

STUDY

Requested by the LIBE Committee



Open SLAPP Cases in 2022 and 2023

The Incidence of Strategic Lawsuit
Against Public Participation, and
Regulatory Responses in the
European Union



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The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union

Abstract

This study was commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament to analyse SLAPP cases and threats which were initiated in 2022 and 2023. The study provides a detailed analysis of the topics of public interest associated with the identified legal actions or legal threats, the cross-border implications of the public interest matter under dispute and, to the extent possible, information about victims, the cause of action, and litigation tactics engaged. Drawing on these findings, recommendations have been formulated on regulatory responses to SLAPPs.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

Brussels Ia	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)
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU Charter	The Charter of Fundamental Rights of the European Union (2000/C 364/01)
Proposed Directive	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) COM/2022/177
Rome II Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1
SLAPP	Strategic Lawsuit Against Public Participation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Strategic Lawsuit Against Public Participation (SLAPPs) refers to legal claims or threats of legal action that involve an abuse of process or right in matters concerning the defendant's exercise of their right to public participation on a matter of public interest. It is becoming increasingly apparent that SLAPPs present a threat to democracy, the rule of law, human rights, and the proper functioning of the European Union. This awareness has led to a number of initiatives to deter, remedy or penalise SLAPPs. In April 2022 the European Commission introduced a package of Anti-SLAPP measures, including a proposed Anti-SLAPP Directive covering SLAPPs in civil matters with cross-border implications. The proposed Directive is currently making its way through the legislative process.

This study was commissioned by the Committee of Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament to analyse SLAPP cases and threats which were initiated in 2022 and 2023. It is to be read in conjunction with an earlier study by the members of the Anti-SLAPP Research Hub at the University of Aberdeen, including one of the present authors.¹

The present study provides a detailed analysis of the topics of public interest associated with the identified legal actions or legal threats, and to the extent possible, information about claimants and defendants, the cause of action, and whether there was a cross border element. Drawing on these findings, recommendations have been formulated on regulatory responses to SLAPPs.

This study is based on a desk review of datasets that monitor SLAPPs. We rely primarily on three databases: the Council of Europe's Safety of Journalists Platform, Mapping Media Freedom, and the Business and Human Rights Resource Centre's SLAPPs database. In addition, consideration was given to the Coalition Against SLAPPs in Europe's (CASE) reports. Our analysis also referred to news articles which reported legal actions or threats of legal action against civil society actors. The search parameters were for legal actions or threats initiated between 1 January 2022 and 31 August 2023 in European Union Member States against civil society actors communicating on a matter of public interest that included one or more indicators of abuse.

The findings are subject to a number of limitations. Firstly, and most importantly, it is not possible to capture the full extent of the SLAPP phenomenon since claimants seek to have matters resolved at a pre-litigious phase without public scrutiny.² It follows that our analysis can only refer to the portion of SLAPPs which are reported. Furthermore, the data used is sourced from existing databases which adopt distinct methodologies and definitions of SLAPPs. Some of these databases rely on self-reporting by purported victims of SLAPPs, two of the databases focus only on media freedom and safety of journalists to the exclusion of other SLAPP targets, and the third database monitors SLAPPs initiated by business actors. As a result, the data presented in this study does not constitute a comprehensive compendium of legal actions or threats initiated between 1 January 2022 and 31 August 2023 against civil society actors communicating on a matter of public interest. Rather the study provides a snapshot of the current state of our knowledge on the problem of SLAPPs in the European Union during this discrete period.

¹ Justin Borg Barthet et al, "The Use of SLAPPs to Silence Journalists, NGOs and Civil Society" (2021) JURI Committee study PE 694.782 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf)> accessed 5 October 2023.

² See for example, commentary by Justin Borg Barthet et al (n 1); Dunja Mijatović, "Time to Take Action Against SLAPPs" (Council of Europe, October 2020) <<https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>> accessed 5 October 2023; Greenpeace, "Sued into Silence: How the Rich and Powerful Use Legal Tactics to Shut Critics Up" (July 2020) <<https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>> accessed 15 October 2023.

Finally, information relating to the quantification of damages claimed was not consistently available, and therefore these findings should be approached with caution and further information should be sought on this matter. Further, the authors are not in a position to determine whether the amount of damages are excessive in the abstract, rather excessive damages were only counted where this was mentioned in the database's reporting of a case.

The identified cases were categorised based on nine factors: the profile of the plaintiff, the profile of the defendant, the jurisdiction where the proceedings were initiated, the type of legal claim, the public interest involved, the litigation tactics engaged, the presence of a European element, the presence of an international element, and whether the case has a cross-border element.³

Findings

These findings should be read with the following caveats in mind. First, SLAPPs are, by their nature, an attempt to suppress information on public interest matters, and, therefore, the number of SLAPPs in Europe is likely to be substantially greater than the figures presented in this study. Second, individual cases and threats must be considered against the broader chilling effect SLAPPs have on the exercise of fundamental freedoms and the proper functioning of the European Union, democracy, the rule of law, and human rights.

Between 01 January 2022 and 31 August 2023, based on the databases searched, 47 legal actions against 102 defendants were identified. Political figures and public officials were the most common claimants, accounting for 42.6% of total claimants followed by companies (21.3%), legal professionals (10.7%), other individuals (8.5%), civil society (6.4%), political parties (4.2%), local government (4.2%), and States (2.1%).

While 47 cases were identified, these cases involved a total of 102 defendants. A relative majority of defendants were individual journalists (44.1%). Individual journalists were, at times, targeted even when the publication was published by a media outlet. It was not uncommon for both the media outlet and an individual journalist to be joined to the same legal action. Media outlets accounted for 28.4% of defendants, while editors-in-chief or directors of media outlets accounted for 7.8%. Non-governmental organizations amounted to 13.7%. The remainder of defendants were publishers (3%), followed by an activist (1%), a journalistic source (1%), and other individuals (1%).

The highest number of cases was recorded in Italy, with 25.5% of total cases. Spain (17%) and Greece (12.8%) had the second and third highest number of cases respectively. France and Bulgaria each had 10.6% cases. The remainder of cases were filed in Ireland (6.4%), Poland (4.3%), Croatia (4.3%), Austria (4.3%), Slovakia (2.1%), and Hungary (2.1%).

The majority of claims were founded in civil defamation laws, accounting for 74.5% of total cases. In relation to other civil claims, breach of trade secrets accounted for 2.1% of reported cases. Criminal defamation made up 14.9% of cases, while other criminal offences included breach of privacy (2.1%), criminal indecency (2.1%), hate crimes (2.1%) and the crime of offending religious sentiment (6.3%).

Many cases involved a communication which concerned multiple public interest matters. Of the 47 cases identified, the communications touched upon over 80 public interest matters including, corruption (40.4%), public procurement (2.1%), criminal justice and the legal system (23.4%), labour rights (6.4%), social housing (2.1%), migration (8.5%), taxation (4.3%), organised crime (12.8%), financial

³ This category was analysed by reference to the grounds of jurisdiction laid out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (hereinafter 'Brussels Ia').

crime (12.8%), international relations (14.9%), media pluralism (2.1%), privacy (6.4%), cybercrimes (2.1%), insurance (2.1%), health (2.1%), disinformation (2.1%), environment (8.5%), defence and security (8.5%), satirical political commentary (2.1%), and international crimes (12.8%). Reporting covered subject matter including strikes by undocumented workers on working conditions, the Russian war on Ukraine, the handling of the COVID-19 pandemic, the use of Pegasus spyware, prison conditions, capture of media, sexual offences, and pollution in the extractive sector.

Five litigation tactics were identified: multiple lawsuits, multiple targets, targeting an individual, excessive damages, and claims for moral damages. 74.5% of cases targeted an individual while 44.7% of cases targeted multiple natural or legal persons and 10.6% involved multiple lawsuits concerning the same public interest matter. Moral damages were claimed in 4.3% of cases. Information relating to the quantification of damages claimed was not consistently available, and therefore these findings should be approached with caution and further information should be sought on this matter. Further, the authors are not in a position to determine whether the amounts of damages are excessive in the abstract; rather excessive damages were only counted where this was mentioned in the relevant database's reporting of a case. With this limitation in mind, excessive damages were claimed in 10.6% of cases.

We adopt a definition of "European element" with reference to matters which are of public interest to more than one Member State. On this basis, we include matters which impact upon the functioning of the internal market, or which affect matters falling within the Union's legislative competence. On this basis, we find that 85% of total cases had a European element. Matters which were categorised as a European element included, anti-money laundering, EU-Russia relations, misuse of EU grants, cybersecurity, migration, extradition, financial supervision, organised crime, and drug trafficking.

International element was defined as a matter which is relevant to the economic or political activity of a third State, related to a matter of public interest of significance to the governance of a third State, involved a legal or natural person resident in a third State, or related to the functioning of the international economic or political order. Based on this definition, 44.6% of total cases had an international element. Matters which were categorised as having an international element included, EU-Russia relations, undocumented workers, extradition, organised crime, international drug trafficking, international abduction, money laundering, war crimes and crimes against humanity. In addition, a number of cases were classified as having an international element due to the ownership structure of the claimant company or the nationality of the claimant.

For the purposes of this study, the cross-border category was assessed based on grounds of jurisdiction in the Brussels Ia Regulation (or "the Brussels Regulation").⁴ Under the general rule on jurisdiction contained in the Brussels Ia Regulation, and in the absence of a jurisdictional agreement between the parties, defendants in civil and commercial matters shall be sued in the place of their domicile.⁵ In addition, in matters relating to a tort or delict, the claimant may also bring proceedings in the place in which the harmful event occurred, which is to be understood either as the place where the harm originated or was felt.⁶ When analysing whether one of these conditions was met we referred to the facts of the case, not the nature of the specific claim deployed. Based on this criterion, 91.4% of total cases had a cross-border element.

⁴ Ibid.

⁵ Ibid Article 4.

⁶ Ibid Article 7(2); see also Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* ECLI:EU:C:1995:61.

14 legal threats were identified with links to, Spain (2), Luxembourg (4), Poland (1), France (3), Italy (3), and Malta (1). Seven threats were made on behalf of companies, two by politicians, one by a political party, one by a political commentator, two from non-profit organisations, and one by a businessperson with a private limited company registered in the United Kingdom, and connections to India, Canada, the United States, Malta, Dubai, Montenegro and Russia. The matters which were the subject of these threats of legal action ranged from environmental pollution and corruption, the misuse of state subsidies, and fraudulent activity in public procurement projects.

Summary of Recommendations

Summary of Recommendations	
Recommendation 1	Provide a clear definition of cross-border implications which reflects the potential for a public interest matter to have relevance for (or connections to) multiple member states and for the overall governance of the Union
Recommendation 2	Remove reference to the claimant's motivation or purpose in bringing the dispute and instead focus on (i) the existence of an act of public participation and (ii) the litigation tactics used by the claimant
Recommendation 3	Extend the remedy of early dismissal to all abusive court proceedings against public participation. If this recommendation is not implemented, it is suggested that the final Directive clarify that the remedies available in abusive court proceedings are equally available in manifestly unfounded court proceedings.
Recommendation 4	Extend the non-exhaustive list of indicators of abuse to include: an inequality of arms between the parties, targeting individuals, or targeting multiple legal or natural persons.
Recommendation 5	Take action to recommend the decriminalisation of speech across Member States
Recommendation 6	Revise the Brussels Ia and Rome II Regulations to provide greater predictability regarding jurisdiction and applicable law in matters relating to speech.
Recommendation 7	Continue to provide recommendations to Member States on appropriate legislative and non-legislative protections for SLAPP targets that fall outside the scope of a final Anti-SLAPP Directive
Recommendation 8	The final Directive should make explicit that it provides minimum standards, and that Member States may opt for greater protection. When transposing the final Directive, Member States should consider

	the Council of Europe recommendation alongside the Commission's Recommendation (EU) 2022/758 and existing model laws which align with their specific legal traditions.
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Based on the data analysed, this study includes a number of recommendations for the consideration of legislators. We note in particular that the success of a future anti-SLAPP Directive is contingent on the articulation of key terms in language which is sufficiently clear and precise to ensure the adoption of common minimum standards of protection throughout the Union.

To this end, we recommend that an Anti-SLAPP Directive should include a sufficiently broad definition of cross-border implications, to reflect our finding that the public interest matter under dispute is frequently relevant to multiple Member States and to the overall governance of the Union. This would align the directive with the general principle of legal certainty and limit the advantage which could accrue to abusive claimants through forum shopping.

In addition, rather than focusing on the claimant's motive or purpose in bringing an action, a future Anti-SLAPP Directive should focus exclusively on (i) the existence of an act of public participation and (ii) the litigation tactics used by the claimant. Reference to the claimant's motivation is not only unhelpful in that it detracts from the focus on the respondent's public participation, but could also constitute an insuperable evidentiary burden for the respondent. We therefore recommend that the defendant's motivation should not constitute an essential element of a SLAPP.

We also note that the Proposed Directive restricts the remedy of early dismissal to cases in which the claim in the main proceedings is manifestly unfounded. Furthermore, the Council proposes to define manifest unfoundedness as "so obviously unfounded that there is no scope for any reasonable doubt." Early dismissal is a central plank of anti-SLAPP legislation, the limitation of which would have deleterious effects on the efficacy of a future instrument. A requirement of manifest unfoundedness would constitute an insuperable hurdle to the deployment of early dismissal in each of the cases in the datasets we have analysed. This would be exacerbated by the inclusion of a common, restrictive definition of the sort proposed by the Council. It follows, in our view, that the retention of a requirement of manifest unfoundedness for early dismissal would limit access to this remedy to an exceedingly limited class of cases.

In relation to indicators of abuse, the data analysis suggests that inequality of arms as between claimant and respondent is of particular concern. We recommend that the legislator consider including inequality of arms as an indicator of abuse, albeit not one which is conclusive in its own right, particularly in relation to respondents sued in their personal capacity. We further observe that SLAPPs claimants often target individuals and/or multiple defendants, and initiating multiple lawsuits.

We also note, in relation to the scope of a future anti-SLAPP Directive, that the limitation of anti-SLAPP measures to matters of a civil or commercial nature. As criminal law is excluded and a number of Member States continue to criminalise defamation and the crimes of hate speech have grounded SLAPPs, it is important that the Commission recommend, through the means available to it, the decriminalisation of speech in Member States.

Furthermore, given defamation is excluded from the Rome II Regulation and bespoke rules relating to defamation are absent from the Brussels Ia Regulation, the adoption of an Anti-SLAPP Directive would not of itself remove the potential for private international law rules to be used to increase the psychological and financial burden of defending abusive lawsuits against public participation. It is

therefore recommended that the Brussels Ia and Rome II Regulation be recast with a view to providing greater predictability as to the exercise of jurisdiction and the applicable law.

Finally, we also recommend that soft law measures be deployed to sound effect, and that the Commission consider whether provisions of its Recommendation merit legislative intervention.

1. GENERAL INFORMATION

KEY FINDINGS

This Chapter provides an overview of trends relating to SLAPPs in Europe and worldwide and surveys current regulatory response at the European Union.

Strategic litigation against public participation or SLAPPs are legal actions or threats of legal action that relate to a communication on a matter of public interest and engage abusive litigation tactics. SLAPPs use the judicial process for purposes other than genuinely asserting, vindicating or exercising a right. They suppress a communication on a matter of public interest and produce a broader chilling effect on free speech.

SLAPPs are on the rise in both Europe and globally. In August 2023, the Coalition Against SLAPPs in Europe (CASE) published a report which presented data on the number of SLAPPs filed around Europe (EU and non-EU Member States) from 2010 to 2023. This report updated earlier research and found that cases had increased from 570 in 2022 to 820 in 2023 – an increase of 161.

The growing awareness of the threat SLAPPs present to democracy, the rule of law, human rights, and the proper functioning of the European Union has led to a number of initiatives to deter, remedy or penalise SLAPPs. In April 2022 the European Commission introduced a package of Anti-SLAPP measures, including a proposed Anti-SLAPP Directive covering SLAPPs in civil matters with cross-border implications. The proposed Directive provides for procedural safeguards and remedies, including early dismissal, compensation for damages, costs awards, dissuasive penalties, and protections against third country judgments.

The proposed Directive is currently making its way through the legislative process, with the Council (Justice and Home Affairs) approving a General Approach on 9 June 2023 and the European Parliament adopting its negotiating position on the proposed directive on 11 July 2023.

Strategic litigation against public participation or SLAPPs use the judicial process for purposes other than genuinely asserting, vindicating or exercising a right. They tend to suppress a communication on a matter of public interest and produce a broader chilling effect on free speech. Often, SLAPPs are filed by powerful private, corporate or political actors, and target activists, non-profit organizations, journalists, and media organizations who speak out on matters of public concern. As a result, they typically involve an inequality of arms between the disputing parties and transform matters of public interest into private disputes in which one party is able to deploy resources to secure advantages.

