



## EU-CITZEN:

### ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

#### Ad-Hoc Request SLAPP in the EU context

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Version	v.2
Delivery date	29 May 2020
Total number of pages	67 (including Annex)



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# Contents

<b>CONTENTS</b> .....	<b>2</b>
<b>1. CHALLENGE SETTING: SLAPP IN THE EU</b> .....	<b>4</b>
1.1. WHAT IS AT STAKE: EUROPEAN DEMOCRACY AND FUNDAMENTAL RIGHTS .....	5
1.2. EU-SPECIFIC CROSS-BORDER ISSUES: JURISDICTION, INCLUDING THE PROBLEM OF FORUM SHOPPING .....	6
1.3. SLAPP VICTIMS ACROSS EUROPE AND EU REACTIONS .....	8
<b>2. DEFINITIONAL CHALLENGES TO BE EXPLORED IN FUTURE RESEARCH</b> .....	<b>11</b>
2.1. THE “SPEAKER” TO BE PROTECTED.....	12
2.2. THE “SPEECH”, OR CONTENT TO BE PROTECTED .....	14
2.3. THE IMPACT ON DEMOCRATIC PARTICIPATION .....	15
2.4. THE LAWSUIT IS MERITLESS .....	15
2.5. THE INTENT TO INTIMIDATE .....	15
<b>3. LEGAL AND NON-LEGAL TOOLS USED IN A SLAPP-RELATED CONTEXT</b> .....	<b>16</b>
3.1. LEGAL INSTRUMENTS WHICH MAY BE USED TO “SILENCE” JOURNALISTS AND NGOs .....	16
3.1.1 <i>Instruments limiting free speech: civil and criminal, substantive and procedural laws</i> .....	17
Defamation and libel: the difference between statements of facts and value statements .....	17
Criminal defamation.....	18
Covid-19 .....	19
3.1.2 <i>Other, non-freedom of expression related legal tools</i> .....	21
The burden of being a whistle-blower .....	21
Community participation .....	22
3.2. OTHER, NON-LEGAL FORMS OF JOURNALISTS’ AND NGO’S HARASSMENT.....	24
<b>4. MODELS AND TECHNIQUES OF ANTI-SLAPP REGULATION TO BE EXPLORED IN A FUTURE RESEARCH</b> .....	<b>25</b>
4.1. THE ROLES AND RESPONSIBILITIES OF THE DIFFERENT BRANCHES OF POWERS.....	26
4.2. DISMISSING THE APPLICATION BEFORE THE MERITS PHASE.....	26
4.2.1 <i>Legality and opportunity</i> .....	27
4.2.2 <i>Abuse of rights</i> .....	28
4.3. TECHNIQUES IN THE MERITS PHASE TO OVERCOME THE NEGATIVE EFFECTS OF SLAPPS.....	29
4.3.1 <i>Cost transfer, legal aid for litigants</i> .....	29
4.3.2 <i>Publicity and warning against SLAPPers</i> .....	29
4.3.3 <i>SLAPP-back</i> .....	30
4.4. FURTHER CONSIDERATIONS WITH RESPECT TO THE EUROPEAN CONTEXT .....	30
4.4.1 <i>Freedom of speech and its limits</i> .....	30
4.4.2 <i>The constitutional pre-requisites to successfully fight against SLAPP</i> .....	32
4.4.3 <i>Potential abuse of anti-SLAPP legislation (particularly by government-sponsored NGOs)</i> .....	33
4.4.4 <i>The importance of an independent judiciary</i> .....	34
<b>5. FUTURE RESEARCH AVENUES</b> .....	<b>35</b>
<b>ANNEX – CASE STUDIES</b> .....	<b>38</b>
CASE STUDY 1 – CROATIA: SLAPP SUITS TARGETING JOURNALISTS .....	40
<i>Evaluation</i> .....	41
CASE STUDY 2 – ITALY: THREATS BY THE SICILIAN MAFIA .....	41
<i>Evaluation</i> .....	43
CASE STUDY 3 – MALTA: THE ASSASSINATION OF DAPHNE CARUANA GALIZIA.....	45
<i>Evaluation</i> .....	47



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CASE STUDY 4 – POLAND: MULTIPLE CASES AGAINST PROFESSOR WOJCIECH SADURSKI .....	47
<i>Evaluation</i> .....	48
CASE STUDY 5 – HUNGARY: VEXATION OF CIVIL ACTIVISTS .....	48
<i>Evaluation</i> .....	51
CASE STUDY 6 – FRANCE: PIERRE ALAIN MANNONI AND SLAPPS-LIKE ‘CRIMINALISATION OF SOLIDARITY’ CASES.....	52
<i>Evaluation</i> .....	53
<b>REFERENCES.....</b>	<b>57</b>
ACADEMIC SOURCES .....	57
MEDIA SOURCES .....	61
CASE-LAW .....	66
<i>CJEU case-law</i> .....	66
<i>ECtHR case-law</i> .....	66
<i>National case-law</i> .....	67
LAWS AND LEGAL INSTRUMENTS, MODEL LAWS .....	67



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## 1. Challenge setting: SLAPP in the EU

### Key Findings

A free and functional press, especially investigative journalism, is a cornerstone of all democracies. It is also a basic pillar of European integration. SLAPP cases interfere with these values and prevent citizens from engaging in a meaningful debate on public issues. SLAPP cases also interfere with fundamental rights of individuals, such as freedom of expression and freedom to receive information.

The common European rules (Brussels I Regulation (recast) and Rome II Regulation) are based on the mutual trust between Member States. In case of tort (damages claims), Brussels I Regulation (recast) allows the plaintiff to choose the jurisdiction flexibly. The choice of law rules made an exception to defamation cases; therefore, plaintiffs have extensive choice of applicable law.

As there are significant differences in both the procedural and substantive rules of defamation among Member States, vexatious litigants are able to leverage the legal regime to their advantage and against public participation.

SLAPPs – Strategic Lawsuits Against Public Participation – are groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties – journalists, civil society organisations, human rights defenders and others – who express criticism or transmit messages uncomfortable to the powerful, on a public matter. The aim of SLAPP is not to win the case. Instead the procedure is initiated for the sole reason of having the procedure, in an attempt to intimidate, tire out, and consume the financial and psychological resources of the speakers, with the ultimate goal of achieving a chilling effect and silencing them, which will also discourage other potential critics from expressing their views.

SLAPPs are increasingly used across member states, in an environment that is getting more and more hostile towards journalists, human right defenders and various NGOs.<sup>1</sup> This may have a detrimental effect on democracy and fundamental rights in both the respective states and, due to the cross-border nature of the problem and the inter-connectedness of the various levels of governance, in the European Union (EU) as a whole.

The main objective of this paper is to present the state of the art in the EU; to show the complexity of the matter; and to highlight the issues to be tackled in later research in order to create solid scientific ground paving the way for fighting SLAPPs effectively across the Union.

This paper is based on desk research exploring existing literature. Comparative law methodology has been employed, which is all the more important, since literature to a large extent stems from common law jurisdictions, mainly the United States of America (US), whereas the majority of member states follow the Continental tradition. In common law countries SLAPPs are hitting the critics harder due to the specificities of the legal family and the national legal system.

Based on our preliminary research, differences in the various jurisdictions may result from dissimilar substantive law provisions, such as: constitutional differences (see for example the right to public

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<sup>1</sup> ECPMF, "SLAPPs: Strategic Lawsuits Against Public Participation", Resource Centre on Media Freedom in Europe, Special dossier, 19 December 2019, (<https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation>); European Union Fundamental Rights Agency (FRA) (2018) "Challenges facing civil society organisations working on human rights in the EU", January. ([https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-challenges-facing-civil-society\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf))



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participation as it stems from the First Amendment to the US Constitution); the nature of defamation laws; or from procedural distinctiveness, such jury trial, length of procedures as legal costs, excessive attorney's fees, the amount of damages and whether a cap to damages is defined; the availability of legal aid; or the existence or lack of adequate safeguards to protect against abuse of rights.

Our hypothesis is that the effects of SLAPP are similar in Continental Europe and the Anglo-Saxon world, but procedural issues are very different. Therefore, borrowing legal transplants when trying to prevent SLAPPs is only possible to a limited extent in the EU. In addition, the specificities of the Union legal system need to be taken into account when planning EU law responses to the harmful effect of SLAPPs. While in the US the issues have primarily arisen vis-à-vis private actors, the cases analysed in the EU show how in the EU Member States, ruling parties or governments do not shy to resort to SLAPP-like measures.

In this first chapter, SLAPPs' distorting effect on European democracy and fundamental rights will be highlighted, followed by specificities of the common market, with a focus on cross-border jurisdictional issues, such as forum shopping. This chapter also highlights current EU debates and the Union lawmakers' prioritisation of fighting against SLAPP. In the second chapter on the definitional elements of SLAPP we suggest adopting an inclusive approach of subjects to be protected. Each and every definition deserves further exploration: who the speaker targeted by SLAPP is; what the subject matter of the speech is; how it impacts democratic participation; exploration whether the lawsuit is meritless; and what the intent of the plaintiff was. The third chapter addresses legal and non-legal tools used against typical targets, where with regard to the former, we again suggest following an inclusive approach covering civil law and criminal disputes, and substantive and procedural matters equally. Finally, in the fourth chapter, we highlight the key issues of the various models and legislative techniques behind anti-SLAPP regulation, which will need to be explored in future research assisting European lawmakers on the matter.

### ***1.1. What is at stake: European democracy and fundamental rights***

Expressing different thoughts and participating in public debates is the basis of democracies. Access to information is equally important for making informed choices and for making debates meaningful in a deliberative democracy. According to the instrumental theory, freedom of expression is crucial for democracies, since it contributes to citizens' understanding of participation in public matters and their involvement in the governance of their own communities.<sup>2</sup> At the same time, it enhances – even if it does not necessary lead to – the discovery of truth.

The fundamental rights to freedom of expression and the right to receive information, the right to public participation, just like the informed participation in a democracy all belong to the basic tenets of the European understanding of democracy and fundamental rights. Bills of rights, such as Article 11 of the Charter or Article 10 ECHR list the right of access to information next to freedom of expression as the passive side of free speech. Article 19 of the International Covenant on Civil and Political Rights states that “this right shall include freedom to seek, receive and impart information and ideas of all kinds”. As to the latter aspects, Article 21(1) of the 1948 Universal Declaration of Human Rights provides that “everyone has the right to take part in the government of his country”. Article 25 of the

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<sup>2</sup> Barendt, Eric: Freedom of Speech. Oxford University Press, 2005. p. 19-20.



International Covenant on Civil and Political Rights guarantees the right “to take part in the conduct of public affairs”.<sup>3</sup>

Highlighting the interdependent nature of the above values of fundamental rights and democracy with the rule of law,<sup>4</sup> individuals must know what public policy is, how they will be affected and what alternative solution there are,<sup>5</sup> and legal instruments can only be regarded as legitimate if they have been adopted based on deliberation and subsequent agreement of all citizens, in a fair and discursive process equally open to all.<sup>6</sup> Silencing views on public matters runs against the above principles and foundational values behind European integration, also enshrined in Article 2 of the Treaty on the European Union.

In sum, SLAPP actions attack democratic public participation, and they indirectly threaten the democracy and the rule of law within the European Union. Tolerating or getting involved in SLAPP cases by the government should be regarded as early warning signs for a rule of law oversight by the EU. A rule of law oversight should register reported SLAPP-cases, and also eventual abuse of anti-SLAPP.

In transmitting knowledge, the free press, civil society organisation including human rights NGOs and academia play a crucial role. The public watchdog function of journalists and NGOs has also been acknowledged by the European Court of Human Rights, and because of this role they were granted special protection in the Strasbourg jurisprudence.

### ***1.2. EU-specific cross-border issues: jurisdiction, including the problem of forum shopping***

Forum shopping is a practice applied by claimants when they, in a lawsuit that can be connected to more than one countries and legal systems, don't select the jurisdiction that has the closest relation to the dispute, but the one where the likelihood of achieving the desired result is the greatest. In SLAPP cases, the desired outcome is not necessarily winning the case (see below) but making the litigation procedure the most burdensome for the respondent/defendant.

In the age of online media, when the same online (but often also offline) publication is accessible simultaneously in many provinces, regions and states, the alleged injury to the reputation of the person who believes to be defamed and the potential resulting damage may also incur at several locations.

In the United States of America, the federal system offers wide possibilities for forum shopping. Acknowledging its dangers, thirty US states have enacted anti-SLAPP legislation, but in some states, the respective statute applies only to a very narrowly defined set of cases, and twenty states have no anti-SLAPP laws whatsoever. This allows strategic litigants to start their lawsuits in states where no anti-SLAPP law protects journalists or NGOs.

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<sup>3</sup> These provisions are basically identical with the provision set forth in the 1<sup>st</sup> Amendment of the US constitution.

<sup>4</sup> Carrera et al. (2013)

<sup>5</sup> ECtHR, Leander; Gaskin v United Kingdom, (1990) 12 E.H.R.R. 36, para 49; G. (M.) v United Kingdom, (2002) 36 E.H.R.R. 22, para 30; Guerra v Italy, (1998) 26 E.H.R.R. 357, para. 60; Oneryildiz v Turkey (2005) 41 E.H.R.R. 325, paras. 89-90, 108; McGinley and Egan v United Kingdom (1998) 27 E.H.R.R. 1, paras 101-2; LCB v United Kingdom (1998) 27 E.H.R.R. 212, paras 38-9 and Roche v United Kingdom (2006) 42 E.H.R.R. 599, paras. 165-6; Társaság A Szabadságjogokért v. Hungary, 14 April 2009; Guseva v. Bulgaria

<sup>6</sup> Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy*, Cambridge: MIT Press, 1996, 447-8, 107. Gutmann, A. and D. Thompson (1996). *Democracy and disagreement*. Cambridge: Harvard.



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In the European Union, issues of cross-border court procedures for civil and commercial lawsuits are regulated by the Brussels I Regulation (recast) and the Rome II Regulation. Brussels I Regulation (recast) regulates the jurisdiction, where a lawsuit may be started. While the main principle is that defendants are to be sued before the courts of the Member State of their domicile, there are also other options depending on the subject matter, among others in tort. Plaintiffs can sue for damages also in the Member State where the harmful event occurred (Article 7 (2) Brussels I Regulation (recast) ),<sup>7</sup> which, according to the widening interpretation of ECJ, can be both the place where the damage occurred (e.g. the reputation of the plaintiff suffered harm) and the place of the event giving rise to it (*Shevill and Others v. Presse Alliance S.A.*<sup>8</sup> Shevill and the other plaintiffs could sue the newspaper in England where they did not need to prove actual damage and the good faith of the publisher was generally irrelevant, unlike under French law.<sup>9</sup> The principle was reinforced in *eDate*, in relation to online content.<sup>10</sup> In *Shevill*, the ECJ firmly rejected the concept of “the most significant connection”, and it found that plaintiffs can sue in each and every state where they suffered damages, but only up to the extent of the damage in that state.<sup>11</sup>

Advocate General Bobek recommended to limit the choice of fora to two options: in his view the place where the event giving rise to the harm took place should be the domicile of the publisher, whereas the place where the harm occurred should be “where the protected reputation was most strongly hit”, i.e. the plaintiff's centre of interest.<sup>12</sup> The ECJ followed his advice only in respect of rectification and correction of the defamatory information, but not in respect of suing for damages: for the latter, the mosaic approach was upheld (*Bolagsupplysningen OÜ and another v Svensk Handel AB*).<sup>13</sup>

The wide range of possibilities for selection of jurisdiction are an invitation for forum shopping, beyond the fair goal of optimizing the chances of winning, with the purpose to maximise the burden of the lawsuit(s) on the defendant. This made possible, for example, that Daphne Caruana Galizia had 47 libel cases, and she was among others sued also in the UK.<sup>14</sup> (See Annex.)

The situation is further complicated by the lack of a common conflict law regulation for defamation cases. While the Rome II Regulation<sup>15</sup> strived to deliver a solution acceptable to all Member States

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<sup>7</sup> More on this: Kramberger Škerl, J. (2017), "Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance", *Lexonomica*, Vol. 9, No. 2, pp. 87-108.

<sup>8</sup> Case C-68/93, 1995. See also Borg-Barthet, J. (2020) Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union. Centre for Private International Law, School of Law, University of Aberdeen. <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>, at 11.

<sup>9</sup> Forsyth, C. (1995). Defamation under the Brussels Convention: A Forum Shopper's Charter? *The Cambridge Law Journal*, 54(3), 515-517. Retrieved May 8, 2020, from [www.jstor.org/stable/4508121](http://www.jstor.org/stable/4508121)

<sup>10</sup> *eDate Advertising v X*, cases C-509/09 and C-161/10 EU:C:2011:685, 25 October 2010.

<sup>11</sup> Ironically, Fiona Shevill was an employee of one of those companies which were linked by the article of France Soir to drug-trafficking and money laundering. 237.000. copies of the newspaper were sold in France, several thousand circulated in other states of Europe but only 230 were sold in England and Wales. Although the facts of the case are not readily accessible today, the public interest argument could have been potentially relevant.

<sup>12</sup> Advocate General's Opinion in Case C-194/16 Press and Information Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170078en.pdf>

<sup>13</sup> ECJ, 17 October 2017, *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16, EU:C:2017:766, 17 October 2017, in particular points 44 and 45-49.

<sup>14</sup> <https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation>

<sup>15</sup> REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)



with their different cultural and political traditions on defamation, finally the European Commission removed the defamation provision from the Rome II Regulation and excluded this field of law from its scope.<sup>16</sup> In addition, after a plaintiff succeeded in getting his or her case through in the most restrictive jurisdictions of the EU, the national court nearest to the defendant will not have the possibility to examine and refuse enforcement of a decision which may violate the rights of the defendant.

In sum, the European legal framework on private international law provides flexibility and a range of options for the plaintiffs in defamation cases, in fact it appears to favour the purported victim.<sup>17</sup>

But this widening of plaintiffs' jurisdictional options was the result solely of judicial interpretation in *Shevill* and *Bolagsupplysningen*. The text of the Brussels I Regulation (recast) is narrower: the principle to offer alternative grounds of jurisdiction based on a close connection beyond the defendant's domicile serves the "sound administration of justice" (Recital 16). It is added that the "existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen". It further emphasised that this is particularly important in disputes concerning rights relating to personality, including defamation.<sup>18</sup>

While access to justice is a fundamental right and foundational European value (See Articles 47, 51, 52 (3) Charter of Fundamental Rights, Articles 2 and 19 TEU and Articles 6 and 13 ECHR), safeguards to protect defendants against abuse of this right is very limited, which again could chill freedom of expression.

The ECtHR has emphasised that a strong connection must exist between the tortious situation and the forum state,<sup>19</sup> which was also reiterated by the Council of Europe<sup>20</sup> in its report on forum shopping. The Council of Europe also recommends several good practices to prevent abusive forum shopping, some of which appeal to the courts' and judges' professional insight and independence (Good Practice 1-4, 9, 13-15), whereas others would require legislative intervention (5-8, 11-12).

A group of prestigious NGOs have recommended concrete changes to the Brussels I Regulation (recast) and the Rome II Regulation.<sup>21</sup>

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<sup>16</sup> Warshaw, A. (2006) "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims", *Brooklyn Journal of International Law*, Vol. 32, no. 1. Article 7. <https://brooklynworks.brooklaw.edu/bjil/vol32/iss1/7>

<sup>17</sup> Borg-Barthet, J. (2020) Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union. Centre for Private International Law, School of Law, University of Aberdeen. <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>

<sup>18</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).

<sup>19</sup> *Arlewin v. Sweden*, no. 22302/10, 1 March 2016, §§ 65, 72-73.

<sup>20</sup> Liability and jurisdictional issues in online defamation cases, Good Practice 1., 2019, Council of Europe Study DGI(2019)04.

<sup>21</sup> Borg-Barthet, J. (2020) Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union. Centre for Private International Law, School of Law, University of Aberdeen. <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>





### 1.3. SLAPP victims across Europe and EU reactions

The SLAPP cases against and the subsequent assassination of Maltese journalist Daphne Caruana Galizia, who revealed corruption and money laundering, was a wake-up call for EU stakeholders. She had fought dozens of SLAPP suits and harassment incidents for years. Reporters without Borders note that she “at the time of her death was the target of 42 civil suits and five criminal cases.”<sup>22</sup>

The Annex to this Ad Hoc Request provides a detailed overview of the above and a selection of other SLAPP cases across several EU countries. The intimidation of investigative journalists has been increasing over the past years.<sup>23</sup> But SLAPP also goes way beyond investigative journalism.

Jan Kuciak and his fiancée have been murdered in Slovakia following Kuciak’s investigation in corruption cases.<sup>24</sup> Victoria Marinova was raped and murdered in Bulgaria following her investigation in allegations of fraud involving the EU funds.<sup>25</sup>

In Italy, a mixture of harassment and SLAPP cases can be observed primarily related to organised crime. Civil society<sup>26</sup> and the House of Representatives make repeated efforts to protect journalists, and an anti-SLAPP bill is pending in the Senate.<sup>27</sup> In Croatia, the large number of lawsuits, many of them initiated by the public service media company signal systemic problems of media freedom.<sup>28</sup> Existing literature on the problems with the Hungarian media is rich.<sup>29</sup> Therefore, we chose a case study which illustrates the vicious attacks on civil society organizations through arbitrary audits, tax procedures and excessive transparency requirements imposed by legislative action specifically meant to chill watch-dog civil society and civic activism (See Annex).

