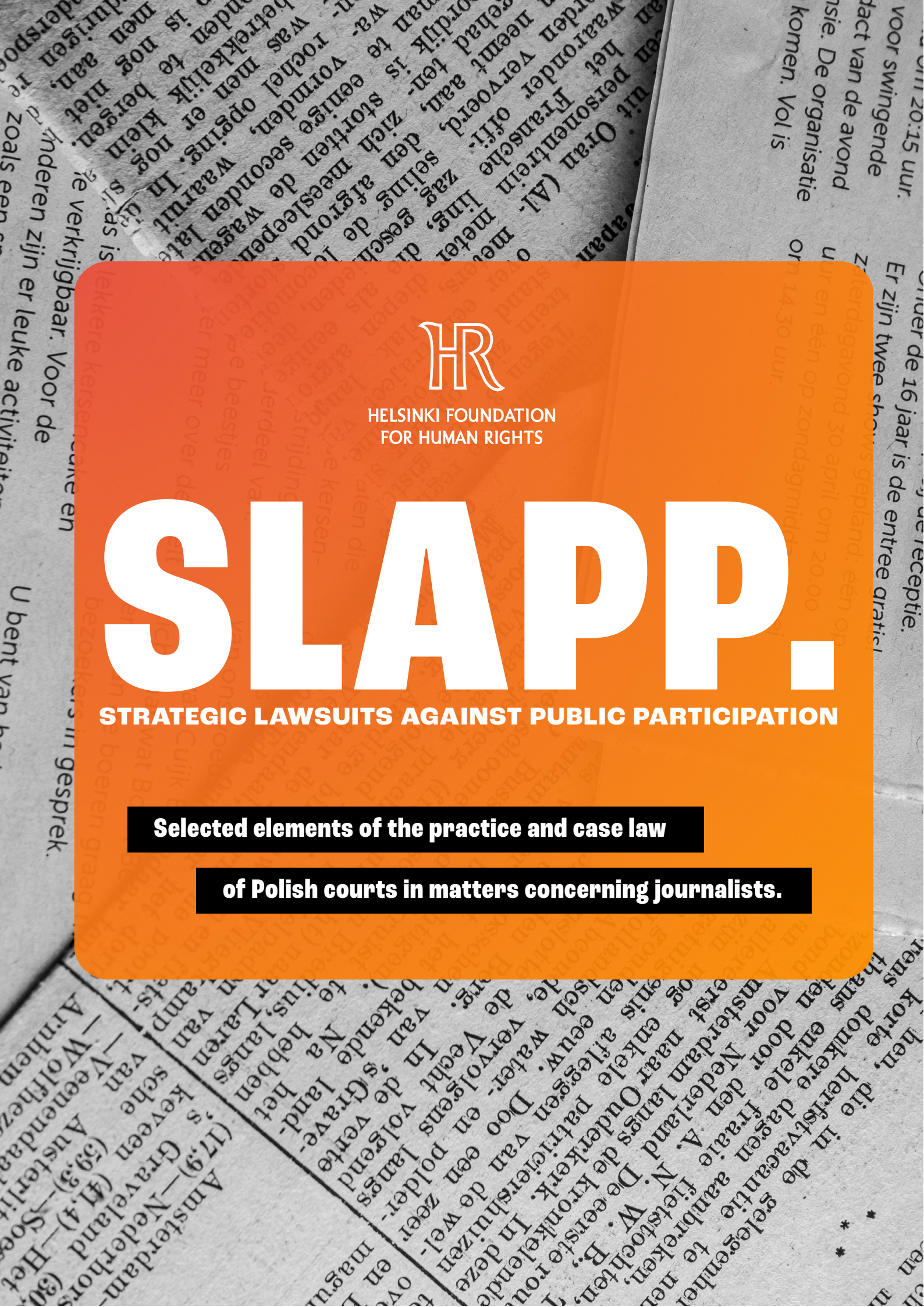

HELSINKI FOUNDATION
FOR HUMAN RIGHTS

SLAPP.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

Selected elements of the practice and case law

of Polish courts in matters concerning journalists.

SLAPP.

Strategic lawsuits against public participation – selected elements of the practice and case law of Polish courts in matters concerning journalists

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Summary

Lawsuits Against Public Participation ("SLAPP proceedings", or "SLAPPs") are proceedings whose main purpose is to restrict or penalise public participation. They are often initiated by exploiting the imbalance of power between the parties, which is related to the financial advantage or social position of the party initiating the proceedings. Often, such proceedings are initiated by corporations, businesspeople, politicians, or, as in the case of Poland, state institutions, against journalists and their editors, but also civil society activists.

Although the exact number of SLAPP proceedings pending before Polish courts is difficult to estimate, there has been an increase in such proceedings against selected professional groups since 2015, including journalists, but also civil society activists and academics. This is partly due to the crisis in the rule of law and the progressive curtailment of media freedom.

The report presents selected elements of the practice of SLAPP proceedings initiated against journalists and their editors in the period 2015-2023.

SLAPP proceedings are frequently initiated through the instrumentally used provisions of civil law (in particular proceedings for violations of personal rights), criminal law (including the provisions on defamation) and the Code of Administrative Offences. In the case of journalists, the provisions of the Press Law Act are also (mis)used, in particular the legal remedy of rectification.

Current civil law provisions allow defendants to defend themselves against the negative consequences of SLAPP proceedings only to a limited extent. In addition to the general rules for the dismissal of a claim due to the lack of unlawfulness in the defendant's actions, civil law provides for special solutions that relate, among other things, to the theory of manifestly unfounded claim or that of abuse of rights (substantive or procedural). The HFHR's research shows that these specific provisions are very rarely applied by the courts. None of the courts surveyed by the HFHR on the application of these tools cited a single case in which the courts had decided to apply these specific institutions to a case that could be considered SLAPP proceedings.

Existing criminal laws are similarly instrumentalised to initiate SLAPP proceedings. In the case of the media, the laws providing for criminal liability for defamation are most commonly used in this context.

As in the case of proceedings initiated in civil cases, the code of criminal proceedings also include certain provisions that allow SLAPP cases to be terminated earlier. The HFHR study has shown that these mechanisms are sometimes used in practise by criminal courts in relation to defamation claims. However, in relation to criminal SLAPP cases, the study was limited to the Warsaw courts. The question of whether this practice is also used in other regions would need to be investigated further.

In order to increase the level of protection from SLAPP proceedings, civil and criminal law provisions need to be amended. Such amendments are also necessary for the effective implementation of the Anti-SLAPP Directive. The implementation of the Directive should be accompanied by training for judges, prosecutors, advocates and legal advisors on issues related to SLAPP proceedings.

Strategic lawsuits against public participation (SLAPPs) targeting journalists in Poland

Although strategic legal actions to suppress public participation have been taking place in European countries for years, SLAPPs have begun to be widely discussed since the murder of the journalist **Daphne Caruana Galizia** in 2017[1]. At the time of her death, more than 40 SLAPPs were open against Caruana Galizia in various countries. The journalist spent almost every day in court, and her funds were frozen. Thanks to the successful campaign of Daphne's sons (who were awarded the Magnitsky Prize for their actions), the problem of SLAPPs has become a major issue at the European Union (EU) level. It led to the creation of the CASE coalition, which has worked vigorously for the adaptation of the EU's anti-SLAPP law. The Anti-SLAPP Directive came into force in spring 2024[2]. It covers civil cases with a cross-border element. Member States have two years now to implement the Directive.

SLAPP proceedings are most often initiated by an entity or individual with significant financial resources and social standing against persons or organisations that criticise their actions. SLAPPs are usually initiated by corporations, state-owned companies, politicians or businesspeople. The persons targeted by this type of proceedings are usually those who speak out on matters of public importance, i.e. mostly journalists, but also academics and representatives of civil society.

The goal of SLAPP proceedings is not to win the case itself, but primarily to deter the defendant/accused from pursuing a particular topic further, as well as to burden the defendant with the financial and psychological costs of the proceedings themselves and to achieve a **chilling effect**.

1 Taub B. (14 December 2020), Murder in Malta, The New Yorker.

2 Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("Strategic lawsuits against public participation").