SLAPPs are not limited to specific categories of claim and can take a variety of forms including both civil and criminal claims. However, defamation claims, privacy actions, copyright infringement, and data protection are common routes.⁷ SLAPPs are characterised by an abuse of judicial process, including exaggerated or unfounded claims for damages, amending, or withdrawing claims or pleadings, and exploitation of appeals procedures. In short, SLAPP pursuers rely on the procedural costs associated with defending an action and the threat of disproportionate damages to frustrate the

⁷ Foreign Policy Centre, "Unsafe for scrutiny: examining the pressures faced by journalists uncovering financial crime and corruption around the world" (November 2020) < <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf> > accessed 2 September 2023.

defender's genuine exercise of their right to public participation.⁸ Consequently, SLAPPs may be understood as "punishment by process". For this reason, reforming the content of substantive legal rules may not be sufficient to deter abuses of legal process.

Another feature of SLAPPs is the engagement of "forum shopping". The psychological cost of international litigation and the uncertainty arising from a lack of familiarity with foreign law and procedure are deployed by pursuers to exact economic and psychological advantage over potential defenders. Therefore, private international law rules have a significant impact on the SLAPP culture of a legal system.

In August 2023, the Coalition Against SLAPPs in Europe (CASE) published a report which presented data on the number of SLAPPs filed around Europe (EU and non-EU Member States) from 2010 to 2023. This report updated earlier research by CASE, and found that cases had increased from 570 in 2022 to 820 in 2023 – an increase of 161.⁹ In 2021, the Business and Human Rights Resource Centre identified 355 SLAPPs brought or initiated by business actors since 2015.¹⁰ Similarly, in 2020 the Foreign Policy Centre (FPC) conducted a global survey of threats to journalists and found that legal threats were pervasive and having the greatest impact on journalists' ability to continue reporting.¹¹ On this point, a recent study by the Thomson Reuters Foundation found that 47.6% of surveyed respondents had reported that they or their media organisation had been threatened with legal action as a result of their journalism.¹² Overall, these studies evidence a concerning increase in the number of reported SLAPPs both in Europe and worldwide.

In response to the growing awareness of SLAPPs as a threat to democracy, the rule of law, and human rights, jurisdictions across the world have begun introducing or contemplating Anti-SLAPP measures. These include alterations to the legal and regulatory frameworks that govern freedom of speech, particularly amendments to defamation laws, procedural relief in the form of early dismissal mechanisms, and penalties for abuses of legal process and right.

In its resolution of 11 November 2021 on strengthening democracy and media freedom and pluralism in the Union, the European Parliament called on the Commission to propose a package of measures to address the increasing number of SLAPPs in the EU, including reforms to the EU's private international law rules to prevent libel tourism and forum shopping.¹³ In April 2022 the European Commission

⁸ Justin Borg Barthet et al (n 1).

⁹ The Coalition Against SLAPPs in Europe, "SLAPPs: A threat to democracy continues to grow" (July 2023) <<https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf>> accessed 2 September 2023.

¹⁰ Business and Human Rights Resource Centre, "SLAPPED but not silenced: Defending Human Rights in the Face of Legal Risk" (June 2021) <https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf> accessed 2 September 2023.

¹¹ Susan Coughtrie and Poppy Ogier, "Unsafe for scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world" (Foreign Policy Centre, November 2020) 3 <<https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf>> accessed 2 September 2023.

¹² Joel Simon, Carlos Lauría, and Ona Flores, "Weaponizing the law: attacks on media freedom" (Thomson Reuters Foundation, April 2023) <<https://www.trust.org/documents/weaponizing-law-attacks-media-freedom-report-2023.pdf>> accessed 2 September 2023.

¹³ European Parliament resolution of 11 November 2021 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)).

introduced a package of Anti-SLAPP measures,¹⁴ including a proposed Anti-SLAPP Directive.¹⁵ The proposed Directive is part of the European Democracy Action Plan¹⁶ and follows on from the Commission's Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union.¹⁷ The Commission's legislative proposal is based, in part, on a Model Law which was commissioned by CASE.¹⁸

The proposed Directive is grounded in Article 81 TFEU which confers competence in respect of judicial cooperation in civil matters. Consequently, a cross-border element is needed to trigger the directive. The Commission proposes an interpretation of cross-border implications which is not limited to situations in which at least one of the parties is domiciled outwith the Member State in which the court seised of the case is situated, but includes situations where the act of public participation concerns a matter of public interest which is relevant to more than one Member State, or where the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.¹⁹ Once this initial condition has been satisfied, the claim must also qualify as an "abusive court proceeding against public participation". This is defined as a court proceeding brought in relation to public participation that is fully or partially unfounded and has as its main purpose to prevent, restrict or penalise public participation. A non-exhaustive list of indicators of abuse is provided and includes the disproportionate, excessive or unreasonable nature of the claim, the existence of multiple proceedings, or evidence of intimidation, harassment or threats.²⁰

Where the proceedings satisfy these conditions, the defender should be entitled to apply for a remedy. The nature of the remedy will depend on whether the proceedings were manifestly unfounded or abusive. Early dismissal is only available for manifestly unfounded proceedings. In such instances, the burden of proof will rest on the claimant in the main proceedings to prove that the claim is not manifestly unfounded.²¹ If the main claim is dismissed during the course of the ordinary proceedings, the defendant may still benefit from other remedies if elements of abuse are then recognised. These remedies are also available to those who have successfully applied for early dismissal, and include full award of costs,²² full compensation for material and immaterial damages,²³ and the imposition of effective, proportionate, and dissuasive penalties.²⁴

¹⁴ European Commission, "Commission tackles abusive lawsuits against journalists and human rights defenders 'SLAPPs'", Press Release (27 April 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2652> accessed 24 October 2023.

¹⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") COM/2022/177 final (hereinafter the "Proposed Directive").

¹⁶ European Commission, "European Democracy Action Plan: making EU democracies stronger" Press Release (3 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2250> accessed 20 October 2023.

¹⁷ Commission Recommendation C(2021) 6550 final of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union.

¹⁸ Coalition Against SLAPPs in Europe, "Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law" <https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf> accessed 18 October 2023.

¹⁹ Proposed Directive (n 15).

²⁰ Ibid, Article 3.

²¹ Ibid, Article 12.

²² Ibid, Article 14.

²³ Ibid, Article 15.

²⁴ Ibid, Article 16.

In recognition of the tendency of SLAPP pursuers to abuse private international law rules, the proposed Directive also provides for mechanisms to deter the institution of proceedings in third countries. Where a judgment has been issued by the courts of a third country in proceedings which would constitute an abusive court proceeding against public participation, Member States must refuse recognition and enforcement of that judgment.²⁵ Further, a natural or legal person domiciled in a Member State may apply before the courts of the Member State in which they are domiciled for compensation for damages or costs incurred in connection with a SLAPP brought before the court of a third country.²⁶

Following the publication of the proposed Directive, the European Economic and Social Committee issued an opinion in October 2022²⁷ followed by a draft report by the European Parliament's JURI Committee in March 2023 which was adopted in June 2023.²⁸ In addition, the LIBE committee produced a draft opinion in March 2023²⁹ which was adopted in May 2023.³⁰

The LIBE Committee, correctly in our view, situates SLAPPs as a fundamental rights and rule of law concern through various amendments seeking to clarify or expand the scope of the Proposed Directive. Through amendments to recitals and substantive articles, the Committee notes the insidiousness of SLAPPs for democratic governance, while also seeking to address the full extent of the threat. This includes *inter alia* acknowledgement in Amendments 7-14 of the disproportionate effects of SLAPPs on individuals and groups in conditions of economic, political and social asymmetry of power. Substantively, the proposed amendments provide valuable guidance to adjudicators – and, of course, to potential litigants – concerning the extent of the instrument's scope and its relevance to good governance. By way of example, it is suggested in the LIBE Committee's Amendment 47 that the Proposed Directive include in the definition of matters of public interest in Article 3 an explicit reference to "...embezzlement, money laundering, extortion, coercion, sexual harassment and gender-based violence, or other forms of intimidation, or any other criminal or administrative offence, including environmental crime..." While Article 3(2) of the Proposed Directive is intended to be illustrative rather than exhaustive, the clear acknowledgement in the interests of clarity and foreseeability of matters which are of particular concern to the good governance of the Member States and the Union is noteworthy.

On 11 July 2023, informed in great part by the Opinion of the LIBE Committee, the European Parliament adopted its negotiating position on the proposed directive.³¹ The Parliament's proposed amendments

²⁵ Ibid, Article 17.

²⁶ Ibid, Article 18.

²⁷ European Economic and Social Committee, "Opinion on the initiative against abusive litigation targeting journalists and rights defenders" SOC/734-EESC-2022.

²⁸ European Parliament, Draft report on the proposal for a directive of the European Parliament and of the Council on protection persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation" 2 March 2023).

²⁹ DRAFT OPINION of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") (COM(2022)0177 – C9-0161/2022 – 2022/0117(COD)).

³⁰ OPINION of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") COM (2022)0177 – C9-0161/2022 – 2022/0117 (COD).

³¹ Amendments adopted by the European Parliament on 11 July 2023 on the proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") (COM(2022)0177 – C9-0161/2022 – 2022/0117(COD)) (hereinafter "the Parliament's Approach" or "the Parliament's proposal").

emphasise that the proposed Directive lays down minimum standards, that it should include specific reference to threatened SLAPPs, and that its personal scope is not limited to journalists and human rights defenders. In great part, therefore, the proposed changes seek to clarify the scope of the proposed Directive. The Parliament also seeks to clarify the scope by specifying that cross-border implications include “interim and precautionary measures, counteractions or other particular types of remedies available under other instruments.”³² Parliament’s proposed amendments also add to the facts which may indicate that a matter is of public interest or constitutes public participation.

Substantive amendments include the alteration of language which refers to the subjective intention of the claimant. Accordingly, Parliament proposes to replace the words “have as their main purpose to prevent, restrict or penalize public participation” to “characterised by elements indicative of a misuse of the judicial process for purposes other than genuinely asserting, vindicating or exercising a right and have as their main purpose to abusively prevent, restrict or penalize public participation”.³³ As we discuss further in Part 6.2, the continued reference to main purpose may present a substantial evidentiary burden for defendants who are called on to evidence the claimant’s intent in commencing the action. However, the Parliament does provide a more robust non-exhaustive list of indicators of abuse. The Parliament also proposes to add an article relating to access to information, legal aid, and financial assistance. In addition, a more extensive role for third party interveners is suggested.

In relation to remedies, the Parliament suggests that Member States are required to establish time limits and to make provision for the compensation of the full costs of legal representation. Full compensation for damages is clarified as covering both material and non-material harm.

Importantly, in relation to EU private international law rules, the Parliament proposes a new article (Article 18a) stating that in defamation claims or other claims based on civil or commercial law which may constitute a claim under the proposed Directive, the domicile of the defendant shall be considered to be the sole forum having regard to cases where the victims of defamation are natural persons. A further new article is proposed (Article 18b) specifying that in claims regarding a publication as an act of public participation, the applicable law shall be the law of the place to which that publication is directed to or, in the event of it not being possible to identify the place to which the publication is directed, the applicable law shall be the law of the place of editorial control or of the relevant editorial activity with regard to the act of public participation.

Finally, the Parliament proposes a number of complementary measures including a publicly accessible register, awareness raising and a ‘one-stop-shop’ for SLAPPs for information on the safeguards available, and training for legal professionals alongside rules that guide the conduct of legal professionals.

The Council (Justice and Home Affairs) approved a General Approach on 9 June 2023.³⁴ The Council has made a number of recommendations that restrict the scope of the proposed Directive and the remedies available to SLAPP targets. In particular, the Council has removed the definition of cross-border proposed by the Commission. This may have the effect of creating uncertainty as to the meaning of a crucial term for the operation of the Proposed Directive, and may result in a narrow

³² Parliament’s Proposal (n 31) Article 2 (1).

³³ Ibid, Article 3(1).

³⁴ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) – General approach 2022/0117 (COD) (hereinafter “the Council’s Approach” or the Council’s proposal”).

definition of cross-border being adopted by Member States, and significant variation in the scope of national measures transposing the EU directive.

The Council deletes provisions relating to compensation of damages, proposes a restrictive definition of manifestly unfounded cases as "so obviously unfounded that there is no scope for any reasonable doubt", and removes the possibility of appealing a refusal to dismiss.

The Council's General Approach also includes a provision that the Directive will not affect the application of bilateral or multilateral conventions that were concluded before the entry into force of the Directive.

The Council's approach does specify that the Directive lays down minimum standards and allows Member States to provide a higher level of protection. Reference is also made to future public interest, recognising that a matter may not yet be of public interest but could become so once the public is aware of it. This is particularly useful for clarifying the position on legal action or threats that pre-empt publication. The Council provides further guidance on matters of public interest, including reference to criminal offences such as sexual harassment.

With this background in mind, the present study is structured as follows: Chapter 2 defines the subject matter under review, focusing on the constituent elements of SLAPPs – proceedings which relate to a person's public participation on a matter of public interest (section 2.1) and the use of abusive litigation tactics (section 2.2). Chapter 3 sets out the methodology used to identify and review SLAPP cases initiated between January 2022 and August 2023. The Chapter provides an overview of the databases and search parameters engaged during this study and details the criteria and key resources used to categorise and analyse the identified legal actions and legal threats. The Chapter concludes by detailing the limitations of the methodology engaged. Our analysis of the identified legal actions and threats is presented in Chapters 4 and 5, respectively. Finally, Chapter 6 concludes by providing recommendations on present and future regulatory responses to SLAPPs in the European Union.

2. DEFINITIONS

KEY FINDINGS

This Chapter defines the subject matter under review – strategic litigation against public participation or SLAPPs.

SLAPPs have two constituent components they involve (a) a legal claims or threats of legal action that involve an abuse of process or right and (b) relate to public participation on a matter of public interest. In addition, SLAPP definitions may make reference to the aim or purpose of the legal action or threat, requiring that the primary aim of the conduct is to suppress freedom of expression on a matter of public interest. However, reference to the *aim* or *purpose* of the legal proceedings or threat may place an unwieldy or insurmountable evidentiary burden on the defendant to prove the intent of the claimant in bringing or threatening the proceedings.

The way legislation defines ‘abuse’, ‘public participation’ or ‘matter of public interest’ will determine the scope of actions that come with the scope of the legislation. For example, public participation or communication may be defined broadly to protect speech made in any forum on any matter of public concern. Conversely, public participation or communication may be defined narrowly to apply to particular expression such as those concerning a government body and an action under consideration by that body, or a communication made by environmental rights defenders.

The second element of a SLAPP is that the conduct of the person initiating the legal action, or the threat of legal action indicates an abuse of process or right. Anti-SLAPP legislation tends to take one of two approaches, either leaving the decision of what constitutes an indication of abuse to the discretion of the judge or providing a non-exhaustive list of indicators. Such indicators include: the disproportionate, excessive or unreasonable nature of the claim; the seriousness of the harm suffered or likely to be suffered by the claimant; the litigation tactics deployed by the claimant; the costs of proceedings; the existence of multiple claims against the defendant or related parties; any failure to provide answers to good faith requests for pre-publication comment or clarification; the financing of litigation by third parties; any forms of intimidation, harassment or threats directed towards the defendant; and the actual or potential chilling effect on public participation.

As elaborated in Chapter 3 Methodology, information on SLAPP cases or threats has been compiled from existing datasets, each of which have their own definitions and indicators of SLAPPs. Across these databases and more generally, there is no uniform definition of SLAPPs derived from national, European Union or international law.

In general, **SLAPPs** refers to legal claims or threats of legal action that involve an abuse of process or right in relation to the respondent’s exercise of their right to public participation on a matter of public interest. These legal actions are directed against individuals and organisations exercising their freedom of expression to participate in a matter of public interest, in either a professional or personal capacity, collectively referred to in this report as **civil society actors**. Civil society actors include but are not limited to, journalists, environmental and human rights defenders, academics, and non-governmental organizations.

2.1. Legal Definitions in Existing Third Country and Model Legislation

2.1.1. Public participation on a matter of public interest

Anti-SLAPP legislation (i.e. legislation that deters, remedies or penalises abuse of process in legal claims involving a communication on a matter of public interest) has been primarily adopted in common law countries, including the United States, Canada and Australia. In addition, a number of Southeast Asian jurisdictions,³⁵ provide legislative protections to human rights defenders which could be characterised as targeted anti-SLAPP measures of limited scope. In Europe, model laws have been developed by the UK Anti-SLAPP Coalition³⁶ and the Coalition Against SLAPPs in Europe,³⁷ while a draft recommendation has been developed by the Council of Europe.³⁸ However, Anti-SLAPP legislation has not yet been introduced in any EU Member State.