In recent years, European citizens and volunteers, among them also journalists, film-makers and staff of the well-known humanitarian NGOs (i.e. MSF, Save the Children, MOAS), even churches or faith-based organisations helping irregular migrants or asylum seekers, have been targeted across the EU as ‘migrant smugglers’.<sup>30</sup> Researchers have accounted that in the period between 2015 -2019 there were at least 171 individuals prosecuted under charges of facilitation of irregular entry and stay.<sup>31</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Reporters Without Borders (RSF) ‘RSF Index 2018: Journalists Are Murdered in Europe as Well’. RSF, 23 April 2018, <https://rsf.org/en/rsf-index-2018-journalists-are-murdered-europe-well>.

<sup>24</sup> Ibid.

<sup>25</sup> Radina Gigova, “Bulgarian Journalist Viktoriya Marinova Raped and Murdered.” CNN, 8 October 2018. <https://www.cnn.com/2018/10/08/europe/bulgaria-journalist-murder-intl/index.html>. Accessed 11 May 2020.

<sup>26</sup> Rosa, P., Claudia Pierobon (2019) "SLAPPS: the Italian Case", ECPMF, 12 November 2019, <https://www.rcmediafreedom.eu/Tools/Legal-Resources/SLAPPS-the-Italian-Case>

<sup>27</sup> Perrone, A. (2020) "A slap in the face: Meet the Italian journalist who has had to fight over 126 lawsuits all aimed at silencing her", Index on Censorship, 6 April 2020.

<sup>28</sup> Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>.

<sup>29</sup> Bárd, P. - Bayer, J.: [A comparative analysis of media freedom and pluralism](#) in the EU Member States, research paper for the European Parliament Policy Department C: Citizens' Rights And Constitutional Affairs. 2016.

<sup>30</sup> Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliūtė (2019), Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society, Hart Publishing, London (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>).

<sup>31</sup> ReSOMA (2020) The criminalisation of solidarity in Europe, ReSOMA Infographic, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/FSR%20Strategic%20Litigation\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/FSR%20Strategic%20Litigation_0.pdf).



Some of these accusations have been aggravated with espionage, participation in the organised criminal group, or anti-money laundering clause.<sup>32</sup>

While the majority of cases have resulted in acquittals, they managed to harm the reputation and the societal trust in such organisations and to erode the trust between the law enforcement actors and civil society.<sup>33</sup> Some of the most outspoken migrant rights defenders, like Pierre Alain Mannoni (see Case Study in Annex of this Ad Hoc Request), Anouk Van Gestel, Cedric Herrou, Carola Rackete, and many others have entered into the multiple rounds of appeals by state prosecutors against positive decisions, or other measures aiming at stopping their activities (SAR NGOs, the deportation of Salam Kamal Aldeen from Greece, closure and fines against Baobab Centre).<sup>34</sup>

From the perspective of human rights defenders, this situation can be assessed as judicial harassment, while from the perspective of EU citizens' rights there are also issues with 'right to good administration' and 'better regulation' at national and EU level. The latter stems from the fact that vague and ambiguous provisions were left in EU laws. The definition provided within the EU Facilitation Directive<sup>35</sup> does not meet the international threshold for criminal 'migrant smuggling' and therefore can be misused against human rights defenders or humanitarian actors.<sup>36</sup> The methods used against civil society actors and citizens aiming to uphold the human dignity of migrants and refugees, extend well beyond the criminal law, including disciplining for unrelated charges, intimidation and harassment, also suspicion and surveillance.<sup>37</sup> Recently, several legislative changes make it harder for civil society actors to intervene or even to observe the violations in the border zones, and especially at high seas.<sup>38</sup>

All cases show that SLAPP and other methods to suppress public participation are alive and threaten democracy within the EU (See in detail the case studies in the Annex of this Ad Hoc Request).

On 19 April 2018, the European Parliament passed a resolution on the "Protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová".<sup>39</sup> One of the points of resolution called on the European Commission and the EU Member States to "present legislative or non-legislative proposals for the protection of journalists in the EU who are *regularly subject to lawsuits intended to censor their work or intimidate them, including pan-European anti-SLAPP (Strategic Lawsuit Against Public Participation) rules*" (emphasis added).<sup>40</sup> Similar calls on the European Commission to adopt European legislation to address the issue of SLAPP suits can be found

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<sup>32</sup> Vosyliūtė, L. and C. Conte (2019) "Crackdown on NGOs assisting refugees and other migrants", ReSOMA Final Synthetic Report, June. (<http://www.resoma.eu/node/194>).

<sup>33</sup> Carrera, S., J. Allsopp and L. Vosyliūtė (2018), "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism", International Journal of Migration and Border Studies, vol. 4/3. 9 August.

<sup>34</sup> Vosyliūtė, L. (2019) "How could strategic litigation prevent policing of humanitarianism?", ReSOMA Policy Options Brief, December.

<sup>35</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

<sup>36</sup> Carrera, S., L. Vosyliūtė, J. Allsopp, G. Sánchez, S. Brenda Smialowski (2019) "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update", January. (<https://www.ceps.eu/publications/fit-purpose-facilitation-directive-and-criminalisation-humanitarian-assistance>).

<sup>37</sup> Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliūtė (2019), Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society, Hart Publishing, London (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>).

<sup>38</sup> Vosyliūtė, L. and C. Conte (2019) "Crackdown on NGOs assisting refugees and other migrants", ReSOMA Final Synthetic Report, June. (<http://www.resoma.eu/node/194>).

<sup>39</sup> P8\_TA(2018)0183, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183_EN.html).

<sup>40</sup> Ibid., para. 6.



in the European Parliament Resolutions of 3 May 2018 on “Media pluralism and media freedom in the European Union”,<sup>41</sup> and of 28 March 2019 on the “Situation of rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia”.<sup>42</sup>

The European Commission has variously addressed the question of SLAPP suits and anti-SLAPP legislation in the EU. In response to written questions prior to her confirmatory hearing before the European Parliament, Vice President-designate for Values and Transparency Jourová stated that

“The issue of Strategic Lawsuits Against Public Participation (SLAPP) can be considered as an abuse of defamation laws. In particular, I am aware that such lawsuits can amount to a misuse of the law which makes it possible to threaten journalists with lawsuits that would be too expensive to fight –even in cases where the lawsuits have little or no chance of succeeding –which can create a chilling effect and are therefore a threat to media freedom. I therefore consider that this issue is of direct relevance to my portfolio and the combination of questions at the intersection of private international law, public policy and media freedom deserve deeper analysis”.<sup>43</sup>

In her previous capacity as Commissioner of Justice and Consumers, Commissioner Jourová responded to a question from an MEP on national anti-SLAPP legislation, stating that “[i]n the absence of Union competence to harmonise substantive defamation laws and address SLAPP lawsuits, Member States are free to introduce such legislation at national level”, but that such legislation will have to be in line with relevant EU laws, including issues of jurisdiction of Member States’ courts in cross-border civil and commercial disputes and of the recognition and enforcement of judgments from other Member States.<sup>44</sup>

Albeit they fall outside the scope of this paper, academics who traditionally participate in democratic public discourse are also regularly attacked by SLAPP-like lawsuits in Member States that abandon the path of the rule of law and liberal democracy. Violations of academic freedom in conjunction with silencing academics, and the consequential veiling of scientific truth is a related topic worth to be explored in future research in order to gain a full understanding of distorting public debates and limiting access to information.<sup>45</sup>

## 2. Definitional challenges to be explored in future research

### Key Findings

SLAPP lawsuits carry some common elements identified by the legislation and the case law in those – mainly common law – legal systems where this notion is explicitly applied. Knowing these elements is

<sup>41</sup> P8\_TA(2018)0204, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183_EN.html).

<sup>42</sup> P8\_TA(2019)0238, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0183_EN.html).

<sup>43</sup> <https://www.europarl.europa.eu/resources/library/media/20190927RES62431/20190927RES62431.pdf>.

<sup>44</sup> [https://www.europarl.europa.eu/doceo/document/E-8-2018-002149-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2018-002149-ASW_EN.html).

<sup>45</sup> Some of these cases ended at the ECtHR (Ungváry v. Hungary, no. 64520/10, Kenedi v. Hungary, 31475/05, both applicants were historians.) Famous democrat and political philosopher János Kis was sued by the General Prosecutor Péter Polt for calling him the “servant of Orbán rather than of the public” – the plaintiff appealed against the unfavourable decision, but the defendant won the procedure at both instances. See <https://www.es.hu/cikk/2014-01-03//jogerosen-is-pert-nyert-kis-janos-valamint-az-es-polt-peter-es-a-legfobb-ugyeszseg-ellen-a-per-iratai.html> Writer István Eörsi was sued by Mária Schmidt, a prominent historian of the official governmental policy, for having called her a “history-forging businesswoman” and immoral; the public figure won damages of 1000 EUR. See HVG, (2004) September 2004, <https://hvg.hu/itthon/00000000059BFA9>.



essential for courts to identify if they face a SLAPP lawsuit. Not all SLAPP lawsuits carry all elements, but they all have several of them.

These elements are the speaker, the public interest in the content (public participation), the chilling effect; the intent to intimidate; vertical power relationship between the speaker and the litigant; exaggerated damages claims; meritless claims. See Table 2 in Annex 1 for linking cases to the elements.

The boundaries of when a lawsuit should be regarded as SLAPP are fluid and cannot always be established without debate; American model laws therefore emphasise that courts need to rely always on the purpose of the law for interpretation of the exact wording of the anti-SLAPP laws (see also the discussion on the characteristics of court systems in the Subchapter 4.4.4. on the independence of the judiciary, below).

It is crucial, prior to addressing the issue of SLAPP suits and anti-SLAPP legislation in the EU context, to determine what constitutes SLAPP. This chapter explores the key elements of SLAPPs and how specific SLAPP related vulnerabilities are to be identified.

The term SLAPP, Strategic Lawsuit Against Public Participation was coined by Professors Pring and Canan in the 1980s to describe the phenomenon of legal action in the United States against individuals and organisations exercising their rights to petition the government under the First Amendment (the so-called Petitions Clause).<sup>46</sup> SLAPP has been variously described in the literature as “attempts to use civil tort action to stifle political expression”,<sup>47</sup> “the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena”,<sup>48</sup> “legally meritless suits designed from their inception to intimidate and harass political critics into silence”,<sup>49</sup> and “the initiation of a lawsuit that has the principal effect of silencing representations being made in the public sphere by the person being sued, when the impugned representations have to do with an issue of social significance”.<sup>50</sup>

### **2.1. The “speaker” to be protected**

The media landscape dramatically changed with the appearance of online journalism. Some print media could not even survive; others were forced to restructure their business models. Also distribution methods changed considerably and are diverse: 32 % of readers visit online newspaper sites directly and at least 23 % access them via social media.<sup>51</sup> Apart from online journals, also blogs, social media, comments on articles or under the social media posts, Facebook event pages, Twitter

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<sup>46</sup> See P. Canan and G.W. Pring (1988), “Strategic Lawsuits Against Public Participation”, *Social Problems*, Vol. 35, No. 5, pp. 506-519; P. Canan (1989), “The SLAPP from a Sociological Perspective”, *Pace Environmental Law Review*, Vol. 7, No. 1, pp. 23-32; G.W. Pring (1989), “SLAPPs: Strategic Lawsuits against Public Participation”, *Pace Environmental Law Review*, Vol. 7, No. 1, pp. 3-22.

<sup>47</sup> Canan and Pring (1988), *op. cit.*, p. 506.

<sup>48</sup> Canan (1989), *op. cit.*, p. 23.

<sup>49</sup> E. Constantini and M.P. Nash (1991), “SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response”, *Journal of Law and Politics*, Vol. 7, No. 3, pp. 417-480.

<sup>50</sup> P. Shapiro (2010), “SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International”, *Review of European Community & International Environmental Law*, Vol. 19, No. 1, pp. 14-27.

<sup>51</sup> Bertin Martens, Luis Aguiar, Estrella Gomez-Herrera and Frank Mueller-Langer, The digital transformation of news media and the rise of disinformation and fake news - An economic perspective; Digital Economy Working Paper 2018-02; JRC Technical Reports. <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>



hashtags, 'memes', messaging applications, bulletin boards, etc. shape the public discourse. As journalists' role in shaping public debates diminishes, influencers, bloggers, YouTube channel owners or TikTok video creators gain increasing influence. The hyper-pluralistic public sphere with its myriad of forms many of which do not maintain journalistic standards deepened problems of quality and disinformation, especially in light of the fact that "many users do not distinguish consciously between well-established, high-quality news sites and ephemeral, sensational misinformation or disinformation sources."<sup>52</sup> At the same time, the proliferation of tools and the increasing number of citizens shaping public discourses enriches direct democratic participation. It is less and less the format of the speech that matters, rather the content, which should deserve protection and trigger legislation that fights against oppression of certain views.

In the European setting, the approach of extended understanding of the citizen not only as a recipient of information under Article 10 ECHR, but also as a potential watchdog<sup>53</sup> has been explained by the ECtHR in *Steel and Morris v. UK*, colloquially called the McLibel-case.<sup>54</sup> The Court held that in a democratic society even small and informal campaign groups should be enabled to contribute to public debate on matters of general public interest, such as health and the environment.

### Box 1: The McLibel case

McLibel-case (UK): Five Greenpeace activists distributing leaflets on "What's wrong with McDonald's?" in the streets of London in 1990 were threatened to be sued for defamation by McDonald's.<sup>55</sup> According to the fast-food company, the leaflets were "extremely critical of many aspects of the business (food quality, employment relations, etc.)" and capable to destroy McDonald's reputation. Two activists chose to defend the case, three of them apologized. McDonald's said all statements in the leaflets were false. McDonald's was notorious for its aggressive litigation strategy against all critics who would typically capitulate to the excessive demands of the huge corporation and provide an apology or even corrections. Interestingly, McDonald's successfully relied on previously acquired apologies – gained regardless of the merit of its claims – to support further demands for retractions.<sup>56</sup> This strategy proved wrong with the two activists of London Greenpeace, who decided to stand in a precedent lawsuit, which became the longest trial in English criminal law history. The case lasted for almost ten years and the court found that some of the statements were false, while some of them were identified as true. In 1995 McDonald's offered settlement through donating the received money to a charity chosen by the two defendants but they could not come to an agreement. Despite the fact that McDonald's technically won the case in the UK, the publicity that the controversy attracted was a victory for the activists.<sup>57</sup> After the case had finished in London, it ended up in front of the ECHR, which found that the two activists' rights were violated as their fair

<sup>52</sup> Judit Bayer, Natalija Bitiukova, Petra Bárd, Judit Szakács, Alberto Alemanno, Erik Uszkiewicz, Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States Brussels, Belgium: European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs (2019), p. 59.

<sup>53</sup> Donson, F. (2010), p. 89.

<sup>54</sup> *Steel and Morris v. UK*, Application no. 68416/01, 15 February 2005. McLibel is the title of the movie inspired by this lawsuit, directed by Ken Loach and Franny Armstrong in 2005. <https://www.imdb.com/title/tt0458425/>

<sup>55</sup> Accusing the company of "McCancer, McDisease and McGreed". The allegations related to the negative health consequences of the food, bad working conditions, exploitation of children, deforestations, etc. See more in Donson, 2010.

<sup>56</sup> Donson, 2010, p. 85.

<sup>57</sup> Hilson, C. (2016) op. cit. p. 248-267.



trial under Article 6(2) ECHR was not properly provided by the state which should also have defended their rights to freedom of expression (Article 10 ECHR – see more on this case in Subchapter 3.1.1).

Clustering the speaker is less important from both a free speech and also a SLAPP perspective. What matters is the vertical power-relationship between the parties to the case, where the Applicant is in a position of power. This has practical implications. The ‘cost’ of SLAPP suits and their potential chilling effect is best highlighted by the research done by Canan and Pring. SLAPP suits are filed with a claim, on average, of around USD 9 million in damages.<sup>58</sup> The filing parties – such as real estate developers, property owners, business owners, and state or local government agencies – are often in a stronger ‘position of power’ compared to the defendants in SLAPP suits – which are often individuals or public interest groups. SLAPP suits that actually end up before a court take on average 36 months of litigation across multiple judicial levels.<sup>59</sup>

Taking the above into consideration, typical targets of SLAPPs are journalists, NGOs, HR-defenders, including humanitarian aid workers, academics, and anyone else speaking truth to power.

## ***2.2. The “speech”, or content to be protected***

SLAPP suits, as originally conceived by Canan and Pring, and subsequently employed in describing various phenomena, display a number of specific characteristics making a clear definition difficult. First, the use of SLAPP suits is not restricted to any particular form of expression or petition. While the origins of SLAPP, as analysed by Canan and Pring in the 1980s were grounded within the context of public participation in the form of petitioning a governmental authority, it is not restricted thereto. Without the aim of coming to an exhaustive enumeration of possible forms of actions ‘triggering’ a SLAPP suit, the following examples have been noted in the literature: petitioning governmental action, electoral campaigns, calling for a boycott, journalistic expressions, and forms of expressions ranging from dissatisfaction with governmental services to negative reviews of businesses, including speech on the internet and social media.<sup>60</sup> Furthermore, the ample literature on SLAPP suits demonstrates that SLAPP is not limited to any particular field of public interest. Examples from the literature include civil rights,<sup>61</sup> environmental interests,<sup>62</sup> land use rights,<sup>63</sup> (sub)urban development,<sup>64</sup> neighbourly

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<sup>58</sup> Canan (1989), op. cit., p. 26.

<sup>59</sup> Canan (1989), op. cit., p. 26.

<sup>60</sup> Cf. Canan and Pring (1988), op. cit.; R.D. Richards (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*, Vol. 21, No. 2, pp. 221-256; CLDC (2014), “Strategic Lawsuits against Public Participation”, website of the Civil Liberties Defense Center, 24 April 2014, <https://cldc.org/slapp-suits/>; S.P. Trende (2006), “Defamation, Anti-SLAPP Legislation and the Blogosphere: New Solutions for an Old Problem”, *Duquesne Law Review*, Vol. 44, No. 4, pp. 607-648; S. Hartzler (2007), “Protecting informed public participation: Anti-Slapp Law and the Media Defendant”, *Valparaiso University Law Review*, Vol. 41, No. 3, pp. 1235-1284; T. Murombo and H. Valentine (2011), “SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa”, *South African Journal on Human Rights*, Vol. 27, No. 1, pp. 95-96.

<sup>61</sup> Canan and Pring (1988), op. cit., p. 506.

<sup>62</sup> Canan (1989), op. cit., p. 25; D.H. Merriam and J.A. Benson (1993), “Identifying and Beating a Strategic Lawsuit Against Public Participation”, *Duke Environmental Law & Policy Forum*, Vol. 3, No. 1, p. 17; T. Murombo and H. Valentine (2011), “SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa”, *South African Journal on Human Rights*, Vol. 27, No. 1.

<sup>63</sup> Merriam and Benson (1993), op. cit., p. 17.

<sup>64</sup> Canan and Pring (1988), op. cit., p. 508; Canan (1989), op. cit., p. 25.



disputes,<sup>65</sup> as well as animal welfare.<sup>66</sup> More recently, SLAPP suits have been witnessed against journalists and the media.<sup>67</sup> See also the Annexes on other typical topics of public interest, such as political criticism and corruption.

### **2.3. The impact on democratic participation**

As already discussed in Subchapter 1.1. SLAPP cases prevent citizens from an informed, and thus meaningful participation in public matters and their involvement in governance due to the silencing of individuals and entities that could deliver crucial information and generate a debate on these issues. Both the active right of free speech, and its passive component, i.e. the right to receive information are violated and thus so is the right to take part in the conduct of public affairs.

### **2.4. The lawsuit is meritless**

SLAPP suits are typically entirely meritless, if not frivolous. The tragedy of the legal system is that – unless the prosecutor or the judge have the legal possibility and courage to drop or dismiss such cases early on – they may last for years, irrespectively of the apparently absurd allegations of the plaintiff. This may tire out and exhaust the financial and psychological resources of the speaker, which is the exact purpose of SLAPP suits. On the surface it seems as if the Plaintiff requested financial and/or moral compensation, but in reality the objective is not winning the case – which is impossible in case of meritless claims – but to exhaust the speaker, and censor him or her or push them – and everyone else in similar situations – towards self-censorship for the future.

### **2.5. The intent to intimidate**

Another characteristic of SLAPP suits in the literature is the intended or achieved result. The general consensus in respect of the intended or achieved result of SLAPP suits seems to be the so-called ‘chilling effect’.<sup>68</sup> Hartzler describes the intended use or effect of SLAPP suits as a means “to deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court”.<sup>69</sup> Canan identifies four ‘general motivations’ for filing SLAPPS, which are a) retaliating against successful opposition on an issue of public interest, b) attempting to prevent expected future opposition on subsequent public policy issues, c) intention to intimidate and send a message that opposition will be punished, and d) use of litigation and the court

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<sup>65</sup> Canan and Pring (1988), op. cit., p. 510.

<sup>66</sup> CLDC (2014), op. cit.

<sup>67</sup> J. Ni Mhainin (2020), “SLAPP lawsuits aiming to silence journalists on the rise”, *The Press Gazette*, 4 March 2020, <https://www.pressgazette.co.uk/help-record-rise-of-slapp-lawsuits-aiming-to-silence-journalists-comment/>; R. Chandra (2017), “We Need an Anti-SLAPP Law To Encourage and Protect Free Press”, *The Wire India*, 12 October 2017, <https://thewire.in/law/we-need-an-anti-slapp-law-to-encourage-and-protect-free-press>.

