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The impact of strategic lawsuits against public participation (SLAPPs) on the news media sector

News Media Europe recommends

1. To include newsrooms and press publishers in the scope of the EU Directive on SLAPPs to grant them adequate protection against SLAPPs.

2. To provide EU harmonized rules recognising and defining SLAPPs to identify abusive lawsuits and have them dismissed at an early stage.

3. When assessing dismissal, to protect investigative journalism by considering a web of indicators such as parties' unequal powers, media freedom, public interest and contribution to democracy.

4. To review the Brussels I (recast) and Rome II Regulations to make abusive lawsuits more difficult and limit forum shopping with stricter conflicts of laws rules for defamation and privacy.

5. To limit the number of connected claims brought by the same plaintiff, its representatives or affiliates, against newsrooms. An EU database should help identify sources of abusive claims.

6. Based on the European Court of Human Rights 2017 ruling, to limit the award of reputational damages and favour amiable remedies as a first resort.

7. To reinforce the role of press councils and non-judicial remedies to exclude frivolous claims and strategies aimed at financially asphyxiating press publishers.

8. To support training for press publishers' lawyers to allow them to identify and deal with SLAPPs faced by the company and its editorial team.

9. To create a support network at national and European levels, raise awareness and bring visibility to the different types of support available to victims of SLAPPs.

10. To launch an EU-wide campaign for media freedom and the safety of journalists.

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Introduction

As part of its December 2020 European Democracy Action Plan, the European Commission committed to legislating for the protection of news media professionals facing strategic lawsuits against public participation (SLAPPs). News Media Europe has joined the expert group composed of specialized lawyers, academia, NGOs, journalists and press representatives, to collect evidence, identify legal issues and formulate concrete recommendations within the EU's competence. The European Commission has set an ambitious agenda with the aim of delivering a legislative proposal by Spring 2022.

Over the past months, News Media Europe interviewed press publishers, in-house lawyers, journalists and editors-in-chief to collect evidence on the impact of such lawsuits on the news media sector. This document is a collection of our findings broken down by jurisdiction and makes recommendations on the basis of our findings.

We hope this report will raise awareness about the great number and variety of intimidation cases affecting newsrooms, foster dialogue within the media industry and best advise EU decision-makers on how to move forward against SLAPPs.

Belgium

Our member association, Vlaamse Nieuwsmedia (Flanders), would welcome European legislation against SLAPPs, despite the freedom of the press being highly protected by the Belgian Constitution (Article 25 and Article 150). The most prominent SLAPP case is against "Apache", an investigative magazine consecutively sued in 2016, 2019 and 2021 by politicians and businessmen suspected of collusion over property development projects. Moreover, we list further cases that demonstrate the misuse of legal proceedings against the media, yet all ruled in favour of the defendants.

The Apache saga

Erik Van der Paal v Apache (2021): Apache investigative magazine filmed almost the entire City Council of Antwerp attending the birthday party of a property developer, Erik Van der Paal. The press publisher, its editor-in-chief and the journalist were sued for invasion of privacy and stalking under criminal law. Apache communicated they face "a tsunami" of proceedings from Erik Van der Paal[1]. The Court dismissed the claims and recognised[2] that the

[1] Erik Can der Paal comes up with tsunami of proceedings against Apache (in Flemish), Apache website, 19 November 2020

[2] Apache wins lawsuit over Fornuis video (in Flemish), Apache website, 20 January 2021

presence of the entire Council of Antwerp was a fact of public interest. Also, the judge ruled that filming in the public space stayed within the limits of the GDPR and investigating politicians and businessmen operating behind the scenes did not violate their privacy[3]. It is important to note that the property developer had previously tried, unsuccessfully, to silence *Apache* with sky-high damage claims.

Ogeo Fund v Apache and Le Vif (2019): Apache and Le Vif magazines were sued by the Ogeo pension fund regarding revelations involving the construction promoter *Land Invest* and Antwerp politicians. Ogeo, until recently a shareholder of *Land Invest Group*, asked for 500,000 EUR compensation[4] before finally withdrawing its complaint. The legal action seemed part of an intimidation campaign from the construction promoter to silence publications about plans involving the Antwerp City Council and Liège socialist party, also dominating the Ogeo pension fund. According to the association of journalists, this was a clear SLAPP framework to silence critical news media[5]. In total, Ogeo Fund spent 100,000 EUR in lawyers' fees against the press[6].

Joeri Dillen and Land Invest Group v Apache and journalists (2016): Again, the property developer *Land Invest Group* and Joeri Dillen (former chief of staff of the mayor of Antwerp) sued Apache for what they called "inaccurate and defamatory" articles, and asked for withdrawal of the said articles and 350,000 EUR compensation damages. The judge found that Apache had done correct journalistic work and followed deontological rules. Apache won both cases.

Overall, Apache faced three consecutive lawsuits, once on slander and defamation (2016), second on the grounds of stalking and invasion of privacy (2019) third with criminal charges (2021)[7].

