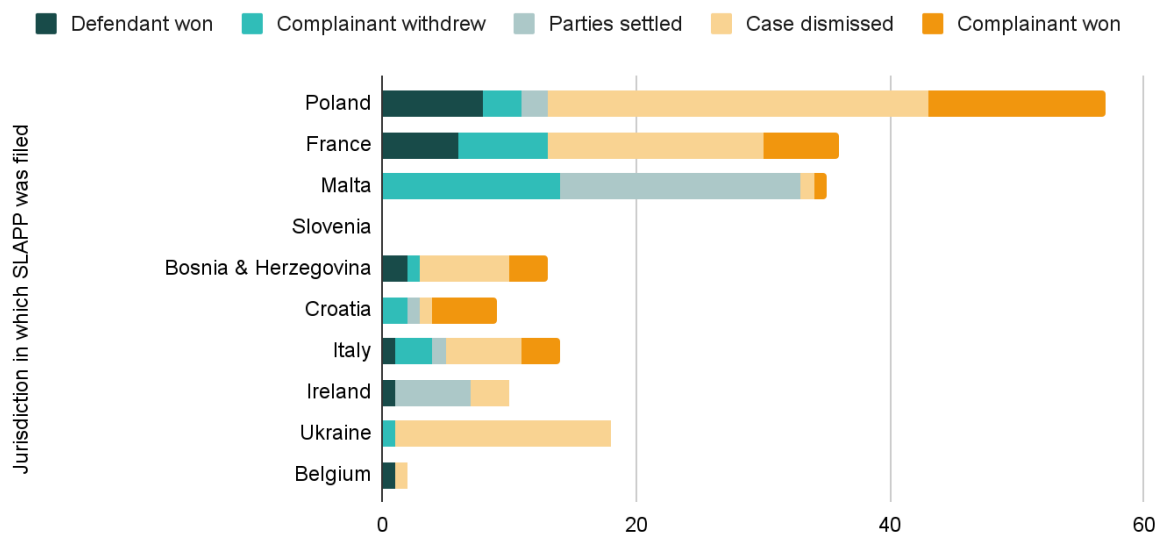


Figure 12: CASE-recorded SLAPP legal cases from 2010 - 2021, breakdown of outcomes<sup>52</sup>

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).

<sup>52</sup> 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>.

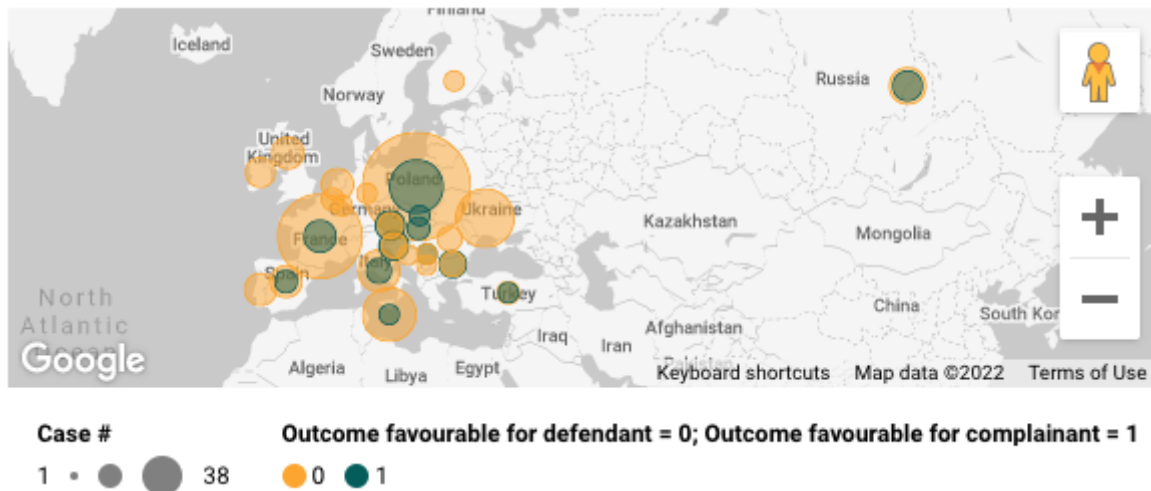


Figure 13: CASE-recorded SLAPP legal cases from 2010 - 2021, the outcome of cases<sup>53</sup>

That most SLAPP cases are lost by the complainant in court does not, of course, diminish the harm they cause to the targets: it's the litigation *process* that causes the most harm. The validity of this statement was tested by the researchers. A sample size of 10% of the cases was randomly selected to minimise bias and maximise representation.<sup>54</sup> This sample shows that, in most instances, damages claimed were not awarded or were reduced by the court, or the cases did not run their course.

- **1 instance** of the damages awarded was higher than those requested; the court of appeals overruled the decision in favour of the defendant.
- **10 instances** of the damages awarded were the same as those requested; in **5 instances**, the decision was overruled in favour of the defendants.
- **8 instances** of the damages awarded were less than those requested.
- **22 cases** were dismissed by the court of first instance (therefore, no damages were awarded); of these, the damages initially requested were recorded in **17 instances**.
  - Of those damages that were recorded, the highest amount requested was €120,000,000 in a case filed by Denis O'Brien and Patrick McKillen against the *Sunday Times* and one of its journalists, Mark Tighe.

<sup>53</sup> 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>.

<sup>54</sup> The database was randomised by using the spreadsheet command '=RAND()' in the *Google Sheets* document with the 570 cases. The first 57 different cases were selected. Of these 57 cases, there were certain repetitions of legal complaints, since the same complainant/s would have filed more than one complaint against the same target/s. Therefore, in the interest of representing a sample size without replacement, the duplicates were filtered out.

- **12 cases** were withdrawn by the complainant (therefore, no damages were awarded); of these, the damages initially requested were recorded in 4 instances.
  - Of those damages that were recorded, the highest amount requested was €25 million, in a case filed by the energy company Eni against the TV program RAI and its anchorwoman, Milena Gabanelli.
- **4 instances** of the plaintiff paying the court fees of the defendants;
  - Of these, the highest amount of damages requested was €5 million by the technology group Voestalpine against the Austrian NGO Umweltdachverband (UWD).

In this sample, 38 cases (66.6%) were dismissed, withdrawn, or settled. In these cases, the legal costs (including the court costs and the costs of the lawyers' time) of the defence were paid by the defendants or the organisations for which they worked. Therefore, while they did not suffer the legal harm of a guilty verdict or the financial costs of damages awarded by the court, they were obliged to fork out costs to defend themselves in a case that was ultimately concluded without any finding of wrongdoing.

Although these cases did not run their course or end with a judgement in favour of the plaintiff, they were often dragged out by the complainants with the intention of exhausting their target. In one of the cases referenced above, whereby Eni sued RAI and anchorwoman Milena Gabanelli, the litigation went on for almost 3 years before the parties settled. The legal costs paid by the defendant could have been put to better use on other journalistic investigations. Moreover, the time Gabanelli spent preparing her defence could have been spent on her journalistic work. While at the end of it all RAI and Gabanelli did not suffer further payments to Eni for damages awarded by the court, they had wasted time and money on a case that need not have been instituted in the first place.

As the above analysis shows, the harm of SLAPPs - be it the financial costs of prolonged litigation, the psychological harm to the defendant, or the distraction of the defendant's attention and reduction of capacity - has the strongest impact when the legal process is prolonged.

A good example of this can be found in Italy. According to the Federazione Nazionale Stampa Italiana (FNSI), Italy's national federation of press unions, 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% of cases go to trial.<sup>55</sup> But dismissals can take years, as in the case of Nello Trocchia, sued in April 2018 by an online training centre for damages to their reputation

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<sup>55</sup> '5. Italy: lawsuits like weapons' In SLAPPs: Strategic Lawsuits Against Public Participation. *Osservatorio Balcani Caucaso Transeuropa*. Retrieved from: <https://www.balcanicaucaso.org/eng/ECPMF/ECPMF-news/SLAPPs-Strategic-Lawsuits-Against-Public-Participation-198695#5>.

amounting to 38 million euros. The claim was rejected by the civil court of Naples in December 2021, three years and a half later.<sup>56</sup>

- **Damages:** Disproportionate damage claims and very high litigation costs driven up by SLAPPs not only can reduce targets to silence, they 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. Of the 570 SLAPP cases recorded, damages were requested (and not necessarily awarded) in 189 cases. Of those cases, the data reflected the following findings:
  - the **median** value of damages requested is the equivalent of **€11,500**;
  - the **average** value of damages requested is the equivalent of **€5.86 million**;
  - the **maximum** value of damages requested was **€610.94 million** by the Italian designer company Dolce and Gabbana in Italy; and
  - the **minimum** value of damages requested was **€1** in symbolic damages.<sup>57</sup>

The ECtHR has made it very clear: unreasonably high damages for defamation claims have a chilling effect on freedom of expression.<sup>58</sup>

## 2.3 Qualitative data

In its 2021 Annual Report, the Council of Europe Platform to Promote the Protection of Journalism and the Safety of Journalists observed “a notable increase of SLAPP-related alerts over the previous year, both in numbers of alerts and jurisdictions concerned”.<sup>59</sup> This was echoed in a comment made by Dunja Mijatović, the Council of Europe’s 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>60</sup>

<sup>56</sup> Di Mambro, G. (3 December 2021). ‘Nello Trocchia e L’Espresso non danneggiarono la Pegaso. Chiusa con un rigetto l’azione bavaglio record. Fnsi: ora la riforma’. Articolo21. Retrieved from: <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/>.

Rosà P. (January 2022). ‘SLAPP and democracy, side effects and collateral damage’. Resource Centre on Media Freedom. Retrieved from: <https://www.rcmediafreedom.eu/Dossiers/SLAPP-and-democracy-side-effects-and-collateral-damage>.

<sup>57</sup> The median, average and maximum values were calculated through the exchange rates for various non-euro currencies as at December 2021, and therefore are susceptible to a margin of error. This data is available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>58</sup> ECtHR judgement of 15.06.2017, case of Independent Newspapers (Ireland) Limited v. Ireland (application no. 28199/15).

<sup>59</sup> 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.

<sup>60</sup> Dunja Mijatović, *Time to take action against SLAPPs*, Council of Europe Commissioner for Human Rights, 27/10/2020, available at <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

Similarly, in its special report on legal harassment and abusive litigation, the OSCE Representative on Media Freedom paper, “Special Report: Legal harassment and abuse of the judicial system against the media”, reported 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 retaliation for their unwanted investigations or reporting.<sup>61</sup> A recent study by the European Commission confirmed that SLAPP lawsuits 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>62</sup>

The assault on media freedom should cause serious worry. As these studies and the quantitative data show, legal attacks on public participants have grown exponentially in recent years. It is necessary to question the culture which allows for, and perhaps normalises, the abuse of the law to silence public watchdogs. Although tougher to determine, this will help to understand “the extent to which society sees the media as essential to democracy, and the extent of people's readiness to resort to law to resolve disputes.”<sup>63</sup>

In Europe, the rise in populism<sup>64</sup> has led to a deterioration of media freedom.<sup>65</sup> The fear of the truth speaks to the power of the media and advocates who expose corruption and other violations that are in the public interest. However, in a climate of political tribalism, it is much easier to claim in court that a journalist is a propagator of ‘fake news’ and that an activist is an ‘eco-terrorist’. Plaintiffs are becoming emboldened by the perceived successes of SLAPPs at home and abroad.

The Covid-19 pandemic has been an alibi for the dilapidation of democracy. For example, in Hungary, journalists were made to submit questions before daily press conferences on the pandemic and “[f]acts, data or narratives perceived as questioning or undermining the government’s official narrative of the day were not allowed to feature.”<sup>66</sup> Even in longer-standing democracies, a culture of public mistrust in the media during the pandemic was prevalent. A YouGov survey in May 2020 showed that “in the UK and

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<sup>61</sup> OSCE Representative on Media Freedom, Special Report: Legal harassment and abuse of the judicial system against the media, 23 November 2021.

[https://www.osce.org/files/f/documents/c/f/505075\\_0.pdf](https://www.osce.org/files/f/documents/c/f/505075_0.pdf).

<sup>62</sup> Bard, P. et al. (2020). ‘SLAPPs in the EU context’, *EU-CITIZEN*, p. 4. Retrieved from: [https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf).

<sup>63</sup> Ni Mhainín, J. (1 June 2020). ‘A gathering storm: the laws being used to silence the media’. Index on Censorship, p. 3. Retrieved from:

<https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf>.

<sup>64</sup> Bartlett, J. (2014). “Populism, social media and democratic strain.” In *European populism and winning the imagination debate*, p. 101. <https://eprints.whiterose.ac.uk/104297/1/Korr%20igen.pdf#page=121>.

<sup>65</sup> Engesser, S., Ernst, N., Esser, F., & Büchel, F. (2017). Populism and social media: How politicians spread a fragmented ideology. *Information, communication & society*, 20(8), p. 1119. [http://populism.byu.edu/App\\_Data/Publications/Global%20Populism%20Database%20Paper.pdf](http://populism.byu.edu/App_Data/Publications/Global%20Populism%20Database%20Paper.pdf).

<sup>66</sup> Hajnal, G. and Kovács, E. (2020). “Governance and policy responses to the COVID-19 pandemic in Hungary: Early experiences and lessons.” In *Good Public Governance in a Global Pandemic*, p. 311.

France, just one in three respondents said they trusted the media on COVID-19 information, way behind the government, friends and family, or healthcare professionals.”<sup>67</sup>

Finally, one point that is not captured in the quantitative data examined here is that the objective of a SLAPP is often achieved through legal threats alone. Threats of legal action often force public watchdogs into submission. Media organisations tend to have small budgets for legal defence and would rather work on publishing reports than defending them in courts. The economic pressure that media outlets are under due to the gradual demise of print media and the rise of social media makes it difficult for journalists, editors, and media organisations to receive legal support. This is a threat for all of us, as it means that our access to information is compromised.