The chilling effect is to create a sense of threat that discourages a person from exercising his or her rights. The European Court of Human Rights[3] has repeatedly pointed out the threats to freedom of expression that the chilling effect can cause. For example, in the case of Lombardo and Others v. Malta, where the applicants were three local councillors and the editor of the newspaper In-Nazzjon Taghna, the ECtHR stated that "[t]he imposed sanction had a chilling effect on the applicants' exercise of their right to freedom of expression, as it could discourage them from making critical statements about the Local Council's policies in the future.[4]"

In Poland, a significant increase in the number of SLAPP proceedings can be observed between 2015 and 2023. This was primarily related to the escalating the rule of law crisis (which included the curtailing of the independence of courts and prosecutors and the ruling majority's disregard for final judgements of national and international courts), the process of shrinking space for civil society and the gradual restriction of the media freedom.

In the press freedom ranking compiled by Reporters Without Borders since 2015, Poland has fallen from 18th to 57th position[5].

The reasons for this worrying trend were linked to the ruling majority's actions against the media. These included the subordination of the public media to the ruling majority, the misuse of state funds (spent, inter alia, for advertisements of state-owned companies) to support the media loyal to the authorities, the takeover of the largest publisher of regional media by Orlen and measures directed against certain journalists, including cases of violence against journalists[6]. SLAPPs were also one of the legal strategies used by the authorities against the media between 2015 and 2023.

3 As, for example, in the cases:

1) **Demirtaş v. Turkey** (No. 2), CE:ECHR:2018:1120JUD001430517. Demirtaş was a member of the National Assembly and a co-chair of the Peace and Democracy Party (a left-wing pro-Kurdish political party). On account of his political speeches and statements on the Kurdish-Turkish conflict, which were directed against the government, the applicant was arrested for membership of an armed terrorist organisation and public incitement to commit an offence. The ECtHR ruled that Turkey had violated Article 10 (freedom of expression), Article 5 §§ 1 and 3 (right to liberty and security of person), Article 18 (limitation on use of restrictions on rights) and Protocol No. 1 Article 3 (right to free elections) of the European Convention on Human Rights.;

2) **Wille v. Liechtenstein**, CE:ECHR:1999:1028JUD002839695. In his lecture, Herbert Wille, President of the Liechtenstein Administrative Court, presented an opinion that the Constitutional Court is competent to decide on the interpretation of the Constitution in the event of a disagreement between the Prince, who exercises executive power, and parliament. The view was met with displeasure by the Prince of Liechtenstein, who deemed it unconstitutional. The Prince declared that the judge was unsuitable for any public office. The ECtHR held that there had been a violation of Articles 10 and 13 of the Convention.;

3) **Baka v. Hungary**, 23 June 2016, CE:ECHR:2016:0623JUD00202611. Baka is the former President of the Hungarian Supreme Court and a former judge of the European Court of Human Rights on behalf of Hungary. As the position of President of the Hungarian Supreme Court was linked to that of President of the National Council of Justice, he was obliged to express an opinion on parliamentary bills that affected the judiciary. In 2011, Baka expressed a negative opinion on some draft legislative changes (one of them was to lower the mandatory retirement age of judges from 70 to 62). Under these provisions, Baka's term of office expired prematurely – in accordance with the old provisions there would have been three and a half years left until the end of his term. The ECtHR found Hungary in violation of Articles 6 § 1 and 10.

4 **Lombardo and Others v. Malta**, 24 April 2007, ECLI:CE:ECHR:2007:0424JUD000733306.

5 Reporters Without Borders, 2023 World Ranking, Country Report: Poland.

6 Helsinki Foundation for Human Rights (26 September 2019), Rule by law replaced the rule of law. Threats to human rights in Poland, 2015–2019.

In addition, the changes in the Polish justice system and the effects of these changes limit effective protection against SLAPPs. In the Rule of Law Report 2023, the European Commission mentions in the chapter on Poland the main problems related to the independence of the Polish judiciary, including restrictions on the independence of the judiciary, objections to the independence of the National Council of the Judiciary and disciplinary proceedings affecting independent judges[7]. Furthermore, the authoritative powers of prosecutors performing leadership roles were extended so that they can intervene in virtually any proceedings. At the same time the Prosecutor General was granted the power to appoint and dismiss heads of organisational units without any restrictions. Another important context in which SLAPP cases occur in Poland is the issue of the length of court proceedings. In recent years, the length of court proceedings in courts of all instances has increased significantly. According to the CEPEJ report, the average duration of proceedings at first instance in civil matters was 203 days in 2014 and 317 days in 2020[8].

In the years 2015-2023, SLAPP proceedings were initiated against, journalists, academics and civil society activists, among others. These proceedings were often, though not exclusively, initiated by people close to the ruling camp. The basis for initiating them included the provisions of the Civil Code on the protection of personal rights as well as criminal law provisions (e.g. on the offence of defamation) and the Code of Administrative Offences. SLAPPs are often initiated under the provisions of the Press Law Act, which regulates issues of "press rectification". Although this provision is generally understood to serve to correct false information, a different interpretation has been adopted in case law, according to which the truthfulness of press material is irrelevant. Due to this interpretation, the provision might be misused in order to initiate court proceedings against the media in relation to truthful, reliable material.

The exact number of SLAPP proceedings initiated in Poland since 2015 is difficult to determine. A statistical analysis of the proceedings pending under the provisions most frequently used to initiate SLAPP proceedings is not conclusive (not all proceedings involving, for example, the protection of personal rights exhaust the definition of a SLAPP). At the same time, the possibility of conducting a qualitative analysis is also limited. In the case of proceedings against journalists, media outlets do not always release all information, which may be related to the protection of trade secrets, among other things. Nevertheless, certain matters have resonated widely in the public consciousness. To name just a few – after 2015, the SLAPP cases in Poland as verified by Mapping Media Freedom are those directed against Gazeta Wyborcza (currently there are 100 such civil and criminal SLAPP cases according to Gazeta Wyborcza)[9], OKO. press (currently, there are 8 SLAPPs pending)[10], or the journalist of the weekly Polityka Grzegorz Rzeczkowski[11].The international and national debate was rife over the proceedings against Professor Sadurski, a prominent constitutionalist who, with his publications in Gazeta Wyborcza and tweets, pointed out to the abuse of power and the ongoing destruction of democracy[12]. Ringier Axel Springer, the publisher of many major media outlets in Poland, stated that it is facing almost 100 SLAPP lawsuits.[13]

7 European Commission, 2023 Rule of Law Report (5 July 2023), Country Chapter on the rule of law situation in Poland.
8 Council of Europe (2022), European Judicial Systems CEPEJ Evaluation Report. 2022 evaluation cycle (2020 data). Part 2 country profiles.
9 Mapping Media Freedom, Gazeta Wyborcza threatened with 55 lawsuits.
10 European Centre for Press and Media Freedom, Poland: OKO.press bears huge financial burden for legal threats against it.
11 European Centre for Press and Media Freedom, Legal threats brought against Polityka journalist to muzzle investigative reporting.
12 de Búrca G., Morijn J., Open Letter in Support of Professor Wojciech Sadurski, VerfBlog.
13 Rzeczpospolita, Jak pozywa władza? Niemal sto procesów dziennikarzy Ringier Axel Springer Polska w pięć lat.

SLAPP proceedings against the media

SLAPP proceedings and the protection of personal rights in civil law

SLAPP proceedings are initiated, inter alia, on the basis of Articles 23 and 24 of the Civil Code (CivC), which deal with the protection of personal rights.[14] Every legal[15] and natural person is entitled to the protection of personal rights.[16] Although the Civil Code does not define what personal rights are, Article 23 CivC contains a list of examples of protected rights, such as liberty, surname or pseudonym, image or name. The catalogue of protected rights has been expanded by the courts. Personal rights in Polish law are classified as non-pecuniary and non-hereditary rights.

In cases for the protection of personal rights, the claimant must prove the existence of a specific interest and its violation, i.e., for example, they must prove that the disputed statement made by the journalist was a violation of reputation. The defendant, in turn, must prove that this violation was not unlawful (i.e. that there were circumstances that ruled out unlawfulness). In assessing whether there has been a violation, the courts should take into account the "average human reaction to similar behavior, disregarding the individual sensitivity of the victim"[17]. This means that the violation should be objective. There is no violation if the harm suffered by a person would be considered minor by the general public.

14 Błaszczyk M., Skala zjawiska SLAPP w Polsce, Siecobywatelska.pl.

15 Pazdan M., [w:] Komentarz do Kodeksu cywilnego, Artykuły 1-449, Tom 1, art. 23 k.c., red. K. Pietrzykowski, Legalis.

16 In the context of the standard arising from the judgment Memo OOO v. Russia (ECtHR), there are certain restrictions on bodies exercising public authority. Of particular interest here is the case of activist Katarzyna Urbaniak, who has been sued by the city of Kalisz.