Other cases against the media

Patokh Chodiev v Humo Magazine (2017): Humo Magazine published a critical article about the Belgo-Ouzbek entrepreneur Patokh Chodiev, said to have forced the vote on the "Surrender Law 2011" in order to buy off criminal prosecution ("Kazachgate"). Chodiev asked for the removal of the article on the ground of defamation and 10,000 EUR daily compensation for as long the article stayed online. The President of the Brussels Court rejected the claim. The following grounds are interesting:

[3] Court rules on Fornuis video (in Flemish), Apache website, 19 January 2021
[4] New claim of 500,000 EUR in Land Invest gate file (in Flemish), Apache website, 3 April 2019
[5] VVJ behind Apache and Le Vif against SLAPP (in Flemish), VVF website, 4 April 2019
[6] Ogeo: 100,000 euros in lawyers' fees against the press (in French), Le Vif, 23 September 2021
[7] The most important of our freedoms, Karl van den Broeck, Goethe Institute Belgium

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- **Balancing press freedom and privacy in a democratic society:** Citing Article 10 of the European Convention on Human Rights, the Court stressed that "*the removal of the challenged article is not necessary in a democratic society in the interest of protecting the good name or the rights of others*", meaning that Mr. Chodiev's privacy did not outweigh the citizens' interests in access to information. Hence, the decision clarifies the application that must be made of Article 10 ECHR, where the right to protection of reputation must be weighed against the right to freedom of expression and reporting on matters of social importance.
- **Protecting investigative journalism:** Here, the Court found that investigative journalism, counting as participation in the social debate, deserves a particularly high level of protection. The fact that some statements were hurtful to Mr Chodiev was not a sufficient reason to order the removal of the contested article. Also, the journalist had no criminal intent or intention to harm when reporting the story.

Politician Pol Van Den Driessche v Humo Magazine and journalist (2013): N-VA politician Pol Van Den Driessche demanded compensation of 625,000 EUR from Humo magazine and the journalist who had reported accounts of sexual harassment. The claim was rejected on the ground that the large number of witnesses allowed the journalist to assume statements were true. The plaintiff had to pay for the legal fees.

George Forrest v Magazine MO and journalist John Vandaele (2008): Belgian businessman George Forrest sued MO magazine and its journalist before Belgian courts on the ground of defamation, following a critical article about the role of the Forrest Group in the Congolese mining industry. The Brussels Court of Appeal dismissed the claim, making it clear that that "*persons who are professionally confronted with public opinion have to tolerate more criticism, even with a certain dose of exaggeration. This also applies to businessmen".* Therefore, the fact that Mr Forrest and his company were critically exposed was not insulting or defamatory.

The above cases all have in common:

- They are lawsuits against independent and specialised media (e.g. magazines);
- Brought in Belgium (no cross-border element);
- With very long legal proceedings, draining on press publishers' financial resources;
- Generally, small outlets go to court, because they cannot afford to settle but also because they refuse to. In the above cases, press publishers stood by their articles and refused to take them down on demand of the plaintiffs.

Measures in place in Belgium

At this stage, no specific anti-SLAPP legislation is foreseen in Belgium. In March 2019, a non-binding resolution supporting independent journalism was adopted, yet not resulting into any concrete legislation. Since then, another resolution regarding the protection of journalists was submitted, but is currently still being discussed in several committees. To note that a third resolution regarding the protection of Julian Assange is also being discussed alongside, making it more difficult to move fast. So the current legal framework remains the following:

- Art. 780bis Ger. Wb (Judicial Code) states that the party who starts a case for unlawful purposes can be convicted of abusive and reckless litigation. By extension, plaintiffs starting harassing lawsuits against journalists could themselves be convicted for intentional abuse of justice. The fine is up to 2500 EUR without the compensation that the publisher or journalist would be entitled to.
- However, the general rule under which the convicted party covers the costs of the winning party still applies to journalists and press publishers.
- Journalists can benefit from a group insurance for professional liability as well as legal assistance. The journalists' association offers such insurance to its members for instance.

Denmark

Settlements, as a way out of SLAPPs

The following Danish cases demonstrate the use of settlements for newspapers to avoid a risk of SLAPP.

In 2010, eleven Danish newspapers which reproduced Prophet Mohammed cartoons, originally published in 2005, were threatened by a law firm from Saudia Arabia with "multiple jurisdictional litigations" and exposure to "costly damages", unless they accepted to enter in a settlement and publish an apology[8]. Ahmed Zaki Yamani, the lawyer and son of Saudia Arabia's oil minister, purported to represent the descendants of the Prophet for the obtention of moral damages based on defamation. Politiken newspaper agreed to settle with eight organisations representing Muslims' interests[9]. In a joint statement, Politiken publicly apologized for the offence caused to the Muslim community. The settlement received criticism from other media companies and from politicians[10], raising the issue of the role of amiable agreements and impact on self-censorship.