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<sup>67</sup> Macleod, H. (2021). *Covid-19 and the media: A pandemic of paradoxes*, p. 35. [https://www.mediasupport.org/wp-content/uploads/2021/04/2990-Covid19\\_and\\_the\\_media\\_FINAL\\_singlepages.pdf](https://www.mediasupport.org/wp-content/uploads/2021/04/2990-Covid19_and_the_media_FINAL_singlepages.pdf).



# Thematic Discussions

## 3.1 Status of the parties

### 3.1.1 Common targets

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. The data compiled by CASE and ALCs showed that the main targets of SLAPPs in Europe are journalists (34.2%) and media outlets (23%), while activists, NGOs and academics are also commonly targeted.<sup>68</sup>

SLAPPs are 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 the abuse of power. Generally, the defendants of SLAPPs are public watchdogs that are “generally advancing causes of genuine public interest and [are] not motivated by pecuniary or personal gain.”<sup>69</sup> SLAPPs target anyone who works to hold the powerful to account or engages –in matters of public interest. As our data shows, this category includes journalists, activists, rights defenders, whistleblowers, civil society organisations, trade unions and professional associations, and academics.

SLAPPs have been a matter of concern in Europe for decades. An early example is the *McLibel* case, where two activists - part-time bartender Helen Steel and unemployed former postman David Morris - were sued by McDonalds. The case attracted global notoriety given the amount of money McDonald's spent (estimated to be up to £10 million) and the amount of time the case was stretched out for - two and a half years.<sup>70</sup> Despite this, little attention was paid to SLAPPs<sup>71</sup> until the assassination of the Maltese investigative journalist Daphne Caruana Galizia.

The ramifications of SLAPPs are felt more intensely by freelancers. A journalist emphasised this during an interview for this report, saying: “I have a media house that can help me with my legal fees. [...] I’m in a very supportive circle which is different from a freelance journalist.” Indeed, freelance journalists may not have the resources to finance their legal defence.

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<sup>68</sup> 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>.

<sup>69</sup> Glover, A. and Jimison, M. (1995). ‘S.L.A.P.P. Suits: A First Amendment Issue and Beyond’, p. 127.

<sup>70</sup> Baksi, C. (2019). ‘Landmarks in law: *McLibel* and the longest trial in British legal history’, <https://www.theguardian.com/law/2019/jul/08/landmarks-in-law-mclibel-and-the-longest-trial-in-british-legal-history>.

<sup>71</sup> Donson, F. (2010) ‘Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs’, *Review of European Community & International Environmental Law*, 19(1), p. 84. doi: 10.1111/j.1467-9388.2010.00666.x.

**Case study 1: The OCCRP and freelancers**Limassol v Sara Farolfi and Stelio Orphanides [2018]

Freelancers are not always left to defend themselves as Steel and Morris did. Sara Farolfi, an Italian freelance journalist, worked with Cypriot journalist Stelios Orphanides to investigate a whistleblower's claims regarding a Libyan-owned company in Limassol, Cyprus. The investigation was published with the Organised Crime and Corruption Reporting Project (OCCRP). The pair were sued for €2 million by lawyers who were peripheral to the story, for allegedly defaming them, ruining their reputation, and humiliating them. In an Index on Censorship report, Farolfi reports feeling "scared" and "alone". OCCRP immediately reassured the journalists that they would support them and eventually hired both of them. Orphanides left Cyprus, feeling unable to continue his investigative journalism there.<sup>72</sup>

**Case study 2: Academia and SLAPPs**Serhat Albayrak v Yaman Akdeniz [2021]

A more recent example of individuals being unduly targeted for acting or speaking out against abuses of power involves the Turkish professor, Yaman Akdeniz. This case involved a tweet by Akdeniz about the court's decision to censor the judgement on the slander case where Çalık Holding, a Turkish conglomerate worth \$7.6 billion, demanded reparations from the journalist Pelin Unker, which was dismissed by the court in December 2020. The Turkish Freedom of Expression Association (IFÖD) reported on this decision about which Akdeniz, who is also the co-founder of IFÖD, tweeted.<sup>73</sup> In April 2021, another access ban was ordered by the court at the request of Serhat Albayrak on Yaman Akdeniz's tweet about the censorship of the reports.

On 5 May 2021, Albayrak filed a suit against Akdeniz for violation of his rights. The Istanbul 7th Court of First Instance judge dismissed the lawsuit. It held that the defendant's social media posts (mainly sharing tweets regarding Pelin Unker's case) did not violate the plaintiff's rights.

### 3.1.2 Sectors and issues

Targets are sued for speaking out because their words and actions concern the public interest. 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 of "simple self-interest".<sup>74</sup> In this vein, the public interest includes

<sup>72</sup> (2020). 'Slapped down: Six journalists on the legal efforts to silence them', *Index on Censorship*. [https://www.indexoncensorship.org/campaigns/slapped\\_down\\_report\\_efforts\\_to\\_silence\\_journalists/](https://www.indexoncensorship.org/campaigns/slapped_down_report_efforts_to_silence_journalists/).

<sup>73</sup> (2021). 'Turkey: SLAPP lawsuit filed against academic over Paradise Papers tweet', *Article19*. <https://www.article19.org/resources/turkey-slapp-lawsuit/>.

<sup>74</sup> Pring G. and Canan P. (1996). *SLAPPs: Getting Sued for Speaking Out*, Temple University Press, p. 9.

topics “about which a vivid public debate should evolve in a deliberative democracy.”<sup>75</sup> Our data shows that the SLAPPs under review concerned issues including government (31.6%), corruption (11.6%), and business (9.6%), among others.<sup>76</sup>

### Case study 3: Elitech v. FoE Croatia

#### Elitech v Friends of the Earth Croatia [2017]

The public interest component in SLAPP cases is emblematic in the case filed by Elitech against Friends of the Earth (FoE) Croatia and the civic initiative, Srđ je naš (which translates to ‘Srđ is ours’). In a 2013 campaign, *FoE Croatia*, *Srđ je naš*, and the Croatian Architects Association submitted a request to the Constitutional Court on the assessment of the legality of the construction of a luxury resort with a golf course on Srđ hill by the multinational manufacturing company, Elitech. The court invalidated the permit and the project was halted. However, following various complaints filed by Elitech, the project was re-permitted.

FoE Croatia placed a billboard criticising the project in a public place. FoE Croatia subsequently faced two different lawsuits: civil defamation against the organisation with a request for a gagging order; and the president and two vice presidents of FoE Croatia were criminally prosecuted for libel.<sup>77</sup> The court of first instance rejected the complaint, however Elitech said they will appeal. Meanwhile, the criminal case is ongoing.

The various legal tools that Elitech had at its disposal to combat criticism about the project on Srđ hill shows “the link between political tolerance and economic dominance, and a window on the tension between constitutionalism and capitalism.”<sup>78</sup> FoE Croatia was targeted since it financed the billboard with the allegedly defamatory statement. However, it did so as part of a campaign that citizens of Dubrovnik, where Srđ hill is located, had initiated. This case shows that SLAPPs do not only seek to intimidate the target but also to generate “ripple effects”. This is due to its impact on “scores of people” who have read about the case or those citizens who were directly, or indirectly, affected by the case.<sup>79</sup> The FoE Croatia case shows how SLAPPs are used as a means of silencing those speaking out about a shared concern.

Additionally, the SLAPP threat has permeated the virtual world through the Internet and social media. This is because, as “more and more public discussion migrates to the Internet, the burden of SLAPPs on the free flow of information becomes increasingly

<sup>75</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 6.

<sup>76</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>77</sup> (June 2019). ‘Bypassing Courts and Local Democracy to Build a Gated Community for The Rich: Razvoj Golf and Elitech Vs Croatia’, *Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International*, <https://www.tni.org/files/razvoj-golf-and-elitech-vs-croatia.pdf>.

<sup>78</sup> Canan, P. (1989). ‘The SLAPP from a Sociological Perspective’, *Pace Environmental Law Review*, p. 24.

<sup>79</sup> *ibid.*, p. 30.

evident.”<sup>80</sup> The Internet is an essential tool in today’s world that helps public participants to reach audiences, build networks, and garner support. However, as much as it helps those who wish to speak out, it also aids those looking to silence criticism.

#### **Case study 4: SLAPPs on the Internet**

##### **Tony Robbins v BuzzFeed UK Ltd [2019]**

An example of how the problem of SLAPPs can be compounded by the internet is the case filed by the American self-help guru, Tony Robbins, against BuzzFeed UK Ltd. The article described allegations of sexual misconduct, harassment, and bullying by Robbins against some of his employees and attendees at his events.

This case is particularly noteworthy because of its cross-border nature. The article in question was published by a female American journalist based in the US who works for a US-based online news portal, BuzzFeed Inc. Despite this, Robbins opted to sue BuzzFeed UK in Dublin, although it does not own or operate the website to which the article was posted. Moreover, the alleged abuses that the journalist reports in the article took place in the US.

While BuzzFeed UK challenged the fact that Robbins filed the complaint in Dublin, the Irish High Court decided that Robbins could do so. Mr Justice Heslin determined that the article was indeed published in Ireland “as the articles were viewed as many as 13,382 times by users geo-located in Ireland.”<sup>81</sup>

This case is emblematic of the many lawsuits filed against women making allegations of sexual harassment and bullying - and the journalists who amplify their voices. It also shows how the cross-border nature of the Internet provides new opportunities for SLAPP plaintiffs to engage in forum shopping.<sup>82</sup>

### **3.1.3 Frequent complainants**

The most common SLAPP litigants are those in positions of power and include businessmen, politicians, public figures, and corporations (see Chapter 2, [Figure 10]). Through the data compiled, this report found that the most common perpetrators were

<sup>80</sup> Richards, R. P. (2011). “A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites”. *DePaul Journal of Art, Technology & Intellectual Property Law*, p. 229.

<sup>81</sup> Healy, T. (4 June, 2021). “Buzzfeed fails to prevent millionaire American self-help guru Tony Robbins suing it for defamation in the High Court here”, *Independent.ie*. Retrieved from: <https://www.independent.ie/news/buzzfeed-failsto-prevent-millionaire-american-self-help-guru-tony-robbins-suing-it-for-defamation-in-the-high-court-here-40503634.html>.

<sup>82</sup> Katie Baker made this remark on 23rd November, 2021, during “Panel 7” of the Anti-SLAPP conference that took place in London and online. Information about the event: <https://anti-slappconference.info/>.

businesses and businesspersons (31.9%), politicians or people in the public service (23.3%), and state-owned entities and the state, the judiciary, and security services.<sup>83</sup>

The issue of SLAPPs is that, irrespective of the outcome, the litigation process itself drains the resources of the defendant and threatens public participation. As Judge Nicholas Cobella observed, “an ultimate disposition in favour of the target often amounts merely to a pyrrhic victory.” This is because these cases are an attempt to drain the financial and emotional resources of the targets and the “ripple effect of such suits in [...] society [are] enormous.”<sup>84</sup>

A complainant in a SLAPP case is often an individual who views “litigation and the use of the court system as simply another tool in a strategy to win a political and/or economic battle.”<sup>85</sup> For them, the legal process is a method of drowning the public participant in paperwork, arguments, and costs for many years and stifling public debate. General Comment No. 24 of the United Nations (UN) Committee on Economic, Social and Cultural Rights highlights this by emphasising the need for sanctions where business activities undermine the rights guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR) - 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>86</sup>

Consequently, insofar as they constitute an abuse of the law and 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 States have to guarantee the enjoyment of human rights to all without discrimination.

As Pring and Canan assert in their book *SLAPPs: Getting Sued for Speaking Out*, SLAPPs are wrong because of the “wrong shifting of the political process to court, wrong chilling of public participation in government.”<sup>87</sup> They allow powerful people to abuse the law to reach their goal of quashing dissent against them.

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<sup>83</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>84</sup> Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (1992).

<sup>85</sup> Canan, P. (1989). ‘The SLAPP from a Sociological Perspective’, *Pace Environmental Law Review*, p. 30.

<sup>86</sup> 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).

<sup>87</sup> Pring G. and Canan P. (1996). *SLAPPs: Getting Sued for Speaking Out*, Temple University Press, p. 14.

**Case study 5: Billionaire SLAPPs award-winning journalist in the UK**Arron Banks v Carole Cadwalladr [2019]

The defamation case filed by millionaire businessman Arron Banks against the award-winning journalist, Carole Cadwalladr, is emblematic of the undue burden placed on targets in SLAPP cases. He chose to sue her individually, and not the better-resourced “Guardian Media Group, which published her reporting for years; nor TED, which hosted her talk; nor the many large media outlets, [...] where she made similar allegations.”<sup>88</sup> Consequently, the disparity of arms between the two parties widened significantly.

The asymmetric nature of SLAPPs is also evident in the *Tortoise Media* podcast, “A finding of rape”. The media outlet battled to publish the story of the former UK Member of Parliament (MP), Andrew Griffiths, who was charged with intramarital rape and sexual assault and abuse of his wife at the time, Kate Griffiths.<sup>89</sup>

SLAPPs are different from other legal cases because the complainant intends to waste the time and resources of the courts and targets by filing a complaint against a public participant speaking out in the public interest. Baroness Hale of Richmond recognised the severe impact that this has on the freedom of speech when she stated that:

**“The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. [...] This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life.”<sup>90</sup>**

As the next section emphasises, the attempt of those in power to subdue freedom of expression is a severe threat to democratic participation and should not be regarded lightly.

