

STUDY

Requested by the JURI committee



The Use of SLAPPs to Silence Journalists, NGOs and Civil Society



Policy Department for Citizens' Rights and Constitutional Affairs
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, analyses legal definitions of Strategic Lawsuits Against Public Participation (SLAPP) and assesses the compatibility of anti-SLAPP legislation with EU law. It is recommended that an anti-SLAPP Directive should be adopted, and that the Brussels Ia Regulation and Rome II Regulation should be recast to limit the incidence of SLAPPs.

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LIST OF ABBREVIATIONS

Brussels Ia 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)
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
ECJ	European Court of Justice
ICCPR	International Covenant on Civil and Political Rights
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
UDHR	Universal Declaration of Human Rights

EXECUTIVE SUMMARY

The European Convention on Human Rights establishes a positive obligation to safeguard the freedom of pluralist media and to 'create a favourable environment for participation in public debate'. Strategic Lawsuits Against Public Participation (SLAPP), a form of retaliatory lawsuit intended to deter freedom of expression on matters of public interest, constitute a significant threat to the fulfilment of this obligation.

By restricting scrutiny of matters of public interest, whether of economic or political concern, SLAPPs also have a deleterious effect on the functioning of the internal market, as well as the rule of law in the European Union. However, while several jurisdictions outside the European Union have adopted anti-SLAPP legislation, no Member State of the Union has yet done so. Nor has the Union itself yet adopted any legislation which would dissuade the institution of SLAPPs. There is therefore a significant gap in the integrity of the legal order of the Union.

In 2021, the Council of Europe's Commissioner for Human Rights observed that, while SLAPPs are not a new phenomenon, the extent of the problem is increasing and poses a substantial threat to freedom of expression. There is therefore a need for robust legislative intervention in the European Union with a view to stemming the flow of litigation which is intended to suppress public participation in matters of public interest.

While legislative models adopted in the United States, Canada and Australia are instructive insofar as the overarching structure of EU legal reform is concerned, EU legislation would require the careful articulation of bespoke definitions and methods of analysis. This should be characterised by a distinctive approach which draws on good practice from jurisdictions outwith the European Union, but which recognises nevertheless the unique characteristics of the EU legal order and the legal traditions of its Member States.

Furthermore, legislative intervention must be formulated in a manner which empowers national courts to attain the intended outcome of expeditious dismissal of cases without harming potential claimants' legitimate rights to access courts. Properly framed anti-SLAPP legislation affords the claimant the opportunity to present legitimate claims to the court and therefore satisfies the requirements of Article 6 ECHR. Far from stultifying access to courts for the parties, anti-SLAPP legislation would dissuade the misuse of civil procedure in a manner which prevents respondents from articulating a defence in accordance with EU law and international human rights instruments.

In addition to the adoption of an anti-SLAPP Directive, it is recommended that the Brussels Ia Regulation concerning jurisdiction, recognition and enforcement of judgments be recast with a view to adopting a specific rule concerning defamation claims, and thereby to distinguish jurisdiction in defamation cases from ordinary torts. This would restrict the availability of opportunities for forum shopping arising from the Regulation as presently framed. To this end, it is recommended that jurisdiction should be grounded in the forum of the defendant's domicile, unless the parties agree otherwise. This would enable public interest speakers to foresee where they will be expected to defend themselves, and would be in keeping with the core values of the Brussels Ia Regulation, namely predictability and the limitation of forum shopping.

Greater predictability as to the outcomes of choice of law processes is also needed to dissuade meritless litigation intended to suppress public participation. Accordingly, it is recommended that a new rule be included in the Rome II Regulation which would harmonise national choice of law rules in defamation cases. It is proposed that this rule should focus in the first instance on the closest connection with the publication and its audience, namely the law of the place to which the publication is directed.

The adoption of anti-SLAPP legislation is an especially pressing concern in the context of a Union which is currently facing unprecedented challenges to the rule of law and democracy. Reforms which recognise the central role of journalists, NGOs and civil society in safeguarding the rule of law would constitute a meaningful contribution to the advancement of democratic values where so much else has failed.

1. GENERAL INFORMATION

KEY FINDINGS

Strategic lawsuits against public participation (SLAPPs) are routinely used against public watchdogs with an active role in the protection of democracy and the rule of law in the European Union. Targets of these lawsuits include journalists, independent media outlets, academics, civil society and human rights NGOs. Filers include corporations, wealthy individuals, or even governmental bodies in some instances. Strategic lawsuits are not limited to specific categories of claim and can take a variety of forms. The key feature of SLAPPs is their tendency to transfer debate from the political to the legal sphere. The need for the introduction of Anti-SLAPP legislation in the European Union began to capture public interest following the assassination of Daphne Caruana Galizia in October 2017. Days after the assassination, it became clear that physical violence was part of a broader phenomenon in which related entities suppressed scrutiny of matters of public interest. The mere threat of SLAPPs resulted in the alteration of the entire online record of illicit activities of interest to the governance of the internal market. This was symptomatic of far-reaching challenges to press freedoms and the rule of law in other member states of the European Union, and by extension in the Union as a whole. Index on Censorship has identified cases which could qualify as SLAPPs in every Member State of the European Union, as well as Norway and each of the legal systems of the United Kingdom. This poses a threat to democratic governance and the rule of law in the European Union. It follows, therefore, that the upholding of the rule of law and the preservation of an internal market which operates consistently in accordance with the law necessitate the adoption of robust legislative measures which will limit the extent to which threats of vexatious legal proceedings are deployed to suppress public scrutiny in matters of public interest.

Strategic lawsuits against public participation (SLAPPs) are a form of retaliatory lawsuit intended to deter freedom of expression on matters of public interest.¹ They are commonly deployed in virtually any area of public interest and may include both civil and criminal claims.² SLAPPs are routinely used against public watchdogs with an active role in the protection of democracy and the rule of law in the Union. Targets of these lawsuits include journalists, independent media outlets, academics, civil society and human rights NGOs.³

In a 2021 report to the Council of Europe, the authors noted widespread abuse of legal proceedings against journalists in several countries over the previous year.⁴ Cases ranged from independent Maltese news outlets being sued by different businessmen, often outside of Malta,⁵ to private companies

¹ R Kraski, 'Combating Fake News in Social Media: U.S. and German Legal Approaches' (2017) 91 *St John's Law Review* 923.

² Jessica Ní Mhainín, 'Fighting the Laws That Are Silencing Journalists: Vexatious Legal Threats Are Part of the European Media Landscape. We Need to Take Action Against Them, Says a New Index Report' (2020) 49(3) *Index on Censorship* 63.

³ Petra Bárd, Judit Bayer, Ngo Chun Luk, and Lina Vosyliute. 'SLAPP in the EU context' (2020) <https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf> accessed 28 April 2021

⁴ Wanted! Real action for media freedom in Europe. Annual Report 2021 by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists <https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e>

⁵ Ibid 31

succeeding in censoring content via injunctions and defamation claims in Hungary and Romania,⁶ but also criminal charges brought by Slovakian authorities against a newspaper writer over an opinion piece on a religious topic,⁷ to name but a few.

Filers include corporations, wealthy individuals, or even governmental bodies in some instances. Pring demonstrates that more than 50% of SLAPP involve defamation claims next to others such as business torts. However, strategic lawsuits are not limited to specific categories of claim and can take a variety of forms.⁸

The key feature of SLAPPs is their tendency to transfer debate from the political to the legal sphere. The plaintiffs seek to achieve a number of goals: the focus shifts from the defendant's grievances to those of the plaintiff; energy and resources are diverted from the relevant public interest project to the lawsuit; private citizens, NGOs, journalists and small media outlets and civil society are likely to be intimidated by the large damages and expensive legal costs. By inflicting these burdens on one subject, initiators of SLAPPs aim to discourage others from conducting future campaigns.⁹

Furthermore, a recent trend, especially in relation to SLAPPs against media outlets, involves affluent entities not only directly suing an individual or organisation, but also setting up funds to offset the costs of third parties willing to pursue litigation against their common target.¹⁰ This phenomenon further exacerbates the scope of intimidation tactics in such a way that significantly hinders free press and free speech, to the advantage of one powerful group.¹¹

The need for the introduction of Anti-SLAPP legislation in the European Union began to capture public interest following the assassination of Daphne Caruana Galizia in October 2017. Days after the assassination, it became clear that physical violence was part of a broader phenomenon in which related entities suppressed scrutiny of matters of public interest.

In particular, shortly after the assassination, commentators noted that online news reports which reproduced Caruana Galizia's revelations concerning the since-shuttered Pilatus Bank were in the process of being deleted from various news portals in Malta.¹² That removal was not prompted by the violent assassination of a fellow journalist but by the ruinous threats of litigation which, it was confirmed through subsequent events, had no merit whatsoever.¹³ Judge Colabella famously argued that 'short of a gun to the head, a greater threat [than SLAPPs] to First Amendment expression can scarcely be imagined.'¹⁴ The events in Malta may prompt some reconsideration of the hierarchy of the systemic effectiveness of threats to freedom of expression.

⁶ Ibid 32

⁷ Ibid 35

⁸ George W Pring, 'SLAPPs: Strategic Lawsuits against Public Participation' (1989) 7(1) Pace Environmental Law Review 3.

⁹ T Anthony, 'Quantum of Strategic Litigation — Quashing Public Participation' (2009) 14(2) Australian Journal of Human Rights 1.

¹⁰ SS Tu and N Stump, 'Free Speech in the Balance: Judicial Sanctions and Frivolous SLAPP Suits' (2020) WVU College of Law Research Paper 1.

¹¹ Ibid 6.

¹² See Manuel Delia, 'Pilatus Bank bullies the local press. We will not be silenced', Truth be Told (24/10/2017). Accessible at: <https://manueldelia.com/2017/10/pilatus-bank-bullies-local-press-will-not-silenced/>.

¹³ Jurgen Balzan, "'Government should have sought advice to protect journalists" – lawyers', The Shift News (10/04/2018). Accessible at: <https://theshiftnews.com/2018/04/10/government-should-have-sought-advice-to-protect-journalists-lawyers/>

¹⁴ *Matter of Gordon v. Marrone*, [1991] 151 Misc. 2d 164, 169 (Sup. Ct., Westchester County 1991) (per Justice Colabella).

As is now well-known, Caruana Galizia's revelations concerning money laundering and corruption were of transnational concern. At the time, however, they had yet to attract the sustained attention of the international media. By silencing the Maltese press through threats of vexatious litigation, it appears that Pilatus Bank could have ensured that the online record of their illicit activities was removed altogether and would not, therefore, pose a threat to their penetration of other EU markets.¹⁵

Notably, the Pilatus Bank affair was not an isolated incident. An editor of a Maltese daily observed that international businesses routinely use the threat of transnational litigation to coerce newspapers to delete factual reporting.¹⁶ In 2017, he cited four separate incidents involving unrelated businesses in which his newspaper acquiesced in the demands of transnational business entities to delete reports, implicitly suggesting that this was not due to the strength of the claim, but the force with which it was made.¹⁷ Another Maltese news site, which was established following the assassination of Daphne Caruana Galizia, noted a further example in which credible attempts were made to coerce news organisations to delete or alter online content following threats from the concessionaire for Malta's lucrative Citizenship by Investment programme.¹⁸

Furthermore, the Maltese examples of disadvantageous out-of-court settlement are far from unique, save to the extent that the specific instances of the practice have been exposed.¹⁹ The events in Malta were symptomatic of far-reaching challenges to press freedoms and the rule of law in other member states of the European Union, and by extension in the Union as a whole.²⁰

The geographic and economic scope of the problem is readily discernible with reference to similar abuse of defamation litigation and threats thereof in Poland,²¹ Croatia,²² Germany,²³ Italy,²⁴ and Malta,²⁵ among others. Indeed, Index on Censorship has identified cases which could qualify as SLAPPs in every Member State of the European Union, as well as Norway and each of the legal systems of the United

¹⁵ See Luca Rainieri, 'The Malta Connection: A Corrupting Island in a "Corrupting Sea"?' (2019) *The European Review of Organised Crime* 10, 22-25; Jelter Meers, 'UK Branch of Pilatus Bank Closed Down' (26/04/2018) Organized Crimes and Corruption Reporting Project. Accessible at: <https://www.occrp.org/en/daily/8019-uk-branch-of-pilatus-bank-closed-down>

¹⁶ Juliette Garside, 'Murdered Maltese reporter faced threat of libel action in UK' (02/03/2018), *The Guardian*. Accessible at: <https://www.theguardian.com/world/2018/jun/01/murdered-maltese-reporter-faced-threat-of-libel-action-in-uk>

¹⁷ *Ibid.*

¹⁸ Alice Taylor, 'Lawsuits that cripple journalists: Malta a protagonist in debate on press freedoms' (02/03/2019), *The Shift News*. Accessible at: <https://theshiftnews.com/2019/03/02/lawsuits-that-cripple-journalists-malta-a-protagonist-in-debate-on-press-freedom/>

¹⁹ Luke Harding on 'Good Morning Scotland', *BBC Scotland*, 23/06/2018; NGOs report evidence of deletion and alteration of online reporting in several jurisdictions but have been unable to report specific instances due to confidentiality obligations.

²⁰ See Gill Philips, 'How the free press worldwide is under threat', *The Guardian* (28/05/2020). Accessible at: <https://www.theguardian.com/media/2020/may/28/how-the-free-press-worldwide-is-under-threat>.

²¹ Wyborcza.pl, 'Gag Lawsuits and Judicial Intimidation: PiS Seeks to Turn Courts Into an Instrument of State Censorship' (2021) <<https://wyborcza.pl/7,173236,26887459,gag-lawsuits-and-judicial-intimidation-pis-seeks-to-turn-courts.html>> accessed 30 April 2021.

²² Giovanni Vale, 'Croatia: over a thousand ongoing trials against journalists or media' (23/01/2019) *European Centre for Press and Media Freedom*. Accessible at: <https://www.ecpmf.eu/archive/news/threats/croatia-one-thousand-lawsuits.html>

²³ Sofia Verza, 'SLAPP: the background of Strategic Lawsuits Against Public Participation'. *European Centre for Press and Media Freedom*. Accessible at: <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>

²⁴ Global Freedom of Expression, 'SLAPPs' 5 W's: a background of the Strategic Lawsuits Against Public Participation (12/07/2018). Accessible at: <https://globalfreedomofexpression.columbia.edu/publications/slapps-5-ws-background-strategic-lawsuits-public-participation/>

²⁵ Elaine Allaby, 'After journalist's murder, efforts to combat SLAPP in Europe' (24/04/2019) *Columbia Journalism Review*. Accessible at: <https://www.cjr.org/analysis/slapp-daphne-caruana-galizia-malta.php>

Kingdom.²⁶ It is especially noteworthy that cases in which defamation law has been deployed to suppress factual reporting often relate to matters of cross-border concern, whether for reasons relating to the distortion of the single market, or more broadly to the political governance of the Union.²⁷

The extent of the problem is reflected in growing concerns over the relationship between SLAPPs and the safeguarding of the rule of law and freedom of expression within the EU.²⁸ Indeed, it is uncontroversial that the protection of fundamental rights – most notably in respect of SLAPPs, the rights to access to courts and freedom of expression – are a central feature of a legal order founded on the rule of law.²⁹

Moreover, within the EU legal order, a vibrant civil society contributes to the scrutiny which is necessary to ensure the safeguarding of other features of a broader conception of the rule of law, including the prevention of corruption, and the upholding of access to justice.³⁰ Indeed, the very nature of the EU legal system as a legal order which is distinct from international law relies on the notion that public enforcement is to be supplemented by the enforcement function of individuals bearing enforceable rights derived directly from EU law.³¹

Furthermore, the 'free flow of information and ideas lies at the heart of the very notion of democracy ...[which] demands that individuals are able to participate effectively in decision making and assess the performance of their government.'³² The rights to free expression and information are also crucial to the internal market, and are demonstrably 'linked with well-functioning markets [and] improvements in investment climates'.³³ To this end, it is necessary to safeguard a pluralist public space

²⁶ Jessica Ni Mhainin, 'A gathering storm: the laws being used to silence the media' (Index on Censorship 2020). Accessible at: <https://euagenda.eu/upload/publications/a-gathering-storm.pdf.pdf>.