17 Regional Court in Warsaw, 3rd Civil Division, 12 January 2017, case no. III C 544/15 following the judgment of the Supreme Court of 26 October 2001, V CKN 195/01.

Examples of SLAPPs brought under civil law:

Mirosław Koźlakiewicz v. OKO.press[18]

The case concerned articles titled "Stinking business for EU money", "We won a round with the 'king of poultry'" and "Stifling freedom of expression..." published by OKOpress in 2018. The first article was part of an international investigation aimed at checking whether EU subsidies ensure the sustainable development of agricultural production and improve the level of environmental protection. The investigation mentions Mirosław Koźlakiewicz and his large-scale poultry farms, among others. The second article describes Koźlakiewicz's attempts to exert pressure on OKO.press with the help of the Ministry of Science and Higher Education, which oversees the foundation that publishes OKO.press. In his lawsuit, the businessman demanded that OKO.press will publish an apologies for its publications about EU subsidies and articles reporting cases against the editorial office, and that OKO.press remove all these articles from its website and social media. Initially, the court secured the claim in a far-reaching form, i.e. it ordered the removal of the article. In its judgement at first instance, the Regional Court of Warsaw found that "the journalists who wrote the contested publications exercised the utmost degree of care and reliability". After several years of proceedings, the Court of Appeal in Warsaw ruled in its final judgment that OKO.press did not have to comply with any of the claimant's demands. The Court argued that the activities of Koźlakiewicz's farms and the legal steps he had taken against OKO.press were truthfully described.

Krzysztof Niewiadomski v. Kamil Kulig („Wspólnota Łęczyńska")[19]

In his 2018 article published in the newspaper Wspólnota Łęczyńska, journalist Kamil Kulig described the case of a former representative of Poland in football whose domicile was registered in the house of the district governor of Łęczna. The reason for the registration of his domicile was to enable the player to participate in the elections to the district council. The district governor received a payment notice from the commune of Milejów (where Niewiadomski's house is located) for the unpaid additional fee for rubbish collection for a new household member. However, Niewiadomski said that there was no additional tenant. After the publication, the district governor accused the journalist in court of having damaged his reputation. He demanded PLN 10,000 for charity and the publication of an apology on the entire front page of Wspólnota Łęczyńska. The Regional Court in Lublin, which decided the case at first instance, and later the Court of Appeal agreed that Kulig's articles were reliable and related to matters of public importance. The Regional Court stated that "there is no doubt that the defendant in the present case has exercised proper degree of care and accuracy".[20]. The Court also stressed that "the publication in the press of material raising the above questions [i.e. discussing this topic,] should undoubtedly be assessed as an action taken in the legitimate interest of citizens".[21]. In addition, the Court ordered Niewiadomski to pay the costs of the first instance proceedings.

18 Court of Appeal in Warsaw, 1st Civil Division, case no. I ACa 335/21.
19 Court of Appeal in Warsaw, 1st Civil Division, case no. I ACa 104/23.
20 Regional Court in Lublin, 1st Civil Division, case no. I C 16/21.
21 Ibidem.

Polska Wytwórnia Papierów Wartościowych S.A (Polish Security Printing Works, PWPW) v. Agora S.A. (publisher of Gazeta Wyborcza)[22]

PWPW's statement of claims concerned a series of seven articles from 2016, which reported in particular on the lawsuits against Gazeta Wyborcza and Newsweek. PWPW demanded that Agora SA publish an apology and pay PLN 100,000.00 to the account of the Reduta PWPW Foundation. PWPW did not question the facts described in the articles.

The company had reservations about terms, titles, leads and statements by experts who were asked for their opinion.[23] In addition, PWPW applied for having the claim secured for a year (which consisted in removing many fragments from the texts). The application was rejected by the Regional Court in Warsaw, which found that the press material had not violated the personal rights of the state-owned company. When Gazeta Wyborcza reported on the lawsuit filed by PWPW, the company filed another lawsuit, claiming that „the articles contain statements denigrating PWPW and aimed at humiliating the company in the eyes of the public."[24]

PWPW also initiated other cases of this kind against the media. For example, PWPW demanded from the publisher of Newsweek, Ringier Axel Springer, compensation for non-pecuniary damage of PLN 1 million for an article about redundancies at the company[25]. The Regional Court in Warsaw dismissed the claim in its entirety in a judgment of 26 February 2018. The company did not appeal. The judgment became final[26].

In the event of a violation of personal rights, the Court may award an appropriate amount as monetary compensation for non-pecuniary damage or for a specific social purpose in accordance with Article 448 CivC. The aggrieved party also has the right to demand that the violation of personal rights cease (e.g. by requesting that the defendant refrain from publishing an article) and that the actions necessary to eliminate the effects of such an infringement be completed. The law does not set an upper limit for the compensation for non-pecuniary damage claimed. Although in many cases against the media the claimed compensation for non-pecuniary damage is not excessive, there are cases such as the action brought by Polish Radio against Ringier Axel Springer, in which the claimant sought compensation for non-pecuniary damage in the amount of one million PLN[27].

In assessing what amount of compensation for non-pecuniary damage is appropriate in a particular case, "one should take into account the nature of the right violated and the nature, degree and duration of the mental distress (harm) suffered by the person whose right has been violated as a result of the violation[28]." In making such an assessment, courts can rely on an extensive case law, which indicates what amounts are considered adequate. Furthermore, pursuant to Article 448 § 2 CivC, a person whose personal rights have been violated may, in addition to monetary compensation for non-pecuniary damage, also demand that an appropriate sum of money be awarded to the social purpose he or she indicates.

22 Woźnicki Ł., PWPW chce ocenzurować siedem tekstów w „Gazecie Wyborczej", „Gazeta Wyborcza".
23 Woźnicki Ł., PWPW - „Wyborcza" 0:2. Pozew oddalony, „Gazeta Wyborcza".
24 Ibidem.
25 Ex. Woźnicki Ł., Zarząd PWPW żąda miliona złotych od „Newsweeka". HFPC: To tłumienie krytyki prasowej, „Gazeta Wyborcza".
26 Ivanova E., 187 spraw przeciwko polskim dziennikarzom. Monitoring represji wobec wolnych mediów 2015-21, „Gazeta Wyborcza".
27 Kozielski M., Polskie Radio chce 1 mln zł zadośćuczynienia od „Newsweeka" za materiał „Szczujnia zabija", Press.pl.
28 Case no. I ACa 2015/15, Court of Appeal in Warsaw, 6th Civil Division.

The court may also order that a statement be made in an appropriate form and with appropriate content – e.g. the publication of an apology. In the event that the defendant fails to publish the ordered apology, Article 1050§4 of the Code of Civil Procedure (CcivP) on the enforcement of an irreplaceable measure applies. This provision applies only to cases of violations of personal rights. In the event that the defendant does not publish the statement ordered by the court, the court imposes a fine not exceeding PLN 15,000 on the defendant. The court also orders the publication of the statement in Monitor Sądowy i Gospodarczy (Court and Commercial Gazette, an official bulletin authorised to publish public or legal notices) which will result in the expiration of the claim. The provision excludes the possibility of imposing a custodial sentence and the accumulation of fines of up to one million PLN.

Certain forms of securing the claim can be used by the initiators as tools in SLAPP cases. One such instrument is the device provided for in Article 755 of the Code of Civil Procedure, which relates to the securing of non-monetary claims. The forms of securing the claim can vary – from the publication of a frame alongside an online publication indicating that a particular article is the subject of legal proceedings, to the partial or complete removal of the publication, to the prohibition of any publication on a particular topic. The controversy on this topic has been described, among others, by the HFHR's stance on the motions to secure the claim in connection with the corruption scandal in the Polish Financial Supervision Authority (PFSA)[29]. However, the legislator has limited the possibility of securing non-monetary claims in the form of a publication ban only to matters that do not conflict with an important public interest and has limited the duration of the security to one year. If the case is still pending after one year, the claimant can apply to the court for an extension of the security. As long as the court has not examined the application, the previous security is extended.

29 Helsinki Foundation for Human Rights (5 December 2018), Stanowisko HFPC w sprawie wniosków o zabezpieczenie powództwa wokół afery korupcyjnej w KNF.