<sup>88</sup> Fitzgerald, M. (2022). ‘Arron Banks vs Carole Cadwalladr shows how badly UK is failing press freedom’, para. 3.

<https://www.opendemocracy.net/en/opendemocracyuk/arron-banks-vs-carole-cadwalladr-shows-how-weak-uk-press-freedom-is/>.

<sup>89</sup> Cummings, B. (10 January 2022). “A finding of rape”, *Tortoise Media*. Retrieved from: <https://www.tortoisemedia.com/audio/a-finding-of-rape/>.

<sup>90</sup> Campbell v MGN Limited [2004] UKHL 22, [2002] EWCA Civ 1373 [148].



### 3.1.4 Threatened freedoms

SLAPP suits are both a threat to healthy public dialogue and a direct attack on our fundamental freedoms.<sup>91</sup> Under the provisions of the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the EU Charter of Fundamental Rights (EUCFR), the civil society space is protected by freedom of expression, freedom of assembly, and freedom of association provisions.<sup>92</sup>

The right to freedom of expression includes a speaker's freedom to communicate an idea, express an opinion or impart information, as well as the receiver's interest in receiving ideas and information. Freedom of speech must be protected "because it is a public good, rather than because individuals value it or have a strong interest in its exercise."<sup>93</sup>

#### *The 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 expression.<sup>94</sup> There must be adequate domestic safeguards to avoid disproportionate awards being granted. This means that 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>95</sup> Not only must States 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.

The multiple legal mechanisms available to complainants to stifle public participation 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 regime.<sup>96</sup> Nevertheless, the reasoning of the ECtHR, which focuses on the chilling effect of multiple prosecutions, can be transposed readily to a situation in which a claimant brings several potentially ruinous civil proceedings. While the respondent is not faced with potential deprivation of liberty, the opportunity cost of time and money invested in defending a

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<sup>91</sup> Merriam, D. H., & Benson, J. A. (1993). Identifying and Beating a Strategic Lawsuit Against Public Participation. *Duke Envtl. L. & Pol'y F.*, 3(17), p. 21.

<sup>92</sup> Vosyliūtė, A. and Luk, C. (October 2020). "Protecting civil society space: strengthening freedom of association, assembly and expression and the right to defend rights in the EU", *European Parliament*, p. 15. Retrieved from:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659660/IPOL\\_STU\(2020\)659660\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659660/IPOL_STU(2020)659660_EN.pdf).

<sup>93</sup> Barendt, E. (1985). *Freedom of Speech*. Oxford University Press, p. 30.

<sup>94</sup> ECtHR judgement of 15.06.2017, case of *Independent Newspapers (Ireland) Limited v. Ireland* (application no. 28199/15).

<sup>95</sup> ECtHR's judgement of 14.09.2010, case *Dink v. Turkey* (case nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09).

<sup>96</sup> The Brussels Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 outlines the rules on the jurisdictional scope of civil and commercial matters. The basis of this Regulation is that a defendant should be sued in the country of domicile, although certain exceptions apply.

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.

### Case study 6: *Gazeta Wyborcza*

[2010 -2021]

The research undertaken for this report revealed that the Polish independent daily newspaper, *Gazeta Wyborcza*, was the target of 73 legal actions from 2010 until the end of 2021, when the research for this study was concluded. The majority of these cases were civil defamation cases and/or requests for injunctive relief against the newspaper's articles. While we have not been able to assess each of these cases as SLAPPs, many targeted individual journalists as well as the newspaper itself - a classic intimidation tactic used by SLAPP litigants.

The former deputy editor-in-chief of *Gazeta Wyborcza*, Piotr Stasiński, has commented that the online news outlet has been harassed by the Law and Justice Party (PiS). He explained that they have to spend a lot of time talking with lawyers and going to court, while spending a lot of money on these lawsuits and using up time that would normally be spent working on journalism.<sup>97</sup>

It is also important to note that this report does not assert that freedom of speech means that individuals should not have the right to protect their reputation. The rights of the complainants "to sue, to go to trial, to have their plans and reputations protected" are also protected under international law. There is well-established case law in the European Court of Human Rights (ECtHR) on the relationship between Article 8 and Article 10.<sup>98</sup> When balancing these rights, the Court applies several criteria, such as the contribution to a debate of general interest; how well-known the person concerned is and what the subject of the report is; 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.

### *The right to freedom of assembly and association*

It is crucial in a democratic society that individuals exercising the right to freedom of association can operate freely, without fear that they may be subject to any threats, acts of intimidation, or violence. The fact that Hrvoje Zovko, a Croatian journalist, asserted that he was targeted because "[he is] the President of the Croatian Journalists' Association"

<sup>97</sup> Kinkel, L. and Whyatt, J. (3 August, 2020). "Gazeta Wyborcza's Piotr Stasiński: 'They want to bury us under an avalanche of lawsuits'", *Mapping Media Freedom*. Retrieved from: <https://www.mappingmediafreedom.org/2020/08/03/gazeta-wyborczas-piotr-stasinski-they-want-to-bury-us-under-an-avalanche-of-lawsuits/>.

<sup>98</sup> ECtHR's judgement of 07.02.2012, case Axel Springer AG v. Germany [GC], (case no. 39954/08), § 89-95.



shows the risk that individuals take for being critical voices in society.<sup>99</sup> NGOs are often targets of SLAPPs that induce fear among other public watchdogs of setting up an association or getting involved in existing ones. From a societal perspective, SLAPP suits are a serious threat to balanced input on important public concerns.<sup>100</sup> Taken into account along with the watchdog function of NGOs, this can lead to an erosion of democratic standards.

SLAPPs are often filed by big corporations or businesspeople (Chapter 2 [Figure 10]). However, in countries with flawed democracies, such as Poland,<sup>101</sup> SLAPPs are being used by entities close to the government as a tool for targeting those who hold them to account, thus affecting democracy more broadly.<sup>102</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 in response to his criticism of the ruling party.<sup>103</sup>

### Right to access information

As explained earlier, 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>104</sup> This is how SLAPPs impair the right to information. Access to information is fundamental to making informed choices and for meaningful debate in deliberative democracies.

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<sup>99</sup> "HRVOJE ZOVKO", *CASE: Coalition Against SLAPPs in Europe*. 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>.

<sup>100</sup> Merriam, D. H., & Benson, J. A. (1993). Identifying and Beating a Strategic Lawsuit Against Public Participation. *Duke Envtl. L. & Pol'y F.*, 3(17), p. 35.

<sup>101</sup> The *Economist Intelligence Unit* noted the fragility of democracy in various European countries, categorising the regime type of various countries in the region as a "flawed democracy". More in "Democracy Index 2020: In sickness and in health?", *Economist Intelligence Unit*, p. 33, p. 50. Retrieved from: <https://www.eiu.com/n/campaigns/democracy-index-2020/>.

<sup>102</sup> Huetting, L. (24 February 2021). "Strategic Lawsuits Against Public Participation threaten human rights and democracy. The EU must act", *Ruleoflaw.pl*. Retrieved from: <https://ruleoflaw.pl/strategic-lawsuits-against-public-participation/>.

<sup>103</sup> Ticher, M. (3 October 2020) "Long arm of Law and Justice: the Sydney professor under attack from Poland's ruling party", *The Guardian*. Retrieved from: <https://www.theguardian.com/world/2020/oct/04/long-arm-of-law-and-justice-the-sydney-professor-under-attack-from-polands-ruling-party>.

<sup>104</sup> *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*.

## 3.2 Legal theories

Although the data indicates that there is a link between SLAPPs and jurisdictions where the rule of law, specifically judicial independence, is hindered, legislation is nonetheless susceptible to exploitation even in jurisdictions where the rule of law is robust. One main reason why identifying SLAPPs across jurisdictions is difficult is that different legal theories are used as a basis for them. SLAPP suits can be filed based on civil or criminal law.<sup>105</sup> The most common categories of legislation that are exploited in SLAPP cases are: defamation, both civil and criminal; breach of privacy; and data protection, especially the General Data Protection Regulation (GDPR), as Figure 3 of Chapter 2 illustrates.<sup>106</sup>

Civil defamation laws tend to favour the claimant since the burden of proof is often on the defendant and the claimant can rely on a broad range of procedural techniques. In SLAPP litigation, procedural techniques can be used by the claimant to lengthen the proceedings, rendering the case that much more costly and stressful for the target.

Legislation on civil defamation has many gaps which allow for its exploitation by powerful claimants. Across the jurisdictions analysed in this report's research, there is a lack of stringent and efficient pre-trial hearings and early dismissals, which are effective tools to promptly identify and terminate vexatious lawsuits. Efficient and stringent pre-trial hearings ensure that time is not wasted and court systems are not clogged up by dealing with frivolous lawsuits.

Additionally, courts do not always automatically dismiss a case at the trial stage when it becomes clear that it is meritless and vexatious. For example, the data gathered for this report includes cases in which the claimant did not attend any of the hearings, requiring them to be continuously postponed leading to further stress and additional financial burden on the defendants. The case that former minister Chris Cardona had initiated against the slain journalist Daphne Caruana Galizia is an example of a case where the claimant displayed a lack of seriousness by failing to appear for hearings.<sup>107</sup>

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<sup>105</sup> Bayer, J. et al. (2021). 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study', *EU-CITIZEN*, p. 20.

<sup>106</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

<sup>107</sup> (31 January 2017). "Minister Chris Cardona says he will sue Caruana Galizia over brothel claims". *Times of Malta*. Retrieved from: <https://timesofmalta.com/articles/view/minister-chris-cardona-rejects-brothel-claims-as-fake-news.638184>.

### Case study 7: Former minister's absence from hearings

Chris Cardona v Daphne Caruana Galizia [2017]

In January 2017, Caruana Galizia broke the story of Cardona's alleged visit to a brothel while he was on an official business trip in Germany. Cardona initiated a civil defamation lawsuit in January 2017 and, following Mrs Caruana Galizia's assassination, the case was passed onto her heirs. Mr Cardona never attended any of the hearings and only in May 2018 was the case dismissed, and only after a request by the heirs' lawyer.<sup>108</sup>

Another loophole within civil defamation legislation in some European jurisdictions is the absence of a preset limit on damages. The lack of curbs on damages in a civil defamation suit allows the claimant to request an exorbitant amount of money with the sole purpose of coercing the defendant to back down. This adds to the financial pressure on the defendant, who already has to cover their own legal costs.<sup>109</sup>

In 2021, the Serbian investigative journalism outlet KRIK was the target of ten lawsuits by actors who are seemingly unrelated but who all have strong ties to the ruling party. In total, the lawsuits are seeking \$1 million in damages, which is three times KRIK's annual budget.<sup>110</sup>

In 2019 Dolce & Gabbana and its owner, Stefano Gabbana, filed a defamation lawsuit in Italy against the fashion industry Instagram account and fashion watchdog group Diet Prada. In 2018, the fashion brand cancelled its Shanghai fashion show after an advertisement campaign was accused of being racist. Diet Prada re-posted the advertisement as well as the alleged anti-Asian remarks published in Stefano Gabbana's social media account. Dolce & Gabbana requested €3 million in damages from the fashion industry watchdog, while Stefano Gabbana requested €1 million in damages.<sup>111</sup>

As previously stated, this has a chilling effect on the defendant and deters other individuals from engaging in the same act of public participation. An example of this is in the case initiated by John Delaney against the *Irish Journal*, whereby Delaney admitted (in a board meeting that *The Times* revealed later on) that he was keeping the case going to ward off further coverage.<sup>112</sup>

<sup>108</sup> Agius, M. (31 May 2018) "Updated | Cardona won't pursue brothel libel after court strikes off case on defence's request". *MaltaToday*. Retrieved from: [https://www.maltatoday.com.mt/news/court\\_and\\_police/87238/magistrate\\_strikes\\_off\\_cardona\\_brothel\\_libel\\_case#.YgZZCvjTW5d](https://www.maltatoday.com.mt/news/court_and_police/87238/magistrate_strikes_off_cardona_brothel_libel_case#.YgZZCvjTW5d).

<sup>109</sup> Bayer, J. et al. (2021). 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study', *EU-CITIZEN*.

<sup>110</sup> OCCRP. "Cascade of Frivolous Lawsuits Endangers Top Serbian Investigative Journalism Outlet KRIK". (OCCRP, December 7, 2021).

<sup>111</sup> Tyler McCall. "Dolce & Gabbana is suing Diet Prada in Italy for Defamation". (*Fashionista*, March 4, 2021).

<sup>112</sup> Mark Tighe. "FAI board minutes expose details of John Delaney's media war". (*The Times*, August 25, 2019). Retrieved from:

Prior to being awarded damages, claimants may exploit interim measures that are within the powers of the court to further coerce and harass their targets. Interim measures can take different forms, from a restriction on publication to garnishee orders. In the previously mentioned case brought by Chris Cardona against Daphne Caruana Galizia, Cardona requested and obtained a garnishee order, i.e. an order to freeze all assets, against Caruana Galizia, on the basis of an oath sworn in court. In a parallel process, Cardona's aide, Joe Gerada, also requested and obtained a garnishee order against Caruana Galizia, also on the basis of an oath sworn in court. Indeed, at the time of her assassination, Ms Caruana Galizia was still unable to use her bank accounts.<sup>113</sup> Interim measures are also frequently requested, and in some cases granted, in Ireland; a notable example is the case initiated by Denis O'Brien and Patrick McKillen against Times Newspapers Limited and Mark Tighe.<sup>114</sup>

The use of civil law for SLAPP litigation is not restricted to defamation. In the last few years, there has been a rise in cases based on data protection laws and privacy laws.<sup>115</sup> The exploitation of these categories of legislation is not restricted to just a few jurisdictions but is a discernible trend across all the jurisdictions analysed in this report.