<sup>68</sup> Cf. Murombo and Valentine (2011), op. cit., p. 84; B. Ashenmiller and C.S. Norman (2011), “Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement”, *The B.E. Journal of Economic Analysis & Policy*, Vol. 11, No. 1 (Topics), Article 67, p. 2; Constantini and Nash (1991), op. cit., pp. 420-423; Merriam and Benson (1993), op. cit., pp. 21-23; S. Verza (2018), “SLAPP’s 5 W’s: A background of the Strategic Lawsuits Against Public Participation”, published in the Resource Centre on Media Freedom in Europe, 28 June 2018;

<sup>69</sup> Hartzler (2007), op. cit., p. 1240.



system as a strategic tool to win a political and/or economic battle.<sup>70</sup> Other (potential) effects include depletion and diversion of resources of opposing sides to a public interest issue, cost of legal defence, psychological trauma and a ‘ripple effect’ on public participation of other citizens.<sup>71</sup>

The question then becomes how to define Strategic Lawsuits Against Public Participation. Pring presented a set of four criteria to determine what constitute a SLAPP suit,<sup>72</sup> namely 1) a civil complaint or counterclaim (for monetary damages and/or injunction), 2) filed against non-governmental individual and/or groups, 3) because of their communications to a government body, official, or the electorate, 4) on an issue of some public interest or concern. A fifth ‘additional’ criterion to the definition of SLAPP proposed by some concerns the merit of the legal action undertaken. This ‘fifth criterion’ is often meant to identify the subjective reasoning behind the legal action concerned. For example, Merriam and Benson consider it essential in defining SLAPP suits that “the suits are without merit and contain an ulterior political or economic motive”.<sup>73</sup> Similar references to the merits of or subjective reasoning behind legal action have been expressed by academic,<sup>74</sup> CSOs,<sup>75</sup> and even judicial authorities.<sup>76</sup>

This question of the choice of criteria in defining SLAPP, more specifically whether the ‘fifth’ criterion of intent is included in the definition, is crucial. Lott notes, for example that “[t]he issue of how to define SLAPPs is an important one, because it determines what expressive activities by citizens should be afforded protection from litigation by the courts or by legislation”.<sup>77</sup> Macdonald, Noreau and Jutras argue that the criterion of intent is crucial in order to detach the phenomenon of SLAPP suits from the American context and thereby make it applicable in other jurisdictions.<sup>78</sup> Shapiro, on the other hand, argues that introducing a criterion of intent results in any anti-SLAPP legal or policy strategies being ineffective on all but the most blatantly malicious or manifestly ill-founded lawsuits.<sup>79</sup>

### 3. Legal and non-legal tools used in a SLAPP-related context.

#### 3.1. Legal instruments which may be used to “silence” journalists and NGOs

Key findings
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<sup>70</sup> Canan (1989), op. cit., p. 30.

<sup>71</sup> Canan and Pring (1988), op. cit., p. 515.

<sup>72</sup> Pring (1989), op. cit., p. 8.

<sup>73</sup> D.H. Merriam and J.A. Benson (1993), “Identifying and Beating a Strategic Lawsuit Against Public Participation”, *Duke Environmental Law & Policy Forum*, Vol. 3, No. 1, p. 18.

<sup>74</sup> T. Murombo and H. Valentine (2011), “SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa”, *South African Journal on Human Rights*, Vol. 27, No. 1, p. 84.

<sup>75</sup> RCFP, “Understanding Anti-SLAPP laws”, website of the *Reporters Committee for Freedom of the Press*, <https://www.rcfp.org/resources/anti-slapp-laws/>; WCEL (2002), *Strategic Lawsuits Against Public Participation Handbook*, Vancouver, West Coast Environmental Law, November 2002, <https://www.wcel.org/publication/strategic-lawsuits-against-public-participation-handbook>.

<sup>76</sup> See S. Lott (2004), “Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPS) in Canada”, Ottawa, the Public Interest Advocacy Centre, September 2004, p. 9, referring to the judgment of the Supreme Court of New York in *Gordon v Marrone*, 616 N.Y.S.2d 98.

<sup>77</sup> *Ibid.*, p. 12-13.

<sup>78</sup> R.A. Macdonald, P. Noreau and D. Jutras (2007), “Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)”, Report for the Minister of Justice of Canada, Montréal, 15 March 2007, pp. 6-7.

<sup>79</sup> Shapiro (2010), op. cit., pp. 24-26.





The variety of legal instruments applied to silence public participation is wide and not always related to freedom of expression: they can be disguised in many other forms. They most typically include defamation, criminal defamation, labour sanctions (dismissal), criminal charges of tax fraud, tax-audit procedure. (All these legal instruments are demonstrated by case studies in the Annex). Other legal tools, like business torts, conspiracy, judicial process abuse, constitutional rights, and nuisance exist mainly in common-law jurisdictions. Procedural rules may also be abused to prolong the procedure and exhaust the speaker.

Various other laws restricting media pluralism and limiting free space for civil society have been observed especially during the migrant crisis (see case studies 5 and 6) and the recent Covid-19 health crisis.

Beyond the types of legal instruments, also the types of speakers and the type of public participation can be manifold. In order to fight the SLAPP phenomenon effectively an awareness of their context is necessary.

**Table 1: Types of legal SLAPP tools. Source: Authors.**

Substantial	Procedural
<b>Criminal defamation</b>	Amending the claim during procedure
<b>Civil claim for protection of reputation, tort</b>	Abuse of procedural rules to prolong the procedure
<b>Criminal charges of tax fraud</b>	Meritless claims and appeals
<b>Arbitrary tax-audit procedure or other authority control.</b>	

### 3.1.1 Instruments limiting free speech: civil and criminal, substantive and procedural laws

SLAPP according to the literature is not restricted to the type of legal action pursued. Civil law and criminal law can equally be abused to silence critics. Both types of procedures have the same ‘chilling effects’; both of them have a detrimental impact on democracy, both of them are typically meritless, and the strategy of the Plaintiff is not to win the case, but to intimidate or to stop ongoing journalistic investigations, NGO operations, civic mobilisations. Another reason not to limit the discussion of SLAPPs to either branch of law is that the borderline between the two is blurred.

Civil and criminal defamation and libel cases are the typical avenues exploited by SLAPPers. As noted by Canan and Pring, the SLAPP suit filers “recast the offending political behavior as common torts”.<sup>80</sup> The literature, primarily focused on the United States and other common law jurisdictions, highlights a number of commonly observed legal actions in SLAPP suits, namely defamation (including libel and slander), business torts, conspiracy, judicial process abuse, constitutional rights, and nuisance.<sup>81</sup>

Various other laws restricting free space for media pluralism and civil society, including actions of EU citizens all add to the gravity of the problem. The new Covid-19-related measures deepen this

<sup>80</sup> Canan and Pring (1988), op. cit., p. 511.

<sup>81</sup> Ibid.; Merriam and Benson (1993), op. cit., p. 19.



problem in several jurisdictions. Beyond substantive legal provisions, procedural rules may also be abused to prolong the procedure and thereby exhaust the speaker.

### **Defamation and libel: the difference between statements of facts and value statements**

The specific issue of proving facts before courts shall be addressed when considering SLAPP cases. The academic literature and judicial practice in most European courts is on the same platform in treating statements of facts differently from value judgments, or in other words, from opinions. Whereas the allegation of untrue facts forms the basis of defamation claims, opinions enjoy a higher threshold of protection. The factor for distinction is that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible to proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ECHR (see, for example, *Lingens v. Austria*, no. 9815/82, § 46; *Oberschlick v. Austria (no. 1)*, 11662/85, § 63, *Ungváry v. Hungary*, 64520/10).

Distinction of the two is not always an easy exercise: sometimes statements which are formulated as value judgments, carry a strong implication of facts - in these cases, the veracity of the underlying fact is a decisive factor in deciding about the defamatory nature of the value judgment. Thus, a value judgment based on distorted or untrue facts, may be found excessive (*Jerusalem v. Austria*, no. 26958/95, § 43). Therefore, it is relevant to offer evidence to show a prima facie case that the value judgment expressed by the applicant was fair comment. The difference lies in the degree of factual proof which has to be established (see *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 40).

When it comes to value judgments or opinions, it is important to note that freedom of expression applies also to "ideas that offend, shock or disturb... Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (*Handyside v. UK*, no. 5493/72).

The use of civil defamation and libel as a strategic litigation tool against public participation can be seen, for example, in Case Study 4 on Malta, i.e. the various libel suits filed against journalistic reports by Daphne Caruana Galizia.

### **Criminal defamation**

Criminal defamation is still maintained in 23 Member States of the European Union, in spite of the repeated calls for its abolition by the UN, the Council of Europe,<sup>82</sup> OSCE, prestigious NGOs such as Index on Censorship, the International Press Institute, the Committee to Protect Journalists, and expert bodies for several decades.<sup>83</sup> In particular, journalists should not be imprisoned or threatened with a prison sentence for defamation.<sup>84</sup>

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<sup>82</sup> CoE (2018) "Defamation - Brief overview", <https://rm.coe.int/leaflet-defamation-en/168079cecahttps://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>

<sup>83</sup> Transparency International (2016) "Panama: Release Dutch Journalist and Abolish Criminal Defamation Charges", 25 November 2016, website of the Transparency International, [https://www.transparency.org/news/pressrelease/panama\\_release\\_dutch\\_journalist\\_and\\_drop\\_criminal\\_defamation\\_charges](https://www.transparency.org/news/pressrelease/panama_release_dutch_journalist_and_drop_criminal_defamation_charges); Article XIX (2004), Briefing Note on International and Comparative Defamation Standards <https://www.article19.org/data/files/pdfs/analysis/defamation-standards.pdf>; UN (1999) "Promotion and protection of the right to freedom of opinion and expression", UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.; loC - by Dohel, I. (2009),



Member States often defend their criminal defamation provisions by saying that they are actually not used;<sup>85</sup> however, even if journalists are not found guilty, the charges and threatening with a criminal procedure alone have substantial chilling effects for press freedom. Moreover, 16 Member States of the EU have been found to regularly apply their criminal defamation provisions, among which Germany, which boasts a count of 22.000 convictions for insult, defamation or slander in one year alone.<sup>86</sup>

Future research exploring criminal SLAPP cases will need to acknowledge the crucial procedural difference between civil law and criminal lawsuits. Whereas criminal law should be the last resort when responding to any norm violations because of the graver intrusions into liberties, procedurally it is the civil procedure that puts the applicants in an easier situation due to the lower standards of proof, and defendants have more safeguards in criminal law. The plaintiff of a civil suit only has to prove that the defamatory statement was uttered by the defendant, and the truthfulness is to be proven by the speaker, whereas in a criminal process the state (the prosecutor or private prosecutor) has to prove all the allegations beyond reasonable doubt. In addition, in some civil law jurisdictions the court will have the duty to assist the defendant under jurisdictions the court will have the duty to assist the defendant under its general obligation to strive at disclosing the truth.<sup>87</sup>

The Italian Constitutional Court ruled on 9. June 2020 that prison sentence for criminal defamation should be abolished, and called upon the Parliament to amend the law accordingly until 22 June 2021, or the Court itself will abolish the rule.<sup>88</sup>

Case studies 1 (Croatia) and 4 (Malta) in the Annex to this study identify examples of the use of criminal defamation provisions.

## Covid-19

The global Covid-19 pandemic has placed a new burden and responsibility on the press. In many states, rather than supporting the media in their struggle amidst their financial and reporting difficulties, new restrictions were introduced, and attacks were registered worldwide.<sup>89</sup> This is particularly true for, but not limited to, authoritarian regimes across the world. Autocracies have

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"Freedom from Fear", *Index on Censorship*, Vol. 38, no. 2, <https://www.osce.org/fom/37714?download=true>; the Committee to Protect Journalists, CPJ, "Critics are not criminals", Comparative study of criminal defamation laws of the Americas, [https://cpj.org/reports/critics\\_are\\_not\\_criminals-english.pdf](https://cpj.org/reports/critics_are_not_criminals-english.pdf); IPI (2001) "Letter: EU defamation laws", 13 June 2001, <https://ipi.media/letter-eu-defamation-laws>.

<sup>84</sup> ECPMF (2019), SLAPPs: Strategic Lawsuits Against Public Participation", Resource Centre on Media Freedom in Europe, Special dossier, 19 December 2019, <https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation>.

<sup>85</sup> IoC - by Dohel, I. (2009), "Freedom from Fear", *Index on Censorship*, Vol. 38, no. 2, <https://www.osce.org/fom/37714?download=true>.

<sup>86</sup> ECPMF (2015), "Criminal Defamation Laws in Europe", Resource Centre on Media Freedom in Europe, <https://www.rcmediafreedom.eu/Publications/Reports/Criminal-Defamation-Laws-in-Europe>.

<sup>87</sup> See for example in Germany: "der Täter trägt das Beweisrisiko. Die Beweislastführungslast obliegt dagegen dem Gericht, das von Amts wegen die Wahrheit erforschen muß." Karl Lackner, StGB. Strafgesetzbuch mit Erläuterungen, München: C.H. Beck, 1991, p. 871

<sup>88</sup> Article 19 (2020) Italy: Constitutional Court refers decision on abolishing prison sentences for criminal defamation to Parliament. Website of Article 19, 10 June 2020. <https://www.article19.org/resources/italy-constitutional-court-refers-decision-on-abolishing-prison-sentences-for-criminal-defamation-to-parliament/>

<sup>89</sup> IPI (2020) "WPF 2020: COVID-19 accelerating a global decline in media freedom", May 1, 2020, <https://ipi.media/wpfd-2020-covid-19-accelerating-a-global-decline-in-media-freedom>



become very creative in seizing the opportunity to introduce different restrictive measures, from taking away the power from parliaments to control emergency measures, to limiting freedom of the press. For example, in Europe alone, 15 incidents of arrest, detention or charging of journalists reporting on the pandemic were registered by IPI.<sup>90</sup>

Amnesty International reported that journalists have been prosecuted or assaulted for reporting about Covid-19 related news in several countries including Azerbaijan, Bangladesh, Cambodia, several Gulf states, Hungary, India, Kazakhstan, Kenya, Palestine, Russia, Rwanda, Serbia, Somalia, Sri Lanka, Thailand, Tanzania, Tunisia, Uganda, and Uzbekistan.<sup>91</sup>

Turning to the EU Member State listed above, the Hungarian Act XII of 2020 of March 30 2020, enabling the government to rule by decree in order to fight Covid-19, introduced an amendment to the Criminal Code,<sup>92</sup> which punishes with 1 to 5 years imprisonment anyone who, during the period of a special legal order in front of a large audience, claims or spreads any untrue facts or true facts in such a distorted manner that it can hinder or prevent the success of the protection against the danger.

This provision has been criticised on the one hand for being open to abuse, and on the other for introducing a permanent change to the Criminal Code, albeit the government insisted that the measures in the 2020 law are temporary and last until the Covid-19 epidemic poses dangers.<sup>93</sup> Whereas journalists and analysts do not expect mass incarcerations as a result of the criminal law amendments, the sheer existence of the law, and the arrests have a chilling effect.<sup>94</sup>

The provision has already been invoked by the police. An opposition politician was arrested for a post he made on a Facebook site titled “Uncensored chatroom of Gyula”. On April 20 anti-government demonstrations were held in the capital and in the town of Gyula, and the politician urged citizens to participate, adding that “1,170 beds were emptied in Gyula” to deal with the pandemic. This was a reference to a controversial government move, where 60 per cent of all hospital beds were freed up for potential Covid-19 patients, which resulted in sending home severely ill patients, too. Even though it was factually true that in the Gyula hospital, about 1,200 beds had been freed up to receive Covid-19 patients, this sentence allegedly “obstructed efforts to combat the pandemic”. The politician spent four hours in detention at the police station, and once he was released, police refused to drive him home despite the fact that he is disabled.<sup>95</sup>

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<sup>90</sup> IPI (2020) " COVID-19: Number of Media Freedom Violations by Region", May 2020, <https://ipi.media/covid19-media-freedom-monitoring/>

<sup>91</sup> Amnesty International (2020) “Crackdown on journalists weakens efforts to tackle Covid-19”, 1 May, [https://www.amnesty.org/en/latest/news/2020/05/global-crackdown-on-journalists-weakens-efforts-to-tackle-covid19/?fbclid=IwAR0GO9WSuyXFBp-VXhqmQJXuf8HlI81PEAESEkUBIM\\_sIFbAftNGIE3yWQ](https://www.amnesty.org/en/latest/news/2020/05/global-crackdown-on-journalists-weakens-efforts-to-tackle-covid19/?fbclid=IwAR0GO9WSuyXFBp-VXhqmQJXuf8HlI81PEAESEkUBIM_sIFbAftNGIE3yWQ)

<sup>92</sup> See Article 337(2) of Act C of 2012 on the Criminal Code.

<sup>93</sup> Petra Bárd, Sergio Carrera, Showing true illiberal colours – Rule of law vs Orbán's pandemic politics, CEPS POLICY INSIGHTS 2020-10/April, 1-17 (2020), pp. 5-6.; IPI (2020) " Hungary: Press freedom threatened as Orbán handed new powers", 30 March 2020; <https://ipi.media/hungary-press-freedom-threatened-as-orban-handed-new-powers/>

<sup>94</sup> Cf. “Several doctors have declined to speak to the Guardian in recent weeks, citing strict orders from hospital management. One Hungarian journalist said he had been unable to follow up a tip-off about coronavirus cases in a Hungarian school because everybody was scared to speak, even anonymously. ‘People were scared of talking to journalists, because they were afraid of losing their jobs. Not just doctors and nurses, but school headteachers and parents as well,’” The Guardian (2020), Hungarian journalists fear coronavirus law may be used to jail them, 3 April, <https://www.theguardian.com/world/2020/apr/03/hungarian-journalists-fear-coronavirus-law-may-be-used-to-jail-them>

<sup>95</sup> Keller-Alant, Á. (2020) Hungarian Police Accused of Abusing Powers to Arrest Critics, Balkan Insight, 13 May, <https://balkaninsight.com/2020/05/13/hungarian-police-accused-of-abusing-powers-to-arrest-critics/>



Another Facebook user was also detained by police at his home and taken into custody on suspicion of fearmongering due to a post where he contemplated about the reasons for Hungary's leadership lifting the curfew restrictions at the time of the peak of the Covid-19 pandemic in the country, which could lead to mass infections.<sup>96</sup>

Albeit both persons were released, their cases were discontinued, and it was admitted that the police made mistakes while arresting the government critics, the stories widely covered by the news are likely to have a chilling effect for the future. The respective provision was attacked in front of the Hungarian Constitutional Court and will be decided in an urgent procedure.<sup>97</sup>

### 3.1.2 Other, non-freedom of expression related legal tools

The following paragraphs illustrate the diversity of the tools, the speakers and the participations, and demonstrate that strategic lawsuits may target any type of public participation beyond exercising freedom of expression. Typical cases may be related to environmental activism or community advocacy, for example when a large company sues an environmental activist who has exposed a pollution scandal, in the hope that the lawsuit will scare away other activists as well. A real estate developer could use the threat of a civil lawsuit – claiming exaggerated damages for its reputation – to silence community opposition to a new building project (Roest and Maguire, below). Companies may silence revelations of corruption through **dismissing** their whistle-blowing employee (Monssen, below). Through **digital** democratic participation, the range of targets is getting wider, extending to whistle-blowers, community leaders and everyday citizens.<sup>98</sup>

Defamation is only part of the problem; if solely the defamation laws or provisions were changed in favour of freedom of expression, SLAPPs might be shifted to other causes. For example, vexatious measures or actions may target freedom of association rights or weaponize **arbitrary tax audit** (see the case study on the Hungarian Ökotárs Foundation in the Annex) and can take on even more versatile forms of vexation.<sup>99</sup>

It is recommended to apply a broader approach and focus on the inherent nature of SLAPPs, rather than on the specific areas of laws where SLAPPs emerge.<sup>100</sup> The elements of SLAPP lawsuits (listed in Chapter 2 of this Ad Hoc Request) apply also the above mentioned situations, with the exception of the speaker's quality: they may be ordinary citizens, "everyday heroes". Two cases of this kind are highlighted below.

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<sup>96</sup> 444 Insight Hungary (2020), He criticized the government on Facebook, and was taken from his home by police at dawn, 12 May, <https://insighthungary.444.hu/2020/05/12/he-criticized-the-government-on-facebook-and-was-taken-from-his-home-by-police-at-dawn>

<sup>97</sup> Case number: IV/00699/2020, application filed on 15 April 2020, <http://public.mkab.hu/dev/dontesek.nsf/0/BD83430C4D2A942AC125855E005C4028?OpenDocument&fbclid=IwAR2W7JdC9FxnLOpMGROtxCeUepVa9Ik1gNqrEixkSegKVXyrcO85nMAAc9A>

<sup>98</sup> ECPMF (2019) "SLAPPs: Strategic Lawsuits Against Public Participation", 19 December 2019, <https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation>.

<sup>99</sup> Policy Solutions (2017) "Political Discrimination in Hungary", Case Studies from The Hungarian Justice System, Local Government, Media, Agriculture, Education and Civil Sector, [https://www.policysolutions.hu/userfiles/elemzes/265/political\\_discrimination\\_in\\_hungary.pdf](https://www.policysolutions.hu/userfiles/elemzes/265/political_discrimination_in_hungary.pdf)

<sup>100</sup> Sheldrick, Byron (2014) Blocking Public Participation. Wilfrid Laurier Univ. Press. p. 99. For example, the author held that legislative reform of defamation law in Australia has been counterproductive as it became more difficult to introduce general anti-SLAPP laws, whereas that law is insufficient alone to address the problem.