²⁷ For an extensive overview of the geographic range and variety of SLAPPs in the EU, see Tarlach McGonagle et al, 'The Safety of Journalists and the Fighting of Corruption in the EU' (2020) Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 655.187. Accessible at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)655187](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)655187); Greenpeace, 'Sued into silence: How the rich and powerful use legal tactics to shut critics up (July 2020). Accessible at: <https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>

²⁸ See for example Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors (*Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies*); Resource Centre on Media Freedom in Europe, 'Defamation and Insult Laws in the OSCE Region: A Comparative Study' (2017) <<https://www.rcmediafreedom.eu/Publications/Reports/Defamation-and-Insult-Laws-in-the-OSCE-Region-A-Comparative-Study>> accessed 27 April 2021; ECPMF, 'Romania: abusive legal action by former bishop against journalists and outlets in Romania' (2021) <<https://www.ecpmf.eu/romania-abusive-legal-action-by-former-bishop-against-journalists-and-outlets-in-romania/>> accessed 28 April 2021; ECPMF, 'Poland: Editorial independence of Polska Press outlets at risk' (2021) <<https://www.ecpmf.eu/poland-editorial-independence-of-polska-press-outlets-at-risk/>> accessed 28 April 2021; ECPMF, 'SLAPP: the background of Strategic Lawsuits Against Public Participation' <<https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>> accessed 27 April 2021; Rule of Law, 'Strategic Lawsuits Against Public Participation threaten human rights and democracy. The EU must act' <<https://ruleoflaw.pl/strategic-lawsuits-against-public-participation/>> accessed 28 April 2021.

²⁹ O Hamul'ák and A Circolo 'Challenges and Possibilities of Enforcing the Rule of Law within the EU Constitutional Edifice—The Need for Increased Role of Court of Justice, EU Charter and Diagonality in Perception' in Ramiro Troitiño, D., Kerikmäe, T., De la Guardia, R.M., Perez, G.A. (Eds.) *The EU in the 21st Century: Challenges and Opportunities for the European Integration Process* (Springer 2020).

³⁰ See A Magen, 'Overcoming the diversity-consistency dilemmas in EU Rule of Law external action' *Asia Eur J* (2016) 14(1), 25

³¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

³² UNESCO, 'About Freedom of Information (FOI)' <<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>> accessed 27 April 2021.

³³ *Ibid.*

in which citizens are able to participate 'in an informed way in decisions that affect them, while also holding governments and others accountable.'³⁴

It follows, therefore, that the upholding of the rule of law and the preservation of an internal market which operates consistently in accordance with the law necessitate the adoption of robust legislative measures which will limit the extent to which threats of vexatious legal proceedings are deployed to suppress public scrutiny in matters of public interest.

It is argued hereunder that the European Union ought to adopt a suite of measures to combat SLAPPs. These should include reform of the Brussels Ia Regulation and Rome II Regulation with a view to increasing legal certainty and limiting forum shopping. Furthermore, the introduction of an anti-SLAPP Directive would serve to ensure that abuses of procedure intended to suppress public participation could be readily dismissed by national courts, and that the legal systems of the Member States would include measures which deter the threat and institution of SLAPPs.

Of course, legislative measures should not operate as a replacement for the fulfilment of the obligations of the Union's institutions to safeguard the rule of law, including the right to freedom of expression, as enshrined in Article 2 TEU. In this respect, it is submitted hereunder that the Union ought to ensure that egregious examples of national laws which facilitate the institution of SLAPPs be addressed through existing rule of law mechanisms.

The Study is structured as follows: Chapter 2 provides an overview of the development of anti-SLAPP legislation and discusses the manner in which definitions and methods in legislation from third countries could be transposed to suit the EU context. In Chapter 3, we discuss the human rights issues which are affected by SLAPPs. It is argued here that future legislation could ensure that a better balance is struck between the rights of parties. In Chapter 4 the case for reform of current EU private international law instruments is presented, including the articulation of potential legislative solutions. Chapter 5 then sketches the form and content of a future anti-SLAPP Directive, and also proposes that rule of mechanisms could be deployed to dent the effectiveness of SLAPPs in the period prior to the coming into force of any future EU legislation. This is followed by brief concluding remarks in Chapter 6 in which it is reiterated that there is a pressing need for the introduction of new measures with a view to safeguarding the internal market and the rule of law in the European Union.

³⁴ UNESCO, 'Freedom of information as a tool for empowerment: Enabling protection and achievement of other rights' <<http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/themes/enabling-protection-and-achievement-of-other-rights/>> accessed 27 April 2021; UNESCO, 'Transparency, accountability and the fight against corruption: FOI laws and beyond' <<http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/themes/foi-laws-and-beyond/>> accessed 27 April 2021.

2. DEFINING SLAPPS IN AN EU CONTEXT

KEY FINDINGS

This chapter traces the development of anti-SLAPP legislation with a view to identifying models for the articulation of a definition of SLAPPs in European Union legislation.

The term 'SLAPP' was first used in academic literature to describe the phenomenon of litigation which is intended to quash criticism or political debate in matters of public interest. It has since been deployed in case law and legislation in several common law and mixed legal systems, most prevalently in the United States of America, but also in Canada and Australia.

SLAPPs are defined differently across relevant legal systems, and anti-SLAPP legislation may be deployed across divergent classes of activity. There are also varying degrees of judicial overlay to explain the definition and scope of the term.

Notwithstanding this diversity, common features are discernible. SLAPPs are characterised by abuse of process by a plaintiff or excessive claims in matters in which the defendant is exercising a constitutionally protected right.

In all cases, in order to ensure that principles of due process are upheld, the claimant is afforded the opportunity to persuade the court that their claim is meritorious. This ensures the preservation of balance between the interests of the parties, and that legitimate claims can be heard in the usual way.

It is argued in this chapter that a bespoke definition of SLAPPs is needed in the European Union in order to ensure that it is well-suited to the legal systems of the Member States. It is proposed that the definition and method of analysis adopted in the anti-SLAPP Model Directive provides a sound basis for the legislator to articulate the term for the purposes of EU law. The following definition is therefore proposed:

a claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right

This broad definition captures activity of public interest broadly construed to include the exercise of both political and economic power. This is consistent with the EU legal system's recognition that governance of public interest can be situated in both the State and non-State entities.

This chapter analyses the development of the term 'SLAPP' and its deployment in a number of legal systems. Anti-SLAPP legislation is, to date, limited to common law jurisdictions and mixed legal systems in which there is a stronger legal-cultural reliance on judicial elaboration of terminology than would be the case in most EU Member States. Drastically different procedural traditions in continental Europe call for careful transposition in preference to the wholesale importation of models which are designed for courts which enjoy a greater degree of flexibility.

Indeed, the uncritical transplanting of common law measures could be counter-productive insofar as it would afford litigants with precisely the kind of legal uncertainty which enables the deployment of SLAPPs. Accordingly, it is submitted that a robust and fully articulated statutory definition of the type

developed in the Anti-SLAPP Model Directive³⁵ would be preferable to the direct transplantation of statutory provisions adopted elsewhere.

2.1. Genesis of the Term

The term 'SLAPP' was introduced by American legal scholars and subsequently mainstreamed in legal practice between the 1980s and 1990s.³⁶ It refers to the growing trend of quashing criticism and political debate by transforming a public dispute into a private adjudication, where the defendant is cast into a significantly disadvantageous position.³⁷ The use of the term 'SLAPP', or similar, is important insofar as it enables litigants and adjudicators to identify and regulate the overarching abusive purpose of litigation rather than its neat packaging within a specified innocuous legal category such as libel or defamation.³⁸

The use of SLAPPs by powerful corporations and individuals is not aimed at obtaining a legal victory, which seldomly materialises, but to deploy procedural costs and the threat of disproportionate damages to silence the respondent in a specific claim, and to have a broader "chilling effect" on the work of journalists, NGOs and civil society.³⁹ Therefore, the threats that SLAPPs pose are not limited to the effects on the defendants alone, but also to the wider community impact of allowing an affluent minority to hold public dialogue hostage,⁴⁰ in what has been defined as a "modern wave of censorship-by-litigation."⁴¹

According to Professor George W. Pring, whose work first identified and categorised SLAPPs, there are four criteria to which these lawsuits adhere:

- being a civil complaint or counterclaim seeking monetary compensation and/or injunction;
- filed against a non-governmental group or individual;
- because of their communication with the electorate or with a government body;
- on an issue of public interest.⁴²

When SLAPPs first emerged in the literature, studies showed that most defendants were private citizens involved in activism, especially in areas such as environmentalism and community development.⁴³ The phenomenon was predominantly analysed in common law jurisdictions, particularly in the United States.⁴⁴

³⁵ Linda Ravo, Justin Borg-Barthet and Xandra Kramer, 'Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law' (Liberties 2020). Accessible at: https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/Anti_SLAPP_Model_Directive.pdf (hereafter 'Anti-SLAPP Model Directive').

³⁶ GW Pring and P Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996) 3.

³⁷ GW Pring and P Canan, 'Strategic Lawsuits against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders' (1992) 12 *University of Bridgeport Law Review* 937.

³⁸ Pring and Canan 1996 (n 36) 3.

³⁹ R Abrams, 'Strategic Lawsuits against Public Participation (SLAPP)' (1989) 7 *Pace Environmental Law Review* 33.

⁴⁰ M Stetson, 'Reforming Slapp Reform: New York's Anti-Slapp Statute' (1995) 70 *NYU Law Review* 1324.

⁴¹ L Levi, 'The Weaponized Lawsuit against the Media: Litigation Funding as a New Threat to Journalism' (2017) 66 *American University Law Review* 761.

⁴² GW Pring, 'SLAPPs: Strategic Lawsuits against Public Participation' (1989) 7 *Pace Environmental Law Review* 3.

⁴³ TA Waldman, 'Slapp Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation' (1992) 39 *UCLA Law Review* 979.

⁴⁴ SA McEvoy, 'The Big Chill: Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights' (1990) 17 *Hastings Constitutional Law Quarterly* 503.

Because the ultimate goal of SLAPPs is the chilling effect on public debate, lawsuits of this kind can display a number of different features, adopting a scattergun approach to pleadings which contributes to significant legal, personal and financial costs.⁴⁵ Since proving the veracity of the allegations is not a priority in SLAPP cases,⁴⁶ litigation regularly involves allegations such as defamation, amongst the most common, but also invasion of privacy, intentional infliction of emotional distress, and a wide array of economic torts.⁴⁷ As found in the case of *Gordon v Morrone*, due to the nature of these lawsuits as a form of retaliation and intimidation, the plaintiff has an interest in stretching out the litigation process to inflict a greater financial burden, which will result in a success regardless of the verdict.⁴⁸

Another common feature of SLAPPs is the engagement in the practice of “forum shopping” as a further hurdle for the defendant. In the US, selecting a jurisdiction other than that most closely connected with the facts of the case presents significant advantages since only around half of all states have enacted anti-SLAPP legislation, while no such protections are available in the remaining states. It follows that filing suit in a state which offers no anti-SLAPP remedies to the defendant enables the plaintiff to avoid the procedural safeguards available in more closely connected legal systems.⁴⁹

In the EU, on the other hand, no member state has yet developed an anti-SLAPP framework; however, plaintiffs will often take advantage of the rules on civil and commercial cross-border procedures under the Brussels Ia Regulation,⁵⁰ which allows libel proceedings to be brought in a jurisdiction in which the harmful event occurred or may occur.⁵¹ By credibly threatening to bring legal action before the court of a foreign country, the plaintiff creates an additional layer of costly litigation related to contesting the jurisdiction of a court, determining the law governing the dispute, as well as the financial and psychological consequences of having to defend oneself in an unfamiliar, remote forum.⁵²

2.2. Legal Definitions in Existing Third Country Legislation, and Model Laws

2.2.1. United States of America

While no European country has yet developed a legal framework against SLAPPs, legislation in the USA, Canada and Australia provides protection against them. Legislation and case law are particularly well-developed in the United States, where SLAPPs are recognised as a violation of citizens' rights under the

⁴⁵ A Freeman, 'The Future of Anti-SLAPP Laws' (2018) *SLU Law Journal* 26.

⁴⁶ See Anthony (n 9) 5.

⁴⁷ S Hartzler, 'Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant' (2007) 41 *Valparaiso University Law Review* 1238.

⁴⁸ *Gordon v. Morrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

⁴⁹ L Bergelson, 'The Need for a Federal Anti-SLAPP Law in Today's Digital Media Climate' (2019) 42 *Colum JL & Arts* 213; see also *Nunes v. Twitter, Inc et al.* CL19-1715-00, a case in which California Representative Devin Nunes sued Twitter, a company also based in California, in Virginia, a state which provides much weaker Anti-SLAPP protection.

⁵⁰ 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').

⁵¹ Brussels Ia, Art 7(2).

⁵² J Borg-Barthet, 'Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union' (2020) Centre for Private International Law, School of Law, University of Aberdeen. Accessible at: <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>

First Amendment, namely free speech and right to petition the government for the redress of grievances.⁵³

When early studies identifying SLAPPs emerged, it was recognised that the most problematic feature was the psychological and financial toll caused by these lengthy trials, which effectively resulted in sufficient intimidation that even if the plaintiffs lost the case, they still succeeded in discouraging future scrutiny.⁵⁴ Case law from the 1980s first identified the need to distinguish lawsuits that had a legitimate claim from frivolous suits which simply aimed at restricting the defendant's First Amendment rights.

In the *POME* case, the Colorado Supreme Court ruled that these types of lawsuits are "baseless" and may result in damages to wider society by way of having a chilling effect on constitutionally protected activities.⁵⁵ The Court articulated a three-prong test to avoid early dismissal of a case. This required the plaintiff in the main proceedings to prove that the defendants' actions are void of legal or factual basis, that the defendant's main purpose was to harass the plaintiff, and that the actions affect the legal interests of the plaintiff.⁵⁶

Starting in the 1990s, state legislatures started recognising the need for ad hoc statutes to define and contain the threat of SLAPP.⁵⁷ As such, nearly 30 states have enacted anti-SLAPP legislation, sometimes known as SLAPP-back, which provide remedies ranging from early-dismissal to the adjudication of damages to the targets of the lawsuit, in order to prevent any chilling effect.⁵⁸ Nevertheless, the scope of what is intended as SLAPP and as a consequence what is protected by state law varies significantly across different statutes.⁵⁹

Some states, most notable of which is New York, have enacted anti-SLAPP legislation that covers only a limited area of interest or provides a narrow definition whereby the plaintiff can only be a "public applicant or permittee,"⁶⁰ in many cases necessitating a connection to government involvement. Other state legislation, such as that of Minnesota, follows similar reasoning by only applying its anti-SLAPP provisions to activities genuinely aimed at "procuring favourable government action."⁶¹ As a result, these statutes have been criticised for curtailing the definition of SLAPP in a way which excludes their use in cases involving media defendants, for example.⁶²

At the other end of the spectrum is California and its broadly worded legislation, which is considered one of the most far-reaching anti-SLAPP provisions, and has spurred a great amount of case law. SLAPPs are defined as lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech" and that abuse the judicial process, thereby discouraging participation in matters

⁵³ U.S. Const. am. 1.

⁵⁴ P Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International' (2020) 19(1) *Review of European Community & International Environmental Law* 14.

⁵⁵ *Protect Our Mountain Environment Inc v District Court* 677 P2d 1361 (Colo 1984).

⁵⁶ *Ibid*, paras 1368-1369.

⁵⁷ DH Merriam and JA Benson, 'Identifying and Beating a Strategic Lawsuit Against Public Participation' (1993) 3 *Duke Environmental Law and Policy Forum* 17.

⁵⁸ CH Barylak, 'Reducing Uncertainty in Anti-SLAPP Protection' (2010) 71 *Ohio State Law Journal* 845, 866.

⁵⁹ S Brown and M Goldowitz, 'The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA' (2010) 19(1) *Review of European Community & International Environmental Law* 3.

⁶⁰ New York Civil Practice Law and Rules, r 3211

⁶¹ MINN. STAT. §§ 554.01-05 (2018).

