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analytical supporting document accompanying

a Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

and

a Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

{COM(2022) 177 final} - {C(2022) 2428 final}

1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

Nurturing, protecting and strengthening our democracy is at the heart of the Commission's priorities, as set out in President von der Leyen's political guidelines.[1]

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. Free media and civil society representatives have a crucial role to play in stimulating open debate. Therefore, it is important to protect journalists, human rights defenders and others involved in protecting public interest from manifestly unfounded or abusive court proceedings (also known as strategic lawsuits against public participation (SLAPP) launched against them by powerful individuals and entities, including corporations and state organs) in an attempt to silence public debate.

On 3 December 2020, the Commission issued a European Democracy Action Plan,[2] which announced a set of measures to promote public participation and support free and independent media, including this initiative to protect journalists and civil society against abusive litigation and a recommendation on the safety of journalists.[3] The action plan complements other initiatives, e.g. the strategy to strengthen the application of the Charter of Fundamental Rights in the EU,[4] which sets out actions to empower civil society organisations and human rights defenders, as well as EU Rule of Law reports.

The European Parliament adopted an own-initiative report on SLAPP on 11 November 2021[5] calling for the Commission to present a comprehensive package of measures against SLAPP, including legislation.

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[1] https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

[2] COM(2020) 790 final, 3.12.2020.

[3] Commission Recommendation on ensuring the protection, safety and empowerment of journalists and media professionals in the European Union, C(2021) 6650 final

[4] COM(2020) 711 final, 2.12.2020.

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

2. PROBLEM DEFINITION

2.1 Definition of SLAPP

SLAPP are a recent but increasingly prevalent form of interference with public debate in the EU, as shown by a study carried out for the Commission.[6] They are a particular form of harassment used against journalists, human rights defenders and others (e.g. media outlets, civil society organisations, environmental activists and researchers/academics) who are involved in matters of public interest. Typically, they are unfounded and abusive court proceedings 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 purpose is to intimidate and ultimately silence the defendants by draining their resources, e.g. by filing high claims for damages or deliberately lengthening proceedings. SLAPP are typically not initiated with a view to winning the legal proceedings or obtaining any form of redress. Instead, "the procedure is initiated for the sole reason of having the procedure, in an attempt to intimidate, tire out, and consume the financial and psychological resources of the target, with the ultimate goal of achieving a chilling effect and silencing them, which will also discourage other potential critics from expressing their views".[7] SLAPP may have a deterrent effect on other potential targets, who may decide not to assert their right to investigate and report on issues of public interest.

According to a recent study,[8] SLAPP "are groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties (…). [The latter includes] journalists, civil society organisations, human rights defenders – and others who express criticism or transmit messages uncomfortable to the powerful, on a public matter".

[6] https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf

[7] Scott Griffen, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, Organisation for Security and Co-operation in Europe, p. 1.

[8] Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, *Ad-hoc Request – SLAPP in the EU context*, 2020, EU-Citizen: Academic Network on European Citizenship Rights, p. 5.

SLAPP-initiating entities and individuals can base their claims on various grounds, the most common being defamation (both in civil and criminal suits), data protection, privacy laws, blasphemy, intellectual property or tax law.[9]

Given the imbalance in power and resources, SLAPP can have a devastating impact on the targets' financial status and produce chilling effects, dissuading or preventing them from pursuing their work. They also represent a threat to pluralistic public debate at large, as they may lead to the self-censorship of the targets but also of others engaged in public debate. While SLAPP arise in both domestic and cross-border settings, cross-border cases involve an additional layer of complexity and costs, with even more adverse consequences for defendants.

SLAPP constitute an abuse of court proceedings (or of the threat to bring such proceedings), threatening democratic values and the exercise of fundamental rights, in particular the freedom of expression and information, and the freedom of the media and leading to additional cost and burdens for the court system.

2.2 Drivers behind SLAPP

Intentions behind SLAPP may differ between the initiators of the court proceedings. When SLAPP are initiated by businesses or wealthy individuals, they are typically aimed at protecting their financial interest or reputation. When initiated by state entities, they may be also aimed at protecting the politicians' position, or even at undermining the freedom of speech as the primary objective. In any case, SLAPP have a common denominator – creating a chilling effect among NGOs, whistle-blowers, journalists (or more broadly – news outlets) and all citizens involved in public debate, and thus avoiding public scrutiny of the actions of their initiators.[10] Another common theme of SLAPP is an abuse of process by the claimant, or excessive claims in matters in which the defendant is exercising his or her constitutionally protected right.[11]

[9] Scott Griffen, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, 2017, Organisation for Security and Co-operation in Europe, p. 6.

[10] Reporters Sans Frontières, *RSF and 60 other organisations call for an EU anti-SLAPP directive*, 2.12.2020, consulted on 26.8.2021, available at: https://rsf.org/en/news/rsf-and-60-other-organisations-call-eu-anti-slapp-directive

[11] European Parliament, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, June 2021 p. 12

The phenomenon of forum shopping (or libel tourism) is a factor amplifying the problem. Some jurisdictions, e.g. Ireland or Malta, are perceived as more claimant-friendly.[12] Suing the defendant outside of his or her place of abode may further exhaust their resources, as it adds a linguistic barrier, geographical dimension, and drives up legal costs even further. The effect is even stronger when the target (journalist, rights defender or other) is sued outside the EU, for instance in the United States or the United Kingdom.

2.3 Quantitative and qualitative data related to SLAPP

As observed by Borg-Barthet, Lobina and Zabrocka in their 2021 report commissioned by the European Parliament, due to the nature of the phenomenon, it is not possible to provide exact numbers related to it.[13] An attempt can be made, however, at illustrating its scale.

Perhaps the most widely known example of SLAPP against journalists is the case of Daphne Caruana Galizia, a Maltese journalist who was killed by a car bomb in 2017.[14] Caruana Galizia was involved in the Panama Papers[15] investigation. At the time of the attack, she had 47 pending defamation court proceedings against her, filed in Malta, the United States and the United Kingdom.[16] Whereas this example provides an illustration of the insistence of SLAPP initiated by private entities, emanations of state are not idle plaintiffs, either. *Gazeta Wyborcza*, a Polish daily, reports of pending court cases against it in which it is either the Polish state or state-owned companies acting as claimants.[17]

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[12] Jessica Ní Mhainín, *A gathering storm - The laws being used to silence the media*, 2020, available at: https://euagenda.eu/upload/publications/a-gathering-storm.pdf.pdf

[13] European Parliament, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, June 2021, p. 45.

[14] Juliette Garside, *Malta car bomb kills Panama Papers journalist*, "The Guardian", 16.10.2017, available at https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist

[15] 2016 leak of over 11.5 million documents linking prominent figures of global politics and business to tax evasion practices: https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/

[16] https://www.the-case.eu/slapps-in-europe, consulted on 26.8.2021

[17] Wojciech Czuchnowski, Katarzyna Korzeniowska, *Kończy się talia wolnych mediów. PiS szybko zgarnia kolejne karty*, Gazeta Wyborcza, 13.8.2021, available at https://biqdata.wyborcza.pl/biqdata/7,159116,27448575,kurczy-sie-talia-wolnych-mediow-zobacz-kto-zgarnia-kolejne.html

These examples are not outliers in Europe. In 2014, the Council of Europe, together with a number of NGOs defending the freedom of expression, launched a Platform for the Protection of Journalism and Safety of Journalists[18]. Thanks to the collection of alerts regarding attacks on media freedom, the annual reports linked to this platform provide a telling insight into the numbers and dynamic of SLAPP.

The 2021 Annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned.[19]

Croatia, Estonia, France, Germany, Hungary, Malta, Poland and Slovakia have been identified as notable examples of jurisdictions where SLAPP is rising in numbers.[20]

Evidence from the 2021 Commission Rule of Law Report[21] suggests that SLAPP against journalists are a serious concern in several Member States. The evidence of their increasing occurrence in the EU appears to point to a need for action in order to enhance protection for potential targets. Such action includes raising awareness and knowledge on SLAPP among legal practitioners (e.g. lawyers, judges and prosecutors) and potential targets (notably journalists, media houses, and civil society representatives and organisations).

Information collected on the European Media Pluralism Monitor[22] also shows a deterioration in journalists' working conditions. While there is more available data on threats to journalists, human rights defenders are facing the same problems.

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[18] Available at https://www.coe.int/en/web/media-freedom (consulted on 6.9.2021).

[19] In 2021, 282 alerts were published on the Platform to promote the protection of journalism and safety of journalists (coe.int), amongst these, several concerned cases of judicial intimidation, i.e. opportunistic, arbitrary or vexatious use of legislation, including defamation, anti-terrorism, national security, hooliganism or anti-extremism laws. The 2021 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists noted an increase in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned - 1680a2440e (coe.int).

[20] *Supra.*, at 6.

[21] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en

[22] https://cmpf.eui.eu/media-pluralism-monitor/

Media Freedom Rapid Response (MFRR) partners have documented no less than 626 press freedom violations in EU Member States, candidate countries and the United Kingdom in 2021, among them numerous SLAPP, affecting 1063 persons or media entities in 30 countries.[23] A separate factsheet provides data concerning the 27 EU Member States.[24]

The recent Article 19 report[25] provides a Europe-wide overview of SLAPP and is based on in-depth research on SLAPP litigation against journalists in 11 countries across Europe[26] over the last four years. It concludes that there is a clear overall trend of SLAPP cases targeting journalists, media, civil society organisations and individuals in nearly every country researched and that SLAPPs represent a real threat to freedom of expression and participation on matters of public concern.

The 2022 report[27] of the Coalition Against SLAPPs in Europe (CASE) and the Amsterdam Law Clinics (ALCs) surveyed 570 cases to identify the full scale and nature of the SLAPP problem. It is intended to give a general overview of the nature of SLAPPs in Europe and the common trends and patterns identifiable in the documented cases.

2.4 SLAPP-related alerts from 2021

Examples of how SLAPP concretely unfold is provided by the Council of Europe Platform for the safety of journalists. SLAPP-related alerts in the Platform are grouped together with other forms of harassment and intimidation of journalists. In the year 2021, over 300 alerts were submitted by partner organizations, amongst these several concerned cases of judicial intimidation, meaning opportunistic, arbitrary or vexatious use of legislation, including defamation, anti-terrorism, national security, hooliganism or anti-extremism laws; issuing bogus or fabricated charges. Instances of SLAPP-related

[23] https://www.ecpmf.eu/wp-content/uploads/2022/02/MFRR-Monitoring-Report.pdf

[24] https://www.mfrr.eu/wp-content/uploads/2022/02/2022_02_17_MFRR_FACT_SHEET_MAPPING_MEDIA_FREEDOM_European_Union_Member_States_Year_2021.pdf

[25] https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf

[26] Belgium, Bulgaria, Croatia, France, Hungary, Ireland, Italy, Malta, Poland, Slovenia, and the UK.

[27] https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/6231bde2b87111480858c6aa/1647427074081/CASE+Report+on+SLAPPs+in+Europe.pdf

alerts published in the Platform originate from a number of Council of Europe Member States, including several EU countries, clearly showing the worrisome width of the phenomenon, often enacted by powerful complainants possessing greater means and resources than the defendants and whose underlying objective is to silence public debate on matters they consider undesirable.

SLAPP alerts in the Platform for the year 2021 include:

- The case of the Bulgarian Editor Stoyan Tonchev, facing charges of 'Hooliganism', supposedly in retaliation for his journalistic investigation into the alleged corruption of a senior magistrate and related publishing;[28]
- Also in Bulgaria, three defamation court proceedings filed against the financial editor of newspaper Nickolay Stoyanov;[29]
- In Croatia, in an alert created in September 2021, it is submitted that the publisher of the Croatian news website Index.hr, and its journalists currently face 65 active court proceedings before Croatian courts; amongst these 56 are defamation claims against the publisher, nine are defamation claims against journalists and three are claims under the EU General Data Protection Regulation (GDPR), anti-discrimination and copyright laws;[30]
- In March 2021, the Minister of Justice and Prosecutor-General of Poland filed a court proceedings against the editor-in-chief of Gazeta Wyborcza, Adam Michnik over an article written by the newspaper's investigative journalist, reportedly the case is one of the 60 civil and criminal cases against Gazeta Wyborcza, initiated by politicians of the ruling Law and Justice party (PiS), various ministries, state-owned companies, and business people with close ties to the government;[31]
- A British journalist and his Portuguese publisher, following the publication of a book investigating corruption and kleptocracy, received letters warning them of legal action in Portugal and were then notified a "declarative action of conviction" where it appears that €525,000 in compensation is being sought from the author and €225,000 from the publisher;[32]

[28] https://fom.coe.int/alerte/detail/79634050?langue=en-GB

[29] https://fom.coe.int/alerte/detail/100064153?langue=en-GB

[30] https://fom.coe.int/alerte/detail/107128483?langue=en-GB

[31] https://fom.coe.int/alerte/detail/93414878?langue=en-GB

[32] https://fom.coe.int/alerte/detail/107136614?langue=en-GB

- In Romania, three investigative journalists and two media outlets were sued for defamation over a series of articles alleging sexual abuses and rape in an Orthodox Christian high school;[33]
- Still in Romania, over €488,000 in damages were claimed from an investigative journalism project and a journalist over an article on the sale of masks that were allegedly faulty;[34]
- In Slovenia, the Prime Minister accuses German television ARD Correspondent Nikolaus Neumeier of Nazi-style Propaganda after Criticism;[35]
- In Spain, the far-right party Vox issued a veiled threat against Magazine Publisher.[36]

The Platform partner organisations' 2021 Annual Report "Wanted! Real action for media freedom in Europe"[37] notes that powerful individuals or companies brought court proceedings that had little legal merit and were designed to intimidate and harass journalists by introducing burdensome legal costs. According to the Report, SLAPP appear in all three of the legislative areas: civil, administrative and criminal law. Addressing the abuse in the area of civil law, the Report notes that, in some cases, the desired chilling effect is pursued merely by threatening litigation or other intimidating action. SLAPP's targets are frequently the publisher as well as the editor or individual journalists.

2.5 Examples of potential cross-border SLAPP

There are indications of potential SLAPP in the following cases flagged in the public consultation and other reporting on SLAPP, although bringing a defamation claim to court cannot in itself be considered per se as being SLAPP:

- In 2016 Holzindustrie Schweighofer (now HS Timber Group) brought defamation proceedings in Austria against the Romanian vice-president of a small Romanian NGO, Neuer Weg, which was campaigning against illegal logging.

[33] https://fom.coe.int/alerte/detail/97308654?langue=en-GB

[34] https://fom.coe.int/alerte/detail/101422058?langue=en-GB

[35] https://fom.coe.int/alerte/detail/97358405?langue=en-GB

[36] https://fom.coe.int/alerte/detail/103833260?langue=en-GB

[37] https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e

- In 2018, Bulgarian co-owner of Maltese bank Satabank, Christo Georgiev, sued Maltese independent journalist Manuel Delia in Bulgaria for a blog entry in which Manuel Delia reported how he had chosen to remove a story on money laundering by the Satabank bank after receiving legal threats. In 2020, Christo Georgiev sued the Times of Malta in Bulgaria for alleged damage to his reputation because the Times of Malta had reported on an ongoing money laundering inquiry concerning Satabank.
- In 2018, a Dutch company, Elitech sued Friends of the Earth Croatia in Croatia for its campaign against a golf resort in Dubrovnik. In addition, the investors were seeking a court order to prevent Friends of Earth Croatia from speaking against the project in public.
- In November 2020, the Swedish online business and finance magazine Realtid, its editor in chief and two journalists in their personal capacity (one of them Annelie Östlund) were sued from London by Mr Svante Kumlin, a Swedish businessman and CEO of Eco Energy World on the ground of defamation. Realtid had been investigating a network of stock promotors selling shares in Eco Energy World (EEW) to private individuals in Sweden while at the same time the company was preparing a major financing round and a stock exchange launch in Norway. The company always declined to comment ahead of publications. Instead, Realtid received legal threats from Monaco, where the company owner resides, and from London, where the company is registered. Despite the charges, Realtid continued to publish information perceived as beneficial for investors and of public interest. The following elements strongly indicate the orchestration of a SLAPP: Mr Kumlin and Eco Energy World claimed to have "significant business interests" in the UK which would justify the competence of the UK civil courts. The decision on competence is still awaited. Suing in the UK seems a strategic decision since in Sweden, the plaintiff would only be able to sue the company and its editor in chief (principle of the responsible editor), but not the journalists. Also, Swedish law would not admit a company's claim on defamation, as only individuals can be defamed.

2.6 Council of Europe

Several texts adopted at the Council of Europe refer explicitly to the problem of SLAPP or other forms of intimidating or vexatious litigation against journalists and media outlets, including online media. The Recommendation on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers in March 2018, states explicitly that "State authorities should consider the adoption of appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression."

The Council of Europe has produced the following further documents on SLAPP or related to SLAPP:

- 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, 2012.

- Freedom of expression and protection of reputation, a study of the case law of ECHR, 2016.[38]
- Recommendation on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers in March 2018.[39]
- Liability and jurisdictional issues in online defamation cases, Council of Europe study DGI(2019)04.[40]
- 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).[41]
- In 2021, the Council of Europe's Commissioner for Human Rights[42] observed that, while SLAPP are not a new phenomenon, the extent of the problem is increasing.
- Declaration of the Committee of Ministers on the Desirability of International Standards in 2021 dealing with Forum Shopping in respect of Defamation concerning "libel tourism".
- Many NGOs have asked the Council of Europe to issue a recommendation to combat SLAPP.[43]

The Council of Europe shares the concerns of the European Union regarding the rising threat of SLAPP to democracy and freedom of expression and information. Therefore, the Council of Europe has decided to launch work to prepare a recommendation on

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[38] JUST PUBLISHED - Freedom of expression and protection of reputation - Home (coe.int)

[39] "*State authorities should consider the adoption of appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression*."

[40] 168097d9c3 (coe.int)

[41] Hands off press freedom: attacks on media in Europe must not become a new normal (coe.int)

[42] Time to take action against SLAPPs - Human Rights Comments - Commissioner for Human Rights (coe.int)

[43] Statement on The Need for a Council of Europe Recommendation on Combatting SLAPPs — (the-case.eu) Extract: "*a self-standing recommendation should be issued with clear guidance on measures needed to discourage SLAPPs and dismiss them at an early stage, to sanction those who use SLAPPs or threaten to do so, and to provide financial and legal support to those targeted by SLAPPs. It should also give guidance on how to prevent the use of forum shopping, whereby cases are brought in jurisdictions that maximise the cost and inconvenience for the defendant*."

SLAPP. In 2022 a specific committee has started its work to prepare the recommendation.