[8] "Yamani or Your Life: A nasty attempt to coerce Danish newspapers into apologizing for the cartoons of Mohammed", Slate.com, 8 March 2010
[9] "Politiken settles Mohammed cartoon issue", Politiken, 26 February 2010
[10] "Danish newspaper apologises in Muhammad cartoons row", 6 February 2010, The Guardian

Previously, in 2007, the Danish tabloid Ekstra Bladet published critical articles about an Icelandic bank regarding tax evasion, in English, on its Danish website. As a result, Kaupthing Bank sued the Danish newspaper in London on the grounds of defamation. The UK court found itself competent, although it concerned a Danish newspaper's publication (in English) on a Danish website[11]. Because UK legal costs would be so substantial (estimated more than £1 million), Ekstra Bladet accepted an out-of-court settlement in February 2008, in which the newspaper apologized for the articles published, paid between £50,000-£70,000 covering legal costs and £100,000 of compensation damages to Kaupthing Bank, according to Berlingske.dk. This case illustrates the extensive interpretation of what constitutes a connection to the damage (here, the publication in English and access by British readers to a Danish website) to justify UK courts' competence. It also illustrates the defendant's preference for out-of-court-settlements to avoid engaging in third-country litigation and risking paying very substantial legal costs and damages.

Although settlements can offer reasonable out-of-court solutions and contribute to diffusing tensions between parties, they can also feed into an imbalanced system where a strong party puts pressure on a weaker one for obtaining concessions under the threat of litigation. Therefore, even when SLAPPs are not reported, it is worth looking at the role of settlements on media freedom and the limits some of these agreements can put to freedom of expression. There is also merit considering a change of conflicts of laws rules to ensure that legal proceedings are brought to a jurisdiction closer to the defendant's establishment and allow newsrooms to better assess the outcome of litigation, prepare their defence and manage legal fees.

Ireland

Libel tourism

Our member NewsBrands Ireland is alerted by the situation in Ireland, where the law makes press publishers particularly vulnerable to defamation suits, a situation acknowledged by the European Commission in its Rule of Law report[12]. An internal survey (January 2021) showed that over the period 2018-2020, Irish press publishers spent 14.2€m in court proceedings, settlements and legal fees.

Defamation suits are engrained in public figures' culture, to the extent that Ireland has become a hub for defamation suits – especially since the UK reformed its Defamation Act in 2013, requiring proof of "serious harm".

[11] "Banking on libel victories in Britain", The Guardian, 14 February 2008

[12] European Commission 2020 Rule of Law Report, situation in Ireland: "*Ireland's defamation laws raise concerns as regards the ability of the press to expose corruption.*"

The **Tony Robbins vs Buzzfeed (2019)** case illustrates the issue of libel tourism in Ireland. Here, an American plaintiff sued the American online newspapers Buzzfeed in Ireland for a story revealing allegations of sexual harassment in the USA during the #MeToo movement. Robbins sued on the ground that the publications, on the US Buzzfeed website, were accessible from Ireland. In New York, he, as public figure, would have had to prove 'actual malice' from the media. Whereas Irish law – notably the lack of "serious harm" to one's reputation requirement - made it more attractive for the American celebrity to sue from Dublin. Consequently, the High Court accepted jurisdiction, arguing that "the articles were viewed online 13,382 times by users geo- located in Ireland" meaning Mr Robbins had an audience and therefore a reputation to protect in Ireland[13].

Similar examples include the defamation lawsuit brought by American celebrities, Justin Timberlake and Jessica Biel, against Heat Magazine (part of Germany-based Bauer Media) in Ireland, in 2014[14].

Press publishers, as direct victims of strategic lawsuits

As illustrated above, press publishers are direct victims of abusive lawsuits. In Ireland, defamation proceedings would often target the journalist, the editor and the brand, all represented in a single team. Press publishers would take over costs and representation for both employed and freelance journalists and, when relevant, ensure the protection of the whistle-blower involved through an insurance policy.

The **John Delaney vs Sunday Times (2019)** case provides another illustration. Here, the newspapers, the editor-in-chief and the journalists were targeted by repeated letters on behalf of former CEO of the Football Association of Ireland, John Delaney, which sought to prevent the newspapers reporting a serious financial scandal in the Irish Football Association. The Sunday Times took over the legal costs and representation on behalf of its employees and made sure that the whistle-blower was protected. The court ruled in favour of the Sunday Times and rejected John Delaney's request for an injunction against the publication of the story, which was found to meet the "public interest" criteria. The Sunday Times was able to recover the legal costs of the injunction application from John Delaney.