⁶² L Wright-Pegs, 'The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant' (2019) *UCLA Entertainment Law Review* 323, 332-339.

of public interest.⁶³ As interpreted by the court in *Wilcox*, the two essential components that distinguish SLAPPs from ordinary defamation or business tort is the chilling effect and the public interest involved.⁶⁴

Therefore, the two-prong test devised by the courts seeks to evaluate the presence of these features in a way that is the most effective to dismiss actual SLAPPs without waste of time and resources. To establish that a lawsuit is not meritless, and therefore only meant to intimidate and vex the defendant, the plaintiff has to demonstrate the probability of their claim's success.⁶⁵ Secondly, the court decides whether the matter falls under a protected category, such as interference with free speech.⁶⁶

While these cases may appear to be rather straightforward to recognise, case law has been instrumental in determining what classifies as an "issue of public interest" under section 425.16, subdivision (e)(3) and (4). The courts have found the presence of public interests in cases concerning public figures,⁶⁷ political speech,⁶⁸ or topics of more widespread public interest than the actual facts present in a particular speech, program or article.⁶⁹ The California statute is widely considered to be among the most effective at protecting media outlets and journalists, as well as the constitutional right to free press and participation in government more broadly.⁷⁰

Following legislative developments at state level, various courts have also commented in favour of the enactment of federal SLAPP jurisdiction to discourage and protect from the practice of forum shopping. It has been argued that litigants bringing meritless claims have an incentive in avoiding states which provide statutory remedies, strategically denying defendants the protection they are entitled to under their state law.⁷¹

There has been a series of bills introduced in Congress over the years, including the Citizen Participation Act (CPA) of 2009,⁷² the Free Press Act in 2012,⁷³ and the SPEAK FREE Act in 2015.⁷⁴ None of them was successful, but they nevertheless demonstrate a bipartisan recognition of the importance of anti-SLAPP mechanisms.⁷⁵ The latest bill to be presented before Congress is the Citizen Participation Act of 2020,⁷⁶ which defines SLAPPs as "an abuse of the judicial process that waste judicial resources"⁷⁷ due to being mostly "groundless and unconstitutional".⁷⁸ The bill seeks to establish a uniform protection of any act

⁶³ California Code, Code of Civil Procedure - CCP § 425.16

⁶⁴ *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449-50 (Cal. Ct. App. 1994)

⁶⁵ California Code, Code of Civil Procedure - CCP § 425.16(b)(3); *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907

⁶⁶ CCP section 425.16 (e)(1) and (2)

⁶⁷ *Sippel v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 239.

⁶⁸ *Roberts v. Los Angeles Cty. Bar Assn*, 105 Cal.App.4th 604, 614 (2003).

⁶⁹ *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629.

⁷⁰ See Hartzler (n 47).

⁷¹ *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

⁷² Citizen Participation Act of 2009, 111 H.R. 4364 (2009).

⁷³ Free Press Act of 2012, 112 S. 3493 (2012).

⁷⁴ SPEAK FREE Act of 2015, 114 H.R. 2304 (2015).

⁷⁵ JJ O'Neill, 'The Citizen Participation Act of 2009: Federal Legislation as an Effective Defence against SLAPPs' (2011) 38 *Boston College Environmental Affairs Law Review* 477.

⁷⁶ Citizen Participation Act of 2020 116 H.R.7771 (2020).

⁷⁷ *Ibid*, 2(7).

⁷⁸ *Ibid*, 2(4).

in furtherance of the right of free speech⁷⁹ in regard to issues of public interest intended broadly.⁸⁰ While prospects for the passage of this bill remain limited at the time of writing,⁸¹ it is noteworthy that efforts to elevate anti-SLAPP legislation to federal status remain on the agenda in the United States.

2.2.2. Canada and Australia

Common law and mixed jurisdictions outside the United States have recognised SLAPPs both at judicial and legislative level. Due to the lack of provisions adjacent to the First Amendment of the US Constitution, other jurisdictions have placed more emphasis on striking a balance between freedom of expression and competing rights such as privacy and reputation.⁸²

In Australia, the issue of SLAPP rose to prominence as a consequence of the notorious 'Gunns 20' case,⁸³ where the plaintiff, Australia's largest timber and woodchip company, Gunns Ltd, sued 20 people including high profile individuals, environmental NGOs and activists over their work concerning the protection of forests in Tasmania. Following the media attention garnered by this case, legislative efforts were initiated in several territories,⁸⁴ although only succeeding in the Australian Capital Territory (ACT) where the Protection of Public Participation Act was adopted in 2008.⁸⁵

The act has been criticised for failing to take the most effective approach, instead opting for a heavy focus on the concept of "improper purpose" of the plaintiff's suit, defined as aiming to discourage public participation, to divert the defendant's resources, and to punish the defendant's public participation.⁸⁶ The high threshold posed by this narrow definition fails to recognise the fact that the main problem with SLAPPs is that the litigation process itself, regardless of the outcome, constitutes a threat to public participation.⁸⁷

The Canadian experience offers more in the way of successful legislative intervention, including procedural law reform in Quebec.⁸⁸ This is especially compelling insofar as Quebec offers a glimpse of the potential for intervention in a legal tradition which is more readily comparable to the European Union Member States' predominant civil law traditions.⁸⁹

In the 1990s, Canadian cases *Daishowa Inc v Friends of the Lubicon*⁹⁰ and *Fraser v Corp of District of Saanich*⁹¹ were first identified as lawsuits targeting freedom of expression on a public issue employing

⁷⁹ Ibid, 11(1); including statements on proceeding under review by a public body or official; made in a public forum, in connection with a public interest; or any other exercise of the right to free speech or petition in the public interest sphere.

⁸⁰ Ibid, 11(5); including issues of health and safety; environmental, economic or community well-being; the government; public figures; a good, product or service in the market place. Not including private interests, like statements protecting business interests which carry no public significance.

⁸¹ Govtrack, 'H.R.7771 (116th): Citizen Participation Act of 2020. Accessible at: <https://www.govtrack.us/congress/bills/116/hr7771>.

⁸² See Shapiro (n 54).

⁸³ *Gunns v. Marr & Ors*, Supreme Court of Victoria 9575 of 2004.

⁸⁴ Protection of Public Participation Bill 14 of 2005 (Tas); Protection of Public Participation Bill 2005 (SA).

⁸⁵ Protection of Public Participation Act 2008 A2008-48 (ACT).

⁸⁶ Protection of Public Participation Act 2008, section 6(a)-(c).

⁸⁷ G Ogle, 'Anti-SLAPP reform in Australia' (2010) 19(1) *Review of European Community & International Environmental Law* 35.

⁸⁸ Quebec Code of Civil Procedure, Article 51.

⁸⁹ See e.g. Michael Deturbide and Elizabeth J Hughes, 'Canada' in Jan M Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar 2012) 132-136.

⁹⁰ *Daishowa Inc v Friends of the Lubicon* (1998) 158 DLR (4th) 699 (Ont Gen Div).

⁹¹ *Fraser v Corp of District of Saanich* [1999] BCJ 3100 (BCSC).

frivolous and exaggerated claims.⁹² The latter provided the first acknowledgement of SLAPP from a Canadian court, which defined it as a meritless suit to “silence of intimidate citizens who have participated in proceedings regarding public policy or public decision making.”⁹³ Following these developments, Anti-SLAPP legislation has been passed in Quebec⁹⁴ and Ontario,⁹⁵ generally providing expedited mechanisms for defendants to have SLAPP suits dismissed.

The Quebec legislation provides perhaps the clearest definition in existing legislation of the circumstances in which a court may apply anti-SLAPP measures. Article 51 of the Quebec Code of Civil Procedure now provides as follows:

The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.

Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person’s freedom of expression in public debate.

According to this test, therefore, in order to accord the remedy of early dismissal, the court would need to be satisfied that the plaintiff’s pleading is “clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome.” Alternatively, it can be shown that “use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice”. Notably, these are not cumulative requirements. Nor is it necessary to show that a chilling effect arises from the specific facts of proceedings.

The Quebec legislation provides a useful example of statutory intervention which is designed to provide clear, systematic guidance on the method of analysis which a court born of the civilian tradition is to follow in dealing with anti-SLAPP remedies. This approach to legislation is followed in the anti-SLAPP Model Directive, to which this discussion turns next.

2.2.3. The Anti-SLAPP Model Directive

In 2020, following a period of consultation with legal practitioners, scholars, and SLAPP targets, a coalition of NGOs commissioned the authorship of an anti-SLAPP Directive.⁹⁶ The Anti-SLAPP Model Directive is intended to provide legislators with a basis for the adoption of a future EU instrument. It has been endorsed by a wide range of NGOs, taking in interests from journalism to environmental protection, the rule of law, and human rights more broadly.⁹⁷

The Model Directive substitutes the term ‘SLAPP’ with ‘abusive lawsuit against public participation’. The replacement of the term ‘strategic lawsuits’ with ‘abusive lawsuits’ is intended to clarify that a claimant would not need to demonstrate in every dispute that the plaintiff’s case is part of a broader

⁹² B Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Wilfrid Laurier University Press 2014).

⁹³ *Fraser* para 49.

⁹⁴ Quebec Code of Civil Procedure, Arts 51–56.

⁹⁵ Protection of Public Participation Act, 2015; Courts of Justice Act sections 137.1-137.5.

⁹⁶ Anti-SLAPP Model Directive (n 35).

⁹⁷ *Ibid*, 4-6.

strategy to suppress scrutiny. It is abuse in the individual case which needs to be demonstrated for anti-SLAPP measures to be deployed.

In its second recital, the Model Directive provides an extensive narrative account of the nature of relevant lawsuits and the chilling effect they have on public participation:

Abusive lawsuits against public participation can materialize in a variety of legal actions. Irrespective of the object and the type of action, these lawsuits are characterised by two common core elements. First, the behaviour from which the claim arises, which expresses a form of public participation by the defendant on a matter of public interest. This exposes the chilling effect which the claim has or may potentially have on that or on similar forms of public participation. Secondly, the abusive nature of the claim that rests in the claim's lack of legal merits, in its manifestly unfounded nature or in the claimant's abuse of rights or of process laws. This exposes the use of the judicial process for purposes other than genuinely asserting, vindicating or exercising a right, but rather of intimidating, depleting or exhausting the resources of the defendant.

A more succinct legal definition of lawsuits falling within the scope of the Model Directive is then provided in Article 3(1):

'abusive lawsuit against public participation' refers to a claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right

The definition in Article 3(1) refers to "matters of public interest", which is inclusive of any "political, social, economic, environmental or other concern". This is in keeping with definitions of public interest in case law of the European Court of Human Rights,⁹⁸ as well as the broader philosophy of a liberalised internal market in which it is recognised that there exist private asymmetries of power which result in private governance having a state-like function.⁹⁹

The legal definition in Article 3(1) does not rely on the chilling effect of the lawsuit since, as noted by the European Court of Human Rights in *Independent Newspaper (Ireland) v Ireland*, this effect is implicit in the manner in which a claim is framed.¹⁰⁰ Nor does the definition rely on the intent of the claimant. As noted by Shapiro, legislation which refers to the claimant's intention to suppress scrutiny tends to shift the focus from the protection of the respondent's right to public participation, emphasising instead a need to analyse in greater depth the claimant's case.¹⁰¹

The key feature, therefore, is the existence of a number of elements which are indicative of abuse of rights as opposed to the genuine vindication of rights to which the claimant is entitled. These are articulated in Article 6(1) of the Model Directive:

Member States shall take the measures necessary to ensure that the court or tribunal competent to hear the motion [for early dismissal], where it is satisfied

⁹⁸ *Independent Newspapers (Ireland) Limited v Ireland* (Application no. 28199/15).

⁹⁹ See Sauter and Schepel (n 98) 19-20; Laurent Warzoulet, 'The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism' (1957-1995) (2019) *Journal of Common Market Studies* 77-93.

¹⁰⁰ *Independent Newspapers (Ireland) Limited v Ireland* (Application no. 28199/15).

¹⁰¹ Shapiro (n 54) 24-25.

with the evidence provided by the defendant that the claim arises from public participation on matters of public interest, shall adopt a decision to dismiss, in full or in part, the claim in the main proceedings if any of the following grounds is established:

- (i) the claim does not have, in full or in part, legal merits;
- (ii) the claim, or part of it, is manifestly unfounded;
- (iii) there are elements indicative of an abuse of rights or of process laws.

Crucially, a respondent need not show that all of the elements are present in order for "SLAPP back" remedies to be available to them. What is required is that the respondent demonstrate that 'the claim arises from public participation on matters of public interest' and that at least one of the abusive techniques enumerated in Alinea (i), (ii) or (iii) is present.

Article 6(2) then provides an inexhaustive list of matters which a court should take into account in its determination of the extent to which the conditions in Article 6(1) are satisfied:

- (i) the reasonable prospects of success of the claim, also having regard to the compliance with applicable ethics rules and standards of the conduct constituting the object of the claim in the main proceedings;
- (ii) the disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;
- (iii) the scope of the claim, including whether the objective of the claim is a measure of prior restraint;
- (iv) the nature and seriousness of the harm likely to be or have been suffered by the claimant;
- (v) the litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies;
- (vi) the envisageable costs of proceedings;
- (vii) the existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;
- (viii) the imbalance of power between the claimant and the defendant;
- (ix) the financing of litigation by third parties;
- (x) whether the defendant suffered from any forms of intimidation, harassment or threats on the part of the claimant before or during proceedings;
- (xi) the actual or potential chilling effect on public participation on the concerned matter of public interest.

In view of the need to ensure that the claimant's fundamental right to due process is upheld, the court must be satisfied that, on balance, the claim should be dismissed. Article 6 empowers the court to do this through consideration of all relevant elements of the claim and the manner in which it is framed.

2.3. Conclusions

The analysis in this chapter demonstrated that legal definitions of SLAPP vary across the several jurisdictions in which legislation has been adopted to combat the phenomenon. Definitions continue

to evolve as a consequence of the developments in legal practice and the responses of legislators and courts in legal systems with different philosophical leanings concerning the substantive and procedural rights of the parties.

Overall, despite the lack of recognition across all states, or homogenous definition and scope in states in which anti-SLAPP law exist, US anti-SLAPP legislation and case law, particularly in the state of California, is presently the most advanced in the world. This is attributable in part to the pivotal role occupied by the rights that SLAPPs seek to infringe, free speech and petition, encapsulated in the First Amendment. More importantly, however, that legislation has been in force for some time and has therefore benefited from extensive judicial overlay and clarification.

On the other hand, jurisdictions where the right to freedom of expression is more overtly required to be balanced with other competing rights, the political groundswell in support of the adoption of anti-SLAPP measures has proved more difficult to achieve. It is argued hereunder that a sound balance may be achieved between relevant rights, however, and that the need for legislative intervention could be met through careful articulation of legislation which is finetuned to the European legal context.

In seeking to define SLAPPs for the purposes of EU law, it is necessary to deploy definitions which are inexhaustive and flexible with a view to capturing the various ways in which claimants set out to chill public participation. A broad definition, which focuses on recognising the right to public participation and freedom of expression, best serves the purpose of discouraging the use of SLAPPs.

In particular, in view of EU legal order's recognition of the centrality of both public and private governance,¹⁰² it is submitted that anti-SLAPP legislation should be defined with reference to a broad public interest in scrutiny. Limiting the concept to activities with a direct connection to the government, or placing excessive emphasis on demonstrating malicious intent and lack of legal foundation, would overlook the fact that SLAPPs pose a threat through any form of litigation and affect public participation at all levels of governance.

It is submitted, therefore, that the definition adopted in the anti-SLAPP Model Directive provides a sound basis for the legislator to articulate the term for the purposes of EU law:

a claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right

Furthermore, the approach adopted in the anti-SLAPP Model Directive, based on a bespoke, structured system of analysis of the rights of each of the parties, would provide a sound and balanced basis for the further articulation of a definition which is suited to the legal systems of the Member States. This should include sufficient guidance for courts to apply the law in systems which are not accustomed to being entrusted with the development of the law in quite the same manner as the common law courts in which existing anti-SLAPP legislation has been deployed most extensively.

¹⁰² See Sauter and Schepel (n 99) 19-20; Laurent Warzoulet, 'The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism' (1957-1995)' (2019) *Journal of Common Market Studies* 77-93.

3. HUMAN RIGHTS CONSIDERATIONS

KEY FINDINGS

SLAPPs constitute a significant threat to freedom of expression and the right to access to courts. It is to be noted in this respect that, while EU law and broader European human rights law already provide protection against SLAPPs in principle, the enforcement of these rights through the European Court of Human Rights requires engagement in litigation at a national level, and the exhaustion of all domestic remedies.

The ECHR imposes a positive obligation on Member States to protect freedom of expression. It is apparent that national laws which enable SLAPPs do not conform to this requirement. Reliance on the ECtHR for the prevention of SLAPPs is unsound both in terms of the likelihood of individuals having the means to pursue claims fully, and because it is a measure of last resort which captures failings in respect of the systemic positive obligation incumbent on States.

Anti-SLAPP legislation respects the claimant's right to access to courts because it is only claims which fall within the definition of SLAPPs that are liable to early dismissal. Such claims are not protected by human rights instruments. Claims which have merit and which are not framed in an abusive manner would continue to be heard in the usual way.