2.7 United Nations

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights,[44] and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[45]

States have the obligation to respect and ensure the right to freedom of opinion and expression for all, including for journalists and the media.[46] In General Comment No. 31, the Human Rights Committee stated that States also have a positive duty to protect against any undue limitation or restriction on freedom of expression from both State agents and private parties.[47] In practice, this means that States must guarantee a broad protection of the right to freedom of expression in the national legal system and also should undertake all necessary measures to give effect to the right and protect its exercise from undue restrictions. States must adopt legislative, judicial, administrative, or special measures geared towards safeguarding the exercise of freedom of expression in line with international and regional human rights standards.[48]

The positive obligation is central to addressing situations when legal actions are brought solely to harass or subdue an adversary and prevent an exercise of fundamental rights and the right to freedom of expression. This applies to SLAPPs. Although there is no uniform definition of SLAPPs and different concepts are used in laws and advocacy, the impact of SLAPPs on freedom of expression and human rights has been widely recognised. For instance:

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[44] Although as a UN General Assembly resolution, the Universal Declaration of Human Rights is not strictly binding on States, and many of its provisions are regarded as having acquired legal force as customary international law; see Filartiga v. Pena-Irala, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

[45] International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN Doc. A/6316.

[46] Article 2 of the ICCPR read in conjunction with Article 19. Article 1 of the European Convention read in conjunction with Article 10.

[47] General Comment No. 31, paras 6 & 8.

[48] Ibid. See also European Court's interpretation in Hokkanen v. Finland, (1994) and López-Ostra v. Spain, (1994) where it interprets the positive obligation of State parties in similar terms as the UN Human Rights Committee.

- The UN Special Rapporteur on the right to freedom of peaceful assembly and of association, and the UN Special Rapporteur on extrajudicial, summary, or arbitrary execution have raised concerns over the use of SLAPPs against assembly organisers. This concerned, in particular, instances where business entities seek injunctions and civil remedies against protesters on the basis of trespass or defamation laws. The mandate holders established that States have the obligation to ensure due process and to protect assembly organisers from civil actions that lack merit.[49]
- In General Comment No. 24, the UN Committee on Economic, Social and Cultural Rights established that "actions [instituted] by corporations to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies".[50]
- The UN Working Group on Business and Human Rights recommended States enact anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities.[51]
- The Resolution on Safety of Journalists, adopted by the UN Human Rights Council (UN HRC) at its 46th session, recognised SLAPPs against the media as an attempt to silence journalists and media workers and as a means used by business entities and individuals to exercise pressure on journalists and stop them from critical and/or investigative reporting.[52]

3. WHY SHOULD THE EU ACT?

3.1 Legal basis

The legal basis for the legislative instrument is Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), which is the legal basis for civil judicial

[49] UN HRC, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary execution on the proper management of assemblies, UN Doc.A/HRC/31/66, 4 February 2016, para 84.

[50] UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities, E/C.12/GC/24, 10 August 2017.

[51] UN Working Group on Business and Human Rights, Guidance on National Actions Plans on Business and Human Rights, 2016, p. 31.

[52] UNHRC, Resolution 45/18 on the Safety of Journalists, A/HRC/45/L.42/Rev.1, 1 October 2020, p.3.

cooperation. The legal basis for the Recommendation is Article 292 TFEU, which allows the Commission to adopt recommendations.

3.2 Subsidiarity: Necessity and added value of EU action

SLAPP are an EU-wide problem – they can be both domestic and cross-border, but cases with cross-border implications represent a particular challenge. Also, the number of cases with cross-border implications is increasing since today a statement or activity is normally accessible or visible across borders via electronic means and can lead to court proceedings initiated against the SLAPP target in another Member State. This risk grows if the safeguards are divergent in Member States. Action at EU level helps to combat the emergence and growth of SLAPP throughout the EU in a consistent manner and ensure convergence in Member States' approaches to the phenomenon. However, the action should be targeted and limited to what is necessary to ensure consistency in approach in the Member States. In this respect, there is a need to balance access to justice as guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union and personality/privacy rights with the protection of freedom of expression and information.

Currently, there are very limited procedural safeguards against SLAPP under national law, they are not SLAPP-specific and the situation varies between Member States. Therefore, Member States acting individually cannot resolve the problem satisfactorily.[53]

Joint action from the Member States is needed also to fight against SLAPP from third countries because otherwise claimants will seek to benefit from divergence of systems between Member States and seek the recognition and enforcement of third-country SLAPP judgments where it can be most easily obtained. In the absence of specific safeguards costs and harassment outside the EU, SLAPP could be inflicted without remedies against abuse and plaintiffs could just resort to other fora to circumvent protection. Where (due to different standards of the protection of fundamental rights or different rule-of-law standards) a plaintiff is successful in a third country in a case that would be qualified as SLAPP in the EU, even the recognition and enforcement could be conceivable (subject only to the general ordre public clause).

[53] According to available information only 23 MS are currently considering SLAPP-specific measures (MT, LT and IE).

4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

By targeting journalists, human rights defenders and others in their public watchdog function, SLAPP represent a serious threat to democracy and fundamental rights, such as freedom of expression and information. This includes people's right to receive and impart information and ideas without external interference and to take part in fair democratic debate. It also represents a threat to their rights in public participation. This initiative aims to address this threat and help ensure the proper functioning of the checks and balances of a healthy democracy.

In particular, the initiative aims to protect journalists, human rights defenders and others from the use and effects of SLAPP by:

(1) ensuring that the procedural toolbox provides courts and tribunals and other legal professionals with effective means to deal with SLAPP and targets with the means to defend themselves;

(2) building awareness and expertise among legal professionals and targets that will help them take action against SLAPP;

(3) ensuring that support is available for those facing SLAPP; and

(4) ensuring a more systematic monitoring of SLAPP.

It should be stressed that there is no implicit assumption that court proceedings against journalists and human rights defenders are by default unfounded and that they may need special treatment by the legal system. This is only the case where SLAPPs are used against journalists and others. It is therefore not the objective of this initiative to introduce different legal standards depending on who is sued.

5. STATE OF PLAY

Anti-SLAPP legislative measures may seek to eliminate the effects of SLAPP in three main ways: by deterring the filing of SLAPP, by providing avenues for a quick dismissal of a SLAPP, once it is filed; and by providing for other remedies. This section presents an analysis of the relevant legislation and case law of Member States (subsections 5.1 and 5.2).

Member States do not have specific safeguards against SLAPP. Annex 3 provides an overview of the characteristics of civil proceedings in Member States which are relevant for SLAPP. It contains information on possibilities of early dismissal in first and second instance proceedings and an overview of existing rules in Member States on abuse of rights, showing that at present there are no specific procedural tools against SLAPP. With the existing limited possibilities, SLAPP can only be dismissed under the same rules as any other claims that may be unfounded, costs only be awarded under the same rules as for other court proceedings and penalties are not available except where there are general provisions on abuse of procedure. For the specific situation of SLAPP where it is not the objective of the plaintiff to win the case, but to harass the defendant, just ensuring

eventual dismissal is not an appropriate solution. They require instead a speedy procedure leading to the dismissal of the claim, penalties for the claimant and the elimination or at least reduction of damages imposed on the SLAPP target.

Specific statistics on civil proceedings do not exist in most EU Member States. Apart from general information regarding the total number of civil cases, appellate proceedings and enforcement, specific data (i.e. on the number of cases under the specific EU procedural law instruments, precise numbers of cross-border cases etc.) are missing. Also, courts and other authorities in Member States do not ordinarily distinguish between purely national cases or international cases and cases with an EU element.

Anti-SLAPP non-legislative measures may seek to build awareness and expertise among SLAPP targets, legal professionals and other groups, ensure that support is available for those facing SLAPP and ensure a more systematic monitoring of SLAPP. Subsection 5.3 presents an overview of the situation regarding awareness, knowledge and data monitoring and occurrence of SLAPP in the EU.

5.1 The notion of public interest

An effective way of fighting SLAPP is their dismissal at the earliest possible stage of proceedings in those cases where the court proceedings are evidently and manifestly unfounded (sections 5.1 and 5.2). This may however not always be possible or successful, which means that the court would have to consider SLAPP on substance. The notion of the public interest is inherent to actions of public participation that are targeted by SLAPP is a key concept in that context and may provide an avenue to discharge the defendant from liability for actions that were in the public interest (5.1.2) or, as a measure of last resort, cancel or reduce the damages owed to the plaintiff (5.1.3).[54]

5.1.1 European Convention on Human Rights

The role of public interest is most frequently considered in the context of a collision between freedom of expression of a journalist/publisher/activist and the right to privacy of another individual or even a legal entity.[55] The two rights are enshrined in the

[54] Please note that a limited number of Member States were included in the public interest analysis. The references in the text to certain Member State(s) serve as examples, but do not preclude the existence of a relevant legislation/case law in other Member States as well.

[55] Please note that the ECtHR has emphasized that there is a difference between the reputation of a legal entity and the reputation of an individual. See e.g. ECtHR, *Margulev v. Russia*, Application no. 15449/09 (8 January 2020), paragraph 45. See also ECtHR, OOO Memo v. Russia, Application no.

European Convention on Human Rights (ECHR) and usually also form part of the fundamental rights under the constitutions of the Member States.

The collision of two convention rights that deserve equal protection requires a balancing test, the outcome of which should in principle be the same whether court proceedings have been lodged under Article 8 of the ECHR (right to privacy) by the person who was the subject of a certain publication, or under Article 10 of the ECHR (freedom of expression) by the publisher, journalist or activist that may be targeted by a SLAPP.[56] In its landmark cases *Von Hannover (no. 2)*[57] and *Axel Springer*[58], the European Court of Human Rights (ECtHR) developed the criteria which national courts should follow when determining whether the right to privacy may be limited by the freedom of expression. One of the principal elements of the balancing test is that a publication contributes to a debate of general interest.[59] In a recent case *OOO Memo v. Russia*[60], the ECtHR specifically refers to the growing awareness of the risks that court proceedings instituted with a view of limiting public participation bring for democracy and to the power imbalance between the claimant and the defendant when assessing whether the claimant was pursuing a legitimate aim of protection of reputation.

2840/10 (15 March 2022), paragraph 46-47, where the ECtHR considered that, by virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace.

[56] Guide on Article 8 of the European Convention on Human Right, URL: https://www.echr.coe.int/documents/guide_art_8_eng.pdf (14 September 2021), paragraph 43.

[57] ECtHR, *Von Hannover v. Germany (no. 2)*, Application no. 40660/08 and 60641/08 (7 February 2012).

[58] ECtHR, *Axel Springer AG v Germany*, Application no. 39954/08 (7 February 2012).

[59] The full set of criteria to be considered by courts when balancing the two rights is the following: "i) contribution to a debate of general interest, ii) how well known is the person concerned and what is the subject of the report, iii) prior conduct of the person concerned, iv) method of obtaining the information and its veracity, v) content, form and consequences of the publication, vi) severity of the sanction imposed." ECtHR, *Axel Springer AG v Germany*, Application no. 39954/08 (7 February 2012), paragraphs 89-95.

[60] ECtHR, *OOO Memo v. Russia*, Application no. 2840/10 (15 March 2022), paragraph 43. This judgment is not yet final.

The general (public) interest is assessed on a case-by-case basis.[61] However, the ECtHR has stated that it "ordinarily relates to matters which affect the public to such an extent that [the public] may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."[62] On the contrary, the right to privacy cannot be limited where an action has "the sole purpose of satisfying the curiosity of a particular readership" regarding the details of a person's private life.[63] In other words, unless actions of journalists or activists demonstrate a public interest component, court proceedings based on the right to privacy, in principle cannot be perceived as malign and could not qualify as SLAPP. The legislation and particularly the national case law of several Member States (ES, HR, SL) are heavily influenced by the case law of the ECtHR,[64] which appears to result in a certain level of harmonisation among Member States concerning limitations of the right to privacy in favour of the freedom of expression, but differences in the precise way these rights are balanced still remain.

5.1.2 Public interest and liability

The basic premise of the public interest in the context of liability is that there can be no infringement of the rights of others (and thus liability) by an action of a journalist or an activist where such action was taken in the public interest.

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[61] Previous examples where the existence of a public interest was recognised include a publication concerning information on the medical condition of a candidate for the highest office of State, sporting issues, criminal proceedings, crimes committed etc. ECtHR, Guide to Article 10 of the Convention – Freedom of expression, URL: Guide on Article 10 - Freedom of expression (coe.int) (22 September 2021), paragraph 137.

[62] ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, paragraph 71.

[63] ECtHR, *Aleksey Ovchinnikov v. Russia*, no. 24061/04, paragraph 50.

[64] E.g. Judgments of the Constitutional Court of Croatia U-III-1876/2018 and U-III-1898/2018 of 14 November 2019 and U-III-2971/2017of 15 October 2020; Judgements of the Spanish Constitutional Court 27/2020 of 24 February 2020 and 18/2015 of 16 February 2015; Judgement of the Constitutional Court of Slovenia Up-349/14-39 of 16 May 2019.

In this context, the most effective method of addressing SLAPP is by means of "public interest exceptions", i.e. exclusion of liability for potential monetary or moral harm suffered by the plaintiff when an action was in the public interest. The personal and material scope of such exceptions varies in different Member States. Moreover, the notion of public interest in provisions containing such exceptions is usually not defined, but rather assessed on a case-by-case basis (IT, SL, ES) and taking into account the relevant national and ECtHR case law.[65]

Some Member States provide for this type of "public interest exceptions" in the general civil or criminal law and in particular in provisions concerning the infringement of personality rights, while others provide exceptions only in more specific areas of law such as media law (HR)[66] or trade law (SE)[67]. The notion of public interest may be included by direct reference (EE)[68] or by referring to other circumstances that could potentially also cover actions in the public interest.[69] In some Member States where concrete reference to the notion public interest is absent in the legislation, the courts have introduced the notion of public interest as a means to exclude liability through the relevant civil (PT, PL, SL)[70] or criminal (IT, PT)[71] law jurisprudence, notably by applying the balancing test and by referring to the criteria developed by the ECtHR.

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[65] E.g. Italian case law has referred to the notion of "public interest" in various ways (e.g. "societal relevance", "societal interest"), however, in essence, it consists of the reporting of events concerning the life of the community and the individuals who are central to it, the knowledge of which is essential to the creation of public opinion. Judgment of the Tribunal of Messina of 13 February 1988.

[66] E.g. Article 21(4) of the Croatian Media Act.

[67] E.g. Swedish Law (2018: 558) on Trade Secrets ("*Lag (2018:558) om företagshemligheter*"), Section 4.

[68] E.g. Estonian Law of Obligations Act (*Võlaõigusseadus*), Article 1046(2).

[69] E.g. Article 158(3) of the Criminal Code of Slovenia ("*Kazenski zakonik*") (Insult).

Article 160(5) of the Criminal Code of Slovenia (Calumny).

[70] E.g. Portuguese Civil Code does not provide exemptions linked to the public interest for the infringement of personality rights, however, the Supreme Court has clarified that a "relevant public interest" overrides the right to honour and good name and that thus a legitimate exercise of the right to freedom of expression and information through the press cannot give rise to civil liability. Supreme Court of Justice of Portugal, Decision of 28 June 2012, ECLI:PT:STJ:2012:3728.07.0TVLSB.L1.S1.9D; Article 484 of the Portuguese Civil Code ("Código Civil").

In terms of the personal scope of the "public interest exceptions", some Member States make a distinction between the right to privacy of private and public persons (HU),[72] while the legislation of others does not make such a distinction (EE).[73] In the latter cases, a distinction may however be made by the courts (ES)[74] when balancing the right to privacy and freedom of expression *inter alia* by applying the relevant ECtHR criteria concerning a lawful limitation of a right to privacy of public figures.[75] Furthermore, some Member States provide additional protection to certain categories of persons who are

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Polish case law confirmed that defending a justified interest of the society can exclude the unlawfulness of an action in civil cases. Judgment of the Appellate Court in Warsaw of 9 February 2007, VI ACa 960/06.

[71] E.g. Italian Cassation Court set three cumulative conditions under which the freedom of the press to report a given fact takes precedence over the privacy of the individual(s) concerned. if these conditions are fulfilled, publishing remarks or news of a defamatory nature is justified and thus legal: 1) the published news is true, 2) there is a public interest in the news (so-called criterion of pertinence), 3)the news is reported in a 'civil' manner (so-called criterion of restraint). Judgments of the Court of Cassation of 18 October 1984, no. 5259 and of 20 February 2014, no. 4068.

Polish case law stated that acting in a defence of a justified interest of the society can exclude the unlawfulness of an action; Journalists can be successful only if they fulfilled their duty of care and integrity. Judgment of the Appellate Court in Łódź of 11 June 2015, I ACa 1820/14; Judgment of the Supreme Court of 10 August 2017, I CSK 21/17.

Slovenian case law emphasizes that civil liability may be excluded when actions of a journalist were in the pubic interest, subject to a balancing test. Judgment of the Higher Court in Ljubljana of 22 June 2016, I Cp 488/2016, paragraph 21.

[72] E.g. Section 2:44 (Protection of the personality rights of politically exposed persons) of the Hungarian Civil Code.

[73] E.g. Estonian Law of Obligations Act (*Võlaõigusseadus*), Article 1046(2), cf. footnote 12.

[74] Spanish Constitution and Organic Law for instance do not differentiate between private and public persons, however, the courts do make a distinction and follow the ECtHR caselaw in this respect. Fayos Gardó: ¿Tienen las personas públicas derecho a la intimidad y a la propia imagen?, URL: https://comein.uoc.edu/divulgacio/comein/es/numero35/articles/Article-Antonio-Fayos-Gardo.html (21 August 2021).

[75] The ECtHR interpretation of persons who can be considered as public figures is broad and includes e.g. heads of state, politicians, high-ranking local civil servants, filmmakers, actors. K. Hughes, The public figure doctrine and the right to privacy, URL: THE PUBLIC FIGURE DOCTRINE AND THE RIGHT TO PRIVACY | The Cambridge Law Journal | Cambridge Core (9 January 2022).

generally considered to work in the public interest such as whistle-blowers (FR)[76] or journalists/publishers (HR, ES, SL).[77]

5.1.3 Public interest and damages

Even where a court would also find a journalist or an activist liable for an action which was in the public interest, the notion of public interest may sometimes be relied on in order to reduce or cancel altogether the damages owed to the plaintiff.

Irish tort law for instance provides that the jury or the court may decide to only award nominal damages where a plaintiff has established that that he/she has suffered a breach of a legal right but has not suffered a loss, while contemptuous damages are awarded where a court accepts that the plaintiff has suffered a wrong, but his/her behaviour has been such that the Court signals its disapproval of the conduct.[78]

Differently, the legislation of most other Member States does not provide for a *de iure* or *de facto* cancellation of damages,[79] but rather provides that a calculation of damages should take into account several factors and concrete circumstances of each case (DE, SL, ES). In this context, acting in the public interest may be considered as a mitigating

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[76] E.g. Article 122-9 of the French Penal Code ("*Code pénal*") provides a codified defence for whistle blowers, against accusations of defamation, breach of privacy etc. and excludes civil and criminal liability.