Anti-SLAPP legislation defines the protected speech and can either provide narrow or broad protections to civil society actors. For example, California defines speech broadly and protects speech made in any forum on any matter of public concern.³⁹ Conversely, Hawaii, only protects speech concerning a government body and an action under consideration by that body.⁴⁰ In some jurisdictions, such as the Philippines and Indonesia, special protection is afforded to environmental rights defenders, but relevant instruments lack general application.⁴¹ Similarly, legislation has been adopted in England and Wales which affords limited anti-SLAPP protection in respect of reporting of financial crime.⁴²

In Australia, the Australian Capital Territory introduced Anti-SLAPP legislation following the *Gunns 20'* case⁴³ which targeted environmental defenders. The Protection of Public Participation Act (2008)⁴⁴ adopts a narrow definition of SLAPPs, requiring proof of "improper purpose" (e.g., that the claim has been brought to discourage public participation). Reference to the *aim* or *purpose* of the legal proceedings or threat may place an unwieldy or insurmountable evidentiary burden on the defendant to substantiate that the litigation is commenced or threatened for the purposes of suppressing public participation on a matter of public interest. By pointing to purpose or aim, the definition implicates the intent of the claimant. Given that SLAPPs may, at times, involve a legitimate or partially founded claim, this may be problematic. Such legitimate or partially founded claims may still amount to a SLAPP by virtue of the litigation tactics employed, considered further in Chapter 6.

³⁵ Maysa Zorob & Elodie Aba, "Anti-SLAPP legislation must outlaw judicial harassment of human rights defenders" (Business and Human Rights Resource Centre, December 2021 <[Anti-SLAPP legislation must outlaw judicial harassment of Human Rights Defenders - Business & Human Rights Resource Centre \(business-humanrights.org\)](https://www.business-humanrights.org/en/latest/news-and-analysis/anti-slap-legislation-must-outlaw-judicial-harassment-of-human-rights-defenders-business-human-rights-resource-centre)> accessed 3 September 2023.

³⁶ UK Anti-SLAPP Coalition, "Model Anti-SLAPP Law" <<https://www.englishpen.org/wp-content/uploads/2022/10/Model-UK-Anti-SLAPP-Law-Final-Version.pdf>> accessed 13 October 2023.

³⁷ The Coalition Against SLAPPs in Europe (n 17).

³⁸ Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member states on countering the use of SLAPPs, MSI-SLP(2022)07 Revised Draft <<https://rm.coe.int/msi-slp-revised-draft-recommendation-on-slapps/1680abaf88>> accessed 30 September 2023.

³⁹ California Code, Code of Civil Procedure - CCP § 425.16.

⁴⁰ For further details on Hawaii and Anti-SLAPP legislation across the globe see, Evan Brander and James L Turk, "Global Anti-SLAPP Ratings: assessing the strength of Anti-SLAPP laws" (Centre for Freedom of Expression, Toronto Metropolitan University, March 2023) <[2023_03_23 Anti-SLAPP Evaluations FINAL.pdf](https://www.cfe.org/2023-03-23-anti-slap-evaluations-final.pdf)> accessed 2 September 2023

⁴¹ Maysa Zorob & Elodie Aba (n 34).

⁴² Economic Crimes and Corporate Transparency Act 2023.

⁴³ *Gunns v. Marr & Ors*, Supreme Court of Victoria 9575 of 2004.

⁴⁴ Protection of Public Participation Act 2008.

The Proposed Directive similarly places emphasis on the main purpose of the proceedings, defining abusive court proceedings against public participation as “court proceedings brought in relation to public participation that are fully or partially unfounded and have as their *main purpose* to prevent, restrict or penalize public participation” (emphasis added).⁴⁵

The proposed Directive defines public participation on matters of public interest as any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression relating to any matter which affects the public to such an extent that the public may legitimately take an interest in it. Article 3 of the Draft Directive provides a non-exhaustive list of matters that may be of public interest, including public health, safety, the environment, climate or enjoyment of fundamental rights, activities of a person or entity in the public eye, matters under review or public consideration by a governmental body, allegations of corruption, fraud or criminality, or activities aimed to fight disinformation.⁴⁶

2.1.2. Indicators of Abuse

The second element of a SLAPP is that the conduct of the person initiating the legal action, or the threat of legal action indicates an abuse of process or right. A number of common law jurisdictions have left the determination of what constitutes an indication of abuse to the court’s discretion. For instance, Anti-SLAPP legislation in British Columbia⁴⁷ and Ontario⁴⁸ has been criticized for providing little guidance to the courts on how to characterise a SLAPP. The provisions define “expression” but not “matter of public interest.” There is also no definition of what distinguishes an abusive proceeding from a legitimate proceeding involving a communication on a matter of public interest. While this may leave scope for judicial discretion, it may also encourage a conservative approach to defining SLAPPs; particularly as there is no statement to the effect that the law is to be broadly construed.⁴⁹ There have been mixed views in the Canadian courts on how indicators of SLAPP factor into the assessment of Anti-SLAPP measures.⁵⁰ In contrast, section 54.1 of the Quebec Code of Civil Procedure⁵¹ lists a number of indications of abuse, which include the excessive or unreasonable use of procedure which causes prejudice to another person, defeat the ends of justice, or, restricts freedom of expression in public debate.

CASE’s Model EU Directive and the UK Anti-SLAPP Coalition’s Model Law provide non-exhaustive indicators of abusive litigation, and include the disproportionate, excessive or unreasonable nature of the claim; the seriousness of the harm suffered or likely to be suffered by the claimant; the litigation tactics deployed by the claimant; the costs of proceedings; the existence of multiple claims against the defendant or related parties; any failure to provide answers to good faith requests for pre-publication comment or clarification; the financing of litigation by third parties; any forms of intimidation, harassment or threats directed towards the defendant; and the actual or potential chilling effect on public participation.

Article 3(3) of the proposed Directive provides a non-exhaustive list of indicators, including the disproportionate, excessive or unreasonable nature of the claim or part thereof, the existence of

⁴⁵ Proposed Directive (n 15) Article 3(3).

⁴⁶ Ibid Article 3(2).

⁴⁷ Protection of Public Participation Act [SBC 2019].

⁴⁸ Protection of Public Participation Act, 2015, S.). 2015, c23 – Bill 52.

⁴⁹ Evan Brander and James L Turk (n 40).

⁵⁰ Hillary Young, “Canadian Anti-SLAPP Laws in Action” (2022) 100:2 Canadian Bar Review 186, 203.

⁵¹ Chapter C-25 of the Code of Civil Procedure.

multiple proceedings initiated by the claimant or associated parties in relation to similar matters or intimidation, harassment or threats on the part of the claimant or his or her representatives.

Finally, a 2022 report by the Foreign Policy Centre (FPC) on SLAPPs in the UK highlights that a key feature of SLAPPs is the severe power imbalance between the claimant and the defendant. FPC further notes that a key tactic in SLAPPs is to target individuals.⁵² Our findings support this insight.

⁵² Susan Coughtrie, "London Calling: The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom" (Foreign Policy Centre, April 2022) < <https://fpc.org.uk/wp-content/uploads/2022/04/London-Calling-Publication-February-2023.pdf> > accessed 2 September 2023.

3. METHODOLOGY

KEY FINDINGS

This Chapter outlines the methodology engaged for this report and the limitations associated with this methodological approach.

This study is based on a desk review of datasets that monitor legal actions and threats against civil society actors. We relied primarily on three databases: the Council of Europe’s Safety of Journalists Platform, Mapping Media Freedom, and the Business and Human Rights Resource Centre’s SLAPPs database. In addition, consideration was given to the Coalition Against SLAPPs in Europe’s reports, we also referred to news articles which reported legal actions or threats of legal action against civil society actors. The search parameters were for legal actions or threats initiated between 1 January 2022 and 31 August 2023 in European Union Member States against civil society actors communicating on a matter of public interest that included one or more indicators of abuse.

The identified cases were categorised based on nine factors: the profile of the plaintiff, the profile of the defendant, the jurisdiction where the proceedings were initiated, the type of legal claim, the public interest involved, the litigation tactics engaged, the presence of a European element, the presence of an international element, and whether the case had a cross border element.

The findings are subject to a number of limitations. Firstly, and most importantly, it is not possible to capture the full extent of the SLAPP phenomenon since claimants seek to have matters resolved at a pre-litigious phase without public scrutiny. It follows that our analysis can only refer to the portion of SLAPPs which are reported. Furthermore, the data used is sourced from existing databases which adopt distinct methodologies and definitions of SLAPPs. Some of these databases rely on self-reporting by purported victims of SLAPPs, two of the databases focus only on media freedom and safety of journalists to the exclusion of other SLAPP targets, and the third database monitors SLAPPs initiated by business actors. As a result, the data presented in this study does not constitute a comprehensive compendium of legal actions or threats initiated between 1 January 2022 and 31 August 2023 against civil society actors communicating on a matter of public interest. Rather the study provides a snapshot of the current state of our knowledge on the problem of SLAPPs in the European Union during this discrete period.

Information relating to the quantification of damages claimed was not consistently available, and therefore these findings should be approached with caution and further information should be sought on this matter. Further, the authors are not in a position to determine whether the amount of damages claimed are excessive in the abstract, rather excessive damages were only counted where this was mentioned in the database’s reporting of a case.

The data is analysed by reference to the jurisprudence of the European Court of Human Rights (ECtHR) and the EU’s Rule of Law Reports. In addition, consideration was given to recommendations and publications from the Council of Europe, the European Union, alongside academic and expert commentary on SLAPPs in Europe and worldwide.

3.1. Data Collection

This study is based on a desk review of datasets that monitor SLAPPs. We relied on three databases: the Council of Europe’s Safety of Journalists Platform, Mapping Media Freedom, and the Business and

Human Rights Resource Centre's SLAPPs database. In addition, consideration was given to the Coalition Against SLAPPs in Europe's reports, our analysis also referred to news articles which reported legal actions or threats of legal action against civil society actors. The search parameters were for legal actions or threats initiated between 1 January 2022 and 31 August 2023 against civil society actors communicating on a matter of public interest that included one or more indicators of abuse outlined in Section 2.1.2 above.

3.2. Databases

Council of Europe's Safety of Journalists Platform reports on serious threats to the safety of journalists and media freedom in Europe. The Platform publishes alerts from 15 international NGOs and associations of journalists who are partnered with the Platform. The alerts are posted subject to the publishing organisation's own verification processes and standards. Alerts must relate to a serious concern with regard to media freedom, an alleged threat or violation of Article 10 of the European Convention on Human Rights in one of the 46 Council of Europe member states, be based on reliable information and facts, and be published with the consent of the person(s) identified in the alert (if not already in the public domain).

Mapping Media Freedom documents abusive legal actions against journalists and media outlets. Mapping Media Freedom gathers information through media networks, self-reporting, and by using an AI tool that automatically detects violations which are reported on Twitter or in the media. The alerts are then verified by a network of experts. Mapping Media Freedom does not provide a legal definition of vexatious lawsuits and threats of proceedings against journalists, but notes that relevant lawsuits and proceedings include both civil and criminal lawsuits in which journalists are sued by powerful or wealthy individuals aiming to silence legitimate public interest journalism and investigative reporting.⁵³

The **Business and Human Rights Resource Centre (BHRRC)** has recently launched a database to collect information on SLAPPs brought or initiated by business actors globally. The BHRRC classifies a SLAPP as a lawsuit which:

- is brought or initiated by a private party (such as a company, owner of a company, or employees at a company).
- targets acts of public participation related (but not limited) to human rights, social justice, and environmental protection, including public criticism or opposition campaigns. Public participation can encompass a range of activities, from peaceful protest to writing blogs – assuming the latter is in the public interest.
- came after the defender and/or organization expressed a critique of the claimant's economic activities by publishing a report, posting on social media, participating in an event or interview, launching a campaign, organizing a demonstration, and/or another peaceful means.⁵⁴

The BHRRC also employs indicators of improper purpose developed by Greenpeace International:

- Remedies sought are aggressive or disproportionate to the conduct targeted by the lawsuit or sanctions are severe (e.g. large amount of monetary damages or long prison sentences).
- The plaintiff is engaged in procedural manoeuvres that appear intended to drag out the case.
- The plaintiff appears to be exploiting its economic advantage to put pressure on the defendant.
- The lawsuit targets individuals as well as the organizations for whom they work.

⁵³ Mapping Media Freedom, "Monitoring Report 2022" (2022) < <https://www.mappingmediafreedom.org/wp-content/uploads/2023/02/MFRR-Monitoring-Report-2022.pdf> > accessed 1 August 2023.

⁵⁴ Business and Human Rights Resource Centre (n 10) 29 -30.

- The arguments relied on are factually or legally baseless.
- The plaintiff uses the litigation process to harass third-party critics (e.g. through the discovery process).
- The lawsuit appears to be part of a wider public relations offense designed to retaliate against, bully or intimidate critics.
- The corporate plaintiff has a history of SLAPPs and/or legal intimidation.⁵⁵

3.3. Data Analysis

The identified cases were categorised based on nine factors:

- **the profile of the plaintiff**
- **the profile of the defendant**
- **jurisdictional distribution:** this category refers to the jurisdiction where the proceedings were initiated.
- **types of legal claims:** this category refers to the cause of action asserted against the defendant.
- **the public interest involved:** this category was construed broadly and in line with Article 3 of the proposed Directive to mean any matter which affects the public to such an extent that the public may legitimately take an interest in it.
- **litigation tactics engaged:** this category encompasses litigation strategies which may indicate abuse of legal process or right.
- **international element present:** this category was assessed based on whether the communication related to economic or political activity in a third State, related to a matter of public interest of significance to the governance of a third State, involved a legal or natural person resident in a third State, or related to the functioning of the international economic or political order.
- **European element present:** this category was assessed based on whether the communication under scrutiny in the case has a European element, consideration was given to whether the information relates to EU governance including the EU's commitment to ensuring that its Member States uphold the values enshrined in Article 2 TEU and the indicators used to assess compliance with the rule of law by virtue of the Rule of Law Reports' methodology. In addition, reference was made to the areas in which the EU has exclusive or shared competence under Articles 3, 4 and 6 of the Treaty on the Functioning of the EU (TFEU). These include the functioning of the internal market, aspects of social policy, agriculture and fisheries, environment, consumer protection, transport, energy, area of freedom, security and justice, and certain public health matters.
- **cross border element:** this category was assessed based on grounds of jurisdiction in the Brussels Ia Regulation.⁵⁶ Under the general rule on jurisdiction⁵⁷ contained in the Brussels Regulation, and in the absence of a jurisdictional agreement between the parties, defendants

⁵⁵ Ibid.

⁵⁶ Brussels Ia (n 3).

⁵⁷ Ibid Article 4.

in civil and commercial matters shall be sued in the place of their domicile. In addition, in matters relating to a tort or delict, the claimant may also take proceedings in the place in which the harmful event occurred, either where the harm originated or was felt. On this basis, we considered whether, on the facts present:

- a. the domicile of the defendant and claimant differs.
- b. the domicile of the defendant is different from the location of the court seised.
- c. the place where the harmful event occurred (where it originated or was felt) is different to the domicile of the defendant or claimant, or to the location of the court seised.

When analysing whether one of these three conditions is met, the facts of the case - not the characterisation of the specific claim deployed - was assessed. The potential for the subject matter to ground a cross-border claim as defined by EU private international law suffices to bring a legal action or threat within this category. Furthermore, we are not in a position to assess whether the claim is connected to another jurisdiction pursuant to a choice of court or choice of law agreement, or whether there exist any other multinational connecting factors arising from contractual relations between the parties. Accordingly, our definition of cross-border does not encompass all matters which would be amenable to being governed by the selected jurisdictional rules in the Brussels Ia Regulation, but is limited to the grounds of jurisdiction which are most relevant to non-contractual claims.

The data is typically presented as a percentage of total cases. However, 44.7% of total cases involved multiple targets (detailed further in Part 4.6 on litigation tactics). Therefore, to properly account for the profile of defendants, the data in Part 4.6 is presented as a percentage of total targets.

Throughout the analysis reference is made to the jurisprudence of the European Court of Human Rights (ECtHR), in particular Article 10 on freedom of expression. Reference to the ECtHR provides context on the discretion afforded to particular actors and public interest speech, and the balance between freedom of expression and other fundamental human rights. At the EU level, the relevant provisions are set out in the Treaty on European Union and the EU Charter of Fundamental Rights, which by virtue of Article 6 TEU has the legal status of EU treaties. Article 6(3) TEU further provides that the "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." The provisions of the EU Charter are supported by Articles 2 and 10(3) of the TEU which provide protections for participation in democratic life.

The EU Charter provides for the rights to respect for private and family life (Article 7), freedom of expression and information, which includes respect for the freedom and pluralism of the media (Article 11), and to an effective remedy and to a fair trial (Article 47). By virtue of Article 52(3) of the EU Charter the aforementioned rights are to be given the meaning and scope of corresponding rights guaranteed by the ECHR.