On the other hand, the respondent's right to a fair trial is also engaged by SLAPPs. It is demonstrated in this chapter that the right to a fair trial and the right to freedom of expression, both separately and taken together, are infringed in the absence of anti-SLAPP legislation.

3.1. Context

Article 6 TEU provides that fundamental rights are to be protected in the Union, and elevates the EU Charter of Fundamental Rights to equivalent status to the Treaties at the apex of the Union's hierarchy of norms:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions...

3. Fundamental 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.

Article 6 TEU encapsulates the development of fundamental rights protections in EU law over a period of fifty years. The Court of Justice first alluded to the inclusion of fundamental rights in the EU legal

order in the judgment in *Stauder*.¹⁰³ In *Internationale Handelsgesellschaft*, the Court went on to explain that fundamental rights protections in EU law were derived from the constitutional traditions of the Member States and the international legal instruments to which they are party.¹⁰⁴ In *Wachauf* the Court held that both the Union and the Member States are required to uphold fundamental rights in the application of EU law.¹⁰⁵

The Treaty of Lisbon codified earlier case law concerning the status and sources of fundamental rights in EU law, and also formalised the Charter of Fundamental Rights as a source of law of equivalent value to the Treaties. Article 51(1) of the Charter provides that it is binding on both the Union and the Member States when implementing EU law.

Although the Union is not yet party to the ECHR, rights included in the Charter which stem from the ECHR, have the same meaning and scope as they do in the Convention.¹⁰⁶ Given the extent of the case law of the ECtHR as well as the influence of the ECHR on the Charter, jurisprudence of the ECtHR will be the main focus of the below analysis.

It is also essential to ensure that future legislation conforms to the ECHR since all Member States are party to the Convention in their own right and may be liable for any breaches of the Convention arising from EU law.¹⁰⁷ It is therefore incumbent on the Union to ensure that EU law does not create conflicts between the Member States' obligations arising from EU law and those which stem from their membership of the ECHR.

The most common violations of fundamental rights arising from SLAPPs are the right to a fair trial¹⁰⁸ and, most emblematically, freedom of expression.¹⁰⁹ The effect of the SLAPP suit is the chilling of political speech, closing down the arena for political discussion and transforming political speech into a more private legal-based dialogue.¹¹⁰ Regulating SLAPPs poses a number of (surmountable) difficulties, however, insofar as the fundamental rights of the claimant are also engaged in relevant proceedings. In the first instance, the right to a fair trial also requires that the claimant have access to an impartial tribunal in which equality of arms is guaranteed. Secondly, the claimants' rights to privacy and family life are engaged in defamation claims.¹¹¹

In this chapter, we consider the interaction of these rights with a view to identifying legislative solutions thereafter which afford a legally sound balance between the fundamental rights of all parties.

3.2. The Right to Freedom of Expression

It is uncontroversial that SLAPPs are intended to suppress the legitimate right to freedom of expression, as enshrined in the Charter of Fundamental Rights and the ECHR.

¹⁰³ Case 9/69 *Stauder v City of Ulm* [1969] ECR 419.

¹⁰⁴ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁰⁵ Case C-5/88 *Wachauf* [1989] ECR 2609.

¹⁰⁶ Charter of Fundamental Rights of the European Union, Art 52(3).

¹⁰⁷ *Matthews v United Kingdom* (1999) EHRR 361.

¹⁰⁸ European Convention on Human Rights (ECHR), art 6; Charter of Fundamental Rights of the European Union (CFR), art 47; International Covenant on Civil and Political Rights (ICCPR), art 14; Universal Declaration of Human Rights (UDHR), art 10.

¹⁰⁹ ECHR, art 10; CFR, art 11; ICCPR, art 19; UDHR, art 19.

¹¹⁰ Fiona Donson, 'Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs' (2010) 19(1) *Review of European Community & International Environmental Law (RECIEL)* 83.

¹¹¹ ECHR, art 8; CFR, art 7; ICCPR, art 17; UDHR, art 12.

The ECtHR established that Council of Europe States have a positive obligation to safeguard the freedom of pluralist media and to 'create a favourable environment for participation in public debate'.¹¹² Given the extensiveness of the problem of SLAPPs,¹¹³ the Council of Europe's Commissioner for Human Rights issued a comment on SLAPP where it was underlined that, while SLAPPs are not a new phenomenon, the extent of the problem is increasing and poses a significant threat to freedom of expression.¹¹⁴ In a further report, it was observed that groundless legal actions are growing in number in Europe.¹¹⁵

The lawsuits have been brought by wealthy and powerful parties (whether individuals, public bodies, or companies) to intimidate journalists and force them to abandon their investigations. In *Independent Newspapers (Ireland) Ltd*,¹¹⁶ the European Court of Human Rights held in regard to a lawsuit which could be qualified as SLAPP that 'it is not necessary to rule on whether the impugned damages' award had, as a matter of fact, a chilling effect on the press. As a matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny...and very strong justification.'¹¹⁷ Furthermore, the Court held that ineffective domestic safeguards against disproportionate awards in defamation lawsuits may constitute a breach of freedom of expression.

Further reports and studies have reiterated concerns in regard to some national laws on libel and their application drawing on case law under the ECHR,¹¹⁸ and have framed the need for further research in regard to SLAPP.¹¹⁹ In its Resolution, the European Parliament referred to, among others, Articles 6, 7, 8, 10, 11, 12 and 47 of the Charter of Fundamental Rights of the European Union; the ECHR and ECtHR's jurisprudence; the ICCPR as well as numerous other human rights-related instruments and documents, in regard to the relevance of protecting investigative journalists in Europe.¹²⁰ Similarly, human rights issues central to the problem of SLAPP as well as applicability of a variety of European and international instruments were covered in the European Parliament's Resolution regarding media pluralism and freedom in the EU.¹²¹

¹¹² *Jafarov v Azerbaijan* (2017) 64 EHRR 13; Rule of Law (n 52); see also CM/Declaration of 4 July 2010 on the desirability of international standards dealing with forum shopping in respect of defamation, "libel tourism", to ensure freedom of expression; CM/Rec 2018/2, on the roles and responsibilities of internet intermediaries which recognises the need for action against SLAPPs.

¹¹³ See for example all the recent reports on SLAPP as mentioned on Business & Human Rights Resource Centre, 'Materials on SLAPPs' (2021) <<https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/materials-on-slapps/>> accessed 27 April 2021.

¹¹⁴ Council of Europe, 'CoE Commissioner for Human Rights issues a Human Rights Comment on SLAPPs' (2020) <<https://www.coe.int/en/web/media-freedom/-/coe-commissioner-for-human-rights-issues-a-human-rights-comment-on-slapps> accessed> 28 April 2021.

¹¹⁵ Council of Europe and others, *Hands off press freedom: attacks on media in Europe must not become a new normal* (Platform for the protection of journalism and the safety of journalists / Council of Europe 2020).

¹¹⁶ *Independent Newspapers (Ireland) Limited v Ireland* (Application no. 28199/15).

¹¹⁷ Ibid.

¹¹⁸ Steering Committee on Media and Information Society (CDMSI), *Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality* (CDMSI (2012)Misc11Rev2) (CoE 2012).

¹¹⁹ Bárd et al (n 3).

¹²⁰ European Parliament resolution of 19 April 2018 on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová (2018/2628(RSP)).

¹²¹ European Parliament resolution of 3 May 2018 on media pluralism and media freedom in the European Union (2017/2209(INI)).

For Article 10 ECHR concerning the right to freedom of expression, any restriction must be prescribed by law;¹²² necessary in a democratic society;¹²³ and must pursue a legitimate aim.¹²⁴ There is an inherent conflict of the right to reputation and the right to freedom of expression which has been open to careful balancing of interests by the Court. The right to freedom of expression can be lawfully interfered with to protect the reputation or rights of others.¹²⁵ However, even if so, the measures employed have to be proportionate.¹²⁶

In *Falzon v Malta*, the Court found a breach of the applicant's right under Article 10 ECHR as domestic courts failed to strike a fair balance between freedom of political expression, especially that of public interest, and the right to respect for privacy of the other party.¹²⁷ The essential role of a free press was considered as a tool to ensure the proper functioning of a democratic society. Furthermore, it was underlined that a key distinction had to be made between simply reporting details of one's private life and reporting facts which could contribute to a wider debate. Additional weight was given to the fact that as a politician, the subject of the allegedly libellous article was open to close scrutiny of journalists and the public. Consequently, it was concluded that the Convention placed a very high bar for reasons capable of lawfully restricting debates on questions of public relevance and interest.

Furthermore, the Court in *Olafsson v Iceland*,¹²⁸ found that the domestic court failed to strike a fair balance between conflicting rights, given the relevance of the matter in question which was of interest to the public voting on candidates running in the Constitutional Assembly elections.¹²⁹ Issues of public concern should not be suppressed by defamation lawsuits attempting to restrict one's Article 10 rights especially when those concerned are, among others, figures open to public scrutiny, such as political candidates.

Another example showing the Court's reluctance to allow undue restrictions on freedom of speech when related to a subject of general interest of the public, is the case of *Morice v France*.¹³⁰ An

¹²² *Sunday Times* (1979) 2 EHRR 245.

¹²³ *Smith and Grady v UK* (1999) 29 EHRR 493.

¹²⁴ ECHR, art 10(2).

¹²⁵ See e.g. *Lingens v Austria* (1986) 4 EHRR 373. For academic commentary see Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26(1) *American University International Law Review* 183; Council of Europe, 'Freedom of the press and the protection of one's reputation' (2018) <<https://rm.coe.int/factsheet-on-defamation-july2018-docx/16808c1688>> accessed 29 April 2021; Human Rights Watch, 'Defamation trials' <<https://www.hrw.org/reports/2002/albania/albania0602-04.htm>> accessed 2 May 2021; European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of expression' (2021) <https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf> accessed 1 May 2021; Dirk Voorhoof, 'Freedom of Expression versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism' in Stijn Smet and others, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford Scholarship Online 2017).

¹²⁶ In regard to the CFR, art 11, pursuant to art 52(3) of the Charter, is to be given the same scope and meaning as the right granted under Article 10 ECHR. Thus, any lawful limitation cannot exceed those granted under the Convention (except restrictions which EU competition law may impose on MS); European Agency for Fundamental Rights, 'EU Charter of Fundamental Rights' <<https://fra.europa.eu/en/eu-charter/article/11-freedom-expression-and-information>> accessed 28 April 2021.

¹²⁷ *Falzon v Malta* (2018) 67 EHRR 34.

¹²⁸ *Olafson v Iceland* (2018) 67 EHRR 19.

¹²⁹ See also *Kharlamov v Russia* (2017) 65 EHRR 33 where professor's comments re lawfulness of elections were found to be a value judgement and a matter of general public interest; and *Brosa v Germany* (2014) 4 WLUK 674 where a domestic court similarly failed to strike a fair balance between the conflicting interests, or to establish a pressing social need that could deem the interference with applicant's rights lawful.

¹³⁰ *Morice v France* (2016) 62 EHRR 1.

interference must be proportionate and cannot restrict freedom of expression enabling access to matters of public interest and concern.

The same reasoning can be found in case of *Novaya Gazeta V Voronezhe v Russia*¹³¹ where the Russian court's decision that an editorial board was liable for defamation due to an article regarding allegations of abuses and irregularities committed by numerous public officials, was found to have breached Article 10.

A violation may also be found where domestic courts hold an individual liable while disregarding the distinction between verifiable statements of fact and unverifiable value-judgements, especially where a complainant has a reasonable explanation for why they have been unable to verify one or more of the statements made.¹³²

In *Bladet Tromso v Norway*,¹³³ the Court found that an exercise of freedom of expression which amounted to a debate of public relevance is capable of prevailing over a claimant's right to reputation. It was held, however, that Article 10 does not give unlimited protection to the press which is to fulfil its role in good faith and with due diligence.

Nevertheless, the net effect of the case 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.

In *Lingens v Austria*, the Court reaffirmed that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.' It held that, while States have a margin of appreciation in deciding what restrictions on free speech are 'necessary', this is subject to the supervisory jurisdiction of the ECtHR. Freedom of expression is not confined to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". It follows that, although the press must operate within the lawful limits of the protection of the reputation of others, 'it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest.' Indeed, the Court noted that, the corollary of the media's rights and obligations is a public right to receive information and ideas with a view to forming opinions regarding political leaders. Accordingly, the limits of acceptable criticism are wider as regards politicians than for private individuals, and the requirement of protecting the reputation of others must therefore be assessed in the context of broader interests in open discussion of political issues.¹³⁴

3.3. The Right to Freedom of Expression and its interactions with the Right to Privacy

As noted above, the right to privacy, which is enshrined in Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights, may contain the scope of the right to freedom of expression in some circumstances.

¹³¹ *Novaya Gazeta V Voronezhe v Russia* (2015) 60 EHRR 5.

¹³² *Flux v Moldova* (2010) 50 EHRR 34.

¹³³ *Bladet Tromso v Norway* (2000) 29 EHRR 125.

¹³⁴ (1986) 8 EHRR. 407 [39]-[42].

It is uncontroversial that the right to privacy includes the protection of an individual's reputation,¹³⁵ and their "physical and moral integrity".¹³⁶ The ECtHR has extended implicitly the right to legal persons, noting that it includes a company's "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good".¹³⁷ It appears, therefore that the right to reputation of legal entities engaged in economic activity is also protected under Article 8 ECHR.¹³⁸

For an interference with Article 8 ECHR to be lawful, three requirements as set out in Article 8(2) ECHR have to be satisfied. It must be in accordance with the law;¹³⁹ pursue a legitimate aim; and be necessary in a democratic society i.e., proportionate. In *Mosley v UK*, it was held that the rights of free press may outweigh the relevance of applicant's right to privacy, however.¹⁴⁰

Article 8 ECHR will be engaged if a person can prove that there has been an interference with their right which was given a broad meaning in *Costello-Roberts v UK*¹⁴¹ as the Convention does not provide an exhaustive list but rather enables continuously evolving interpretation at the discretion of the Court. The right, however, can be restricted to protect health and morals of the public, or to protect rights and freedoms of others, including the right to freedom of expression.

In *Von Hannover v Germany (No. 1)*,¹⁴² the ECtHR set out some guidance in regard to the balancing assessment of right to privacy and the right to freedom of expression: 'The decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published [material makes] to a debate of general interest.'¹⁴³ This judgment is consistent with the other case law concerning weight given to freedom of expression when the matter concerned was of general public interest.

When balancing rights under Article 8 and Article 10, due weight must be given to policy concerns such as that suppressing freedom of expression may, and often does, have a detrimental effect on ensuring transparency, promoting open public debate, pluralism,¹⁴⁴ and democracy. In *Reinboth v Finland*,¹⁴⁵ the complainants argued that their convictions for violating the right to respect for private life of a politician breached their rights under Article 7 and Article 10. The Court partially upheld the complaint due to finding the interference with the right to freedom of expression not necessary in a democratic society. In *Radio Twist AS v Slovakia*,¹⁴⁶ it was held that the judgment in favour of a senior politician in a

¹³⁵ *Belpietro v Italy*, App no 43612/10, 24 September 2013 (hereafter *Belpietro v Italy*). See also *Salumäki v Finland*, App no 23605/09, 29 April 2014 (hereafter *Salumäki v Finland*) and *Axel Springer AG v Germany (no. 2)* (n 1).

¹³⁶ *Von Hannover v Germany (No 1)* (2005) 40 EHRR 1, §§ 95-100.

¹³⁷ *Ibid*, para 94.

¹³⁸ See *Firma EDV für Sie, EFS Elektronische Datenverarbeitung Dienstleistungs GmbH v Germany*, App no 32783/08, 2 September 2014, §§ 22-23; *Ärztchamber für Wien and Dorner v Austria*, App no 8895/10, 16 February 2016, § 62 and 64; *Haldimann and others v Switzerland*, App no 21830/09, 24 February 2015, § 48-52; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, App no 37374/05, 14 April 2009 §§ 65-67.

¹³⁹ *Sunday Times* (1979) 2 EHRR 245.

¹⁴⁰ *Mosley v UK* (2011) 53 EHRR 30.

¹⁴¹ *CostelloRoberts v UK* (1995) EHRR 112.

¹⁴² *Von Hannover v Germany (No 1)* (2005) 40 EHRR 1.

¹⁴³ *Ibid*.

¹⁴⁴ The importance of media pluralism has been recognised by the European Parliament in its resolution of 3 May 2018 on media pluralism and media freedom in the European Union (2017/2209(INI)).