Criminal law is employed as a tool for vexatious lawsuits mainly through private prosecution for criminal defamation, which is still possible in many European Union (EU) Member States, despite criticism and calls for the abolition of criminal defamation laws by most international press freedom and free expression organisations.<sup>116</sup> Due to this criticism, some EU Member States have decriminalised defamation but the problem is still significant,<sup>117</sup> especially since criminal defamation usually carries a prison sentence. The data analysed in this study has shown that a criminal defamation lawsuit is often combined with a civil defamation lawsuit. Criminal defamation cases are predominantly employed in Slovenia, France, and Italy, as displayed in Figure 4 in Chapter 2.<sup>118</sup>

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<https://www.thetimes.co.uk/article/fai-board-minutes-expose-details-of-john-delaney-s-media-war-cq80qx8m0?ni-statuscode=acsaz-307>.

<sup>113</sup> Rebecca Vincent and Caroline Muscat. "Justice Delayed: The assassination of Daphne Caruana Galizia and Malta's deteriorating Press Freedom climate". (*Reporters without Borders and The Shift News*, October 15, 2019).

<sup>114</sup> McKillen & Anor v Times Newspapers Limited & Ors [2013] IEHC 150. Retrieved from: <https://www.bailii.org/ie/cases/IEHC/2013/H150.html>.

<sup>115</sup> Judith Bayer, Petra Bárd, Lina Vosylite, Ngo Chun Luk. "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study". (*EU-Citizen: Academic Network on European Citizenship Rights*, June 30, 2021). Retrieved from: [https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

<sup>116</sup> International Press Institute (IPI). "Defamation Laws in Europe 2016-2017". *International Press Institute*. Retrieved from: <http://legaldb.freemedia.at/defamation-laws-in-europe/>.

<sup>117</sup> Judith Bayer, Petra Bárd, Lina Vosylite, Ngo Chun Luk. "Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study". *EU-Citizen: Academic Network on European Citizenship Rights*, June 30, 2021. Retrieved from: [https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

<sup>118</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

Most of the jurisdictions analysed here have the same legal loopholes, which allow for SLAPPs to arise. However, some jurisdictions have laws that are particularly amenable to abuse. Certain jurisdictions still retain legislation protecting from insult and denigration of honour, which are extremely subjective and can be exploited. Likewise, defamation laws are usually drafted very broadly and this also allows for misuse.

Just as certain laws are particularly amenable to abuse, so too are certain legal systems and procedures. In Ireland, defamation suits are heard by the High Court, meaning that a jury decides the outcome of a case and, if successful, the damages to be awarded. Trial by jury in cases of defamation create more uncertainty and stretch out proceedings, and so make it more difficult to quickly dispose of SLAPPs. They also have a tendency to award greater damages than judges.<sup>119</sup>

## 3.3 Chilling Effect

### 3.3.1 SLAPPs chill participation in our democracies

The previous chapters showed that the purpose of SLAPPs is to “punish participation” in the democratic process, “discourage others” from also engaging in similar activity, and “to silence the debate”.<sup>120</sup> This chapter will assess how SLAPPs effectively disturb public participation, impede targets from focusing on their public interest work, and deter others from doing the same. The purpose of this chapter is to humanise the discussion of SLAPPs by highlighting the financial, personal, and psychological impact that vexatious lawsuits have on their targets.

The well-established case law of the ECtHR has recognised the essential role played by the press as a “watchdog” in a democratic society.<sup>121</sup> It has determined that NGOs also play the role of public watchdogs,<sup>122</sup> as do academic researchers, authors of literature, and even bloggers and popular users of social media.<sup>123</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,

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<sup>119</sup> Judith Bayer, Petra Bárd, Lina Vosylite, Ngo Chun Luk. “Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study”. *EU-Citizen: Academic Network on European Citizenship Rights*, June 30, 2021. Retrieved from: [https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

<sup>120</sup> Donson, F. (2010) ‘Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs’, *Review of European Community & International Environmental Law*, 19(1), p. 86.

<sup>121</sup> 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 Damasos v. Portugal*, § 31.

<sup>122</sup> *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.

<sup>123</sup> *Magyar Helsinki Bizottság v. Hungary* [GC], § 168.

and deserve as such an increased protection connected to their functions.<sup>124</sup> Consequently, “SLAPP suits will often serve to prevent the effective exercise of democratic freedoms”.<sup>125</sup> SLAPPs are different “from ordinary defamation or business tort[s]” because of “the chilling effect and the public interest involved.”<sup>126</sup> The intention of SLAPPs is to chill public participation by impeding the freedom of expression and rights to assembly or association of those targeted. The power imbalance between the complainant and the target, as discussed in Chapter 2, is also a crucial component.

The chilling effect of SLAPPs has a very broad reach. However, as Glover and Jimson explain in ‘S.L.A.P.P. Suits: A First Amendment Issue and Beyond’, this is not so easy to quantify:

**“Quantifying the number of suits, delineating their parameters, calculating damages is an easy task compared to the nearly impossible task of measuring the chilling effect that this type of lawsuit may have on public debate.”<sup>127</sup>**

The conversations that the researchers of this report had with targets and others involved in SLAPP cases have highlighted the psychological and financial burdens the targets faced due to these lawsuits, as will be illustrated hereunder.

SLAPPs can be a tool to systematically reduce media pluralism and democratic debate by exercising a chilling effect on those targeted. Public participants are targeted because, as Constantini and Nash explain, “libel law and political [and corporate] motives have always been inextricably interwoven.”<sup>128</sup> In large part, this is because those in the public domain with a lot of power are likely subjects of criticism and can thus be inclined to use their political and financial advantages to crush criticism against them. As a consequence, targets can be forced to abstain from voicing their concerns on specific issues in the public interest, while published materials, such as news articles, can be taken down in response to spurious legal threats.<sup>129</sup>

<sup>124</sup> Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], § 87.

<sup>125</sup> Preston, J.A. (2014). ‘Participation from the deep freeze: ‘Chilling’ by SLAPP suits’, *Environmental and Planning Law Journal*, 31(1), p. 57. Retrieved from: [http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/18en\\_preston.pdf](http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/18en_preston.pdf).

<sup>126</sup> Borg-Barthet, J., Lobina, B. and Lazaruk, M. L. (2021). ‘The Use of SLAPPs to Silence Journalists, NGOs and Civil Society’, *European Parliament*, p. 16. Retrieved from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL\\_STU%282021%29694782\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU%282021%29694782_EN.pdf).

<sup>127</sup> Glover, A. and Jimison, M. (1995). ‘S.L.A.P.P. Suits: A First Amendment Issue and Beyond’, p. 143.

<sup>128</sup> Constantini, E. and Nash, M. P. (1991). ‘The Misuse of Libel Law for Political Purposes and Countersuit Response’. *Journal of Law & Politics*, 7(3), p. 475.

<sup>129</sup> See by way of examples recent cases concerning the [EU Observer](#) and the news website [Apache](#).



Therefore, on the macrolevel SLAPPs intend to transform “political speech into a more private legal-based dialogue.”<sup>130</sup> Chapter 3.3.1 discussed how SLAPPs are a threat to democracy because they intimidate critical voices into not speaking out and participating in public debate on matters of public interest. This exposes the chilling effect on those directly targeted as well as on others who intended to conduct similar forms of public participation. Therefore, the rest of this section will focus on the microlevel impacts of SLAPPs: on the targets themselves and on the wider society.

### **3.3.2 Financial burden of SLAPPs**

As mentioned in Chapter 1, one of the largest limitations of this research was getting targets of SLAPPs to speak out about their cases. This report, as well as CASE member groups’ research and mapping efforts, have further spotlighted 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. Consequently, 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. Therefore, this report’s exercise of mapping out the number of SLAPPs in Europe only scratches the surface of the problem.

Of those who were interviewed for this research, and about whom information was available in the public domain, several spoke about the financial burdens of the SLAPP procedure. Although most of the SLAPPs recorded targeted individuals (Chapter 2 [Figure 9]), a large number of those interviewed explained that the organisations for which they worked helped them cover the legal costs and, at times, were able to provide them with legal aid. However, for some, even this was not enough. This was the topic of conversation with the former editor of *The Times of Malta*, Steve Mallia.

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<sup>130</sup> Donson, F. (2010) 'Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs', *Review of European Community & International Environmental Law*, 19(1), p. 94.

### Case study 8: 12 years a SLAPP target

Members of the Malta Union of Midwives and Nurses v Steve Mallia & Ariadne Massa  
[2012 - 2021]

In 2012, *The Times of Malta* published an article about an elderly care home nurse who was swindling patients. In the sub-heading of the article, journalist Ariadne Massa wrote that this nurse, whose identity was not revealed since he had not responded to her questions, held a senior position in the nurses' union. As a consequence, both Massa and the editor at the time, Steve Mallia, were the targets of a libel case filed by four council members of the union.

Mallia and Massa lost the case in the court of first instance and appealed. They lost the appeal but the damages awarded were significantly reduced. The pair filed a freedom of expression complaint in the Constitutional Court of Malta and won; however, the Attorney General appealed this decision just two weeks before the one-year deadline. Mallia and Massa lost the appeal and then filed a case with the ECtHR, which ended with a settlement.

This process took eleven years to be resolved.<sup>131</sup> To their benefit, Mallia and Massa had the legal and financial backing of *The Times of Malta* to help them with the exorbitant costs of defending their case. However, they were still targeted as individuals and their assets were frozen for a year after they lost the first appeal case, forcing them to depend on others for financial support.

Chapter 3.2 discussed the lack of pre-trial hearings and early dismissals in the 29 jurisdictions included in this research. This is problematic because the procedure of a SLAPP case is carried out “to make the litigation expensive, long-lasting and complicated for the defendants” so that, ultimately, they are either discouraged from speaking out against the issue in the future or stopped from working to instead prepare their legal defence.<sup>132</sup> It is for this reason that an early dismissal of a SLAPP case is essential; dismissing a complaint after the entire case is heard, by which time the target would have paid substantial legal fees and lost much of their time, allows the harmful and chilling effects of a SLAPP to take effect while doing nothing to deter future cases.

The researchers of this report believe that any anti-SLAPP strategy is inadequate if it does not also equip the target with the necessary tools to remove or substantially reduce the financial burden of the SLAPP legal procedure. Anything less would not effectively mitigate the chilling effect of public participation that is associated with SLAPPs.

<sup>131</sup> (3 December 2021). ‘Former Times of Malta journalists win 11-year freedom of expression battle’, *The Times of Malta*. Retrieved from: <https://timesofmalta.com/articles/view/former-times-of-malta-journalists-win-11-year-freedom-of-expression.919012>.

<sup>132</sup> ‘Protecting Public Watchdogs Across the EU: A Proposal for an Eu Anti-Slapp Law’, *CASE*, p. 7. Retrieved from: [https://www.article19.org/wp-content/uploads/2020/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf).



### 3.3.3 Emotional impact of SLAPPs

The financial costs of a SLAPP can be measured because targets know how much they are spending to defend themselves as well as the time spent away from their normal work to prepare their defence. However, when the researchers of this report interviewed various targets, as well as the lawyers of targets, it was immediately apparent that the psychological cost of SLAPPs is the most cumbersome burden endured. Therefore, it is important to not only think of the financial impact of SLAPPs, but also the psychological impact on the targets and their families, on their personal life, and on other private matters.

Legal threats and complaints work because they scare most people off. An individual would think twice about going to trial and taking on the emotional and financial costs of a SLAPP. This is particularly the case if they are acting alone, as do freelancers, and have family or other personal circumstances that would not be able to handle the burdens of the SLAPP. This situation was a reality for Okke Ornstein, a Dutch journalist who was targeted for his work exposing corruption in Panama and who was imprisoned for criminal defamation. Due to his experience, he “left the country because [he] did not feel safe to continue reporting there.”<sup>133</sup> Although he is still vocal about his experience as a SLAPP target, and continues to win the frivolous cases filed against him,<sup>134</sup> his journalistic investigations have been impacted as a result of the legal actions taken against him.

It is for this reason that Judge Nicholas Cobella calls the victories of SLAPP targets such as Ornstein and Mallia “pyrrhic victories.”<sup>135</sup> As our research has shown, SLAPP cases are more often won by the targets, dismissed, or withdrawn by the complainant than they are won by the complainant (Chapter 2 [Figures 12 and 13]). As Pring has emphasised, the ultimate goal of SLAPP filers is not to win the case, but to achieve their political purpose to make the target feel “devastated and depoliticized - ‘chilled’”.<sup>136</sup>

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<sup>133</sup> “OKKE ORNSTEIN”, *CASE: Coalition Against SLAPPs in Europe*. 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>.

<sup>134</sup> ‘About’, *Ornstein*, para. 5. Retrieved from: <https://www.ornstein.org/about/>.

<sup>135</sup> *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (1992).

<sup>136</sup> Pring, G. (1989). ‘SLAPPs Strategic Lawsuits against Public Participation’. *Pace Environmental Law Review*, 7(1), p. 6.

### Case study 9: A lawyer takes the stand

Pierre Vandersmissen v Alexis Deswaef [2019]

In an interview for this report, the target stated that “I have been a lawyer for 25 or 26 years now and so the first lesson for me [as a SLAPP target was] ... to realise it’s never anecdotal when you’re dragged into court, it’s always confronting.” Those were some of the first words uttered by the human rights lawyer, Alexis Deswaef, during an interview for this report. He had built a career defending the rights of those affected by police misconduct and did not imagine that he would one day be defending himself against the frivolous allegations of the Police Commissioner of Brussels, Pierre Vandersmissen.

Following the terrorist attacks in Brussels in 2016, Deswaef was arrested at the impromptu memorial site, which he had visited with his family at the same time as other members of the Human Rights League had gathered. He was arrested for being part of a demonstration, which was illegal due to Belgium’s state of emergency at that time. Deswaef made a legal complaint against Vandersmissen for illegal arrest and Vandersmissen responded with a complaint that Deswaef - who had spoken publicly against the Commissioner - was harassing him and damaging his reputation.