Both Article 10 (ECHR) and Article 11 (EU Charter) require any restriction on freedom of expression to be prescribed by law, necessary in a democratic society, and made in pursuit of the legitimate aims set out in Article 10(2) of the ECHR (i.e. national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary). The Convention also imposes a positive

obligation on contracting states to safeguard the freedom and pluralism of the media and to create a favourable environment for participation in public debate.⁵⁸

The case law of the ECtHR further specifies that freedom of expression constitutes one of the essential foundations of a democratic society and is applicable not only to information or to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any group in the population.⁵⁹ It has further clarified that 'in a democratic society even small and informal campaign groups (...) must be able to carry on their activities effectively' and that 'there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest'.⁶⁰

Where media freedom is concerned, the Strasbourg Court has placed a very high bar when justifying interference with freedom of expression on matters of public interest.⁶¹ This protection has been extended to human rights defenders,⁶² academics,⁶³ NGOs, and whistle-blowers.⁶⁴ An interference must be proportionate and cannot restrict freedom of expression enabling access to matters of public interest and concern. The Court has found that an exercise of freedom of expression which amounts to a debate of public relevance may be capable of prevailing over the right to reputation⁶⁵ where the press which has fulfilled its role in good faith and with due diligence.⁶⁶ Furthermore, there is a key distinction between simply reporting details of a person's private life and reporting facts which could contribute to a wider debate.⁶⁷ The Court has also found that damages awards may constitute an illegitimate interference with freedom of expression. In *Independent Newspapers (Ireland) Ltd*⁶⁸ the Court held that unpredictably large damages awards may have a chilling effect on media freedom and constitute a breach of freedom of expression. The net effect of the case law is a recognition that press and media play a vital role in a democratic society by ensuring dissemination of information on matters of public relevance, and that any state interfering with free press will face a high bar when seeking to justify that interference.

The right to freedom of expression can be lawfully interfered with to protect the reputation of natural and legal persons or rights of others as guaranteed by Article 8 ECHR on the right to private and family life. However, the measures employed must be proportionate, and construed strictly, and the need for any restrictions must be established convincingly. The Court has laid down a non-exhaustive list of principles which must guide its assessment of whether or not an interference in this area was necessary, including the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; and the content, form and

⁵⁸ *Jafarov v Azerbaijan* (2017) 64 EHRR 13.

⁵⁹ *Handyside v. The United Kingdom* (Application no. 5493/72) [49].

⁶⁰ *Steel and Morris v. The United Kingdom* (Application no. 68416/01) [89].

⁶¹ *Stoll v Switzerland* (Application no. 69698/01) [102].

⁶² *Taner Kılıç v. Turkey (no. 2)* (Application no. 208/18).

⁶³ *Magyar Helsinki Bizottság v Hungary* (Application no. 18030/11).

⁶⁴ *Animal Defenders International v The United Kingdom* (Application no. 48876/08).

⁶⁵ *Couderac and Hachette Filipacchi Associés v France* (Application no. 40454/07).

⁶⁶ *Matter v Turkey* (Application no. 54997/08).

⁶⁷ *Von Hannover v Germany (No.2)* (Applications no. 40660/08 and 60641/08).

⁶⁸ *Independent Newspapers (Ireland) Limited v Ireland* (Application no. 28199/15).

consequences of the publication.⁶⁹ The Court will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers.⁷⁰

In addition to consideration of the case law of the ECtHR, the Rule of Law Reports produced through the EU's Rule of Law Mechanism were also consulted in the formulation of this study with a view to identifying the articulation of common values as captured in relevant recommendations. Article 2 of the Treaty on European Union (TEU) establishes the rule of law, and democracy as common values for all EU Member States. Where there is a risk to one of the values set out in Article 2 TEU, Article 7 TEU empowers the Council of the European Union to make recommendations to the Member State where the risk presents itself. The Rule of Law Mechanism was established in 2014 to open dialogue among EU institutions, Member States, civil society actors, and other stakeholders on the rule of law. The Rule of Law Report is the foundation of the dialogue process and covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. Rule of Law Reports are published annually and rely on a qualitative assessment carried out by the Commission. The network of national rule of law contact points, Member States, and other interested stakeholders provide input into the reports. The Commission also provides an annual report on the independence, quality and efficiency of national justice systems through the EU Justice Scoreboard while the Eurobarometer monitors public opinion in the Europe Union on issues related to the European Union as well as attitudes on subjects of a political or social nature.

In addition, consideration was given to recommendations and publications from the Council of Europe, the European Union, alongside academic and expert commentary on SLAPPs in Europe and worldwide.

3.4. Limitations

The findings are subject to a number of limitations. Firstly, and most importantly, it is not possible to capture the full extent of the SLAPP phenomenon since claimants seek to have matters resolved at a pre-litigious phase without public scrutiny. It follows that our analysis can only refer to the portion of SLAPPs which are reported. Furthermore, the data used is sourced from existing databases which adopt distinct methodologies and definitions of SLAPPs. Some of these databases rely on self-reporting by purported victims of SLAPPs, two of the databases focus only on media freedom and safety of journalists to the exclusion of other SLAPP targets, and the third database monitors SLAPPs initiated by business actors. As a result, the data presented in this study does not constitute a comprehensive compendium of legal actions or threats initiated between 1 January 2022 and 31 August 2023 against civil society actors communicating on a matter of public interest. Rather the study provides a snapshot of the current state of our knowledge on the problem of SLAPPs in the European Union during this discrete period.

Finally, information relating to the quantification of damages claimed was not consistently available, and therefore these findings should be approached with caution and further information should be sought on this matter. Further, the authors are not in a position to determine whether the amount of damages are excessive in the abstract, rather excessive damages were only counted where this was mentioned in the database's reporting of a case.

⁶⁹ *Couderac and Hachette Filipacchi Associés v France* (n 65).

⁷⁰ *Ibid.*

4. ANALYSIS OF LEGAL ACTIONS

KEY FINDINGS

This Chapter reports our findings on legal actions initiated between 1 January 2022 and 31 August 2023 in the European Union. Based on the databases searched, 47 legal actions against 102 defendants were identified. Political figures and public officials were the most common claimants, accounting for 42.6% of total claimants followed by companies (21.3%), legal professionals (10.7%), other individuals (8.5%), civil society (6.4%), political parties (4.2%), local government (4.2%), and states (2.1%).

While 47 cases were identified, these cases involved a total of 102 defendants. The majority of defendants were individual journalists (44.1%). Media outlets accounted for 28.4% of defendants, while editors-in-chief or directors of media outlets accounted for 7.8%. Non-governmental organizations amounted to 13.7%, one case joined 14 non-governmental organisations. The remainder of defendants were publishers (3%), followed by an activist (1%), a journalistic source (1%) and other individuals (1%).

The highest number of cases was recorded in Italy, with 25.5% of total cases. Spain (17%) and Greece (12.8%) had the second and third highest, respectively, number of cases. France and Bulgaria each had 10.6% cases. The remainder of cases were filed in Ireland (6.4%), Poland (4.3%), Croatia (4.3%), Austria (4.3%), Slovakia (2.1%), and Hungary (2.1%).

The majority of claims were founded in civil defamation laws, accounting for 74.5% of total cases, followed by criminal defamation (14.9%), the crime of offending religious sentiment (6.3%), breach of trade secrets (2.1%), breach of privacy (2.1%), criminal indecency (2.1%), and hate crimes (2.1%).

Of the 47 cases identified, the communications touched up over 80 public interest matters, including corruption (40.4%), public procurement (2.1%), criminal justice and the legal system (23.4%), labour rights (6.4%), social housing (2.1%), migration (8.5%), taxation (4.3%), organised crime (12.8%), financial crime (12.8%), international relations (14.9%), media pluralism (2.1%), privacy (6.4%), cybercrimes (2.1%), insurance (2.1%), health (2.1%), disinformation (2.1%), environment (8.5%), defence and security (8.5%), satirical political commentary (2.1%), and international crimes (12.8%).

Five litigation tactics were identified: multiple lawsuits, multiple targets, targeting and individual, excessive damages and claims for moral damage. 74.5% of cases targeted an individual while 44.7% of cases targeted multiple natural or legal persons and 10.6% involved multiple lawsuits concerning the same public interest matter. Moral damages were claimed in 4.3% of cases. Excessive damages were claimed in 10.6% of cases.

85% of total cases had a European element. Matters which were categorised as a European element included, anti-money laundering, EU-Russia relations, misuse of EU grants, cybersecurity, migration, extradition, access to the Eurozone, organised crime, drug trafficking.

44.6% of total cases had an international element. Matters which were categorised as an international element included, EU-Russia relations, undocumented workers, extradition, organised crime, international drug trafficking, international abduction, money laundering, war crimes and crimes against humanity.

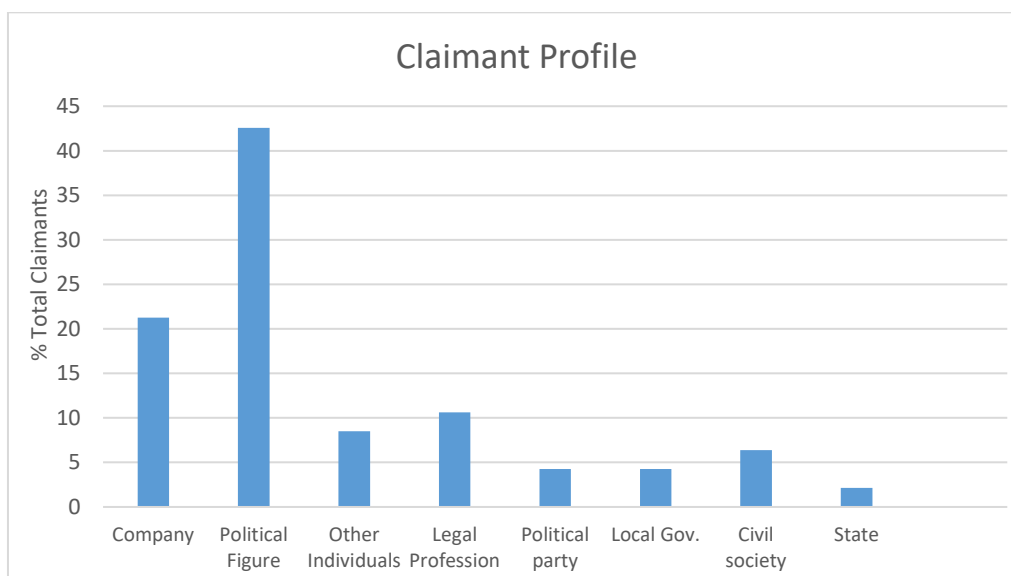
91.4% of total cases had a cross-border element.

Between 1 January 2022 and 31 August 2023, based on the databases searched, 47 legal actions against 102 defendants were identified.

4.1. Profile of Claimants

Political figures and public officials were the most common claimants, accounting for 42.6% of total claimants followed by companies (21.3%). In relation to companies, while legal entities have a commercial interest in their reputation which is protected by Article 10 ECHR, this interest differs from natural persons' reputation which is founded in their right to dignity. Furthermore, large companies are subject to a wider level of scrutiny than smaller companies.

Figure 1: Claimant Profiles as a % of Total Cases



Source: Authors' own.

The political figures and public officials category referred to persons who were either involved in the governance of a country or an active member of a political party. Political figures ranged from current and former MEPs, members of parliaments across EU Member States, members of political parties or diplomats. Those within the political figures category were, typically, acting in a personal capacity and not on behalf of the government. The local government (4.2%) and state (2.1%) categories capture political agents or agencies acting on behalf of the government or segment of the government they represent. Political parties accounted for 4.2% of claimants.

With regard to public officials, particularly political actors, it is worth noting that the ECtHR has confirmed that Article 10 of the ECHR provides specific protection to persons reporting on alleged irregularities in the conduct of State officials.⁷¹ The Court has further established that in relation to State officials "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician."⁷² In the recent case of *OOO Memo v Russia*⁷³ the Court held that

⁷¹ *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (Application no 17224/11).

⁷² *Castells v Spain* (Application no. 11798/85) [46].

⁷³ *OOO Memo v Russia* (Application no. 2840/10). For a commentary, see Dirk Voorhoof, "OOO Memo v. Russia: ECtHR Prevents Defamation Claims by Executive Bodies" (Strasbourg Observers, April 2022) <<https://strasbourgobservers.com/2022/04/01/ooo-memo-v-russia-ecthr-prevents-defamation-claims-by-executive-bodies/>> accessed 7 September 2023.

executive bodies' right to reputation different from that of natural and legal persons. While recognising that legal entities have a commercial interest in their reputation, the ECtHR held that "these considerations are inapplicable to a body vested with executive powers and which does not engage as such in direct economic activities".⁷⁴ The court found that if executive bodies were allowed to bring civil defamation cases against the media this would place "an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog."⁷⁵ However, this does not exclude individual members of a public body from bringing a personal action.⁷⁶

States or State authorities would not come within the scope of the proposed Directive. Article 2 of the proposed Directive states that the Directive does not extend to the liability of the State for actions or omissions in the exercise of State authority (*acta iure imperii*). Recital 15 further explains that claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed officeholders also do not fall within the scope of the Directive. One of the reported claims for damages was initiated by the government of a third State against a Spanish journalist in Spain. While the proceedings were dismissed, Mapping Media Freedom note that the State could claim immunity and not pay the legal costs awarded against it (see further Box 1).⁷⁷

Box 1: Kingdom of Morocco and Ignacio Cembrero

Mapping Media Freedom reported that the Kingdom of Morocco filed a suit against Spanish journalist, Ignacio Cembrero after Cembrero referred to an investigation by 17 media organisations into the use of spyware by the Moroccan government. Mapping Media Freedom further reports that although the damage was not quantified, the lawsuit shows that high financial compensation was sought. The Court of First Instance dismissed the case and ordered the Kingdom of Morocco to cover all legal costs. While the proceedings were dismissed, Mapping Media Freedom note that the State could claim immunity and not pay the legal costs awarded against it.

Source: Mapping Media Freedom, "Morocco files lawsuit against Spanish journalist over his claims it used Pegasus spyware to surveil him" (2022) <https://www.mapmf.org/alert/25031>

Legal professionals, including lawyers, a judge, and chambers made up 10.7% of claimants. In certain cases, the claim related to reporting on the conduct of lawyers during legal proceedings. It is important to recognise that there is a balance to be struck between the importance of the press for maintaining the impartiality of the judicial system and the right to a fair trial as protected by Article 6 and the right to private and family life as protected by Article 8.⁷⁸ Further, public interest in judicial proceedings and the public's right to information on same must be provided in a way that does not undermine the administration of justice.⁷⁹ However, the ECtHR has reiterated that "provided that [reporting] does not overstep the bounds imposed in the interest of the proper administration of justice, reporting,

⁷⁴ *OOO Memo v Russia* [40]; see also *Steel and Morris v. The United Kingdom* (n 57) [40].

⁷⁵ *OOO Memo v Russia* [45].

⁷⁶ *Ibid* [47].

⁷⁷ Mapping Media Freedom, "Morocco files lawsuit against Spanish journalist over his claims it used Pegasus spyware to surveil him" (July 2022) <<https://www.mapmf.org/alert/25031>> accessed 31 August 2023.

⁷⁸ *Bédat v Switzerland* (Application no. 56925/08).

⁷⁹ Article 10(2) European Convention on the Protection of Human Rights; *Worm v Austria*, 29 August 1997, *Reports of Judgements and Decisions* 1997-V.

including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6(1) of the Convention that hearings be public.”⁸⁰ The Court went on to state that “[n]ot only do media have the task of imparting such information and ideas; the public has a right to receive them.”⁸¹

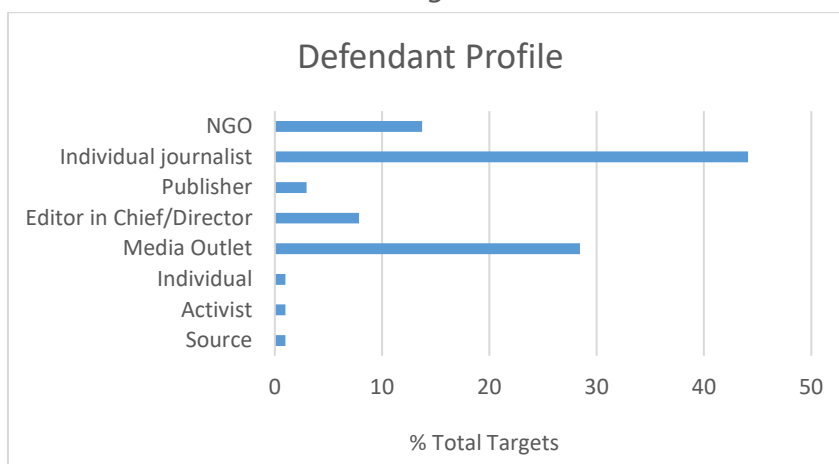
Regulatory bodies have an important role to play in monitoring and, where appropriate, sanctioning legal professionals who either directly engage in SLAPPs or act on behalf of SLAPP claimants. When exercising this responsibility, regulatory bodies must be sure to strike a fair balance between competing rights, and provide the necessary information to the profession and the public of what conduct constitutes a violation of the ethical conduct expected of the legal profession.