The **Denis O'Brien cases** are other examples of a powerful litigant trying to get injunctions against the Sunday Times (2013), the Sunday Business Post (2019) and other newspapers. The Irish businessman sued on grounds of breach of business confidentiality and defamation. At

[13] Buzzfeed fails to prevent millionaire American self-help guru Tony Robbins suing it for defamation in the High Court here, The Independent IE, 4 June 2021
[14] The links between Hollywood, Heat and the Irish High Court, The Irish Times, 10 October 2014

the time, the Sunday Times was the only newspaper to carry on with the story with injuncted details removed.

As opposed to "regular" defamation cases where litigants are interested in obtaining high financial compensation – which of course is also problematic (see below) – these types of defamation cases are characterised by:

- Powerful litigants whose concerns are to stop the newsrooms from writing, usually through court injunctions;
- Experienced litigants whose strategy is to never engage with the media - as such they simply refuse to answer questions from press publishers, a requirement from Section 26 Defamation Act yet with no obligation for the claimant to reply.

High-sky reputational damages

A first procedure before the press ombudsmen would allow for non-judicial remedies. The industry even set up a self-regulated Press Council in 2008 to welcome complaints. Since then, claimants have the option to go to press councils and require for instance an independent arbitrator to rule over the matter at no cost, order the publication of the decision and restore reputation. Yet very few cases go before press councils. We realise that claimants are rarely seeking rectification nor public apology, but financial compensation. In fact, defamation cases are decided by civil juries who can award extremely high damages, up to EUR 1.25 million[15]. Since 2009, judges can provide orientations for the financial award, yet they remain based on very high precedents.

However, the European Court of Human Rights[16] held in 2017, reacting to the EUR 1.25 million award for defamation, that unpredictably large awards of damages in defamation cases are considered capable, in principle, of having "a chilling effect" (para.61) on media's right to freedom of expression and therefore require particularly "the most careful scrutiny" and "very strong justification".

In a context where reputational damage is more protected than any other personal injury and where legal costs could amount up to 60% of the final award, defendants are caught in a financial dilemma.

Considering that it is nearly impossible to budget for litigation in defamation cases and given the unpredictable nature of jury hearings, press publishers face a dilemma, whether to carry

[15] Leech v Independent Newspapers Ireland (2014): the jury had awarded EUR 1,872 millions of damages to the plaintiff, a number reduced to EUR 1.25 millions by the Irish Supreme Court.
[16] Judgment of the European Court of Human Rights of 15 June 2017, *Independent Newspapers (Ireland) Limited v. Ireland*, application no. 28199/15.

on with the story or whether to settle to avoid the cost of litigation. As a result, we have relatively few SLAPP cases to report on, because most cases would be settled as a cautionary measure.

The role of press publishers' in-house lawyers

As a legal business has developed around defamation in Dublin, the role of press publishers' in-house lawyer is becoming increasingly crucial to quantify the risks of publishing a story. When press publishers receive lawsuits, the in-house lawyer would check the validity, grounds and chances of success of the claim. If financial exposure remains limited, the newspapers will typically go ahead with the story. However, if the risk seems higher, the newspapers might seek a more detailed assessment from an external firm, provided it can afford legal advice.

Depending on the risk assessment conclusions, the newspapers could decide to settle, or carry on with the story. In such case, the legal department would exercise careful scrutiny at every step of the editorial process to protect the newspapers and respect for instance the claimant's rights of privacy, data protection, ability to answer questions before publication, etc. In the most established newsrooms, lawyers would now check every single article before publication.

Pending review of the 2009 Defamation Act

Our industry has noticed very little efforts from the Irish government to review the Defamation Act 2009. Although the 5-year review was supposed to be completed in 2014, the government has not yet published any assessment report. "A review of Ireland's defamation laws has been sitting on the acting Justice Minister's desk since summer [2021]" the Irish Independent reports[17]. This could be partly due to a lack of cohesive media policy in Ireland, with a minister in charge of media appointed for the first time in 2020. General distrust from Irish politicians against the media seems to also play a role.

Our member association started the "Journalism Matters" campaign to raise awareness about the value of journalism for society. In parallel, the association called for urgent completion of the review of the Defamation Act, including the following measures:

- Requiring proof of "serious harm" to reputation, to discourage trivial claims: claimants who do not meet the "serious harm" test have the option to engage with press ombudsmen within press councils;

[17] Minister yet to act on "draconian" libel laws months after receiving key report, The Irish Independent, 24 September 2021

- A cap on damages, which are currently way too high compared to other personal injuries' claims;
- The abolition of juries to speed up the court process, reduce legal costs and avoid unpredictable damage awards, as defamation is currently one of the only civil action that continues to be decided by juries.

Conclusions

- Defamation cases in Ireland are numerous and difficult for publishers to defend;
- The "compensation culture" is threatening the financial viability of news businesses and results in soaring insurance costs for press publishers;
- With such a high risk of defamation proceedings hanging over press publishers' head, the press suffers from a certain degree of self-censorship with wider implications on media freedom and democracy;
- Strategic lawsuits have a chilling effect on media freedom and independence. As a result, investments in investigative journalism have been reduced, with preference for more "frivolous" and less risky stories.