Deswaef explained that this case will always be at the back of his mind, especially since he feels that the public authorities and certain sections of society want to condemn him for being too critical of the police.

### 3.3.4 Criminalisation of defamation

The emotional burden of SLAPPs gets in the way of the livelihoods of those targeted. The remedy for this burden lies within the courts, “ironically, the very institution being manipulated to produce the ‘chilling effect’ of SLAPPs.”<sup>137</sup> This is especially true in countries where it is possible to file criminal defamation or insult complaints against targets (Chapter 2 [Figure 4]), despite repeated calls from the Council of Europe to decriminalise defamation.<sup>138</sup>

It is crucial that countries take steps to bring laws criminalising speech, such as defamation, libel and slander, in line with international human rights standards. As discussed in Chapter 3.3, defamation, slander, and insult still constitute criminal offences in many European countries. 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, has on the exercise of freedom of expression and information.<sup>139</sup>

<sup>137</sup> Pring, G. (1989). ‘SLAPPs Strategic Lawsuits against Public Participation’. *Pace Environmental Law Review*, 7(1), p. 21.

<sup>138</sup> ‘Defamation’, *Council of Europe*. Retrieved from: <https://www.coe.int/en/web/freedom-expression/defamation>.

<sup>139</sup> (January 2022). ‘Protection of reputation’, *European Court of Human Rights*. Retrieved from: [https://www.echr.coe.int/Documents/FS\\_Reputation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf).

This is of great concern especially given that the ECtHR held that “a criminal penalty is disproportionate for defamation cases” and that “all criminal consequences, even if suspended, had a chilling effect on public debate and was therefore unjustifiable.”<sup>140</sup>

In Italy, for example, the number of criminal defamation cases filed under the country’s Press Law doubled between 2011 and 2017<sup>141</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>142</sup> Meanwhile, in Poland, the biggest daily newspaper, *Gazeta Wyborcza* (Chapter 3.1 [Case study 6]), 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>143</sup>

While the defendant in a criminal case benefits from the presumption of innocence and thus does not bear the burden of proof, the intention of these cases is not to retract an article, or to issue an apology, or provide compensation for damages. Instead of being a method of restorative justice, it is merely one of retributive justice intended to harass the target. As the case against Vaxevanis shows, the primary purpose of criminal defamation cases “is to exercise a chilling effect: to retaliate and to prevent the perpetrator and other members of the society from repeating the crime.”<sup>144</sup>

### 3.3.5 SLAPPs as deterrents to others

Beyond the censoring effect on the targets of SLAPP actions, SLAPPs have a chilling effect on others who report on or draw attention to the same or similar issues. The spectre of disproportionate damage claims and very high litigation costs driven up by SLAPPs may not only 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. When this pattern of impact is deployed strategically, a SLAPP target is specifically selected to intentionally frighten others into silence.

The extensive damages requested by complainants in SLAPP cases are effective because numbers scare off everyone. Threats of legal action do not only risk forcing targets into

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<sup>140</sup> ECtHR’s judgement of 17.12.2004, case of Cumpănă and Mazăre v. Romania [GC], (application no. 33348/96); ECtHR’s judgement of 06.04.2010, case Ruokanen and Others v. Finland, (application no. 45130/06); ECtHR’s judgement of 11.02.2020, case of Atamanchuk v. Russia, (application no. 4493/11).

<sup>141</sup> (31 March 2021). ‘Thematic factsheet: SLAPP in Italy, a democratic emergency’, *Resource Centre on Media Freedom in Europe*. Retrieved from: <https://www.rcmediafreedom.eu/Dossiers/Thematic-factsheet-SLAPP-in-Italy-a-democratic-emergency>.

<sup>142</sup> (January 2019). ‘Democracy at Risk: Threats and Attacks Against Media Freedom in Europe. Annual Report 2019’, *Resource Centre on Media Freedom in Europe*. Retrieved from: <https://www.rcmediafreedom.eu/Dossiers/Thematic-factsheet-SLAPP-in-Italy-a-democratic-emergency>.

<sup>143</sup> (25 November 2015). ‘The Gazeta Wyborcza newspaper received 63 lawsuits and legal threats’, *Mapping Media Freedom*. Retrieved from: <https://www.mapmf.org/alert/23957>.

<sup>144</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 83.

submission, but “formerly active citizens [could also] become much more cautious in their political activity, even when they had not personally been SLAPP suit targets”.<sup>145</sup>

### Case study 10: A dark moment for Irish media

#### Denis O’Brien v Various Irish media [2015]

The wealthy businessman Denis O’Brien sought to suppress reports about House Deputy Catherine Murphy’s speech, alleging she had abused her parliamentary privilege by disclosing financial information about him when he had already obtained an injunction preventing the TV broadcaster, RTE, from revealing his personal banking details. During the debate, Deputy Murphy broke the injunction and cited her parliamentary privilege as her justification for doing so.<sup>146</sup> Nonetheless, O’Brien threatened Irish newspapers not to publish her speech and also filed a civil suit against Deputy Murphy.

A journalist explained that the media outlet decided that parliamentary privilege ranked higher than a High Court injunction, but Irish media were still wary of O’Brien and so went to court for clarification. The court determined that the High Court injunction could not overrule parliamentary privilege, since it was Murphy’s constitutional right to say what she wanted in the Dáil.<sup>147</sup> Following this decision, all Irish media outlets published the story.

As the case study illustrates, the intended impact of SLAPPs is to chill critical voices into silence and to keep matters of public interest out of the public domain. The result could be disastrous, as it keeps individuals and organisations on the sidelines instead of participating in public life.

## 3.4 Jurisdictions

This chapter has shown how SLAPPs exploit the law covertly, yet intimidate and silence public participants to stop them from publishing information that is in the public interest. However, there is a need to think of SLAPPs more broadly as well. They go hand-in-hand with hostile attitudes towards those who speak out and challenge power.

One of the main aims of this report is to highlight the trends and patterns of SLAPPs and help those reading understand how they work. The aim is to encourage meaningful action when campaigning against SLAPPs at the EU level as well as domestically. For this reason,

<sup>145</sup> Merriam, D. H., & Benson, J. A. (1993). ‘Identifying and Beating a Strategic Lawsuit Against Public Participation.’ *Duke Env’tl. L. & Pol’y F.*, 3(17), p. 22.

<sup>146</sup> ‘Denis O’Brien v. Clerk of Dail Eireann’, *Global Freedom of Expression*. Retrieved from: <https://globalfreedomofexpression.columbia.edu/cases/denis-obrien-v-clerk-dail-eireann/>.

<sup>147</sup> O’Carroll, L. (1 June 2015). ‘Irish media seek right to report on Denis O’Brien’s ties with IBRC’, *The Guardian*. <https://www.theguardian.com/media/2015/jun/01/irish-media-seek-right-to-report-on-denis-obriens-ties-with-ibrc>.

this chapter will dive into specific legal and cultural elements in certain countries that offer a supportive environment for SLAPPs.

*EU-CITIZEN* reports that SLAPPs are a “growing concern” in Croatia, France, Italy, Hungary, Slovakia, and Malta.<sup>148</sup> Meanwhile, the researchers of this CASE report discern a growing concern in Croatia, Poland, France, Ireland, Malta, Serbia, Slovenia, the UK, and Italy. These countries feature in the top ten list of both the absolute number and the per capita number of SLAPPs filed in each jurisdiction (Chapter 2 [Figure 5 + Figure 6]).

This chapter aims to establish why more SLAPPs were filed in these countries compared to the other countries included in this study. To answer this question, the researchers of this report subdivided these countries into groups according to common trends and patterns associated with SLAPPs:

- *Croatia and Poland*: many cases filed by those with political power;
- *France and Ireland*: many cases filed by those with specific business interests;
- *Malta, Serbia, and Slovenia*: many complaints filed by the same complainant/s against the same target/s;
- *The UK*: many complaints filed with cross-country elements; and
- *Italy*: many criminal complaints filed.

The aim of this section is not to point fingers, but to pick up on perceptions of positive and negative trends and contextualise those trends in analytical detail, including against the benchmark of European human rights standards.

The purpose of focusing on these groups is to take a closer look at the legal and cultural frameworks that help create a positive environment for SLAPP filers. Through the research conducted for this study, it was noted that SLAPPs are handled and spoken about differently in the various European countries analysed. For example, in those countries with rule of law issues and where targets have less trust in the executive and the judiciary, respondents spoke about SLAPPs more openly, whereas targets from countries with tighter rule of law mechanisms were more circumspect. Therefore, the researchers of this report identified the need to assess these sets of cases differently.

### **3.4.1 Complaints filed by public officials**

The European Court of Human Rights (ECtHR) has held that politicians ought to demonstrate greater tolerance to criticism compared to ordinary citizens since they wittingly open themselves to the scrutiny of each word and action.<sup>149</sup> As indicated by the

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<sup>148</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 12.

<sup>149</sup> *Lingens v Austria* (1986) 8 EHRR 103.

data, the second most common SLAPP initiators are politicians, including government officials. If the judiciary and state-owned companies are included in the same category, state actors and the political class are the most common perpetrators (Chapter 2, [Figure 10]).

Regardless of the ruling by the ECtHR, many public officials have resorted to litigation to counter criticism from public watchdogs. Although some of these lawsuits are isolated incidents, in some jurisdictions there have been systematic attacks on public watchdogs, which can be linked to the decline of the rule of law.<sup>150</sup> While a weak rule of law is not the only way in which SLAPPs emerge as a problem, it provides fertile ground for SLAPPs to proliferate.

### Country Study 1: Poland

According to the American think-tank Freedom House, Poland is the country that has witnessed the biggest democratic decline in Europe in the last five years.<sup>151</sup> The European Commission's latest rule of law report highlighted concerns that range from the deteriorating independence of the judiciary to the hindrance of media freedom and plurality.<sup>152</sup> This deterioration of the rule of law coincides with the rise in power of the Law and Justice Party (PiS) from 2015.

The Polish government and the governing party, the PiS, either control or heavily influence the vast majority of the media outlets in Poland. Independent media have been constantly challenged in the last years, which has resulted in many smaller outlets and freelancers self-censoring their publications.<sup>153</sup>

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<sup>150</sup> Csak Z. (2021). 'The Antidemocratic Turn', *Freedom House*. Retrieved from: [https://freedomhouse.org/sites/default/files/2021-04/NIT\\_2021\\_final\\_042321.pdf](https://freedomhouse.org/sites/default/files/2021-04/NIT_2021_final_042321.pdf).

<sup>151</sup> *ibid.*

<sup>152</sup> (2021). '2021 Rule of Law Report Country Chapter on the rule of law situation in Poland', *European Commission*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0722>.

<sup>153</sup> Czuchnowski W. and Korzeniowska K. (2022). 'Poland's free media is shrinking (Gazeta Wyborcza)', *International Press Institute (IPI)*. Retrieved from: <https://ipi.media/polands-free-media-is-shrinking-gazeta-wyborcza/>.

(2021). '2021 Rule of Law Report Country Chapter on the rule of law situation in Poland', *European Commission*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0722>.



### Case Study 11: Legal harassment of independent news outlets

#### Poland

Media freedom has been in decline in Poland since 2015. Litigation has become a tool to harass independent media, a process which has escalated in recent years as officials from the PiS and their allies ramped up their efforts to silence critical outlets.<sup>154</sup> Indeed, a large number of the lawsuits are initiated by government agencies or state bodies, or by PiS officials themselves.

The most frequently targeted media outlet is the liberal *Gazeta Wyborcza (GW)*, which is a fierce critic of the Law and Justice Party and is currently facing about 75 lawsuits.<sup>155</sup> Interviewed by the Media Freedom Rapid Response during its country mission to Poland, the publisher of GW, *Agora*, has stated that many of the lawsuits are an orchestrated effort by the PiS to pressure the outlet.<sup>156</sup> Since the lower courts are still independent of the political party, these lawsuits are usually dismissed; however, the chilling effect and the monetary burden of fighting the cases cannot be ignored.

Moreover, during the Covid-19 pandemic, journalists and photojournalists were charged with allegedly breaching lockdown rules. The publisher of GW believes these charges are politically motivated.<sup>157</sup>

All the critical Polish news outlets, as well as the Helsinki Foundation of Human Rights, have highlighted that the use of lawsuits as a tool to harass public watchdogs has increased significantly under the PiS.<sup>158</sup>

### Country study 2: Croatia

Croatia is another European country that has seen a decline in the rule of law, specifically in media freedom and pluralism. Additionally, high-ranking government officials have frequently verbally attacked the media, and the number of SLAPPs continues to rise.<sup>159</sup> The Croatian legal system contains various laws which are problematic and render the work of journalists difficult. For example, insulting “the Republic, its emblem, its national

<sup>154</sup> (2020). Democracy Declining: Erosion of Media Freedom in Poland. Media Freedom Rapid Response (MFRR) Press Freedom Mission to Poland (November-December 2020), *International Press Institute (IPI)*. Retrieved from:

[https://ipi.media/wp-content/uploads/2021/02/20210211\\_Poland\\_PF\\_Mission\\_Report\\_ENG\\_final.pdf](https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf).

<sup>155</sup> Czuchnowski W. and Korzeniowska K. (2022). ‘Poland’s free media is shrinking (Gazeta Wyborcza)’, *International Press Institute (IPI)*. Retrieved from:

<https://ipi.media/polands-free-media-is-shrinking-gazeta-wyborcza/>.