The Solicitors Regulation Authority of England and Wales (SRA) has issued a warning notice which sets out the conduct expected of the legal profession in relation to the misuse of the legal system to suppress scrutiny of public interest matters. In their notice, the SRA recognises that while “making advice and legal representation available to all is in the public interest ... proceedings must be pursued properly, and that means making sure that representing your client’s interests does not override wider public interest obligations and duties to the court.”⁸²

The remainder of claimants consisted of other individuals (8.5%) and civil society actors or organisations (6.4%).

4.2. Profile of Defendants

Figure 2: Defendant Profiles as a % of Total Targets



Source: Authors' own.

While 47 cases were identified, these cases involved a total of 102 defendants. As noted in Figure 6 on litigation tactics, 44.7% of cases involved multiple defendants, while 74.5% involved individual targets. The majority of defendants were individual journalists (44.1%). Individual journalists were, at times, targeted even when the publication was published by a media outlet. It was not uncommon for both the media outlet and an individual journalist to be joined to the same legal action. Media outlets accounted for 28.4% of defendants, while editors-in-chief or directors of media outlets accounted for 7.8%. Non-governmental organizations amounted to 13.7%, with one case joining 14 non-

⁸⁰ *Worm v Austria* [50].

⁸¹ *Ibid.*

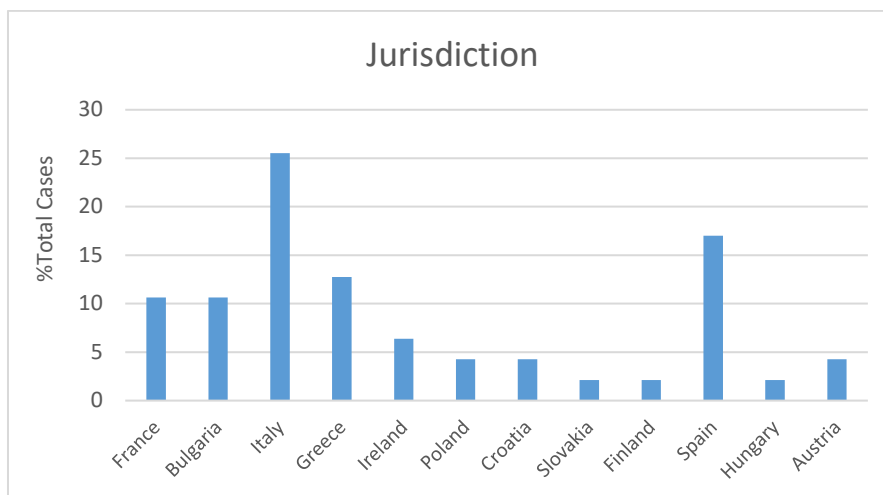
⁸² Solicitors Regulation Authority, “Warning notice: Strategic litigation against public participation (SLAPPs)” (November 2022) <<https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>> accessed 19 October 2023.

governmental organisations. The remainder of defendants were publishers (3%), followed by an individual (1%), an activist (1%), and a journalistic source (1%).

4.3. Jurisdictional distribution of cases

The highest number of cases were recorded in Italy, with 25.5% of total cases. It is noteworthy that Italy retains criminal defamation laws. Article 595 of the Italian criminal code provides for criminal defamations with sentences of up to three years. 42% of actions for criminal defamation were based in Italy, with 14.9% of cases based on criminal defamation. The Constitutional Court has questioned the constitutionality of prison sentences for journalists in defamation cases,⁸³ and there have been recent proposals for reform. The compatibility of criminal defamation laws with Article 10 ECHR is considered further in Section 4.4.

Figure 3: Jurisdiction Seised as % of Total Cases



Source: Authors' own.

Spain (17%) and Greece (12.8%) had the second and third highest, respectively, number of cases. France and Bulgaria each had 10.6% cases. The remainder of cases were filed in Ireland (6.4%), Poland (4.3%), Croatia (4.3%), Austria (4.3%), Slovakia (2.1%), and Hungary (2.1%). A high number of cases or legal threats (considered further in the next Chapter) involving parties with different domiciles to the court seised were reported in France.

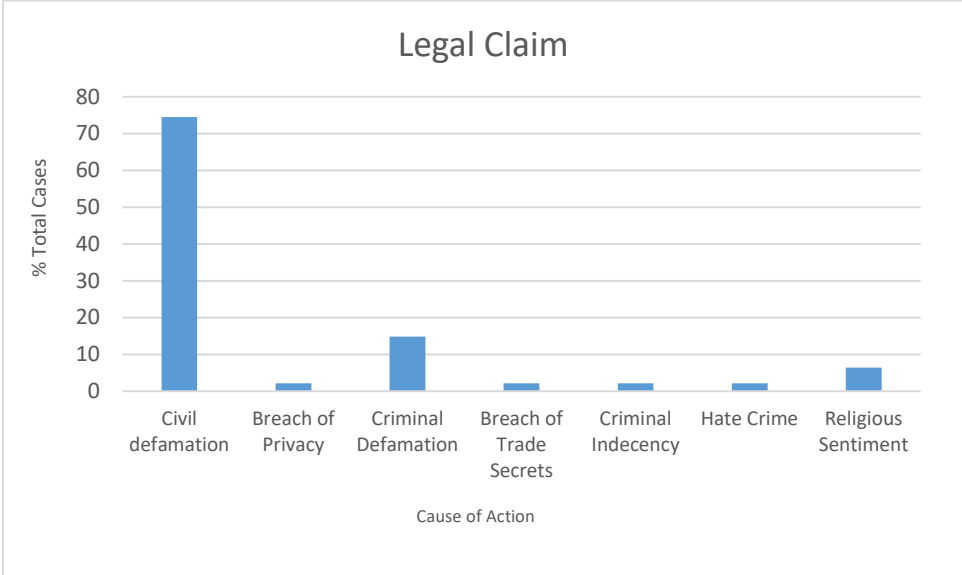
4.4. Types of Legal Claims

The majority of claims were founded in civil defamation laws, accounting for 74.5% of total cases. In relation to other civil claims, breach of trade secrets accounted for 2.1% of reported cases. Criminal defamation made up 14.9% of cases, while other criminal offenses included breach of privacy (2.1%), criminal indecency (2.1%), hate crimes (2.1%) and the crime of offending religious sentiment (6.3%). Criminal defamation cases were recorded in Italy, Slovakia, Austria and Finland. Criminal breach of privacy was reported in Finland while hate crimes and the crime of offending religious sentiment was reported in Spain. It is worth noting that Article 10 ECHR protects speech that offends, shocks or disturbs.⁸⁴

⁸³ European Commission, "2023 Rule of Law Report: Country Chapter on the rule of law situation in Italy" SWD(2023) 812 final (July 2023) <https://commission.europa.eu/system/files/2023-07/29_1_52611_coun_chap_italy_en.pdf> accessed 31 August 2023; The Commission cites Decision of the Constitutional Court of 22 June 2021, No. 150/2021.

⁸⁴ *Handyside v. The United Kingdom* (n 56) [49].

Figure 4: Cause of Action as % of Total Cases



Source: Authors' own.

According to the jurisprudence of the ECtHR, while the margin of appreciation left to Contracting States allows for criminal penalties for defamation this cannot be disproportionate to the aim pursued.⁸⁵ The ECtHR cautions State institutions that criminal proceedings should be a last resort, particularly where a matter of public interest is involved.⁸⁶ The court has reiterated that “the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example in the case of hate speech or incitement to violence.”⁸⁷

In addition, Council of Europe Resolution 1577(2007)⁸⁸ calls for the abolition of prison sentences for defamation and only allow for prison sentences for incitement to violence, hate speech and promotion of negationism. In such cases, the ECtHR has affirmed that such criminal law provisions must “clearly and precisely define the scope of relevant offences, and that those provisions be strictly construed in or to avoid a situation where the State’s discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement.”⁸⁹

In the EU, Commission Recommendation (EU) 2022/758⁹⁰ recommends that Member States ensure that penalties against defamation are not excessive or disproportionate, paying particular attention to the

⁸⁵ *Radio France and others v. France* (Application No 53984/00); *Incal v. Turkey* (41/1997/825/1031) Judgement of 9 June 1998 [54].

⁸⁶ *Incal v. Turkey*, 9 June 1998, *Reports of Judgements and Decisions* 1998-IV [54].

⁸⁷ *Ruokanen and others v. Finland* (Application no. 45130/06) [50].

⁸⁸ Resolution 1577(2007) of the Parliamentary Assembly of the Council of Europe towards decriminalisation of defamation DOC 11305 (October 2007) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17588&lang=en>> accessed 3 September 2023.

⁸⁹ *Savva Terentyev v. Russia* (Application no. 10692/09) [85].

⁹⁰ Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’).

Council of Europe guidelines and recommendations. Member States are further recommended to remove prison sentences for defamation in line with Council of Europe Resolution 1577(2007).

In relation to Italy, the 2023 Rule of Law Report highlighted the “long-standing issue of criminalization of defamation even though the Constitutional Court had held that the penalty of imprisonment for press defamation provided for in Article 13 of the Press Law was unconstitutional and incompatible with Article 10 of the European Convention of Human Rights, and had invited the Italian Parliament to reform the defamation regime.”⁹¹ The 2023 Rule of Law Report does note progress in this area with a legislative proposal presented to the Italian Senate to abolish imprisonment for press defamation. No such observations were made in reference to Austria where defamation is punishable by imprisonment of up to one year⁹² or Finland where defamation is punishable by imprisonment of up to two years.⁹³ In relation to Slovakia, the Rule of Law Report 2023 notes that there were proposals to establish a higher level of proof in criminal defamation cases and reduce the maximum sanction to one year.⁹⁴

On a global level, there is evidence that States have engaged non-speech related crimes to silence journalists, including financial crimes such as evasion, fraud and money laundering, or cybersecurity and national security laws.⁹⁵ While abuses of defamation laws currently present the leading threat to freedom of expression in Europe, it is important to note that SLAPPs can take many forms and may migrate to alternative legal actions when a particular route is closed off. Therefore, reforms of defamation laws may not be sufficient to curtail abuses of legal process or right. Instead, bespoke Anti-SLAPP legislation which provides remedies through procedural rules may be more effective.

Box 2: Slovakian political party files three criminal defamation lawsuits

An opposition party in Slovakia filed three criminal defamation lawsuits against three journalists. The lawsuits impugn a number of articles published by independent daily news outlets. The articles related to alleged support for the Russian war on Ukraine, alleged participation and facilitation in the abduction of a Vietnamese citizen in Germany, and criticise the internal governance of the party. The media outlets who published the articles were not sued. Journalists in Slovakia can face up to eight years in prison if convicted.

Source: Mapping Media Freedom, “Smer party files criminal lawsuit against three journalists over critical commentary” (March 2023) <<https://www.mapmf.org/alert/30105>> accessed 31 August 2023.

⁹¹ European Commission, “2023 Rule of Law Report: Country Chapter on the rule of law situation in Italy” SWD(2023) 812 final (July 2023) <https://commission.europa.eu/system/files/2023-07/29_1_52611_coun_chap_italy_en.pdf> accessed 24 October 2023.

⁹² Media Law Database, “Austria” (International Press Institute) <<http://legaldb.freemedia.at/legal-database/austria/?target=criminal-defamation>> accessed 31 August 2023.

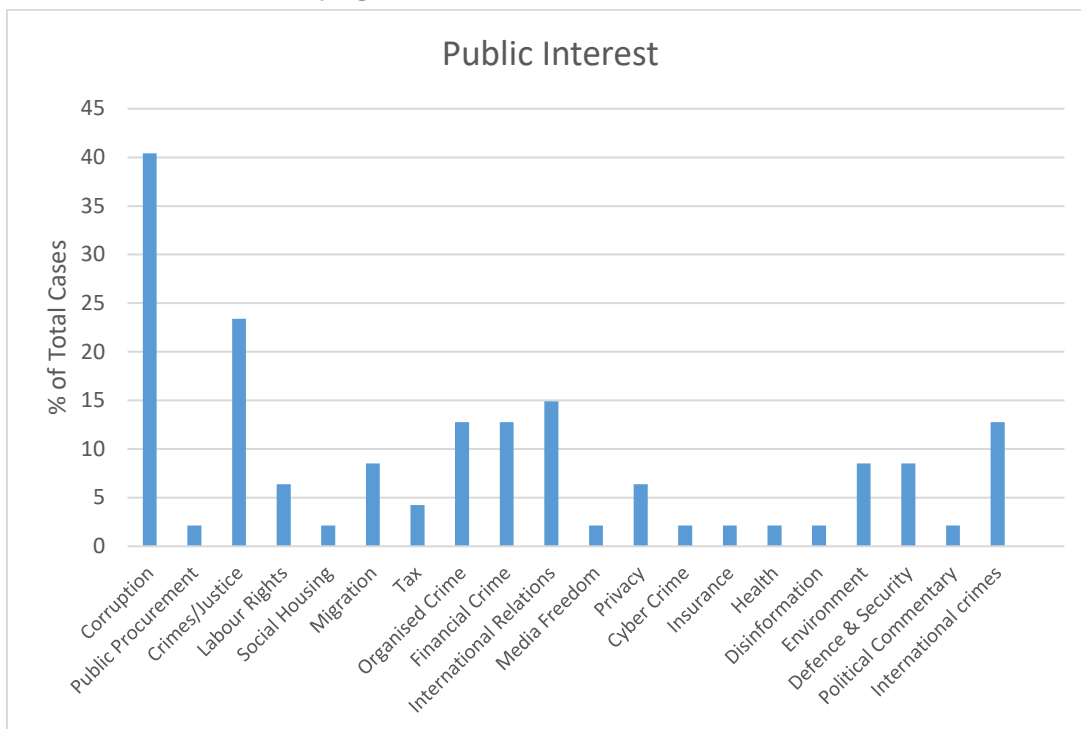
⁹³ Media Law Database, “Finland” (International Press Institute) <<http://legaldb.freemedia.at/legal-database/finland/>> accessed 31 August 2023.

⁹⁴ European Commission, “2023 Rule of Law Report: Country Chapter on the rule of law situation in Slovakia” SWD(2023) 825 final (July 2023) <https://commission.europa.eu/system/files/2023-07/56_1_52633_coun_chap_slovakia_en.pdf> accessed 24 October 2023.

⁹⁵ Joel Simon, Carlos Lauría, and Ona Flores (n 12).

4.5. Public Interest Involved

Figure 5: Public Interest of Impugned Communication as % of Total Cases



Source: Authors' own.

Many cases involved a communication which concerned multiple public interest matters. Of the 47 cases identified, the communications touched upon over 80 public interest matters. Adopting the broad definition of public interest set out in Section 3.3, we identified 21 subcategories of public interest including, corruption (40.4%), public procurement (2.1%), criminal justice and the legal system (23.4%), labour rights (6.4%), social housing (2.1%), migration (8.5%), taxation (4.3%), organised crime (12.8%), financial crime (12.8%), international relations (14.9%), media pluralism (2.1%), privacy (6.4%), cybercrimes (2.1%), insurance (2.1%), health (2.1%), disinformation (2.1%), environment (8.5%), defence and security (8.5%), satirical political commentary (2.1%), and international crimes (12.8%). The subject matter under consideration included strikes by undocumented workers on working conditions, the Russian war on Ukraine, the handling of the COVID-19 pandemic, the use of Pegasus spyware, prison conditions, capture of media, sexual offences, and pollution in the extractive sector.

As mentioned above, in the proposed Directive public interest refers to any matter which affects the public to such an extent that the public may legitimately take an interest in it.⁹⁶ Likewise, the ECtHR has established that “public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.”⁹⁷ The ECtHR adds that “this is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.”⁹⁸ The ECtHR has found a

⁹⁶ Proposed Directive (n 15) Article 3(2).

⁹⁷ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Application no. 931/13) [171].

⁹⁸ *Ibid.*

public interest in the administration of justice,⁹⁹ the protection of the environment and public health,¹⁰⁰ and crimes against humanity.¹⁰¹ However, the Court draws a distinction between reporting on matters of a person's private life which contribute to a debate of general interest to society and those that solely satisfy the public's thirst for information.¹⁰²

4.6. Litigation Tactics

Five litigation tactics were identified: multiple lawsuits, multiple targets, targeting an individual, excessive damages and claims for moral damage. In relation to identification of multiple lawsuits, it is worth noting that the temporal and geographical scope of this study may preclude identification of concurrent or previous court proceedings in another Member State, or indeed in a third State.