[77] E.g. Article 21(4) of the Croatian Media Act, cf. footnote 7.

The Spanish Constitutional Court has emphasized that the constitutional protection of the freedom of expression reaches its highest level when it is exercised by information professionals through the institutionalised vehicle for the formation of public opinion, which is the press, understood in its broadest sense. Judgment of the Spanish Constitutional Court of 6 June 1990, no. 105/1990, point 5.

Slovenian courts emphasized that freedom of expression under Article 39(1) of the Constitution "as a special aspect, protects the freedom of journalistic expression, which not only guarantees individuals (journalistic) rights if it is printed in other public media, but also exercises the democratic right of the public to be informed about matters of public importance." Judgment of the Constitutional Court of the Republic of Slovenia of 16 May 2019, Up-349/14-39, paragraph 8.

[78] Paul McMahon: Defamation Damages, URL: http://mcmahonsolicitors.ie/defamation-damages/ (28 August 2021).

[79] E.g. the Spanish Supreme Court overturned and modified previous lower-court rulings concerning compensation for damage to honour, which had that held the publication of a court judgment was sufficient, and instead ordered (a modest) compensation, which could make good the moral damage suffered. Decision the Supreme Court of 25 September, no. 872/2008.

element relevant when the courts are determining the amount of non-pecuniary damages, i.e. within their discretionary powers, the courts may decide to award a lower amount of damages when an action was in the public interest.[80]

Finally, it should be noted that the amount of damages awarded, particularly for infringement of personality rights, was scrutinised several times by the ECtHR, including in cases involving Member States.[81] Conscious of the potential chilling effect that excessive damages may have on the freedom of expression, the ECtHR emphasized on several occasions that damages for infringement of personality rights must bear a reasonable relationship of proportionality to the injury to reputation suffered and cannot be excessive in that they would go beyond merely compensating the non-pecuniary damage suffered (e.g. punitive damages).[82]

5.1.4 Conclusion

The analysis shows that the legislation in Member States provides for some general safeguards based on which a SLAPP case may end favourably for a journalist or an activist who was being sued for actions that were in the public interest. In this regard, the most reliable method of addressing SLAPP would appear to be through codified "public

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[80] E.g. Article 179(2) of the Slovenian Obligations Code ("*Obligacijski zakonik*;Judgment of Higher Court of Koper of 14 May 2019, I Cp 26/2019, paragraph 16.

In Germany, in order to award non-pecuniary for personality infringements, the infringement must be of grave and serious character. The judges in principle have a discretion in determining the amount, but have to take into account *inter alia* defendant's motives (e.g. acting in a public interest and not to profit economically). Additionally, the damages should not impair the freedom of press and in particular should not threaten the economic existence of the publisher concerned. Ulrich Magnus: Damages for Non-Pecuniary Loss in German Contract and Tort Law, The Chinese Journal of Comparative Law, Volume 3, Issue 2, October 2015, page 301.

In France, despite a liberal approach to non-pecuniary damages in general, the damages awarded for infringements of personality rights have historically been low. Jean-Sébastien Borghetti: Non-Pecuniary Damages in France, The Chinese Journal of Comparative Law, Volume 3, Issue 2, October 2015, Pages 284..

[81] E.g. ECtHR recently held that Croatia has violated a publisher's right to freedom of expression by awarding excessive damages to a judge who was subject of value judgments injurious to his reputation in a weekly magazine. After national courts ruled that the articles exceeded the bounds of acceptable criticism, the ECtHR, conscious of a special role of the judiciary, held that the journalist was acting in the public interest and the damages were excessive which could discourage open discussion of public concern. ECtHR, *Narodni List D.D. v.* Croatia (application no. 2782/12), paragraphs 70-72.

[82] ECtHR, T*olstoy Miloslavsky v. the United Kingdom*, 13 July 1995, paragraph 49.

interest exceptions" that would refer directly to the public interest and would cover all types of damages. Such provisions that would ensure a clear exemption of civil and/or criminal liability, however, currently do not appear to exist. Article 1046(2) of the Estonian Law of Obligations Act could serve as an example of such a targeted "public interest exception", however, in its current version it covers only infringements of personality rights. Even when the legislation does not provide specific exceptions linked to the public interest nature of an action, the public interest is frequently considered as part of the balancing test based on constitutional and ECHR provisions. Acting in the public interest, linked in particular to the freedom of expression, may justify the limitation of other rights and thus result in a conclusion that an action subject of a SLAPP case was lawful. The absence of codified "public interest exceptions" may be perceived as providing less legal certainty for journalists and activists, however, due to the extensive and constantly developing case law of the ECtHR, this may prove to be less critical. In this context, the analysis has demonstrated that the case law in different Member States, particularly concerning freedom of expression and right to privacy, follows the criteria set by the ECtHR and that there even exists a certain level of harmonisation among Member States in this regard. The notion of public interest may be also relied on when determining the amount of damages, however, with the exception of Ireland, acting in public interest appears to only justify the reduction of damages, while we have not found provisions that would allow a cancellation of damages altogether when a journalist or an activist would be found liable in a SLAPP case. Finally, it should be noted that the above analysis mostly considered the notion of public interest in the context of freedom of expression and right to privacy (personality rights), while it cannot be excluded that the notion of public interest in other contexts where SLAPP may exist would be of a limited use (e.g tax or IP law).

It needs to be underlined, however, that at present in Member States there are no SLAPP-specific safeguards available, addressing the situation that harm is done not (only) through potentially winning a court case, but (primarily) through entangling the defendant in a costly and exhaustive court case even though that case will be lost in the end.

5.2 Costs

The costs in civil proceedings[83] represent an important aspect of SLAPP, since one of the aims of SLAPP is to drain the financial resources of SLAPP targets and claiming excessively high amounts in damages is a typical feature of SLAPP, and the costs of proceedings (both court fees and lawyers' fees) are often tied to the amount of the claim. The financial burden linked to legal procedures is an important factor that contributes significantly to their chilling effect.

On the other hand, efficient cost rules are also a crucial deterrent factor, preventing claimants from introducing abusive litigation. This aspect has recently also been stressed by Advocate General Hogan in his Opinion in the pending case C-251/20 where he explicitly addresses SLAPP cases and states that "the existing rules in the Member States relating to the reimbursement of legal costs are often insufficiently rigorous with regard to the obligation of the unsuccessful party to compensate the successful party for the damage caused, as the case may be, either by the action or by the fact of having abusively resisted the applicant's claims. Indeed, these rules do not always take into account sufficiently the indirect costs generated by the management of a procedure (in particular the costs of hardship caused by the litigation), although in practice those costs can be significant, both economically and non-materially. If those costs were systematically and better compensated, in particular in the case of abuse of process, applicants would be dissuaded from abusing the mosaic principle, since this would expose them to the risk, in the event that they are unsuccessful in their claim, of having to pay significant damages to the defendant."

The costs in civil proceedings are regulated differently in Member States, in particular in relation to the costs that are reimbursed to the winning party. Annex 4 provides an overview over the costs rules applicable in the Member States.

It results from this overview that in most Member States the legislation expressly provides that the losing party covers all or part of the costs incurred by the wining party, i.e. the 'loser pays' principle. It appears that some kind of the loser pays principle exists in all Member States with the exception of Czechia, Slovakia, Ireland, and Luxemburg. Even in those jurisdictions, the losing party may be required to cover the costs incurred by the winning party, which is subject to the court's discretion, but in principle awarded.

[83] The summary accompanies the table containing information concerning the costs in civil proceedings in each Member State based on the data obtained from the European e-Justice Portal: European e-Justice Portal - Costs (europa.eu) (21 December 2021).

Luxemburg is an exception in that the winning party in principle has to cover its own costs. The judge may exceptionally and on express request order the losing party to pay to the other party a procedural indemnity, however, the amount is often symbolic.

The scope of the 'loser pays' principle may depend on the definition (recognition) of costs in civil procedure in a particular Member State. In several Member States, the costs that can be reimbursed are in principle limited to the costs considered as necessary or reasonable.[84] Furthermore, the legislation in several Member States provides for different situations when the courts may derogate from the basic rule (e.g. minor defeat, conduct of the parties) and any event the courts appear to be offered a relatively wide margin of discretion when deciding on the costs. The 'loser pays' principle can also be applied proportionally, i.e. according to the partial success of the party.[85]

In the majority of Member States, the plaintiffs in civil proceedings are usually required to pay a certain amount of court fees/costs in the very beginning of the proceedings as a prerequisite to file an application. In Finland, the costs are paid at the end of the proceedings, which is also the case in some other Member States, but only for specific proceedings (e.g. social matter disputes before first instance courts in Slovenia). The court fees are either set as a flat fee or according to the value of the case.

In addition to the court fees in the beginning of the proceedings, a variety of other costs may be incurred by the parties in the course of the proceedings. These costs depend on the Member State, however, in most Member States include the fees of experts, translators, and interpreters, while depending on a particular jurisdiction also for costs of notifications, the copy, certificate rights (IT), witness expenses, travel costs (SL), costs incurred in serving a document abroad (EE) etc. These costs are mostly paid in advance of a particular action and may be reimbursed at the end of the proceedings. The costs are in some instances covered by the court and in others by the parties (by the party requesting a certain action or shared by both parties). The legislation is country-specific in regard to each type of costs. For instance, in Czechia the court pays the fees of experts, translators and interpreters it appoints, while in Estonia the fees charged by experts, interpreters and translators are to be paid in advance by the party who submitted the application resulting in the costs.

[84] E.g. Austria, Croatia, Denmark, Estonia, Italy, Poland, Romania, Slovenia, Sweden.

[85] E.g. Croatia, Latvia, Portugal, Slovenia.

The costs in civil proceedings also include the costs of legal representation, which may also be covered by the 'loser pays' principle.[86] Where the costs of legal representation are borne by the losing party, the (maximum) tariff is usually set, so as to avoid disproportionate costs. However, it should be noted that the lawyers' fees can in principle be agreed outside of this tariff, i.e. the real cost of the legal representation can be much higher than the costs reimbursed to the winning party at the end of the proceedings.[87]

Finally, the reimbursement of costs according to the 'loser pays' principle may be ordered automatically (*ex officio*) or only at the request of a party. In some Member States the costs are awarded already by the final decision, while in others the court issues a separate award (order) concerning the costs.

In accordance with the above, SLAPP targets are generally entitled to a compensation of costs they incurred in the course of the proceedings based on the 'loser pays' principle. However, there are three main problems in relation to the practical application of this rule. First, usually under the loser pays rule not all costs will be reimbursed. Only in a few Member States are legal fees fully recoverable. In others there is a statutory fee system, only part of the costs are to be paid by the winning party, or the court has a discretion to limit the recoverable costs.[88] Second, there are limitations as to what are considered procedural costs and in particular whether costs incurred prior to proceedings are recoverable, including those in case a settlement is reached (the latter is not customary in SLAPP cases). Third, usually costs are only reimbursed after the proceedings are concluded and separate steps proceedings may be required to calculate the costs and to get these actually reimbursed. This may take a significant amount of time. These three issues make the reimbursement of cost rules often problematic in SLAPP cases.

5.3 Non-legislative measures to tackle SLAPP

The consultation on the European Democracy Action Plan showed that the SLAPP phenomenon is still relatively unknown in the EU - only 26 percent of respondents indicated being familiar with the term SLAPP. Knowledge was much higher among academics, NGOs, national authorities or business associations. Nonetheless, awareness

[86] E.g. Sweden, Slovenia, Romania, Croatia, the Netherlands.

[87] E.g. Belgium, Slovenia, Italy, France, Greece, Croatia, Czechia.

[88] See also the EU Justice Scoreboard 2021, figure 26.

on SLAPP and on how to counter SLAPP could be higher, including among the judiciary.

Experts and civil society also have signalled the importance of providing further trainings on SLAPP for judges, legal practitioners, journalists and other media professionals, as well as for human rights defenders.[89] In this vein, the proposed anti-SLAPP Model Directive, which is a civil society model law, includes a reference to training in its Article 25.[90] The Council of Europe has also implemented trainings for judges (e.g. in the framework of the Horizontal Facility for the Western Balkans and Turkey II[91]). This results in judges being educated about the European standards set by the European Convention on Human Rights and the ECtHR, in particular in the areas of media and freedom of expression, as promoted by the Communication 'Ensuring justice in the EU – a European judicial training strategy for 2021-2024'[92]. The use of existing materials and training practices such as the ones promoted on the E-Justice portal, the UNESCO Global Toolkit for Judicial Act and the Council of Europe's HELP (Human Rights Education for Legal Professionals) online courses should be encouraged.

SLAPP targets often have difficulties in finding relevant information to organise their defence and more generally legal assistance on how to address the legal proceedings. Also, the threat of legal proceedings and the potential legal consequences add to the distress of having to find a lawyer, facing charges in a court, etc., especially for SLAPP targets that are not part of resourceful organisations willing to assist them. At times simply finding information on the SLAPP phenomenon is challenging for targets.

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[89] Ní Mhainín, J., *Breaking the Silence*. *A new report on the legal measures that will give journalists back their voices*, Index on Censorship, 2020, p.6. https://www.indexoncensorship.org/wp-content/uploads/2020/09/breaking-the-silence.pdf (24/08/2021)

[90] In 2020, after consulting with legal practitioners, scholars, and SLAPP targets, a coalition of NGOs commissioned the draft of an anti-SLAPP Directive (Ravo, L.M., Borg-Barthet, J., Kramer X., *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, 2020, p.47. https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf [24/08/2021]). Article 25 of the model Directive concerns training and awareness raising.

[91] Through the Horizontal Facility for the Western Balkans and Turkey II', a co-operation initiative co-funded by the EU, the Council of Europe has carried out trainings for judges and prosecutors on freedom of expression and freedom of the media, which included the topic of SLAPP. Link: JUFREX: two day training for judges and prosecutors on defamation and protection of reputation

[92] COM/2020/713 final

Finally, there is a lack of systematic monitoring of SLAPP cases in the European Union. The Platform established in 2015 by the Council of Europe to promote the protection of journalism and safety of journalists[93] has contributed to create some transparency and raise awareness for the issue, as has the Media Pluralism Monitor (that feeds into the Rule of Law reports). However, information available on the Platform on SLAPP only covers cases against journalists (i.e., it does not include cases against human rights defenders) and does not provide details on the entire proceeding, but rather flash alerts that reflect only disparate moments of the proceeding and which do not always contain the same type of data to allow for a systematic aggregation. It is therefore not a monitoring mechanism. In addition, more granular data on the length of the proceedings, judicial costs and the overall evolution of a SLAPP case that could be aggregated together with other relevant information is not available. The lack of systematic monitoring poses a challenge for targets, legal professionals and authorities to obtain sufficient information to monitor and tackle the phenomenon.

6. WHAT IS THE CHOSEN POLICY OPTION?

As shown above, the existing procedural safeguards in the Member States are not sufficient to tackle SLAPP, and protection by substantive safeguards is inadequate. Legislative action is therefore needed for the following reasons:

- Member States do not have specific safeguards against SLAPP, which is a specific, particularly abusive and growing phenomenon threatening the basics of our democracy. This conclusion emerged clearly from the technical workshop with Member States held on 26 October 2021 as well as from the dedicated consultation of national judges;
- The existing general safeguards in Member States as described above in Section 5 are not fit for purpose of dealing with SLAPP cases swiftly and expediently and more generally preventing the harmful phenomenon of SLAPP growing roots in the EU. Legal clarity and certainty is needed, in particular to provide proper protection to targets of SLAPP;
- Evidence on the increase of SLAPP shows that existing deterrent/protective measures, if any, do not currently prevent or discourage SLAPP;
- Due to the specific problems caused by cross-border SLAPP and SLAPP from third countries, uniform EU action is needed to tackle the phenomenon.

[93] https://fom.coe.int/

Tackling SLAPP efficiently requires a combination of legislative and non-legislative measures, in order to address the various aspects in a comprehensive package and take account of the cross-border and national dimensions.

The aim of a legislative instrument is to provide targeted civil procedural safeguards against SLAPP in cross-border situations, e.g. through early dismissal, covering the cost implications and allowing third-party interventions in proceedings to support targets of SLAPP. It contains a set of general rules enabling courts to dismiss abusive SLAPP cases at a very early stage of proceedings, before they can produce their most harmful effects. This will also help deter parties from bringing such cases in the first place, as the threatening effect of lengthy and expensive proceedings would be diminished. Specific protection would be provided to EU targets against SLAPP from third countries.

The proposed personal and material scope of the Directive is wide: it aims to protect any natural or legal person who is targeted with manifestly unfounded and abusive court proceedings due to their engagement in public participation on matters of public interest. The objective of the wide personal scope is to ensure that the protection covers all potential targets of SLAPP, including secondary targets. Early dismissal of manifestly unfounded court proceedings upon the application of the defendant is a key element of the proposed Directive. This would facilitate the swift termination of abusive proceedings, thus preventing further adverse consequences for the defendant resulting from the need to invest monetary and other resources in litigation. Other elements linked to early dismissal are expediency in proceedings, the burden of proof for the claimant to show that the case is not manifestly unfounded and the right for non-governmental organisations to intervene to support the defendant/target of SLAPP. The second key element consists of the remedies against abusive court proceedings. This involves award of costs and compensation of damages to the defendant who has been targeted with a SLAPP. In addition, the court are given the possibility to impose penalties on claimants who have brought abusive court proceedings against public participation, with the aim of deterring potential claimants from initiating abusive court proceedings against public participation. The third key element would be to provide protection to SLAPP targets in the EU against SLAPP from third countries.

Art. 81(2)(f) TFEU allows the Directive to cover only cases with "cross-border implications". The Commission has opted to interpret the concept of "cross-border implications" in a broad sense since SLAPP cases often do not stop at borders. In order to increase legal certainty, the concept would cover also cases where the court seized and the parties are located and domiciled in the same Member State where a) the act of public participation against which court proceedings are initiated concerns a matter of public interest that is relevant to more than one Member State; b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.

Whilst SLAPP can be both domestic and cross-border, the cross-border cases are particularly complex and their speedy dismissal is even more important for preventing a chilling effect. A cross-border dimension of SLAPP makes such cases significantly more

challenging to defendants, who may need to fight proceedings brought in multiple jurisdictions at the same time. This results in additional costs and burdens with even more adverse consequences.

Currently there are very limited procedural safeguards against SLAPP, they are not SLAPP-specific and the situation varies between Member States. Cross-border safeguards would therefore also provide a model for Member States on how to efficiently fight against SLAPP at national level. Since the Member States need to transpose the Directive into their national civil law, it also makes sense, legally speaking, to provide the same safeguards for domestic and cross-border cases.