## The burden of being a whistle-blower

“At the end I felt myself a traitor. I am not sure if I would do it again. And of course, Siemens has not lost its very good position in the Norwegian market” – said Per Yengve Monssen<sup>101</sup> in front of an audience consisting of investigative journalists from all over the world who gathered at an international conference in September, 2008 in Lillehammer. One of the main topics of the conference was how to defend the whistle-blowers and Monssen was one of the “star guest” of the event. He had served as the chief controller of Siemens Business Services in Norway between 1999 and 2005, but he got suspended in October 2004. The official reasoning was that he got suspended “on the grounds of cut-downs of production”.<sup>102</sup>

But the real reason of his dismissal was that he identified 6 million USD overbilling that didn't correspond to any of the services provided as part of a large contract between his firm and the Norwegian Department of Defence.<sup>103</sup> He reported the overbilling as an irregularity for his superior, the Norwegian CFO, and later anonymously to the German headquarters. But instead of correcting of the error, his intimidation started. He was taken to the Siemens headquarter in Germany where he was interrogated and pressurized, and later dismissed as the only employee in an organisational downsizing process.<sup>104</sup> He initiated a labour lawsuit and won, but the emotional and social toll of his whistleblowing remained with him. The transaction that Monssen had reported was investigated and Siemens was finally fined due to its corrupt practice.<sup>105</sup>

The EU provides a good practice in its Directive on the protection of persons who report breaches of Union law.<sup>106</sup> It obliges Member States to take the necessary measures to ensure that reporting persons who acquired information on breaches in a work-related context, are protected against retaliation. In legal proceedings including those initiated for defamation, they should not incur liability of any kind as a result of their reports or public disclosures.<sup>107</sup>

## Community participation

In 2009 when a retired Canadian couple, Ed Roest and Sheila Maguire decided to move from the city to the countryside, to a beautiful place called Botanie Valley, they were hoping to spend their retired years peacefully in the nature and did not expect to face almost nine years of litigation. Shortly after their move, a commercial composting factory was opened close to their new home. The factory was

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<sup>101</sup> Reported by Hungarian journalist Vajda, E (2008) "Magyar szürke", *index*, 18 September 2008, <https://index.hu/velemenyejegyzet/vev080917/>. The fact that Monssen regretted his initiative of blowing the whistle because of the devastating aftereffect has been published elsewhere too, see Einarsen, S, Helge Hoel, Dieter Zapf, Cary Cooper (eds), (2011) *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice*, Taylor and Francis, p. 302.

<sup>102</sup> Mosen v. Siemens, District Court Judgement, No: 29 September 2005, 04-099016TVI-OTIR/07 [https://www-tc.pbs.org/frontlineworld/pdf/permonsens\\_verdict.pdf](https://www-tc.pbs.org/frontlineworld/pdf/permonsens_verdict.pdf)

<sup>103</sup> PBS (2009), "Portrait of a Whistleblower", 11 February 2009, <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/portrait-of-a-whistleblower.html>

<sup>104</sup> Einarsen, S, Helge Hoel, Dieter Zapf, Cary Cooper (eds), (2011) *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice*, Taylor and Francis, p. 302.

<sup>105</sup> Further details of the case: PBS (2009), "Portrait of a Whistleblower", 11 February 2009, <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/portrait-of-a-whistleblower.html>

<sup>106</sup> Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law

<sup>107</sup> *Id.* in Recital (97) and Article 21(7).



owned by a big composting firm, Northwest Organics (NO) which is present in all over North America. The couple was worried about the environmental and health impacts of the site, so they expressed their concerns loudly in different forums and forms. In response, NO demanded “at least 400,000 USD” for damage to its **reputation** and interference with its business.<sup>108</sup> Sheila tried to claim that the lawsuit was a SLAPP suit, and applied for an order dismissing it as SLAPP relying on the Charter of the court rules, but her claim was dismissed. The couple needed to wait by May 2018 when the Supreme Court finally dismissed every allegation against them.<sup>109</sup>

### Trespass as protest action - the boundaries of SLAPP

When action to demonstrate public participation deliberately extends beyond the limits of legitimate criticism, the consequent lawsuit may not be regarded as SLAPP. There is a fine line between whistleblowing, protest action, and sheer violation of the law (in this case: property rights).

In the case between Monsanto and GenetiXSnowball, the activists deliberately chose an illegal action to call attention to their case. The court rejected their public interest argument.

Monsanto, the American agricultural and biotechnological giant corporation well-known for its pioneering role in genetic modification, sued an activist of the civil group GenetiXSnowball which defines itself as a “campaign of non-violent civil responsibility aiming to build active resistance to this new gene technology”.<sup>110</sup> In 1999 the group, strictly convinced that genetically modified food carries risk to public health and safety, unrooted some of the crops on a Monsanto trial site in the UK as part of GenetiXSnowball’ ‘raise awareness’ campaign.<sup>111</sup> Monsanto applied for a summary judgment for a permanent injunction against **trespass** and won a permanent ban which was supposed to prevent the environmentalist group to destroy the crops further. The activist Tilly argued that he wanted to protect the neighbouring farmers and beekeepers from cross-pollination, and also the general public from the GMO foods. However, public interest was not a legal defence other than in cases of necessity, when imminent danger forced a person to opt for trespass as the only reasonable option.<sup>112</sup>

Interestingly, the court argued that “[i]n exceptional circumstances, a person could enter land without licence to prevent serious and immediate danger. In the circumstances here, this point may have been arguable if the entire crop had been uprooted. However, the defendant had only uprooted part of the crop and it was considered that this was done for publicity purposes, rather than for the protection of the public. Furthermore, even if the situation was considered an emergency, trespass was not justifiable where a public authority was responsible for the public interest.”<sup>113</sup>

According to the appeal court, the symbolic nature of the defendants’ actions – in other words not pulling up all of the allegedly dangerous crop – meant that they could not assert a protective intent.

<sup>108</sup> Supreme Court of British Columbia, *Northwest Organics, Limited Partnership v. Roest*, 2018 BCSC 866, 28 May 2018, paragraph 303. For a short description of the case see <https://www.wcel.org/blog/bcs-new-anti-slapp-bill-victory-justice>.

<sup>109</sup> For further details of the case see <https://www.wcel.org/blog/bcs-new-anti-slapp-bill-victory-justice> and <https://www.bccourts.ca/jdb-txt/sc/18/08/2018BCSC0866.htm>

<sup>110</sup> Website of GenetiXSnowball, <http://www.gene.ch/pmhp/gs/>

<sup>111</sup> FWI (1999) "Monsanto wins ban on GenetiX Snowball", *Farmers Weekly*, 25 November 1999, <https://www.fwi.co.uk/news/monsanto-wins-ban-on-genetix-snowball>

<sup>112</sup> Mead, D. (2010) *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*, Bloomsbury Publishing, 2010. p. 391.

<sup>113</sup> *Ibid*, p. 392.



To conclude, unlike in defamation, where truth and fair comment are available defences, the UK Court of Appeal explicitly rejected the very existence of a public interest defence in trespass, unwilling to allow private law court proceedings to be used for political campaigning ends.<sup>114</sup>

This case illustrates that while direct action is a demonstration which gives publicity to an opinion, but if it includes an illegal action, its protected speech component may be overtaken by the considerations of public order.

### **3.2. Other, non-legal forms of journalists' and NGO's harassment.**

Harassment and violence against journalists, as well as censorship, are often concomitant phenomena of SLAPP, as demonstrated in our country studies (see Annex), and they are applied as competing instruments to silence investigative journalism or other forms of public participation. Journalists are under threat globally because of the work they do. Space around civil society organisations is also shrinking. Different actors are using physical and social media strategies against journalists, media workers and NGOs – typically those engaging in human rights activism and litigation –, to intimidate and discredit them, the news media or the organisation they work for, and create significant professional harm. This poisonous climate results in important stories not being told due to self-censorship; the powerful are not held accountable; media plurality is at risk; and ultimately people do not have access to information, and cannot make informed choices and meaningfully participate in public affairs.

The hostile environment that investigative journalists face includes the indifference of the audience and the public in general towards the sensitive issues that journalists cover; editors being unsupportive or even self-censoring because of the fear of potential political pressure (e.g. receiving unfriendly calls from politicians, losing them as sources or supporters)<sup>115</sup> and economic pressure (e.g. fear of losing advertisers).

Digital attacks are also on the rise and affect even more journalists.<sup>116</sup> The vast majority of the work-related threats and harassment journalists face takes place online. According to a war correspondent, the online threat is worse than the offline: *"When I go to the frontline, I choose to go and put myself in a hostile environment. To feel this psychological stress in my house only because I give my opinion on Twitter or Facebook, it's unbearable."*<sup>117</sup> Women journalists carry a double burden: being attacked as journalists and receiving misogynistic threats as women.

There are several types of attacks that journalists face:

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<sup>114</sup> Hilson, C. (2016) Environmental SLAPPs in the UK: threat or opportunity? *Environmental Politics*, 25 (2). pp. 248-267, <http://centaur.reading.ac.uk/44535/>

<sup>115</sup> The political grip is not necessarily legal. State authorities usually have a tendency to censor content deemed false, deceptive or harmful, in the context of national security and public order. In many of these cases, authorities have claimed the right to determine what information is fit to print or broadcast by invoking the "fight against fake news". They also blur the fundamental distinction between facts, which are susceptible to being proven true or false, and opinions.

<sup>116</sup> Most surveys show that more journalists are concerned about their online safety than their physical safety. A good example or solution from Canada: The online environment is seen as an extension of the physical work environment and organizations can be held responsible. Attacks that overwhelm a device, site, server or platform and prevent access to it. (Attacks and harassment: The impact of female journalists and their reporting (International Women's Media Foundation), 2018/9, 13.p.)

<sup>117</sup> <https://cpj.org/2016/04/attacks-on-the-press-combating-digital-harassment.php>





(1) Physical attacks or harassment may include murder; assault, including beating; sexual harassment, including rape; destruction of professional equipment, e.g. camera; damage to property, e.g. arson, killing the pet, crashing the car, etc.; arbitrary detention; denying access to physical events; or placing threatening notes or symbols to journalists in a personal location like car, desk, home, etc.

(2) Verbal – oral and written – attacks may also take several forms: text messages, voice mail message, email or social media – from death threats to threatening friends or family members with “massive consequences”; unsolicited invitations that are sexual in nature in any form, including email or comment; blackmailing; online smear campaign.

(3) Cybercrime-related threats include planting a virus in journalists’ computer that harms data; attacking/hacking the journalists’ website or the organization’s website/blog where the journalists work; denial of digital access, or DOS attacks.<sup>118</sup>

(4) Violations of privacy extend to digital surveillance of the journalists’ online or offline activity (e.g. intercepted emails, wiretapping); impersonation in any forms, including the journalists social media account, imposter accounts and fake tweets sow misinformation; stealing data, including data stored on cloud; posting sexually explicit photographs of the journalists online or any other type of inappropriate images through social media platforms; expose the journalists’ identity online: sharing identifiable or private information online like a home address.

Social media use has become much more integral to journalistic practices lately. Journalists are using social media and other digital tools for social sourcing, creating, and distributing content, engaging with users, broadcasting live and other journalistic uses. With the increased use of social media for distribution and community engagement, individual journalists are put at risk on a daily basis. Using social channels that blend personal and professional identities, means exposing themselves to threats 24 hours a day, seven days a week, from domestic and international sources. *“Being exposed to hate speech is a daily part of my job because of the nature of the reader comment protocols on our company website, which enable haters to comment anonymously, either about me or to make racist comments about others. There are so many of these comments that I can’t flag them all.”*<sup>119</sup>

All surveys show that sexual assault and harassment is part of the job both online and offline, gender-based attacks continue to be a persistent part of the daily routine for women journalists. Online attacks frequently reference body-, personal features or family and personal relationships. Online threats and harassment occurred most in online comment sections but also through personal accounts.<sup>120</sup> Direct harassment, invasion of privacy or denial of access occurs the most often.

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<sup>118</sup> When someone uses the features of the technology or platform to harm the victim, usually by preventing access to essential digital tools or platforms. Examples: sending a very large number of unwanted messages, rendering the account unusable; misuse of reporting tools so that the person is blocked from using a platform; and technical attacks that overwhelm a device, site, server or platform and prevent access to it.

<sup>119</sup> Attacks and harassment: The impact of female journalists and their reporting (International Women’s Media Foundation), 2018/9, 11.p.

<sup>120</sup> Ibid., 12.p.



## 4. Models and techniques of anti-SLAPP regulation to be explored in a future research

### Key Findings:

1. The tools applied in anti-SLAPP cases (see the table below) require legislative intervention.
2. Early dismissal of the SLAPP case is the key element in protecting the defendant from the negative effects.
3. Currently, the EU legal environment protects public participation by way of its freedom of expression standards, where public interest has a higher value in comparison with individual reputation, if other circumstances also support the case (see for example *Thorgeirson v. Iceland*, *Sunday Times v. UK*, *Steel and Morris v. UK*). However, this protection is available to defendants only after all domestic remedies are exhausted which is too late to prevent harmful effects. Further research is needed to map how the national courts follow the ECtHR standards.
4. All legislative tools may become useless if an authoritarian government applies those to its own advantage, for example, weaponizing the anti-SLAPP clause to protect its GONGOs against legitimate defamation lawsuits.
5. In all cases, an independent judiciary is the prerequisite for and the last resort of protecting the public interest.

Table 2: Types of anti-SLAPP tools. Source: authors.

Anti-SLAPP tools	Before the merit phase	During and after the merit phase <sup>121</sup>
	Switching the burden of proof	Cost switching
	Opportunity/legality: prosecutor may decide whether to bring the charge	Legal aid for the defendant
	Invoking abuse of rights arguments, provisions and dismiss the case	Awareness raising on SLAPPers

### 4.1. The roles and responsibilities of the different branches of powers

Along with analyses on what SLAPP suits are and their effects, the literature has also highlighted a number of potential solutions against SLAPP suits. Pring considered that solutions against the SLAPP phenomenon could be found in all three branches of government (legislative, executive and judiciary). Possible legislative solutions, according to Pring, include granting ‘privilege’ or ‘immunity’ to persons addressing governmental authorities on public interest issues, raising the burden of proof of potential SLAPP suit filers, and mitigation of financial burden of SLAPPs.<sup>122</sup> The solution identified by Pring from the executive branch of government consists primarily in ‘speaking out’ against SLAPP.<sup>123</sup> Solutions on the part of the judiciary entail increasing the efficiency of courts in identifying and disposing of SLAPP suits.<sup>124</sup>

<sup>121</sup> SLAPP-back, a counterclaim discussed below, is omitted from the table because it is not a specific legal tool.

<sup>122</sup> Pring (1989), op. cit., p. 15-16.

<sup>123</sup> Ibid., pp. 16-17.

<sup>124</sup> Ibid., pp. 17-21. See also Merriam and Benson (1993), op. cit., pp. 30-34.



## 4.2. Dismissing the application before the merits phase

Our starting point is that SLAPP applications should be dismissed as early as possible. Dismissing SLAPPs altogether may follow several theoretical paths.

One might move towards an absolutist free speech model alleging that those in power – certainly politicians, public figures, but perhaps also business entities – should not litigate when they had been criticised, since they have other avenues to challenge criticism against them. Or along the communication-based definition of SLAPP, the identification and protection of specific types of communication (or speech) should matter.<sup>125</sup> Defining SLAPP based on the type of communication to be protected has its drawbacks, including the risk of stifling legitimate use of legal proceedings,<sup>126</sup> and the risk of too narrowly defining SLAPP and consequently leaving other forms of legitimate speech unprotected.<sup>127</sup> Alternatively, one may justify dismissing SLAPPs by protecting the exercise of the fundamental right to participate in public life. (On the issue and its legal underpinnings see Chapter 1.) Here the difficulty of showing intent of abuse of the procedure must be overcome.

### 4.2.1 Legality and opportunity

Both civil and criminal SLAPP cases should be dismissed as early as possible. In several jurisdictions in criminal cases, the prosecutor might decide not to bring charges. This is so in countries that adhere to the principle of opportunity, where the prosecutor might assess whether, on the basis of evidence available, it is worth to start the criminal procedure, or not, or perhaps more pieces of evidence could be collected in order to reach a plea bargaining agreement. After bringing charges, the court may decide whether to proceed on the basis of evidence presented before it.<sup>128</sup> In the United Kingdom one of the main functions of the Crown Prosecutors' Service is to make sure that courts consequently use their discretionary powers. The regulation at the same time prescribes that the Director of Public Prosecutions issues a code laying down the basic principles of using those discretionary powers. In contrast most Continental countries adhere to the principle of legality, according to which prosecutors are obliged to start the process in case there is a well-founded suspicion of a crime. In the minority of countries adhering to the Continental tradition prosecutors are not obliged to bring charges even in these cases, if dismissing the case better serves the public interest. Prosecutorial discretion, however, has strict limits to be explored in future research that is partially determined by victims' rights and partially by the hierarchical structure and modus operandi of the prosecution services.<sup>129</sup>

Should the case – whether criminal or civil – reach the judiciary, it shall at early phase recognise the meritless nature and/or the abusive intent of the plaintiff. Our hypothesis for future research is that merit is easier to be proven than intent, therefore a two-step test could be developed, whereby the

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<sup>125</sup> Shapiro (2010), pp. 25-26.

<sup>126</sup> Cf. Merriam and Benson (1993), op. cit., p. 18; Macdonald, Noreau and Jutras (2007), op. cit., p. 7.

<sup>127</sup> Cf. Hartzler (2007), op. cit.

<sup>128</sup> René David, *Les Grands Systèmes de Droit Contemporains (Droit Comparé)*, Paris: Librairie Dalloz, 1964.

<sup>129</sup> Damaška, Mirjan R.: *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*. *University of Pennsylvania Law Review*, vol. 121, 1973, 506–589; DAMAŠKA, MIRJAN R.: *Structures of Authority and Comparative Criminal Procedure*. *Yale Law Journal*, vol. 84, 1975, 480–544.



courts dismisses the case if it was meritless, whereas if it is not, the controversy moves to a second step of analysing intent.

When assessing the above matters, the burden of the proof could be reversed. This was a common element of anti-SLAPP laws in the US. However, statutes which introduced these techniques had to face constitutional challenges in some US states. Nevertheless, it is still applied successfully in some other states, such as California. The first issue of an anti-SLAPP motion is the defendant submitting evidence that the claim has been made because of his or her public participation. If this is successful, then the plaintiff needs to provide substantial evidence to the lawsuit in order to prove that his or her claim indeed has merit. This substantial evidence needs to satisfy a higher threshold than usual, because it ought to demonstrate that the claim is supported by facts, which, if true would lead to a favourable judgment. Importantly, at this stage, the court does not weigh the evidence, neither examines their veracity, which is assumed.

#### 4.2.2 Abuse of rights

Any activity that has its aim the destruction of and the excessive limitation on others' fundamental rights is prohibited (see Article 5 of the International Covenant on Civil and Political Rights and Article 17 ECHR). No one is authorised to use the rights enshrined in human rights treaties to weaken or destroy the fundamental values of a democratic society.

The primary purpose of Article 17 ECHR is to preclude that totalitarian or extremist groups exploit the rights set forth in human rights documents for the purpose of destroying or unduly restrict these rights.

Art. 17 has been invoked by the ECtHR primarily against activities that have as their objective to destroy democracy and have it replaced by totalitarian or authoritarian regimes. SLAPP filers may intend to oppress free speech and public participation in general, especially if they are state agent. But more often their aim is to protect their own illegitimate interests by silencing critics. Either way, the chilling impact of SLAPPs goes beyond the individual case and is likely to have the overall effect of discouraging public participation and speech. Hence invoking Article 17 ECHR for dismissing SLAPP claims might be justified.

True, so far Article 17 ECHR has been invoked by the ECtHR in the context of Articles 9, 10 and 11. And in *Lawless*,<sup>130</sup> it has ruled that even those engaged in activities aimed at the destruction of the free and democratic order may avail themselves of procedural guarantees. Article 17 ECHR – as explained by the court – “is negative in scope [and] cannot be construed *a contrario* as depriving a physical person of the fundamental rights guaranteed by [...] Article 6 of the Convention.”<sup>131</sup> Since in the case of SLAPPs it is the access to courts as an implied Article 6 ECHR right itself (and the right to remedy – Article 13 ECHR) that is abused, Article 17, which is “negative in scope” does apply and filers may of course not invoke the right that they abuse.<sup>132</sup>

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<sup>130</sup> *Lawless v. Ireland* (no.3), Application no. 332/5, 1 July 1961.

<sup>131</sup> *Id.* at paragraph 7.

<sup>132</sup> For obvious reasons filers may not assert the proposition expressed in several judgments of the ECtHR that defendants' own fault may not justify depriving them of procedural guarantees. *Lala v the Netherlands*, Application no. 14861/89, 22 September 1994, paragraph 27.



In other words, someone abusing Article 10 ECHR on free speech or any other substantive right enshrined in the Convention can still legitimately invoke his or her Article 6 ECHR rights, but if Article 6 ECHR is abused i.e. the procedure is only started to silence the opposing party, then Article 17 must apply also in relation to Article 6 ECHR. The principle that abuse of rights must result in dismissal is reflected also in Article 35(3)(a) ECHR: the court shall declare the application inadmissible if it considers that the application is an abuse of the right of individual application.

