

Aarhus Convention Task Force on Access to Justice

Fourteenth meeting

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Tools to promote effective access to justice

Measures to discourage strategic lawsuits against public participation (SLAPP)

Csaba Kiss, European ECO Forum

Slides

1. Definition of SLAPP cases

CASE Coalition: an abusive lawsuit filed by a private party with the purpose of silencing critical speech¹

Besides this, there are multiple definitions:

Wikipedia: lawsuits intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition²

Merriam-Webster: a lawsuit alleging defamation that is in reality brought for the purpose of intimidating, burdening, punishing, or harassing the defendant for speaking out against the plaintiff on matters of public interest³

Legal Information Institute of Cornell Law School: lawsuit filed strategically by a corporation against a group or activist opposing certain action taken by the corporation, usually in the realm of an environmental protest⁴

Public Participation Project: lawsuit used to silence and harass critics by forcing them to spend money to defend these baseless suits, intended to intimidate those who disagree with them or their activities by draining the target's financial resources⁵

The key point is not definition but identification. For this reason, there is a step by step guide on the website of CASE to identify SLAPPs: <https://www.the-case.eu/about>

Bordeaux wines pesticide case – Valerie Murat⁶

Südtirol pesticide case - Umweltinstitut München⁷

2. Presentation of the Coalition Against SLAPPs in Europe (CASE) – its members, mission, actions so far + a mention of J&E, ClientEarth and EEB being members of CASE)

CASE is a coalition of non-governmental organisations from across Europe united in recognition of the threat posed to public watchdogs by Strategic Lawsuits Against Public Participation (SLAPPs)

¹ <https://www.the-case.eu/about>

² https://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation

³ <https://www.merriam-webster.com/dictionary/SLAPP%20suit>

⁴ https://www.law.cornell.edu/wex/slapp_suit

⁵ <https://anti-slapp.org/what-is-a-slapp>

⁶ <https://winelifemagazin.com/en/bordeaux-harsh-court-sentence-against-winemakers-daughter-and-activist/>

⁷ <https://www.balcanicaucaso.org/eng/Short-news/Freedom-of-speech-under-attack-pesticides-and-South-Tyrol>

Three-fold approach:

- a) Exposing SLAPPs and those who use them⁸: testimonials, list of SLAPP cases, Report-A-SLAPP online form
- b) Building resilience to SLAPPs⁹: map of SLAPP support, other advocacy materials
- c) Advocating for law reform¹⁰: campaigns: THE EUROPEAN SLAPP CONTEST, THE NEED FOR AN EU ANTI-SLAPP DIRECTIVE, THE NEED FOR A COUNCIL OF EUROPE RECOMMENDATION ON SLAPPs

40+ members, including Article 19, ClientEarth, EEB, Greenpeace, Justice & Environment, Civil Liberties, Transparency International, Whistleblowing International and many more with special regard to the Daphne Caruana Galizia Foundation from Malta

3. Status of SLAPP cases in Europe (based on the study of the DCG Foundation)

Since 2019 CASE has been working with Amsterdam Law Clinics, part of the Law Faculty at the University of Amsterdam (UVA), to catalogue and analyse SLAPP cases from across Europe. Thanks to input from organisations across the CASE coalition, we have collected together 570 cases over a 10-year period. On the basis of this data, we have identified a number of clear trends. In particular, we have found that the number of SLAPP cases across Europe has been increasing year on year, with the highest number recorded in 2020, followed by 2021 and 2019.¹¹

Shutting Out Criticism: How SLAPPs Threaten European Democracy – report¹²

European SLAPPs arise in a situation having the following identifying characteristics:

- a) power imbalance
- b) legal basis
- c) chilling effect
- d) cross-border element

(+ bar chart on page 23 of the report)

4. Status of anti-SLAPP laws (based on the survey of J&E)

J&E survey in 8 EU MS (Austria, Belgium, Bulgaria, Croatia, Estonia, Greece, Hungary, and Spain).

Main findings:

- a) Two countries (AT, BE) have effective mechanisms that can be used in SLAPP cases, but none has specific anti-SLAPP laws.
- b) Four countries (AT, BG, HU) have partial or total (HR) protection for whistle-blowers but never played a role in SLAPP cases.
- c) International legislation's impact is low. AT applies anti-SLAPP mechanism with the GDPR, but this same regulation serves basis for SLAPPs in HU.
- d) None of the countries have effective procedural legal tools against SLAPPs.

⁸ <https://www.the-case.eu/slapp-cases>

⁹ <https://www.the-case.eu/get-help>

¹⁰ <https://www.the-case.eu/our-campaigns>

¹¹ <https://www.the-case.eu/slapps-in-europe>

¹²

<https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/623897f6f5eb056c82fe2681/1647876093121/CASE+report+SLAPPs+Europe.pdf>

- e) Only three countries (AT, BE, ES) have rules in bar association codes of conduct that can prevent lawyers from or punish them for filing SLAPPs.

Ongoing online survey by PILNET: Legal Ethics Questionnaire. Can anti-SLAPP mechanisms be installed into Bar Association Codes of Ethics?