Box 3: French company sues four media outlets, a director, and three journalists

On 15 May 2023, Mapping Media Freedom reported that four French media outlets, three journalists and the director of one of the media outlets had been sued for defamation. The actions were instigated by a waste collection company and related to reporting on strikes by undocumented workers in response to alleged exploitation, blackmail and racketeering. The defendants requested an annulment. In July 2023, L'Humanité reported that the Versailles court had acquitted the defendants of any wrongdoing.

Source: Mapping Media Freedom, "Four media outlets accused of defamation by a waste collection company" (May 2023) <<https://www.mapmf.org/alert/30288>> accessed 31 August 2023; L'Humanité "Victoire judiciaire pour L'Humanité, relaxé des accusations portées par Sepur" (July 2023) <<https://www.humanite.fr/medias/lhumanite/victoire-judiciaire-pour-lhumanite-relaxee-des-accusations-portees-par-sepur-802139>> accessed 31 August 2023.

Just over 50% of cases engaged more than one of the aforementioned litigation tactics. 74.5% of cases targeted an individual while 44.7% of cases targeted multiple natural or legal persons and 10.6% involved multiple lawsuits concerning the same public interest matter. In June 2022, Luis Ferreirim, the Head of Agriculture at Greenpeace Spain, announced that he, Greenpeace Spain and 13 other non-governmental organisations were the subject of a defamation suit filed by a Spanish dairy-cattle farm. The proceedings were filed in March 2022 after the group delivered a report to the Parliament of Navara on the company's environmental practices.¹⁰³ This is just one of the examples of multiple targets and individual targets being the subject of a defamation claim.

To reiterate the limitations set out in Section 3.4, information relating to the quantification of damages claimed was not consistently available, and therefore these findings should be approached with caution and further information should be sought on this matter. Further, the authors are not in a position to determine whether the amount of damages are excessive in the abstract; rather, excessive damages were only counted where this was mentioned in the database's reporting of a case. With this limitation in mind, moral damages were claimed in 4.3% of cases and excessive damages were claimed in 10.6% of cases.

⁹⁹ See for example, *Dupuis and Others v. France* (Application no. 1914/02).

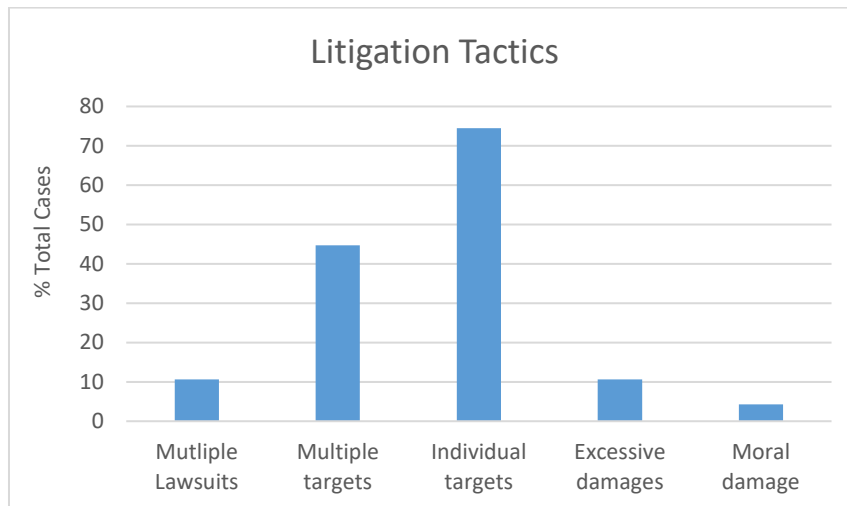
¹⁰⁰ See for example, *OOO Regnum v. Russia* (Application no. 22649/08) and *Mamère v. France* (Application no. 12697/03)

¹⁰¹ See for example, *Giniewski v. France* (Application no. 64016/00).

¹⁰² *Couderc and Hachette Filipacchi Associés v. France* (n 62) [101].

¹⁰³ Luis Ferreirim, "The Spanish factory farming industry is trying to silence us" (Greenpeace, 2022) <<https://www.greenpeace.org/international/story/54303/the-spanish-factory-farming-industry-is-trying-to-silence-us/>> accessed 31 August 2023.

Figure 6: Litigation Tactics as % of Total Cases



Source: Authors' own.

In civil defamation proceedings brought by a Spanish company against a Spanish publisher in Spain, the total damages sought were in excess of 17.6 million EUR. The director of the media outlet was reported to have said that the lawsuit “can only have one goal: silence the press”.¹⁰⁴ In another case, a Bulgarian company brought a claim for civil defamation of the equivalent of 500,000 EUR in Bulgaria against the investigative website Bivol. Bivol’s lawyer is reported as stating that the amount was unprecedented and creates “conditions of censorship”.¹⁰⁵ Mediapool, a Bulgarian media outlet, also faces a civil defamation claim for the equivalent of 500,000 EUR. The media outlet is being sued in Bulgaria by a Bulgarian insurance company. Mapping Media Freedom state that the “requested damages of nearly half a million euros would bankrupt the private media outlet.”¹⁰⁶ The database further reports that the owner and Editor-in-Chief of Mediapool saw the lawsuit as being aimed at silencing legitimate journalistic reporting.¹⁰⁷ The insurance company has defended the quantity of damages claimed as corresponding to the possible damage caused to the insurance sector in Bulgaria, the financial sector and to the company.¹⁰⁸ The claim relates to an article which reported on a statement made by the then caretaker Minister of Finance as based on a transcript published in the legal system of the Council of Ministers.¹⁰⁹

4.7. European Element

When assessing whether the communication under scrutiny in the case has a European element, consideration was given to whether the information relates to EU governance including the EU’s commitment to ensuring that its Member States uphold the values enshrined in Article 2 TEU and the indicators used to assess compliance with the rule of law by virtue of the Rule of Law Reports’ methodology. In addition, reference was made to the areas in which the EU has exclusive or shared

¹⁰⁴ Mapping Media Freedom, “Energy company filed 17.6 million SLAPP lawsuit against independent newspaper” (February 2022) <<https://www.mapmf.org/alert/24588>> accessed 31 August 2023.

¹⁰⁵ Safety of Journalists Platform, “Defamation lawsuit against investigative website Bivol” (January 2022) <<https://fom.coe.int/en/alerte/detail/107637040:globalSearch=true>> accessed 31 August 2023.

¹⁰⁶ Mapping Media Freedom, “Mediapool sued for record €500,000 by Bulgarian insurance company Lev Ins” (March 2023) <<https://www.mapmf.org/alert/30013>> accessed 31 August 2023.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

competence under Articles 3, 4 and 6 of the TFEU. These include the functioning of the internal market, aspects of social policy, agriculture and fisheries, environment, consumer protection, transport, energy, area of freedom, security and justice, and certain public health matters. Adopting this broad definition of “European element” as relating to matters that impact upon the functioning of the internal market or areas of legislative EU competence – 85% of total cases had a European element.

The high instances of reporting on corruption being the subject of legal actions may be of particular concern for EU institutions. Article 2 TEU establishes the rule of law and democracy as common values for all EU Member States. Where there is a risk to one of the values set out in Article 2 TEU, Article 7 TEU empowers the Council of the European Union to make recommendations to the Member State where the risk presents itself. The Rule of Law Mechanism was established in 2014 to open dialogue among EU institutions, Member States, civil society actors, and other stakeholders on the rule of law. The Rule of Law Report is the foundation of the dialogue process and covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.

In relation to anti-corruption, the Rule of Law Reports monitor the capacity to fight corruption, prevention of corruption including measures in place to ensure whistleblower protection and encourage reporting of corruption, and repressive measures. The Eurobarometer which surveys perceptions of corruption is one of the main sources for the anti-corruption framework. The Eurobarometer monitors public opinion in EU Members states. The suppression of information on corruption could distort the perception of corruption and thus lead to an inflated confidence in the integrity of public institutions across the EU. The same consequence of SLAPPs could extend to the other three pillars of the Rule of Law Reports.

The interdependence of media freedom and anti-corruption is acknowledged in the Rule of Law Reports’ methodology. The Rule of Law Reports make specific recommendations on the “rules and practices protecting journalistic and other media activity from state interference, capacity to investigate attacks on journalists, access to information/public documents.”¹¹⁰ Specific emphasis has been placed on strategic litigation against public participation, the criminalization of defamation, the independence of the media, the regulation of the media, and the physical safety of journalists.¹¹¹ Therefore, while we did not count legal actions against civil society actors as a European element *per se*, it should be noted that any threat to the media and media pluralism constitutes a concern for the Rule of Law Mechanism, and for the values enshrined in Article 2 TEU.

Matters which were categorised as having a European element included, anti-money laundering, EU-Russia relations, misuse of EU grants, cybersecurity, migration, extradition, access to the Eurozone, organised crime, and international drug trafficking. In relation to organised crime, money laundering, cybersecurity, organized crime and international drug trafficking, Article 83 TFEU provides that the EU Parliament and Council will legislate on serious crimes with a cross-border impact including terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

¹¹⁰ European Commission, “European Rule of Law Mechanism: Methodology for the preparation of the annual Rule of Law Report” < https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf > accessed 24 October 2023.

¹¹¹ European Commission, “2023 Rule of Law Report” COM(2023) 800 final (July 2023) < https://commission.europa.eu/system/files/2023-07/4_1_52673_comm_recomm_en.pdf > accessed 24 October 2023.

4.8. International Element

Box 4: Reports on corruption on the Bulgaria-Turkey-Border resulting in legal action

Mapping Media Freedom reported that three Bulgarian journalists had been the subject of multiple lawsuits initiated by an individual. The actions related to investigative reports published on two media outlets which concerned the import of food produce and truck parking at the border between Bulgaria, Turkey and Greece. It was alleged that the activity at the border had deprived the Bulgarian state of millions in tax revenue. The second report related to alleged police corruption during a murder investigation. In addition to the lawsuits, a source was arrested before giving an interview to one of the journalists.

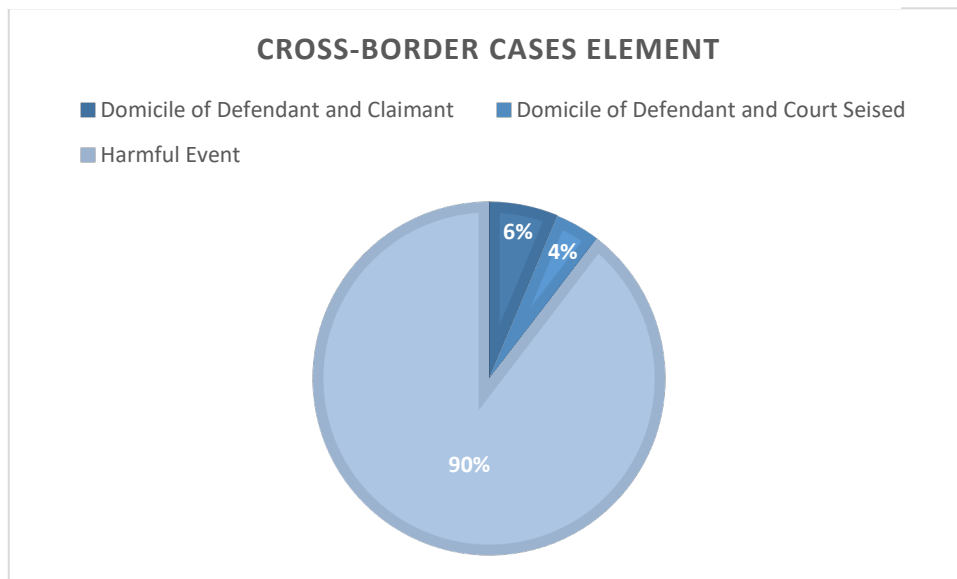
One of the journalists is also facing two separate legal actions relating to his reporting on alleged financial crimes, including money laundering and corruption. Another is facing a civil defamation claim for reporting relating to alleged financial crimes.

Source: Mapping Media Freedom, "Multiple lawsuits filed against BIRD and Bivol journalists by associate of suspected organized crime leader" (March 2023) <<https://www.mapmf.org/alert/30200>> accessed 31 August 2023; Mapping Media Freedom, "Lawyer files SLAPP lawsuit against two BIRD.bg journalists" (December 2022) <<https://www.mapmf.org/alert/25513>> accessed 31 August 2023; Mapping Media Freedom "MP files SLAPP lawsuit against two BIRD.bg journalists" (December 2022) <<https://www.mapmf.org/alert/25512>> accessed 31 August 2023.

To recall, this category was assessed based on whether the communication related to economic or political activity in a third State, to a matter of public interest of significance to the governance of a third State, involved a legal or natural person resident in a third State, or related to the functioning of the international economic or political order. Based on this definition, 44.6% of total cases had an international element. Matters which were categorised as an international element included, EU-Russia relations, undocumented workers, extradition, organised crime, international drug trafficking, international abduction, money laundering, war crimes and crimes against humanity. Outside of the subject matter of the communication at issue, a number of cases were classified as having an international element due to the ownership structure of the claimant company or the nationality of the claimant.

4.9. Cross-Border

Figure 7: Cross Border Cases as a % of Total Cases



Source: Authors' own

For the purposes of this study, the cross-border category was assessed based on the grounds of jurisdiction for cross-border claims in the Brussels Ia Regulation. Under the general rule on jurisdiction contained in the Brussels Ia Regulation, and in the absence of a jurisdictional agreement between the parties, defendants in civil and commercial matters shall be sued in the place of their domicile.¹¹² In addition, in matters relating to a tort or delict, the claimant may also bring proceedings in the place in which the harmful event occurred, which is to be understood either as the place where the harm originated or was felt. The European Court of Justice's (ECJ) has extended the dual meaning of the place where the harmful event occurred to defamation claims. The dual meaning established in *Bier* allows a claimant in a non-contractual matter to sue in the place of the defendant's domicile, in the place where the harm originated or the place where the harm was felt.¹¹³ In defamation cases, according to *Shevill*,¹¹⁴ this means that a claimant can sue for damages related to defamation in the place of publication or the places where the resulting reputational harm was felt. In addition, the claimant can bring an action for the entirety of the resulting harm in the place where the publisher is established.¹¹⁵ In an era of online publication, this means that a claimant can break up a claim by suing for the portion of the damage resulting from the publication in a particular jurisdiction.

Based on this study's criteria (i.e., grounds of jurisdiction under the Brussels Regulation), 91.4% of total cases had a cross-border element, based on the facts of the case, not the nature of the specific claim deployed. The majority of cases were categorised as being capable of grounding a cross-border action by virtue of the *subject matter* under discussion having been published in multiple jurisdictions.

¹¹² Brussels Ia (n 3) Article 4.

¹¹³ Case 21/76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

¹¹⁴ *Shevill* (n 6).

¹¹⁵ See Case C-509/09 *eDate Advertising* EU:C:2011:685; Case C-194/16 *Svensk Handel* EU:C:2017:766.

It is worth contemplating the impact alternative definitions of cross-border implications would have on the number of cases that would fall within scope of a future Directive. Article 4 of the Proposed Directive identifies three situations in which a matter should be considered to have cross-border implications. First, the matters should be considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised; second, the matter should be considered to have cross-border implications where the matter of public interest at stake is relevant to more than one Member State; third, where the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State. In relation to the latter, it is worth noting that the temporal and geographical scope of this study may preclude identification of concurrent or previous court proceedings in another Member State, or indeed in a third State.

The Council's Approach proposes to remove any definition of cross-border implications. It follows that Member States would be at liberty, until such time as an authoritative interpretation of the term is provided, to adopt transposition measures whose scope diverges significantly. It appears that this could include an interpretation of cross-border implications which is limited to consideration of the domicile of the parties.. The articulation of a common, potentially broader, understanding of cross-border implications would be contingent on a case making its way to the European Court of Justice by way of a preliminary reference, which in turn would necessitate the articulation of a plausible argument that national transposition measures are inconsistent with a term which lacks definition in the EU measure. The timeframe for any such preliminary ruling would be uncertain, of course, as would its outcome. While, in our view, cross-border implications should be understood with reference to the existence of economic and political spillovers, as well as jurisdictional connections to multiple courts, the route to articulating this common understanding is uncertain in the absence of legislative definition..

Therefore, there are three possible characterisations of cross-border contemplated (a) in this study, (b) in the Commission's proposal and (c) in the Council's proposal. As mentioned, based on this study's criteria (i.e. grounds of jurisdiction under the Brussels Ia Regulation), 91.4% of total cases had a cross-border element. Based on the Commission's proposal, a more accurate figure would be represented by combining the figures on the defendant's domicile (10%) with the figures on European element (85%). Finally, based on the assumption that the Council's proposed removal of the cross-border definition could result in an interpretation that focuses on the defendant's domicile, approximately 10% of the cases identified in this study would come within the scope of the Council's proposed Directive.