¹⁴⁵ *Reinboth v Finland* (2013) 57 EHRR 34.

¹⁴⁶ *Radio twist AS v Slovakia* (2008) CLY 1890.

defamation claim against a broadcaster, violated the complainant's right to free expression as the broadcast concerned a public figure open to public scrutiny, and a matter of public interest.

To lawfully restrict qualified rights such as those granted under Article 8 and Article 10 ECHR, it has to be necessary in a democratic society, meaning the employed means have to be proportionate to the legitimate aim pursued.¹⁴⁷ When balancing conflicting interests of two individuals or an individual and the public, the Court will assess all facts, circumstances and relevant considerations to the case. In situations where one party attempts to protect its right to privacy or claim compensation for defamation, while the other exercises its freedom of expression and refers to matters of public interest, a key consideration would be the interest of the public in a democratic society as often represented by the side exercising its Article 10 rights.

Based on the case law, as outlined in the analysis above, it can be concluded that there is a tendency of standing by the freedom of expression as a tool of 'keeping tabs' on potential misconduct and questionable practices.

Furthermore, in the *McLibel* case, the ECtHR moved onto analysing the claim for breach of applicants' rights under Article 10 and whether the interference was 'necessary in a democratic society'. The UK government argued that applicants should be afforded a lower level of protection as they were not journalists. The Court, however, stated that:

[I]n a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.¹⁴⁸

Similarly, to other cases on freedom of expression, it was made clear in *McLibel* that journalists, when reporting on matters of general public interest, are to act in good faith and with due diligence. Nevertheless, the Court held that large public companies, regardless of their interest in protecting their commercial success and viability, have by their very nature, opened themselves up to public scrutiny, especially when considering issues such as health, environment, employees' rights and other subjects of public concern.

Accordingly, although the State enjoys a certain margin of appreciation in the balance of rights, when it decides to grant a course of action and a remedy to a corporate body, it must ensure that countervailing interests of freedom of expression are properly safeguarded.

The measure of procedural fairness, effects for open debate in society as well as equality of arms must also be borne in mind. The next section turns to procedural concerns in particular.

3.4. The Right to an Effective Remedy and to a Fair Trial

Article 47 of the EU Charter of Fundamental Rights guarantees, within the scope of EU law, the rights to a fair trial and an effective remedy. In addition, the Charter codifies the case law of the European Court of Human Rights insofar as the right to a fair trial also includes the right to legal aid for parties to civil litigation who lack sufficient resources to ensure effective access to justice:

¹⁴⁷ See for example *Fatullayev v Azerbaijan* (2011) 52 EHRR 2; *Marchenko v Ukraine* (2010) 51 EHRR 36; *Filipovic v Serbia* (2009) 49 EHRR 43; *Dyuldin v Russia* (2009) 48 EHRR 6; *Standard Verlags GmbH v Austria* (2008) 47 EHRR 58; *Grinberg v Russia* (2006) 43 EHRR 45.

¹⁴⁸ *Ibid.*

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

As with the ECHR, the Charter right is applicable to cases concerning both civil and criminal litigation. The key distinction in civil cases is that both claimant and respondent are usually private parties. It follows, therefore, that the articulation of anti-SLAPP solutions must be mindful of the rights of both parties in civil claims.

The case law of the European Court of Human Rights addresses the respondent's right to access to courts primarily from the perspective of the costs of proceedings. In particular, although the Convention text refers only to the right to legal aid of a defendant in a criminal matter, the Strasbourg Court has found that litigants in civil cases may also be entitled to legal aid.¹⁴⁹

The Court has found that the right to a fair trial is limited by practicalities such as availability of legal aid, and in accordance with Article 6(1)-(3) (a-e), requires a fair procedure, including in respect of the process leading to a hearing. In *Airey v Ireland*,¹⁵⁰ it was held that individuals must have effective access to courts, which in case of SLAPP is strategically blocked by targeting defendants in a way that prevents them from accessing justice.

The process should also be timely.

The Strasbourg case law makes plain the object of the reasonable time requirement: to ensure that accused persons do not lie under a charge for too long and that the charge is determined...to protect a defendant against excessive procedural delays and prevent him remaining too long in a state of uncertainty about his fate...to avoid delays which might jeopardise the effectiveness and credibility of the administration of justice.¹⁵¹

The case of *Steel & Morris*,¹⁵² commonly known as *McLibel*, is perhaps the most iconic example of how domestic laws have tended to lean towards an applicant's favour and fail to address the detriment that a defendant may be put to when exercising their freedom of expression, simply due to the lack of legal aid and finances. Those constitute a substantial barrier to access to justice which is of key relevance when the defendant is trying to freely disseminate information of public interest.

There is often a great imbalance of power between the parties where one has the resources and capacity to effectively silence the other through litigation techniques which magnify legal costs and the psychological and economic burden of prolonged proceedings. This was the case in *McLibel* where activists were sued by McDonald's for distributing leaflets with allegations on 'What's wrong with McDonald's'. The fast-food chain won the trial in the English court and the appeal where damages were,

¹⁴⁹ See for example *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

¹⁵⁰ *Airey v Ireland* (1979) 2 EHRR 305, § 26.

¹⁵¹ *HM Advocate v Watson, Burrows and JK* [2002] UKPC D1.

¹⁵² *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

however, reduced by £20,000. It is to be noted that some of the allegations made were indeed true while others were considerably harder to prove.

The case went further to the ECtHR. The Court held that unavailability of legal aid violated applicants' rights under Article 6 and noted also that the lengthy proceedings and their outcome infringed rights under Article 10. The main argument was that the denial of legal aid effectively deprived applicants of the possibility to present their case and defend themselves before a court. It was argued that the disparity of legal assistance and, therefore, the imbalance of power led to unfairness in the process of balancing conflicting interests. It was found that allegations of misconduct in matters of public interest were a form of a political expression and required a high level of protection given their relevance in a democratic society. Conversely, allowing a party to sue for defamation was not in itself an infringement. However, the unfair balancing process, procedural unfairness, inequality of arms and the means of parties, as well as disproportionate damages award did infringe the respondents' rights:

As regards the complexity of the proceedings, the trial at first instance had lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing had lasted 23 days. The factual case which the applicants had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue.¹⁵³

As the Court outlined that each lawsuit is to be assessed on a case-to-case basis, bearing in mind the weight given to the costs, complexity, length and imbalance of power, it can be concluded that when assessing whether unavailability of legal aid can breach one's Article 6 rights, instances of SLAPP are highly likely to be decided in a similar manner.

As noted above, the purpose of SLAPPs is not to produce a judgment in favour of the claimant, but to use litigation (or the mere threat of litigation) to silence the respondent or otherwise coerce them into acting in a manner which they might not otherwise accept. Arguably, regardless of domestic and international safeguards, civil cases are often much more 'deadly' to a defendant who is stripped out of their rights simply because they cannot afford the process of defending themselves against a party that is far better resourced.

Any intervention must also account for the ability of claimant to bring a legitimate claim before a court, however. From the perspective of the claimant, it is paramount that anti-SLAPP legislation does not have the effect of denying the right to have a legitimate claim brought before a court or tribunal. While the right to bring a claim is not absolute, limitations may not be such as to amount to the impairment of the essence of the right to access courts. It follows, therefore that any restrictions must pursue a legitimate aim and must be proportionate.

Accordingly, anti-SLAPP legislation – particularly the remedy of early dismissal of SLAPP cases – may not be framed in a manner which denies the claimant the opportunity to state their claim. It is noteworthy in this respect that the right to a fair trial is engaged where the claimant has an arguable case; the threshold, therefore, is not that the claimant will be successful but that they may state a tenable argument.¹⁵⁴ Accordingly, early dismissal may only occur once the claimant has submitted their claim in outline and had the opportunity to persuade the court that the matter should be heard in its

¹⁵³ Ibid.

¹⁵⁴ *Neves da Silva v Portugal* (1989) 13 EHRR 535, § 37.

entirety in the usual way.¹⁵⁵ It is only once the claimant has had the opportunity to articulate their claim, and failed to do so, that the case may be dismissed.

Furthermore, it is incumbent on the legislator to demonstrate that anti-SLAPP measures pursue a legitimate aim. In this respect, it is clear that the protection of the fundamental rights of the respondent constitute a legitimate aim for the purposes of EU human rights law. In addition to the right to freedom of expression, which is considered above, the respondent's right to a fair trial is also engaged by SLAPP techniques. In particular, the deployment of vexatious litigious techniques is designed to extract from the respondent an agreement to terms which they might not otherwise accept.¹⁵⁶

Having established that restrictions of the claimant's right to access to courts through anti-SLAPP legislation pursue a legitimate aim, it is then necessary to determine whether proposed measures would satisfy the proportionality test. In this respect, the Union's legislators may take ample comfort in the manner in which the Member States' margin of appreciation is assessed by the Strasbourg Court. In particular, the Court takes into account the extent to which there is a trend among the Member States towards the adoption of particular restrictions. In this respect, the adoption of legislation by the EU institutions constitutes evidence of the development of a trend towards a particular balance as a consequence of the geographic scope of the Union as a proportion of the membership of the Convention.¹⁵⁷

3.5. Conclusions

This chapter demonstrated that SLAPPs constitute a significant threat to freedom of expression and the right to access to courts. It is to be noted in this respect that, while EU law and broader European human rights law already provide protection against SLAPPs in principle, the enforcement of these rights through the European Court of Human Rights requires engagement in litigation at a national level, and the exhaustion of all domestic remedies. Reliance on the ECtHR for the prevention of SLAPPs is therefore both unsound in terms of the likelihood of individuals having the means to pursue claims fully and would also constitute a failing in respect of the systemic positive obligation incumbent on States.

It is therefore argued hereunder that there is a need to introduce legislation which would ensure that the substantive and procedural rights of the parties are upheld through *ex ante* legislative provision, as opposed to reliance on remedial judicial intervention in the minority of cases which are litigated before the ECtHR. Although procedural law and private international law rules are ostensibly designed to be neutral as to the substantive outcome of individual cases, it is uncontroversial that the practical ability to enforce rights is inseparable from the effective availability of that right.¹⁵⁸

This is, of course subject to the caveat that the regulation of procedure must be designed in a manner which does not do violence to the legitimate balance between the parties.¹⁵⁹ In respect of defamation claims, procedural rules, including the determination of which forum may hear a case and which law will apply, impinge upon the fundamental rights of both parties.¹⁶⁰ The legislator must consider

¹⁵⁵ See Chapter 2 above.

¹⁵⁶ See Chapter 1 above.

¹⁵⁷ *Christine Goodwin v United Kingdom* (2002) 35 EHRR 447.

¹⁵⁸ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

¹⁵⁹ *Ibid*; *Arlewin v Sweden* (Application no.2302/10), paras 72-73.

¹⁶⁰ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

particularly the extent to which the balance struck between the parties' procedural rights affects the claimant's right to privacy and the respondent's right to freedom of expression.

The next chapters turn to legislative solutions which would address the fundamental rights concerns noted above.

4. EU PRIVATE INTERNATIONAL LAW INSTRUMENTS

KEY FINDINGS

The Brussels Ia Regulation and Rome II Regulation were adopted with a view to providing legal certainty and predictability in cross-border litigation. These instruments are intended to limit forum shopping in the European Union. Nevertheless, the law has evolved in a manner which enables plaintiffs in cross-border defamation claims to deploy the threat of litigation to suppress freedom of expression.

The Brussels Ia Regulation affords the claimant extensive choice of venues in which to initiate litigation, as well as a choice of litigation strategies. This means that the claimant can sue in a place or places which have little connection to the dispute, and which is most inconvenient to the respondent. The cost of a defence in a foreign court is often prohibitive to the defendant.

The Rome II regulation, which harmonises the applicable law in non-contractual obligations, lacks a rule concerning defamation and privacy claims. It follows that national choice of law rules continue to apply. The result is that it is difficult to predict which law or laws will apply in a case. This gives a potential claimant significant advantages because they can choose a court which will apply the lowest level of freedom of expression.

It is proposed that these instruments be recast to (i) ground jurisdiction in the court of the place of the defendant's domicile in defamation cases, and (ii) provide that the law of the place to which a publication is directed should apply. If there is no such place, supplementary rules which focus on editorial control, or the most significant elements of loss, could be included.

4.1. Context

The Brussels Ia Regulation¹⁶¹ regulates jurisdiction and recognition of judgments in civil and commercial matters as between EU Member States. It is replicated, in great measure, in respect of relations with EFTA states through the Lugano Convention.¹⁶² This chapter demonstrates that these instruments provide pursuers in defamation cases with ample opportunity to engage in forum shopping to the detriment of freedom of expression.

The advantages which accrue to litigators in these circumstances are well-documented in the literature.¹⁶³ They include financial costs of litigation arising from a need to employ lawyers in multiple jurisdictions, the potential cost of travel, and the cost of translation.¹⁶⁴ Furthermore, forum shopping

¹⁶¹ 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').

¹⁶² Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L-339/3.

¹⁶³ See e.g. Louis Visscher 'A Law and Economics View on Harmonisation of Procedural Law' in Xandra E Kramer and CH van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012) 82-84; Jean Albert et al *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (European Commission DG 2007). Accessible at <https://e-justice.europa.eu/fileDownload.do?id=99bdd781-aa3d-49ed-b9ee-beb7eb04e3ce> (Accessed 03 March 2019); Adriani Dori and Vincent Richard 'Litigation costs and procedural cultures – new avenues for research in procedural law' in Burkhard Hess and Xandra E Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352.

¹⁶⁴ Ibid.

provides pursuers with psychological advantage insofar as the lack of familiarity with foreign legal systems may prompt defendants to settle on terms which they might not accept in circumstances where they are more certain of their legal position.¹⁶⁵ In other words, if framed with excessive regard for the claimant's position, jurisdictional rules have the potential to deny the defendant their right to access to courts as a consequence of the coercive effects of transnational litigation.

This is exacerbated by a lack of harmonisation of choice of law rules in defamation cases. The Rome II Regulation¹⁶⁶ does not include a uniform rule on the determination of the applicable law in defamation and privacy claims since there was no agreement among the institutions on how such a rule should be framed. This means that the forum in which a case is litigated may be determinative of the substantive rights and obligations of the parties.

Costs arising from the ability to sue journalists in jurisdictions having only a tenuous connection to a case, under laws which bear little relation to the facts, have a chilling effect on press freedom and functioning democracies.¹⁶⁷ In the absence of reform of private international law of defamation, the ability of the European Union to function as a *sui generis* legal order in which individuals supplement institutional enforcement of the Treaties is severely circumscribed. This is especially so given the Union's need for the supplementing of public enforcement functions by individuals bearing enforceable rights¹⁶⁸ cannot be met in the absence of informed and active civic actors.

In this chapter, it is argued that, in its present state, EU law is excessively accommodating to pursuers and provides ample opportunity for transnational SLAPPs. It is therefore recommended that the Brussels Ia Regulation be reformed with a view to streamlining and limiting jurisdictional options, and that the Rome II Regulation be recast to include a harmonised rule on choice of law in defamation to provide readily foreseeable outcomes regarding the applicable law.

4.2. The Brussels Ia Regulation and Lugano Convention

4.2.1. Introductory Remarks

This part explains the existing law concerning the allocation of jurisdiction, and sets out reforms which are needed in order to remedy the opportunities which the Brussels Ia Regulation and Lugano Convention grant potential SLAPPers. It does so primarily with reference to the Regulation. The arguments are equally applicable to the Convention, however, since the interpretation of the Convention is consistent with EU law.¹⁶⁹

Both instruments are intended to afford legal certainty to parties to transnational litigation in respect of process and outcomes. To this end, a key concern in the design and application of the instruments is the prevention of forum shopping. This is achieved through the articulation of common jurisdictional rules which are usually based on the domicile of the defendant. In this way, the pursuer is usually unable to deploy jurisdictional rules in a manner that is designed to be vexatious to the respondent, and thereby to exact procedural and substantive advantages.

¹⁶⁵ Ibid.

¹⁶⁶ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).

¹⁶⁷ Verza (n 23).

¹⁶⁸ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

¹⁶⁹ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L-339/21, Protocol 2.

However, cross-border defamation claims are exceptional insofar as they afford the pursuer with abundant opportunity to choose from among a number of fora in which to initiate litigation.

The potential for transnational SLAPPs is perhaps most readily understood with reference to Pilatus Bank's success in removing the vast majority of the journalistic record of its activities around the time of the assassination of Daphne Caruana Galizia.