<sup>156</sup> (2020). Democracy Declining: Erosion of Media Freedom in Poland. Media Freedom Rapid Response (MFRR) Press Freedom Mission to Poland (November-December 2020), *International Press Institute (IPI)*. Retrieved from:

[https://ipi.media/wp-content/uploads/2021/02/20210211\\_Poland\\_PF\\_Mission\\_Report\\_ENG\\_final.pdf](https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf).

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> (2021). ‘Nations in Transit 2021 - Croatia’, *Freedom House*, Retrieved from: [https://freedomhouse.org/country/croatia/nations-transit/2021#footnote3\\_eq8zq66](https://freedomhouse.org/country/croatia/nations-transit/2021#footnote3_eq8zq66).

Trkanjec Z. (2021). ‘Croatian president attacks public broadcaster HRT’, *EURACTIV*. Retrieved from: [https://www.euractiv.com/section/politics/short\\_news/croatian-president-attacks-public-broadcaster-hrt/](https://www.euractiv.com/section/politics/short_news/croatian-president-attacks-public-broadcaster-hrt/)

hymn or flag” is a criminal offence punishable up to three years in prison. Additionally, “humiliating” media content was established as a criminal offence in 2013.<sup>160</sup>

### Case study 12: Nearly 1000 active lawsuits against media

#### Croatia [2021]

The Croatian Journalists’ Association conducted a survey in April 2021 to assess the depth of the issues concerning SLAPPs. The survey recorded 924 active lawsuits against journalists and media outlets in Croatia at that time. Some cases are initiated by high-ranking politicians, or by government and public officials.<sup>161</sup>

By 2021, *Index Promocija d.o.o.*, the publisher of the online news outlet *Index.hr*, was facing 56 defamation lawsuits and nine cases targeting its journalists.<sup>162</sup> Furthermore, three cases were based on an alleged breach of the EU General Data Protection Regulation (GDPR), anti-discrimination, and copyright law. The claimants in most of the lawsuits are politicians, public officials, and former government ministers.

The two case studies outlined above provide an insight into the risks of SLAPPs. In jurisdictions where public officials systematically exploit the law to silence critics, there is a clear repercussion on the rule of law and democracy. The chilling effect created by SLAPPs pushes journalists and activists not to voice their concerns on matters of public interest, which stifles public debate and reduces accountability. In turn, this allows for the enactment of laws that can be easily abused. This creates a vicious circle, whereby the lack of a strong rule of law allows for SLAPPs to flourish, which then further undermines democracy. The threat to democracy posed by SLAPPs is tangible and cannot be overstated.

### 3.4.2 Complaints filed by business

The research conducted for this report helped to establish that large corporations and businesspeople were the most frequent filers of SLAPPs (Chapter 2, [Figure 10]). In its report, “Business and human rights – access to remedy”, the EU Agency for Fundamental Rights (FRA) identifies protection against SLAPPs as an urgent and necessary measure to ensure 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.<sup>163</sup> Indeed, public participation is a key tool to help rights holders exercise vigilance to protect their rights, and demands legal protection in case of any breaches. This section

<sup>160</sup> (2021). ‘Croatia’, *Reporters Without Borders (RSF)*. Retrieved from: <https://rsf.org/en/croatia>.

<sup>161</sup> Vladislavjevic A. (2021). ‘Croatian Journalists Union Deplores ‘Intimidating’ Rise in Lawsuits’, *BalkanInsight*. Retrieved from:

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

<sup>162</sup> (2021). ‘Croatia: Wave of abusive legal action against Index.hr’, *International Press Institute (IPI)*. Retrieved from: <https://ipi.media/croatia-wave-of-abusive-legal-actions-against-index-hr/>.

<sup>163</sup> (2020). ‘Business and Human Rights – Access to Remedy’, *EU Agency for Fundamental Rights (FRA)*, p.10. Retrieved from: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf).



looks at SLAPP complainants who are powerful individuals or corporations wishing to subvert criticism of harmful, illicit or illegal business actions.

### Country study 3: Ireland

Although Ireland boasts a high ranking in Reporters Without Borders (RSF)'s 2021 World Press Freedom Index (it is in twelfth place with a score of 12),<sup>164</sup> serious concerns about its SLAPP culture nonetheless exist. In the study for this report, Ireland came in eighth place for the highest absolute number of SLAPPs filed, and fourth for SLAPP cases filed per capita.

The ECtHR established that the high damages awarded - €1.25 million - by the High Court jury in the *Leech v. Independent Newspaper (Ireland)* case had a “chilling effect”.<sup>165</sup> This amount was reduced by the Irish Supreme Court, as the High Court had first awarded the complainant a staggering €1.872 million. This case was heard before the enactment of the Defamation Act 2009, which now allows trial judges to give more detailed directions to a jury as to the assessment of damages.<sup>166</sup>

After the long-awaited publication of the review of the Defamation Act 2009,<sup>167</sup> the Irish Cabinet approved plans for an anti-SLAPP mechanism.<sup>168</sup> The process was announced in 2016 and the review was conducted in 2019 and published in 2022.<sup>169</sup> The recommendations in the review report were approved by the Irish Government and these should be legally binding soon.<sup>170</sup>

The Irish legal system makes public participants “particularly vulnerable” frivolous lawsuits.<sup>171</sup> The result has been a greatly cautious media sector that is more willing to settle than to risk facing the exorbitant legal costs and potential damages that are awarded to complainants in defamation cases. This reality is frequently abused by complainants who,

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<sup>164</sup> (2021). ‘Ranking 2021’, *Reporters Without Borders*. Retrieved from: [rsf.org/en/ranking](https://rsf.org/en/ranking).

<sup>165</sup> ECtHR judgement of 05.06.2017, case of *Independent Newspapers (Ireland) Limited v. Ireland* (application no. 28199/15).

<sup>166</sup> Ireland Supreme Court’s judgement on 19.12.2014, [Appeal No. 2009/282],[S.C. No. 282 of 2009]. Retrieved from: <https://ie.vlex.com/vid/leech-v-independent-newspaper-793059677>.

<sup>167</sup> Defamation Act 2009, *Irish Statute Book*. Retrieved from: <https://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/html>.

<sup>168</sup> Report of the review of the Defamation Act of 2009, *Irish Department of Justice*. Retrieved from: <https://www.justice.ie/en/JELR/Report-of-the-Review-of-the-Defamation-Act-2009.pdf/Files/Report-of-the-Review-of-the-Defamation-Act-2009.pdf>.

<sup>169</sup> (27 January 2022). ‘Defamation reform on the way, says justice minister’, *Law Society Gazette*, para. 1. Retrieved from:

<https://www.lawsociety.ie/gazette/top-stories/2022/defamation-reform-on-way-says-justice-minister>; (2021). ‘Ireland’, *Reporters Without Borders*, Retrieved from: [rsf.org/en/ireland](https://rsf.org/en/ireland); Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, pp. 221 - 222.

<sup>170</sup> Department of Justice (2022). ‘Report of the Review of the Defamation Act 2009’, *Ireland Department of Justice*. Retrieved at: <https://www.justice.ie/en/JELR/Report-of-the-Review-of-the-Defamation-Act-2009.pdf/Files/Report-of-the-Review-of-the-Defamation-Act-2009.pdf>.

<sup>171</sup> (October 2021). ‘The impact of strategic lawsuits against public participation (SLAPPs) on the news media sector’, *News Media Europe*, p. 7.

according to the Irish Press Council, “are rarely seeking rectification nor public apology, but financial compensation.”<sup>172</sup>

Consequently, this report’s study on SLAPPs in Ireland barely scratches the surface, since media outlets are extremely sensitive to the threat of receiving a legal complaint on their publications. Self-censorship is thus a serious problem in Ireland, especially given the reductions in revenue that news outlets all over the world have been facing due to the rise of social media.<sup>173</sup> In Ireland, the added element of the unpredictability of civil juries acts as a further restraint on publishing articles and is an inducement to settle. As a result, “prominent individuals known to be litigious have become largely untouchable by the Irish media.”<sup>174</sup>

### Country study 4: France

The government of France has been moving towards stronger legal reforms and other actions to better protect public participation. An example of this is the inter-ministerial working group that has been set up by the French government to respond to media freedom alerts published on the Council of Europe platform to promote the protection of journalism and safety of journalists. The group is composed of representatives from the Permanent Representative of France to the Council of Europe and the Ministers of Interior, Justice, and Culture.<sup>175</sup>

Despite various strong reforms, there have been a worrying number of SLAPP cases filed in France in recent years (Chapter 2, [Figure 5]). Of most concern is the wide use of denigration as the legal basis for SLAPPs filed by multinational companies against public participants (Chapter 2, [Figure 3]). Denigration is “an unfair competition practice consisting of bringing public discredit of a company by disparaging its product or services.”<sup>176</sup>

While defamation protects the reputation or the honour of the attacked person, denigration is intended to protect companies against unfair competition. The issue with denigration is that it is much broader than defamation. For example, the prescriptive period for filing a denigration claim is five years instead of the three-month limit for defamation complaints.

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<sup>172</sup> *ibid.*, p. 9.

<sup>173</sup> (January 2021). ‘Submission by Press Council of Ireland and Press Ombudsman to the Future of Media Commission’, *Press Council*, para. 25.

<https://www.presscouncil.ie/office-of-the-press-ombudsman-164/publications-and-press-releases/press-releases-1048/submission-by-press-council-of-ireland-and-press-ombudsman-to-the-future-of-media-commission>.

<sup>174</sup> (2021). ‘Ireland’, *Reporters Without Borders*, Retrieved from: [rsf.org/en/ireland](https://rsf.org/en/ireland).

<sup>175</sup> ‘Contents’, *Council of Europe*, point 38. Retrieved from: [https://www.coe.int/en/web/minorities/home?p\\_p\\_id=101&p\\_p\\_lifecycle=0&p\\_p\\_state=maximized&p\\_p\\_mode=view&\\_101\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_type=content&\\_101\\_viewMode=view&\\_101\\_groupId=9287595&\\_101\\_urlTitle=conten-2/](https://www.coe.int/en/web/minorities/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_type=content&_101_viewMode=view&_101_groupId=9287595&_101_urlTitle=conten-2/).

<sup>176</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 193.

### Case study 13: A history of SLAPPs

The CASE SLAPP Contest awarded the ‘Litigation Addict’ award to the French multinational company, Bolloré Group - one of the world’s top 500 most successful companies.<sup>177</sup> Since 2009, the company has filed 30 cases against journalists, NGOs, and broadcasting companies, losing almost all of them.<sup>178</sup> Of these, 11 fall within the scope of this study and form part of this research.

An example of the type of vexatious case filed by Bolloré Group and its subsidiaries includes the case that Vincent Bolloré, Bolloré SA, and SAS Bolloré Logistics filed against the television channel, France 2, in 2016. The case concerned the re-airing of a documentary investigating Bolloré and his company, Bolloré Group, which alleged degrading conditions for the workers of the Bolloré Group subsidiary, Socapalm, in Cameroon. The denigration complaint against France 2 was brought before the commercial court, rather than the criminal court, which allowed Bolloré to defend his image without needing to contest the veracity of allegations. The case was dismissed two years later, in 2018.

It is important to note that French courts are responsive to vertical power-relationships between complainants and targets and “are more likely to punish abuses” of the law in these instances.<sup>179</sup> Though most SLAPP cases filed by frequent litigants such as Bolloré Group are not won by these complainants, SLAPP cases have nonetheless “become more and more common these past few years” (Chapter 2, [Figure 2]).<sup>180</sup>

### 3.4.3 Multiple complaints

In *Ali Gürbüz v Turkey*, the ECtHR held that the initiation of multiple proceedings constituted a violation of Article 10 of the ECHR.<sup>181</sup> Moreover, 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>182</sup> Public watchdogs focusing on crime, environment or corruption are typical targets (Chapter 2, [Figure 11]), and sometimes face multiple cases at the same time.

<sup>177</sup> ‘The Group’, *Bolloré*. Retrieved from:

<https://www.bollore.com/en/#:~:text=Founded%20in%201822%2C%20the%20Bollor%C3%A9,a%20long%2Dterm%20investment%20policy>.

<sup>178</sup> (2021). ‘European SLAPP Contest’. *Coalition Against SLAPPs in Europe (CASE)*, p. 3. Retrieved from: <https://www.ecpmf.eu/wp-content/uploads/2021/05/European-SLAPP-Contest-Press-Pack.pdf>.

<sup>179</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 195.

<sup>180</sup> *ibid.*, p. 196.

<sup>181</sup> ECtHR judgement of 27.11.2012, case of *Bayar v. Turkey* (case no. 37569/06).

<sup>182</sup> Bard, P. et al. (2020). ‘SLAPPs in the EU context’, *EU-CITIZEN*, p. 4. Retrieved from: [https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf).

At the start of this report, the researchers differentiated between a SLAPP action and a SLAPP tactic, noting that certain claimants had opted to file various civil or criminal complaints against the same target, or groups of targets. This section will focus on the SLAPP tactics against the Serbian investigative media outlet *KRIK*, the Slovenian newsroom *Necenzurisano.si*, and the late Maltese investigative journalist Daphne Caruana Galizia. The intention is to shed light on the way that the law was abused to silence criticism in these instances.

