

# CCBE Position on abusive litigations targeting journalists and right defenders

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## Executive summary

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries and, through them, more than 1 million European lawyers.

The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE.

Several areas of special concern to the CCBE include access to justice, the development of the rule of law, and the protection of clients through the promotion and defence of the core values of the profession.

The CCBE always places a great emphasis on the respect for the rule of law, democratic principles and fundamental rights.

The CCBE considers that it is important to protect journalists and rights defenders from strategic lawsuit against public participation (SLAPPs) launched against them in an attempt to silence public debate.

Therefore, the CCBE supports the commitments and efforts to protect all actors in public participation from SLAPP.

The CCBE supports any measure discouraging abusive or unmerited litigation.

The CCBE stresses that the definition of SLAPP shall be as broad as possible both in personal and material terms to sufficiently protect public participants.

The CCBE considers that fully effective anti-SLAPP measures should be based both on legislative and non-legislative measures.

When it comes to possible legislative measures at EU level, the CCBE stresses the need for a deep assessment and analysis of already existing national regulations and measures regarding the safeguards against abusive claims before the EU takes any concrete legislative measure.

Any measures proposed should not in any way interfere with the independence, quality and efficiency of national justice systems which are crucial for the achievement of effective justice.

When it comes to non-legislative measures, the CCBE considers there is a need for awareness raising and training courses for legal professionals, as well as the need to establish relevant funds available for supporting victims of SLAPPs.

## I. Introduction

- (1) The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries and, through them, more than 1 million European lawyers.
- (2) The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. Several areas of special concern to the CCBE include access to justice, the development of the rule of law, and the protection of clients through the promotion and defence of the core values of the profession.
- (3) The CCBE always places a great emphasis on the respect for the rule of law, democratic principles and fundamental rights. Therefore, the CCBE welcomes the commitment and the efforts of the European institutions to strengthen the rule of law, upholding democracy and fundamental rights – priorities which are high on the EU political agenda.
- (4) In December 2020, the European Commission issued a [European Democracy Action Plan](#), which announced a set of measures to promote public participation and support free and independent media.
- (5) In July 2021, the European Commission adopted its [Rule of Law Report](#) (RoL Report). One of the areas covered by this RoL Report next to the justice systems, the anticorruption framework, institutional checks and balances, is media pluralism and media freedom thus stressing the importance of this subject in the context of the rule of law. In addition, in September 2021, the European Commission adopted its [Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals](#).
- (6) In November 2021, a [resolution of the European Parliament was adopted on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society](#). In this resolution, the European Parliament is calling for new EU rules “to curtail vexatious legal actions intended to intimidate and silence critical voices”. The European Parliament proposes a series of measures to counteract the threat that Strategic Lawsuits Against Public Participation (SLAPPs) pose to journalists, NGOs and civil society in Europe. According to this resolution, SLAPPs are frivolous legal actions based on exaggerated and often abusive claims, aiming to intimidate and professionally discredit their targets, with the ultimate objective of blackmailing and silencing them.
- (7) In recent years the phenomenon of SLAPP has increasingly become visible. According to the [RoL Report](#) of the European Commission, “the need to address the safety of journalists across the EU has been highlighted by recent cases currently under investigation”, “in 2020, the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists recorded its highest number of alerts ever, an increase of 40% compared to 2019”. As mentioned in the RoL Report, “in 2020, the Mapping Media Freedom Platform also monitored 280 cases of media freedom violations, affecting a total of 908 persons or media entities in 23 Member States. These violations included harassment or psychological abuse, legal threats, physical assaults, attacks on property, hate speech, smear campaigns and censorship.” Moreover, analysis of SLAPP related cases was provided in different studies, for example, in the [EU-CITIZEN Network study entitled ‘SLAPP in the EU context’](#). In the Annex of this study there are SLAPP cases described in several EU Member States. The study commissioned by the European Parliament on the [Use of Strategic Lawsuits Against Public Participation \(SLAPPs\) to silence Journalists, NGOs and Civil Society](#) analyses legal definitions of SLAPP and assesses the compatibility of anti-SLAPP legislation with EU law.