Romania

Feedback from our member, Biroul Roman de Audit Transmedia (BRAT), mostly relates to Dunărea de Jos Press Trust, publisher of the daily newspaper "Viata Libera", facing abusive lawsuits for the deletion of press materials involving public figures from the city of Galati. Despite winning all the cases, Press Trust spent a significant amount in legal fees, which could not be recovered from the plaintiffs. In total, the Romanian publisher spent 352,279 RO lei (approximately 71,175 EUR) fighting over 20 lawsuits over the last years. The Courts approved only the payment of 53,821 lei. Of this amount, only 30,182 lei (less than 10% of expenses) was actually recovered.

Below we provide a snapshot of cases that illustrate how the plaintiffs have used the protection of personal data to sue the media.

Media freedom vs GDPR

Corrupt police officers invoke "personal data protection" in 2020-2021

In December 2020- after the entry into force of the GDPR - the Press Trust was sued by Gabriel Dorobāt - a former police officer sentenced for corruption – on the ground of violation of personal data protection. Gabriel Dorobāt requested a Court order that institutions who had

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revealed his identity, including the newspaper Viata Libera, delete his name from the online environment. Given that the concerned person had been rehabilitated and the press publisher was risking pecuniary sanctions (up to 4 per cent of the turnover) the "Viata libera" deleted references to Gabriel Dorobāt.

A more recent and similar case, in August 2021, refers to the detention of a police officer, Ovidiu Morozan, suspected of bribery with a criminal clan. The newspaper Viata Libera reported about the public hearings at the Galati Court[18]. Mr Morozan "informed" the newsroom he would apply to Court, invoking the protection of personal data and reputation. So far, the police officer, under judicial control, has not put his threats into practice.

These cases illustrate conflicts between data protection and GDPR application on the one hand, and media freedom on the other. In particular with public interest reporting, involving for instance acts of corruption and criminal activities, there is a risk that requests to remove personal data be used insidiously as a means to threaten and silence the media.

Older cases illustrate attempts by local politicians and businessmen to intimidate the Viata Libera reporting on acts of corruption. Again, privacy, personal data and reputation are invoked to have articles taken down and moral damages compensated. In the two following cases, the claims were rejected. We draw the conclusion that the fight against SLAPPs goes hand in hand with the fight against local corruption, supported by a well-functioning criminal and judicial system.

Real Estate scamming of Boldea Parliamentarian (2014)

In 2014, the Galati County former Parliamentarian, and one of Romania's best rated lawyer, Mihail Boldea, opened a series of lawsuits against the daily Viata Libera, disclosing revelations that led to the opening of a criminal investigation by DIICOT Galati (DIICOT is the structure within the Public Ministry specialized in combating organized crimes and terrorism). Mr Boldea, who had been extradited from Kenya, claimed the news articles[19] had violated his right to dignity and to private life and claimed the amount of 1,000,000 EUR for moral injury. The Court rejected the claims. Boldea was convicted in 2018 to seven years of prison.

Hortigal Affair (2013)

[18] *"Galatean police officer caught in flagrant while taking bribes", "Police officer under judicial control caught taking bribes".*

[19] "*Intrigues and political interests - the octopus of Boldea in schools*", "*Viata libera campaign: Houses that die*," "*Pechea – Contrasts Commune: Star factory and underworld nest*", "*Galati City Hall, victim of real estate mafia? 90,.000 Euros real estate con*", "*Justice confirms: Boldea was a Member of MISA. Magistrates suspected of meeting the former Member there*", etc.

Local businessman Petrică Herăscu sued the daily newspaper Viața liberă, its journalists, the editorial team and the company management for the publication of a series of articles revealing corruption in a real estate project. Herăscu claimed reputational and moral amounting to 500,000 EUR. He also tried to intimidate the press employees, requesting the cessation of any journalistic activity against him and putting pressure with information about the journalists' private lives. The Galați Tribunal rejected all his claims.

Ongoing

We are also informed about the owner of a news website tvmneamt.ro, being the target of multiple intimidation and harassment actions from different members of the Social Democratic Party. One of the legal procedures is ongoing.

Sweden

An ongoing case amongst our membership provides illustration of a SLAPP against a Swedish online newspaper. The **Realtid case** caught the attention of the European Parliament who invited journalist Annelie Östlund to speak during a dedicated hearing on 3 June 2021.

In November 2020, the Swedish online business and finance magazine Realtid was sued from London by Mr Svante Kumlin, a Swedish businessman and CEO of Eco Energy World, on the ground of defamation[20]. Realtid had been investigating a network of stock promotors selling shares in Eco Energy World (EEW) to private individuals in Sweden while the company at the same time 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.