5. ANALYSIS OF LEGAL THREATS

KEY FINDINGS

This Chapter outlines our findings relating to legal threats reported between 1 January 2022 and 31 August 2023. Legal threats are particularly hard to quantify as, unlike judicial proceedings, they are not usually in the public domain. A study by the Foreign Policy Centre (FPC) shows that 73% of all respondents had received communications threatening legal action as a result of their journalism. Unlike the cases we consider in this chapter, respondents to the FPC survey benefited from anonymity. The matters we analyse in this chapter represent only the fraction of legal threats which are reported by their recipients. This study identified 14 legal threats with links to Spain (2), Luxembourg (4), Poland (1), France (3), Italy (3), and Malta (1). Seven threats were issued by companies, two by politicians, one by a political party, one by a political commentator, two from non-profit organisations, and one by a businessperson with a private limited company registered in the United Kingdom, and connections to India, Canada, the United States, Malta, Dubai, Montenegro and Russia. The matters which were the subject of these threats ranged from environmental pollution and corruption at a Swiss-based mining company's Guatemalan subsidiaries, the misuse of state subsidies, and fraudulent behaviour in public procurement projects.

In 2020, the Foreign Policy Centre (FPC) presented the findings of their survey on the scope and scale of risks and threats facing investigative journalists uncovering financial crime and corruption. This report found that 71% of respondents had experienced non-legal threats and/or harassment while working on investigations into financial crime and corruption, civil legal cases, especially the use of cease-and-desist letters, interrogation by authorities and smear campaigns were reported by more than 50% of respondents. Importantly, 73% of all respondents had experience had received communications threatening legal action as a result of their journalism. Legal threats were identified as having the greatest impact on the journalists' ability to continue working with 70% of respondents reporting that they had self-censored to some degree due to the risk of legal action or threats.

Legal threats are particularly hard to quantify as they may not be reported in the media and are not otherwise required to be in the public domain. A more recent report by FPC on SLAPPs in the UK caution that "[t]ypically, however, the intention of a SLAPP claimant is not necessarily to reach the court stage, where the facts of the matter might be examined more closely, but rather to draw out the legal proceedings in order to delay publication and/or exhaust the financial as well as other resources (time, energy and psychological) of the defendant. Journalists and media subject to legal threats understandably therefore may fold under the financial pressure of taking a case to court, where they may lose thousands if not tens of thousands of pounds, even if they were to eventually win. Journalists who have 'won' cases, usually due to the claimant withdrawing at a late stage, can still feel that they have lost due to the level of resources wasted that cannot be reclaimed. Cases that reach court are, therefore, the 'tip of the iceberg'."¹¹⁶

This report identified 14 legal threats with links to Spain (2), Luxembourg (4), Poland (1), France (3), Italy (3), and Malta (1). Seven threats were issued by companies, two by politicians, one by a political party, one by a political commentator, two from non-profit organisations, and one by a businessperson with a private limited company registered in the United Kingdom, and connections to India, Canada, the United States, Malta, Dubai, Montenegro and Russia. The matters which were the subject of these

¹¹⁶ Susan Coughtrie (n 52).

threats ranged from environmental pollution and corruption at a Swiss-based mining company's Guatemalan subsidiaries, the misuse of state subsidies, and fraudulent behaviour in public procurement projects.

Box 5: Mining company threatens Basque newspaper with legal action

Mapping Media Freedom reported that a Swiss-based multinational mining company had requested a Basque newspaper to remove of an article by a Guatemalan journalist. The media outlet was threatened with a lawsuit for 15,000 EUR for damages. The article compared the mining company's governance to that of a criminal organization and referred to a cross-border investigative project by a group of journalists. The investigative report had found evidence that pollution reports had been suppressed, plans to destroy local communities' subsistence crops in Guatemala, and bribing national police.

Source: Mapping Media Freedom, "Mining company Solway threatens legal action against Basque newspaper Argia due to critical reporting" (June 2023) <<https://www.mapmf.org/alert/30442>> accessed 31 August 2023

Three threats were initiated by real estate companies based in Luxembourg and threatened legal action unless an article was removed from a Luxembourg based online-platforms' website.¹¹⁷ Another was issued by a Polish political commentator, who demanded a correction and compensation of 20,000 PLN (to be paid to charity) from a Polish reporter. The article related to the misuse of state subsidies.¹¹⁸

In June 2023, an Italian political party insinuated that it would take legal action against an Italian media outlet in relation to a report which alleged connections between the political party and the Kremlin.¹¹⁹ Two additional threats were recorded in Italy. The first was issued by a politician's lawyers, threatening a journalist and editor with a defamation lawsuit for statements made in relation to a bribery scandal in Europe.¹²⁰ The second came from an Italian defence minister and targeted the Italian newspaper, Domani, over an article which concerned a potential conflict of interest relating to links with the arms industry.¹²¹ On Twitter, the minister stated that "I am sure that civil and criminal convictions are the only method that directors, editors and journalists can understand in the face of defamation."¹²²

In Spain, a Spanish football club threatened a Spanish newspaper with legal action in relation to documents seized by police during an ongoing legal case on third-party payments, breach of internal protocols, and smear campaigns.¹²³ The Spanish satirical magazine, Mongolia, was the target of two

¹¹⁷ Mapping Media Freedom, "Reporter.lu received three formal notices threatening legal action" (March 2023) <<https://www.mapmf.org/alert/30021>> accessed 31 August 2023.

¹¹⁸ Mapping Media Freedom, "Milesz Manasterski demands correction and compensation for damaged from Wirtualna Polska journalist" (June, 2023) <<https://www.mapmf.org/alert/30417>> accessed 31 August 2023.

¹¹⁹ Mapping Media Freedom, "Lega threatens L'Espresso with legal action" (June 2023) <<https://www.mapmf.org/alert/30351>> accessed 31 August 2023.

¹²⁰ Mapping Media Freedom, "Italia Viva's leader Matteo Renzi threatens editor Marco Travaglio with defamation lawsuit" (December 2022) <<https://www.mapmf.org/alert/25479>> accessed 31 August 2023.

¹²¹ Mapping Media Freedom, "New defence minister announces intention to sue Domani over report on alleged conflict of interest" (October 2022) <<https://www.mapmf.org/alert/25312>> accessed 31 August 2023.

¹²² Ibid.

¹²³ Mapping Media Freedom, "FC Barcelona threatens legal action against El Mundo over leaked contract negotiations with Lionel Messi" (September 2022) <<https://www.mapmf.org/alert/25460>> accessed 31 August 2023.

separate lawsuits for offending religious sentiment. In addition, the Institute of Social Policy was reported as requesting “the ‘immediate closure’ of the magazine by judicial means.”¹²⁴

In France, three French media outlets received legal threats from a French company specialising in advocacy, cybersecurity and online influence.¹²⁵ These threats are in addition to lawsuits filed against three media outlets by the same firm.¹²⁶ Mapping media freedom report that one of the journalists implicated in the matter reported that the decision was taken to remove passages of the article and modify the article with an addendum that the article had been modified following formal notice. The media outlet reports that they were further pressured to remove the reference to the formal notice.¹²⁷

Finally, the Maltese investigative media outlet, Shift News, reported that they had been threatened with legal action by an Indian-Canadian businessman in relation to articles which addressed fraudulent behaviour in public procurement projects.¹²⁸

¹²⁴ Mapping Media Freedom “Satirical magazine Mongolia sued for ‘offending religious sentiments’ over Christmas front page” (January 2023) <<https://www.mapmf.org/alert/25654>> accessed 31 August 2023.

¹²⁵ Mapping Media Freedom, “Three French media outlets received legal threats” (September 2022) <<https://www.mapmf.org/alert/25200>> accessed 31 August 2023.

¹²⁶ Mapping Media Freedom, “Three French investigative media outlets prosecuted for defamation by firms” (September 2022) <<https://www.mapmf.org/alert/25192>> accessed 31 August 2023

¹²⁷ Mapping Media Freedom, “Three French media outlets received legal threats” (September 2022) <<https://www.mapmf.org/alert/25200>> accessed 31 August 2023.

¹²⁸ Julian Delia, “Ram Tumuluri sends legal threat to The Shift objecting to being called ‘an international scammer’” (Shift News, March 2022) < <https://theshiftnews.com/2022/03/21/ram-tumuluri-sends-legal-threat-to-the-shift-objecting-to-being-called-an-international-scammer/>> accessed 31 August 2023.

6. RECOMMENDATIONS

KEY FINDINGS

Based on the data analysis above, this chapter includes a number of recommendations for the consideration of legislators. We note in particular that the success of a future anti-SLAPP Directive is contingent on the articulation of key terms in language which is sufficiently clear and precise to ensure the adoption of common minimum standards of protection throughout the Union.

We recommend that an Anti-SLAPP Directive should include a sufficiently broad definition of cross-border implications, to reflect our finding that the public interest matter under dispute is frequently relevant to multiple Member States and to the overall governance of the Union.

In addition, rather than focusing on the claimant's motive or purpose in bringing an action, a future Anti-SLAPP Directive should focus exclusively on (i) the existence of an act of public participation and (ii) the litigation tactics used by the claimant. Reference to the claimant's motivation detracts from the focus on the respondent's public participation and could also constitute an insuperable evidentiary burden for the respondent.

We also note that the Proposed Directive restricts the remedy of early dismissal to cases in which the claim in the main proceedings is manifestly unfounded. Furthermore, the Council proposes to define manifest unfoundedness as "so obviously unfounded that there is no scope for any reasonable doubt." Early dismissal is a central plank of Anti-SLAPP legislation, the limitation of which would have deleterious effects on the efficacy of a future instrument. A requirement of manifest unfoundedness would constitute an insuperable hurdle to the deployment of early dismissal in each of the cases in the datasets we have analysed. This would be exacerbated by the inclusion of a common, restrictive definition of the sort proposed by the Council. It follows, in our view, that the retention of a requirement of manifest unfoundedness for early dismissal would limit access to this remedy to an exceedingly limited class of cases.

In relation to indicators of abuse, the data analysis suggests that inequality of arms as between claimant and respondent is of particular concern. We recommend that the legislator consider including inequality of arms as an indicator of abuse, albeit not one which is conclusive in its own right, particularly in relation to respondents sued in their personal capacity. We further observe that SLAPPs claimants often target individuals and/or multiple defendants and initiating multiple lawsuits.

We also note, in relation to the scope of a future Anti-SLAPP Directive, that the limitation of Anti-SLAPP measures to matters of a civil or commercial nature. As criminal law is excluded and a number of Member States continue to criminalise defamation and the crimes of hate speech have grounded SLAPPs, it is important that the Commission recommend, through the means available to it, the decriminalisation of speech in Member States.

Furthermore, given defamation is excluded from the Rome II Regulation and bespoke rules relating to defamation are absent from the Brussels Ia Regulation, the adoption of an Anti-SLAPP Directive would not of itself remove the potential for private international law rules to be used to increase the psychological and financial burden of defending abusive lawsuits against public participation. It is therefore recommended that the Brussels Ia and Rome II Regulation be recast with a view to providing greater predictability as to the exercise of jurisdiction and the applicable law.

Finally, we also recommend that soft law measures be deployed to sound effect, and that the Commission consider whether provisions of its Recommendation merit legislative intervention.

Based on the data analysis above, this chapter includes a number of recommendations for the consideration of legislators. We note in particular that the success of a future anti-SLAPP Directive is contingent on the articulation of key terms in language which is sufficiently clear and precise to ensure the adoption of common minimum standards of protection throughout the Union. In view of the relationship between freedom of expression and the sound governance of the Union and Member States, we are of the view that the adoption of the recommendations below should be treated as a matter of urgency. Failure to address these matters and to ensure that they are given legal effect at the earliest opportunity would have adverse effects on the democratic governance of the European Union, and would have the potential to enable distortions of electoral processes at Union and Member State level.

6.1. Scope of an Anti-SLAPP Directive: Definition of Cross-Border

Our analysis of open SLAPP cases shows that the effectiveness of an EU instrument to combat SLAPPs is contingent on the manner in which the requirement of a cross-border element is defined. As noted above, our data analysis categorises cases with reference to defined international connections in existing legal instruments.

The Commission's Proposed Directive provides that a cross-border element exists where at least one of the following conditions is satisfied:

- At least one of the parties is domiciled in a State other than that in which the court seised of the matter is situated;
- The act of public participation concerns a matter of public interest of relevance to more than one Member State; or
- The claimant or associated entities have initiated related proceedings in another Member State.¹²⁹

The Council's proposed amendments recommend the excising of a definition of cross-border matters. It is not entirely clear what the long-term implications of the removal of a definition would be insofar as the development of a common understanding of key terms is concerned.

However, in the absence of a common definition of a term which is central to the functioning of the Directive, it is to be expected that Member States would transpose the Directive without a uniform common minimum standard. This would provide an opportunity and an incentive to engage in abusive forum shopping to avoid anti-SLAPP protections.

Should the Member States take the view that a cross-border element exists only where the parties are domiciled in different States to that in which the court seised of the matter is to be found, approximately 90% of cases which we identify as cases with connections to more than one Member State would be excluded from the scope of the Directive as transposed in those Member States.

This would be especially anomalous when considered with reference to the jurisdiction of courts in relation to non-contractual obligations. A situation might not be considered of cross-border relevance for the purposes of Anti-SLAPP law, but would be amenable to the jurisdiction of the courts of multiple member states for the purposes of the Brussels Ia Regulation, while the applicable law might be that of another State altogether.

In contrast, the Proposed Directive's definition of cross-border relevance is sufficiently broad to accommodate the inclusion of matters which the Treaty and Union legislation deem to be within the

¹²⁹ Proposed Directive (n 15) Article 4.

Union's competence, and which therefore merit EU legislation precisely because they have effects or are of public interest in a plurality of Member States. This is not to say that the Proposed Directive's definition of cross-border matters takes in all situations such as that noted in the immediately foregoing paragraph; it is possible for a case to be connected to multiple jurisdictions for the purposes of jurisdiction and choice of law without necessarily being of public interest to more than one member state. However, if that public interest to multiple member states is interpreted sufficiently broadly as per our method of analysis in Section 4.7 above, the extent of that disconnect would be limited.

In the interests of clarity and conceptual consistency with other instruments adopted on the basis of Art 81 TFEU, however, we recommend that the definition of cross-border implications be articulated in a manner which also captures explicitly the full range of connecting factors on the basis of which a court could be seised of a non-contractual claim. To this end, we recommend the addition of a new Article 4(2)(c) as follows:

the facts of the case establish connections which could enable the claimant to choose from among the courts of more than one Member State which may be seised of the claim in accordance with 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).

Failure to do so could result in claimants being afforded a choice of forum through the Brussels Ia Regulation in circumstances where a claim might not be considered to be of cross-border relevance for the purposes anti-SLAPP law. It follows that any disconnect between a choice of grounds of jurisdiction and the scope of anti-SLAPP law could result in claimants being empowered unilaterally to bypass anti-SLAPP protections.

6.2. Pursuer's motivation

As noted in Section 2.1 above, references to the claimant's *aim* or *purpose* in instituting legal proceedings tends to place an unwieldy or insurmountable evidentiary burden on the defendant to show said subjective aim or purpose. Shapiro observes that "[b]y requiring that the goal of the suit be to intimidate, impoverish and discourage, this definition of SLAPPs takes the focus away from the communication to be protected and instead requires an examination of the legal justifications of the suit, tying that up with a complicated examination of the SLAPP plaintiff's intent and the relationship between the parties."¹³⁰ Indeed, the databases we analyse in this study are compiled without reference to the claimant's subjective intention, save to the extent that this might be capable of being surmised through the objective identification of factors which may constitute abuse of process.

It follows, therefore, that the inclusion in Article 3 of the Proposed Directive of a reference to the claimant's purpose – indeed, *main* purpose – to prevent, restrict or penalise public participation could prompt courts to engage in a cumbersome exercise intended to identify what was foremost in the claimant's mind. The inclusion in the Proposed Directive of objective indicators of that main purpose does not, in our view, remedy the steer which courts might reasonably take in relation to the need for a subjective inquiry into the claimant's mind.

It is submitted, therefore, that reference to "main purpose" (or, indeed, any purpose) should be removed from the definition of abusive proceedings, and that the law should focus solely on indicators

¹³⁰ Pamela Shapiro, "SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International" (2010) 19 Review of European Community & International Environmental Law 14, 24-25.

of abuse. Alternatively, should legislators be of the view that the claimant's intention should have definitional value, it could be clarified that any reference to the purpose or "main purpose" of the proceedings should be construed as being capable of conclusive identification solely by reference to the presence of abusive litigation tactics enumerated in a non-exhaustive list of indicators of abuse.¹³¹

6.3. Early Dismissal and Manifest Unfoundedness

Early dismissal is the cornerstone of Anti-SLAPP legislation. Accelerated proceedings enable respondents to have claims dismissed without the undue financial and psychological burden of prolonged proceedings. Even in jurisdictions where ample public interest defences exist, it has been noted that these defences come too late in proceedings to deter abusive litigation. For instance, the UK government's consultation on SLAPPs noted that the cost and length associated with mounting a defence may outweigh the strength of the defence and pressure defendants into settling.¹³² Consequently, early intervention is a key remedial and deterrence mechanism.