SLAPP case law – analysing selected civil law instruments that make it possible to counteract SLAPP proceedings

Applicable civil law provisions can be used instrumentally to initiate SLAPP proceedings. Despite the fact that SLAPPs are a significant problem in Poland,[30] the current model of civil proceedings allows defendants to defend themselves against SLAPPs only to a limited extent.

In the case of SLAPPs, the claimant does not seek protection through the courts. Therefore, in principle, such actions do not merit consideration and should be dismissed. However, as pointed out by, among others, the European Commission in its recommendations (i.e. a non-binding document containing instructions for actions for the Member States),[31] it is essential for the protection of public participation that a claim that has SLAPP qualities is not only dismissed but dismissed at an early stage of the proceedings.

Some protection against SLAPP proceedings is currently provided by existing civil law provisions, which can and are used by at least some courts to counteract such actions. These include Article 5 CivC, Article 191[1] of the CCivP and Article 4[1] CCivP. The most common way to counteract civil SLAPP proceedings in Poland is to dismiss the action due to the absence of unlawfulness in the defendant's actions – i.e. by recognizing that by providing certain information to the public, the defendant acted in defense of a socially justified interest and at the same time upheld the standards of journalistic integrity.

The following subsections analyse the case law with regard to the application of existing legal instruments that allow courts for an early dismissal of at least some SLAPP actions or for application of other specific measures. They were developed based on responses to requests for access to public information submitted to 47 regional courts. In order to determine whether the courts apply the provisions of the Civil Code and the Code of Civil Procedure that allow for early termination of proceedings in cases initiated by a lawsuit that has the characteristics of a SLAPP, the HFHR asked the courts whether they apply Article 191[1] CCivP, Article 5 CivC and Article 4[1] CCivP in cases involving the protection of personal rights, including reputation. In addition, the HFHR requested that anonymised judgments with the statements of grounds be made available in cases involving the protection of personal rights, including reputation, in which those provisions were applied. In the case of Article 5 CivC, the period referred to in the request included the years 2013–2023, and in the case of Article 191[1] CCivP and Article 4[1] CCivP the years 2019–2023. Additionally, the case law available in legal information systems was analysed to supplement the data received through the requests for access to public information.

30 The Coalition Against SLAPPs in Europe (CASE), Shutting out criticism: How SLAPPs threaten European democracy.

31 Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation").

Manifestly unfounded claim (Article 191[1] of the Code of Civil Procedure)

Pursuant to Article 191[1] CCivP, an action can be dismissed in camera if it is clear from the content of the statement of claims and the circumstances of the case that the claim is manifestly unfounded. In such a case, the court does not serve the statement of claims on the person named as the defendant and does not examine the motions submitted together with the statement of claims. This article was introduced by the 2019 amendment to counteract the filing of an action for a purpose other than obtaining a court decision. The explanatory memorandum to the amendment points out that a manifestly unfounded claim is, for example, a claim that constitutes harassment of the defendant by forcing him or her to participate in the proceedings, which leads to a waste of time, energy and money.

According to the data collected by the HFHR, the courts do not currently apply Article 191[1] CCivP to claims that have the characteristics of a SLAPP.[32] It should be noted, however, that such a possibility does not seem to be entirely excluded on the basis of existing case law – Article 191[1] CCivP is sometimes applied to claims for the protection of personal rights, including the protection of reputation, which do not necessarily constitute SLAPP proceedings.

This is important because a very restrictive case law has developed with regard to manifestly unfounded claims and only statements of claims in which claims that are unlawful or inadmissible in the light of substantive law have been formulated fall under the heading of manifestly unfounded claims[33]. The adoption of such an interpretation would generally exclude the possibility of applying Article 191[1] CCivP to SLAPPs. However, it should be noted that this is only one of the possible judicial interpretations of this provision. Some courts adopt a broader understanding of manifest unfoundedness. One passage of the judgment is particularly noteworthy – although the claim on which the judgment was based did not itself have the characteristics of a SLAPP, this part of the reasoning could also apply to proceedings brought to suppress public participation.[34]

The case concerned the words of a judge spoken to one of the participants in the proceedings. In the opinion of the participant in the proceedings, his or her reputation had been violated, and therefore the participant sued the judge. That claim was dismissed as manifestly unfounded. The statement of grounds reads: „in view of the allegations contained in the statement of claims, it must be stated that the formulations described by the claimant as a violation of the claimant's personal rights provide no reason to assume that the claimant's personal rights have been or could even have been violated. Even an initial assessment of these formulations leads to the conclusion that there was obviously no violation of the claimant's personal rights." The court noted that „the claimant's reasoning essentially amounts to expressing only his subjective, individual feelings, emotions, values and state of mind. Meanwhile, in assessing whether there has been a violation of a personal right, it is not decisive what reaction the violation provokes in society, taking into account average human reactions."

32 The analysis includes 62 judgments obtained from 12 regional courts, but in no case did the claim, which was considered manifestly unfounded, have the characteristics of a SLAPP. In another 21 regional courts, Article 1911 of the CCivP was not applied in cases involving the protection of personal rights. It cannot be ruled out that Article 1911 CCivP was applied to SLAPPs in the 14 courts that have not responded to the HFHR's request.

33 Judgment of the Court of Appeal in Katowice, 12 April 2021, case number I ACa 89/21, LEX/el.

34 Judgment of the Court of Appeal in Katowice, 17 November 2021, case number II C 1289/21, unpublished.

In line with the European Commission's Recommendations on protection from SLAPPs, Member States should aim to ensure that procedural safeguards to grant an early dismissal of manifestly unfounded court proceedings against public participation are available. Article 191[1] CCivP could possibly be used as such a safeguard, although it should be noted that the defendant would not even know about this institution if it were applied. On the one hand, such a solution offsets the negative financial and psychological consequences that are usually associated with SLAPP proceedings, but on the other hand, the proceedings then take place outside the defendant, so to speak.

Abuse of (substantive) right and abuse of a procedural right

Since the main purpose of a SLAPP action is not to obtain a judicial decision with a specific content, but to silence and intimidate an opponent, the filing of such an action does not constitute the exercise of rights. Under Polish law, it is possible to consider a claim for protection of reputation as an abuse of right on the basis of Article 5 of the Civil Code. According to Article 5 CivC, one may not make use of one's right in a way that is contrary to the socio-economic purpose of this right or the principles of social coexistence. In the statement of defence, the defendant may invoke Article 5 CivC. The defendant must prove that the claimant has exercised his or her right in a manner contrary to the principles of social coexistence or the socio-economic purpose. It should be emphasised that the claimant does not have to prove that this is not the case.

However, none of the courts to which the HFHR addressed its requests cited a single case in their response in which this argument had been effectively raised in the context of SLAPP proceedings[35]. Nevertheless, it is worth recalling the judgment of the Supreme Court[36] regarding the alleged violation of the personal rights of Grupa Allegro sp. z o.o. by the Zielone Światło (Green Light) Foundation. The violation was to occur in connection with the Foundation's objection to the sale of Nazi gadgets on the claimant's website. According to the Supreme Court, the claimant's action violated Article 5 CivC, as the claimant had exercised her right contrary to the principles of social coexistence. The Supreme Court came to this conclusion by focusing on the need to allow criticism of the trade in such items.

Also noteworthy is the judgment of the Court of Appeal in Łódź[37] in the case ING Nationale Nederlanden Polska S.A. v. 'Stowarzyszenie Osób Poszkodowanych przez ING Nationale Nederlanden' ('Association of Victims of ING Nationale Nederlanden'). According to the court in that case, the action brought by ING Nationale Nederlanden constituted an abuse of right and was contrary to the principles of social coexistence, since it sought to prevent the defendant association from critically assessing the bank's behaviour[38]. However, the fact that the bringing of the action constituted an abuse of right was not the reason for its dismissal.

35 The analysis refers to the responses of 30 regional courts, 28 of which did not apply Article 5 CivC at all in cases involving the protection of personal rights, including the protection of reputation. In the two remaining courts, a total of 4 cases concerning the protection of personal rights were considered an abuse of right. Claims initiating these proceedings do not have the characteristics of a SLAPP.