Cross-border claims: The defamation suits, instead of proceeding in Sweden - a member state ranked third in the 2021 press freedom index - were filed in the UK, and seemingly orchestrated as intimidation tactics to pressure investigative journalists. The case was heard by the English High Court on 24-25 March 2021. Mr Kumlin and Eco Energy World claimed to

[20] SLAPP lawsuit taken against Swedish online magazine Realtid in London, RSF, 9 December 2020

have "significant business interests" in the UK which would justify the competence of the UK civil courts[21]. The decision on competence is still awaited.

Multiple targets: The civil claims were jointly brought by Mr Kumlin and the company, and targeted the Realtid brand, its editor in chief but also the two journalists in their personal capacity. 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.

Disproportionate response: EEW and its CEO always declined to comment and exercise their right to respond before the articles publication. Instead, they sent legal letters to Realtid from their law firms. Also, EEW hired a public relations agency to answer questions from the media and from shareholders but refused to communicate directly with Realtid nor provide explanation or counterarguments to the journalists' allegations. So far, the plaintiffs have not been interested in a reasonable settlement, instead demanding a correction and an apology for each of the published articles.

What type of support for victims of SLAPPs?

A first observation is that legal proceedings put investigative journalism - a particularly time-consuming and costly type of journalism - in danger the moment legal fees drain newsrooms' limited financial resources. Second, titles are not equipped with in-house legal expertise, meaning that externalising legal advice will necessarily involve very high costs. Legal pro bono is certainly welcome, but not enough to absorb the workload inherent to such a case. Financial support is also welcome, yet with the wider inconvenience that paying for lawyers in London and in Monaco risks feeding into the legal business of cross-border claims.

With this background, creating a network of legal practitioners who can support victims of SLAPPs seems an important measure. Only the biggest media groups would be equipped with legal departments (and even then, it is not guaranteed that the resources would be sufficient to handle such claims). Therefore, it is important that all newsrooms know who to turn to when legal threats land on their desks. Currently help comes from a fragmentation of different actors, such as NGOs, legal pro bono associations, news media trade associations, etc. Rationalising this network at national and European levels and raising awareness about where to find which type of support would be a first helpful measure.

[21] "Organisations express solidarity with Swedish media outlet Realtid ahead of their UK defamation case", IMS, 24 March 2021

United Kingdom

British members, represented by the News Media Association UK, raised the concern that it is becoming more and more difficult for press publishers to meet the public interest criteria before their national jurisdictions. The following cases illustrate such difficulty, as well as the different types of threats on their freedom to publish.

External pressure faced by newspapers

In 2019, **Philip Green vs Telegraph** is an example of a SLAPP brought by a British fashion businessman against the Daily Telegraph for reporting facts of sexual and racial harassment on his former employees. Sir Philip Green threatened to bankrupt both the press publisher and its editor should they publish the story[22]. After trying to get journalistic sources revealed, hinding the story through non-disclosure agreements and sending threats to witnesses, the billionaire finally dropped proceedings. Philip Green was left with a reported £3m legal bill, having to cover his own legal costs and those of the Telegraph.

In 2018, the Daily Mail published the result of a substantial investigation into **Max Mosley**, the former Formula One Association president, and his involvement with the publication of a racist election pamphlet in 1961[23]. The story raised questions about whether he had lied when giving evidence at a former privacy trial he brought against The News of the World. Mr Mosely sued the Associated Newspapers group for malicious prosecution, but the claim was struck out. This case is an example of a wealthy figure using significant resources to take retaliatory action against a press publisher over an article clearly falling within the confines of public interest reporting (issues of racism and general elections).

In 2009, the Telegraph revealed abusive MPs' expenses, uncovering public money misuses from more than half of the House of Commons. After the first publication, the investigative and editorial teams received repeated threats calls from politicians. Yet the newspapers continued to write as their investigations unfolded, under the careful scrutiny of their in-house lawyer. The House of Commons also put pressure on the Metropolitan Police to investigate at The Telegraph, which the Police refused to do.

The public interest criteria

UK judgements increasingly lead to a narrow interpretation of what constitutes "public interest" reporting. **Sicri vs Associated Newspapers Ltd (2020)** provides illustration: The

[22] "I will personally sue your editor for damages that will be long beyond what he'll be able to earn if he lives to 1,000 years old"

[23] High Court judge throws out Max Mosley's legal action against Daily Mail for sending prosecutors a dossier questioning whether he lied on oath, Mail Online, 22 December 2020

MailOnline reported about the arrest of an individual suspected to be involved in the Manchester Arena bombing. Ultimately the suspect was released without charges and sued the newspaper for violation of his privacy. The High Court dismissed the newspaper's claim for public interest reporting. This case shows a very narrow interpretation of the notion of "public interest" reporting, coupled with a broader definition of the right to privacy (including a reputational element, family life, home and private correspondence).

A narrow interpretation of the "public interest" criteria is becoming a hurdle. In our view, limiting the "public interest" definition strictly to what the public wants to know or deserves to know is too limited. A right interpretation would take into account the press' responsibility, in a democracy, to make public figures or public services accountable to citizens and under higher public scrutiny.