When showing abuse, the intent of the applicant must be shown, which is not to seek remedy in court, but to intimidate the critic.<sup>133</sup> Proponents of the intent-based definition argue that defining SLAPP in respect of the intent to intimidate is integral to distinguish legitimate lawsuits from SLAPP suits.<sup>134</sup> Opponents of the intent-based definition note that such a definition would result in most SLAPP suits still being required to be resolved in full proceedings before courts, as well as the retained time and cost involved in the legal disputes concerned, as SLAPP suit defendants must find and present evidence of the claimants ill-intent.<sup>135</sup>

### **4.3. Techniques in the merits phase to overcome the negative effects of SLAPPs**

Should the process reach the merits phase, certain safeguards must be built into the justice system in order to prevent the abuse of the right to judicial remedy and the abuse of procedure.

#### **4.3.1 Cost transfer, legal aid for litigants**

One of the important reliefs of SLAPPED civilians can be free legal aid, or pro-bono defences. These can be offered by civil society activists, or by the state. The former has limited resources, the latter may be conditional (UK) or the system of official (state) attorneys may be dysfunctional, the attorneys being disinterested in performing their compulsory and low-paid duties (Hungary). EU instruments, such as the 2002 Council Directive on minimum common rules relating to legal aid,<sup>136</sup> or the 2016 Directive on legal aid for suspects and accused persons in criminal and surrender proceedings<sup>137</sup> should be further explored.

When civil society activists protect other civil society activists, the system as a whole is still very much vulnerable to vexation. In order to ease this vulnerability, NGOs taking cases to courts, or those conducting strategic litigation could be supported by the state or directly by the EU.

Cost-shifting to the plaintiff from the SLAPPED civilian is a typical feature of anti-SLAPP laws. At the very minimum, the winning party should be compensated for legal costs after having won the case (which is the case in some jurisdictions, but in others, such as for example Belgium and France lawyers' fees are to be paid by the respective parties themselves, even if they won the case).

If the procedural costs have to be borne by the losing party, that could potentially also serve as a deterrent against meritless claims. Still, until the end of the procedure the defendant would suffer the losses in time, financial resources, emotional burden, and even a settlement may be enforced which

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<sup>133</sup> Shapiro (2010), op. cit., pp. 24-26.

<sup>134</sup> Cf. Merriam and Benson (1993), op. cit., p. 18; Macdonald, Noreau and Jutras (2007), op. cit., p. 7.

<sup>135</sup> Shapiro (2010), op. cit., p. 24-25.

<sup>136</sup> Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

<sup>137</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.



may be beneficial to the litigant. The sought compensation would not be financial: well-financed plaintiffs who sue defendants with limited resources would seek that the defendants surrender what they have: their capacity to express their political convictions.<sup>138</sup>

If the anti-SLAPP motion is applied successfully, the plaintiff may be obliged to pay a fine, its amount dependent on the measure of the claim.<sup>139</sup>

#### 4.3.2 Publicity and warning against SLAPPers

In a model-anti-SLAPP law drawn up by the US Institute for Justice, if a government contractor is found to have initiated SLAPP, the court has to send its decision to the relevant governmental entity doing business with the contractor – and thereby call public attention to the unethical behaviour of the company.

#### 4.3.3 SLAPP-back

An interesting strategy identified in the literature focuses on the role of SLAPP suit defendants, i.e. the so-called “SLAPP-Back” or counterclaim.<sup>140</sup> Merriam and Benson describe (within the US legal context) the legal grounds for SLAPP-Back counterclaims.<sup>141</sup>

A SLAPP-back is a counterclaim by the individual targeted by SLAPP.<sup>142</sup> For example, in the so-called *McLibel* case, Steel and Morris sued McDonald's back for libel, claiming that the company hurt their reputation when it alleged that they were lying in their leaflets. (For the details see Chapter 2.1) The court dismissed the counter-claim on the grounds that the company was covered by the defence of qualified privilege.<sup>143</sup> Another example is by a Danish radiologist who counter-sued GE Healthcare for libel, when GE Healthcare sued him for libel due to a scientific research that he published in a scientific journal. In spite of the pugnacious approach by the company, they reached a settlement within days.<sup>144</sup>

### **4.4. Further considerations with respect to the European context**

#### 4.4.1 Freedom of speech and its limits

While the European law does not know SLAPP cases per se, the balancing of the European Court of Human Rights between freedom of expression and other rights consistently considers **public interest** to have a decisive weight in favour of freedom of expression. This value is not equally reflected in the national jurisprudence of the Member States. Further research is recommended to verify how consistently national courts follow the standards developed by the ECtHR. The following paragraphs will introduce these standards.

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<sup>138</sup> Anthony, T (2009) "Quantum of strategic litigation — quashing public participation", *Australian Journal of Human Rights*, Vol. 14. no. 2. p. 1-38. <https://www.austlii.edu.au/au/journals/AJHR/2009/1.pdf>

<sup>139</sup> For example, this principle is applied in the recent Italian Bill pending in the Senate as of May 2020.

<sup>140</sup> Cf. Pring (1989), op. cit., p. 19; Constantini and Nash (1991), op. cit.

<sup>141</sup> Merriam and Benson (1993), op. cit., pp. 28-29.

<sup>142</sup> See also: Merriam, D., Jeffrey A. Benson, (1993), "Identifying and Beating a Strategic Lawsuit against Public Participation", *Duke Environmental Law & Policy Forum*, Vol. 17, no. 3, p. 17–36.

<sup>143</sup> Hilson, Ch. J., (2016) "Environmental SLAPPs in the UK: threat or opportunity?", *Environmental Politics*, Vol. 25. no.2, p.248-267.

<sup>144</sup> Donson, F. (2010), "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs", *Reciel* Vol.19, no. 1, p. 93.



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The court has established already in 1972 that freedom of expression constitutes one of the essential foundations of a society; it is applicable also to "information" or "ideas" that offend, shock, or disturb. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no "democratic society" (*Handyside v. UK*, no. 5493/72). In its decision *Lingens v. Austria* (9815/82) it added that these "principles are of particular importance as far as the press is concerned." It emphasised also that beyond the press' right to impart information and ideas, also the public has a right to receive them (*Sunday Times v. UK*, para. 65).

Through its landmark decisions, the ECtHR developed three main guiding principles to defamation cases:

- 1) statement of opinions and value judgements should not be subjected to verification procedure, as it is an impossible task (see more above); but the proving of factual statements should always be enabled if the speaker offers evidence (*Castells v. Spain*, no. 11798/85);
- 2) publications which contribute to a debate on a matter of public interest or general concern enjoy a higher threshold of protection;
- 3) the limits of acceptable criticism are wider for public figures, especially politicians, State officials and employees. (*Lingens*, at 42).

The good faith of the journalist is also a relevant factor (*Bladet Tromsø v. Norway*, 1999), especially so in *Bladet Tromsø* when they relied on an official report which contained negative information about a company's actions. The undoubted interest in protecting private individuals' reputation was not sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local, national and international interest (*Bladet Tromsø*, no. 21980/93, at para. 73.). If the information is of public interest, even otherwise criminal content could be imparted to inform the public about an adverse social phenomenon (*Jersild v. Denmark*, no. 15890/ 89). Even if the information is not evidenced but based on allegations, a matter of serious public concern – such as police brutalities – carry significant weight, and a sentence was capable of discouraging open discussion (*Thorgeir Thorgeirson v. Iceland*, no. 13778/88, para. 90).

The ECtHR awards compensation and costs of procedure to those applicants whose rights had been violated. But this should not be viewed as a satisfactory remedy for cases which could well be regarded as SLAPP in some of their aspects. Firstly, the compensation follows the damage years after its occurrence, secondly, ECtHR proceeds only after all domestic remedies have been exhausted which often takes several years, and thirdly, the procedure places a heavy burden on the budget of the Council of Europe.

From the perspective of Member States, these cases were decided in the national courts in favour of the applicant – thus, they were not regarded meritless, despite the relatively consequent precedent system of ECtHR. This discrepancy between the jurisprudence of some national courts and the ECtHR is an issue which needs further investigation.

Besides, cases which carry the typical marks of SLAPP suits would be probably rejected at the level of the national courts, and not reach the level of ECtHR, or would be immediately rejected by ECtHR either for lack of admissibility, or based upon Article 17 (see below).



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Below we collected cases which carry some of the marks of SLAPP. Most typically, the so-called **McLibel** lawsuit which followed a range of other cases where threatening with a lawsuit alone could reach the desired effect for McDonalds.<sup>145</sup> This case raised further important issues: whether **NGOs** and activists enjoy a protection similar to the press workers; and whether the state has an obligation to provide **legal aid** to the defendants in libel cases ((*Steel and Morris v. UK*, no. 68416/01).

The Court rejected the government's argument that the activists did not deserve the same appreciation as responsible journalists and pointed at the legitimate and important role that campaign groups can play in stimulating public discussion (95). It also found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1. (95). The Court also found that the size of the awarded damages was excessive (36.000 and 40.000. for the two applicants respectively), pointing out also that under English law, the plaintiffs were not required to prove their financial losses.

The Sunday Times case also carries significant marks of SLAPP cases. The pharmaceutical company had been defendant in a court case owing compensation to the families of malformed children. The company successfully asked for an injunction against articles published about their case based on 'contempt of court'. Interestingly, none of the Law Lords thought that the publication might have impacted the "impartiality" of the judiciary, rather focused on the protection of the plaintiff from the prejudicial public coverage (57), which implies that the reason for the injunction was rather the reputation of the plaintiff in an undecided case. ECtHR held that in a mass disaster as the one caused by the Thalidomide drug, the society had a vital interest in knowing all the underlying facts and possible solutions (66). As an important circumstance for the case of SLAPP, the injunction also prevented the authors from passing the results of their research to certain Government Committees and to a Member of Parliament and from replying to public criticism aimed at them (53).

Legitimate corporate interests alone do not justify such an interference into press freedom, not even by ordering the journalist to name his confidential sources (*Goodwin v. UK*, 17488/90). The Court expressed that the protection of journalistic sources is one of the basic conditions for press freedom, and that an order of source disclosure would have a potential chilling effect on the exercise of that freedom; therefore incompatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (45).

Even though the information about the company's mismanagement, losses and loan-seeking activities were not expressly of public concern, but it was factual, topical and of direct interest to customers and investors in the market for computer software. The public interest lay in maintaining the confidentiality of journalistic sources as one of the basic conditions of press freedom (39).

The conclusion of this discussion is that the European standards of free speech provide a solid theoretical basis against SLAPP cases. While contrary to the US First Amendment, the European approach is based on balancing between human rights, in cases featuring the marks of SLAPP such as a matter of public interest, vertical relationship between the parties, impact of chilling effect, and in particular journalists or NGOs in the speaker role, the balance consequently inclines in favour of freedom of expression.

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<sup>145</sup> Donson, F. (2010), "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs", *Reciel* Vol.19, no. 1.





Nevertheless, the protection provided by ECtHR cannot be regarded as a protection against SLAPP. By the time the cases reach the ECtHR, they have been dragging on for several years, and no remedy or compensation can be demanded for the lost time, emotional burden, and costs.

Giving SLAPP suits a name and connecting them to the notion of intimidation for public participation would provide an important special protection to the potential targets. This might help national courts to deal with SLAPP and consequently save workload for both the national judiciaries and the ECtHR.

#### 4.4.2 The constitutional pre-requisites to successfully fight against SLAPP

The most attention has been placed in the literature on legislative solutions to SLAPP suits.<sup>146</sup> For a successful anti-SLAPP legislation, the lawmaker has to satisfy certain basic conditions.

SLAPPs typically feature a vertical relationship between the plaintiff and the defendant, where the plaintiff is a powerful actor, whether in financial or political terms. SLAPPers can be governmental entities, authorities, local governments, powerful commercial corporations, influential personalities such as politicians (*Lingens v. Austria*), celebrities (*von Hannover v. Germany no. 2. nos. 40660/08 and 60641/08*), or mafiosos (see the Italian case studies, Annex).

In the peculiar case that the litigant belongs to, or has strong ties to the executive branch of power, the anti-SLAPP instrument can also be regarded as part of the democratic checks and balances, which limit the power of the executive and ensure that the rule of law prevails. Logically, it requires the intention of self-limitation from a governmental majority in the legislative, to initiate and to support an anti-SLAPP bill. Model anti-SLAPP laws demonstrate the attitude of **suspicion towards the government** as litigant and set out additional protective provisions in favour of the defendant: for example, they may declare that government is prohibited to engage in SLAPP suits, that if defendants submit an anti-SLAPP motion in a lawsuit where the plaintiff is a governmental entity (or local government), the court should decide within an exceptionally short timeframe; the defendant is entitled to compensation of his or her damages and costs. And finally, the governmental plaintiff is obliged to report a successful anti-SLAPP motion to the attorney general which reports to the cabinet, the President of the Senate, and the Speaker of the House of Representatives.<sup>147</sup>

Political theory has a strong tradition which holds that citizens' distrust in government is better for democratic operation (liberal political theory and Madisonian political thought, and others, see more in Bertsoy, 2019). Media and political activists are watchdogs: it is their duty to be suspicious of the government. Their critical stance ought to be regarded as a public service, as part of the system of checks and balances, therefore governmental authorities should not enter into legal dispute with them. The equality of weapons which is a requirement by the ECtHR (*Steel and Morris v. UK*), is hardly possible in a lawsuit with a governmental authority. In addition, due to the revolution of informational

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<sup>146</sup> Lott for example identifies four key components necessary for effective anti-SLAPP legislation, namely (i) the clear identification of a SLAPP; (ii) dismissal mechanisms; (iii) granting of costs to defendants; and (iv) establishing qualified privilege with respect to defamation actions that are SLAPPs. Lott (2004), op. cit., pp. 57-61.

<sup>147</sup> Model Anti-SLAPP law of the ALICE, Section 6. a-d). [http://medialaw.org/images/stories/Committees/Anti-SLAPP\\_Committee/Model\\_Anti-SLAPP\\_Law\\_-\\_American\\_Legislative\\_and\\_Issue\\_Campaign\\_Exchange.docx](http://medialaw.org/images/stories/Committees/Anti-SLAPP_Committee/Model_Anti-SLAPP_Law_-_American_Legislative_and_Issue_Campaign_Exchange.docx)



technology, citizens' vulnerability is on the rise, while governments' transparency falls behind. This indicates that a distrust in government is well-founded.

All the more caution may be needed as attacks on democracy are on the rise globally. Suppressive regimes rely on a range of methods, but silencing critical voices is one of their key strategies. This can be achieved with a variety of methods, and SLAPP, threat, and harassment against journalists, as well as arbitrary authority investigations are among them.<sup>148</sup>

#### 4.4.3 Potential abuse of anti-SLAPP legislation (particularly by government-sponsored NGOs)

When the executive branch or any other branch of power has inadequately close relationship with business actors or influential owners, these could act as proxies in litigation to stifle public participation. In the case of media capture, media outlets themselves may either engage in SLAPP (see the case study on Croatia in the Annex) or engage in defamation (smear campaigns). As disinformation is not covered by existing legislation<sup>149</sup> – for it usually does not reach the threshold of either defamation, or hate speech, etc. – it is not likely to have a relevant role in the abuse of anti-SLAPP litigation.

A growing global concern is caused by the proliferation of GONGOs, government-sponsored non-governmental organisations. These are created by governments in order to promote their political interests and to mimic civil organisations, NGOs. They seek influence in civil umbrella organisations, or the international organisations, and take the places meant to be taken by NGO representatives in boards and discussions. They support governmental policy, rather than critically analyse. Their secondary impact is that they delegitimize civil society voices, and consume the financial resources, attention, and space that organic NGOs would utilise to support their goals.<sup>150</sup>

**GONGOs materialise an abuse of the right of association** similarly as SLAPP is an abuse of the right of litigation. GONGOs and captured media organisations would very well be able to publish smear campaigns and character assassination to support governmental politics and abuse an eventual anti-SLAPP law to divert responsibility.

The proliferation of GONGOs and captured media outlets signal a deeper problem with democracy and the rule of law in the effected states. Should this concern be interpreted as counter-indicative of passing anti-SLAPP legislation? First of all, anti-SLAPP is just a possibility to ask the court to take a position at an early phase of the lawsuit whether the claim is meritless, exaggerated, intended to suppress public participation (or using the European terminology; whether the disputed matter is of public interest); and whether there is a vertical power-relationship between the parties. If all or most of these elements of SLAPP suits can be identified by the court, there is no reason why the lawsuit should not be dismissed immediately. Even in the situation that a GONGO or a captured media outlet is defaming an opposition MP with untrue allegations, or insulting opinions, the defamed person

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<sup>148</sup> Repucci, S. (2020) "Media Freedom: A Downward Spiral", website of the Freedom House, <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>.

<sup>149</sup> See more in: Judit Bayer, Natalija Bitiukova, Petra Bárd, Judit Szakács, Alberto Alemanno, Erik Uszkiewicz, Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States Brussels, Belgium: European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs (2019).

<sup>150</sup> Baer, D. B., (2016), "Mind the GONGOs: How Government Organized NGOs Troll Europe's Largest Human Rights Conference" website of the OSCE, 20 September 2016, <https://osce.usmission.gov/mind-gongos-government-organized-ngos-troll-europes-largest-human-rights-conference/>; Naim, M. (2009) "What Is a GONGO? How government-sponsored groups masquerade as civil society", *Foreign Policy*, 13 October 2009, <https://foreignpolicy.com/2009/10/13/what-is-a-gongo/>;



would have ample opportunities as an MP to publish information in his or her defence. The court should also take note of the nature of allegations and insulting opinions and decide if they were beyond the – albeit higher – threshold of protection which is due to a political figure.<sup>151</sup>

In sum, proper application of anti-SLAPP rules depends to a great extent on the insight and courage of an independent judiciary. It can be said that an independent and competent judiciary is inevitable element of the fight against SLAPPs. When judges approve anti-SLAPP motions they may as well face huge informal pressure by the powerful litigant. The early dismissal of a case also requires the courage to decide without knowing all the facts of the case.

#### 4.4.4 The importance of an independent judiciary

The various features of the different judicial systems can be meaningful in this respect. In Common Law systems, judges start their profession after more years of compulsory practice and have more independence in finding the best decision than their Continental colleagues. In the Continental legal system, the role of the judge is more strictly and formally bound to "applying the law".<sup>152</sup> Also the laws are more detailed and formalised, giving more precise instructions to the judge. This relative inflexibility of the Continental judges by which they are more tightly bound to a tighter framework of legal rules could also explain why there are less SLAPP cases in the Continent than in the US and the UK. The openness of the common law legal system means that litigation carries a huge risk and the possibility of huge (financial) wins – this is much more moderated in the Continent, where procedural rules often allow legal aid, the costs are generally born by the losing party, damages must be proven, and the amount of compensation is more moderate, and also the ECtHR might influence the protection of free speech.

While SLAPP cases may be less prominent on the Continent, suppression of critical voices happens often with other, non-legal methods (see Chapter 3.2). Besides, also a proliferation of the number of SLAPP-like cases can be observed also in the Continent, combined with other forms of harassment.

In countries where the independence of the judiciary is jeopardized, anti-SLAPP legislation have little chances. This is the subject matter of the case pending in front of the CJEU in R.G. The Polish lawyer R.G. "commented on the hypothetical possibility of his client, D.T., President of the European Council, being charged with a criminal offence". The First Deputy of the Public Prosecutor General held the view that this "went beyond the limits of an advocate's freedom of expression, could be construed as unlawful threats, that is, as a criminal offence, and constituted disciplinary misconduct" and wrote to the Bar Association requesting it to initiate disciplinary proceedings against R.G. The Bar Association discontinued the case more than once holding that R.G.'s actions did not amount to disciplinary misconduct, but the prosecutor and the Ministry of Justice appealed again and again. The vital question in the case – beyond the applicability of the EU Services Directive covering the disciplinary liability of advocates – is how to ensure that the case is heard by an independent and impartial court

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<sup>151</sup> e.g. Strauss Caricature, BVerfGE 369 (1987)

<sup>152</sup> FDC (2015), "Common Law and Civil Law", website of the **FDC (Civil Law Initiative)**, 12 March 2015, <https://www.fondation-droitcontinental.org/en/2015/03/12/civil-law/>



for the purposes of Article 47 of the Charter, given that the Disciplinary Chamber of the Polish Supreme Court is no longer such a tribunal.<sup>153</sup>

## 5. Future research avenues

To develop feasible responses to SLAPP suits, which are applicable and effective among the European legal traditions and in the diverse legal environment of the European Member States, careful analysis of the issues listed in this Ad Hoc Report is recommended.

Qualitative research should assess the severity and the impact of SLAPP cases on fundamental rights, democracy and the rule of law. Such research ought to be sensitive to the power relationship between the speaker and the targeted person, i.e. the subject of the criticism. In order to understand the broader context beyond different risks speakers face, i.e. the wider implications for European democracy of silencing certain voices, the surroundings of SLAPP cases, their relation to other forms of abuse of power shall be analysed in different countries adhering to the rule of law and media pluralism to varying degrees. Our hypotheses are that beyond the individual harm, SLAPPs have a ripple effect, leading to lack of access to information, inability to conduct a meaningful public debate, and making deliberative democracy impossible – and the effects of SLAPPs may easier and faster escalate towards these phenomena in a climate anyway hostile to Article 2 TEU values.