Pilatus, an entity established in Malta, had been the subject of widespread reporting concerning allegations of money laundering and failure to abide by due diligence obligations.¹⁷⁰ It was alleged that the bank had processed illicit transactions to and between several politically exposed persons connected to government flagship initiatives.¹⁷¹ Several of these allegations have since been proven to be sound.¹⁷²

The bank was headquartered in Malta, established under Maltese law, and, at the relevant time, operated almost exclusively in Malta, but targeted its business to international clients including numerous international politically exposed persons such as Azerbaijan's presidential family.¹⁷³ The reports which were the subject of Pilatus' threatened lawsuits were published by Maltese newspapers, and directed towards a Maltese audience, albeit in a language and via a medium which rendered them accessible worldwide.

Despite the overwhelmingly Maltese connecting factors, Pilatus Bank engaged a law firm based in London to threaten to bring legal action for defamation against every Maltese news site in the United Kingdom (which was still an EU Member State at the relevant time) and the United States. Maltese defendants were understandably concerned by the possible actions in the United Kingdom due to the significant hurdles involved in contesting the jurisdiction of a court which might arguably have jurisdiction under the Brussels Ia Regulation.¹⁷⁴ The Regulation affords the plaintiff in libel cases a choice of forum as between the defendant's domicile and the place in which damages are alleged to have been incurred.¹⁷⁵ At face value, therefore, it would appear that a court in the United Kingdom would have jurisdiction if it could be shown that the allegedly libellous report resulted in damages there,¹⁷⁶ as Pilatus Bank averred. The defendant could be drawn into costly litigation to contest the

¹⁷⁰ Pilatus Bank has since been shut down in view of serious money-laundering failings. See Case T-687/18 R *Pilatus Bank v European Central Bank* ECLI:EU:T:2019:28; Panicos Demetriades and Radosveta Vassileva, 'Money Laundering and Central Bank Governance in the European Union' (2020) *Journal of International Economic Law* 1, 17-18.

¹⁷¹ See e.g. Jacob Borg, 'Separation deed raises questions on Schembri-Tonna "loan"', *Times of Malta* (20/01/2019). Accessible at: <https://www.timesofmalta.com/articles/view/20190120/local/separation-deed-raises-questions-on-schembri-tonna-loan.699516>

¹⁷² See e.g. Stephanie Kirchgaessner and Juliette Garside, 'Authorities seize control of bank at center of Malta corruption scandal', *The Guardian* (22/03/2018). Accessible at: <https://www.theguardian.com/world/2018/mar/21/iranian-banker-malta-corruption-scandal-money-laundering-charges>; Jacob Borg, 'Ex-Pilatus director slammed 'crazy' Schembri-Tonna transaction', *Times of Malta* (05/01/2020). Accessible at: <https://timesofmalta.com/articles/view/ex-pilatus-director-slammed-crazy-schembri-tonna-transaction.761082>

¹⁷³ Rainieri (n 15) 22-25; Juliette Garside and Stephanie Kirchgaessner, 'Azeri ruling families linked to secret investments via Maltese bank', *The Guardian Newspaper* (23/04/2018). Accessible at: <https://www.theguardian.com/world/2018/apr/23/azerbaijan-ruling-families-linked-to-secret-investments-via-maltese-bank>

¹⁷⁴ Brussels Ia, Art 7(2).

¹⁷⁵ Brussels Ia, Arts 4 and 7(2).

¹⁷⁶ Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* ECLI:EU:C:1995:61, para 33.

jurisdiction of a court, determine the law governing the dispute, and to defend a lawsuit, the loss of which would be ruinous to media entities of Maltese dimensions.¹⁷⁷

The threat of legal action in the United Kingdom and United States was a strategic gambit which was motivated primarily by the cost of proceedings, as well as the psychological effects of a lack of familiarity with foreign law and procedure.¹⁷⁸ London was by no means the appropriate forum, or indeed one which unequivocally would be empowered to exercise jurisdiction under the Brussels Ia Regulation as interpreted by the CJEU.¹⁷⁹ Moreover, the bank's substantive claims proved to be especially weak when later exposed to the scrutiny of financial regulators.¹⁸⁰ As regards the threatened suits in the United States, First Amendment protections suggest that a successful defamation action for punitive damages would have been especially unlikely there given the apparent absence of actual malice.¹⁸¹ Nevertheless, the cost of litigation was enough to persuade the three independent Maltese newspapers of note,¹⁸² as well as at least one popular online portal, to delete or alter online content as requested by the bank.¹⁸³ The media outlets invariably stood by the veracity of their published accounts of the facts, noting that the deletion and alteration was not an admission of guilt but a consequence of economic duress.¹⁸⁴ In other words, the mere fact of the potential applicability of jurisdictional rules in the Brussels Ia Regulation and the absence of *ex ante* defensive mechanisms in respect of third states sufficed to undermine press freedoms enshrined in the EU Charter of Fundamental Rights.¹⁸⁵ But for the steadfast resistance of Daphne Caruana Galizia, and the actions of online activists following her assassination, the alteration of the historical record would not have been known, and the altered record would have been the only remaining online account.¹⁸⁶

It is hardly surprising, of course, that journalists would submit, albeit reluctantly, to the demands of a pursuer rather than engaging in litigation which could cost hundreds of thousands of Euros merely to settle a jurisdictional argument.¹⁸⁷ Indeed, the fact of limited incidence of transnational defamation litigation masks extensive out-of-court settlement of disputes in situations in which one might

¹⁷⁷ Delia (n 12)

¹⁷⁸ Ibid.

¹⁷⁹ For analysis of relevant jurisdictional rules, see Sections 4.2.2 and 4.2.3 below.

¹⁸⁰ See Demetriades and Vassileva (n 15) 17-18; Rainieri (n 15) 22-25.

¹⁸¹ See e.g. *New York Times v Sullivan* 376, U.S. 254 (1964); *Gertz v Robert Welch*, 418 U.S. 323 (1974).

¹⁸² These are the Times of Malta, Malta Today, and The Malta Independent.

¹⁸³ See e.g. Chris Peregin, 'The Least We Can Do Six Months After Daphne Caruana Galizia Was Killed' (16/04/2018) LovinMalta. Accessible at: <https://lovinmalta.com/opinion/the-least-we-can-do-six-months-after-daphne-caruana-galizia-was-killed/>

¹⁸⁴ See e.g. Editorial, 'Pilatus Bank: Malta's media freedom SLAPped in the face', The Malta Independent (17/12/2017). Accessible at: <http://www.independent.com.mt/articles/2017-12-17/newspaper-leader/TMIS-Editorial-Pilatus-Bank-Malta-s-media-freedom-SLAPped-in-the-face-6736182724>

¹⁸⁵ Charter of Fundamental Rights of the European Union [2012] OJ C-326/391.

¹⁸⁶ Delia (n 12).

¹⁸⁷ See e.g. the following family law cases: *V v V* [2011] EWHC 1190 (Fam) [61] "The overall bill to the family, now standing at £925,000, will no doubt top £1 million if next month's hearing about the children goes ahead. It should be recalled that this level of expense has been incurred without a basis of jurisdiction having been established"; *W Husband v W Wife* [2010] EWHC 1843 (Fam): legal costs amounted to determine jurisdiction amounted to £120,000; *JKN v KCN* [2010] EWHC 843 (Fam), [7] the combined legal cost to determine jurisdiction amounted to £900,000 at the preliminary stage. In civil and commercial matters, similar costs have been observed; e.g. in *Kolden Holdings Ltd v Rodette Commerce Ltd and another* [2008] EWCA Civ 10, the court lamented the expenditure of £400,000 on a spurious challenge to jurisdiction. For qualitative and quantitative analysis of the use (and abuse) of jurisdictional litigation as a negotiating technique, see Beaumont, Danov, Trimmings and Yüksel 'Great Britain' in Beaumont, Danov, Trimmings and Yüksel (eds) *Cross-Border Litigation in Europe* (Hart/Bloomsbury 2017) 84-85.

otherwise expect respondent journalists to hold their ground.¹⁸⁸ Financial, psychological, and other barriers to defending a lawsuit in a foreign jurisdiction are well documented in the private international law literature.¹⁸⁹

What is more, game theory analysis of out-of-court settlement of a dispute, which incurs negligible direct costs when compared to expensive litigation, would weigh heavily in favour of the former given the limited rationally grounded incentives to incur the risk and opportunity cost of litigation.¹⁹⁰ This is all the more so where the risk of reputational harm to a media entity which deletes content is limited given the fact of the deletion would be unknown to anyone other than the would-be litigants.¹⁹¹

4.2.2. Jurisdiction in Tort/Delict Cases

Article 4 of the Regulation establishes a general rule that, in the absence of a jurisdictional agreement between the parties,¹⁹² defendants in civil and commercial matters shall be sued in the place of their domicile. This is motivated by the notion that jurisdictional rules should be predictable and should not grant an undue advantage to either party.¹⁹³ In view of the fact that the initiator of litigation invariably enjoys the advantage of determining the fact of litigation and how the claim is framed, the view was taken that the defendant should be sued in the place in which they live.¹⁹⁴

This general rule is subject to a number of exceptions, however. These divergences from the default rule are included because there may be an overwhelming State interest or connection to a case, such as in respect of entries in public registers,¹⁹⁵ or because of strong factual connections to a particular jurisdiction which might render it more practically convenient to litigate there.¹⁹⁶ Furthermore, the facilitation of the sound administration of justice may require litigation to take place in a venue which is more closely connected to the facts of the case than the place in which the defendant is domiciled.¹⁹⁷ In particular, evidence may be more readily available in places which are connected to the event, rather than the persons involved in the case.¹⁹⁸ It follows, therefore, that adjustments should be made in order to enable tort victims to choose a forum which provides an adequate route for the administration of their claim.

¹⁸⁸ See Diana Wallis, 'Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, European Parliament DT\820547EN.doc (23.06.2010) 4.

¹⁸⁹ See e.g. Louis Visscher 'A Law and Economics View on Harmonisation of Procedural Law' in Xandra E Kramer and CH van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012) 82-84; Jean Albert et al *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (European Commission DG 2007). Accessible at <https://e-justice.europa.eu/fileDownload.do?id=99bdd781-aa3d-49ed-b9ee-beb7eb04e3ce> (Accessed 03 March 2019); Adriani Dori and Vincent Richard 'Litigation costs and procedural cultures – new avenues for research in procedural law' in Burkhard Hess and Xandra E Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352.

¹⁹⁰ On the application of game theory to civil disputes generally, see Albert et al (n 189) 299-300.

¹⁹¹ Lawyers' letters seen by the present author invariably include a headnote stating that the content of the letter is not for publication. It appears that media entities which acquiesce in the demand to alter content also accept the demand to refrain from publicising the fact of the alteration.

¹⁹² Brussels Ia, Art 25.

¹⁹³ Brussels Ia, Recital 15.

¹⁹⁴ Ibid.

¹⁹⁵ Brussels Ia, Art 24(3).

¹⁹⁶ Ibid, Recital 16.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

In tort cases, the pursuer may choose to sue either in the place of the defendant's domicile or in the place where the harmful act occurred.¹⁹⁹ This adjustment was introduced to reflect the existing laws of the member states at the time the Brussels Convention 1968 was adopted.²⁰⁰ There was little consideration for the manner in which tort should be addressed generally, still less how the practice of defamation law might be altered by the free movement of judgments in an internet age which had yet to dawn. Notably, the Jenard Report states that the inclusion of special rules in respect of tort was necessary 'especially in view of the high number of road accidents.'²⁰¹ It is clear, therefore, that the drafters of the 1968 Convention were concerned principally with ordinary horizontal relationships – important to the parties, but of little systemic consequence for a legal order governed by the rule of law. This is a far cry from the fundamental constitutional problems arising in contemporary defamation cases.²⁰²

In addition to the facilitation of the administration of justice, it appears that the granting of choice to pursuers was motivated in part by policy decisions concerning the rebalancing of the relationship between parties to non-contractual obligations. National jurisdictional laws implicitly accounted for the fact that the victim of a tort or delict is a passive actor who does not choose to establish a legal relationship with the defendant, and still less with the place in which the defendant is domiciled. In contrast, the defendant in a successful tort claim, knowingly or through negligence, will have established a legal relationship with connections to the place in which the harmful act occurred. There is therefore a presumption in the design of the jurisdictional rules that tort claims are based on a sound factual basis, and indeed this is evident in the language of the Regulation which refers to a harmful event rather than one which is alleged to have taken place.

The meaning of 'the place in which the harmful event occurred or may occur' is not immediately obvious since it can refer both to the place in which the act giving rise to the damage occurred and to the place in which the resulting damage was felt. The Court of Justice was therefore required to provide clarity on the meaning of the term.

Departing from its usual narrow construction of exceptions to the rule based on the domicile of the defendant, in *Bier* the Court held that the term could refer to either of the two potential definitions.²⁰³ This is a sensible adjustment insofar as there is no obvious formula to determine which is the more appropriate forum in all cases. The evidence of the harm or the acts causing the harm may be found in different places.

It follows, therefore, that the pursuer is able to choose as between three potential venues for litigation in tort cases, namely (i) the place of the domicile of the defendant, (ii) the place in which the harmful act was committed, (iii) the place in which the effects of the harmful act were manifested.

4.2.3. Defamation

When applied to defamation, jurisdiction rules regarding tort litigation encounter human rights concerns which are of fundamental importance to the maintenance of a legal system which is founded on the rule of law and democratic governance. Consequently, the need for foreseeability in tort cases

¹⁹⁹ Brussels Ia, Art 7(2).

²⁰⁰ Jenard Report [1979] OJ C 59/1, 25-26.

²⁰¹ *Ibid* 26

²⁰² On the complexity and distinctiveness of the private international law of the tort of defamation, see PB Carter, 'Defamation' in Campbell McLachlan and Peter Nygh (eds) *Transnational Tort Litigation: Jurisdictional Principles* (OUP 1996), 107-108.

²⁰³ *Case 21/76 Handelswekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

was especially emphasised with reference to defamation in the preamble to the Brussels Ia Regulation.²⁰⁴ Nevertheless, the Court of Justice has developed a body of case law whose net effect is to afford further opportunities for forum shopping and vexatious litigation strategies in defamation cases, particularly where the claimed defamatory content is posted online.

In *Shevill* the Court held that the *Bier* principle concerning the dual meaning of the place where the harmful event occurred is equally applicable to defamation claims.²⁰⁵ It follows that, in addition to the ability to sue in the place of the defendant's domicile, a claimant in a defamation case may sue in the place of publication or the place (or places) in which the resulting reputational harm occurred:

on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.²⁰⁶

The Court, therefore, pursues the path established in *Bier* whereby jurisdictional rules in tort are shaped by the involuntary nature of the legal relationship to which the purported victim is party. This is evident in the language of the Court; in the paragraph quoted above the Court refers to "the victim of a libel", as opposed to the party claiming to be a victim. This apparently minor linguistic distinction is significant insofar as it suggests an assumption about the relationship between the parties which results in systematic sympathy for the position of the claimant.

This is especially problematic when considered in the light of the extensive use of jurisdictional litigation designed to provide a negotiating advantage.²⁰⁷ Jurisdictional rules are deployed as means to extract agreement to terms which would not otherwise be acceptable to counterparties. When considered in the context of the right to free speech, as well as the rule of law implications of suppression of investigative journalism, it is immediately apparent that the Court's analysis requires greater nuance which might enable a break from the *Bier* principle in respect of defamation cases. This has not been forthcoming.²⁰⁸

For a case to be pursued in a national court, the claimant must show, in accordance with relevant national law, that their claim satisfies the threshold of harm required for the case to proceed in the relevant jurisdiction.²⁰⁹ Of course, where a claimant avers that damage did indeed result in a particular place, the court may not refuse jurisdiction without considering whether the claim is sound. What is

²⁰⁴ Brussels Ia Recital 16.

²⁰⁵ Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* ECLI:EU:C:1995:61, para 33.

²⁰⁶ *Ibid.*

²⁰⁷ See Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel 'Great Britain' in Beaumont et al (n 187) 84.

²⁰⁸ For a critical overview of the development of the case law, see Lorna Gillies, 'Jurisdiction for Cross-Border Breach of Personality and Defamation: *Edate Advertising* and *Martinez*' (2012) *International and Comparative Law Quarterly* 1007-1016; Tobias Lutz, 'Internet Cases in EU Private International Law – Developing a Coherent Approach' (2017) *International and Comparative Law Quarterly* 687.