36 Judgment of the Supreme Court of 23 July 2015, case number I CSK 549/14.

37 Judgment of the Court of Appeal in Łódź of 17 May 2006, case number I ACa 15/06.

38 Cf. M. Bernatt, "Glosa do wyroku Sądu Apelacyjnego (I ACa 15/06) z dnia 17 maja 2006 r. w sprawie ING Nationale Nederlanden Polska S.A. przeciwko Stowarzyszeniu Osób Poszkodowanych przez ING Nationale Nederlanden", Przegląd Ustawodawstwa Gospodarczego 2009, no. 4, pp. 28–32; M. Bernatt, Społeczna odpowiedzialność biznesu Wymiar konstytucyjny i międzynarodowy, Warszawa 2009, p. 147.

Pursuant to Article 4[1] CCivP, the court may consider an action brought as an abuse of a procedural right. According to this provision, the parties and participants in the proceedings may not exercise the right provided for in the rules of procedure in a manner contrary to the purpose for which such a right was created. Article 4[1] CCivP, similar to Article 191[1] CCivP, was added by the 2019 amendment.

Since, as mentioned, Article 4[1] CCivP was only introduced in 2019, extensive case law has not yet developed on its basis. The courts that have responded to the HFHR's requests on this issue do not apply this provision to actions against public participation[39]. However, this article is important from the perspective of preventing SLAPPs, since the recognition of a certain step (e.g. bringing an action) as an abuse of right enables the imposition of sanctions provided for in Article 226[2] § 2 CCivP. One of these sanctions is the sentencing of a party who abuses a procedural right (in this example, the claimant) to a fine (Article 226[2] § 2 (1) CCivP) or the ordering of the claimant to pay the increased costs of the proceedings (Article 226[2] § 2 (3) (a) CCivP). These provisions are similar in some respects to the Recommendations of the European Commission, according to which Member States should aim to provide other remedies against abusive court proceedings, such as the possibility to impose effective, proportionate and dissuasive penalties on a claimant who has brought a SLAPP action and the possibility to order him or her to bear all the costs of the proceedings.

39 The HFHR received a response from 29 regional courts in this matter, none of which applied Article 41 CCivP to actions for the protection of personal rights, including the protection of reputation.

SLAPP proceedings in criminal matters

Poland belongs to a group of countries where, despite the efforts of NGOs and international organisations, defamation is still subject to criminal sanction, which is often used against the media and journalists. In addition, criminal law includes the following types of offences: public insult to the Polish nation, public insult to the President of the Republic of Poland, public insult to a representative of a foreign state, damage to flags, emblems and other signs, Polish and foreign, insult to religious feelings, defamation, insult, release of information about the private life of public officials and incitement to release such information, insult to a public official or a constitutional body of the Republic of Poland, insult to a monument. All of these offences can be used to initiate proceedings such as a SLAPP but they are less frequently used against the media.

The most commonly abused provision in criminal SLAPP proceedings is Article 212 of the Criminal Code (CrC), which provides a penalty for defamation. Cases under Article 212 CrC are in principle prosecuted by private accusation and the aggrieved party acts as a private prosecutor in these cases. However, if the public prosecutor recognises a public interest in the case, he or she may initiate proceedings in accordance with Article 60 §1 of the Code of Criminal Procedure. If a private prosecutor has already filed an indictment, the public prosecutor joins the case and the aggrieved party who previously filed a private indictment acts as an auxiliary prosecutor. However, this is not a common practice. Although many criminal proceedings against journalists end in an acquittal or discontinuation of the proceedings, the threat of possible criminal sanctions has a chilling effect.

To quote the Supreme Court, „the object of protection under Article 212 §1 CrC is the honor and dignity of a person who is defamed for such conduct or characteristics that may bring him or her into disrepute in public opinion or expose him or her to the loss of confidence necessary for a given position, profession or type of activity"[40]. A natural person, a group of persons, an institution[41], a legal person or an organisational unit without legal personality can be defamed. As the Supreme Court emphasised in its judgment, „Article 212 CrC does not require the offence of defamation to have a certain tone, sharpness or forcefulness of expression, but only that the statement made exposes the defamed person to the loss of confidence necessary to perform in a given position, occupation or type of activity"[42]. The penalties provided for an offence under Article 212 CrC are a fine, restriction of liberty or imprisonment for up to one year. A qualified form of defamation (i.e. for which a higher penalty is provided) is defamation by the mass media.

Journalists are often victims of criminal SLAPP proceedings brought by the same people or organisations that bring civil proceedings against them. Such proceedings are often based on the same publication, article or social media post.

40 Supreme Court, Criminal Chamber, 17.03.2016, case no. III KK 477/16.

41 According to the ECtHR judgment in Memo OOO v. Russia, the notion of "institution" should not include public authorities. The OOO Memo judgment is discussed in the report below.

42 Supreme Court, Criminal Chamber, 09.05.2013, case no. IV KK 403/12.

Examples of SLAPP cases brought under criminal law:

Telewizja Polska S.A. (TVP) v. Wojciech Sadurski

In 2019, TVP (the Polish public broadcaster) initiated criminal and civil proceedings against Professor Sadurski (under Article 212 CrC and Articles 23–24 CivC respectively) in connection with his tweet posted after the death of the Mayor of Gdańsk, Paweł Adamowicz, in which the professor referred to TVP as "Goebbels media". TVP filed a private indictment in the criminal proceedings, claiming that "the false information [spread by the professor] fundamentally undermines the Company's reputation as a public broadcaster". TVP also demanded that the court order the professor to pay a penalty assessment of 10,000 PLN to the Great Orchestra of Christmas Charity. A court of first instance discontinued the proceedings, finding that Sadurski's statement did not relate directly to TVP. The court found that the professor's statement was a journalistic commentary and as such did not present the elements of a prohibited act. TVP filed an interlocutory appeal against the court order, which proved to be effective, and the case was reconsidered by the district court. Finally, in December 2022, the case came to a final conclusion before the Supreme Court, which dismissed TVP's cassation appeal as completely unfounded.

In the civil proceedings, TVP sued the professor seeking protection of its personal rights, which were allegedly violated by the dissemination of "untrue, unreliable" and "offensive" information by him, and demanded redress for the violation of TVP's "good name and reputation", which could lead to an undermining of its "authority and position in the media market". In the lawsuit, TVP demanded the removal of the tweet and asked the court to order Sadurski to publish an apology on the homepage of the news portal Onet.pl for a period of 72 hours. TVP also demanded that Sadurski pay PLN 20,000 to the Great Orchestra of Christmas Charity Foundation and PLN 20,000 to a hospice in Białystok and requested reimbursement of the costs of the proceedings and legal fees. In 2022, the court of first instance ruled in Sadurski's favour and ordered the claimant (TVP) to pay the costs of the proceedings. In November 2022, TVP filed an appeal against the judgment at first instance. TVP withdrew its appeal at the beginning of 2024. The proceedings against Prof Sadurski were commented on worldwide as an obvious example of a SLAPP. An open letter in defence of the professor, published on the Verfassungsblog and initiated by Professors de Burce and Morijn, was signed by hundreds of academic authorities from around the world[43].

43 de Búrca, Gráinne; Morijn, John (6 May 2019): Open Letter in Support of Professor Wojciech Sadurski, VerfBlog, https://verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/. The examples described in detail above are not the only SLAPPs against Professor Sadurski. The others were initiated by the Law and Justice party and by Professor Jan Majchrowski.

The mayor of Gryfino (Mieczysław Sawaryn) v. Rafał Remont

In 2017, Rafał Remont, a journalist from the Nadodrzański Obserwator, sent questions about the mayor of Gryfino, Mieczysław Sawaryn, to the press office of Polska Grupa Energetyczna (PGE, a state-owned energy company). Mr Sawaryn was a member of the Supervisory Board of PGE at the time. The mayor found that the questions addressed to PGE were untrue and defamatory. He therefore decided to initiate criminal proceedings against the journalist as aprivate prosecutor under Article 212 of the Criminal Code. The court of first instance found Rafał Remont guilty of the offence under Article 212 § 1. The court of second instance ruled that the journalist had committed the offence under Article 212 § 1 and conditionally discontinued the proceedings in this regard for one year. In addition, the court obliged the journalist to apologise to the aggrieved party. The HFHR intervened in the proceedings and prepared an application to the European Court of Human Rights on behalf of Rafał Remont, alleging a violation of Article 10 (freedom of expression) of the European Convention on Human Rights[44]. The breakthrough in the case came with a cassation appeal to the Supreme Court filed by the then Commissioner for Human Rights, Adam Bodnar. The Commissioner requested that the conviction be overturned and the journalist acquitted. In a judgment issued on 9 May 2023, the Supreme Court acquitted Rafał Remont. The court found that "the journalist's impugned behaviour was deprived of the capacity to cause a potential threat to the legal interest protected by Article 212 CrC. The wording of the questions, which contained insinuations that were objected to as untrue, does not offer the possibility of exposing Mieczysław Sawaryn to a loss of confidence, which is necessary for the exercise of the function of a member of the supervisory board. These questions were submitted to a strictly limited circle of persons to whom this information was available and the insinuations concerned asubject known to the authorities of [PGE].[45]"