SLAPPs should also be assessed against the non-legal tools of vexation and harassment. Our hypothesis here is that the legal and non-legal tools are used simultaneously, sometimes even interchangeably with the same goal: to silence legitimate criticism in matters of public interest, relating to financial, economic, political or other public issues.

SLAPPING can also be a tool to reduce media pluralism at the systemic level, by exercising a chilling effect on independent media. Legal provisions may be enacted and weaponised with a SLAPP-like effect, for example: limiting the space for civil society or imposing onerous burdens on newspapers. The effect of SLAPP, including such measures on media freedom and pluralism, and more broadly on democracy and the rule of law, should be assessed by a qualitative study.

A qualitative overview of the legal, non-legal and legislative attacks on the media and the press, as well as on other forms of public participation could yield a comprehensive picture of the most noxious attacks on democracy (See table 3).

*Table 3: Types of attacks on democratic participation. Source: Authors.*

Attacks on democratic participation			
Types of legal SLAPP tools:		Harassment of journalists	Abuse of power
Substantial	Procedural	Non-legal	Legislative
Criminal defamation	Amending the claim during procedure	Physical attacks on person, on property	Limiting free space for civil society

<sup>153</sup> See pending Case C-55/20 - Ministerstwo Sprawiedliwości. For a parallel with the Sadurski case reproduced in the Annex see de Búrca, Gráinne, Morijn, John: *Repression of Freedom of Expression in Poland: Renewing support for Wojciech Sadurski, VerfBlog*, 3 June 2020, <https://verfassungsblog.de/repression-of-freedom-of-expression-in-poland-renewing-support-for-wojciech-sadurski/>



Civil claim for protection of reputation, tort	Abuse of procedural rules to prolong the procedure	Verbal attacks (oral or written)	Onerious burdens for the press
Criminal charges of tax fraud	Meritless claims and appeals	Cybercrime (attacks on data)	Discriminative state advertising
Arbitrary tax-audit procedure or other authority control.		Privacy violations	Access to information deficiencies

The laws currently in force both at the national and EU setting that might be applied against SLAPP suits, shall be explored. Similarly, the case-law of the Member States should also be analysed in order to assess whether existing judicial tests could be applicable to SLAPP cases.

A detailed mapping of the existing legal rules in Member States, both procedural and substantial, is recommended, also with the view to assess whether and to what extent the lessons from common law jurisdictions can be adjusted to the realities of the European Union. In this process, criminal, civil and administrative legal rules need to be analysed, and the crucial procedural differences between civil law and criminal lawsuits must be acknowledged. Whereas criminal law should be the last resort when responding to any norm violation because of the graver intrusions into liberties, procedurally it is the civil procedure that puts the applicants in an easier situation due to the lower standards of proof. The plaintiff of a civil suit only has to prove that the defamatory statement was uttered by the defendant, and the truthfulness is to be proven by the speaker, whereas in a criminal process the state (the prosecutor or private prosecutor) has to prove all the allegations beyond reasonable doubt.

Generally, defendants have more safeguards in criminal law, at the same time, in some civil law jurisdictions the court will have the duty to assist the defendant under its general obligation to strive at disclosing the truth.<sup>154</sup> Also, the limits of prosecutorial discretion need to be explored in future research, and how state representatives of Member States – whether they adhere to the principle of opportunity or the principle of legality – can dismiss a case at the early stage.<sup>155</sup> The role of private prosecutors also needs to be explored.

Our hypothesis that merit is easier to be proven than intent must be explored in future research, and our suggestion for a two-tier test, whereby judges dismiss the case if it was meritless, whereas if it is not, the controversy moves to a second step of analysing intent, needs to be tested. When assessing intent, invoking abuse of rights provisions might be useful, and an assessment of domestic methods to do so is inevitable. It should be explored why ECtHR's public interest argument in freedom of expression cases, as well as its 'abuse of rights' tool is unequally followed by various Member States.

Also, the question whether reversal of the burden of proof would survive constitutional scrutiny in all Member States should be analysed.

<sup>154</sup> See for example in Germany: "der Täter trägt das Beweisrisiko. Die Beweislastführungslast obliegt dagegen dem Gericht, das von Amtes wegen die Wahrheit erforschen muß." Karl Lackner, StGB. Strafgesetzbuch mit Erläuterungen, München: C.H. Beck, 1991, p. 871

<sup>155</sup> Damaška, Mirjan R.: Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study. *University of Pennsylvania Law Review*, vol. 121, 1973, 506–589; DAMAŠKA, MIRJAN R.: Structures of Authority and Comparative Criminal Procedure. *Yale Law Journal*, vol. 84, 1975, 480–544.



Cost-switching may be much more common in Continental legal systems than in Common Law countries, and exaggerated damage claims are also typically dismissed by courts of the former countries – but these hypotheses need to be proven by factual evidence.

In sum, a detailed analysis of the legal instruments, which are weaponizing victims against SLAPP suits needs a more extensive qualitative research, and becomes possible only with the help of national contact points which have an understanding both of their national law, case law and the concept of SLAPP.



tion has been produced with the financial support of the European Union. The contents of this are the sole responsibility of the author(s) and the EU-CITIZEN Network and can in no way be taken views of the European Commission.

## Annex – Case studies

The following table summarizes the legal aspects of the country studies described in the Annex. The studies explore selected issues to represent the diversity of SLAPP litigants and underlying laws. However, the mentioned cases all represent systemic problems within one or several Member States. The research is illustrative and not based on a systematic collection of all cases.

Table 4. Examples to explore the SLAPP situation in a sample of EU Member States (Source: authors)

	Croatia	Hungary	Italy	Malta	Poland	France
<b>Speaker:</b>	Journalists	NGO activists	Journalists	Journalist	Academic	Academic
<b>Public participation Type</b>	Independent reporting	Distributing Norway Funds	Reporting about organised crime	Reporting about money laundering, corruption, etc.	Political criticism	Helping asylum seekers within France
<b>Chilling effect</b>	X (1000+ lawsuits against journalists) signal a systemic problem)	X (labelling) <sup>156</sup>	X (fear for personal safety)	X (fear for personal safety)	X	X <sup>157</sup>
<b>Intent to intimidate</b>	X	X	X	X	X	X
<b>Vertical power relationship</b>	X (public television as employer)	X (government authority)	X (Mafia members)	X (politicians and organised crime)	X (Political party, public television)	X (Criminal charges)
<b>Exaggerated damages claims</b>	X	N.A.	X	X	-	-
<b>Meritless claim</b>	<i>No data</i>	X	X	X	X	X
<b>Legal basis or legal instrument</b>	1- Criminal charges of "insulting the police"; 2 -Criminal defamation; 3 Labour dismissal;	1 - Tax audit, followed by suspension, criminal charges. 2 Legislative intervention	1 Criminal defamation 2 – Libel	1 - Criminal defamation (abolished since) <sup>158</sup> 2 - Libel	1 Criminal defamation 2 Protection of reputation 3 - Criminal insult of a	The crime of facilitating irregular migration

<sup>156</sup> Spectacular actions like: handcuffing and arresting an activist with live TV-coverage; listing NGOs and names as "foreign agents" by a government-friendly weekly paper – are interpreted as messages to the wider community to achieve a generalised chilling effect.

<sup>157</sup> Between 2015 and 2019, 171 individuals were investigated or prosecuted on these grounds in 14 countries across the EU - see more in the Annex.

<sup>158</sup> After death of Daphne Caruana Galizia, Malta passed a new Media and Defamation Act which abolished criminal defamation, confined applicants to one libel suit per story, removed references to offending "public morals or decency", and ruled out garnishee orders against journalists.

	4 - Libel	(Lex NGO)			public official 4 - Disciplinary action by employing university.	
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### **CASE STUDY 1 – Croatia: SLAPP suits targeting journalists**

Gordan Duhaček, a reporter for the online newspaper *Index.hr*, was arrested by the police at the Zagreb airport on 16 September 2019 when he was planning to board a flight for an official trip. The charges were having published offending comments about the police at his Twitter account. His arrest was short, and he needed to pay only a small amount of fine for one of his remarks. However, his spectacular arrest and preventing his leaving the country frightened him and sent a signal for other journalists all over Croatia as well.

A few months before Gordan Duhaček's arrest, on a Saturday in March 2019, hundreds of journalists protested in Zagreb, organized by the Croatian Journalists Association (CJA). They demonstrated against the growing number of threatening lawsuits against individual journalists and news outlets. The protest was held after the Croatian public broadcasting company, the HRT itself filed 36 lawsuits against its own journalists, including Hrvoje Zovko, the president of CJA.

Zovko was fired from his job from HRT in September 2018 after 21 years of service due to a debate with his editor-in-chief on covering a political event.<sup>159</sup> A year after his dismissal Zovko was officially informed that he was sued by HRT for criminal defamation.<sup>160</sup> According to his own statement, he was sued thrice<sup>161</sup> by HRT for claims that he was not aware of until he was summoned as a defendant by the Zagreb Criminal Court.<sup>162</sup> Two of the lawsuits were personally against Zovko (with damages of approximately 34,500 EUR) while a third one was launched in January 2019 against the CJA for alleged criminal offences against HRT's honour and reputation for a financial compensation for 500,000 Kuna (appr. 67,000 EUR).<sup>163</sup> Later a peaceful settlement of the dispute was proposed by the Croatian public broadcasting company.<sup>164</sup>

"I urge HRT to engage in a constructive out-of-court dialogue with journalists and resolve the current disputes" said the OSCE Representative on Freedom of the Media Harlem Désir a few days after the

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<sup>159</sup> He won his labour trial and the court reinstated him as an editor at HRT, but the decision is pending on appeal. CoE (2018), "President of the Croatia Journalists' Association Threatened with Dismissal", website of the Council of Europe – *Platform to promote the protection of journalism and safety of journalists*, 24 September 2018, <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/39539620>, see also: Vale, G. (2018) "Media in Croatia, defeated by the economy", *Observatorio Balcani e Caucaso*, 14 December 2018, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Media-in-Croatia-defeated-by-the-economy-191644>.

<sup>160</sup> CoE (2018), "President of the Croatia Journalists' Association Threatened with Dismissal", website of the Council of Europe – *Platform to promote the protection of journalism and safety of journalists*, 24 September 2018, <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/39539620>.

<sup>161</sup> First for damages in general for appr. for 10,800 kuna (about 1,450 Euros) and later for alleged damages to honour and reputation, amounting to 250,000 kuna (over 33,000 Euros). Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>.

<sup>162</sup> Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>.

<sup>163</sup> CoE (2018), "President of the Croatia Journalists' Association Threatened with Dismissal", website of the Council of Europe – *Platform to promote the protection of journalism and safety of journalists*, 24 September 2018, <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/39539620>.

<sup>164</sup> *Ibid.*



protest, on 6 March 2019. “It is commendable that the reconciliation process has started in some of the cases and this will hopefully result in the dropping of all charges against journalists.”<sup>165</sup>

There are more than one thousand ongoing lawsuits against journalists and news outlets in the country. Most of the court cases are claims for alleged non-material damages such as “mental anguish” or “tarnished reputation”.<sup>166</sup> “In Croatia, it’s open season on journalists”, said Zovko about the attacks against journalists.<sup>167</sup> Many cases filed by public figures – politicians and businessmen – and companies, include the offence of ‘shaming’ which is still part of the Croatian Criminal Code. 88% of the court decisions found in favour of the journalists, which signals that an overwhelming majority of the complaints were meritless.<sup>168</sup>

### Evaluation

The generally high number of lawsuits against journalists supports the assumption that SLAPP has become a systemic problem which negatively impacts media freedom in Croatia.

The speciality of the named cases was that the procedures were started by the public service media company, and by a state authority (the police). The vertical relationship between the parties of the case, the intended chilling effect, and the meritless nature of the claims give obvious signals of these being SLAPP cases. The high number of lawsuits initiated by HRT against its employed journalists raises the suspicion that the public service media had been captured by a political interest group.

From the perspective of the EU, it should be emphasised that media freedom and pluralism are the basic foundation of democracy, protected by Article 2 TEU and Article 11(2) of the Charter of Fundamental Rights of the EU. Suppressing the watchdog function of the free press are often the first steps in building an autocracy and should be regarded as early warning signs of a democratic backslide.<sup>169</sup>

### **CASE STUDY 2 – Italy: Threats by the Sicilian Mafia**

Lirio Abbate is a Sicilian journalist of the prominent weekly *L'Espresso*, who was the first to publish articles and a book about a network of corruption and mafia-related affairs, also affecting active

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<sup>165</sup> OSCE (2019), "OSCE Representative Désir concerned about numerous lawsuits against journalists in Croatia and disputes involving public service broadcaster HRT", website of the Organisation for Security and Co-operation in Europe, 6 March, 2019, <https://www.osce.org/representative-on-freedom-of-media/413483>

<sup>166</sup> Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>

<sup>167</sup> RSF (2019) "Croatian government’s oppressive silence about attacks on journalists", website of the Reporters Without Borders, 10 September 2019, <https://rsf.org/en/news/croatian-governments-oppressive-silence-about-attacks-journalists>

<sup>168</sup> Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>; Vale, G. (2019), "Croatia, a thousand lawsuits against journalists" *Observatorio Balcani e Caucaso*, 18 January 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-a-thousand-lawsuits-against-journalists-192090>

<sup>169</sup> Bárd, P. - Bayer, J.: [A comparative analysis of media freedom and pluralism](#) in the EU Member States, research paper for the European Parliament Policy Department C: Citizens' Rights And Constitutional Affairs. 2016.



politicians. Abbate was under police protection after a police wiretapping overheard mafia members talking about silencing Abbate after his book has been published in 2007, and two men were found placing a bomb under his car.<sup>170</sup> He was also threatened in the courtroom by mafia boss Leoluca Bagarella who was sentenced to 43 years in prison. “Bagarella sent a message to his accomplices giving my name in open court.” – Abbate said.<sup>171</sup>

Abbate was sued for libel by Massimo Carminati, a famous Sicilian mafia figure, former member of a terrorist group and a criminal gang, who was arrested (with 36 accomplices) in 2014 and charged with fraud, money laundering, embezzlement, and the bribing of public officials, and was later sentenced to 20 years imprisonment. Despite his imprisonment, his lawyer continued to attack and mock Lirio Abbate in the courtroom.<sup>172</sup>

On 4 November 2016, the Civil Court of Rome dismissed the libel case against Abbate and ordered the plaintiff Massimo Carminati to bear the legal costs. The case bears some elements of SLAPP cases: the libel charges against Abbate were meritless, and the lawsuit appears to have dragged on for about four years.

In relation to these arrests and beginnings of the criminal procedure, the association of criminal lawyers accused 97 journalists with violating Article 114 of the Code on Criminal Procedure, by publishing restricted judicial documents, identifying 278 articles in 14 newspapers which reported parts of the arrest warrants.<sup>173</sup> Journalists do so regularly, because Article 51 of the Criminal Code excludes punishment of those who publish such facts in order to carry out a legal duty, or to exercise a constitutional right. But the punishment of 50-251 Euros or alternatively imprisonment up to 30 days remains a risk that they opt to take. These legal charges against journalists have to be assessed in the light of the freedom to receive information about issues of public interest. While there is a legitimate aim to protect restricted judicial documents, some leeway should be allowed to protect journalists who just would like to do their jobs.

Abbate was included in the list of “100 information heroes of the world” prepared by Reporters Without Borders (RSF) in 2014, while Index on Censorship named him among the 17 people in the world who fight for freedom of expression in 2015.

The lawsuit of Amalia De Simone is a more classic case of SLAPP-threatened investigative journalists. On June 18, 2014, she published a video report on the website of *Il Corriere della Sera* about the international cocaine trade from South America to Italy. It included photos of fish that had been found to contain cocaine in a port, as well as emails exchanged between some important politicians, businessmen and members of criminal organizations. Following the report, a businessman from the

<sup>170</sup> Brown, S. (2007) "Living on the Mafia hit list - a journalist's tale, Reuters, 23 October, 2007, <https://www.reuters.com/article/us-italy-mafia-journalist/living-on-the-mafia-hit-list-a-journalists-tale-idUSL1249827220071023>

<sup>171</sup> Ossigeno (2018) "Mafia Capitale. New Attack Against Lirio Abbate at the Appeals Trial", Ossigeno, 15 March, 2018, [https://rsf.org/sites/default/files/rapport\\_en\\_bd-5.pdf](https://rsf.org/sites/default/files/rapport_en_bd-5.pdf)

<sup>172</sup> CoE (2016), "Italian Journalist Lirio Abbate Faces Hate Speech in Courtroom" Platform to promote the protection of journalism and safety of journalists, 4 February 2016, , <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/14472714>; Ossigeno (2018) "Mafia Capitale. New Attack Against Lirio Abbate at the Appeals Trial", Ossigeno, 15 March, 2018, <https://www.ossigeno.info/mafia-capitale-new-attack-against-lirio-abbate-at-the-appeals-trial/?lang=en>

<sup>173</sup> Spampinato, A. (2015), "Reporters accused ahead of Capital Mafia trial in Rome", ECPMF, 3 November, 2015, <https://www.ecpmf.eu/archive/news/threats/archive/reporters-accused-ahead-of-capital-mafia-trial-in-rome.html>



fishing industry of Panama brought a case against her claiming she defamed his personal dignity, as well as damaging the image of his company. It took two and a half years to dismiss the case.<sup>174</sup> Amalia De Simone was honoured with a prestigious journalistic award in Italy for her reporting.<sup>175</sup> She has been subject to several other vexatious lawsuits as well, mainly criminal defamation cases. Although all of these have been dismissed by the prosecutor's office in the investigative phase, the plaintiffs regularly appealed against these dismissals to drag the procedure. This is a typical feature of the SLAPP cases where the motive of the plaintiff is to keep the defendant occupied with the lawsuit even though the claims are clearly meritless.<sup>176</sup>

The list could be continued as investigative journalists in Italy are systematically threatened both physically and legally.

### Evaluation

The lawsuits of De Simone clearly represent the features of SLAPP lawsuits, whereas the case of Abbate represents how SLAPP directed against journalists is coupled with physical threats and psychological pressure to which investigative journalists are exposed. While larger tragedy and injustice was prevented in this case, the events certainly exercised a chilling effect, as it was admitted by Lirio Abbate himself.<sup>177</sup> His case is typical among Italian journalists who cover issues related to the Mafia, as around twenty Italian journalists were under police protection because of serious threats or murder attempts in 2019.<sup>178</sup> Also the sharpest increase of media freedom alerts was registered in Italy in 2018, according to the Council of Europe.<sup>179</sup>

Besides physical threats and attacks, abusive lawsuits remain the main threat, as identified by the Italian Communications Regulatory Authority. Both civil and criminal defamation are weaponized against journalists. Vexatious lawsuits also have their specific Italian names: *querelle pretestuose*, *cause bavaglio*, *liti temerarie*, which refer to their specious, gagging, reckless,

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<sup>174</sup> Verza, S., (2018) "Vexatious cases hindering investigative journalism in Italy", Global Freedom of Expression, Columbia University, 27 March 2018, <https://globalfreedomofexpression.columbia.edu/updates/2018/03/vexatious-cases-hindering-investigative-journalism-italy/>

<sup>175</sup> Verza, S., (2018) "Vexatious cases hindering investigative journalism in Italy", Global Freedom of Expression, Columbia University, 27 March 2018, <https://globalfreedomofexpression.columbia.edu/updates/2018/03/vexatious-cases-hindering-investigative-journalism-italy/>; FNSI, (2016) " Michele Albanese e Amalia De Simone Cavalieri della Repubblica, la Fnsi: «Riconoscimento a tutti i giornalisti minacciati»" FNSI - Minacce, 13 November 2016, <http://www.fnsi.it/michele-albanese-e-amalia-de-simone-cavalieri-della-repubblica-la-fnsi-riconoscimento-a-tutti-i-giornalisti-minacciati>

<sup>176</sup> Verza, S., "SLAPP: the background of Strategic Lawsuits Against Public Participation", ECPMF, no date shown. <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>

<sup>177</sup> Basille, O. - Julliard, J-F., - Roberts, G. - Vidal, E. (2008) "European Union - Risks faced by journalists". Reporters Without Borders, May 2008, [https://rsf.org/sites/default/files/rapport\\_en\\_bd-5.pdf](https://rsf.org/sites/default/files/rapport_en_bd-5.pdf)

<sup>178</sup> ECPMF (2020) "2019 World Press Freedom Index", ECPMF, <https://www.rcmediafreedom.eu/Tools/Monitoring-tools/2019-World-Press-Freedom-Index>

<sup>179</sup> Council of Europe (2019) "Democracy at Risk: Threats and Attacks Against Media Freedom in Europe. Annual Report 2019" ECPMF, <https://www.rcmediafreedom.eu/Publications/Reports/Democracy-at-Risk-Threats-and-Attacks-Against-Media-Freedom-in-Europe.-Annual-Report-2019>



and meritless nature.<sup>180</sup> They are recognised and named as “democratic emergency” by journalists’ organisations.<sup>181</sup> The lawsuits drag on typically for 2-6 years, but sometimes even 20 years.<sup>182</sup>

Italian society and policymakers have been trying to stand up against these threats. The Court of Cassation has a guidance to avert abusive lawsuits. Civil society has invented the “media bodyguard” to provide solidarity and protection to fellow journalists.<sup>183</sup>

A new bill is discussed in Senate which threatens the strategic litigator with a fine, comparable to the amount of damages that he was demanding in his lawsuit.<sup>184</sup> The law is due to be passed in June 2020.<sup>185</sup> At this stage, it also intends to abolish imprisonment for defamation. A bill on decriminalizing defamation was drafted, but voted down by the Senate in 2014,<sup>186</sup> whereas a reform bill against vexatious litigation was struck down by the Parliament in 2016.<sup>187</sup> Again, a bill on easing criminal defamation is pending in the Parliament, and the procedure is certainly accelerated by the Italian Constitutional Court's decision on 9. June 2020, which called upon the Parliament to abolish prison sentence related to criminal defamation until 22 June 2012. Moreover, the Constitutional Court suspended ongoing prison sentences for convicted journalists, or whose procedure is pending.<sup>188</sup>

From the EU perspective, the organized crime which infiltrates into politics and has strong economic dimensions, negatively impacts the European common market and the rule of law. It also effects media pluralism: certain newspapers are owned by Mafiosi, “to broadcast Mafia-friendly news,

<sup>180</sup> ECPMF (2019) "SLAPPS: Strategic Lawsuits Against Public Participation", 19 December 2019, <https://www.rcmediafreedom.eu/Dossiers/SLAPPS-Strategic-Lawsuits-Against-Public-Participation>.