- (8) The CCBE agrees that “a cornerstone of healthy and thriving democracies is a guarantee that people can participate actively in public debate without undue interference. For meaningful participation, people must have access to reliable information and be able to form their own judgment in a public space in which different views can be expressed freely.”<sup>1</sup> The CCBE considers that it is important to protect journalists and rights defenders from SLAPPs launched against them in an attempt to silence public debate. Therefore, the CCBE supports the commitments and efforts to protect all actors in public participation from SLAPP.
- (9) The CCBE is also aware of the phenomenon of so-called fake news and the need to tackle false media coverage. **Therefore, the CCBE highlights that any measures, especially legislative ones, must strike a fair balance** between the issues at hand. This balancing must respect the rights of the individual as laid down in the Charter on Fundamental Rights of the EU, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).
- (10) As it was mentioned in the [preliminary CCBE comments on the Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC](#) “the CCBE stresses that it supports any measure discouraging abusive or unmerited litigation, no matter by whom it is initiated (..)”.
- (11) The CCBE, however, highlights that issue and claims specific regulation should be approached with great caution. The basic possibility of legal effective protection must not be restricted.
- (12) With this paper, the CCBE intends to provide its initial contribution to the ongoing discussion and the efforts to ensure the safety of journalists, but also other relevant actors in public participation such as lawyers, human rights activist, and demonstrators.

## II. Definition

- (13) First, it is important to develop a definition of SLAPP. Currently, there is no official legal definition of SLAPP. It is rather a descriptive term, i.e. it is the attempt to describe a phenomenon that has appeared in recent years. However, some important criteria of SLAPP have been qualified.
- (14) The CCBE is of the opinion that SLAPP shall be defined as broad as possible both in personal and material terms to sufficiently protect public participants.
- (15) **SLAPPs can be defined as lawsuits lodged against public participants ("PP") to prevent them from informing the public and reporting on matters of public interest.** Typically, they are inadmissible or meritless lawsuits lodged by powerful individuals or entities (companies or state organs) against a weaker party who expresses a critical position on a matter of public interest. The main purpose is to intimidate and ultimately silence the defendant (the target) by draining their resources, e.g. by filing high claims for damages or deliberately lengthening proceedings.
- (16) Therefore, indicative criteria are i.a.: an imbalance of power, a matter of public participation and public interests, abusive use of legal actions and justice resources and unsubstantiated and unfounded actions/claims. The subject matter does not only include written and oral statements in public, but also demonstrations and hence every possible action.

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<sup>1</sup> [Roadmap of the European Commission on](#) EU package against abusive litigation (SLAPP) targeting journalists and rights defenders.

- (17) To achieve more legal certainty there should also be a clear distinction between such SLAPPs and other lawsuits, for example defamation, libel and slander claims or suits against fake news.
- (18) In addition, SLAPP should include not only judicial intimidation but also abusive disciplinary proceedings to protect certain professional groups such as lawyers.
- (19) **The approach should be as broad as possible in terms of possible targets:** any natural or legal person involved in public participation must be included in the personal scope. This includes any PP, such as journalists, human rights defenders, lawyers. It should then be explicitly defined and stated which persons and groups exactly fall under the protection of the anti-SLAPP initiatives.
- (20) The exact legal basis relied upon by the plaintiff depends on the relevant jurisdiction under which the case is filed.
- (21) A SLAPP is not filed to obtain justice. The goal of the plaintiff is to have the longest and most expensive trial as possible. Due to the amount of time a court battle takes, actors in public participation, especially journalists, are often prevented from continuing to fully pursue their work, which also deprives them of their source of income. Furthermore, a court case, and especially the prospect of potentially being ordered to pay extremely high damages, also leads to high emotional stress. The longer the trial lasts, the higher the costs (monetarily and emotionally) become.
- (22) As a result, SLAPPs are used specifically to limit the public participation; and to those who opposed it, they convey the message that appropriate activities come at a price.

### **III. Threats to our democratic societies**

- (23) SLAPPs endanger democratic societies in a collective way as well as the individual rights of the targets.
- (24) The press has a crucial role in our democratic society, since news coverage is of special importance for a democratic discussion. SLAPPs undermine our democracy since they damage the functioning of the press. Democracies presuppose a free press, which is driven by integrity. A free media is a guarantee that people can participate actively in public debate without undue interference. For meaningful participation, people must have access to reliable information and be able to form their own judgment in a public space in which different views can be expressed freely. Therefore, any attempt to silence public debate – e.g. via SLAPPs – threatens democracies.
- (25) The European Court of Human Rights (ECtHR) stipulates that the freedom of expression as enshrined in Art. 10 ECHR constitutes one of the essential foundations of a democratic society; it is applicable not only 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. These principles are of particular importance as far as the press is concerned. It is incumbent on it to impart information and ideas on matters of public interest. Moreover, the public also has a right to receive them, otherwise the press would be unable to play its vital role of "public watchdog".
- (26) In addition, PPs may also be protected by other rights in certain situations, such as freedom of assembly (Art. 12 CFR, Art. 11 ECHR, Art. 21 ICCPR), as SLAPP includes, inter alia, measures against demonstrations and demonstrators.