Article 213 CrC sets out the grounds for excluding the unlawfulness of defamation. Pursuant to Article 213 § 2 CrC, one such ground is "acting in defence of a legitimate societal interest". Although the wording of this provision suggests that a legitimate societal interest can only be defended if the allegedly defamatory statements are true, the Constitutional Court ruled in a judgment of 12 May 2008 that "the author of a defamatory statement, if he or she exercises due care and credibility in obtaining information and establishing its truthfulness, cannot be held criminally liable under Article 212 CrC, even if the allegations he has made or disseminated are untrue."[46] The burden of proof for the grounds that exclude the unlawfulness of the defamation lies with the accused.[47]

44 Rycko K. (28 June 2021), HFPC będzie bronić w Strasburgu skazanego dziennikarza, Press.pl.
45 Supreme Court, Criminal Chamber, case no. III KK 433/22, 9 May 2023.
46 Judgment of the Constitutional Court of 12 May 2008, SK 43/05.
47 Sitnicka D. (27 April 2024), Adam Bodnar zapowiada zniesienie art. 212 kodeksu karnego o zniesławieniu, OKO.press.

Furthermore, it is assumed that the criminal offence of defamation cannot be fulfilled by the formulation of an opinion. In other words, the offence of defamation cannot be committed if the perpetrator's statement is not a statement of fact (if its truthfulness cannot be verified).[48]

Article 212 CrC has been controversial for years – many non-governmental organisations in Poland are explicitly calling for its deletion.[49] The HFHR has been doing this consistently for over a decade.[50] The Organisation for Security and Co-operation in Europe[51] and the Parliamentary Assembly of the Council of Europe[52] also recommend the deletion of defamation from the criminal codes of member states. In 2024, Justice Minister Adam Bodnar declared that Article 212 would be abolished.[53]

Early termination of criminal SLAPP proceedings – an overview of the jurisprudential practice of the courts

As with civil SLAPPs, the provisions of criminal procedure theoretically allow for the early termination of SLAPP proceedings.

The basic way to defend against a SLAPP is to obtain an acquittal for the accused, but this entails the need for a trial and is not the optimal solution from the point of view of protecting public participation. The protection of public participation requires that such proceedings be brought to an early end.

Under current criminal procedure law, it is legally possible to discontinue proceedings without a trial under Article 17 § 1(2) of the Code of Criminal Procedure, i.e. if the court finds that the act does not feature elements of a prohibited act or if the law provides that the perpetrator is not committing a criminal offence. If such a ground exists, i.e. if the content of the evidence collected, the description of the act and the factual circumstances stated in the grounds of the indictment clearly indicate the absence of elements of a prohibited act, the judge refers the case to a preliminary hearing (Polish: posiedzenie, Article 339 § 3 (1) CCrP). This means that the accused does not have to bear the financial, time or psychological costs associated with the need to participate in a full criminal trial.

The invocation of the occurrence of the circumstances under Article 17 § 1 (2) CCrP (i.e. absence of elements of a prohibited act) and the dismissal of the case at a preliminary hearing under Article 339 § 3 (1) CCrP could constitute an effective strategy for defence against SLAPP proceedings. The analysis conducted by the HFHR shows that one of the types of cases in which the courts consider that there is no need to refer the case to full trial are those relating to statements made in the exercise of the individual's rights, such as official assessments, pleadings, complaints, reports by victims of offences[54]. Furthermore, in some orders the courts

48 Judgment of the Supreme Court of 16 April 2021, case number V Ka 1/20; J. Raglewski [in:] W. Wróbel, A. Zoll (Eds.), Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. art. 212-277d, Warszawa 2017, Lex/el. However, academic writings and case law also hold other views on this subject.

49 For example: Batko-Tołuć K. (13 February 2020), Artykuł 212 – postulujemy dekryminalizację zniesławienia - wspólna inicjatywa Helsińskiej Fundacji Praw Człowieka, Sieci Obywatelskiej Watchdog Polska oraz Towarzystwa Dziennikarskiego.

50 Głowacka D. (2012), Praktyczny przewodnik po art. 212 k.k., Helsińska Fundacja Praw Człowieka.

51 van den Brandt T. (23 November 2021), Special Report. Legal Harassment and Abuse of the Judicial System Against Media, Organization for Security and Co-operation in Europe Office of the, Representative on Freedom of the Media.

52 Council of Europe Parliamentary Assembly Resolutions 2035, 2141, 1577 and 1814.

53 Sitnicka D. (27 April 2024).

54 Order of the District Court for Warszawa Praga-Południe in Warsaw, 23 June 2021, case number III K 223/20, unpublished.

have drawn a clear line between critical and defamatory statements, as in the following case: "According to the court, the statement quoted by the prosecutor did not exceed the limits of permissible criticism, taking into account the circumstances in which it was allegedly made. Not every critical statement directed at another person can be considered defamatory. The court is obliged to consider the context of the statement, the nature of the wording, the intention of the accused person and the possible consequences of the statement.[55]"

The rulings submitted to the HFHR by the courts show that some of the courts see the need to protect judgemental statements. This includes both those critical information and ideas that are favourably received and considered not offensive or neutral, as well as those that offend, shock or disturb[56]. Other Strasbourg standards applied include broader limits on permissible criticism of public figures[57] and statements made in the context of a lively political debate at local level[58]. Some of the courts also consider reliable press material containing critical judgements to be within the limits of permissible criticism. According to such case law, criticism cannot be considered unfounded if it has been expressed in a factual manner after all possibilities of verifying the truthfulness of the informant have been exhausted.[59]

The court applied Article 17 § 1 (2) CCrP also in a defamation case in which the HFHR was involved. As the court argued in the statement of grounds, „It was sufficient to refer to the reading of the press articles complained of, the overtone of which was the subject of a criminal assessment. There was no need for other means of evidence to issue a decision. The issuance of a decision in the preliminary hearing was justified to the extent discussed because, contrary to the private prosecutor's claims, the criminal assessment of the act in question consisted in the clear significance of the press articles, which did not require a separate hearing of evidence, since the social impact of the articles in question in public opinion was to be assessed in principle within the framework of journalistic reliability, which could also be done overall by the court in the preliminary hearing."[60]

In some cases, the courts took into account the perpetrator's intent.

"The offence under Article 212 § 1 CrC is an intentional offence and it must be proven that the accused acted with direct or oblique intent to commit this offence. Based on the material collected in the file, it should be assumed that the accused only intended to express his opinion."[61]

In order for a perpetrator to be held criminally liable, he or she must be aware that his or her statement contains defamatory accusations. He or she must act with defamatory intent and be aware that he or she may expose a person to public humiliation or loss of the trust required for a particular position or profession.[62]

55 Order of the District Court for Warszawa Praga-Poludnie in Warsaw, 16 August 2022, case number IV K 1264/21, unpublished.

56 Lingens v. Austria, 8 July 1986, no. 9815/82, § 41; order of the District Court for Warszawa-Żoliborz in Warsaw, 16 April 2021, case number III K 709/18, unpublished.

57 , Jucha and Żak v. Poland, 23 October 2012, no. 19127/06, § 40; order of the District Court for Warszawa Praga-Południe in Warsaw, 24 August 2021, case number IV K 855/21, unpublished.

58 Lombardo and Others v. Malta, 24 April 2007, no. 7333/06, § 59; order of the District Court for Warszawa-Żoliborz in Warsaw, 24 March 2021, case number IV K 855/21, unpublished.

59 Order of the District Court for Warszawa-Śródmieście in Warsaw, 15 December 2020, case number II K 264/20, unpublished.

60 Order of the Regional Court in Częstochowa, 10 September 2021, case number VII Kz 277/21.

61 Order of the District Court for Warszawa-Żoliborz in Warsaw, 24 March 2022, case number IV K 855/21, unpublished.

62 Order of the District Court for Warszawa-Żoliborz in Warsaw, 2 February 2021, case number HI K 441/20, unpublished; order of the District Court for Warszawa-Żoliborz in Warsaw, 18 December 2020, case number III K 761/18, unpublished.