In a cross-border context, it is important to explore how to best protect EU journalists, human rights defenders and others from SLAPP filed in third countries. Protection from third-country SLAPP would involve refusal to recognize and enforce third-country judgements against EU journalists and human rights defenders on grounds of public policy in EU Member States, when the judgement is based on SLAPP. The second remedy against third-country SLAPP would allow the defendant (the EU journalist, human rights defender or other) who has suffered harm as a result of abusive third-country court proceedings against public participation to seek full compensation of damages in an EU court against a third-country claimant.

The relevant rules on jurisdiction and applicable law (set out respectively in the Brussels Ia Recast Regulation[94] and the Rome II Regulation[95]) will be assessed at a later stage as part of the ongoing evaluations of these Regulations and, if deemed appropriate, may be reviewed. As a first step, a legal study on the Rome II Regulation on law applicable to non-contractual obligations has been published. This study looks, among other issues, at SLAPP-specific issues related to applicable law, in particular at the current exclusion from the Regulation's scope of defamation claims. Another legal study on the Brussels Ia Regulation has been launched. Therefore, the anti-SLAPP initiative does not cover these elements.

The preparatory work as well as the discussions in the expert group against SLAPP set up by the Commission and with stakeholders suggest that a legislative approach alone,

[94] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

[95] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

especially since it would target only civil procedural safeguards against SLAPP in cross-border situations, may not be sufficient to protect targets of SLAPP in the most effective manner. Non-legislative measures would complement the legislative instrument and apply also to national cases and criminal and administrative law relevant to SLAPP. It will focus on aspects such as training, awareness raising, support and monitoring.

First, Member States are recommended to review their applicable legal frameworks to provide for the necessary safeguards to address SLAPP in full respect of fundamental rights including the right to freedom of expression, the right to access to justice and the right to the protection of personal data and democratic values.

Second, as judiciary and judicial staff as well as other legal professionals (e.g. lawyers) play a central role in an effective fight against SLAPP, Member States should support training opportunities on unfounded and abusive court proceedings against public participation for legal professionals such as judiciary and judicial staff at all court levels, lawyers, covering in particular the Charter and the European Convention on Human Rights as relevant in the SLAPP context. In addition, training should cover the case law of the ECtHR on ensuring freedom of expression and information with other fundamental rights. The level of awareness and knowledge of lawyers is important, in particular of lawyers who may have to defend a SLAPP target in court. To strengthen their capacity to deal with SLAPP, legal trainings should also be made available to journalists and other media professionals and human rights defenders. Adequate training will contribute significantly to informing journalists and human rights defenders of their rights and obligations, thus helping them to take the necessary steps to protect themselves from possible legal action.

Third, despite its prevalence in the EU, the SLAPP phenomenon, as well as the term itself, is still unknown to most citizens. Awareness raising efforts towards citizens and specific groups should provide a clear overview of the defence capabilities available to them under their national framework should they face an unfounded and abusive court proceeding against public participation and how to effectively use them.

Fourth, SLAPP targets encounter difficulties in finding relevant information to organise their defence and more generally legal assistance on how to address the situation. Member States are therefore recommended to ensure that targets of unfounded and abusive court proceedings against public participation have access to individual and independent support. To that end, Member States should also establish a focal point that gathers and shares information on all organisations that provide guidance and support for targets of unfounded and abusive court proceedings against public participation.

Fifth, an effective approach to counter SLAPP would require a more systematic monitoring of and data collection on SLAPP (including self-reporting). Member States should, taking into account their institutional arrangements on judicial statistics, entrust one or more authorities to collect and report to the Commission in full respect of data protection requirements, data on unfounded and abusive court proceedings against public participation initiated in their jurisdiction. To ease the collection of data, the authorities

entrusted to collect and report data can establish contact points in order for judicial authorities, professional organisations, non-governmental organisations, human rights defenders, journalists and other stakeholders to share data on unfounded and abusive court proceedings against public participation. There may also be existing structures that can support the collection of data. For example, National Human Rights Institutions, where established, may play an important role as independent entities that are able to collect data on and report SLAPP. Other entities such as ombudspersons' offices, equality bodies, or competent authorities such as those designated under the Directive on the protection of persons reporting on breaches of Union law[96] may also be relevant. National focal points providing an overview of support resources and the entities or authorities entrusted to collect and report data could be situated in the same organisation, taking into account the requirements and criteria described in this Recommendation.

The data collected should include sufficient information for authorities and other relevant stakeholders to quantify and better understand the phenomenon of SLAPP including in view of providing the necessary support. This includes for example the duration of proceedings. The data collected and reported should include: the number of SLAPP, initiated in the relevant year; the number of SLAPP dismissed early in the relevant year, both dismissed on merits and for procedural reasons; the type of defendant (e.g. journalist, rights defender, press outlet); the type of plaintiff (e.g. politician, private person, company); the statement or activity related to public participation that led to court proceedings; the initial damages requested by the plaintiff; the employed legal basis by the plaintiff; the length of the proceedings, including all instances; any identified cross-border element; and where available, other relevant data including the judicial costs of the proceedings; as relevant, the historical background of the case, the law firms representing the plaintiff.

The initiative (including both legislative and non-legislative measures) needs to preserve all parties' fundamental rights, e.g. data protection and privacy rights, and access to an effective remedy and a fair trial.

As necessary, the EU expert group against SLAPP established by the Commission[97] could support the development across Member States of comparable criteria that can be

[96] Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17.

[97] Register of Commission expert groups and other similar entities (europa.eu)

easily applied by the authorities entrusted to collect and report data on manifestly unfounded or abusive court proceedings against public participation.

The EU expert group against SLAPP supports the exchange and dissemination of practice and knowledge among practitioners on SLAPP related issues. It could provide among others technical assistance to authorities in setting up focal points, developing training material and organising legal assistance.

7. EXPECTED IMPACTS

Because the Commission is proposing a carefully targeted combination of legislative and non-legislative measures, there are no significant negative impacts for citizens or businesses to be expected.

The application of the proposed Directive will, however, have two main impacts for the specific group of SLAPP targets, namely to speed up litigation in SLAPP cases, and to reduce costs and burdens for SLAPP targets which can be expected to be significant.

Firstly, where a claim is dismissed early as manifestly unfounded in an accelerated procedure, it should be faster than dismissal in a normal procedure in accordance with national law.

Secondly, a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant, unless such costs are excessive. This cost rule is of significant importance for SLAPP targets because under otherwise applicable national law, they are often not reimbursed all their costs, in particular with regard to lawyers´ fees (see above under 5.2). That this is a problematic issue in general (outside the specific context of SLAPP) is highlighted by the fact that a large majority (69 %) of respondents of an evaluation study of national procedural laws and practices considered the (non-)recoverability of legal costs to be a significant or very significant impediment/obstacle to cross-border litigation.[98]

[98] An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, p. 136.

Furthermore, procedural savings can be expected for national justice systems due to the shortening of the duration of judicial proceedings in SLAPP cases. Successful deterrence of SLAPP would free court systems of the burden of dealing with manifestly unfounded and abusive proceedings allowing to focus their resources on meritorious (at least non-abusive) cases for the benefit of everyone.

The proposed Directive has an impact on fundamental rights, in particular on access to justice because it provides for an early dismissal of claims and rules on costs, damages and penalties which normally do not apply. The procedural safeguards are carefully targeted and leave the court sufficient discretion in individual cases to maintain the delicate balance between speedy dismissal of manifestly unfounded claims and effective access to justice. In particular, the early dismissal of a case is permitted only in cases where the court is in a position to come to the conclusion very early on that they are manifestly unfounded; in such cases access to justice is not limited but just effectively dealt with in view of an assessment on the merits. Furthermore, also the foreseen right to appeal against judgments dismissing claims early is intended to maintain the guarantee of access to justice. In this regard, it should be borne in mind that the aim of an abusive court proceeding is to harass and intimidate the defendant and not to gain access to justice. Therefore, safeguards provided to the defendant do not deprive the claimant of access to justice that the claimant is anyway not seeking in the first place. Also on the basis of the case law of the European Court of Human Rights, the proposed Directive balances access to justice as guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union and personality/privacy rights with the protection of freedom of expression and information.

The proposed Directive will also have an impact on the legal systems of Member States because their codes of civil procedure will have to be aligned with the Directive. This impact will, however, be limited since it concerns specifically targeted safeguards only.

Soft-law measures addressing SLAPP face the barrier of being non-compulsory. Addressing the decriminalisation of some activities may be difficult to achieve, requiring both substantive legal changes and political decisions. Such reform processes may be lengthy and could also face opposition at national level. Implementation costs of training, awareness-raising and support measures would otherwise likely be minor as synergies will be exploited. Monitoring measures are not expected to impose significant costs on national administrations as they will be able to rely on existing institutions and infrastructure, collect data from a variety of stakeholders and profit from synergies with existing instruments in the area of rule of law and protection of fundamental rights. Support will be provided by the Commission to ease the process of monitoring by developing templates.

Annex 1: Procedural information

1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

Lead DG: DG Justice

Planning reference: PLAN/2021/11950 (Directive) and PLAN/2021/11951 (Recommendation).

2. EVIDENCE AND SOURCES

This analytical Commission staff working document accompanying the initiative compiles the evaluative evidence. Evidence has been gathered through several consultation activities. In addition, the Commission commissioned two studies on the topic, in 2020 and 2021.[99] Furthermore, a recent European Parliament study, the EU Rule of Law reports (2020 and 2021), a recent report from the Fundamental Rights Agency on "Protecting civic space in the EU" as well as data stemming from the alerts reported on the Council of Europe platform for promoting the safety of journalists and the data gathered via the European Media Pluralism Monitor provide evidence.

There is no Impact Assessment on this initiative. As SLAPP target and harm actors who play a fundamental role in preserving the public interest in our democratic systems, it is crucial that strong and swift action be taken to prevent their extensive use. Given the nature of SLAPP, quantifying their incidence in the EU and the full extent of their economic impact is a challenge, and fully assessing their impact on democracy even more so. Due to a shortage of quantitative data, other available evidence have been used.

An expert group against SLAPP[100] has assisted the Commission in the preparation of the initiative and in the exchange and dissemination of best practice and information on SLAPP. A sub-group has supported the group's discussions with research on the relevant

[99] The study commissioned in 2021 has not yet been published.is available at: https://ec.europa.eu/info/files/strategic-lawsuits-against-public-participation-slapp-european-union-comparative-study_en. The study commissioned in 2020 is available at: https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf

[100] https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=3746

legal issues. A specific sub-group on monitoring has assisted with the relevant areas of the non-legislative measures.

Annex 2: Stakeholder consultation

The stakeholder consultation collected feedback on various aspects of the Commission's initiative against abusive litigation (SLAPP) targeting journalists and human rights defenders and its various policy options. Input and comments were received from a wide range of key stakeholders representing EU and non-EU citizens, national authorities, academics, research institutions, legal professionals, NGOs and other relevant interest groups.

The aim of the consultations was to gather feedback from those directly concerned by SLAPP, notably targets but also legal professionals such as judges, prosecutors or lawyers. Associations and organisations that represent and defend SLAPP targets, such as journalists' organisations and human rights defenders organisations, were considered to provide important input, as well as Member States, especially for information on the remedies available at the national level against SLAPP (albeit non-SLAPP specific), best practices and the dimension of SLAPP, despite the challenges of data collection.

CONSULTATION STRATEGY & CONSULTATION METHODS AND TOOLS

The Commission's consultation strategy included **five main consultation activities**, each of them having a different running period, recipient and/or object.

The consultation activities involved an **exploratory technical focus group discussion** in March 2021, with a selected number of participants that included four targets of SLAPP, who agreed to share their personal experience, provided useful insights on SLAPP and helped inform the preliminary, preparatory phase.

An **Open (online) public consultation** accessible via the Commission's central public consultations page[101], collected from 4 October 2021 to 10 January 2022 views of citizens, journalists, Member States, NGOs, civil society, judges, legal professionals and other stakeholders on SLAPP and what action should be taken to tackle it in the EU.

[101] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders/public-consultation_en

A **targeted consultation of national judges** took the form of a survey[102] shared through European Judicial Network in civil and commercial matters. It was launched on 12 November 2021 and remained open until 10 January 2022. It sought more detailed feedback on identification of SLAPP, potential procedural shortcomings, already existing (albeit non-SLAPP specific) national remedies, awareness of judges on SLAPP and judges' training needs.

A **technical meeting with Member States experts** in October 2021 gathered insights on Member States views (including experts from relevant Member States' independent bodies and authorities) on whether and what type of EU-level action could be needed against SLAPP, what judicial remedies (if any and general or specific) and what kind of support are currently available at national level to SLAPP's targets.

A **meeting/workshop with selected stakeholders,** with particular interest in issues related to SLAPP, provided in November 2021 a forum for discussion on the dimension of SLAPP, collecting information, discussing and testing possible solutions.

In addition, an **informal expert group** against SLAPP was set up in early 2021 (following a call published in December 2020) to assist the Commission in shaping an effective package against SLAPP. The expert group provided legal expertise as well as other good practice to help shape an effective initiative.

The Commission's work took also into account the **evidence gathered by the European Parliament** during the preparation of its own-initiative report on the matter adopted at the end of 2021. **Two studies on SLAPP** commissioned by the Commission also fed into the initiative.

IDENTIFIED STAKEHOLDERS

The following stakeholders were identified as relevant: citizens, SLAPP targets, NGOs and civil society organisations, media, publishing houses, associations involved in the protection of journalists, legal professionals, in particular judges, prosecutors, lawyers (e.g. having to organise the defence of a SLAPP target) and their training providers and professional networks, both at the European and national level, Member States, international organisations with a mandate in freedom of expression and democracy, other EU institutions (Council, European Parliament, European Economic and Social Committee, Committee of Regions) and agencies (Fundamental Rights Agency),

[102] https://ec.europa.eu/eusurvey/runner/EJN_SLAPP

ombudsman office, associations and organisations involved in democracy matters, other organisations, especially those involved in the protection of freedom of expression, research, academia and "think-tanks".

MAIN STAKEHOLDER FEEDBACK PER CONSULTATION ACTIVITY

Exploratory technical focus group discussion

The technical focus group discussion took place on 11 March 2021 with the aim to gather direct feedback from SLAPP targets or those working on SLAPP on the type of support that would be helpful. Among the ten participants (representing the media and civil society), four targets of SLAPP shared their personal experience and lessons drawn. Two academics and representatives of the Council of Europe helped putting the contributions into the wider context of fundamental rights and EU competences. The focus group discussed about the rising number of alerts received by the Council of Europe on its 2015 platform; the difficulty to establish a clear, undisputable criteria characterising a SLAPP case; the need for a mix of measures and a combined effort at EU and national level, such as easier access to legal aid and financial assistance for targets, awareness raising and training of legal professionals concerned; the complexity added by the cross border dimension of cases; the crucial role played by the independence of the judicial system and expertise of the judiciary professionals to identify and use tools available to end SLAPP cases.

Open (online) public consultation (OPC)[103]

The open public consultation received 178[104] replies from across the European Union and abroad, mostly from NGOs (70) and citizens (60), representing 22 Member States. However, some of the respondents were umbrella organisations with members in all Member States[105]. These EU-wide organisations reported that SLAPP are on the rise in the EU, including cross-border cases. Among the NGOs, organisations of journalists,

[103] The contribution received in the context of the OPC cannot be regarded as the official position of the Commission and its services and thus does not bind the Commission nor the contributions can be considered as a representative sample of the EU population

[104] The OPC received 146 replies but the Coalition against SLAPPs in Europe (CASE; the-case.eu) requested that 32 signatory organisations of its reply be each calculated as a respondent. However, for the purposes of illustrating facts and figures from the OPC, the Coalition has been considered as a single respondent

[105] e.g. European Broadcasting Union, EBU, and ILGA Europe

environmental organisations and human rights organisations were most prominent. The ENNHRI (European Network of Human Rights Institutions) flagged the use of SLAPP against national human rights institutions. Seven Member States[106] participated in consultation, including France and Czechia. Citizens, NGOs and trade unions strongly support EU-wide action against SLAPP, both legislative and non-legislative, whilst the views among Member States were more divided, in particular concerning legislative action.

The opinions expressed in the OPC were convergent in terms of the content of training on SLAPP and its audience, the need to raise awareness across the board and to provide support to SLAPP targets, the benefits of collecting data systematically and proper monitoring of SLAPP.

Feedback taken on board in the Recommendation includes in particular the invitation to review defamation laws, the promotion of professional and ethical standards on SLAPP, the emphasis on fundamental rights and practical information in SLAPP trainings, the forms of assistance to SLAPP targets and defendants, which comprise provision of information and public funding, as well as collection, monitoring and publication of SLAPP.

Some feedback was not taken into account, as it is outside the scope of the initiative (e.g. the possibility of the defendant to be substituted in proceedings by a third party, the setting up of a mechanism to refinance journalistic activities, the establishment of a EU register of claimants or of dedicated professional indemnity insurance schemes for journalists, and ensuring access to psychosocial support services).

Targeted consultation of national judges

The targeted consultation received 130 replies, in 11 languages[107]. All the respondents answered as individual national judges. Unlike the majority of respondent to the OPC consultation, the majority of judges were unfamiliar with the concept of SLAPP (60.77% of the respondents, 79 out of 130 replies). The respondents signalled that there is no legal definition of SLAPP or a special procedure in their Member State. However, many respondents referred to general remedies, which are applicable to SLAPP, such as

[106] CZ, EE, FI, FR, IT, LT and MT. Also some regional authorities (ES, DE) and national Ombudsmen (HR, PL).

[107] CZ, DE, FI, FR, IE, IT, LV, NL, PL, PT and SE

applicable law rules, an early dismissal procedure, legal aid for the target, third party interventions and suspensive measures. Majority of the respondents were not able to reply to the question related to the need of legislative changes at national and/or at the EU level. As for non-legislative measures, judges listed in order of preference: training (prioritizing specific training on SLAPP), exchange of best practices with other legal professionals in their Member State or from other Member States and a specific contact point for guidance and monitoring. The majority considered that SLAPP should be monitored in Member States.

Technical meeting with Member States experts

The meeting took place on 26 October 2021. The Commission presented the plan to propose a comprehensive initiative in the form of a package of both legislative and non-legislative components. Member States' experts discussed the questions prepared by the Commission with regard to the legislative elements, which are limited to civil procedural area. They also exchanged information on the provisions available under their national procedural systems, the cross-border dimension of the phenomenon and the possible key components of a legislative and non-legislative anti-SLAPP initiative at EU level. The French Presidency expressed a mainly positive opinion towards the initiative and considered that both legislative and non-legislative action is needed. In contrast, Czechia signalled that it would not support legislative action against SLAPP in cross-border situations and, instead, action should be non-legislative.[108] Most Member States[109] demonstrated support or some support. In contrast, FI, HU and PL expressed a negative opinion towards legislation. Some Member States[110] showed hesitation, in particular towards legislation, while others were still reflecting or on a waiting mode[111].