- (27) Since SLAPPs are decided in courts, an effective and efficient judicial system is crucial to tackle SLAPP. Therefore, the right to an effective remedy as enshrined in Art. 49 CFR and Art. 6 para. 1 ECHR becomes of essential importance.
- (28) A phenomenon that has also gained importance in recent years is fake news. While there can hardly be a legitimate interest in silencing accurate media reporting, there is a legitimate interest in taking action against false media reporting. However, it is not always easy to determine whether a piece of information is true or false. This task is performed by courts. **Therefore, an effective and efficient judicial system is necessary in combating SLAPPs as well as fake news.**

#### IV. Guiding principles

- (29) **It is important to remember that lawsuits against any type of public participation play in a multipolar legal relationship. The conflicting positions, in particular freedom of opinion and freedom of the press on the one hand, and an applicable obligation to tell the truth and the general right of personality on the other hand must be balanced in a just and fair way. Both SLAPPs and fake news are abusive and should be tackled in order to ensure a free democratic discussion.**
- (30) On the one hand, the **freedom of expression** as well as media freedom and pluralism as enshrined in Art. 11 CFR, Art. 10 ECHR and Art. 19 para. 2 ICCPR are of paramount importance. The targets of SLAPPs are protected by this fundamental right, and SLAPPs endanger the exercise of this right. The Member States as well as the European Union have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals. Hence, phenomena that systematically undermine fundamental rights – like SLAPPs – must be tackled.
- (31) On the other hand, the right to an effective remedy as enshrined in Art. 49 CFR and Art. 6 para. 1 ECHR, the right to respect for private life, home and communications pursuant to Art. 7 CFR as well as the right to the protection of personal data pursuant to Art. 8 CFR must be respected. Despite the fact that there is a growing number of SLAPPs, there is also false news coverage, also known as fake news. The fight against SLAPPs should not hinder victims of fake news and false statements of fact and insults to take legal action against it.
- (32) Fundamental rights do not guarantee an absolute right to freedom of expression. The aim cannot be that persons can say whatever they want. Primary guideline should be the truth. As emphasised by the ECtHR, factual allegations may permissibly be made the subject of judicial proof of truth in legal proceedings. The legitimate interest in combating fake news, and thus the right to an effective remedy, may not be compromised by the measures to tackle SLAPPs.
- (33) One of the elements of SLAPPs is the uncertainty of the targets since court proceedings take a certain amount of time. It must be ensured that any measure installed does not prolong court proceedings, but rather shortens them and makes them efficient.
- (34) As news coverage is often not limited to one state, it is necessary to address cross-border situations. Unfavourable side effects of cross-border situations must be prevented. This requires uniform Europe-wide solutions.

## V. ANTI-SLAPP-measures

- (35) According to the [resolution of the European Parliament on strengthening democracy and media freedom and pluralism in the EU](#), in order to be fully effective, anti- SLAPP measures should be based both on legislative and non-legislative measures.

The CCBE agrees that there is a need to continue a debate and consider possible further measures at EU level. **When it comes to possible legislative measures at EU level, the CCBE stresses the need for a deep assessment and analysis of already existing national regulations and measures regarding the safeguards against abusive claims before the EU takes any concrete legislative measure. This is necessary to ensure that both principles of subsidiarity and proportionality are well respected in this regard. Any measures proposed should not in any way interfere with the independence, quality and efficiency of national justice systems which are crucial for the achievement of effective justice. In this regard it should be noted that the independence of the judiciary must not be compromised, therefore putting judges in a structural “monitoring” role should not be supported.**

- (36) Lawyers have a central position in the administration of justice. They defend citizens’ rights by assisting and representing them, and liaise between citizens and courts. In this capacity, they hold a key position in ensuring the trust of the public in actions of the courts – the mission of which is fundamental in a democratic system governed by the rule of law. Essential principles guide lawyers’ behaviour in all circumstances, including independence, observance of legal professional secrecy and confidentiality, refusal to counsel, assist or defend a client if the lawyer is having a conflict of interest. The lawyer shall be competent, devoted, diligent and cautious with their clients. When carrying out their duties, lawyers shall respect principles of dignity, conscience, integrity and loyalty. These principles are prescribed in the [CCBE Code of Conduct and the Charter of Core principles of the European Legal Profession](#), as well as in the ethical regulations of national Bars and Law Societies. In this regard, it is of the utmost importance to ensure that these principles are respected and not undermined.