### Country study 5: Serbia

By the start of 2022, the well-respected Serbian investigative journalism outlet *KRIK* was facing ten ongoing legal cases against it and its journalists: 8 civil cases, 1 criminal case, and one misdemeanour. Many of these complaints request an injunction and are considered by *KRIK* and international press freedom NGOs as an attack by powerful individuals to deter the organisation from its work.<sup>183</sup>

The organisation has not been taking these SLAPP actions lightly. Combined, these legal cases are seeking damages of nearly \$1 million, which is three times *KRIK*'s annual budget. Additionally, the lawsuits were brought by “ostensibly unrelated actors”, including a high-ranking police official, the head of the secret service, and an accused drug lord. While seemingly unrelated, “almost all have close connections to the ruling party of President Aleksander Vucic.”<sup>184</sup>

#### Case study 14: International mining company v. *KRIK*

##### Mineco v KRIK & Stevan Dojčinović [2021]

The international mining company Mineco, which is very active in the Balkans and was featured in the FinCen Files,<sup>185</sup> sued *KRIK* and the editor-in-chief, Stevan Dojčinović, for alleged defamation for its articles about the company's alleged bribery and fraud.<sup>186</sup> Mineco is requesting \$500,000 in damages for the articles.

This case is just one of the ten legal cases filed against *KRIK* that has alarmed the media outlet and international NGOs since it seems to be part of a concerted effort to silence hard-hitting investigations into criminals and abuses of power in Serbia.

<sup>183</sup> (21 December 2021). ‘Serbia: Wave of lawsuits against investigative portal KRIK chills media freedom’. *ECPMF*. Retrieved from:

<https://www.ecpmf.eu/serbia-wave-of-lawsuits-against-investigative-portal-krik-chills-media-freedom/>.

<sup>184</sup> (7 December 2021). ‘Cascade of Frivolous Lawsuits Endangers Top Serbian Investigative Journalism Outlet KRIK’. *OCCRP*, para. 3. Retrieved from:

<https://www.occrp.org/en/40-press-releases/press-releases/15619-cascade-of-frivolous-lawsuits-endangers-top-serbian-investigative-journalism-outlet-krik>.

<sup>185</sup> (2020). ‘An ICIJ Investigation: FinCen Files’. *International Consortium for Investigative Journalism*. Retrieved from: <https://www.icij.org/investigations/fincen-files/>.

<sup>186</sup> Jovanović, B. (20 August 2020). ‘„FinCEN dosijei”: Svet sumnjivih transakcija’ (‘FinCEN Files’: A World of Suspicious Transactions). *KRIK*. Retrieved from: <https://www.krik.rs/fincen-dosijei-svet-sumnjivih-transakcija/>.

A Media Freedom Rapid Response report based on the Serbia mission by Article 19 contextualises the SLAPP tactics against *KRIK* in Serbia's hostile environment towards journalists and other critical voices, whereby "journalists are subjected to almost daily attacks that increasingly come from the ruling elite and pro-government media."<sup>187</sup> During this mission, it was particularly noted that:

**"Of particular concern are cases of politicians or public officials openly threatening journalists, targeting and defining them as 'enemies of the state' or 'traitors'. [...] For example, a recent smear campaign run by pro-government tabloids against the independent investigative outlet *KRIK* falsely claimed a collaboration of *KRIK* with a criminal organisation."**<sup>188</sup>

The culture of hostility towards journalists is reinforced by politicians and prominent public figures in Serbia. For those at *KRIK*, this has meant that the SLAPPs they face are only part of the package of online hate, smear campaigns, and other attacks against them. The impact of these attacks is felt beyond *KRIK* since journalists are less likely to report attacks to the police "due to a lack of trust that the attacks will be independently and effectively investigated."

### **Country study 6: Slovenia**

A similar situation presented itself in Slovenia, where defamation is still criminalised and used by politicians and those in powerful positions as an effective means of silencing criticism. Those who take a critical stance against the government of Slovenia are not only targeted by legal actions, they are also at risk of being the targets of smear campaigns and online harassment, at times perpetrated by the media outlets that support the ruling political party.<sup>189</sup>

Although in criminal proceedings legal costs must be paid by the complainant, the costs are so low compared to those of other forms of dispute that they have "little to no deterrence effect".<sup>190</sup> In a country study by the Slovenian Journalists' Association, over a third of the

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<sup>187</sup> (2021). 'Serbia'. *Reporters Without Borders*. Retrieved from: <https://rsf.org/en/serbia>.

<sup>188</sup> (26 April 2021). 'Media Freedom and Safety of Journalists in Serbia'. *Article 19*, p. 6. Retrieved from: <https://www.article19.org/wp-content/uploads/2021/04/MFRR-Serbia-mission-report.pdf>.

<sup>189</sup> Bayer, J. et al. (2021). 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study', *EU-CITIZEN*, p. 305.

<sup>190</sup> *ibid.*, p. 60.

defamation lawsuits against the media collected were criminal complaints based on insult, defamation, and public disclosure offences.<sup>191</sup>

### Case study 15: 3x13 criminal complaints against journalists

Rok Snežić v Primož Cirman, Vesna Vuković, and Tomaž Modic [2021]

In Slovenia, at the moment, journalists Primož Cirman, Vesna Vuković, and Tomaž Modic have each had thirteen different criminal lawsuits lodged against them by Rok Snežić, a tax expert and unofficial financial advisor to Slovenian Prime Minister, Janez Janša.<sup>192</sup> This SLAPP tactic targets the journalists' joint reporting over the last three years on Snežić's business dealings and alleged involvement in an illegal loan to Janša's ruling SDS party.

The cases not only seek to harass the journalists by, for example, being filed in Maribor instead of Ljubljana, where the media outlet is based. They are also accompanied by smear campaigns intended to discredit the work of the journalists by besmirching them personally. In August 2020, Snežić accused the three journalists of "cheating the taxpayer" and made sexist remarks about Vuković, accusing her of being an "intimate friend" of a former president of the Executive Council of Slovenia.<sup>193</sup>

The Slovenian case, just like the Serbian one, highlights how SLAPPs do not exist in isolation but are also reminiscent of a hostile environment against those who are critical of the *status quo*. The tactic of filing many legal complaints against the same targets for the same article is an attempt to halt their work and use up an enormous amount of their time, money, and energy to defend themselves.

### Country study 7: Malta

At the time of her death, the assassinated investigative journalist Daphne Caruana Galizia was facing forty-seven libel cases filed against her in Malta and was the target of another case filed against her in Arizona. While most of the cases have now been concluded or withdrawn by the complainants, five of them are still ongoing. This is due to a quirk in Maltese law which allows the plaintiff to continue to pursue a civil suit against the defendant's heirs. Among the many politicians behind these cases was Malta's former Prime Minister, Joseph Muscat, whose government's corruption had been previously exposed by Caruana Galizia.<sup>194</sup> The legal actions "were just the last phase of a systematic

<sup>191</sup> Delić, A. and Stare, S. (23 April 2015). 'Analiza tožb in ovadb medijev' (Analysis of lawsuits and media complaints). *Novinar.com (Slovenian Journalists' Association)*, para. 7. Retrieved from: <https://novinar.com/novica/analiza-tozb-in-ovadb-medijev/>.

<sup>192</sup> Nielsen, N. 'MEPs seek EU law on bogus anti-media litigation'. *EUObserver*, para. 17. Retrieved from: <https://euobserver.com/world/153234>.

<sup>193</sup> (1 December 2021). '39 Lawsuits against Journalists from Necenzurirano'. *Council of Europe, Safety of Journalist Platform*. Retrieved from: <https://fom.coe.int/alerte/detail/72423132;globalSearch=true>.

<sup>194</sup> Garside, J. (1 December 2019). 'Malta's PM quits in crisis over Daphne Caruana Galizia murder'. *The Guardian*. Retrieved from: <https://www.theguardian.com/politics/2019/dec/01/malta-pm-joseph-muscat-quits-daphne-caruana-galizia>; See also: <https://www.theguardian.com/world/2020/aug/21/maltas-former-pm-questioned-daphne-caruana-galizia-inquiry-joseph-muscat>; and



campaign of dehumanisation that the journalist had been subjected to throughout her 30-year career.”<sup>195</sup>

In a letter to the Prime Minister at the time, Joseph Muscat, the Council of Europe Commissioner for Human Rights Dunja Mijatović expressed that this practice is an “excessive” and complex burden which “may also constitute an undue interference with the right to protection of journalistic sources”.<sup>196</sup>

### Case study 16: File and retreat

#### Konrad Mizzi v Daphne Caruana Galizia [2021]

A common SLAPP tactic for complainants in Malta is to file a defamation claim and withdraw from the case “when evidence which might be deleterious to the claimant’s case is about to be heard.”<sup>197</sup> In 2017, the politician and Minister Konrad Mizzi filed five libel cases against Daphne Caruana Galizia over claims she had made in her blog that a company owned by one of the daughters of Azerbaijani President, Ilham Aliyev, had made sizeable monetary transfers to various offshore companies. According to Caruana Galizia’s blog post the transfers were made through the company’s account at Pilatus Bank. Mizzi withdrew his suits against Caruana Galizia (and several others based on the Panama papers) after the Maltese courts threw out a request for an inquiry into the Panama Papers in 2019.

The shock of Caruana Galizia’s assassination led to increased international attention to Malta which resulted in some amendments to the laws on defamation and press freedom. Nonetheless, the culture of filing legal complaints to silence criticism is still prevalent in Malta. At the start of 2022, three defamation cases were filed by public officials against newsrooms and journalists.<sup>198</sup>

<https://www.vice.com/en/article/7x5n5d/how-the-murder-of-an-anti-corruption-journalist-could-bring-down-the-maltese-government>.

<sup>195</sup> (15 October 2019). ‘Justice Delayed: The Assassination of Daphne Caruana Galizia and Malta’s Deteriorating Press Freedom Climate’. *Reporters Without Borders* and *The Shift News*, p. 30. Retrieved from: [https://rsf.org/sites/default/files/rapport\\_2019\\_v4.pdf](https://rsf.org/sites/default/files/rapport_2019_v4.pdf).

<sup>196</sup> (12 September 2019). Letter to Prime Minister Joseph Muscat from Dunja Mijatović, ref: CommHR/DM/sf 033-2019. Retrieved from:

<https://rm.coe.int/letter-to-joseph-muscat-prime-minister-of-malta-by-dunja-mijatovic-cou/168097562f>.

<sup>197</sup> Bayer, J. et al. (2021). ‘Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study’, *EU-CITIZEN*, p. 250.

<sup>198</sup> See (6 January 2022). ‘The Shift News faces attempts to block public interest FOI request’. *Mapping Media Freedom*. <https://www.mapmf.org/alert/24507>; see also:

(24 January 2022). ‘Adrian Delia takes Lovin Malta editor to task over Yorgen Fenech message allegations’. *Malta Today*,

[https://www.maltatoday.com.mt/news/court\\_and\\_police/114575/adrian\\_delia\\_takes\\_lovin\\_malta\\_editor\\_to\\_task\\_over\\_yorgen\\_fenech\\_message\\_allegations#.YfwKle7MJhE](https://www.maltatoday.com.mt/news/court_and_police/114575/adrian_delia_takes_lovin_malta_editor_to_task_over_yorgen_fenech_message_allegations#.YfwKle7MJhE); and:

(2 February 2022). ‘No chance of settlement in Mark Camilleri libel in view of ‘continued insults’, Cutajar says’. *Malta Independent*.

<https://www.independent.com.mt/articles/2022-02-02/local-news/No-chance-of-settlement-in-Mark-Camilleri-libel-in-view-of-continued-insults-Cutajar-says-6736240308>.

### 3.4.4 Cross-country cases

#### Country study 8: The UK

As discussed in Chapter 1, cross-border SLAPPs are lawsuits filed in a jurisdiction that the complainant perceives will best serve their interests. SLAPPs tend to have a cross-border element especially in cases where the complainant is domiciled or habitually resident in more than one country – including in the case of participation acts tackled simultaneously through multiple lawsuits filed in different jurisdictions by the same complainant or associated entities (including multinational corporations or members of a cross-border business conglomerate).

#### Case study 17: Swedish freelancers SLAPPED in London

Svante Kumlin v Realtid, Camilla Jonsson, Per Agerman & Annelie Östlund [2020]

Per Agerman and Annelie Östlund are freelance reporters who started to work for *Realtid*, which is a small Swedish financial news website that publishes in Swedish for a Swedish audience. In 2020, they investigated a story on the “grey-market share trading network”.<sup>199</sup> They published a due-diligence story on the share trading practices of a company called EEW.

Agerman and Östlund received letters from a law firm stating that they made wrongful comments in their questions when they asked for a reply. They put together a long memo with the facts of the report to show what they were planning to report. In response, they received more threatening letters from the UK-based law firm and were later served with a libel suit from the High Court in the UK. The four defendants of the case are the two journalists, their editor, and *Realtid*. It would not have been possible for them to be sued personally in Sweden as in the Swedish press system the editor is the only one who can be held liable in a defamation case.

The case study above gives the context of why cross-country cases are more popular in the UK than in any other country included in this report’s study (Chapter 2, [Figure 7]). In the UK, complainants feel more confident that they can silence those who are critical of them because the legal costs of proceedings are high and complainants can use the law to “intimidate, wear down and financially destroy journalists and campaigners”.<sup>200</sup> These high costs - along with the UK’s plaintiff-friendly defamation laws - allow for the weaponisation of the right to reply process. The case study above gives an example of the weaponisation of the right of reply - instead of responding to the journalists’ questions, the complainant

<sup>199</sup> (22 November 2021). YouTube video. ‘DAY 1: Anti-SLAPP Conference’, *Justice for Journalist Foundation*. Comment made by Per Agerman at 6:20:00. Retrieved from: <https://youtu.be/6LAXvNDnqzk>.

<sup>200</sup> (20 January 2022). UK Parliament debate on Lawfare and the UK Court System (volume 707).

Comment made by MP Bob Seeley. Retrieved from:

<https://hansard.parliament.uk/Commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/details>.



turned the public interest matter into a legal conflict. The weaponisation of the right of reply has a very chilling effect, particularly on freelancers.