Stakeholder workshop

On 25 November 2021, the Commission organised a stakeholder workshop with participation of 34 interested organisations, including the Council of Europe and the Fundamental Rights Agency and with the participation of the European Parliament. The

[108] Both FR and CZ positions are based on their reply to the public consultation.

[109] BE, DE, ES, FR, HR, IE, IT, LV, LT, MT, NL, PT and SK.

[110] EE and SE

[111] AT, BG, EL, LU and RO

attending organisations expressed strong support to EU-level action on SLAPP and provided important additional evidence on SLAPP in the EU.

Other consultations

Informal expert Group

The Commission worked intensively both with the main Expert Group and the legislative sub-group, who met on a monthly basis. An informal sub-group on monitoring was also organised on 17 January.

European Parliament

The European Parliament adopted an own-initiative report on SLAPP on 11 November 2021[112] calling for the Commission to present a comprehensive package of measures against SLAPP, including legislation.

Commissioned studies

The Commission has also commissioned two studies in order to develop a better understanding of the phenomenon in the EU and a first mapping of the situation in the Member States.[113]

Feedback to the Roadmap

Feedback resulted from six NGO's, three EU citizens and a micro enterprise, whose countries of origin are Spain (2), Germany (2), Netherlands (1), Italy (1), Hungary (1), Czech Republic (1), Belgium (1) and Austria (1). The contributions emphasized the need of a broad definition of the personal and material scope and suggested to put in place procedural safeguards, such as accelerated proceedings, measures to deter the filing of multiple claims against the same claimant and related to the same publication, specialization of courts. Other suggestions concerned the mapping of SLAPP within the rule of law monitoring, funds to support and assist the targets and data collection.

Contributions received outside the formal consultations

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

[113] See Annex 1.

Ministry of Justice of Land Nordrhein-Westfalen in Germany issued a Position Paper, stating that the initiative can be supported insofar as corresponding mechanisms are to be launched in legal systems which do not yet offer sufficient protection against abusive court proceedings. The basic prerequisite for combating SLAPP claims however is to ensure the independence, quality and efficiency of the judicial systems of the member states. Where effective procedural and substantive rules for the dismissal of abusive claims already exist in Member States, the intended European requirements should take these into account and be consistent with them. Amendments to international civil procedural law and soft law measures appear particularly suitable to prevent possible abuse.

The Office of the Croatian Ombudsman issued the replies to the questionnaire of the OPC via mail outside the EU survey Portal, reporting that they had not been granted user profile registration. The contribution has been taken into account even if it does not result the statistics provided by the software available to the Commission services.

The Government of Malta issued the replies to the questionnaire of the OPC via mail outside the EU survey Portal two days after the closure. The contribution has been taken into account but it has not been included in the statistics provided by the software available to the Commission services.

Annex 3: Overview of the characteristics of civil proceedings in Member States relevant for SLAPP

1 Early Dismissal

As explained in the analysis of the characteristics of SLAPP, they aim at draining defendant's resources, such as time and money. Because of that, the possibility to detect and dismiss a SLAPP at the earliest stage possible is a critical measure in the anti-SLAPP toolbox. At the same time, the benefits of early dismissal must be weighed against the principle of the right to be heard and right of access to justice.

1.1 First instance proceedings

The technical workshop with Member States on 26 October 2021 revealed that none of the Member States had any specific safeguards against SLAPP. However, some Member States have reported on general procedural safeguards, which may provide some protection against SLAPP. This section concerns predominantly provisions that allow the court to dismiss a SLAPP before the first hearing. Table 1 presents seven EU jurisdictions (CY, EE, FI, NL, PL, PT, SE), where reasons that could be associated with a SLAPP case - such as lack of sufficient interest, a clearly unfounded claim or its frivolous nature – could lead to such dismissal.

Member State	Condition	Result; stage of the proceedings	Remarks
Cyprus	Action is frivolous or vexatious (Order 27 Rule 3 of the Civil Procedure Rules)	Action stayed, dismissed or judgement to be enter accordingly	Applies to any stage of the proceedings
Estonia	- The violation of the rights of the plaintiff is not possible on the basis of the factual circumstances presented; - The action is not filed for the protection of a right or interest of the plaintiff protected by law or for a purpose for which the state should grant legal protection, or the action cannot achieve the aim pursued by the plaintiff (article 371(2) of the	The court may refuse to hear an action – inadmissibility.	

	Civil Procedure Code)		
Finland	- Claim is clearly unfounded - No sufficient interest in bringing the case	Inadmissibility	
Netherlands	- No sufficient interest in bringing the case (Article 3:303 of the Civil Code)	Inadmissibility	Applies to all legal remedies during the course of proceedings[114]
Sweden	- Plaintiff's statement does not constitute a legal basis for the case - Case is clearly unfounded (Chapter 42 Section 5 Code of Judical Procedure)	The court may enter into judgement without issuing a summons – decision on the merits.	
Portugal	Claim is manifestly unfounded (article 590(1) of the Civil Procedure Code)	Claim is dismissed	
Poland	Claim is obviously unfounded (article 191^1 of the Code of Civil Procedure)	Dismissal – decision on the merits during an *in camera* sitting	Analogous conditions are laid down for an appeal that is lodged against a judgement issued pursuant to article 191^1 (article 391^1 of the Code of Civil Procedure)

Table 1. *Instruments allowing for early dismissal of the case in civil proceedings at the court of first instance*

[114] ECLI:NL:HR:1928:86, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1928:86

As to the conditions, only the Cypriot provision refers explicitly to a "frivolous or vexatious" action, which may be best suited to counter SLAPP. The remaining provisions refer to, i.e., the action being "manifestly unfounded" and the lack of sufficient interest. With regard to the result, the mechanisms allow for declaring an action as inadmissible or for dismissing it by entering into judgement. While both of these solutions are beneficial for potential SLAPP defendants, the second one allows the case to gain a *res iudicata* quality – barring subsequent attempts to bring the same case before a court.

Case law and/or legal commentaries underline the extraordinary nature of the above-described mechanisms. The Supreme Court of Cyprus has underlined that the use of Order 27 is "appropriate only in cases that are simple, obvious and clear" and cannot be applied where the decision required taking testimony either in writing or orally.[115] In Estonia, an action may be dismissed only if the plaintiff's claim could not be upheld on *any* substantive basis, even one not mentioned in the claim itself.[116] The courts may also not examine any evidence when deciding to dismiss a claim.[117] The Supreme Court of the Netherlands has also ruled that courts should be cautious about rejecting a claim on the ground that there is no sufficient interest.[118]

In some jurisdictions, the possibility to use the early dismissal mechanism for SLAPP cases has been questioned explicitly. According to legal commentaries concerning the Dutch mechanism, it seems that the fact that an action is lodged only to harm another party or for a purpose other than that for which the legal remedy was envisioned does not, in itself, mean that there is no sufficient interest in the proceedings.[119] Similarly, the

[115] Judgement of the Supreme Court of Cyprus in the case Charilaos Aloneftis Ltd. (Industry) and Others Alpha Bank Ltd former Lombard Natwest Bank Ltd (2003) 1 AAD 990.

[116] Judgement of the Supreme Court of Estonia of 5 June 2007, 3-2-1-56-07, points 11 and 12, points 11 and 12 https://www.riigikohus.ee/et/lahendid/?asjaNr=3-2-1-56-07

[117] Judgement of the Supreme Court of Estonia of 6 January 2021, 2-19-20574, points 9 and 10, https://www.riigiteataja.ee/kohtulahendid/fail.html?id=281852456; Judgement of the Supreme Court of Estonia of 2 May 2012, 3-2-1-31-12, point 13 https://www.riigiteataja.ee/kohtulahendid/fail.html?id=206130530

[118] Judgement of the Sureme Court of the Netherlands of 17 September 1993, ECLI:NL:HR:1993:ZC1058, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1993:ZC1058

[119] V.C.A. Lindijer, De goede procesorde (BPP nr. IV) 2006/9.5.3.2, at 546, https://www.navigator.nl/document/ida1a9a6de8f62af34ba43ec31f7d810d5/de-goede-procesorde-burgerlijk-proces-praktijk-nr-iv-9532-criteria-voor-misbruik-van-procesbevoegdheid-uitoefening-zonder-redelijk-belang?ctx=WKNL_CSL_1311

Appellate Court in Łódź (Poland) has ruled that the early dismissal mechanism "…seems to refer primarily to situations in which, by bringing an action, a party seeks neither to obtain a favourable judgment nor to oppress his opponent, but merely to instigate legal proceedings for the sake of participating in them".[120]

Finally, in some legal systems that do not foresee explicitly a possibility for early dismissal of a case, there are some elements which may nevertheless expedite proceedings of SLAPP, to the benefit of the defendant.

In Slovakia, the court may, pursuant to article 171(2) of the Code of Civil Procedure (*Civilný sporový poriadok*) decide the merits of a case during a preliminary hearing, as long as it is "possible and expedient". (In other cases, the preliminary hearing serves as an opportunity for the court, together with the parties to the dispute, to determine whether the procedural conditions have been met and to take measures to eliminate the identified deficiencies, determine which factual allegations are disputed, take decisions on evidence and the expected data of the hearing.)

Pursuant to article 86a(2) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*), if a written pleading consists of confused, unclear or pointless statements, and if it fails to recognise the request, or exhaustively repeats points of dispute which have already been settled or claims already made, it shall be rejected without any attempt to improve it. Similarly, pursuant to Order 19 r. 26 of the Cypriot Civil Procedure Rules, the court may at any stage of proceedings order to struck or amend any matter in any of the pleadings which may be unnecessary, scandalous, or which may tend to prejudice, embarrass or delay the fair trial of action. These tools, which concern specific pleadings or actions and aim at countering the unnecessary delay of proceedings, bear resemblance to instruments allowing judges to punish the abuse of procedural rights (see below under 5.2).

1.2 Second instance proceedings

There are also some possibilities for "early" dismissal of a SLAPP case at the courts of second instance (appellate courts). Table 2 contains relevant mechanisms from seven EU jurisdiction (DK, MT, EE, ES, IE, IT, PT).

[120] Judgement of the Appelate Court in Łódź of 30 October 2020, I Aca 1050/20, https://sip.lex.pl/#/jurisprudence/523201844 (own translation, emphasis added).

Member State	Provision	Condition	Result/procedure
Estonia	Article 637(1)(6) of the Civil Procedure Code	The appeal could manifestly not be upheld.	The court of appeal should not accept an appeal.
Spain	Article 473 Civil Procedure Act	The appeal is manifestly unfounded (concerns only extraordinary appeals for procedural infringements).	The appeal shall be declared inadmissible.
Ireland	Order 19, Rules 27-28 of the Superior Court Rules	The action is frivolous or vexatious.	The Court may order the action to be stayed or dismissed, or judgment to be entered (issued) accordingly, as may be just.
Italy	cf. Art. 348 bis Civil Procedure Code	The appeal has no reasonable probability of being upheld.	The appeal is dismissed, after a hearing in which the court has to determine the changes that the appeal will be upheld.
Malta	Section 195(7) of the Code of Organisation and Civil Procedure	The appeal is frivolous and vexatious.	The Court of Appeal may dismiss the appeal in open court on the day fixed for the first hearing, after the written pleadings are deemed to be concluded.
Portugal	Article 656 of the Civil Procedure Code	The appeal is manifestly unfounded.	The rapporteur shall give a summary decision, which may consist in a simple reference to a previous decision.

Table 2. *Instruments allowing for early dismissal of the case in civil proceedings at the court of second instance*

This shows that some jurisdictions set significantly higher conditions for appeals than for the claims submitted at first instance and may therefore constitute a barrier against

frivolous SLAPP appeals. In particular, two jurisdictions (IE and MT) foresee the "frivolous and vexatious" nature of an appeal as a reason for an early dismissal.

2. Abuse of procedural rights

The principle of prohibition of abuse of rights is a principle common to the legal traditions of essentially all the Member States. This is reflected in the fact that the Grand Chamber of the Court of Justice recently recognised that the principle of prohibition of abuse of rights is a general principle of Union law, which individuals must comply with.[121] Similarly, Article 54 of the Charter of Fundamental Rights explicitly lays down the prohibition of abuse of rights. That provision is itself based on Article 17 of the ECHR[122] which also sets out the prohibition of abuse of rights.

Whilst this principle has a wider application in the legal systems of the Member States, it also applies – in almost every Member State – to the abuse of procedural rights during judicial proceedings. As such, it is intended to prevent – or at least discourage – the lodging of abusive legal actions and/or the submission of abusive procedural requests during the course of proceedings. If effective, it can therefore prove a useful means of countering SLAPP, provided that the latter fulfil the conditions laid down in national law to be considered as abusive.

It appears that virtually all Member States – with the exception of Denmark – apply the principle of prohibition of abuse of procedural rights to civil proceedings. There are, however, significant differences in the way the principle is applied in practice. In particular, two main distinctions ought to be highlighted. Firstly, Member States apply different criteria to determine whether an action is abusive (2.1). Whereas a majority of Member States applies the concept of good/bad faith in order to determine whether a given action is abusive, other national legal systems focus on whether the (procedural) right is being relied upon for reasons other than those intended by the legislator. Secondly, national legal systems diverge on the sort of remedy to be granted in case the action is indeed deemed abusive (2.2). On the one hand, most Member States prefer either to award damages to the party which has suffered from the abusive action or to impose fines on the party that acted abusively. On the other hand, some Member States

[121] Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63, paragraph 49. See also Stefan Vogenauer, 'The Prohibition of Abuse of Law: An Emerging General Principle of EU Law' in Rota de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law* (Hart 2011) 521.

[122] Cf. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17.

have chosen to empower the national courts to dismiss abusive requests or actions instead.

2.1 Criteria for abuse of rights

In all Member States a party to legal proceedings will be deemed to have acted abusively only in exceptional circumstances. Indeed, as parties are, in principle, entitled to bring legal actions and to rely, during the course of proceedings, on the procedural rights available to them, it is only in particularly extreme situations that national courts will make a finding of abuse of rights.

For instance, the Lithuanian Supreme Court has stressed that it is only in exceptional circumstances that it can be concluded that a procedural right was abused, namely when the right was manifestly not used for the purpose for which it was intended.[123] The Portuguese Supreme Court equally ruled that courts should be cautious, prudent and reasonable when examining whether there is a case of bad faith litigation, which only occurs when it is demonstrated, manifestly and unequivocally, that the party acted maliciously or with severe negligence.[124] Similarly, according to the Italian Supreme Court, punitive damages for abusive appeals cannot be awarded simply because the grounds of appeal were unfounded – or even manifestly founded. Rather, they can only be awarded if the party failed to display the minimum level of diligence that would have allowed it to realise that its arguments were unfounded or inadmissible.[125]

The exceptional nature of a finding of abuse of rights is also reflected in the case-law of the European Court of Human Rights on the application of Article 17 of the Convention. In its first ever judgment, the Strasbourg Court held that the crucial criterion for an assessment under Article 17 of the ECHR is whether the applicant sought to rely on his/her Convention rights '*in order to justify or perform acts contrary to the rights and freedoms recognised therein*'.[126] Thus, the Grand Chamber of the Court has for instance held that the glorification of wartime French collaborators, which fell short of denying

[123] Judgment of the Supreme Court of Lithuania of 29 October 2020, No 3K-3-279-684/2020.

[124] Judgment of the Supreme Court of Portugal of 2 June 2016, No 2326/22.09TBLLE.E1.S1.

[125] Judgment of the Supreme Court of Italy of 20 April 2018, No 9912.

[126] ECtHR, Lawless v Ireland, ECLI:CE:ECHR:1961:0701JUD000033257, para 7.

Nazi atrocities committed in France, was not an abuse of the freedom of expression enshrined in Article 10 of the Convention.[127]

Generally, all national legal systems require a case-by-case, in-depth assessment. For instance, the Spanish Supreme Court has called for a prudent and restricted application of the doctrine of abuse of rights, underlining that a finding of abuse requires strong and effective proof of the exercise of an action for a tortious and fraudulent purpose.[128] In Germany, the case-law has also explicitly underlined the need for a careful examination and weighing of the relevant individual circumstances, taking into account the behaviour of the claimant in pursuing the action, the type and severity of the incriminated behaviour and the behaviour of the defendant.[129] Furthermore, in carrying out their assessment, national courts must take into account not just the behaviour of the parties during the course of proceedings, but also prior to them.[130]

The need for an individual assessment demonstrates the difficulty inherent in drawing up general criteria to determine the abusive nature of a party's conduct during legal proceedings. Indeed, in most circumstances, a finding of abuse will be extremely case-specific and based on the unique circumstances of those proceedings. Nonetheless, national legislators and national courts have sought to devise different sets of criteria to guide the assessment to be carried out by the courts. Whilst each national legal system has its own peculiarities, two main strands can be identified.[131] On the one hand, approximately half of the Member States rely – at least to some extent – on the concept of good faith and a party will thus be considered as having acted abusively if it failed to comply with the requirement of good faith. On the other hand, in some Member States, national courts examine whether the party's conduct was motivated by a purpose other than that for which the procedural right had been bestowed upon that party.

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[127] ECtHR, Lehideux and Isorni v France, ECLI:CE:ECHR:1998:0923JUD002466294, para 47.

[128] Judgment of the Supreme Court of Spain No 4623/2010.

[129] BGH, Judgment of 15 December 2011 - I ZR 174/10 (OLG Hamm) Bauheizgerät, para 15; OLG Brandenburg (6. Zivilsenat), Judgment of 26 June 2020 – 6 U 119/19, para 18.

[130] OLG Brandenburg (6. Zivilsenat), Judgment of 26 June 2020 – 6 U 119/19, para 19.

[131] One outlier in this respect is Ireland, where the crucial test for granting the so-called Isaac Wunder orders is whether the plaintiff has habitually or persistently instituted vexatious or frivolous civil proceedings. See Lavery J. in *Keaveney v Geraghty* [1965] IR 551. Similarly, the Maltese Code of Organisation and Civil Procedure refers to '*frivolous or vexatious*' appeals.

2.1.1 Good/bad faith

Most legal systems contain a provision requiring parties to legal proceedings to act in good faith. Either by means of legislation or through case-law, these provisions have become also the underlying legal basis for a finding of abusive of procedural rights. This is, for example, the case of:

1. Section 200 of the Estonian Civil Procedure Code[132]
2. Section 74(6) of the Latvian Code of Civil Procedure[133]
3. Article 95 of the Lithuanian Civil Procedure Code[134]
4. Article 6(1) of the Luxembourgish Civil Code[135]
5. Article 5 of the Hungarian Code of Civil Procedure
6. Article 1295(2) of the Austrian Civil Code.

That said, the way in which legal systems have articulated and implemented the principle of good faith varies greatly.