In many cases, SLAPP proceedings are conducted against people who wanted to inform the public about an important social issue or simply express their opinion. Not only is defamation not their intention, but they are often unaware that their actions could be perceived as such.

Negligible social harmfulness of the act

The proceedings can be discontinued during a hearing if the social harmfulness of the act is negligible (17 § 1(3) CCrP). For the purposes of assessing the harmfulness of the act, the perpetrator's motive, the extent of the damage caused and the manner and circumstances in which the act was committed are taken into account.

The courts recognise that a particular defamatory statement constitutes negligible social harm, taking into account, inter alia, the nature of the wording of the statement and the vocabulary used, the fact that the statement had only a small number of potential recipients[63], the fact that the incriminated statement was only a small fragment of a larger statement[64], that the extent of the harm is insignificant and the context of the conflict between the parties[65]. In addition, courts sometimes dismiss defamation proceedings on the basis of Article 17 § 1 (3) CCrP if the aggrieved party's image has been injured but this injury was within the limits of permissible criticism.[66] The courts sometimes find that the act constitutes negligible social harm even in relation to statements containing "very harsh and potentially offensive language" that "should not be used in the public sphere".[67] In none of the judgments analysed was this provision applied to SLAPPs. Nevertheless, it could be a good instrument of judicial protection against SLAPPs.

Manifest lack of factual grounds for the accusation

Another tool provided for in the Code of Criminal Procedure that the court may resort to when it considers a case to be SLAPP is Article 339 § 3(2) CCrP, i.e. manifest lack of factual grounds for the accusation. This article can be seen as a kind of criminal law equivalent to Article 191[1] CCivP, which relates to a civil law claim that is manifestly unfounded. According to case law, there is a manifest lack of factual grounds for the accusation if the evidence examined by an average, objective and reasonable observer does not prima facie allow the accused to be held responsible for the commission of the alleged act, even if there are individual circumstantial indications that the accusation is well-founded. It is therefore a situation in which the determination of the lack of grounds for court proceedings does not require any further procedural steps, because it is sufficient to read the contents of the indictment, attached evidence or files of the pre-trial proceedings, provided that such an assessment must include all evidence and provide the opportunity to gain insight into the totality of the relevant circumstances of the case. In none of the judgments analysed by the HFHR was this provision applied to SLAPPs. However, it should be recalled that some courts tend to dismiss the proceedings under Article 339 § 3(2) CCrP if the indictment is not "a legally admissible means of obtaining legal protection, but is merely an instrument used to involve the judiciary in conflicts that the accused had with various persons".[68] This reasoning can be applied mutatis mutandis to SLAPP proceedings.

63 Order of the District Court for Warszawa-Mokotów, 1 April 2014, case number XIV K97/13, unpublished.
64 Order of the District Court for Warszawa-Żoliborz in Warsaw, 28 February 2023, case number III K 11/22, unpublished.
65 Order of the District Court for Warszawa Praga-Południe in Warsaw, 26 January 2021, case number IV K 666/20, unpublished.
66 Order of the District Court for Warszawa-Śródmieście, 13 October 2022, case number X K 867/20, unpublished.
67 Order of the District Court for Warszawa-Żoliborz in Warsaw, 28 February 2023, case number III K 11/22, unpublished.
68 Order of the District Court for the Capital City of Warsaw, 15 April 2015, case number III K 519/13, unpublished.

Selected examples of the case law of the European Court of Human Rights on SLAPP proceedings

SLAPP proceedings are not often brought before the European Court of Human Rights, as these cases, which by their nature are unfounded, are usually decided in favour of the defendant in earlier instances before national courts. Nevertheless, journalists and media companies who defend themselves against SLAPPs can rely on the extensive case law of the ECtHR, which sets standards for the protection of freedom of expression and freedom of the press.[69]

The most important judgement for the study of the SLAPP problem is undoubtedly the judgement of the ECtHR in the case OOO Memo v. Russia. A local internet portal, Caucasian Knot, was sued by the Administration of the Volgograd Region, which wanted to protect its reputation, after publishing an article about the suspension of subsidies to the city of Volgograd. The courts of both instances agreed with the arguments of the administration and ordered OOO Memo, the portal's owner, to publish a rectification.

Citing Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression, OOO Memo filed an application with the ECtHR. The Court's judgment is ground-breaking for at least several reasons. For the first time in the history of the ECtHR, the phenomenon of SLAPP proceedings was mentioned in a reasoning of a judgement of the Court. Referring to the comment by Council of Europe Commissioner for Human Rights Dunja Mijatović entitled *Time to take action against SLAPPs*[70], the Court emphasised the growing awareness of the threat to democracy posed by SLAPPs.

In addition, the ECtHR stated in this judgment that legal and natural persons can defend their personal rights through lawsuits. Tax-financed institutions that exercise public authority, such as the Administration of the Volgograd Region, are an exception to this rule. The Court held that an action brought by a legal person exercising public authority could not be regarded as pursuing the legitimate aim of protecting "the reputation or rights of others" under Article 10(2) of the Convention. Unlike other legal entities, such as companies, an administrative authority does not need to protect its reputation in connection with competition for customers in the market. Such an authority is not at risk of financial loss which might be a consequence of defamatory articles. The ECtHR emphasised that allowing the media and journalists to initiate defamation proceedings against them would impose an excessive and disproportionate burden on them. Moreover, this may lead to a chilling effect, discouraging the media from fulfilling their task of providing information on matters of public interest. In OOO Memo v. Russia, the ECtHR departed from its previous case law, which allowed legal persons exercising public authority to initiate proceedings for the protection of personal rights.[71]

69 A comprehensive proposal for ECtHR standards that can be invoked by those affected by SLAPPs is presented in a report, see Bayer J. and Bard P. and Vosyliūtė L. and Luk N. Ch. (30 June 2021), Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study.

70 Mijatović D. (27 October 2020), Time to take action against SLAPPs.

71 The standard set out in Memo OOO v. Russia has been applied by a Court of Appeal in Łódź, when on 20 December 2023 the court has dismissed the action brought by the City of Kalisz against Katarzyna Urbaniak, a member of the organisation Obywatele RP. To our knowledge, this is the first judgement in Poland where this standard has been applied. More about the case.

SLAPP proceedings and the European Union law

A milestone for attempts to combat SLAPPs at EU level was 27 April 2022, when the European Commission presented a proposal for an **Anti-SLAPP Directive** (officially: Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")[72] and Recommendations[73].

The Directive was adopted in April 2024. Since then, the Member States have had two years to transpose it into national law. Although the introduction of an EU law against SLAPP proceedings is a great success, it will not offer protection to all parties harmed by SLAPPs.

The legal basis for the Directive is Article 81 of the Treaty on the Functioning of the European Union (TFEU), which relates to judicial cooperation in civil matters. Article 81 TFEU regulates judicial cooperation in civil matters with cross-border implications.[74] This means that the Directive does not apply to cases in which both the defendant and the claimant are from the same EU country in which the court is based or in which the case is only relevant to one Member State. This approach to the problem leaves room for judicial interpretation, which will determine what exactly constitutes a cross-border element.

According to a report by the CASE Coalition in 2022, only 9.5% of the matters examined between 2010 and 2022 could be categorised as cross-border, or those in which both the defendant and the claimant are from the same EU country in which the court is based.[75] The report thus points to the very low effectiveness of the Directive in domestic matters. However, Member States may choose to propose a broader scope of protection by supplementing the Directive. Some Member States are currently working on their laws to combat SLAPPs.[76]

72 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"), Brussels, 27 April 2022, 2022/0117 (COD).

73 Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation").

74 Borg-Barthet J. (29 April 2022), "Daphne's Law": The European Commission introduces an anti-SLAPP initiative, EU Law Analysis.

This is referred to in Article 5 of the Directive: Matters with cross-border implications:

1. For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised and all other elements relevant to the situation concerned are located only in that Member State.