Despite reforms to the defamation laws in the UK in 2013, the Foreign Policy Centre found that they were abused by legal threats or actions taken against many whose work involves exposing global corruption.<sup>201</sup> While the UK's 2013 Defamation Act introduced a serious harm requirement, which helped deter the filing of frivolous claims, the burden of proof remains on the defendant to prove a statement is true or substantially true.<sup>202</sup> The difficulty this creates for defendants is compounded by the uncertainty caused by the UK's convoluted rules of procedure. The "single meaning rule", for example, requires the defendant to defend their work based on the judge's legal interpretation of the statements in question. These structural features produce a high volume of threats and legal actions in the UK.

Additionally, there are many reputation management law firms in the UK that assist complainants to deploy various UK laws - such as defamation or data protection laws - to commence legal actions. These are law firms, such as *Mishcon de Reya*, *Schillings*, and *Carter-Ruck*,<sup>203</sup> which have a department specific to reputational damage concerns.

### 3.4.5 Criminal cases

Criminal SLAPPs against public watchdogs are often based on defamation (Chapter 2, [Figure 3]) which, as previously said, is still criminalised in different jurisdictions of Council of Europe Member States.

#### Country study 9: Italy

Defamation in Italy is still a criminal offence, punishable with a fine of €1,032 or custody of up to one year, and the specificity of individual cases can exacerbate the penalty.<sup>204</sup> Criminal defamation committed through the press is regulated by the Criminal Code and the Press Law, specifically Article 13 if the defamatory statements are accusations of facts. Journalists can face up to six years of imprisonment and a fine of up to €50,000, regardless of multiple warnings by the ECtHR.<sup>205</sup> The ECtHR has warned the Italian state of the risk of a potential "chilling effect" and of self-censorship that the existence of a prison sentence

<sup>201</sup> (2020). 'Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world', *Foreign Policy Centre*, p. 30. Retrieved from: <https://fpc.org.uk/publications/unsafe-for-scrutiny/>.

<sup>202</sup> (12 January 2014). 'Defamation Act 2013 - A summary of the Act'. *Brett Wilson*. Retrieved from: <https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-of-the-act/>.

<sup>203</sup> Taylor, A. E. (14 August 2021). 'London law firms 'reputation laundering' wealthy clients by intimidating journalists'. *The Shift News*, para. 16. Retrieved from: <https://theshiftnews.com/2021/08/14/london-law-firms-reputation-laundering-wealthy-clients-by-intimidating-journalists/>.

<sup>204</sup> Bayer J. et al (2021), 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study'. *EU-Citizen* Retrieved from: [https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

<sup>205</sup> Pierbon C. and Rosà P. (2019). 'SLAPPs: the Italian Case'. *Media Freedom Resource Centre OBC Transeuropa*. Retrieved from: <https://www.rcmediafreedom.eu/Tools/Legal-Resources/SLAPPs-the-Italian-Case>.

can have on journalists.<sup>206</sup> According to the Press Law, in cases of defamation the editors (or deputy editors), publishers and printers can be held liable civilly and criminally for the failure of adequate supervision of the content of the publication.<sup>207</sup>

### Case study 18: Journalist arrested at the age of 81

Francesco Gangemi [2015]

In 2015, Francesco Gangemi, editor of the monthly magazine *Il Dibattito*, was subject to an arrest warrant. Gangemi was sentenced to nearly three years of custody for defamation and perjury, the latter after he refused to disclose his sources<sup>208</sup>. At the time, Gangemi was 81 and fully disabled. He was later arrested and placed under house arrest.

In 2020, the Italian Constitutional Court held a public hearing concerning the constitutional legitimacy of prison sentences for defamation through the press or public dissemination. The Court, at the time, stated that reforms to the legal framework of defamation were necessary but it was up to the Italian Parliament to amend the legislation.<sup>209</sup> The Court gave the Parliament a year to legislate the matter, or the decision would be reversed to the Constitutional Court. In 2021, the Constitutional Court held that Article 13 of the Press Law is unconstitutional because it contrasts with freedom of expression as contemplated by the Italian Constitution and the European Courts of Human Rights. The Court further called for the Parliament to legislate and amend the legal framework on defamation.<sup>210</sup>

Recently, due to the Covid-19 Pandemic, multiple laws have been introduced to tackle the pandemic; in some jurisdictions, breaches of these laws carry criminal charges. Many of these laws have been used as a tool to stop public participation. Indeed, journalists have been subject to dubious charges for alleged breaches of Covid-19 regulations, which the media organisations suspect are politically motivated against independent media.<sup>211</sup>

<sup>206</sup> Belpietro v. Italy, ECtHR 24 September 2013, nr. 43612/10; Ricci v. Italy, ECtHR 08 October 2013, nr. 30210/06.

<sup>207</sup> Bayer J. et al (2021), 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study'. *EU-Citizen* Retrieved from:  
[https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

<sup>208</sup> (2015). 'Diffamazione, arrestato a 81 anni il giornalista Francesco Gangemi. Parisi: "Intervenga il Capo dello Stato", *Federazione Nazionale Stampa Italiana (FNSI)*. Retrieved from:  
<https://www.fnsi.it/diffamazione-arrestato-a-81-annirnil-giornalista-francesco-gangemi-parisi-ldquointervenga-il-capo-dello-statordquo>.

<sup>209</sup> (2020). 'Major step forward in push to scrap prison sentences for criminal defamation in Italy'. *Media Freedom Rapid Response*. Retrieved from:  
<https://ipi.media/major-step-forward-in-push-to-scrap-prison-sentences-for-criminal-defamation-in-italy>.

<sup>210</sup> (2021). 'Italy: Defamation law must be reformed'. *Article19*. Retrieved from:  
<https://www.article19.org/resources/italy-decision-of-constitutional-court-on-prison-for-journalists/>.

<sup>211</sup> (2020). 'Democracy Declining: Erosion of Media Freedom in Poland. Media Freedom Rapid Response (MFRR) Press Freedom Mission to Poland (November-December 2020)', *International Press Institute (IPI)*. Retrieved from:  
[https://ipi.media/wp-content/uploads/2021/02/20210211\\_Poland\\_PF\\_Mission\\_Report\\_ENG\\_final.pdf](https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf).

## Recommendations

As this report has shown, 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. Insofar as SLAPPs 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.

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, as stated by international and regional human rights bodies, including the UN Human Rights Council,<sup>212</sup> the Council of Europe Commissioner for Human Rights,<sup>213</sup> and the OSCE Representative on Freedom of the Media.<sup>214</sup>

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 are not protected by the right to access to a court, due to their abusive nature. Among others, this is reflected in the 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 freedom of expression and, therefore, there must be adequate domestic safeguards to avoid disproportionate awards being granted.<sup>215</sup> It 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>216</sup>

Therefore, 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.

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<sup>212</sup> (2021). *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*. United Nations. Retrieved from: <https://undocs.org/A/HRC/47/39/Add.2>.

<sup>213</sup> (27 October 2020). 'Time to take action against SLAPPs'. *Council of Europe*. Retrieved from: <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

<sup>214</sup> (23 November 2021). 'Special report on legal harassment and abuse of the judicial system against the media'. *OSCE*. Retrieved from: <https://www.osce.org/representative-on-freedom-of-media/505174>.

<sup>215</sup> ECtHR judgement of 15.06.2017, case of *Independent Newspapers (Ireland) Limited v. Ireland* (application no. 28199/15).

<sup>216</sup> ECtHR judgement of 15.02.2005, case of *Steel and Morris v. the UK* (application no. 68416/01).

## 4.1 What can the EU do?

As illustrated in previous sections, SLAPPs are an EU-wide issue since they not only affect most Member States across the EU, but also have a detrimental impact on the EU legal order, the respect for EU values, and the health of EU Member States' democracies. While the Whistleblower Directive sets an important precedent for protecting those who report a breach of Union law in a work-related context,<sup>217</sup> a strong EU response to SLAPPs is a further necessary step to protect public participation. As the European Parliament also recommends, such a response should consist of a combination of ambitious legislative and non-legislative measures.<sup>218</sup>

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.

In line with proposals made in the model directive,<sup>219</sup> CASE member groups recommend that the Commission proposes an EU anti-SLAPP Directive based on a sound and comprehensive understanding of SLAPPs, and not just tackle the issue of cross-border litigation. The CASE public consultation submission<sup>220</sup> and the CASE Model EU Directive<sup>221</sup> should be referred to for in-depth analysis into the legal framework that should be instituted to better protect public watchdogs.

Nonetheless, stated broadly, the EU should:

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<sup>217</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Retrieved from: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>.

<sup>218</sup> (27 October 2021). 'Report on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society' (2021/2036(INI)). *European Parliament*. Retrieved from: [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).

<sup>219</sup> (2021). 'A Model EU Directive on Providing Protection From Abusive Lawsuits Against Public Participation' In the CASE proposal for an EU Anti-SLAPP Law', pp. 23 - 49. Retrieved from: [https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs\\_04Dec.pdf](https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs_04Dec.pdf).

<sup>220</sup> (January 2022). CASE submission to the European Commission public consultation on EU action against SLAPPs, pp. 37 - 42. Retrieved from: [https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/61ead5bc96dc8d1d01180a1a/1642780097193/SLAPPs+IN+EUROPE\\_+HOW+THE+EU+CAN+PROTECT+WATCHDOGS+FROM+ABUSIVE+LAW+SUITS.pdf](https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/61ead5bc96dc8d1d01180a1a/1642780097193/SLAPPs+IN+EUROPE_+HOW+THE+EU+CAN+PROTECT+WATCHDOGS+FROM+ABUSIVE+LAW+SUITS.pdf).

<sup>221</sup> (2021). 'A Model EU Directive on Providing Protection From Abusive Lawsuits Against Public Participation' In the CASE proposal for an EU Anti-SLAPP Law'. Retrieved from: [https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs\\_04Dec.pdf](https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs_04Dec.pdf).

## Harmonise EU laws on SLAPPs so as to make them predictable for all those targeted by SLAPPs.

Harmonised rules put forward in an EU anti-SLAPP Directive should be applicable to both cross-border and domestic SLAPP cases.<sup>222</sup> Any EU initiative combating SLAPPs should build on a broad, non-exhaustive definition of a public participant as well as a broad, non-exhaustive identification of SLAPP complainants and targets as well as SLAPP suits, which shall include any type of legal claim.

## Reform the EU private international law framework.

As already recommended in the recent study commissioned by the European Parliament,<sup>223</sup> in addition to the adoption of an anti-SLAPP Directive, CASE member groups recommend that the EU legislator propose a targeted reform of the EU private international law framework.

## Support the EU Member States.

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:
  - providing technical assistance to the authorities;
  - ensuring close monitoring of the implementation of EU rules and recommendation; and,
  - ensuring 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;

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<sup>222</sup> 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. For more information, kindly refer to the CASE submission to the European Commission public consultation on EU action against SLAPPs, pp. 39 - 40, cited above.

<sup>223</sup> Borg-Barthet, J., Lobina B. and Zabrocka, M. (June 2021). ‘The Use of SLAPPs to Silence Journalists, NGOs and Civil Society’. *European Parliament*, pp. 33 - 44. Retrieved from: [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).

- cooperating with the Council of Europe to provide capacity building for legal professionals on freedom of expression and media freedom; and,
- earmarking funding under the Citizens, Equality, Rights and Values Programme and under the Justice Programme to support awareness raising initiatives, training programmes and programmes to provide SLAPP targets with support and assistance, including by civil society organisations.

## 4.2 What can European states do?

### Decriminalise defamation and bring other laws criminalising speech in line with human rights standards.

Defamation, libel and slander still constitute criminal offences in most EU Member States, despite repeated calls for decriminalisation by international and regional bodies including the Council of Europe.<sup>224</sup>

### Fully implement EU Directive.

Member states of the European Union should commit to the full implementation of anti-SLAPP legislation proposed by the Commission. Moreover, if Member States want to domestically introduce specific anti-SLAPP measures, this should be done transparently and in good faith. This involves consulting with international experts and national civil society throughout the drafting process.

### Offer 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; and,

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<sup>224</sup> 'Defamation'. *Council of Europe*. Retrieved from:  
<https://www.coe.int/en/web/freedom-expression/defamation>.



- political and financial support to strengthen and fund civil society organisations, professional associations and networks providing support and assistance to SLAPP targets.

## **Implement professional standards for lawyers and law firms.**

While legal ethics regulation generally holds lawyers to integrity principles, currently there are no legal ethics regulations that explicitly address SLAPPs or the role of lawyers in facilitating them across Europe. States should invite their national legal regulatory bodies to explore the extent to which legal ethics should address SLAPPs and treat them as sanctionable disciplinary offences.

## **Enable civil society.**

Member States must engage with national and international civil society bodies, such as CASE. These can provide in-depth knowledge of SLAPPs necessary to introduce tools to limit vexatious litigation. By following their work, governments will be kept updated on the new trends and issues of SLAPPs and will have the necessary knowledge to enact comprehensive legislation.

Member States must promote the registration of SLAPP cases on the Mapping Media Freedom and CoE platforms and, also, promote organisations such as ECPMF, RPT, Media Defence and FPU, which can financially support victims with the legal fees.

## **Create and/or support independent bodies.**

Independent authorities like ombudspersons, trade unions, or press councils have a role to play in hearing complaints from and providing assistance to persons threatened or faced with SLAPP suits. 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.

## **Offer awareness raising and training to stakeholders.**

States should facilitate the provision of both general and specialist training to judges and lawyers to increase their awareness of SLAPP suits. States should also promote and support training on SLAPPs for targets and potential targets, such as journalists and civil society actors.

## **Collect data on SLAPPs.**

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>225</sup>

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<sup>225</sup> CASE collected data from SLAPP legal cases across Europe from 2010 - 2021, available at: <https://datastudio.google.com/reporting/2222427e-5b20-4678-bb44-90565410d86b>.

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