In **Germany**, an action is admissible only if it has *Rechtsschutzbedürfnis*, which roughly translates to 'need for legal protection'.[136] This prerequisite is a generally recognised legal principle, which is common to all procedural rules. It is derived from the principle of good faith enshrined in § 242 of the *Bürgerliches Gesetzbuch* (Civil Code), which obliges the parties to legal proceedings to conduct honest litigation and prohibits the abuse of procedural rights. The exercise of such rights is illegal and therefore inadmissible if they are used for purposes other than those stipulated by law and which, whilst not necessarily forbidden, are legally disapproving.[137] Accordingly, whilst based

[132] See judgment of the Estonian Supreme Court of 2 November 2017, No 21462992.

[133] '*Parties shall exercise their rights and perform their obligations in good faith.*' The official translation of the Code is available here. For an example of a practical application of Section 74, see judgment of the Supreme Court of Latvia of 25 August 2020, SKC-1304/2020.

[134] See the judgment of the Supreme Court of Lithuania of 29 October 2020, 3K-3-279-684/2020.

[135] See judgment of the Cour de Cassation of Luxembourg of 5 January 1993, pas. Lux, XXIX, p.241.

[136] As the German Federal Constitutional Court explained, there is an interest in legal protection as long as the person seeking legal protection is currently affected and can achieve a concrete practical goal with the legal remedy (BVerfG, judgment of 05 December 2001 - 2 BvR 527/99 -, para 33).

[137] OLG Brandenburg (6. Zivilsenat), judgment of 26 June 2020 – 6 U 119/19, para 18.

on the principle of good faith, the concept of abuse of rights in German law draws also from the second type of criteria chosen in certain Member States, namely whether procedural rights are used for purposes other than those provided for by law.

The **Spanish** Civil Code also provides that rights must be exercised in accordance with the requirements of good faith. Article 7 of the Code specifically provides that any act or omission which by the intention of its author, by its object or by the circumstances in which it is carried out manifestly exceeds the normal limits of the exercise of a right, with damage to third parties gives rise to liability in damages. According to the Spanish Supreme Court,[138] three cumulative conditions must be fulfilled in order for a court to make a finding of abuse of rights. First, a party has used a right, which is objectively or externally legal. Second, the exercise of that right has caused damage to an interest of a third party, which is not protected by a specific legal provision. Third, the damage must be of an immoral or anti-social nature, either from a subjective perspective (i.e. the right is replied upon with the intention to harm, or simply without a serious or legitimate aim) or from an objective perspective (i.e. the damage is the result of the excessive or abnormal reliance on the right, which is contrary to the right's economic-social purpose).

In **Italy**, Article 96 of the *Codice di procedura civile* (Civil Procedure Code) provides that the losing party in a civil case may have to pay compensatory as well as punitive damages. The latter may be awarded in case the losing party acted in bad faith or with gross negligence. In accordance with the case-law of the Italian Supreme Court, bad faith requires that the party knew that the arguments it presented in court were unfounded, whereas gross negligence corresponds to a lack of normal diligence that would have allowed the party to realise that its arguments were unfounded.[139] Punitive damages have, for instance, been awarded where the cassation appeal on a point of law requested, in essence, a new assessment of the facts or of the substance of the case, which is clearly inadmissible in such appeals.[140] Damages have also been awarded where the judgment under appeal was fully reasoned and the grounds of appeal submitted by the losing party were manifestly wrong.[141] On the other hand, the Supreme Court has refused to award

[138] Judgment of the Supreme Court of Spain of 3 April 2014, No 159/2014.

[139] Judgment of the Supreme Court of Italy of 13 September 2018, No 22405.

[140] Judgment of the Supreme Court of Italy of 2 April 2019, No 9064.

[141] Judgment of the Supreme Court of Italy of 28 November 2019, No 31075.

punitive damages where the applicable legal framework was unclear[142] or where the arguments presented seemed *prima facie* well founded or at least worthy of careful examination.[143]

Portugal seems to be the only Member State in which the national legislator laid down in the Civil Procedure Code, in an explicit and exhaustive manner, the circumstances in which a party to legal proceedings can be considered to have acted in bad faith. Article 542(2) of the Civil Procedure Code lists four instances of bad faith, including the fact that the party in question used the proceedings or procedural means in a manifestly reproachable manner. It should be stressed, however, that, as noted also by the Portuguese Supreme Court, a party only acts in bad faith where there is clear evidence of willful or grossly negligent conduct.[144] Thus, the Court of Appeal of Lisbon has defined a party acting in bad faith as '*the party which, not only intentionally but also with gross negligence, makes a manifestly unfounded claim or opposition, alters by action or omission the truth of the relevant facts, commits an inexcusable omission of the duty to cooperate or makes a reproachable use of adjectival instruments*'.[145]

2.1.2 Purpose of the action

In a smaller number of Member States, the assessment of an abuse of procedural rights is instead based on whether the party to the proceedings relied upon a right for a purpose other than that intended by the law. This is the case, for example, in Czechia, in the Netherlands, in Poland and, to some extent, in Italy. However, whereas in Czechia and in Italy this criterion results from the case-law of the national courts, in the Netherlands and Poland[146] it is explicitly provided for in national law.

In particular, Article 3:13 of the **Dutch** Civil Code provides a non-exhaustive list of circumstances that constitute an abuse of power. One of those three circumstances refers to situations in which a power is exercised for a purpose other than that for which it was

[142] Judgment of the Supreme Court of Italy of 24 September 2020, No 20039.

[143] Judgment of the Supreme Court of Italy of 7 January 2021, No 87.

[144] Judgment of the Supreme Court of Portugal of 11 December 2003, SJ200312110038937.

[145] Judgment of the Court of Appeal of Lisbon of 27 April 2017, ECLI:PT:TRL:2017:735.15.3T8LSB.L1.2.66.

[146] Article 4 of the Polish Code of Civil Procedure.

granted. Since it may not be very easy to assess for what reason the legislature granted a given power relating to legal proceedings, the judgment finding that there has been an abuse of power may, sometimes, have a circular reasoning. In other words, the court will first examine the reason for which the party exercised its power and will then decide whether such a reason could possibly have been the reason intended by the legislature. For instance, it is unlawful to conduct proceedings seeking to bring pressure to bear on another person, to encourage that other person to provide a service on a matter other than that brought before the court or to cooperate better in other proceedings. The same is true if procedural powers are exercised for the sole purpose of prolonging the legal proceedings.[147]

In **Czechia**, the Supreme Court ruled in 2015 that '*an abuse of a procedural right may be regarded as an act of a party which is contrary to the purpose of a procedural rule or to a procedural concept and by which a party seeks to obtain an advantage unforeseen by procedural law or to frustrate the proper conduct of proceedings*'.[148]

The **Italian** Supreme Court held that one the circumstances in which punitive damages may be awarded at the end of civil proceedings is where the losing party abused the *potestas agendi*, i.e. if it initiated civil proceedings for reasons other than those for which the legal remedy was originally intended.[149]

It is also interesting to note that the case-law of the **Court of Justice** would appear to also fit within this category, at least to some extent. As the Court has explained, a finding of abuse requires a combination of objective and subjective elements.[150] In particular, with regard to the objective element, it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved. Thus, when assessing the objective element, the Court examines whether a party's reliance on the rights laid down in Union

[147] V.C.A. Lindijer, *De goede procesorde (BPP nr. IV)* 2006/9.5.3.2, point 550.

[148] Judgment of the Supreme Court of the Czech Republic of 10 February 2015, No 30 Cdo 3190/2014.

[149] Judgment of the Supreme Court of Italy of 13 September 2018, No 22405.

[150] Judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 44 to 46.

law is one of the possible situations in which the objectives of the piece of Union law at issue are achieved, in which case there can be no abuse of right.[151]

2.2 Remedies granted in case of abuse of rights

2.2.1 Award of damages and imposition of fines

In the majority of Member States, the primary remedy granted where a court has made a finding of abuse of procedural rights is of a financial nature. In principle, such a remedy can take two forms: either the winning party is awarded damages or the losing party is ordered to pay a fine. Furthermore, whereas in most cases only one of these remedies will be granted, in Belgium, Lithuania, Poland and Portugal a court can potentially grant both.[152]

The imposition of a **fine** is provided for in Latvia,[153] Hungary,[154] Malta[155] and Slovakia[156]. However, it is questionable to what extent such fines can have a real dissuasive effect upon parties intending to pursue SLAPP. Fines range from between 15 and 2 500 EUR in Belgium, to a maximum of 1 200 EUR in Latvia and up to 5 000 EUR in Lithuania. Whilst such amounts could dissuade an average person from lodging abusive proceedings, they could scarcely have a real impact on wealthy individuals or big corporations.

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[151] Ibid., paragraph 49. As it is clear from the Opinion of AG Wahl in *Torresi* (C-58/13 and C-59/13, EU:C:2014:265, paragraph 95), a finding of abuse would require, in essence, unequivocal evidence that the person concerned sought to fulfil the conditions laid down in Union law by fraud or illegal means, such as forgery, bribery or misrepresentation).

[152] For Belgium, see Article 780 *bis* of the *Code judiciaire*. For Lithuania, see Article 95 of the Civil Procedure Code. For Poland, see Article 226(2) of the Code of Civil Procedure. For Portugal, see Article 542 of the Code of Civil Procedure.

[153] Article 74(6) of the Code of Civil Procedure.

[154] Article 5 of the Code of Civil Procedure.

[155] In the form of increased court courts to be paid to the Registrar of Courts in accordance with the Code of Organisation and Civil Procedure.

[156] Article 58 of the Code of Civil Procedure.

In most other Member States, national courts are empowered to order the losing party to bear the additional costs linked to the legal proceedings[157] and/or to indemnify the winning party for the **damages** it suffered. In particular, in a number of Member States, the losing party can be required to pay compensation to the winning party for material and non-material damage. This is for instance the case in Spain,[158] Italy,[159] Luxembourg,[160] Austria,[161] Portugal[162] and Romania.[163]

Interestingly, the Italian Code of Civil Procedure also lays down the possibility to award **punitive damages** on top of the compensatory damages.[164] Although such a possibility was introduced already in 2009, its use has been limited thus far as a consequence of the diverging views as to its scope of application expressed in the case-law, including the case-law of the Supreme Court. More recently, the Supreme Court has, however, begun to clarify the issue and has started applying the provision on a regular basis.[165] Since punitive damages are a real novelty in the Italian legal system, their introduction was subject to some controversy in light of the wide margin of discretion exercised by the national courts when determining the amount of damages. The Supreme Court has thus sought to limit that discretion by ruling that the amount of punitive damages should be calculated by reference to the cost of proceedings.[166] Such an approach would, however,

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[157] This is for instance the case in Czechia. See Article 147 of the Code of Civil Procedure. Italian criminal law also provides for the reimbursement of the costs of proceedings, to be born – under certain circumstances – by the person who alleged having being defamed. See, in that regard, Articles 427 and 541(2) of the Code of Criminal Procedure.

[158] Article 1902 of the Civil Code.

[159] Article 96, first indent, of the Code of Civil Procedure.

[160] Article 6 of the Civil Code and Article 240 of the New Code of Civil Procedure.

[161] Article 408(1) of the Civil Procedure Code.

[162] Article 542 of the Code of Civil Procedure.

[163] Article 12 of the Civil Code.

[164] Article 96, third indent, of the Code of Civil Procedure.

[165] Judgments of the Supreme Court of Italy of 2 April 2019, No 9064; of 28 August 2019, No 21759; of 21 November 2019, No 30328; of 28 November 2019, No 31075; of 20 April 2020, No 7954 and of 3 November 2020, No 24258.

[166] Judgment of the Supreme Court of Italy of 13 September 2018, No 22405.

seem to limit the effectiveness of punitive damages. In a 2018 judgment,[167] the Supreme Court ordered Ryanair to pay just 5 000 EUR in punitive damages, since the costs of proceedings were 5 200 EUR. Whilst punitive damages can be awarded on top of compensatory damages, it is doubtful whether such limited amounts can have a real deterrent effect on a big company like Ryanair.

2.2.2 Dismissing an action or request

In a more limited number of Member States, a finding of abuse of procedural rights can be a ground for dismissing an action or a request lodged by the party that committed the abuse in question. Such a dismissal can take various forms. German courts are for instance empowered to dismiss as inadmissible **legal actions** that lack *Rechtsschutzbedürfnis* on account of their abusive nature.[168] Claims have even been dismissed as inadmissible due to their abusive character without an explicit reference to the concept of *Rechtsschutzbedürfnis.*[169] In Cyprus,[170] defendants can request that the court dismiss or set aside the whole claim or just a part of thereof on the ground that the proceedings are frivolous or vexatious or constitute an abuse of the court's process. An application to set dismiss or strike out court proceedings must be made without delay and as soon as possible, preferably before the filing of a statement of defence. As explained by the Cypriot Supreme Court, such a procedure cannot be applied in cases where diagnosis of the problem requires a lot of examination, argumentation of reflection.[171] It is an exceptional and drastic measure which must be exercised sparingly and only in obvious and clear cases.[172]

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[167] Judgment of the Supreme Court of Italy of 20 April 2018, No 9912.

[168] OLG Brandenburg (6. Zivilsenat), judgment of 26 June 2020 – 6 U 119/19, para 17; OLG Hamm (5. Zivilsenat), Notice Decision of 10 August 2015 - 5 U 46/15, para 15. See also VG München (16. Kammer), judgment of 8 April 2008 - M 16 K 07.3303.

[169] BGH, decision of 12 July 2012 − V ZB 130/11, para 10; BGH, judgment of 17 November 2005 - I ZR 300/02 (OLG Hamburg) MEGA SALE.

[170] Order 19 r.26 & Order 27 r.3.

[171] Charilaos Aloneftis Ltd. (Industry) and Others Alpha Bank Ltd former Lombard Natwest Bank Ltd (2003) 1 AAD 990.

[172] Judgment of the Supreme Court of Cyprus of 22 November 2017, Nasas Papatapiou Christofidou N. Radio Foundation of Cyprus, Political Appeal No. 226/2012.

In certain jurisdictions, the powers of national courts are even more wide-ranging, as they entail the right to dismiss even **individual motions** raised by a party during the proceedings. In the Netherlands, Article 3:13 of the Civil Code[173] enables courts to make exceptions to powers and rights, often enshrined in law, when they are used in an unacceptable manner. Thus, during the course of proceedings, a court can rely on Article 3:13 BW to (partially) set aside a provision conferring a given power on a party, insofar as the exercise of that power would constitute an abuse of power. This may therefore apply to both procedural rights of parties during the proceedings (e.g. the right to request a hearing[174] or to hear witness testimony) as well as to the forms of order sought by the parties.[175] Similarly, Latvian courts may rely on Article 74(6) of the Code of Civil Procedure to dismiss requests on the ground that they were not submitted in good faith.[176] The powers of Estonian courts are perhaps even more extensive, since Section 200 of the Code of Civil Procedure stipulates that the courts must not allow parties to abuse their rights, prolong the proceedings or mislead the court, thereby providing also for an active role of the court. For instance, in a 2017 judgment,[177] the Estonian Supreme Court held that a breach of the principle of acting in good faith needed to be taken into account when judging the evidence presented to the court, insofar as one party's actions could potentially have hindered the other party's chance to present their own evidence.

Finally, the Irish legal system appears to provide the most effective means of redress in case of repeated abusive actions lodged by the same claimant against the same defendant. If the claimant is found to have habitually or persistently brought frivolous or vexatious actions against the defendant, the court may issue a so-called **Isaac Wunder order**, i.e. an injunction preventing the claimant from suing the defendant without a preliminary leave from court.[178] If, despite the Isaac Wunder order, the claimant brings an action

[173] Where relevant, by virtue of Article 3:15 of the Civil Code.

[174] See, for instance, judgment of the Supreme Court of the Netherlands of 24 June 2016, No 15/03942, ECLI:NL:HR:2016:1290.

[175] F.S. Bakker, *Billijkheidsuitzonderingen (SteR nr. 40)* 2018/4.2.2.

[176] See notably judgment of the Supreme Court of Latvia of 25 August 2020, SKC-1304/2020

[177] Judgment of the Supreme Court of Estonia of 2 November 2017, No 21462992.

[178] High Court, unreported, Ó Caoimh J., 11 May 2001 at pp. 2-3; affirmed by the Supreme Court (Keane C.J.) on 19th October 2001. See also Queen's Bench Division, unreported, Auld L.J. and Smedley J., 14th April, 1997.

against the defendant in question without first obtaining leave from court, the defendant is not required to appear or take any steps in relation thereto. Such proceedings would be treated as void and of no effect. Whilst this remedy is highly effective against repeated future claims, it does not constitute a basis for striking out the first claim lodged by the plaintiff despite its clearly frivolous or vexatious nature.