²⁰⁹ *Shevill* (n 205) paras 34-41.

more, in some jurisdictions, the national courts are required to presume that damage did indeed occur and must therefore assume jurisdiction.²¹⁰

It follows that, regardless of the persuasiveness of the pursuer's claim, the respondent may be called upon to contest the jurisdiction of the Court and, potentially, to litigate the substantive claim. Contesting jurisdiction alone may be an expensive process in and of itself; costs, both direct and otherwise, may be multiplied through the availability of appeals where the pursuer fails to persuade a court of first instance that it should exercise jurisdiction.

The *Shevill* judgment is especially problematic insofar as it opens up a defendant to the potential deployment of the 'mosaic approach' to litigating a defamation claim. The Court held that the purported victim may sue in every State in which it is claimed that damage arose in respect of the damage arising in that State. Accordingly, the claimant may choose either to pursue the entire claim in a single jurisdiction, or to split up the claim across several courts. This should not, in principle, have any effect on the total quantum of damages. However, the immediate problem for journalists is, of course, that this could expose the defendant to the costs of litigation in each of those states notwithstanding the fact that the pursuer could, in principle, sue for the entire claim in the state of the defendant's jurisdiction.²¹¹

The scale of potential exposure to litigation is especially accentuated in the context of the ubiquitous accessibility of online reporting and commentary.²¹² Online content is visible in every Member State of the Union. It follows, therefore, that it is arguable that harm occurred or may occur in any State in which the content may be read. The Court is mindful that the Regulation was not intended to confer jurisdiction on every court of the Member States.²¹³ It has not, however, established rules which would prevent an attempt to seize the courts of any number of Member States.

In order to address concerns regarding potential universal jurisdiction in defamation cases, the Court of Justice developed further conditions governing which parts of the claim each court can hear. In *eDate Advertising*²¹⁴ and *Svensk Handel* it was established that the global claim for damages can only be heard in the place of the defendant's domicile under Article 4, or in the place of the claimant's centre of interests under Article 7(2).²¹⁵ The centre of interests is defined as follows:

As to the identification of the centre of interests, the Court has stated that, with regard to a natural person, this generally corresponds to the Member State of his habitual residence. However, such a person may also have his centre of interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State (judgment of 25 October 2011, *eDate Advertising and Others*, C-509/09 and C-161/10, EU:C:2011:685, paragraph 49).

As regards a legal person pursuing an economic activity, such as the applicant in the main proceedings, the centre of interests of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined

²¹⁰ Ibid, para 40.

²¹¹ Lutz (n 208) 691-692.

²¹² Ibid 690.

²¹³ Case C-194/16 *Svensk Handel* EU:C:2017:766.

²¹⁴ Case C-509/09 *eDate Advertising* EU:C:2011:685.

²¹⁵ *Svensk Handel* (n 213)

by reference to the place where it carries out the main part of its economic activities. While the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis.²¹⁶

Courts other than that of the plaintiff's centre of interests may hear the part of the claim regarding the portion of the global damages resulting in that State, but they may not determine the global damages or order the removal of content.²¹⁷ This means that a claimant may avoid the need to litigate wherever damage has occurred, and may opt instead to concentrate a claim and thereby limit the cost of litigation.

While the Court of Justice's elaboration of the application of the *Bier* principle to defamation cases is welcome insofar as it affords greater clarity, the net effect remains that the claimant has an extensive choice of fora in which to initiate litigation, as well as a choice of litigious techniques. The claimant is not precluded from pursuing a case in multiple jurisdictions; all that is constrained is the part of the claim which can be pursued in a particular place.

A claimant who wishes to act in a manner that is most vexatious to the respondent may choose from a number of techniques. The so-called 'mosaic approach' whereby the claim is split over several jurisdictions has the potential to enable a claimant to exhaust a prospective respondent through multiple contemporaneous disputes concerning essentially the same subject matter. The option to concentrate proceedings in a single jurisdiction is one which the pursuer may choose to forgo.

It is especially noteworthy that the availability of the mosaic approach could constitute a breach of the right to freedom of expression. In *Ali Gürbüz v Turkey* the European Court of Human Rights held that the initiation of multiple proceedings constituted a violation of Article 10 of the ECHR.²¹⁸ This case concerned criminal proceedings, and is therefore distinguishable from civil defamation suits which would fall within the scope of the Brussels Ia regime. Nevertheless, the reasoning of the ECtHR, which focuses on the chilling effect of multiple proceedings, can be transposed readily to a situation in which a claimant brings several potentially ruinous proceedings in a number of states. While the respondent is not faced with potential deprivation of liberty, the opportunity cost of time and money invested in defending a plurality of civil suits has the same effect on the attractiveness of the exercise of free speech.²¹⁹ The mischief of a chilling effect on freedom of expression therefore remains, and, it is submitted, equally constitutes an infringement of Article 10 ECHR.

Human rights defences to the operation of the jurisdictional rules in defamation cases remain an underexplored possible route for litigants, however. This may appear to be surprising given the fact that the Regulation has been deployed to undermine the right to access to courts, and by extension the right to freedom of expression, as guaranteed in the EU Charter of Fundamental Rights.²²⁰

Nevertheless, the CJEU's broader inclination to reinforce the predictability, and therefore the rigidity, of the Brussels/Lugano system limits optimism in the viability of a human rights claim concerning the

²¹⁶ *Ibid* paras 40-41.

²¹⁷ *Ibid*, para 48.

²¹⁸ *Ali Gürbüz v Turkey* (Ap. nos. 52497/08, 6741/12, 7110/12, 15056/12, 15057/12 and 15059/12).

²¹⁹ *Ibid*.

²²⁰ Charter of Fundamental Rights, Arts 11 and 47.

application of the Regulation. In particular, judgments concerning the deployment of antisuit injunctions reveal a Court that is reluctant to replace the *ex ante* general analysis deployed by the legislator with its, or a national court's, judgement of the merits of jurisdictional justice in individual cases.²²¹ This would, in the CJEU's view, do violence to the general scheme of the Brussels Ia Regulation which is predicated on the notion that jurisdictional outcomes should be predictable, and that courts in different Member States are required to trust one another's decisions as to the exercise of jurisdiction under the Regulation.²²² It follows, therefore, that contesting the lawfulness of the application of jurisdictional rules in a judicial forum offers little promise.

While the CJEU could, in principle, soften the harder edges of the application of the Regulation, it is unlikely that the Court would be willing to break with the path it has established in its earlier case law.²²³ Accordingly, it is for the legislator to loosen the bonds created by the Regulation, or to reorder the rules with a view to grounding jurisdiction in a court which is in fact closely connected to the dispute. Furthermore, it is submitted that a clear rule is required which would eliminate the opportunity for pursuers vexatiously to seise a court of litigation intended only to create a jurisdictional dispute.

This would be best achieved by restricting jurisdiction in defamation cases to the Brussels/Lugano regimes' default rules, namely the grounding of jurisdiction in the court of the defendant's domicile in defamation cases, unless the parties agree otherwise. Since the default rule of jurisdiction grounds jurisdiction in the courts of the place of the respondent's domicile, there does not appear to be any obvious argument that granting that court jurisdiction in defamation cases would infringe the claimant's right to access to courts. Nor is there any obvious systemic reason to expect the availability of evidence to be limited because of constraint of pursuer choice. In contrast, the threat to freedom of expression posed by the permanence of existing rules is amply evident with reference to contemporary legal practice.

4.3. The Rome II Regulation

The Rome II Regulation harmonises the rules whereby national courts determine which law will apply to cases concerning non-contractual obligations.²²⁴ The purpose of the Regulation is to ensure that, regardless of which national court is seised of a matter, the substantive law which governs the dispute will be the same.²²⁵ This limits the benefits which could accrue to a claimant who engages in forum shopping and provides legal certainty to both parties.²²⁶

Regrettably, however, the Regulation lacks a harmonised rule on choice of law in defamation cases. Defamation was excluded from the Regulation not because harmonisation was deemed unnecessary, but because agreement concerning the content of that rule was wanting.²²⁷ Proposals for a choice of law rule in defamation included the Commission's recommendation that the applicable law should be that of the claimant's habitual residence at one end of the spectrum, and the European Parliament's

²²¹ See Trevor Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) *International and Comparative Law Quarterly* 813, 813-815.

²²² See in particular Case 159/02 *Turner v Grovit* EU:C:2004:228, paras 24-26.

²²³ Hartley (n 221) 813-815.

²²⁴ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L-199/40.

²²⁵ *Ibid*, recital 6.

²²⁶ *Ibid*.

²²⁷ Wallis (n 188) 2-3.

suggestion that the place of the publisher's establishment should be determinative.²²⁸ In the Council of Ministers, some thirteen different options were floated, reflecting the diversity of national laws and multiple views on how they should be bridged.²²⁹

Ultimately, the differences between institutions and States could not be resolved. If the Rome II Regulation was to be adopted timeously, harmonisation of choice of law in defamation could not be included. Consequently, it was decided that the Regulation would proceed to be adopted with harmonisation of matters on which agreement could be achieved and that defamation would be excluded initially. It was intended that the matter of a harmonised rule for defamation claims would be revisited in an eventual recast of the Regulation. That recast has yet to happen.

This means that each Member State continues to apply its own private international law rules to these cases. This poses numerous difficulties. First, there is a lack of predictability concerning which national law will apply to a case with a potential cross-border element. Secondly, and consequently, media entities are required to consider all the national laws which could potentially be applied to a case by relevant national courts, identifying and applying the lowest threshold for a successful defamation claim. It follows, therefore, that in the absence of harmonisation, the lowest common denominator of press freedom applies.²³⁰

Proposals for reform include the European Parliament's proposal for the introduction of a choice of law rule for defamation in a recast of the Rome II Regulation.²³¹ The Parliamentary proposal begins with a presumption that the applicable law will be the law of the place in which the most significant elements of the loss are situated (para 1). This is subject to the exception, however, that the law of the defendant's habitual residence will apply if it was not reasonably foreseeable that damages would occur elsewhere (para 2). There are then safeguards for printed matter and broadcasts whereby it is presumed that the place in which the damage occurred is the place of editorial control or the place to which a publication is directed (para 3).²³²

While the European Parliament's proposal has the merit of addressing conflicting concerns in defamation law,²³³ it is submitted that, for reasons of cost cited above, a rule which is more readily applied by courts and foreseeable to the parties would be preferable.

Scholarly commentators have suggested the introduction of the common law double actionability rule.²³⁴ The rule, which is retained in Ireland, requires that in order for a claim to be successful it must be actionable both in the court in which it is being heard and in the place in which the damage occurred.²³⁵ In England and Wales, the courts have introduced a number of mitigations to the rule,

²²⁸ Ibid.

²²⁹ Andrew Dickinson, 'Privacy and Personality Rights in the Rome II Regime – Not Again?', *conflictoflaws.net* (19/07/2010). Accessible at: <http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/>

²³⁰ Alex Mills, 'The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?' (2015) *Journal of Media Law*, 1, 19.

²³¹ European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)) (2013/C 261 E/03).

²³² Ibid, draft Article 5a.

²³³ Mills (n 230) 14-15.

²³⁴ Eduardo Alvarez-Armas, 'Alvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs' (2021) *Conflictoflaws.net*: <https://conflictoflaws.net/2021/alvarez-ii-regulation-i-the-law-applicable-to-slapps/>

²³⁵ *Phillips v Eyre* (1870) LR 6 QB 1

which allow given issues, such as the availability of particular types of damages awards, to be governed by the law of the forum should the circumstances exceptionally so require.²³⁶ While English refinements of double actionability have been followed to varying degrees in other common law jurisdictions such as Ireland,²³⁷ they have not been replicated in Scotland where the stricter original version of double actionability remains in place.²³⁸

Double actionability would have the benefit of ensuring that there are safeguards against the application of the lowest standard of press freedom.²³⁹ Of itself, it would not resolve the question of predictability or costs, however. Indeed, Prof Mills notes that double actionability has the effect of increasing procedural complexity due to the need to analyse the laws of multiple jurisdictions.²⁴⁰ In a simple cross-border defamation case, this would require the court to rely on expertise concerning a foreign law. In more complex cases in which it is argued that the damage occurred in multiple legal systems, the court would be required to consider whether the claim is actionable under each of those laws, in addition to consideration of the position obtaining under its own laws.²⁴¹

It follows, therefore, that while double actionability is attractive insofar as it prevents the application of defamation laws which are repugnant to the law of the forum, it is not an adequate remedy for the resolution of the costs associated with SLAPPs. Indeed, it is arguable that the costs associated with double actionability would be beneficial to a prospective litigant who wishes to deploy complex litigation as a coercive technique to suppress public participation in matters of public interest.

This is not to say that the potential benefits of a rule which is similar to double actionability should not be considered. It is submitted, however, that the stated benefits of double actionability are readily achieved through the availability of public policy exceptions to the application of a foreign law provided in Article 26 of the Rome II Regulation.

A simpler rule which focuses on the audience to which a publication is directed would establish a closer connection between the law applied to the dispute and the facts of the case. It is submitted, therefore, that the law of the place to which a publication is directed should apply. If there is no such place, a supplementary rule would be required. In these circumstances a case could be made for the application of the rule in paragraph 3 of the Parliamentary proposal which refers to the place of editorial control.²⁴² In the absence of either of these places being identifiable, the default rule as proposed in paragraph 1 of the Parliamentary proposal, namely that the law of the place in which the most significant elements of the loss would apply, could then provide a further supplementary rule.²⁴³

This formulation would be in keeping with the overarching aim of achieving predictability in EU private international law and determining the governing law on the basis of the closest connection to a dispute, as well as dovetailing with the intention to limit abusive litigation techniques designed to increase costs of proceedings.

²³⁶ *Boys v Chaplin* [1971] AC 356

²³⁷ See Liz Heffernan, 'Rome II: Implications for Irish Tort Litigation' in John Ahern and William Binchy (eds) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Martinus Nijhoff 2009) 259-264 and the references therein.

²³⁸ *McElroy v McAllister* [1949] SC 110

²³⁹ Alvarez-Armas (n 234).

²⁴⁰ Mills (n 233) 7-10.

²⁴¹ *Ibid*

²⁴² European Parliament (n 231), draft Article 5a(3).

²⁴³ European Parliament (n 231), draft Article 5a(1).

5. AN ANTI-SLAPP DIRECTIVE: COMPETENCE AND CONTENT

KEY FINDINGS

This chapter explains the various ways in which the Treaties confer competence on the Union to adopt anti-SLAPP legislation. It is argued that, like the Whistleblower Directive, a future anti-SLAPP Directive could be adopted on the basis of various legal bases in the Treaties since SLAPPs also affect a vast swathe of EU governance. Alternatively, competence can be identified exclusively in Article 114 TFEU which concerns the internal market, or Article 81 concerning civil procedure. Should legislation address harmonisation of criminal law and procedure too, Article 82 et seq also confer competence.

It is recommended that a directive would be the most appropriate legal instrument since this would allow Member States to transpose EU legislation in a manner that is best suited to their national legal systems. It would also enable the Member States to develop more robust standards of protection than the minimum required by EU law.

An anti-SLAPP directive should include measures which empower national courts to dismiss cases which fall within its definition of SLAPPs at an early stage. It is also proposed that deterrent measures should be included which would disincentivise the institution of claims which are intended to suppress public participation. These could take the form of civil penalties and administrative fines, and these should be extended to protect against the initiation of litigation in third countries.

The adoption of a directive and its implementation in national law is a lengthy process. In view of the effect of SLAPPs on the rule of law in the Member States, it is therefore recommended that egregious examples of national laws which enable SLAPPs be addressed in the interim through rule of law dialogue and, if necessary, enforcement actions.

5.1. Legal Basis and Choice of Legal Instrument

Given the nature of SLAPPs, it is not possible to quantify the incidence of the phenomenon or the full extent of its impact in economic or democratic terms. In particular, while NGOs have been able to compile several cases which demonstrate the pervasiveness of SLAPPs, a numerical account of SLAPPs will remain elusive because SLAPPs tend to be effective in the pre-litigious phase wherein the claimant exerts sufficient pressure to coerce the respondent to comply with their demands without resorting to courts. Indeed, this is precisely what the claimant would wish given the fact that, should litigation proceed, it is often unlikely that a claim which satisfies the definition of SLAPPs would be upheld.

Nevertheless, as noted in the introductory section above, it is clear that domestic SLAPPs are a pervasive problem in the European Union. The introduction of anti-SLAPP legislation would serve to ensure that opportunities to suppress public participation are severely limited throughout the European Union.