2. Domicile shall be determined in accordance with Regulation (EU) No 1215/2012.

75 The CASE Coalition Against SLAPPs in Europe (July 2023), SLAPPs: The Threat to Democracy Continues to Grow.

76 Maltese anti-SLAPP proposal.

The tools proposed by the Directive can significantly help journalists targeted by SLAPP proceedings with a cross-border element. First, thanks to the Directive, courts will be able to assess at an early stage whether they are dealing with a SLAPP. If the answer to this question is in the affirmative, the court will have the following options:

1. dismiss the "manifestly unfounded" claim. An important innovation is the claimant's obligation to prove that the allegations are well documented and that the case is not a SLAPP. The application for early dismissal should be treated by the court in an accelerated manner;
2. impose on the claimant the obligation to pay all the costs of the proceedings, including the costs of legal representation;
3. impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, "including the payment of compensation for damage or the publication of the court decision, where provided for in national law";
4. refuse to recognise the judgment of a third country if the court considers the case to be SLAPP.

Despite introducing the anti-SLAPP Directive, the problem of forum shopping remains unsolved. Forum shopping is a practice in which a claimant chooses the most favourable jurisdiction for its case. Forum shopping in SLAPP proceedings is about choosing a country where the defamation laws are the strictest against defendants. For journalists, it is an additional burden to deal with a trial in a country whose language they do not speak and where legal services are often more expensive than in their home country. The practice of forum shopping is based on the provisions of the Brussels I (recast)[77] and Rome II[78] Regulations. Despite pressure from non-governmental organisations, these regulations have not yet been amended in a way that would prevent their application in SLAPP cases.

The problems for freedom of expression arising from the solutions contained in the Brussels I Regulation are addressed to some extent in the opinion of **Advocate General Maciej Szpunar in Case C 633/22, Real Madrid Club de Fútbol, AE v EE, Société Éditrice du Monde SA[79]**:

The background to the case is a Spanish court judgment that the publisher of Le Monde Diplomatique and the newspaper's journalist must pay Real Madrid damages for defamation in connection with the publication of articles in 2006. The article in question described the links between the soccer club and Dr. Fuentès, the mastermind behind a doping scandal in cycling. The publisher and the journalist were ordered to pay damages of EUR 390,000 and EUR 33,000 respectively. Real Madrid applied for the Spanish judgment to be enforced in France, but in 2020 the Paris Court of Appeal dismissed its application on the grounds of public policy.

77 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (reacst).

78 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

79 Published on 8 February 2024.

The Paris court ruled that the amount of damages awarded had a chilling effect on journalists and the media and therefore violated freedom of expression and media freedom. On 28 September 2022, the Cour de Cassation (Supreme Court) submitted a request for a preliminary ruling to the Court of Justice of the European Union (CJEU), asking it to interpret the provisions of the Brussels I Regulation in the context of the Charter of Fundamental Rights of the European Union.

In his opinion, the Advocate General proposed an interpretation according to which "a Member State in which enforcement is sought of a judgment given in another Member State, concerning a financial penalty imposed on a newspaper publishing house and a journalist for harm caused to the reputation of a sports club and a member of its medical team by the publication of a story in that newspaper, must refuse or revoke a declaration of enforceability of that judgment where enforcement of that judgment would give rise to a manifest breach of the freedom of expression guaranteed in Article 11 of the Charter [of Fundamental Rights]."

The Advocate General refers directly to the problem of SLAPPs, which is part of the analysis of the relationship between the principle of mutual trust and the substantive legal dimension of public policy (ordre public). The Advocate General states that in the case at hand, "the claim asserted by the applicants in the main proceedings did not seem to have a substantive basis in EU law", adding that an anti-SLAPP directive "could alter the applicability of Article 11 of the Charter in proceedings before a court of the Member State of origin in situations such as that at issue in the present case".

The Advocate General emphasises that the amount of damages awarded must not have a potentially dissuasive effect on participation in the debate on matters of public interest. In the case of media companies, such an effect "must be understood as a manifest threat to the financial stability of that newspaper". In turn, journalists are at risk "where that sum is several dozen times the standard minimum salary in the Member State in which enforcement is sought".

Furthermore, the Advocate General described freedom of the press as a fundamental principle of the EU legal order. The Advocate General's opinion is not binding on the Court, but it is "a signpost" that the Court is likely to follow.

The Recommendations of the European Commission, which accompany the Directive, can also be a major step towards effective protection against SLAPP proceedings. The Recommendations are not binding for the Member States – the implementation of the Recommendations into national law depends on their will. Nevertheless, they are a means of exerting political pressure and a signpost that shows the members of the European Community the direction of legal development.

The European Commission's Recommendations include the following measures:

1. **introducing national legislative solutions similar to the proposed directive;**
2. **organising training courses for lawyers and potential victims to raise awareness of SLAPPs;**
3. **organising social campaigns on SLAPPs;**
4. **organising support for SLAPP victims, e.g. through law firms;**
5. **preparing annual reports to the Commission on SLAPPs in a given Member State.**

In recent years, as awareness of the dangers of SLAPPs has grown, attempts have been made to enact regulations to protect against SLAPPs, and this problem is also being recognised by the courts.[80]

80 One example of this is a judgment by the Court of Appeal in Kraków, in which the Court addresses the Recommendations. Court of Appeal in Kraków – 1st Civil Division, 3 November 2022., case no. I ACa 1508/21.

Conclusions and recommendations

As the analysis carried out for the purposes of this report has shown, the provisions of criminal and civil law can be misused as a basis for SLAPPs against journalists. As far as civil law is concerned, Articles 23 and 24 of the Civil Code (which establish the legal protection of personal rights) and Article 755 of the Code of Civil Procedure (which establishes measures to secure non-monetary claims, including a prohibition of publication) are misused in this way. Nevertheless, the law applicable to civil proceedings provides mechanisms that can effectively counter SLAPPs to a certain extent. These include Article 1911 CCivP, which establishes the institution of a "manifestly unfounded claim", Article 5 of the Civil Code (abuse of right) and Article 41 of the CCivP (abuse of a procedural right). In criminal law, parties wishing to initiate SLAPP proceedings against the media (mis)use Article 212 CrC, acting as private prosecutors. Criminal law also offers mechanisms that can ward off at least some SLAPPs. These are Article 17 § 1(2) CCrP (absence of elements of a prohibited act), Article 17 § 1(3) CCrP (negligible social harmfulness of the act), as well as Article 339 § 3(2) of CCrP (obvious lack of factual grounds for accusation). It happens that the same natural or legal person initiates a SLAPP in response to the same statement using criminal and civil law.

The analysis of existing case law presented in the report shows that, in practice, the courts have recently avoided resorting to the instruments presented, which would allow at least some SLAPPs to be quickly dismissed. On the other hand, it is positive that there are situations in which the courts see the need to protect critical and important voices from the perspective of public participation, referring to the standards developed by the ECtHR. In addition, and most importantly, in cases of defamation, some courts consider that criminal law is the ultima ratio and should be used as a last resort: they discontinue matters where they consider that a person's reputation should be protected by civil law and not by criminal law.

The topic of SLAPP proceedings has only recently been recognised in Europe. Nevertheless, its importance has been recognised by the EU institutions and the European Court of Human Rights. As described in this report, the Anti-SLAPP Directive was adopted in April 2024. Once implemented by the Member States, the solutions contained in the Directive will enable at least some types of SLAPPs to be tackled effectively. The number of cases that fall within the scope of the Directive will also depend on the judicial interpretation of the ‚cross-border element' that a case must have. The European Commission has also proposed a number of recommendations that can serve as a guide for Member States to effectively combat SLAPPs. Whilst these recommendations are not binding, they are an important indication of the level of protection that Member States should provide against SLAPPs.

The European Court of Human Rights mentioned the problem of SLAPPs for the first time in the grounds of its judgment in Memo OOO v. Russia. The ECtHR stated that legal and natural persons can defend their personal rights through lawsuits. However, it emphasised that tax-financed institutions that exercise public authority are an exception to this rule. The Court thus departed from its previous case law, which allowed legal persons exercising public authority to initiate proceedings for the protection of personal rights.

Recommendations

The fight against SLAPP proceedings is necessary to protect the freedom of public participation, media freedom and the activities of civil society. Measures aimed at better protection against such SLAPPs should take into account the following factors:

- The implementation of the Anti-SLAPP Directive and the accompanying Recommendations of the European Commission. In addition, work on the implementation of the Directive should also be guided by the standard set out in the ECtHR judgment in Memo OOO v. Russia, which prevents legal persons exercising public authority from seeking protection of their personal rights.
- The implementation of the Directive should be accompanied by training for judges, prosecutors, advocates and legal advisors on issues related to SLAPP proceedings.
- Pending proper implementation of the Directive, courts should consider applying the existing criminal and civil procedural provisions that allow for the swift conclusion of SLAPP proceedings.

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