<sup>181</sup> ECPMF (2019) "SLAPPS: Strategic Lawsuits Against Public Participation", 19 December 2019, <https://www.rcmediafreedom.eu/Dossiers/SLAPPS-Strategic-Lawsuits-Against-Public-Participation>.

<sup>182</sup> Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>

<sup>183</sup> Rosa, P. - Pierobon, C. (2019) "SLAPPS: the Italian Case", ECPMF, 12 November 2019, <https://www.rcmediafreedom.eu/Tools/Legal-Resources/SLAPPS-the-Italian-Case>

<sup>184</sup> The proposal was named after the long-time journalist of *Espresso*, Primo Di Nicola. According to the proposal, Article 96 of the Code of Civil Procedure would be accompanied by the provision of the so-called “civil aggravated liability”, to sanction the bad faith of those who abuse the instrument of the lawsuit for other aims. As Antonella Napoli, a famous Italian investigative reporter described: „if someone wants to sue you, they will; but if they know they have no real ground to prove defamation, and they risk paying half of what they claimed, they'll think twice. Do you file a meritless lawsuit against journalist, asking to pay for 100,000 Euros? Then, if you lose in court, you will pay not only the expenses, but also 50% of what you claimed. Then we'll see if they dare. It would be a deterrent”. (Rosa, P., Claudia Pierobon (2019) "Croatia and Italy, the chilling effect of strategic lawsuits" *Observatorio Balcani e Caucaso*, 29 October 2019, <https://www.balcanicaucaso.org/eng/Areas/Croatia/Croatia-and-Italy-the-chilling-effect-of-strategic-lawsuits-197339>)

<sup>185</sup> Perrone, A. (2020) "A slap in the face: Meet the Italian journalist who has had to fight over 126 lawsuits all aimed at silencing her", Index on Censorship, 6 April 2020

<sup>186</sup> La Rue, F. - Mijatovic, D. - Muiznieks, N (2014) "Defamation in Italy: a draft law to be changed, Council of Europe, Commissioner for Human Rights, 08 June 2014, <https://www.coe.int/en/web/commissioner/-/defamation-in-italy-a-draft-law-to-be-changed>

<sup>187</sup> Perrone, A. (2020) "A slap in the face: Meet the Italian journalist who has had to fight over 126 lawsuits all aimed at silencing her", Index on Censorship, 6 April 2020

<sup>188</sup> Article 19 (2020) Italy: Constitutional Court refers decision on abolishing prison sentences for criminal defamation to Parliament. Website of Article 19, 10 June 2020. <https://www.article19.org/resources/italy-constitutional-court-refers-decision-on-abolishing-prison-sentences-for-criminal-defamation-to-parliament/>



covering issues that are of interest to the Mafia, or attacking certain people, magistrates or investigators".<sup>189</sup>

Apparently, the Italian MEPs did not consider anti-SLAPP legislation to be contrary to EU law.

### ***CASE STUDY 3 – Malta: the assassination of Daphne Caruana Galizia***

Daphne Caruana Galizia was a Maltese reporter well-known from reporting on corruption, wrongdoings, misuse of power, nepotism, and money laundering. She was murdered on 16 October 2017 not far from her home in a car explosion while driving, killing her immediately.

Caruana Galizia's home had not been under police guard, except during elections, albeit she got death threats.<sup>190</sup> When Caruana Galizia was assassinated, she faced 47 civil and criminal defamation lawsuits.

Caruana Galizia was born in 1964, studied archaeology and began her career at the Sunday Times of Malta in 1987. Later she became the Associate Editor of *The Malta Independent* before she started to run her own blog, *Running Commentary*, focusing on controversial issues.

On some occasions the site attracted 400,000 readers a day while Malta's total population is around 420,000.<sup>191</sup> In her blog she revealed corruption among Malta's influential people and consequently she had to face many legal battles, including multiple libel suits. Her most impactful stories were the following:

- In 2016 she was the first to report that Keith Schembri (the PM's chief of staff) and Konrad Mizzi (Malta's tourism minister) were affected in the Panama Papers leak. She also uncovered that the wife of the Maltese PM, Joseph Muscat, held a company in Panama called Egrant (one of her sons, Matthew Caruana Galizia – who found her dead body after the explosion –, was part of the team that broke the Panama Papers story). These reports were also followed by several lawsuits.
- In 2016-17 she published a series of articles about Silvio Debono, owner of DB Group, a real estate investment company called DB Group. Debono received a huge area of public land from the central government at a very reasonable price in order to build a luxury hotel and houses. In March 2017 Debono filed 19 libel cases against Caruana Galizia.
- In February 2017 she reported that Chris Cardona (Malta's Economic Minister) and Joseph Gerada (EU presidency policy officer) visited a brothel in Germany on their official business trip. They filed four civil suits against her while her bank accounts were frozen with precautionary warrants for 47,460 EUR.
- She revealed a money laundering story of the opposition leader, Adrian Delia who held offshore bank accounts. She stated that a regular monthly amount of £20,000 – earned from prostitution in London – was transferred to Delia's account over the course of "three or four

<sup>189</sup> Abbate, L. (2015) "The Mafia's war on Italy's journalists" Al Jazeera, 23 August 2015, <https://www.aljazeera.com/programmes/listeningpost/2015/08/mafia-war-italy-journalists-150823092312499.html>

<sup>190</sup> Vella, C., (2019) Daphne had not been offered police protection for years", Times of Malta, 30 April 2019, <https://timesofmalta.com/articles/view/daphne-had-not-been-offered-police-protection-for-years.708651>

<sup>191</sup> McNaughton, K., (2017) "Daphne Caruana Galizia: Life and career of murdered Maltese journalist", Index on Censorship, 17 October 2017, <https://www.indexoncensorship.org/2017/10/daphne-caruana-galizia-life-and-career/>



years”, altogether approximately one million pounds. The politician filed five libel suits against Caruana Galizia.

At the time of her murder, she was sued by Pilatus Bank, a Maltese financial institution. A year later, in November 2018 this bank was shut down, and its licence was revoked by the European Central Bank, after his Iranian owner was charged in with fraud and money laundering in the US.<sup>192</sup> Caruana Galizia covered the bank laundering funds from allegedly corrupt schemes on behalf of offshore companies and individuals. Following this case, a few months after her death, a new Media and Defamation Act was passed in Malta which decriminalised defamation.<sup>193</sup> The new act which replaced the Press Act of 1970, abolished criminal defamation, confined applicants to one libel suit per story, removed references to offending “public morals or decency”, and ruled out garnishee orders against journalists.<sup>194</sup>

A year after her murder still 34 libel case were pending at domestic courts. Among them, one case was brought by Malta's then Prime Minister Joseph Muscat, two cases were started by then Minister for Tourism Konrad Mizzi and two cases were initiated by the then Prime Minister's Chief of Staff Keith Schembri.<sup>195</sup>

Two years after her murder, in November 2019 both Keith Seimbri and Konrad Mizzi resigned while Chris Cardone, the economy minister of Malta was suspended.<sup>196</sup> At the end of November, PM Joseph Muscat has also resigned. Yorgen Fenech, a Maltese businessman whose main investments are in hotels and casinos, was arrested in November and is held in custody since then.<sup>197</sup>

After his resignation, on 6 December 2019, Keith Schembri withdrew the two libel cases he had filed against Daphne Caruana Galizia over her articles about his company leaked in the Panama Papers. The libel suit filed by the Prime Minister Joseph Muscat about his wife who owns the Panama-registered company Egrant was adjourned at his request until March 2020.

Her last years were filled with harassment and threats: her dog’s throat had been cut;<sup>198</sup> her home was set on fire; she received threatening phone calls, letters, text messages – she chose self-imposed

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<sup>192</sup> Osborne, H., (2018) "Malta's Pilatus Bank has European licence withdrawn", The Guardian, 5 November 2018, <https://www.theguardian.com/world/2018/nov/05/pilatus-bank-malta-european-banking-licence-withdrawn>

<sup>193</sup> Verza, S., "SLAPP: the background of Strategic Lawsuits Against Public Participation", ECPMF, no date shown. <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>

<sup>194</sup> garnishee order: a third party debt order, with the purpose to enforce a debt against a creditor; and prevent the debtor from removing funds; the court directs a third party that owes money to the judgement debtor to instead pay the judgment creditor. In the case of Caruana Galizia, the court ordered the bank to freeze her bank account, during the defamation procedure by Maltese Economy Minister Chris Cardona and his consultant Joe Gerada, after the journalist alleged they have visited a brothel in Velbert (Germany) while on government business. CoE (2017)

<sup>195</sup> "Malta Economy Minister Issues four Libel Suits and Warrants Against Blogger Daphne Caruana Galizia", Media Freedom Alerts, 10 February 2017, [https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/22997320?p\\_p\\_state=pop\\_up](https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/22997320?p_p_state=pop_up).

<sup>196</sup> Shiel, F. (2019) "Top Malta Resignations Linked To Scandal Over Journalist Murder Probe", ICIJ, 26 November 2019, <https://www.icij.org/blog/2019/11/top-malta-resignations-linked-to-journalist-murder-probe/>

<sup>197</sup> Brincat, E. (2020) "Yorgen Fenech denied bail, again", Times of Malta, 7 April, 2020, <https://timesofmalta.com/articles/view/yorgen-fenech-denied-bail-again.784073>

<sup>198</sup> Sherwood, H. (2019) " Daphne Caruana Galizia’s son: ‘They killed my mother but they won’t stop me’", The Guardian, 29 June, 2019,



isolation to protect her family.<sup>199</sup> She never received armed police protection.<sup>200</sup> No one has yet been convicted of murdering Daphne Caruana Galizia.

### Evaluation

The lawsuits against Caruana Galizia were clearly initiated with the purpose of intimidation: their demands for damages were exaggerated,<sup>201</sup> the content they objected were of substantial public interest, and the defamed persons were powerful politicians in their official duties. Even by European standards, her statements were protected by freedom of expression. Daphne Caruana Galizia's litigators also took advantage of the loose forum shopping rules of the EU.

From the EU perspective, corruption and money laundering threaten the economic and fiscal stability of the European Union's common market. Investigative journalists like Daphne Caruana Galizia perform a public service, which should be highly supported and protected.

### ***CASE STUDY 4 – Poland: multiple cases against Professor Wojciech Sadurski***

Wojciech Sadurski, a recognized constitutional law professor, published a text on Twitter on 10 November 2018 characterizing the Polish Law and Justice Party (PiS) as “an organized criminal group”. The Tweet called upon citizens to boycott the so-called “Independence March” to be held in the streets of Warsaw. The full text read: “If anyone still had any doubts, after the maneuver of the past two days, this much should be clear: no honest person should go in a parade of defenders of the White race, who have hidden for a moment their “falangas” [a neo-Nazi symbol] and swastikas, in collusion with the organized criminal group PiS”.<sup>202</sup>

A lawsuit “for protection of personality rights” under Articles 23 and 24(1) of the Polish Civil Code was started by the Law and Justice Party. Mixing statements of facts with opinions, the Plaintiff cited “the common understanding of Organized Criminal Group” and stressed that the party had no criminal character. PiS demanded a public apology in the form of a pinned tweet, an injunction that the defendant refrains in future from any statements which imply that the activities of the party may be characterized as criminal, a payment of PLN 20,000 (approximately EUR 4,600) to a nominated charity organization, and the payment of all legal costs and the costs of legal representation.<sup>203</sup>

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<sup>199</sup> The Shift (2020) " Threats to Daphne Caruana Galizia increased before she died, friends testify", The Shift News, 26 February 2020, <https://theshiftnews.com/2020/02/26/threats-to-daphne-caruana-galizia-increased-before-she-died-friends-testify/>

<sup>200</sup> Caruana Galizia, D. (2014) "The Police Minister Is A Liar. I Never Had A Protection Officer, Let Alone An Armed One", Running Commentary, Daphne Caruana Galizia's Notebook, 24 November, 2014, <https://daphnecaruanaGalizia.com/2014/11/the-police-minister-is-a-liar-i-never-had-armed-protection-i-never-even-had-an-unarmed-protection-officer-let-alone-an-armed-one/>

<sup>201</sup> CoE (2017) "Malta Economy Minister Issues four Libel Suits and Warrants Against Blogger Daphne Caruana Galizia", Media Freedom Alerts, 10 February 2017, [https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/22997320?p\\_p\\_state=pop\\_up](https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/22997320?p_p_state=pop_up)

<sup>202</sup> Article 19 (2019)

<sup>203</sup> Morijn, J. (2000)





Wojciech Sadurski has also been sued in Warsaw by the Polish public television TVP, under Article 212 of the Criminal Code on defamation on 21 January 2019. The indictment is based on an allegation that he committed intentional and deliberate defamation of TVP by saying, again in a Tweet, that Gdańsk Mayor Mr Paweł Adamowicz, who was murdered in Gdańsk on 13 January 2019, was killed after he had been hounded by governmental media, and that no democrat and opposition politician should enter the premises of that Goebbelsian media company. TVP has also brought a civil defamation suit demanding Sadurski to pay PLN 10,000 (approximately EUR 2,300) to a charity.<sup>204</sup> Going considerably beyond the amount of compensation, TVP also demands an advertisement with an apology on the homepage of the main Polish news portal, at an estimate of a price PLN 90000.

Proceedings against Sadurski were also launched by the public prosecutor based on Article 226 of the Criminal Code for the crime of insult of a public official, Jarosław Kaczyński, leader of the ruling party Law and Justice. The process was discontinued by the public prosecutor's office. Even though this case is no longer pending, the sheer fact that it had been launched may add to the picture of legal harassment and intimidation.

### Evaluation

Academics who traditionally participate in democratic public discourse are regularly attacked by SLAPP-like lawsuits in Member States that abandon the path of the rule of law and liberal democracy. The Hungarian government carried out a coordinated strategy on curbing academic freedom, for example by banning gender studies from the offered subjects<sup>205</sup>, forcing Central European University to leave Hungary or close<sup>206</sup>, taking control of the funding of the Hungarian National Academy of Sciences<sup>207</sup>, and many other legislative measures which take a toll on the higher education<sup>208</sup>.

Some of these cases ended at the ECtHR.<sup>209</sup> Famous democrat and political philosopher János Kis was sued by the General Prosecutor Péter Polt for having called him the “servant of Orbán rather than of the public” – the plaintiff appealed against the unfavourable decision, but the defendant won the procedure at both instances.<sup>210</sup> Writer István Eörsi was sued by Mária Schmidt, a prominent historian of the official governmental policy, because he had called her a “history-forger businesswoman” and immoral; the public figure won damages of EUR 1,000.<sup>211</sup>

### ***CASE STUDY 5 – Hungary: vexation of civil activists***

Early in the morning on a Tuesday, 8 September 2014, twenty special policemen from the country's investigative unit showed up at the Ökotárs office in Budapest. The environmental NGO was the one

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<sup>204</sup> Article 19 (2019)

<sup>205</sup> Wilson, L. (2018) and Gall, L. (2018a).

<sup>206</sup> Gall, L. (2018b), Bárd, P. (2017).

<sup>207</sup> Gall, L. (2019) and BBJ (2019).

<sup>208</sup> Bárd, P. (2018), and Ziegler, T.D. (2019).

<sup>209</sup> *Ungváry v. Hungary*, no. 64520/10, and *Kenedi v. Hungary*, no. 31475/05. Both applicants were historians.

<sup>210</sup> *ÉS* (2014)

<sup>211</sup> HVG, (2004)



which distributed Norway Funds<sup>212</sup> to other NGOs in Hungary. “The raid has been considered as disproportionate and unnecessary”, - said Veronika Móra, the leader of Ökotárs whose home was also searched by the police and her personal laptop was confiscated.<sup>213</sup>

A year before NGOs which were considered to “serve foreign interests” were listed by the government-friendly weekly *Figyelő*,<sup>214</sup> and since then civil society organisations have been under fire.

The peak of the anti-NGO rhetoric campaign was the infamous speech by Prime Minister Viktor Orbán on 26 July 2014 when he declared that his government is building an “illiberal state”, and referred to NGOs as “paid political activists who are trying to help foreign interests”.<sup>215</sup>

In May 2014, the government requested the Government Control Office (GCO) to launch an audit how Ökotárs manages the funds which it shall distribute. According to FMO, GCO had the right to audit only state financial affairs and not NGOs'.<sup>216</sup>

In June 2014, the GCO delivered an on-site audit at the Foundation and requested project documentations (with a noticeably short deadline) from almost 60 NGOs, supported by the Norway Fund. Some of the NGOs questioned the legal basis of the audit but complied with the request (taking also into account that the GCO may suspend their tax numbers in case of non-cooperation). Four NGOs decided to make project documentation available on their websites instead of submitting it to the GCO.

Ökotárs did not comply with the repeated request, so along the above described raid and seizure of laptops and documents, a criminal procedure was launched against it with the accusation of “fraud and fraudulent misuse of funds” and “unauthorized financial activities”.<sup>217</sup> The Norwegian authorities expressed their deep concern officially and condemned the police raid as “completely

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<sup>212</sup> Hungary receives aid from the so-called Norwegian Grants as a result of an agreement that Norway, Iceland, and Lichtenstein signed in, the “Agreement on the European Economic Area,” which allowed these three non-EU states to join the common market of the European Union. Joining the single EU market was financially beneficiary to these countries because their products were no longer subject to tariffs. In return, the three countries agreed to extend aid, mainly to less developed countries of the Union. Hungary received appr. 300 million EUR since 2004. (Source: <https://eeagrants.org/countries/hungary>) The larger portion of this sum that was spent under the supervision of the Hungarian government, while a smaller portion (called Norwegian Civic Fund) was handled by an NGO called Ökotárs Alapítvány. The organization was chosen by a Brussels-based office to be the lead NGO in disbursing funds within Hungary. See: Hungarian Spectrum (2014) "The Latest Scandal: The Orbán Government And The Norway Fund, 2 June 2014. <https://hungarianspectrum.wordpress.com/2014/06/02/the-latest-scandal-the-orban-government-and-the-norway-fund/>

<sup>213</sup> Independence of Civil Society threatened by Orbán’s Government in Hungary, while the EU looks the other way, website of the Environmental Partnership Association, <https://www.environmentalpartnership.org/News/News-Independence-of-Civil-Society-threatened-by-O>

<sup>214</sup> HHC - Eötvös Károly Institute - TI - HCLU: Timeline of Governmental Attacks Against Hungarian Ngo Sphere", website of the Hungarian Helsinki Committee, 12 August 2015, [https://helsinki.hu/wp-content/uploads/Timeline\\_of\\_gov\\_attacks\\_against\\_HU\\_NGOs\\_short\\_12082015.pdf](https://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_12082015.pdf)

<sup>215</sup> Szuleka, M. (2018) "First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland" CEPS Research Paper, 24 April 2018, <https://www.ceps.eu/ceps-publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies/>

<sup>216</sup> The secretariat of the donor countries (the Financial Mechanism Office, FMO) states that the audit is in breach of the respective agreements. (See: Hungarian Spectrum (2014) "Assault on the Ökotárs Foundation in Charge of Disbursement of the Norwegian Civic Fund", 8 September 2014, <https://hungarianspectrum.wordpress.com/2014/09/08/assault-on-the-okotars-foundation-in-charge-of-disbursement-of-the-norwegian-civic-fund/>

<sup>217</sup> Ökotárs declared that it has given bridging loans to NGOs from its own capital to help with the financing of their EU-projects while fundings were in delay, but it did not benefit from this activity which was included in its public reports, and it was not related to the EEA/Norway Grants NGO Fund.



unacceptable".<sup>218</sup> The scope of the state audit was extended to other funds received in the framework of interstate agreements, and GCO initiated a criminal procedure, requested an extraordinary tax audit which resulted in the tax number suspension (equal to suspension of operation).<sup>219</sup>

On 23 January 2015 the court found the police raid and the seizures unlawful.<sup>220</sup> A month later the court allowed all the affected NGOs<sup>221</sup> to continue their operation.<sup>222</sup> The investigation concluded on 30 June 2015 that only administrative irregularities were found.<sup>223</sup> Meanwhile, the court filed a request to the Constitutional Court<sup>224</sup> for the constitutional review of GCO investigation and its decision suspending the organization's tax number.