Balancing fundamental rights

European Convention rights

This leads us to an important and wider consideration about the role of the press and how to take this role into account when balancing fundamental rights for articles written in respect of professional ethical standards. Summary judgements sometimes show a certain degree of distrust towards the media. A way forward should consider the necessity for the press to write free from fear of litigation and its duty to make public figures accountable to the public, in a democratic society.

When applying Convention rights, effective anti-SLAPP measures would require revisiting the balancing of fundamental rights between Article 8 on the one hand (privacy) and Article 10 on the other (freedom of expression) to enforce the democratic function of the media, while effectively protecting individuals' privacy right. Currently, Article 10 does not take precedence over other Convention rights.

This approach differs from the USA for instance, where the First Amendment of the Constitution gives prominence to freedom of speech and of the press.

US Constitution rights

Anti-SLAPP measures are state measures, meaning that there is no harmonisation over the protection against SLAPPs at federal level. Currently, anti-SLAPP statutes are in place in thirty-one States.

Generally, the definition of what constitutes a SLAPP is very broad to best protect the First Amendment rights. As such, a SLAPP is any civil complaint or counterclaim filed against people or organisations who speak out on issues of "public interest or concern".

For instance, Section 425.16 of the relevant Californian statute (code of civil procedure) reads:

> *(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.* ***To this end, this section shall be construed broadly.***
>
> *(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution* ***in connection with a public issue*** *shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.*

The same goes for the state of New York where anti-SLAPP protection applies to "*any communication in a place open to the public or a public forum in connection with an issue of public interest;"* or from "*any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest*." (Amendment introduced on 10 November 2020 to enlarge protection of free speech).

Based on this large interpretation, the defendants can more easily apply to have the SLAPP dismissed early in the procedure, as follows:

1) **The SLAPP motion to dismiss**: The defendant would apply to have the claim qualified as a SLAPP (which as we have seen enjoys a very broad definition for the purpose of protecting the First Amendment);
2) **Burden of proof shift:** If the judge recognises a SLAPP, the burden shifts on the claimant to prove he/she is likely to succeed which is quite a difficult step as it happens even before the discovery of documents;
3) **Mandatory full fee recovery**: If the defendant successfully gets the claim struck out under SLAPP statutes, it shall recover attorney fees in full. This has a chilling effect on abusive claims, especially given the non-reciprocity (the successful claimant would not recover the full fees from the defendant).

Therefore, this interpretation gives judges the opportunity to stop litigation in its track to allow the press to report on issues of public interest, an important procedure considering substantial litigation costs.

The UK approach, on the other hand, presents more risks for the media having to settle the case to avoid paying substantially high litigation costs and damages.

All in all, while staying faithful to European definitions of fundamental rights, there is merit considering how media freedom could be better protected in Europe both from a procedural and a substantial standpoint.

The Defamation Act 2013 reform

The introduction in the 2013 Defamation Act of the "serious harm" test already has a filtering effect on abusive lawsuits (Section 1). However, the burden of proving that publications are true remain on the defendant newspaper, meaning the presumption of falsity remains. Also, the burden remains on the defendant to characterise the publication is of public interest (Section 4).

Finally, conditional fee agreements ("no win, no fee") have been outlawed removing some pressure from the media to reimburse extremely high legal fees (including the lawyer's fee topped up with payment for the risk incurred. Overall, the reform does not go as far as the media would have hoped for.

Libel and privacy tourism

Despite the reform of the Defamation Act in 2013, it seems that the UK remains a privileged hub for libel and privacy cases. The very high legal fees and extremely generous compensation culture often operate as a chilling effect on newsrooms' willingness to engage in long and costly trials and ultimately, on their freedom to publish. It is fair to say that the legal business that has developed around defamation and privacy claims has made London a *forum conveniens* for notorious figures acting against the media.

To avoid libel tourism, it would be worth introducing rules for:

- Election of a single jurisdiction at the place of residence or establishment of the defendant, to limit forum shopping;
- Claim preclusion (res judicata) for the judge to dismiss defamation claims brought twice and avoid multiple charges against the same defendant;
- The early dismissal of a case identified as a SLAPP.

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However, since Brexit, efforts to change international private laws risk leaving in a gap with English jurisdictions. It is therefore necessary to ensure reciprocity between changes to Brussels I and Rome II Regulations and international treaties with the UK, such as the Lugano Convention.

Reforming private international law

Brussels I Regulation (EU) 1215/2012 (jurisdictional competence): The debate around the impact of forum shopping on the media is not a new one. Shortly after the adoption of Brussels I Regulation, the industry alerted the European Commission about press publishers' exposure to forum shopping when a press article is published online and called for a legislative review. Under the current Regulation, news media companies are exposed to lawsuits coming from either their country of establishment or from a country connected with the damage (Recital 16). Such connection, based on "where the harmful event occurred or may occur" (Article 7.2), may – as we have seen in the above cases - be broadly interpreted, exposing press publishers to risks of unpredictable and cross-border lawsuits.