Annex 4: Cost Rules in Member States

Member State	Lawyer fees	What do civil proceeding costs include	Procedural fees/costs - when are they paid	Loser pays principle
Austria	Fees paid to lawyers for services rendered can be freely agreed upon between client and lawyer	The court fees payable for using the services of the courts take the form of either a flat fee or a proportional fee of the basis of assessment.	**Court fees** - For civil proceedings at first instance a flat-rate fee must be paid when lodging the application. Generally, each party must initially pay the costs incurred by their involvement in the proceedings. Mutually incurred costs are initially to be equally split between the parties.	**Yes** – the principle is that the costs are awarded to the successful party, when the court decides the case it makes an order to costs. A party who loses a dispute in every respect must compensate the other party for all the fees and costs that were necessary for the proper prosecution or defence of the case. If the parties have succeeded in some of their claims and failed in others, the costs are mutually offset or shared proportionately. **Departure from the principle that costs are awarded to the successful party** is justified in certain cases: 1) in the case of defeat on a relatively minor point, if the part of the action that is dismissed has occasioned no particular costs; 2) if the amount of the claim is determined by experts, or is at the court's discretion, and where costs are to be offset against each other; 3) if the defendant's conduct has given no cause for bringing the action and he or she has acknowledged the claim at the first opportunity; and 4) if one of the parties has caused the proceedings to be cancelled or to be declared null and void, that party may be required to pay the full costs.
Belgium	Lawyers' fees are not regulated. Lawyers set them freely and they may be negotiated between client and lawyer, but lawyers must still set them within suitably restrained limits. The lawyers' association may check that lawyers do not exceed these limits. Several calculation methods are	Court costs which are fixed in Belgium. Costs vary depending on the court before which the proceedings are brought and the stage of the proceedings (first instance or appeal). These include: (a) registry and registration fees, (b) cost of an emoluments and salaries for judicial documents, (c) cost of executing a copy of the judgment, (d) costs of all measures of investigation – e.g. witness and expert	The registry fee must be collected when the case is entered in the register. Costs arising during the proceedings are generally collected while the proceedings are underway. For some costs, a reserve must be established, e.g. for expert costs.	**Yes** - the costs that constitute legal costs (costs of bailiff, expert, court etc.) are, in general, awarded to the losing party, once the judgment was delivered. In some cases, costs may be shared. A one-off contribution to the lawyer costs and fees of the winning party is part of the legal costs awarded against the losing party. This contribution is termed the 'case preparation allowance' and is a one-off contribution calculated according to a scale based on the amounts involved in the case. It does not necessarily cover all of the fee costs. A Royal Decree of 26 October 2007 determines the amounts of this case preparation allowance. The amounts are minima and maxima and it is for

	possible: hourly remuneration, remuneration for each service provided, remuneration according to the value of the case (percentage of the amount involved in the proceedings), etc. A fees pact solely linked to the outcome of the action is prohibited by Article 446b of the Belgian Judicial Code. Lawyers must inform their clients in advance of their fee calculation method. Lawyers' fees are not subject to VAT in Belgium.	allowances, (e) travel and subsistence costs for members of the national legal service, registrars and parties, (f) case preparation allowance, and (g) fees, emoluments and costs of a mediator.		the judge to assess the amount of the allowance within this range
Bulgaria	The remuneration (fee) is regulated in line with the Ordinance of the Supreme Bar Council No 1 from 2004.		Civil law: The fees are paid before the proceedings begin or the required actions are performed. The fees are fixed as an exact sum or as a percentage of the claimed amount. Criminal law: The costs must be deposited in advance by the private complainant (according to the Criminal Procedure Code). If they are not deposited, he or she must be given seven days to deposit them.	**Yes**
Croatia	Lawyers costs are part of the costs, but limited according to the tariff. The Tariff determines the manner of evaluation, calculation and payment of legal		Civil law: In general, each party bears its own costs during the proceedings.	**Yes.** Common to all these costs is that their compensation by the opposing party in the dispute depends on the **success of the proceedings.** In principle, each party pays the costs caused by its actions (Article 152 of the LCP), while upon completion of the proceedings, the party to the dispute who succeeds in the dispute

	services and expenses that the parties are obliged to pay to the lawyer or law firm for actions performed by power of attorney or decision of the competent authority. The Tariff on Remuneration and Reimbursement of Attorneys' Fees specifically regulates the issue of reimbursement of costs for various types of proceedings (criminal and misdemeanor, litigation, etc.). For each performed action, the lawyer is obliged to adhere to the Tariff and is obliged to issue an invoice to the party. The tariff may be increased by the lawyer for specialist knowledge required (up to 100%) or lowered for 50% depending on specific circumstances.			will be entitled to reimbursement of the costs of the proceedings in full (Article 154 of the LCP). And). But here, too, it should be borne in mind that these costs were **necessary** for the conduct of the litigation, because that party is entitled to reimbursement only of these costs (Article 155 of the LCP). In the case of **partial success** in the proceedings, the court may, in view of the success achieved, order that each party bear its own costs or that one party reimburse the other and the intervener a proportionate share of the costs. **The court may decide that one party shall reimburse all costs incurred by the opposing party and its intervener if the opposing party has failed only in a relatively insignificant part of its claim and no special costs have been incurred as a result of that part.** The two basic principles that accompany the decision on the costs of litigation are **the principle of success (causae) and the principle of guilt (culpe).** --> The **Court order** concerning the costs should be issued by the end of the main hearing or 15 days after the end.
Cyprus	Fees for legal services are set on the basis of a scale of court costs approved by the Supreme Court. The advocate can agree on a higher fee with the client.		Initial costs for court fees are prescribed on the basis of the scale of the petition or some other procedure and are paid when the petition is filed. Court fees are not prescribed as a specific sum; they depend on how the case proceeds and are calculated on the basis of an approved scale.	**Yes.** As a rule, the losing party pays the other side's costs, although the question of costs is at the discretion of the court, which may order otherwise.
Czech	The Regulation of	Fixed fees apply in	Costs must be paid **within**	**No** - It is up to the judge to decide (in

Republic	the Ministry of Justice No. 177/1996 Sb. of 4th June 1996 deals with the fees and remuneration payable to lawyers for the provision of legal services (the lawyers' tariff). A lawyer's fee is regulated by a contract between the lawyer and the client, where it is not set by the contract, it is regulated by the said Regulation. Where a client is awarded compensation of costs of proceedings by the decision of a court or any other body, the amount of the lawyer´s fee shall be set in compliance with provisions for non-contractual fees.	some cases; in others, the fee payable is calculated on the basis of a percentage. Orders for costs may also cover the lawyer's costs. The court pays the fees of experts it appoints, as well as translators and interpreters. The contending parties are responsible for an expert's fees only when they themselves request the services of an expert. In certain specific cases, the court may decide that the losing party should pay an expert's fee.	**three days of the date of notification**, before the first hearing takes place.	their final decision) in each specific case; the judge may order the losing party to pay all or part of the costs. However, this does not apply in divorce proceedings. Orders for costs may also cover the lawyer's costs.
Denmark	In principle there is no regulatory framework governing fees charged by the legal professions. However, the High Court (*landsret*) has established guidance rates, which can be consulted by the public. Anyone can submit a complaint about a lawyer's fee to the Disciplinary Board of Lawyers.	Danish law requires the claimant to pay a court fee for submitting the claim. As a starting point, the fee is set at DKK 500. Where the sum claimed is more than DKK 50 000, the fee is DKK 750, plus 1.2% of the amount by which the sum claimed exceeds DKK 50 000. Where the sum claimed is more than DKK 50 000, an additional hearing fee is payable for the court hearing. This fee is the same as the fee paid when the claim is submitted. For the court hearing too, therefore, the claimant must pay DKK 750	As noted above, the claimant must pay a court fee on submitting the claim. The fee for the court hearing must be paid by the time the date of the hearing is set, but at the earliest three months before the hearing.	**Yes** - As a general rule, the losing party must pay the winning party's costs. However, if special circumstances so require, the court may decide that the losing party need not pay the winning party's costs, or must pay only a proportion of such costs. Only costs necessary for the proper handling of the case can be awarded.

		plus 1.2% of the amount by which the sum claimed exceeds DKK 50 000. An upper limit of DKK 75 000 is set for each of the two types of court fee (the fee for submission of the claim and that for the court hearing). In some cases (for example, those relating to the exercise of public authority), the upper limit is only DKK 2 000. In some types of civil case, including those involving family law, there are no fees payable to the court.		
Estonia	The fees of legal advisers, lawyers, attorneys-at-law and advocates are not regulated in Estonia. Bailiffs' fees are regulated in Estonia by the Bailiffs Act. A bailiff's fee may consist of a fee for initiating proceedings, the principal fee for the proceedings and an additional fee for enforcement activities. A bailiff also has the right to charge a fee for the provision of a professional service.	The fixed costs incurred by litigants in civil proceedings are set on the basis of Sections 139–144 of the Code of Civil Procedure and are divided into judicial costs and extra-judicial costs. Judicial costs consist of State fees, security and the costs of reviewing a case. At each instance, the court keeps a record of the procedural costs involved, including the costs of reviewing a case.	The following costs must be paid in advance by the party applying for proceedings to be initiated or procedural acts to be carried out: - the State fee; - security on cassation; - security for a petition to set aside a default judgment; - security for the reopening of proceedings or to reset the term; - the costs of bailiffs forwarding procedural documents; - the costs of publishing summonses or notices in the official publication Ametlikud Teadaanded (Official Announcements) or in a newspaper; - other costs of reviewing a case, to the extent determined by a	**Yes -** The successful party bears the costs of remunerating the legal representative or adviser for those costs considered by the court to be reasonable and not to be borne by the unsuccessful party. According to the judgment on determining procedural costs, the unsuccessful party must reimburse the procedural costs borne by the successful party, which may include: - the State fee; - security; - costs relating to witnesses, experts, interpreters and translators, and the costs of an expert analysis carried out by a person who is not a party to the proceedings and which are to be reimbursed under the Forensic Examination Act; - costs of obtaining documentary and physical evidence; - inspection costs, including necessary travel expenses incurred by the court; - costs of delivering, forwarding and issuing procedural documents; - costs of determining the value of the civil case; - costs relating to the representatives and advisers of the parties to the proceedings; - travel, postal, communications, accommodation and other similar expenses incurred by the

			court. Unless the court rules otherwise, the fees charged by experts, interpreters and translators are to be paid in advance by the party to the proceedings who submitted the application resulting in the costs. The court sets out the definitive procedural costs to be recovered and awarded in its final decision in the main case or in a ruling after that final decision has entered into force.	parties to the proceedings in connection with the proceedings; - earnings or other permanent income not received by the parties to the proceedings; - costs of pre-trial proceedings laid down by law, unless the action was filed later than 6 months after the end of the pre-trial proceedings; - the bailiff's fee for securing an action and the costs of executing a ruling on the securing of an action; - the bailiff's fee for the delivery of procedural documents; - costs of processing an application for procedural assistance in bearing procedural costs; - costs of the accelerated order for payment procedure; - costs of participating in conciliation proceedings if the court has required the parties to participate under Section 4(4) of the Code of Civil Procedure or, if the proceedings are mandatory, pre-trial conciliation proceedings under Section 1(4) of the Conciliation Act. The party to the proceedings who is required to pay the procedural costs of the party to the proceedings who is entitled to reimbursement of procedural costs will only be ordered to pay those costs that are necessary and justified.
Finland	- **Barristers (including solicitors and lawyers)** In Finland, barristers' fees are regulated by the Rules of Proper Professional Conduct for Advocates and the Fee Guideline, approved by the Finnish Bar Association. - **Bailiffs** In Finland, bailiffs' fees are	In Finland, fixed costs include **processing charges** and **document charges**. Processing charges (trial charges, petition charges, delivery charges) are collected from a party as compensation for hearing a case and the measures taken in the process. The processing charge also covers the delivery of the official instrument containing the decision or interim decision in the case. The trial charge varies from €79 in civil	Costs must be paid at the end of the proceedings.	**Yes -** As a general rule, the costs in civil justice cases are borne by the losing party (exceptions include matters involving petitions and matters involving imperative provisions of the law, such as many family law issues). In administrative courts, each party must bear her or his own costs. The court's judgment will state whether the losing party is required to pay the winning party's cost.

	regulated by Government Decree 925/2008, the Act on Enforcement Fees (34/1995) and Government Decree 35/1995. - **Advocates** In Finland, advocates' fees are regulated by the Code of Commerce 18:5, the Legal Aid Act (257/2002) and Government Decree 290/2008.	matters in district courts to €223 in market court cases. Document charges (extract charges, copy charges, certificate charges) are collected for specifically requested documents, unless a statutory exemption from charges is in effect. For instance, there is no charge for documents issued to the injured party in a criminal case pursued by the public prosecutor. Details on costs are available on the Justice website and in the Act on court charges (Act on the Charges for the Performances of the Courts and Certain Organs of Judicial Administration 701/1993) and the corresponding Decrees of the Council of State. In divorce cases, the total trial charge consists of an initial charge of €79 and a charge of €44 for continued proceedings after the reconsideration period. An advocate's assistance may cost approximately €1000. In matters involving petitions, the charge is €72. In civil law cases, the trial charge is €79 to €179 in the district court and another €179 if an appeal is made before the Court of Appeal. Advocates' costs can be up to and in excess of €6000. **Stage of the civil proceeding where fixed costs for litigants must be paid**		

		Fixed costs for litigants in civil proceedings must be paid at the end of the proceedings.		
France	The rates are made up of **fixed fees** and **variable fees** (often as percentage of the value of the dispute). A **distinction** should be made between: • **officers of the court (lawyers** and legal representatives), whose remuneration is only partially fixed; for the most part, fees are agreed freely with the client. • **court or public officials**, whose remuneration is fixed by the regulatory framework of the French government. - Court advocates Decree no. 80-608 of 30 July 1980 sets the rates for court advocates at the Courts of Appeal. Officers of the court / Lawyers. Regulations set the rates for lawyers representing parties at first instance (Decree no. 72-784 of 25 August 1972 and	**In civil matters**, there are **fees that are legally indispensable in order to pursue an action**, and their amount has been **set** either by legislation or by order of the court. These fees are known as **costs**. They comprise: • Fees, charges, taxes or levies paid to court offices or the tax authorities (these fees or levies are rare since Law no. 77-1468 of 30 December 1977 established the principle of free public service with regard to the civil and administrative courts); • The costs of translating documents, where this is required by statute or by an international undertaking; • Witness expenses; • Remuneration of technical specialists; • Fixed outlays (fees for process servers, court advocates, lawyers); • Emoluments for court or public officials; • Remuneration of lawyers in so far as this is regulated, including pleadings and advocacy fees;	**Civil proceedings costs** include all **sums paid out or owed by the parties** before or in the course of an action. These are for example, before the opening of the proceedings, the **costs of consulting legal advisers**, technical specialists and **travel costs**. **In the course of the action**, these costs may concern the **costs of proceedings paid to officers of the court or court officials, fees paid to the State** and **consultancy fees.** **After the proceedings**, they may concern the **costs of enforcing** the judgment.	**Yes** - In civil matters, any judgment or decision that brings an end to an action must make a ruling on the costs incurred in the proceedings. As a general rule, **costs** (**fixed fees** – see above) are payable by the losing party. However, the court may in a reasoned judgment order the other party to pay some or all of those costs. A party may also request that the opponent bear all or part of the charges incurred, and which are **not included in the costs**. These concern, for example, the lawyer's advocacy fees, the fees for the process server's report and travel expenses. If this happens, the court can order the party required to pay the costs, or in default the losing party, to pay the other party an amount which the court determines to cover the expenses incurred and not included in the costs. The court will have regard to principles of fairness and the financial circumstances of the party ordered to pay. The court may, of its own motion, state that there are no grounds for making such an order for reasons based on the same considerations.

	no. 75-785 of 21 August 1975). **Court appointed process servers** The rates for court appointed process servers to serve claim forms, notices of application and court orders are dealt with in decree no. 96-1080 of 12 December 1996.	• Costs incurred in serving a document abroad; • Interpreting and translation costs made necessary by evidential enquiries carried out abroad at the request of the courts under Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; • Social welfare reports ordered in family matters and wardship proceedings for adults and minors; • Remuneration of the person appointed by the courts to represent the interests of the child.		
Germany	Lawyers' fees are charged either in accordance with the Lawyers' Remuneration Act [Rechtsanwaltsvergütungsgesetz] (RVG) or on the basis of fee agreements. In principle, fee agreements are always possible as an alternative to the statutory charges. However, if the lawyer represents the client in court, the agreed fees cannot be less	Usually, the court receives a court fee, calculated according to the value of the claim. In civil cases it is determined by the Court Costs Act [Gerichtskostengesetz] (GKG] and the Court Costs (Family Matters) Act [Gesetz über Gerichtskosten in Familiensachen] (FamGKG). The amount of the fees depends on the matter under dispute (e.g. marital matters or matters relating to children).		

	than those laid down by law.			
Greece	Lawyers' fees are generally regulated. Lawyers may also agree on fees with clients in writing, with no legally set minimum or maximum fee. In the absence of a written agreement, a legally established system of fees (for appearing in court and based on the amount at issue) determines court costs, lawyers' fees for legal aid, etc. Lawyers agree with their clients on when their fees will be paid. Generally, these fees are paid in instalments as proceedings progress.			**Yes** - Once a court issues a decision, the legal costs and expenses incurred by the winning party generally become payable by the losing party, depending on the extent of each party's victory or loss. The court must also make this part of the decision enforceable. Expenses and costs are calculated according to the above rules, with particular consideration for provisions on legal professionals' fees and possible fixed costs for litigants in civil proceedings. The calculated amount is generally less than actual costs.
Hungary	As a general rule, an attorney's fee is set by agreement between the party and the attorney. If no settlement is reached, the fee is decided by the court on the basis provided in law (5 percent of the claimed amount and at least 10,000 HUF [27 EUR]). The parties can ask the judge to apply the fee stipulated by law if they do not want the settlement to become public.	In first instance cases, the fee for court proceedings is 6 percent of the value of the claim, there are specific rules for different types of actions (e.g., divorce, appeal). As a general rule, the experts', translators', interpreters' fees are paid by the losing party, and if (in specific cases) the state is responsible for paying the costs, it also bears these costs.	The obligation to pay court duties in civil proceedings arises **when the request for litigation is made**. Therefore, the court duties must be paid together with the request of litigation. If the party does not pay the court duties, or pays less than is required by law, the court must ask him/her to pay the remaining court duties on submission of the request.	**Yes** - In its final decision, the court requires that the losing party pay the costs incurred by the winning party within a period of 30 days.
Ireland	The basis on which fees are	With the exception of the items set out in	In the cases of Order 27 rule 1A(3) and rule 9	The award of costs is at the discretion of the courts. The exercise

	payable to solicitors may be categorised in terms of contentious business (i.e. advice and representation in respect of litigation before a court, tribunal or arbitrator) and non-contentious business. Insofar as contentious business is concerned, costs may be further categorised as solicitor and client costs (i.e. costs payable by the party to his or her solicitor) and party and party costs (i.e. costs which are awarded to one party to proceedings against another party to those proceedings). Barristers fees are treated as a disbursement by the solicitor to whom they are invoiced, and as such are regarded as a disbursement by the solicitor and are regulated by the legislation governing solicitors' fees and decisions of the courts concerning the allowance to be made for counsels' fees. The fees of the sheriff, court messenger and bailiffs for execution of execution orders of the court are	Order 27 rule 1A(3) and rule 9 (costs payable by a party lodging a pleading after other party has brought application for judgment in default of lodgement of that pleading) and Appendix W, Rules of the Superior Courts and Schedule E, District Court Rules, costs items are generally discretionary. Costs payable also include disbursements such as court fees, which are fixed by the Fees orders of the Supreme and High Court, Circuit Court and District Court, respectively.	(costs payable by a party lodging a pleading after other party has brought application for judgment in default of lodgement of that pleading) , the costs are payable on striking out of the application for judgment in default of the pleading concerned. The costs items set out in Appendix W, Rules of the Superior Courts, are recoverable: • by the solicitor from the client on receipt of the bill of costs one month after receipt of the bill if the client has not within that time sought taxation (assessment) of the bill (section 2, Attorneys' and Solicitors' Act 1849). However, the client has in any event a period of twelve months from receipt of the bill within which to demand and obtain taxation. After the expiry of twelve months or after payment of the amount of the bill, the Court may, if the special circumstances of the case appear to require it, refer the bill to taxation, provided the application to Court is made within twelve calendar months after payment; • where one party is awarded costs against another party, on the issue of a certificate of taxation of the costs or in accordance with any agreement reached between the parties for payment. The costs items set out in Schedule E, District Court Rules, are payable: • where judgment in default of defence is given, by the party in default on the issue of	of that discretion has to be carried out in accordance with certain well established rules and principles derived from case law of the courts. For example, the primary rule is that costs follow the event, i.e., the losing party pays the winning party's costs. This is however subject to exceptions which will depend upon the circumstances of the case. For example the winning party may not get all of his costs if he has been considered by the court to have delayed or unnecessarily prolonged the proceedings or while winning the case may have lost on certain discrete issues within the case. In certain cases such as cases involving constitutional issues and raising matters in the public interest the losing party may obtain some or all of his costs.