After the 2007-2014 period for the Norway Funds has been officially closed in 2014,<sup>225</sup> the third grant cycle 2014-2021 has been suspended, because the Hungarian government could not agree with the Norway Fund, as the Norwegian government insisted to have an independent NGO in the redistribution of the fund.<sup>226</sup>

The government's rhetorical campaign and harassment resulted in a hostile environment, psychological and legal burden, and the loss of substantial funding for civil society.<sup>227</sup> This was followed by yet another attack: the Lex NGO adopted in June 2017.<sup>228</sup> This increased the already existing requirements of submitting detailed annual financial and narrative reports to the court (in force since 2011). The new law obliged any association or foundation receiving financial support from a foreign state above the amount of 9 million HUF per year (approximately 23,000 EUR) to register with the Hungarian authorities as 'organisation supported from abroad', and to show this label on

<sup>218</sup> Hungarian Spectrum (2014) "Assault on the Ökotárs Foundation in Charge of Disbursement of the Norwegian Civic Fund", 8 September 2014, <https://hungarianspectrum.wordpress.com/2014/09/08/assault-on-the-okotars-foundation-in-charge-of-disbursement-of-the-norwegian-civic-fund/>

<sup>219</sup> The Foundation requested a judicial review of the decision suspending their tax number.

<sup>220</sup> In February, an independent evaluation, ordered by the FMO concluded that the "selection of the current Fund Operator in Hungary has been an excellent one" and that it is "of critical importance that the NGO Programme in Hungary continues its implementation independently from the Government and operated by the current consortium". See: HHC - Eötvös Károly Institute - TI - HCLU: Timeline of Governmental Attacks Against Hungarian Ngo Sphere", website of the Hungarian Helsinki Committee, 12 August 2015, [https://helsinki.hu/wp-content/uploads/Timeline\\_of\\_gov\\_attacks\\_against\\_HU\\_NGOs\\_short\\_12082015.pdf](https://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_12082015.pdf)

<sup>221</sup> As NGOs which received funds from Ökotárs were also suspended.

<sup>222</sup> HHC - Eötvös Károly Institute - TI - HCLU: Timeline of Governmental Attacks Against Hungarian Ngo Sphere", website of the Hungarian Helsinki Committee, 12 August 2015, [https://helsinki.hu/wp-content/uploads/Timeline\\_of\\_gov\\_attacks\\_against\\_HU\\_NGOs\\_short\\_12082015.pdf](https://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_12082015.pdf)

<sup>223</sup> Ibid.

<sup>224</sup> The Court decided that the procedures of the Government Audit Office were in harmony with the Fundamental Law. The decision was published in October 2015. See: About Hungary (2016) "The Case of the Norway Grants and NGOs in Hungary", 21 February 2016, <http://abouthungary.hu/issues/the-case-of-the-norway-grants-and-ngos-in-hungary/>

<sup>225</sup> Ibid.

<sup>226</sup> The irony of the harassment of Ökotárs Foundation is when its mandate as grant distributor expired in 2017, they were awarded with a prize given by the Prime Ministerial Office for the excellence of the work they carried out. Horváth, B (2017) "Orbán utasítására vegzálták, most a Miniszterelnökség kitüntetését kapta meg a norvég civil pénzek kezeléséért az Ökotárs Alapítvány", 444, 29 November 2017, <https://444.hu/2017/11/29/orban-utasitasara-vegzaltak-most-a-miniszterelnokseg-kitunteteset-kapta-meg-a-norveg-civil-penzek-kezeleseert-az-okotars-alapitvany>.

<sup>227</sup> The civil society was to get a minor portion of the 220 million EUR grant which would have been used to fund development in Hungary between 2014-2021.

<sup>228</sup> Act LXXVI of 2017 on the transparency of foreign funded organisations adopted on 13 June 2017. <https://net.jogtar.hu/jogszabaly?docid=a1700076.tv>



their websites and in all their publications. The effected NGOs were listed in a publicly accessible electronic database. The reasoning and preamble of the law implied that such NGOs were a threat to national security and linked them to terrorism.<sup>229</sup> The AG Opinion on the Lex NGO case acknowledged that state interests such as public policy and the fight against money laundering and terrorist financing may justify rights limitations, however it also stressed that these legitimate objectives do not make a piece of law permissible that imposes *ex ante* restrictions on all NGOs receiving foreign funds above a certain amount.<sup>230</sup> The Opinion also underlined that EU laws on the fight against money laundering and against terrorist financing – as opposed to the Hungarian government’s claim – are sufficient guarantees, and therefore the impugned measures are unnecessary.<sup>231</sup> Albeit this is not a SLAPP case, there are similarities in the line of the state’s reasoning with SLAPP suits: in both cases an abusive interpretation of laws is followed.

The listed actions by law enforcements – police raid, state audit controls and accusations toward the operator of the grants and the beneficiaries claiming they serve political and foreign state interests – and the new law resulted in growing tension in the civil sector and had a chilling effect - not only on the targeted organisations, but also among their potential clients as well as their donors and supporters in general.<sup>232</sup>

### Evaluation

The cases illustrate that not only journalists, but also civil associations can be targets of harassment for their public participation, as acknowledged by ECtHR (*Steel and Morris v. UK*, no. 68416/01). The lawsuit proved to be meritless, and independent sources argued that Lex NGO was also superfluous because of the already existing transparency requirements which were generally respected by the NGOs. Both the lawsuit against Ökotárs and Lex NGO aimed at vexation of the civil organisation and to have a chilling effect on their activities, as well as to harm their social reputation.

Through the legal tools of the legislative and of the executive powers, the Hungarian government has been exerting a constant pressure on the whole of the Hungarian civil sector, from a financial, administrative, and emotional aspect. It has deprived independent NGOs from funding, and discouraged employees in the public sector (such as teachers) to participate in civil society organisations for fear of retaliation.

These cases represent those types of SLAPP suits, where an individual or private actor faces the authorities, and even more dramatically, when legislative power is misused to exert a chilling effect on public participation. Such processes cannot be fought against from within the national arena, as the goal of the processes are precisely to divert such opposition. International organisations would

<sup>229</sup> Bárd, P. (2020) "The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name", *Verfassungsblog*, 27 January 2020, <https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name>

<sup>230</sup> AG Opinion, delivered on 14 January 2020 in the Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:1, paras. 137. ff.

<sup>231</sup> *Ibid*, at para. 146.

<sup>232</sup> Szuleka, M. (2018) "First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland" *CEPS Research Paper*, 24 April 2018, <https://www.ceps.eu/ceps-publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies/>



have better chances to raise awareness, and fund independent actions – even if in these cases, the legislative and executive interventions aim precisely to fight back such “foreign” interference.

The effected NGOs and the Norwegian government urged an official EU statement as well as a diplomatic intervention on this matter, but the EU did not comment on the issue.<sup>233</sup>

From the perspective of the EU, as the Advocate General in the infringement cases held, Lex NGO violates free flow of capital, as the harsh transparency requirements may withdraw EU donors from donating to Hungarian NGOs, it violates the donor's right to protection of personal data, and the law exerts a chilling effect on the freedom of association.

### **CASE STUDY 6 – France: Pierre Alain Mannoni and SLAPPs-like ‘criminalisation of solidarity’ cases**

‘Criminalisation of Solidarity’ cases are similar to the case of NGOs in Hungary who have been arrested and prosecuted under various vague criminal law provisions. Many well-known organisations, like MSF, Save the Children, MOAS have been experiencing meritless prosecutions or intimidation and harassment, surveillance on the vague grounds of ‘facilitating irregular migration’. This example shows how citizens showing actions of compassion can be intimidated via SLAPP’s like litigation strategies.

Pierre Mannoni is a researcher and teacher, living in France, Roya Valley. In October 2015, he had been stopped and arrested as he gave a free ride with his car to Eritrean asylum seekers, three women and a child, who irregularly crossed from Italy into France. He also intended to lodge them in his apartment for the night.<sup>234</sup> French prosecutors have accused him of ‘facilitation of irregular entry’ migrants.

The first-instance court acquitted him, elaborating that “he had “no other intention than to offer them a night of safety and thereby preserve their dignity,” and also that he had no direct or indirect benefit resulting from his activity.<sup>235</sup> Pierre Mannoni received media attention, where he expressed that he found his activities moral and commendable, for instance: “In France today we have the right to save people in distress”.<sup>236</sup>

The prosecutors have appealed claiming that Pierre Mannoni was an activist, and therefore the ‘material benefit’ for him has been advancing his cause.<sup>237</sup> This appeal has led to a sentence of two months in prison by the Aix-en-Provence Court of Appeal. His lawyer has appealed and in December

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<sup>233</sup> Vidar Helgesen, the Norwegian minister of EU-affairs in 2014 held that “the EU should demonstrate in no uncertain terms that it will not accept the re-establishment of an illiberal state within its borders”. Hungarian Spectrum (2014) "The Latest Scandal: The Orbán Government And The Norway Fund, 2 June 2014. <https://hungarianspectrum.wordpress.com/2014/06/02/the-latest-scandal-the-orban-government-and-the-norway-fund/>

<sup>234</sup> ‘French Court Acquits Researcher of Aiding Eritrean Migrants’. RFI, 7 Jan. 2017, <http://www.rfi.fr/en/france/20170107-french-court-acquits-researcher-aiding-eritrean-migrants>.

<sup>235</sup> ‘French Court Acquits Researcher Who Helped Illegal Migrants Find Shelter’. France 24, 6 Jan. 2017, <https://www.france24.com/en/20170106-french-court-acquits-researcher-mannoni-illegal-migrants-nice-roya-valley>.

<sup>236</sup> ‘French Court Acquits Researcher of Aiding Eritrean Migrants’. RFI, 7 Jan. 2017, <http://www.rfi.fr/en/france/20170107-french-court-acquits-researcher-aiding-eritrean-migrants>.

<sup>237</sup> Vosyliūtė, L. (2019) “How could strategic litigation prevent policing of humanitarianism?”, ReSOMA Policy Options Brief, December. [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/POB%20Strategic%20Litigation.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/POB%20Strategic%20Litigation.pdf)



2018, the Court of Cassation “quashed the sentence and ordered a new appeal hearing”.<sup>238</sup> In January 2020, the decision to acquit Pierre Mannoni was appealed by state prosecutor before the Lyon Court of Appeal for the fourth time, and the case is still pending and if convicted, he would face 5 years of prison.

This case is not based on the issue of defamation, but on the vague criminal law provision on ‘facilitation of irregular migration’. The strategy of meritless and lengthy litigation that aims at the exhausting defendant, silencing his speech and his activities. It is also, creating broader chilling effects among the citizens and NGOs who were upholding the human dignity of irregular migrants and asylum seekers in France and across the EU.

Despite that three times, court has ascertained that Pierre Mannoni was innocent and acted for the public good ‘upholding the human dignity of others’, the state prosecutors continued to appeal the case.<sup>239</sup> Mannoni’s lawyer was concerned that other times prosecutors went on to appeal without fully informing the client of whether and what kind of additional or new accusations were, thus violating fair trials guarantee ‘the equality of arms’. Even if Mannoni eventually wins the case, the lawyers’ fees remain his responsibility, since state does not compensate legal fees. The case has been ongoing for 5 years already. It could have been closed after less than two years in January 2017 when first instance court issued the decision. Therefore, just like in other SLAPP cases, time, lawyer’s fees and reputation of the defendant are all relevant stakes, besides broader legal uncertainty in the society and chilling effects among citizens and volunteers who are assisting irregular migrants and asylum seekers for human rights and humanitarian motives.

### Evaluation

Pierre Mannoni case is SLAPPs-like, as it aims to produce wider chilling effects, among other freedoms, on freedom of speech and expression. To illustrate the point, the parallel could be drawn with ECtHR case *Ali Gürbüz v Turkey*, in light of Article 10, where ECtHR has ruled that:

“The automatic application of the law prohibiting the publication of any statement emanating from a terrorist organisation, regardless of its actual content or context, had entailed seven sets of criminal proceedings, brought against the applicant for similar facts over a two-year period. Those proceedings, on account of their number and duration – up to seven years –, were capable of having a chilling effect on freedom of expression and public debate, by intimidating the applicant and discouraging him from publishing articles on questions of general interest. Those criminal proceedings had consisted in themselves of genuine and effective constraints.”

The Pierre Mannoni has been litigating for 5 years (3 of which appeals). He is accused of ‘facilitation of irregular entry/transit’ what could mean at least 5 years of prison. The case aimed at producing broader chilling effects among the French citizens so that they would be less likely to help people in need, during the time of litigation. In this way, it suppressing wide-range of behaviours that are moral,

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<sup>238</sup> ReSOMA (2020) The criminalisation of solidarity in Europe, ReSOMA Infographic, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/FSR%20Strategic%20Litigation\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/FSR%20Strategic%20Litigation_0.pdf).

<sup>239</sup> ReSOMA (2020) The criminalisation of solidarity in Europe, ReSOMA Infographic, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/FSR%20Strategic%20Litigation\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/FSR%20Strategic%20Litigation_0.pdf).



necessary and proportionate within the democratic society – from giving food, lift, shelter to irregular migrants and asylum seekers who do not (yet) have the authorisation to be in a country. His alleged ‘crime’ does not have any criminal motive, such as profit or invoke harm to people. Judges have recognised his acts as civic duty. In addition, these acts fall in the freedoms protected by the EU Charter of Fundamental Rights and the European Convention of Human Rights - freedom of conscience, freedom of speech and information, freedom of assembly and association when aim is to uphold the dignity of irregular migrants.

His acquittals were also accompanied by a smear campaign from the right-wing politicians. For instance, after first instance decision in 2011 The right-wing president of the Riviera region, “Christian Estrosi, said on Facebook that Friday's ruling was "an insult to the work of the security forces who put their life in danger to protect ours” and also portraying irregular migrants as potential jihadists. Thus, Mannoni and similar citizens were also portrayed as kind of ‘enemies of the state’. Indeed, in this and similar ‘criminalisation of solidarity’ cases the first instance court seems to generate a debate on what is a public good ‘upholding human dignity of others’ or ‘preventing irregular migration’. The media have portrayed that some mobilisations happened after the initial Cedric Herrou case and have dubbed the Roya valley – ‘rebbel valley’.<sup>240</sup> Similarly, the Anouk van Gestel and ten other volunteers and migrants that are active in Citizens’ Platform (Plateforme Citoyenne), have been accused in Belgium.<sup>241</sup> The very prosecution thus aims to intimidate and silence not only a concrete individual but to ‘re-label’ all ‘solidarity with migrants’ movement, that people like Pierre or Anouk happened to represent precisely because of the state accusations against them. Such cases have polarised society by making mobilisations for and against solidarity with migrants more visible.<sup>242</sup>

This point brings us back to the issues of freedom of expression. The case shows how the definition of ‘public good’ or ‘public interest’ can be contested even between judges and prosecutors. In this debate, the Governments and certain parties in the power position, attempt to have monopoly of the definition of ‘what should be seen as public good?’. It also seems that prosecutors also were continuing appeals, not because there was a new evidence, but because the context evolved - as a way to silence and intimidate the mobilisations of citizens and volunteers that came together after initial accusations. Such an attempt to silence competing ideas is in contradiction of EU values. First of all, the EU law is clear that border controls must be conducted in compliance with Fundamental Rights, and the Fundamental Rights Charter, where dignity is guaranteed for everyone, despite the irregular status. Moreover, freedom of speech, association and assembly are cornerstones of the European democracy. Thus, European citizens coming together are ensuring that State’s actions are complying with moral and legal standards and EU’s own definition of ‘public good’ - fundamental rights.

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<sup>240</sup> ‘French Court Acquits Researcher Who Helped Illegal Migrants Find Shelter’. France 24, 6 Jan. 2017, <https://www.france24.com/en/20170106-french-court-acquits-researcher-mannoni-illegal-migrants-nice-roya-valley>

<sup>241</sup> Conte, C. and S. Binder (2019) “Strategic litigation: the role of EU and international law in criminalising humanitarianism”, ReSOMA Discussion Brief, July. [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/Discussion%20Policy%20Briefs%20-%20Strategic%20Litigation.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Discussion%20Policy%20Briefs%20-%20Strategic%20Litigation.pdf)

<sup>242</sup> Carrera, S., J. Allsopp and L. Vosyliūtė (2018), “Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism”, International Journal of Migration and Border Studies, vol. 4/3. 9 August.



ReSOMA H2020 research has identified that national laws criminalising ‘facilitation of irregular migration’ that are transposing so-called EU Facilitators Package have been widely misused against human rights defenders, citizens and volunteers.<sup>243</sup> In the period between 2015 and 2019, researchers identified 171 individuals investigated or prosecuted on these grounds in 14 countries across the EU.<sup>244</sup>

Just like in other SLAPP cases are the litigants’ wants to suppress freedom of speech and other expressions, such as acts of solidarity. However, in ‘Criminalisation of Solidarity’ cases and the Hungarian case of vexing NGOs, the litigant is the State. In these cases, State prosecutors are continuing appeals on the ‘meritless’ cases with likely outcome of acquittal.

The ReSOMA research found that majority of ‘solidarity’ cases on the ground of ‘facilitation of irregular entry/ stay/ residence’ ended up in acquittals. Often they were politically motivated, started in the absence of evidence, or simply could not pass the criminal justice threshold of proving any harm or profit (the definition of crime does not require it either, but it becomes an issue of contention at courts).<sup>245</sup> The research indicated that ‘gap between prosecutions started and convictions’ combined with various violations of fair trial guarantees, is indicating a more systemic issue of misguided or politically motivated prosecutions.<sup>246</sup> Such prosecutions may amount judicial harassment of human rights defenders, since they were acting out of compassion for humanitarian, upholding human rights. Sometimes such citizens and volunteers are also witnessing and objecting police violence or state’s inaction on its International Law obligations, such as the obligation of rescue. For example, Italian Court of Cassation, in another famous case of Carola Rackete, Captain of Sea Watch 3, has eventually ruled, that she should not have been arrested in a first place. The Court of Cassation made this ruling after Prosecutor of Agrigento appealed against the first instance court’s decision to release her in July.<sup>247</sup> Nevertheless, former Minister of Interior, Minister Salvini has orchestrated a smear campaign against Carola Rackete and other SAR NGOs, also insulted courts as acting against state’s interests.<sup>248</sup> The EU Fundamental Rights Agency has been documenting judicial harassment against SAR NGOs, that included state brought actions of disciplining and also criminal charges, mainly based on crime of facilitation of irregular migration.<sup>249</sup> The smear campaigns around SAR NGOs as ‘migrant smugglers’, ‘pull factor’ were also linking back to this vague legal provision.

<sup>243</sup> Vosyliūtė, L. and C. Conte (2019) “Crackdown on NGOs assisting refugees and other migrants”, ReSOMA Final Synthetic Report, June. (<http://www.resoma.eu/node/194>).

<sup>244</sup> ReSOMA (2020) The criminalisation of solidarity in Europe, ReSOMA Infographic, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/FSR%20Strategic%20Litigation\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/FSR%20Strategic%20Litigation_0.pdf).

<sup>245</sup> Vosyliūtė, L. and C. Conte (2019) “Crackdown on NGOs assisting refugees and other migrants”, ReSOMA Final Synthetic Report, June. (<http://www.resoma.eu/node/194>).

<sup>246</sup> Vosyliūtė, L. (2019) “How could strategic litigation prevent policing of humanitarianism?”, ReSOMA Policy Options Brief, December.

<sup>247</sup> ‘Sea-Watch Captain Rackete Shouldn’t Have Been Arrested, Italian High Court Rules’. InfoMigrants, 21 Jan. 2020, <https://www.infomigrants.net/en/post/22223/sea-watch-captain-rackete-shouldn-t-have-been-arrested-italian-high-court-rules>.

<sup>248</sup> Hughes, R. (2019) ‘How This Ship Captain Took on Italy’s Strongman’. BBC News, 6 July 2019. [www.bbc.com](http://www.bbc.com), <https://www.bbc.com/news/world-europe-48853050>.

<sup>249</sup> European Union Fundamental Rights Agency (FRA) (2019) 2019 Update - NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations’. European Union Agency for Fundamental Rights, 19 June 2019, <https://fra.europa.eu/en/publication/2019/2019-update-ngo-ships-involved-search-and-rescue-mediterranean-and-criminal>.





The research has highlighted how lack of a clear and precise definition at EU level of ‘what is (not) a crime of facilitation’, leaves much discretion for national authorities and open doors to misuse such vague provisions against the ‘watch-dog’ civil society and in particular – Human Rights Defenders.<sup>250</sup> EU Agency for Fundamental Rights also found the issue particularly concerning, and issued official opinion that:

"Member States and the EU should pay increased attention when drafting and implementing legislation in areas which potentially (directly or indirectly) affect civil society space, including freedom of expression, assembly and association, to ensure that their legislation does not place disproportionate requirements on civil society organisations and does not have a discriminatory impact on them, thereby diminishing civil society space. In so doing, they should fully respect applicable EU and relevant international treaty law."<sup>251</sup>

Therefore, the European Commission is preparing guidelines on how the EU Facilitation directive should be interpreted in line with Fundamental Rights. Additionally, civil society has been calling for better monitoring via independent observatory. Civil society also called, for the Guidelines on Human Rights Defenders, as to ensure the environment conducive to the protection of fundamental rights, and therefore, to ensure the ‘watchdog’ function including on States’ accountability regarding their migration and border policies meeting rule of law and fundamental rights standards.

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<sup>250</sup> Vosyliūtė, L. (2019) “How could strategic litigation prevent policing of humanitarianism?”, ReSOMA Policy Options Brief, December.

<sup>251</sup> European Union Fundamental Rights Agency (FRA) (2018) “Challenges facing civil society organisations working on human rights in the EU”, January. ([https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-challenges-facing-civil-society\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf)). p.8, FRA opinion No.1.



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