### 1. Legislative measures

- (37) Both procedural law and substantive law can be safeguards against SLAPP and could be further assessed:

#### a. Procedural law

- (38) As regards **procedural law** there are a number of possibilities:
- (39) First of all, the plaintiff should (in general) carry the **burden of proof**, hence he/she must prove that the elements of the claim are fulfilled. Therefore, the initiator of the SLAPP would be in a position where he/she must be active and provide evidence. This should in general include the proof that the news coverage is false.
- (40) In civil disputes, the action should not be served until the required **fee for the proceedings** has been paid. It is important that the plaintiff must pay the court fee in order for the proceedings to take their course. This ensures that the plaintiff must take action and that a SLAPP does not continue without his/her intervention.
- (41) It should be possible for the **admissibility as well as the coherence and logical consistency** (conclusiveness) of claims to be examined by courts **at the very beginning** of proceedings. It should

be possible to dismiss obviously inadmissible or unfounded claims at an early stage and before an oral hearing. In addition, there should be the possibility to object to abusive acts by the defendant.

- (42) As news coverage is often transnational, one element of potential SLAPPs is the uncertainty about the forum, hence the target cannot foresee where a lawsuit will be filed against her/him. This situation is based on **Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**. According to Art. 4 para. 1 persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. However, there is a crucial exception from this principle: Art. 7 para 2 states: A person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. Since SLAPPs are based on these kind of legal basis, the lawsuit could then also be filed at the place where the damage occurred. This is especially problematic in times of online journalism. The place of publication and the place of access are usually different. The possibility of accessing the article is sufficient to establish a sufficient connection. Therefore, the plaintiff regularly has a wide choice of forums. In order to put an end to this so-called "forum-shopping", standards that define jurisdiction precisely for cases involving media publications, should be considered. The possibility of **forum shopping imposes an unacceptable burden** on the targets of SLAPPs with regard to possible legal disputes.
- (43) It must be ensured that SLAPPs – at least in the end – do **not constitute a financial burden** on the targets. In order to assure this, the **loser-pay-principle** should be a minimum standard. Due to the fact that SLAPPs are not designed to win the case, they are usually inadmissible or unfounded. Therefore, EU-wide introduction of the loser-pay-principle is an important measure to reimburse the target of the costs he/she had in connection with the SLAPP. Hence, the defeated plaintiff must pay their own expenses, as well as all judicial fees and the expenses of the defendant (the target).
- (44) The option of a **counterclaim** should be introduced. This would allow the target to take action against the abusive plaintiff in the same proceeding, e.g. by claiming damages.
- (45) The possibility to introduce specialised chambers that could possibly deal with all media/press cases could be further assessed according to the justice system of each EU Member State. This chamber could, for example, deal with disputes concerning infringements of the right of personality, infringements of the protection of honour or infringements of the right to established and practised business directly by publications by the press, film, radio, television or other mass media or by reports of press agencies, as well as disputes concerning the obligation to publish a counterstatement in a mass medium.
- (46) With regard to the aforesaid issues, still the question of EU competence would have to be diligently assessed.

#### **b. Substantive law**

- (47) **Substantive law** also offers a wide range of possibilities to tackle SLAPPs:
- (48) In order to prevent 'libel tourism' or 'forum shopping' amendments of the Brussels I (No. 1215/2012) and Rome II (No. 864/2007) Regulations by means of determining of the court having jurisdiction and the law applicable to criminal or civil lawsuits concerning defamation, reputational damage and protection of an individual's reputation should be closely explored and be considered.

- (49) In order to ensure that SLAPPs – at least in the end – do not constitute a financial burden for the targets, there should be the **possibility of an action for damages by the defendant**.
- (50) Since SLAPPs constitute an abuse of rights it could be considered **to allow the courts to charge the plaintiff with a penalty fee**, i.e. imposition of a sanction on the plaintiff in the event that it turns out that his/her allegations in the lawsuit were false and must have been known to the plaintiff at the time when the lawsuit was filed. However, such instruments are vague and therefore open to abuse itself. They should, in any event, be handled with great care.
- (51) Also, criminal law can play a role in tackling SLAPP as well as fake news. There should be **criminal liability for casting false suspicion and for defamation**. However, neither offence should be applied carelessly and the principle of certainty, in particular clarity, should be respected. Otherwise, offences such as false suspicion and defamation could endanger the freedom of the media.
- (52) Here as well, the question of EU competence would have to be diligently assessed.

## 2. Non-legislative measures

- (53) Besides assessment of possible legislative measures, the establishment of possible non-legislative measures could be considered.
- (54) The CCBE agrees with the suggestion to ensure that there are **relevant funds available for supporting victims of SLAPPs**. Such funds could also be used for legal fees or the provision of legal aid.
- (55) **The CCBE considers that there is a need for awareness raising and training courses** for legal professionals, including for lawyers on anti-SLAPP related issues, including on typical manifestations of SLAPP, relevant case law. It is important to ensure that relevant EU funding is available for such awareness raising and training courses.