	regulated by the Sheriff's Fees and Expenses Order, 2005 and include provision for fees chargeable on lodgement of the execution order and poundage, expenses of travelling, removal and storage /safekeeping of goods or livestock seized.		the judgment in default • in the case of other costs, by the party against whom the court has awarded costs , on the issuing by the court of the decree for such costs.	
Italy	**Lawyers** The rules governing the costs of proceedings are laid down in the Consolidated Text of the laws and regulations on legal costs referred to in Presidential Decree No 115 of 30 May 2002, with the amendments most recently introduced by Decree-Law No 83 of 27 June 2015, converted, with amendments, into Law No 132 of 6 August 2015, Legislative Decree No156 of 24 September 2015 and Law No 208 of 28 December 2015, and in the new Law on Legal Profession (Law No 247/2012, or 'L.P.F.'), as supplemented by Ministerial Decree No of, which replaced Ministerial Decree No of, and in the new Law on Legal Profession (Law	In civil proceedings, each party — in addition to bearing the costs of his lawyer's fees — is to pay the costs of the acts which it carries out and advances the costs of the acts necessary for the proceedings when the law or the magistrate charge them (Article 8 of the Consolidated Law on the costs of justice). The fees in civil action are as follows: the standard fee, the service at the request of the office, the costs of notifications, the copy and certificate rights.		**Yes -** In civil matters, Articles 91 to 98 of the Code of Civil Procedure deal with the award of costs. By the judgment closing the proceedings before it, the court shall order the unsuccessful party to reimburse the costs to the other party and shall pay the amount thereof together with the defence fees. If it upholds the claim to an extent which does not exceed any proposed settlement made by the court in the course of the proceedings, it shall order the party who has unjustifiably refused to pay the costs incurred after the proposal has been made, unless the conditions for set-off are satisfied (each party's unsuccessful party, the absolute novelty of the matter being dealt with, or a change in the case-law in relation to the relevant questions). In making the order referred to in the preceding article, the court may rule out the recovery of the costs incurred by the successful party if it considers them to be excessive or unnecessary; and may, irrespective of the unsuccessful party, order a party to pay the costs, even those which are not recoverable, which, by reason of a breach of the duty of loyalty and probity, have caused the other party to pay the costs. If there is a mutual loss or if the matter at issue is completely new or the case-law has changed in relation to the relevant questions, the court may order that the parties bear some or all of the costs. If the parties have agreed, the costs shall be deemed to be shared, unless the parties themselves have agreed

	No 140/2012, or 'L.P.F.'), as supplemented by Ministerial Decree No 55/2014 (which replaced Ministerial Decree No). 'Determination of the parameters for the payment of fees for the legal profession in accordance with Article 13 (6) of Law No 247 of 31 December 2012', in force since 3/4/2014.			otherwise in the conciliation report. If it is established that the unsuccessful party has acted or has been resisted by bad faith or gross negligence, the court shall, at the application of the other party, order the party to pay the costs and pay damages, which it shall pay, of its own motion, in the judgment. The court which finds that there is no right in respect of which a protective measure has been enforced, transcribed the document instituting the proceedings or registered as a mortgage, or where enforcement has been initiated or completed, on the application of the injured party, the plaintiff or the creditor seeking damages, who acted without normal caution. In any event, where the court makes an order for costs, it may also, of its own motion, order the unsuccessful party to pay to the other party a sum determined in an equitable manner.
Latvia	**Bailiffs** The fees for the services of certified bailiffs (zvērināti tiesu izpildītāji) are determined in line with the statutory rates. Agreeing on a fee that differs from the statutory rate is prohibited. **Lawyers** Except in cases where the state provides legal aid, there is no fixed fee for the services provided by certified lawyers (zvērināti advokāti) in Latvia; the lawyer agrees on a fee with the client. Pursuant to Section 57 of the Lawyers Act (Advokatūras likums), certified lawyers conclude a written agreement with	Fixed costs for litigants include state fees, a chancery fee, and costs associated with the examination of the case.		**Yes -** A party in whose favour a judgment is delivered can recover from the other party all the court costs they have paid. If a claim is upheld in part, the costs can be recovered in proportion to the extent of the claims accepted by the court. The defendant will be reimbursed in proportion to the part of the claim dismissed in the action. Where judgment is delivered by default, state fees for an application for the reopening of court proceedings and a fresh adjudication of the matter will not be reimbursed. If the plaintiff's application is upheld in whole or in part, the defendant will be ordered to make good, to the extent provided for by law, the costs incurred by the plaintiff in bringing the action, such as lawyers' fees, expenses in connection with attendance at court, or expenses in connection with the gathering of evidence. If the application is dismissed, the court will order the plaintiff to make good the costs incurred by the defendant in defending the action.

	the client that provides that the lawyer will act for the client in the case and sets the relevant fee. In the event of a dispute where there is no written agreement, the amount chargeable for the lawyer's fees can be set at double the amount laid down in the legislation on the payment of state legal aid, and other expenses can be determined subject to the limits laid down in that legislation. Section 12 of the Lawyers Act provides that in the cases laid down by law the state will cover the fees of lawyers and other related expenses. The legislation governing state legal aid (the State Legal Aid Act (Valsts nodrošinātās juridiskās palidzības likums) and the Criminal Procedure Act) (Kriminālprocesa likums)) lays down the circumstances in which legal aid may be granted, in civil cases, administrative cases and criminal cases, the assistance given being paid for by the state. The costs and expenses of providers of legal			

	aid are covered by the state pursuant to Cabinet Regulation No 1493 of 22 December 2009 laying down rules on the scope of state legal aid, the amount of payment, related expenses and the procedure for payment thereof. The regulation lays down fixed fees (a certain amount or hourly rate) that the state pays to legal aid providers in line with the established procedure. See also the replies to questions below.			
Lithuania	**Lawyers** Lawyers' fees are not regulated in Lithuania. They vary according to the level of complexity of the case and of the resources involved. However, fees may not be superior to the maximum amount established by recommendations approved by the Minister for Justice and the Chairman of the Council of the Lithuanian Bar Association (Lietuvos advokatų tarybos pirmininkas). **Bailiffs**: Bailiffs play a role only if the debtor does not comply with the judgment and legally	In civil proceedings, litigation costs comprise stamp duty and other costs: legal representation, delivery of court documents, experts' or witnesses' fees, execution, etc. Stamp duty is, where applicable, defined in the Code of Civil Procedure and is fixed. Litigation costs are defined in section VIII of the Code of Civil Procedure (Civilinio proceso kodeksas).	Stamp duty is normally paid before presenting a claim to the court.	**?**- The amounts paid to experts and expert institutions must, when no surety has been collected, be charged to the court's special account and paid by the party against whom judgment was made, or by the parties in proportion to the magnitude of the claims allowed and dismissed.

	enforceable documents have to be produced. The fees, their payment and exemption from enforcement costs are regulated by the Instructions for executing judgements. All enforcement costs must be paid by the judgment creditor. The bailiff's fees are to be recovered from the debtor during or after the execution of the judgment. The amount of the fees depends on the type of enforcement required and the number of times it is provided. Some enforcement costs are fixed: some cost LTL 60 per hour and some are determined based on a percentage of the value of the assets subject to enforcement.			
Luxembourg	A lawyer's total fees and professional expenses are **set by the lawyer**. When determining their fees, lawyers take the different elements of the case file into consideration, such as the importance of the case, the level of difficulty, the result achieved and the client's financial situation. Where the amount	In principle**, no court costs are incurred** in the civil courts.	Following judgment, there may be costs incurred to enforce the decision at the request of the successful party.	**No**. Each party, even if it wins the case, must bear all its own legal costs. The judge may, however, exceptionally and on express request, order the party who loses the case to pay the other party a procedural indemnity. But the amount is often symbolic and covers only part of the lawyer's fees.

	calculated is found to be excessive, it may be lowered by the Bar Council.			
Malta	The fees charged by lawyers are regulated by Tariff E of Schedule A annexed to the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta). Advocates are also guided by the Code of Ethics and Conduct for Advocates when establishing their fee: this is done either by the advocate himself or by agreement between him and his client. This Code of Ethics considers a fee to be reasonable if it in keeping with specific factors, such as the time required, the novelty and difficulty of the issues involved; responsibility undertaken, the time limitations, the nature and length of the professional relationship; the experience, reputation and ability of the advocate, the costs recoverable from the other party.	Fixed costs for litigants vary depending on the nature of the case and whether it has a monetary value.		**Yes.** The successful party normally recuperates all judicial costs provided that the judgment orders the unsuccessful party to pay the costs. The unsuccessful party has to pay the costs of the case and those of the successful party.
Netherlands	With the exception of fees payable to those offering subsidised legal assistance, fees in the Netherlands are not regulated.	Under the Court Fees (Civil Cases) Act (Wet griffierechten in burgerlijke zaken), parties in civil cases are required to pay court fees. Court fees are fees that must be paid to the court	In civil cases, every claimant and defendant must pay fixed costs. Claimants must pay court fees as soon as their case is referred to a court, while defendants must pay court fees after appearing in court.	**Yes -** In civil cases, the winning party may incur the following costs: - legal assistance (e.g. lawyers' fees); - remuneration or compensation of witnesses or experts; - travel and accommodation expenses; and

		registry (the court's administrative office) when your proceedings begin.		- other legal and non-legal expenses. The losing party incurs the same costs as the winning party, but may also be ordered by the judge to bear the costs incurred by the winning party.
Poland	Remuneration in individual cases is determined by agreement between the advocate and the client.	The fee is the amount of money charged for every document presented to the court, where the law provides for such a fee. There are three different types of fees: variable, fixed and basic. The expenses include charges linked to the participation of the parties, witnesses and experts in the proceedings. Expenses may include the remuneration of interpreters and translators, costs of travel and accommodation, and remuneration for income lost by witnesses because of time spent in court. Other expenses considered are: remuneration of other institutions and persons, the examination of evidence, transport and safekeeping of animals and objects, time spent under arrest, and making announcements. Additionally, there are litigation costs. These consist of judicial costs, the costs of trial preparation and actions taken by the advocate or attorney at law to represent the client.	The court fees are charged when a document is presented to the court. The winning party must wait until sentencing before the costs can be reimbursed. The question of costs is decided in the last phase of a judicial proceeding, just before final judgement.	**Yes** - The general rule is that the losing party must reimburse the successful party for costs that were reasonably incurred to safeguard the latter's interests, unless provided otherwise. However, the amount granted by the judge (for the representation provided by the advocate) must respect the limit set out in the Regulation of the Minister of Justice on Fees for Advocates' Services of 28 September 2002. Therefore, the fee may not exceed the minimum rate multiplied by six, nor the value of the object of litigation. The amount of the fee also depends on the nature and objectives of the case and the stage of the proceedings.
Portugal	Fees for legal advisers and for lawyers are not regulated.	Fixed costs are set out in Articles 5-7 and Tables I and II annexed to the Regulation on	Court fees are paid at the start of the proceedings and when the date is set for a court hearing.	**Yes**. The successful party is entitled to compensation for cots, which is to be paid by the unsuccessful party in the proportion laid down by the judge, depending on the final ruling.

		Procedural Costs.		
Romania	Lawyers' fees are variable and determined according to the case's level of difficulty, size and duration. The level of fees may be agreed upon freely between the lawyer and his client, yet within the limits of the law and the Statute of the profession	- Cost of bringing an action to the courts - court fees (variable EUR 0.5 to over EUR 1,500) and the stamp duty - Judicial Executors' fees - Translators or interpreters' fees - Experts' fees	Court fees and Judicial Executors' fees must be paid in advance, interpretation fee is paid by a court-fixed fee, the official travel expenses or the interpreter‘s fee within 5 days of the fixing of the fee are paid and experts’ fees are paid five days after the appointment of the judicial technical expert by the party requesting the expert or if the court so decides by both parties	**Yes** - The losing party is obliged (upon request) to pay the costs of the court proceeding; The judge cannot reduce the court fee or any other expenses paid by the winning party; In principle, a defendant who has admitted the plaintiff’s claim at the first hearing need not pay the judicial expenses, unless he or she was officially notified by the bailiff through the specialised prior- to-judgment procedure, previously presented above;
Slovakia	A lawyer’s fee must be determined by agreement between the lawyer and his or her client. The vast majority of all lawyers’ fees are agreed on a contractual basis, unless the law prescribes tariff fees.	- court fees; - loss of earnings by the litigants and their counsels, - the costs of furnishing evidence (including **experts’ fees**),; - notaries’ compensation for services in their role as judicial commissioner, and their out-of-pocket expenses, - compensation for the administrators/executors of inheritance and their out-of-pocket expenses; - translation/interpreting fees, - fees for representation – if a litigant is represented by a licensed lawyer registered with the Slovak Bar Association.	Only the court fee must be paid before the hearing begins. Other costs are usually paid after the court judgement has been rendered.	**No** - A person may apply to the competent court for a full or partial exemption from court fees. **The court may, on its own motion**, award the (fully) successful party the costs necessarily incurred in the proceedings (including court fees). In the case of partial success, the court will award a portion of the costs of proceedings to each of the parties, and also may rule that none of the parties has the right to compensation for the costs of proceedings. However, the court may award the partially successful party full compensation for the costs of proceedings if the decision on the amount of the payments imposed to be made by such party depended on an expert opinion or the court’s discretion, or if the lack of success is related to a relatively negligible part of the proceedings.
Slovenia		- court fees, - attorneys’ fees, - experts’ fees, - translators' and interpreters' fees and travel costs (e.g. those of witnesses and experts)	<u>Civil law</u>: Court fees are usually paid at the beginning of the proceeding when the application has been filed. In some cases, the fees are paid when the court hands down a decision (e.g. social matter disputes before first instance courts,	**Yes** - the principle of success and the principle of fault (each party must request the compensation of costs, not ex officio, but it is part of the standard steps in the procedure). Note also that the system is almost the same as in Croatia. In civil proceedings, the unsuccessful

			land register proceedings, proceedings concerning first instance decisions on indemnities). In probate proceedings, the fee is paid at the end of the hearing – once the exact estate of the deceased is known. Attorneys' fees must be paid after the court issues an order on the costs of the proceeding. Attorneys may request that a portion or the full amount of their fees be paid in advance, which is common practice. The party who suggests an examination of the evidence (e.g. by an expert or witness), or the use of the service of a translator or interpreter must pay these costs in advance.	party must refund the costs incurred by the successful party. Each party must cover costs resulting from their own fault or by coincidence. If none of the parties wins in full, the costs are divided proportionally. In criminal proceedings, the court will generally rule that the defendant reimburses costs, if found guilty.
Spain	Lawyers set their fees according to guidelines published by their professional association. These rules are based on general criteria for drawing up lawyers' bills, such as the complexity of the case, proportionality, etc., and are followed by all lawyers when issuing their bills. These rules always distinguish between the separate court systems in which litigation takes place.	Article 241(1)(1) of the Code of Civil Procedure (Ley de Enjuiciamiento Civil) specifically covers the fees charged by lawyers and legal representatives (procuradores) for cases where their assistance is mandatory. These fees are included as an item in calculating costs. The Code of Civil Procedure provides for lawyers to set their fees subject to the rules governing their profession. Since Law 10/2021 came into force, a court fee must be paid, i.e. a natural tax that must be paid in certain cases by users, whether natural or legal persons, for going to court and making use of the public service of the	Clients are always required to pay fees to their lawyers and pay advances on fees to their legal representatives. Clients have a rough idea of the sum involved from the outset, but the exact amount of the bill has to be established once litigation has ended. Lawyers and legal representatives can claim payment from their clients, including through special procedures such as an advance on fees (provisión de fondos, while the proceedings last) or a final statement of accounts (jura de cuentas, once proceedings are concluded). In practice, what usually happens is that clients initially pay an amount in advance and then await a decision on costs. In cases where the other party has to pay the fees, lawyers and legal representatives present their fees to the	**Yes.** In actions for a full judgment, the costs of first instance are payable by a party whose claims have all been dismissed, unless the case raises serious matters de factor or de jure to be clarified. If claims are granted or dismissed in part, each party pays its costs and half the joint costs, unless there are grounds from imposing them on one of the parties because of reckless litigation. Where the costs are imposed on the losing party, he or she will be required to pay, for the part corresponding to lawyers and other legal professionals not subject to rates or scales, only a total amount of no more than one third of the sum at issue for each of the litigants that have secured the decision. For these purposes only, claims on which no value can be put will be valued at €18 000, unless the court determines otherwise because of the complexity of the case. The provisions in the preceding paragraph do not apply if the court declares that the litigant ordered to

		administration of justice.	court, and once the fees are approved they are paid by the opposing party.	pay the costs has acted recklessly.
Sweden	Legal professionals' fees are not regulated in Sweden. However, if legal aid is granted, an hourly fee rate determined by the government applies. In 2012, this rate is, in most cases, SEK 1 205 exclusive of VAT (i.e. SEK 1 506 inclusive of VAT). The Code of Conduct for Members of the Swedish Bar Association (advokater) states that fees charged by members of the Bar must be reasonable.	For an application in a civil case, the applicant must pay a filing fee to the court. At present the filing fee is SEK 450 (approximately EUR 50). In cases where out of court settlement is permitted and the value of the claim obviously does not exceed half of the base amount prescribed in the National Insurance Act (the base amount for 2012 is SEK 44 000; i.e. half the base amount for 2012 is SEK 22 000), **compensation for litigation costs** may not include other expenses, except for: • Costs arising from legal advice, which is restricted to one hour at a time for each matter dealt with; the fee charged corresponds to the amount payable for one hour of legal advice under the Legal Aid Act (1996:1619) • The application fee • Travel and subsistence costs incurred by the party or the party's legal representative in order to attend a court hearing or, if the party is not required to attend in person, the travel and subsistence costs incurred by the	The filing fee must be paid to the court when the application is made. However, the **Legal Aid Act** states that if legal aid has been granted the party should pay a legal aid fee to the legal representative once the costs arise. This fee is principally based on the party's income.	**Yes** - As a rule, the losing party pays the winning party's litigation costs. Compensation for litigation costs fully covers the costs of preparing for trial and of representation by the counsel in court, and the costs involved in presenting evidence (including witnesses and experts), provided that these costs were necessary to protect the party's interests. Compensation is also payable for the time and effort expended by the winning party on account of the trial. Negotiations aimed at settling the dispute which are directly related to a party's action are considered as measures taken for the preparation of the trial.

		legal representative • Expenses incurred by witnesses • Translation costs. Compensation is granted only if the costs incurred were necessary in order to safeguard the interests of the party concerned. For other civil cases (i.e. where the value of the claim exceeds half of the base amount according to the National Insurance Act) no such limitations or fixed costs apply.		