The Proposed Directive affords the remedy of early dismissal in cases where courts find that the claimant's case is manifestly unfounded.¹³³ The remedy is not extended to cases in which a court finds that proceedings are disproportionate, excessive or unreasonable, but where the claim is at least partially founded.¹³⁴ It follows, therefore, that early dismissal would not be available in respect of all abusive lawsuits against public participation.

The remedy would be further restricted if the Council's proposed definition of manifestly unfounded claims were to be adopted. The Council defines manifestly unfounded cases as "so obviously unfounded that there is no scope for any reasonable doubt,"¹³⁵ a threshold which exceeds the ECtHR common standard for access to courts by some distance.¹³⁶ This has a twofold problematic effect on the fulfilment of the aims of the Proposed Directive. First, the inclusion of a common definition could circumscribe the member states' ability to adopt higher standards of protection of public participation as (i) they might consider that they are precluded from departing from the shared definition or (ii) the Court might take the view that the common definition operates as a minimum safeguard for the protection of the right to access to courts. Secondly, and perhaps more fatally, the substance of the Council's proposal is exceedingly restrictive.

While, for reasons noted above, we are unable to engage in deep analysis of individual cases, we note that it appears that the requirement of manifest unfoundedness would constitute an insuperable hurdle to the deployment of early dismissal in each of the cases in the datasets we have analysed. This

¹³¹ A briefing document from the Parliament suggests that the correct interpretation of Article 3(3), observing that the non-exhaustive list of indicators may be used to identify the hidden purpose of a lawsuit, see Maria Diaz Crego and Micaela Del Monte, "Strategic Lawsuits Against Public Participation (SLAPPs)" EU Parliament Briefing PE 733.668 (April 2022), 8 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI\(2022\)733668_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf)> accessed 13 October 2023.

¹³² Ministry of Justice, "Consultation Outcome: Strategic Lawsuits Against Public Participation (SLAPPs): Government Response to Call for Evidence" (20 July 2022) <<https://www.gov.uk/government/consultations/strategic-lawsuits-against-public-participation-slappls/outcome/strategic-lawsuits-against-public-participation-slappls-government-response-to-call-for-evidence#defamation-libel-laws>> accessed 1 November 2023.

¹³³ Proposed Directive (n 15) Article 9.

¹³⁴ Alternative remedies are available in abusive court proceedings against public participation and are set out in Articles 14 – 16 of the Proposed Directive (n 15).

¹³⁵ Council's Approach (n 34) Recital 13a.

¹³⁶ See Council of Europe, "Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)" <https://www.echr.coe.int/documents/d/echr/guide_art_6_eng> accessed 6 November 2023; see also commentary by Borg Barthet et al (n 1).

would be exacerbated by the inclusion of a common, restrictive definition of the sort proposed by the Council. It follows, in our view, that the retention of a requirement of manifest unfoundedness for early dismissal would restrict access to this remedy to an exceedingly limited class of cases.

The restricted availability of the remedy would appear to be motivated by the interest of the legislator in ensuring that the parties' enjoyment of their right to access courts be unencumbered by disproportionate government interference. It is noteworthy in this respect that Anti-SLAPP legislation has survived constitutional challenge to the early dismissal remedy in the United States of America.¹³⁷ The reasoning in those decisions would equally be transposable in a European context where the ECtHR has provided clear guidance on the balance to be struck between relevant fundamental rights. Indeed, the Council of Europe's draft Anti-SLAPP recommendation on countering the use of SLAPPs extends the remedy to all SLAPPs, whether manifestly unfounded or otherwise.¹³⁸

We are therefore of the view that, if the aims of the Proposed Directive are to be fulfilled, the remedy should be extended to all SLAPPs. This would do no violence to the sound balance between the parties' fundamental rights but would, rather, remedy the existing practical imbalance, in keeping with the aims of the proposed legislation.

There further appears to be some confusion as to whether the remedies that extend to abusive lawsuits against public participation are available in manifestly unfounded proceedings. For instance, a briefing document by the Parliament states that "the proposed directive also provides for a number of remedies that would *only* be available in cases of abusive court proceedings against public participation and seek to compensate for the harm suffered by SLAPP targets." Our reading of the legislation is that the remedies available in abusive lawsuits would be available in manifestly unfounded proceedings, the latter having passed a higher threshold for establishing abuse. Further, early dismissal procedures would be insufficient, in and of themselves, to compensate targets of manifestly unfounded proceedings for immaterial and material damages suffered in defending an action, even to an early stage. Nor would early dismissal mechanisms necessarily provide a sufficient deterrence mechanism without the possibility of the court imposing effective, proportionate and dissuasive penalties. Therefore, we would recommend clarifying that the remedies available in abusive court proceedings are available to defendants in manifestly unfounded court proceedings.

6.4. Indicators of Abuse

Article 3 of the Commission's proposal provides the following non-exhaustive list of indicators: the disproportionate, excessive or unreasonable nature of the claim or part thereof; the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; intimidation, harassment or threats on the part of the claimant or his or her representatives. The Parliament adds to this list: the misuse of economic advantage or political influence by the claimant against the defendant, leading to an imbalance of power between the two parties; the use in bad faith of procedural tactics such as delaying proceedings, and choosing to pursue a claim that is subject to the jurisdiction of the court that will treat the claim most favourably, or the discontinuation of the cases at a later stage of the proceedings.

¹³⁷ While some States had to amend their laws following findings that Anti-SLAPP legislation violated the constitutional right to a trial by jury (see e.g., *Davis v Cox* 351 P.3d 862, 864 (Wash. 2015), and *Mobile Diagnostic Imaging v. Hooten* 889 N.W 2d 27, 35 (Minn. Ct. App. 2016)), States have avoided this issue by adopting the Uniform Public Expression Protection Act drafted by the Uniform Law Commission.

¹³⁸ Draft Recommendation (n 38).

From our analysis, the following common litigation tactics were employed: targeting individuals, targeting multiple persons or organisations, filing multiple lawsuits, excessive claims of damages or claims of moral damages. The claims often involved an inequality of arms between the parties to the dispute, with the defendant (particularly individual targets) being less resourced than the claimant. It is worth clarifying that the right to a fair trial includes access to a court,¹³⁹ an effective remedy,¹⁴⁰ and a fair procedure. The ECtHR has found a breach of the right to a fair trial as a consequence of a lack of access to legal aid,¹⁴¹ the length of the proceedings,¹⁴² and the inequality of arms between the parties.¹⁴³ The latter implies a fair balance between the parties, meaning each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the other party.¹⁴⁴ Consequently, a denial of legal aid may constitute a failure to observe the equality of arms principles, as was the case in *Steel and Morris v United Kingdom*.¹⁴⁵ However, in *McVicar v United Kingdom*, the ECtHR found that the lack of legal aid in a libel action brought by a comparatively wealthy individual placed a greater physical and emotional toll on the applicant than it would have on an experienced legal advocate.¹⁴⁶ Despite this acknowledgement of the relative disparity of power between the parties, the Court found no violation of the applicant's ability to present an effective defence as a consequence of his ineligibility for legal aid, as the case was not overly complex.¹⁴⁷ Therefore, the threshold for when ineligibility for legal aid will constitute a violation of the equality of arms principle must be determined by reference to the circumstances of the case as a whole. Consequently, if courts are to consider whether an inequality of arms between the parties indicates abuse, it will be necessary to look to the circumstances of the case as a whole, including the complexity of the proceedings and the availability of legal aid.

6.5. Decriminalisation of Speech

Commission Recommendation 2022/758 acknowledges numerous resolutions of the Council of Europe in which the chilling effect of the criminalisation of defamation is recognised. Article 7 provides as follows: "Member States should also ensure that penalties against defamation are not excessive and disproportionate. Member States should take utmost account of the Council of Europe's guidelines and recommendations addressing the legal framework for defamation, and in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. Member States are encouraged to favour the use of administrative or civil law to deal with defamation cases, provided that such provisions have a less punitive effect than those of criminal law."¹⁴⁸

In the nineteen months between the adoption of that recommendation and the completion of this report, authorities of the Member States have continued to bring criminal defamation proceedings. There is no evidence that the Commission's recommendation has prompted any change in the incidence of criminal defamation cases, or of wholesale reform of criminal laws in accordance with the Commission Recommendation. It appears, therefore, that non-binding measures are of limited utility.

¹³⁹ *Golder v. The United Kingdom* (Application no. 4451/70).

¹⁴⁰ *Nait-Liman V. Switzerland* (Application no. 51357/07).

¹⁴¹ *Steel and Morris v. The United Kingdom* (n 60).

¹⁴² *Scordino v Italy (No.1)* (Application no. 36813/97) [224].

¹⁴³ *Kress v. France* (Application no. 39594/98).

¹⁴⁴ *Regner v. The Czech Republic* (Application no. 35289/11).

¹⁴⁵ *Steel and Morris v. The United Kingdom* (n 60).

¹⁴⁶ *McVicar v. The United Kingdom* (Application no. 46311/99) [51].

¹⁴⁷ *Ibid* [62].

¹⁴⁸ Commission Recommendation (EU) 2022/758 (n 90).

Furthermore, while the decriminalisation of defamation would limit the extent to which criminal laws could be used to suppress legitimate public participation, it is noteworthy that there remains ample room for criminal liability in relation to speech.

The cases we analyse above include offences relating to offending of religious sentiment. In addition to matters captured in the datasets we analyse above, we are also aware of criminal cases concerning spurious allegations of harassment and insult in at least one member state,¹⁴⁹ Malta, where ministers have proposed the further criminalisation of speech in the intervening period since the adoption of the Commission Recommendation.¹⁵⁰

It is therefore submitted that the institutions should consider in due course the exercise of legislative competences and/or use of judicial proceedings to ensure member state compliance with their obligations to uphold the rule of law, including through the fulfilment of their obligations in respect of freedom of expression.

6.6. Private International Law Instruments

The Commission and Council's proposals do not, of themselves, resolve existing issues relating to defamation claims under the Brussels Ia and Rome II Regulations.¹⁵¹ Under Brussels Ia, a claimant may choose unilaterally between the defendants' domicile or the place where the harm occurred (i.e., where the harm was felt or originated). This application of Brussels Ia in the realm of defamation law increases the risk of forum shopping, particularly in an age of digital media. Further, defamation is excluded from the Rome II Regulation and Member States apply their own domestic private international law rules to determine applicable law in defamation cases. The Parliament has already observed, in the context of SLAPPs, that this exclusion is "conducive to forum shopping and libel tourism, as it allows claimants to choose the forum of the state with the lowest standards of protection of press freedom or freedom of expression".¹⁵²

The European Parliament's proposal aims to reduce the potential for forum shopping through two new articles which clarify rules relating to jurisdiction and applicable law in defamation claims and civil and commercial matters which may constitute a claim under the proposed Directive. Article 18a specifies that, in such claims, the domicile of the defendant shall be the sole forum where the victims of defamation are natural persons. In relation to choice of law, Article 18b provides that the applicable law will be the law of the place to which that publication is directed to or, if it is not possible to identify this place, the place of editorial control or of the relevant editorial activity with regard to the act of public participation.

As is evident with reference to our discussion of cross-border cases in Section 4.9 above, there is ample opportunity for forum shopping through the deployment of the rules in Brussels Ia. In 90% of the identified cases, the communication was publicised in more than one jurisdiction, meaning that a claimant would have, under the current Brussels Ia Regulation, the choice of taking multiple proceedings across jurisdictions where the communication was published, thus increasing the

¹⁴⁹ Jonna Demarco, "'Criminal libel resurrected?': Alarm following Mark Camilleri criminal harassment case' (The Shift News, May 2022) <<https://theshiftnews.com/2022/05/27/criminal-libel-resurrected-alarm-following-mark-camilleri-criminal-harassment-case/>> accessed 6 November 2023.

¹⁵⁰ Jacob Borg "New cyberbullying laws aim to tackle 'keyboard warriors'" (The Times of Malta, 18 January 2022) <<https://timesofmalta.com/articles/view/new-cyberbullying-laws-aim-to-tackle-keyboard-warriors.935537>> accessed 6 November 2023.

¹⁵¹ For a more in-depth analysis see Borg-Barthet et al (n 1).

¹⁵² Maria Diaz Crego and Micaela Del Monte (n 131) 4.

psychological and financial cost of defending an action. The effects of that forum shopping would be exacerbated further by the availability of different national rules on choice of law in defamation.¹⁵³

The combined threat of jurisdictional and choice of law rules has, on occasion, resulted in the wholesale suppression of reporting of matters of public interest to the Union. Such is the existential nature of the threat to potential respondents that it has gone unreported, and, therefore, it is not captured in relevant databases.¹⁵⁴

It follows, in our view, that the potential and actual misuse of EU private international law rules for the suppression of public participation should be addressed through the amendment of existing Regulations.

6.7. Soft Law Measures

The Council and the Parliament's proposals explicitly set down minimum standards as opposed to the adoption in common of gold standard legislation. It is therefore important to recall that a Member State may opt for greater protection than the minimum required by a final Directive. When transposing the final Directive, Member States should consider the Council of Europe recommendation¹⁵⁵ alongside the Commission's Recommendation (EU) 2022/758 and existing model laws which align with their specific legal traditions.¹⁵⁶ and scholarly analyses which contribute to the development and interpretation of the law.

In recognition of the limited scope of the proposed Directive, the Commission complements the proposed Directive with a non-binding recommendation based on Article 292 TFEU.¹⁵⁷ The recommendation provides that member states should:

- review their legal frameworks applicable to defamation laws to limit the scope for abuse of those laws, including the proportionality of damages¹⁵⁸
- include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive court proceedings against public participation for civil matters with cross-border implication,¹⁵⁹
- encourage self-regulatory bodies and associations of legal professionals to align their deontological standards with the Recommendation,¹⁶⁰
- provide training¹⁶¹ and awareness raising initiatives¹⁶² to legal professionals on SLAPPs and journalists and human rights defenders,
- provide access to individual and independent supports,¹⁶³ and

¹⁵³ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L-199/40. defamation is excluded from the Rome II Regulation and Member States apply their own domestic private international law rules to determine applicable law in defamation cases, for a more in-depth analysis see Borg-Barthet et al (n 1).

¹⁵⁴ For commentary on the extent to which the threat of litigation (including the use of private international law rules to exacerbate this threat) has resulted in out of court settlements or the removal of information, see Coughtrie (n 52); Greenpeace (n 2); Borg Barthet et al (n 1).

¹⁵⁵ Draft Recommendation (n 38).

¹⁵⁶ Commission Recommendation (EU) 2022/758 (n 90).

¹⁵⁷ Ibid.

¹⁵⁸ Ibid 5-7.

¹⁵⁹ Ibid 4.

¹⁶⁰ Ibid 9.

¹⁶¹ Ibid 10-18.

¹⁶² Ibid 19-23.

¹⁶³ Ibid 24-28.

- put in place data collection, reporting and monitoring arrangements.¹⁶⁴

The Recommendation is, of course, a non-binding instrument, the function of which is to guide Member States on how to construct robust Anti-SLAPP legislation and provide complementary supports to SLAPP targets who fall both within and outside the scope of the proposed Directive.

It is noteworthy, however, that recommendations and model legislation have no binding force on the Member States. Given the importance of the matters identified in the Recommendation, it is submitted that the EU institutions should consider in due course whether the aims of the Recommendation can be better achieved through the introduction of further binding measures.

In relation to deontological rules for legal professionals, it is worth noting that, albeit outside the EU context, the Solicitors Regulation Authority of England and Wales has issued guidance to legal professionals on the ethical conduct expected of them when they encounter SLAPPs.¹⁶⁵

Finally, the Commission, in its proposed Directive has already recognised the issue of SLAPPs in the context of the Rule of Law Reports.¹⁶⁶ The Rule of Law Reports are an important mechanism for monitoring the administration of justice and media freedom in the EU. It is important that the Rule of Law Mechanisms continues to monitor abuses of the court system and threats to media freedom by reference to SLAPPs.

¹⁶⁴ Ibid 29-32.

¹⁶⁵ Solicitors Regulation Authority, "Warning Notice: Strategic Litigation Against Public Participation (SLAPPs)" (28 November 2022) <<https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>> accessed 19 October 2023.

¹⁶⁶ Proposed Directive (n 15) 2.

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This study was commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament to analyse SLAPP cases and threats which were initiated in 2022 and 2023. The study provides a detailed analysis of the topics of public interest associated with the identified legal actions or legal threats, the cross-border implications of the public interest matter under dispute and, to the extent possible, information about victims, the cause of action, and litigation tactics engaged. Drawing on these findings, recommendations have been formulated on regulatory responses to SLAPPs.

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