5. EU actions in the matter (roadmap, consultation, Ms. Vera Jourova statements, etc.) and Council of Europe actions in the matter

The European Parliament voted to request the EU to act on SLAPPs: 2021/2036(INI) Strengthening Democracy and Media Freedom and Pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society¹³: “25. Urges the Commission to present a proposal for a measure to address SLAPP cases such as rules for the early dismissal of SLAPPs and other court actions that have the purpose of preventing public participation”¹⁴

The European Commission proposes anti-SLAPP legislation and set up an EU Anti SLAPP expert group: Vice-President of the Commission, Věra Jourová, confirmed in a hearing in front of the Committees on Civil Liberties, Justice and Home Affairs (LIBE) and Legal Affairs (JURI) of the European Parliament that took place on the 3 June 2021, that the initiative could have a legislative and a non-legislative component.

Commission Roadmap: EU package against abusive litigation (SLAPP) targeting journalists and rights defenders¹⁵ (EC will be announcing its proposals for measures to tackle SLAPPs on 27 April)

legislative: legal basis for a legislative instrument - Article 81(2) TFEU

non-legislative: legal basis for a recommendation - Article 292 TFEU

Open Public Consultation factual summary report¹⁶

The Council of Europe (CoE) set up the Anti-SLAPP expert group and is drafting a recommendation on SLAPPs to be published in 2023.¹⁷ CoE Report: The Use of SLAPPs to Silence Journalists, NGOs and Civil Society.¹⁸

6. CASE advocacy actions and further demands of CASE

All these actions by the EU and the CoE were motivated by CASE advocacy actions including a model EU Directive on Providing Protection from Abusive Lawsuits Against Public Participation.¹⁹

Further claims:

- a) Harmonise EU laws on SLAPPs so as to make them predictable for all those targeted by SLAPPs
- b) Reform the EU private international law framework
- c) Support the EU Member States
- d) Decriminalise defamation and bring other laws criminalising speech in line with human rights standards

¹³ [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/2036\(INI\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/2036(INI)&l=en)

¹⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2021-0451_EN.html

¹⁵ blob:https://ec.europa.eu/7869487e-56f9-4a81-8c5d-093c37e648bc

¹⁶ blob:https://ec.europa.eu/71daa2bc-6d41-4b70-a6b7-23263d7d5805

¹⁷ <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>

¹⁸ <https://rm.coe.int/0900001680a57861>

¹⁹ https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs_04Dec.pdf

- e) Fully implement EU Directive (once enacted)
- f) Offer victims support
- g) Implement professional standards for lawyers and law firms
- h) Enable civil society
- i) Create and/or support independent bodies
- j) Offer awareness raising and training to stakeholders
- k) Collect data on SLAPPs

7. Art. 3.8 of the Convention, ACCC case law

Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

a) ACCC Case Law

ACCC/C/2009/36 Spain: insulting the communicant publicly in the local press and mass media for its interest

ACCC/C/2013/98 Lithuania: telephoning and visiting of persons linked to the communicant by the State Security Department

ACCC/C/2014/102 Belarus: “the wording of article 3, paragraph 8, is not limited in its application to acts of public authorities as defined in article 2, paragraph 2, of the Convention, but rather covers penalization, persecution or harassment by any State body or institution, including those acting in a judicial or legislative capacity. It also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent.”

b) RRM

Decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Adopted by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session

Special Rapporteur:

- (a) Issue an immediate protection measure to the Party concerned (see para. 13 below);
- (b) Issue an ongoing protection measure to the Party concerned (see para. 14 below);
- (c) Issue public statements and press releases and distribute them actively via the Special Rapporteur’s website, the media and social media;
- (d) Use diplomatic channels;
- (e) Request the Chair of the Bureau of the Meeting of the Parties to use diplomatic channels, including bringing the matter to the attention of the Head of State or Government and/or another senior official of the Party concerned;

- (f) Bring the complaint to the attention of other relevant human rights bodies (for example, special rapporteurs, national independent human rights commissions, etc.) and, to the extent feasible and appropriate, coordinate efforts with those other bodies.

Some countries suffer more from SLAPPs than others, reflecting gaps in procedural protections in those different legal systems probably. SLAPPs feed off deficiencies in laws and legal systems and Member States have a positive obligation under both the Aarhus Convention and the ECHR to protect those seeking to engage in public participation from harassment or abuse.

8. Importance of the matter for fundamental freedoms and rule of law and need for action

On 20 January 2022, the UK Parliament held a debate (14:29:00 – 16:58:00) on Lawfare and UK Court System.²⁰

*“Transparency and integrity are key to the proper functioning of the courts and to the law. Those values underpin public scrutiny of the powerful and maintain confidence in our laws. Let me be clear: today’s speakers are right to highlight the rare instances where the law is being weaponised as lawfare. SLAPPs represent an abuse of the legal system—let me be clear about that—as they rely upon threatening tactics to silence free speech advocates who act in the public interest. **Public participation enriches all our lives and our democracy.**”*

- James Cartledge, Parliamentary Under Secretary of State for Justice, UK²¹

For more information:

- Justice & Environment: <http://www.justiceandenvironment.org/home/>



- CASE: <https://www.the-case.eu/>



²⁰ Lawfare is the misuse of legal systems and principles against an enemy, such as by damaging or delegitimizing them, wasting their time and money (e.g., SLAPP suits), or winning a public relations victory.

²¹ <https://hansard.parliament.uk/Commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem?highlight=lawfare#contribution-61B08842-CF97-4224-BFE0-29C311B22728>, 4:37 p.m.