The Whistleblower Directive²⁴⁴ provides one potential model for the identification of a legal basis for the adoption of an anti-SLAPP directive. That Directive identifies multiple bases in the Treaty which demonstrate the correlation between procedural remedies and the operation of a vast swathe of EU

²⁴⁴ Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law [2019] OJ L-305/17.

governance. The Commission identified no fewer than seventeen legal bases for the introduction of the directive in its original proposal.²⁴⁵ Taken globally, however, there is a clear thread running through the arguments which relies most especially on the internal market effects of whistleblower protection.

That same reasoning could be transposed in the context of anti-SLAPP legislation, most obviously insofar as it relates to the protection of freedom of expression. In particular, it is untenable to argue that whistleblowers should be able to turn to journalists as a matter of EU law, while the activities of journalists themselves do not fall within the scope of EU law save to the extent that the courts which may hear a case are determined by the Brussels Ia Regulation.

It is submitted, however, that reliance on a trawl of the treaties to identify competence is not necessary given the clear connection between SLAPPs and the proper functioning of the internal market. The Whistleblower Directive itself relies on Article 114 TFEU as one of a number of limbs supporting legislative intervention.²⁴⁶ In view of the demonstrably deleterious effects of SLAPPs on the functioning of the internal market, particularly insofar as they relate to activities which distort the market and the enforcement of EU law, it is submitted that the internal market argument is sufficient to support legislative intervention.

Alternatively, Article 81(2)(e) and (f) provides that, acting in accordance with the ordinary legislative procedure, the Union may adopt legislation to ensure effective access to justice and the compatibility of the civil justice systems of the Member States. Competence is conferred on the Union in this respect "particularly when necessary for the proper functioning of the internal market". In view of our analysis of competence founded on Article 114, it follows that the conditions for the exercise of legislative competence in Article 81(2) are also satisfied. To date, Article 81(2) has not been deployed in tandem with Article 114 of the Treaty since the relationship between the two is implicit in the framing of Article 81. Moreover, the availability of opt-outs from the area of freedom, security and justice complicates the interaction of these legal bases.²⁴⁷

This study focuses particularly on civil claims. However, it is noteworthy that many SLAPPs in the European Union deploy criminal complaints as an instrument for the suppression of freedom of expression. By way of example, in Italy alone, 9,479 criminal complaints were made under Italian Press Law in 2017.²⁴⁸ Of these, only 6.6% went to trial.²⁴⁹ The chilling effect of the claims is, however, readily discernible, and appears to motivate the registration of criminal complaints which have no real prospect of success.²⁵⁰

It follows that a robust intervention in respect of SLAPPs would apply equally to criminal proceedings. While the decriminalisation of libel is certainly a desirable outcome which would eliminate the misuse of criminal law in private disputes, it is not immediately clear that this is attainable in the current state of EU law.²⁵¹ It is generally for the Member States to regulate which matters fall within the scope of criminal law. Nevertheless, procedural safeguards may be harmonised on the basis of Article 82 TFEU

²⁴⁵ Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law COM(2018) 218 final 2018/0106(COD), Recital 1.

²⁴⁶ Directive (EU) 2019/37, Recital 1.

²⁴⁷ Denmark and Ireland have opt-outs from Title V of Part 3 of the TFEU.

²⁴⁸ Paola Rosa, 'SLAPPs: the Italian Case' (2019 Resource Centre on Media Freedom in Europe). Accessible at: <https://www.rcmediafreedom.eu/Tools/Legal-Resources/SLAPPs-the-Italian-Case>

²⁴⁹ Ibid

²⁵⁰ Ibid

²⁵¹ See Arts 82-86 TFEU.

et sequitur which confer competence on the Union to adopt measures concerning the harmonisation of criminal law and procedure. This is subject to the same opt-outs as are available in respect of Article 81, however.

It is submitted, therefore, that reliance on Article 114, whether or otherwise combined with other generally applicable articles of the Treaty as in the Whistleblower Directive, provides a clearer route for the adoption of harmonising measures.

As regards the type of instrument which should be adopted, a directive would allow Member States to transpose legislation in a manner which best suits the civil procedure of each legal system. From a formal perspective, a directive is an appropriate instrument since it would uphold the procedural autonomy of the Member States and go no further in harmonising legislation than necessary. This is to be contrasted with a regulation, which is a directly applicable instrument and therefore implemented in national law in the form in which it is adopted by the EU legislator.²⁵² It is submitted, however, that a directive is a preferable instrument insofar as it enables Member States to adopt higher standards of public participation, and it allows Member States a degree of flexibility which could provide fertile ground for imitation of national implementing measures as they evolve through practice and periodic revision.

In view of the lack of direct applicability of directives,²⁵³ however, it is noteworthy that a future directive would require a period of time in which the Member States are required to transpose the EU legislation into national law. Directives typically allow Member States two years in which to adapt national law to achieve the result sought by the directive. While Member States would not be precluded from conforming to EU legislation sooner than the deadline – and indeed while there is nothing preventing Member States from acting immediately – it is to be noted that the attainment of the outcome sought across the Union would not be immediate. This is, of course, in addition to the period invested in the adoption of a future instrument by the institutions of the Union, including broad public consultation and inter-institutional negotiation.

5.2. Content

While anti-SLAPP legislation varies significantly, there are a number of key features which are necessary in order to strike a sound balance between the rights of the parties. In the first instance, it must be noted that the purpose of legislation should not be to constrain the ability of parties to assert their rights.²⁵⁴ What is required is a number of tools which would enable a respondent to limit the harm caused by claims which are vexatious and intended to limit their right to engage in public participation.

The key features are therefore remedial procedures which enable courts to dismiss unfounded or exaggerated claims at an early stage, as well as deterrent measures whereby a victim of a SLAPP is compensated by the pursuer. In the United States, anti-SLAPP statutes typically include the following procedural safeguards:

- (1) granting defendants specific avenues for filing motions to dismiss or strike early in the litigation process;
- (2) requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard;
- (3) requiring the plaintiff to produce evidence that shows the case has merit; and
- (4) imposing

²⁵² Article 288 TFEU.

²⁵³ *Ibid.*

²⁵⁴ See Chapter 3 above.

cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry his burden.²⁵⁵

This section considers a number of potential remedies to be included in an EU anti-SLAPP Directive. It draws in particular on the Model EU Anti-SLAPP Directive, which in turn is the product of analysis of existing instruments in non-EU jurisdictions as well as an extensive consultation process with scholars and practitioners in several EU jurisdictions.²⁵⁶

5.2.1. Early Dismissal

The central plank of anti-SLAPP litigation is the expeditious dismissal of cases which satisfy the definition of SLAPP. Since strategic litigation is litigation for its own sake, courts should be empowered to ensure that SLAPPs are dismissed at the earliest possible juncture in proceedings.

In the first instance, in order to show that anti-SLAPP legislation may be invoked, the respondent in the main proceedings must persuade the court that the matter for which they are being sued falls within the scope of the relevant legislation. In other words, they must show that the case concerns public participation in a matter of public interest.²⁵⁷

Once the respondent has shown that the matter does fall within the scope of the legislation, the burden shifts to the claimant to demonstrate that the claim does not satisfy the relevant definition of a SLAPP. Typically, this places the burden on the claimant to demonstrate that a claim has merit in law or is founded on a factual basis.²⁵⁸ The extent of the burden which is placed on the claimant at this stage varies across the many anti-SLAPP statutes adopted in the United States.²⁵⁹ Indeed, even where statutory terminology is very similar, terminology may be interpreted differently across state lines.²⁶⁰ In all cases, however, it is for the claimant to demonstrate that the claim is not a SLAPP as defined in the relevant legal system.²⁶¹

If the claimant fails to show that the claim is meritorious, having satisfied itself that the due process rights of the claimant would not be infringed,²⁶² the court will be able to dismiss proceedings.²⁶³ Otherwise, the substantive claim will then proceed as it ordinarily would, including insofar as the usual burden of proof is concerned in respect of the substance of the case.

It is to be noted, therefore, that anti-SLAPP legislation need not interfere with the procedural laws of the Member States save insofar as those courts are dealing with the stage of the litigation which concerns the determination of the SLAPP itself.

²⁵⁵ Robert T Sherwin, 'Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation' (2017) *Columbia Journal of Law and the Arts* 431, 437.

²⁵⁶ Anti-SLAPP Model Directive (n 35) 3.

²⁵⁷ See Sherwin (n 255) 438-440 and the references therein.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Matthew D Bunker and Emily Erickson, '#Aintturningtheothercheek: Using Anti-SLAPP Law as a Defense in Social Media' (2019) *UMKC Law Review* 801, 801.

²⁶¹ *Ibid* 804.

²⁶² See *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 452-454.

²⁶³ Sherwin (n 255) 439.

5.2.2. Deterrent Measures

While early dismissal of cases is a fundamental feature of anti-SLAPP legislation insofar as it relieves the respondent of the immediate threat posed by a case, it does not of itself necessarily dissuade the claimant from bringing or merely threatening litigation in an abusive manner. Indeed, even where a SLAPP case is dismissed, the claimant imposes the opportunity cost of some degree of litigation, as well as the psychological burden of uncertainty up to the point that the claim is struck out.

In order to deter the institution of SLAPPs, it is therefore proposed that some measure of penalty be imposed on the claimant, and that this should translate into an advantage to the party who the claimant had wished to vex through litigation. In other words, the courts should be empowered to transform a SLAPP into precisely the opposite of that which the abusive party had intended.

Accordingly, it is recommended in Article 21(1) of the Anti-SLAPP Model Directive that the courts be empowered to impose penalties which are “effective, proportionate and dissuasive”. These may include penalties payable to the respondent in the main proceedings, as well as administrative fines to reimburse the public purse.

The following sub-articles of Draft Article 21 then explain how these penalties are to be calculated. Crucially, courts are to take into account the claimants’ means in determining the effectiveness, proportionality and dissuasiveness of the penalty. Moreover, in view of the overarching aim of the proposed legislation, namely the protection of public participation in matters of public interest, courts are to consider the public interests concerned in the matter with a view to determining a proportionate response.

The effect of these measures is restitutive insofar as the persons or public institutions which incur a cost as a consequence of abuse of process by the SLAPPER are to be reimbursed. They may also operate as an effective retributive measure where compensation exceeds direct financial costs incurred by the defendant in the main proceedings.

5.2.3. Restriction of forum shopping

While it is proposed above that the Brussels Ia Regulation should be revised to limit forum shopping, this would have no effect on the threat of or institution of proceedings in third countries. This is especially problematic given the costs associated with litigation in a number of third countries, particularly the United States and United Kingdom. Indeed, while the substantive defences for freedom of expression in those jurisdictions may be robust, they retain procedural attractiveness for SLAPP claimants due to the burden which litigation there could place on respondents, as well as because of the extraordinarily burdensome awards in damages which could be claimed in the United States in particular.²⁶⁴

It follows that anti-SLAPP legislation should include both specific rules to deter litigation in third countries, as well as the extension of remedies available to deter domestic SLAPPs.

As in the State of New York’s Libel Terrorism Protection Act, a future directive could include provision for the granting of relief to counter proceedings instituted outwith the European Union in respect of defendants amenable to the jurisdiction of courts of the Member States.²⁶⁵ Accordingly, Article 24 of the Model Directive would empower national courts to adopt measures “necessary to ensure that where a claim that arises from public participation on matters of public interest is “led in a court or

²⁶⁴ See Part 4.1 above.

²⁶⁵ See Michelle Feldman, ‘Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction Under New York’s Libel Terrorism Protection Act’ (2010) *Cardozo Law Review* 2457, 2458-2460.

tribunal of a state outside the Union" in respect of persons domiciled in the Member States in accordance with the Brussels Ia Regulation, "the defendant has access to appropriate remedies before the national courts or tribunals of such Member State as are necessary to dissuade the pursuance of the claim in those other courts.":

2. The remedies referred to in paragraph 1 shall include the possibility to claim a summary award of damages in sums which are at least equal to the sums claimed in damages in those other courts seized, as well as the imposition of penalties established in accordance with Article 20 of this Directive.

The introduction of measures to dissuade litigation in third countries would therefore close an important loophole by preventing libel tourism to third countries or the highly effective deployment of threats thereof.

5.3. Interim Measures: Rule of Law Mechanisms

In view of the expected delay between the proposal of legislation and its coming into force in the Member States, it is submitted that a number of non-legislative measures be adopted in the short term in order that the Union exercise existing powers to protect public participation and uphold the rule of law in the Member States.

The institutions' efforts to provide financial support to investigative journalism by encouraging the development of international networks is to be welcomed in this respect. The pooling of resources has proved a particularly effective mechanism not only as regards the quality of investigative journalism, but also as an effective means to afford strength in numbers which makes it harder for would-be SLAPPers to pick off and silence smaller media entities.

Of itself, however, this does not resolve the broader threat to the rule of law arising from the suppression of public participation. It is submitted, therefore, that rule of law mechanisms available in the treaties should be deployed systematically to ensure that the Member States uphold their obligations in respect of freedom of expression as required by Article 2 TEU. Rule of law dialogue provides a useful instrument for the Union to exercise good offices in support of national reforms.

Regrettably, however, this is not necessarily sufficient, and it is recommended that robust action be taken in cases of egregious failure to uphold fundamental rights. In this respect it is noteworthy that the Commission already enjoys powers of enforcement which could and, it is submitted, should be deployed systematically to ensure that the Member States take immediate action to uphold the legally enforceable fundamental rights obligations of the Member States.²⁶⁶

²⁶⁶ See e.g. Scheppele, K.L., Kochenov, D.V. and Grabowska-Moroz, B., 'EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the member states of the European Union' (2020) *Yearbook of European Law*, 1-121

6. FINAL RECOMMENDATIONS AND CONCLUSIONS

In view of the foregoing, it is submitted that there is a need for significant legislative intervention in the European Union with a view to stemming the flow of litigation which is intended to suppress public participation in matters of public interest. This legislation would require the careful articulation of definitions and methods of analysis. It is argued in this study that this would require a distinctive approach which draws on good practice from jurisdictions outwith the European Union, but which recognises nevertheless the distinctive characteristics of the EU legal order and the legal traditions of its Member States.

Furthermore, legislative intervention must be formulated in a manner which empowers national courts to attain the intended outcome of expeditious dismissal of cases without harming potential claimants' legitimate rights to access courts. It is found in this study that anti-SLAPP legislation affords the claimant the opportunity to present legitimate claims to the court and therefore satisfies the requirements of Article 6 ECHR. Far from stultifying access to courts for the parties, anti-SLAPP legislation would dissuade the misuse of civil procedure in a manner which prevents respondents from articulating a defence in accordance with EU and international human rights instruments.

It is submitted, therefore, that the relationship between the rights of pursuers and defendants in defamation cases should be revisited to remedy existing imbalance.

In addition to the adoption of an anti-SLAPP Directive, it is recommended that the Brussels Ia Regulation be recast with a view to adopting a bespoke rule concerning defamation claims and thereby to distinguish jurisdiction in defamation cases from ordinary torts. To this end, it is recommended that jurisdiction should be grounded in the forum of the defendant's domicile unless the parties agree otherwise. This would enable public interest speakers to foresee where they will be expected to defend themselves, and would be in keeping with the core values of the Brussels Ia Regulation, namely predictability and the limitation of forum shopping.

Greater predictability as to the outcomes of choice of law processes is also needed to dissuade meritless litigation intended to suppress public participation. Accordingly, it is recommended that a new rule be included in the Rome II Regulation which would harmonise national choice of law rules in defamation cases. It is recommended that this rule should focus on the closest connection with the publication and its audience, namely the law of the place to which the publication is directed.

This is an especially pressing concern in the context of a Union which is currently facing unprecedented challenges to the rule of law and democracy. Reforms which recognise the central role of the journalists, NGOs and civil society in safeguarding the rule of law would constitute a meaningful contribution to the advancement of democratic values where so much else has failed.

This is not to say, however, that existing instruments for the upholding of fundamental rights and the rule of law more broadly should not be deployed in the short term. Indeed, in view of the expected delay between the formulation of a legislative proposal and its coming into force in the Member States, it is recommended that the Union deploy the tools available to support the rule of law with a view to eliminating egregious examples of SLAPPs in the laws of the Member States.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, analyses legal definitions of Strategic Lawsuits Against Public Participation (SLAPP) and assesses the compatibility of anti-SLAPP legislation with EU law. It is recommended that an anti-SLAPP Directive should be adopted, and that the Brussels Ia Regulation and Rome II Regulation should be recast to limit the incidence of SLAPPs.

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