Rome II Regulation (EU) 864/2007 (applicable law): During the adoption of Rome II Regulation, European press publishers called for the exclusion of personality rights from the Regulation to avoid press publishers being exposed to the laws of another country in defamation cases. The Regulation ended up excluding defamation from the general rule (Article 4) that the applicable law is that of the country where the damage occurs. Yet, the above cases show that it would have been more useful if the country-of-origin had applied, as a general rule, to defamation cases. It is now important that press publications are protected from financially burdensome legal proceedings abroad, whenever the media complies with their country-of-origin laws. Press publishers cannot reasonable be held accountable to the laws and standards of other jurisdictions where public figures claim they have a reputation. As a principle, press publishers should be held to the standards of the country-of-origin where they are based and where they publish from.

The review of Brussels I and Rome II Regulations would be very positive steps forward, yet leaving the UK unaffected. In our view, tackling SLAPPs, from identification to dismissal of abusive lawsuits, would be more effective in cooperation with non-EU countries. So when the EU review takes place, it would be preferable to include the UK to ensure harmonized solutions.

Integration of the 2007 Lugano Convention in the Brussels I and Rome II Regulations: The 2007 Lugano Convention is the international treaty between the EU and Denmark (in its own right), Norway, Iceland and Switzerland to govern conflicts of competence in civil and commercial cases. In 2020, the UK applied to accede the Convention, but the European

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Commission advised Member States against[24]. Should Brussels I and Rome II be reviewed, it would make sense to include the UK through, for instance, the inclusion of Lugano Convention parties, to ensure that defamation suits cannot be brought in third countries that may claim connection with the damage. This solution would first require the accession of the UK to the Lugano Convention.

The UK acceded the **2005 Hague Convention on Choice of Courts Agreements** in its own right, effective from 1 January 2021. The Hague Convention allows the status quo between the EU – also a contracting party - and the UK on jurisdiction of the chosen court and the recognition of judgements. It also simplifies proceedings by requiring the "exclusively designated" court to hear the case without parallel hearings in other contracting states. However, the Hague Convention leaves some gaps, excluding for instance "claims for personal injury" such as defamation (Article 2.j).

To some extent, the Lugano Convention is the agreement that resembles the most Brussels I Regulation: the competent jurisdiction is the one where the defendant is domiciled (Article 2) except for torts or delicts, such as defamation, for which the jurisdictions is the one where the damage occurred (Article 5.3). Reviewing the rules for defamation consistently across EU and international laws while ensuring cooperation between UK and EU member states' courts, would be a step in the right direction.

Concluding remarks

1. The results of our interviews show that newsrooms are either direct targets of SLAPPs or undertake legal costs and representation on behalf of employed and often freelance journalists.

2. There is no established definition of SLAPPs at national level, making it difficult for press publishers to identify and react to such lawsuits.

3. Cases indicate that lawsuits intended to silence press publishers and journalists are both internal and cross-border. Admittedly, there is limited competence for the EU to intervene in purely internal cases involving a single jurisdiction.

4. The prevalence of SLAPPs is clearly more severe in some countries than others, but in principle poses a cross-border threat to all jurisdictions.

[24] European Commission Communication – Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Convention, 4 May 2021

5. Certain forms of journalism, in particular investigative journalism, inherently attract more SLAPPs by their very nature. This means that some news media companies can be more exposed than others to such problems and consequently have to regularly invest more resources in legal defence.

6. Such suits can be draining on press publishers' limited time and financial resources. In light of the current financial pressures on the industry brought upon by the COVID19 crisis and digital transformation, such fees could further threaten the existence of a newsroom, endanger the jobs of numerous journalists and undermine access to pluralistic high-quality journalism for citizens.

7. While we greatly value solutions *a posteriori*, such as training and capacity-building between European countries, change should first and foremost happen at a procedural level to have SLAPPs dismissed at an early stage of the legal proceedings.

8. The early dismissal of a SLAPP case would prevent newspapers from covering for high legal costs, their attorney fees and potentially that of the claimant. Should the case however be admissible, stricter budget rules and greater case management (e.g. estimation for each step of the court process) should allow press publishers to better foresee legal costs and mitigate fee reimbursement. A principle of proportionate costs should in any case apply in proceedings against news publications. Finally, the defendant that wins the case should recover legal fees in full.

9. Anti-SLAPP measures require private international law reforms to make cross-border defamation suits more difficult. The applicable jurisdiction should be that of the residence of the defendant, while the applicable law should be that of the publication. It makes sense to cooperate with the UK on this matter through international treaties.

10. This would not however prevent home defamation suits (no cross-border element), where national legislation is needed to better protect the rights of the media and its democratic function.

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