German Law Journal (2025), **26**, pp. 568–585
doi:10.1017/glj.2024.46

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

SLAPP vs. Mutual Trust: Protecting the Public Debate Through Public Policy Considerations

Zuzanna Nowicka

Doctoral School in the Social Sciences, Jagiellonian University, Kraków, Poland
Email: zuzanna.nowicka@doctoral.uj.edu.pl

(Received 21 August 2024; accepted 30 October 2024; first published online 10 December 2024)

Abstract
This Article argues that to protect public debate, which is vital for democratic societies, it is crucial for courts in EU Member States to apply the freedom of expression standards established by the European Court of Human Rights (ECtHR) when adjudicating cases, particularly in the context of Strategic Lawsuits Against Public Participation (SLAPPs). The Article examines whether the obligation to protect the freedom of expression extends to the non-enforcement of judgments that could have a chilling effect on public debate, and explores the legal implications within the framework of the EU's mutual recognition regime. By analyzing the Real Madrid v. Le Monde case, the Article highlights the importance of safeguarding free speech and public debate, praising the European Court of Justice (ECJ) for providing clear guidance on when non-enforcement is necessary to prevent the suppression of the public debate. The Article concludes by emphasizing the evolving role of the ECJ in balancing mutual trust among Member States with the protection of fundamental rights, especially in light of the EU's ongoing integration and its potential accession to the ECtHR.

Keywords: Freedom of expression; SLAPP; ECJ; mutual trust; public policy

A. Introduction

The main goal of this Article is to explore how states can fulfill their obligation to protect freedom of expression, particularly in the context of Strategic Lawsuits Against Public Participation (SLAPPs) and examine whether this obligation can extend to the non-enforcement of judgments that negatively impact public debate. The Article aims to assess whether such non-enforcement is permissible within the EU's mutual recognition regime, specifically under the "contrary to public policy" clause, while considering the legal dialogue between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

The ECJ faced a landmark moment as it faced its first request for a preliminary ruling regarding proceedings initiated with could be considered a SLAPP—Strategic Lawsuit Against Public Participation.[1] The court of reference sought guidance on identifying judgments that may chill public debate and whether enforcement of such judgments should be refused, which the ECJ thoroughly addressed.[2] This case prompts a critical examination of the measures states must adopt

[1]Case C-633/22, Real Madrid Club de Fútbol, AE v. EE, Société Éditrice du Monde SA, Request for Preliminary Ruling from the Cour de cassation (France) (Oct. 11, 2022).

[2]ECJ, Case C-633/22, Real Madrid Club de Fútbol, AE v. EE, Société Éditrice du Monde SA, ECLI:EU:C:2024:843 (Oct. 4, 2024), para. 61, https://curia.europa.eu/juris/liste.jsf?num=C-633/22&language=EN.

© The Author(s), 2024. Published by Cambridge University Press on behalf of the German Law Journal. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

to uphold open public discourse in an era where abusive legal tactics seem increasingly common.[3] The case also provides the foundation for the structure of this Article, which is as follows.

In the first section of this Article, I outline freedom of speech standards relevant for the case at hand as well as for similar cases. In this section, I also clarify the concept of SLAPPs and the chilling effect to highlight the importance of addressing them.

The second section of the Article begins with an overview of the recently adopted EU directive commonly referred to as the anti-SLAPP directive. I then draw attention to the positive obligation of states to protect freedom of expression, stemming from other acts adopted on the European level, as well as the jurisprudence of the ECtHR and the ECJ. I interpret that positive obligation in the present-day conditions and identify the procedural safeguards, the implementation of which can be derived from it. I also try to answer the question of whether it extends to non-enforcement of a judgment, enforcement of which could have a negative impact on the public debate.

In the third section, I analyze if the non-enforcement of a judgment on such grounds is permissible under the mutual recognition regime in the EU. In other words, I examine if a violation of freedom of expression falls within the scope of the contrary to public policy clause which can constitute the grounds for refusal of enforcement under the Brussels I regulation, recast. I frame this issue in the context of the dialogue between the ECJ and the ECtHR and I conclude by recapitulating both the opinion of AG Szpunar delivered in case C-633/22 and the judgment of the ECJ.

B. Real Madrid v. Le Monde Case

The main proceedings, marking the ECJ's first opportunity to address the issue of SLAPPs, were initiated concerning an article published in Le Monde in 2006 titled *Doping, first cycling, now football* (French: *Dopage: le football après le cyclisme*).[4] The article was published both online and in print. It concerned the hiring of doctor Eufemiano Fuentes by a Spanish football club, Real Madrid. Fuentes was previously arrested in connection to a doping scandal that involved many professional cyclist, including some Tour de France favorites.[5]

As a response to the publication, the football club, as well as a member of its medical team sued both the publisher of Le Monde, Société Éditrice du Monde, and the author of the article for defamation. The proceedings in Spain were won by the claimants and the defendants were ordered to pay jointly 390,000 to Real Madrid and 33,000 to the member of the medical team by way of the principal amount, interest and costs.

The Regional Court of Paris later issued two declarations of enforceability in relation to that judgment, which were then overturned by The Court of Appeal in Paris. The Court of Appeal in Paris held that the recognition of the judgment would be contrary to the French public policy. The awarded damages would have a deterrent effect on the defendants, discouraging them from participating in public debate. The plaintiffs in the principal proceedings brought an appeal in cassation. Before delivering a judgment, the French supreme court in civil matters, Cour de Cassation, referred seven questions to the ECJ on 28 September 2022.

The referring court essentially sought to determine whether Article 45(1) of the Brussels I Regulation,[6] in conjunction with Article 34(1), Article 45(2), and Article 11 of the Charter of the Fundamental Rights of the European Union,[7] should be understood as allowing a Member State,

[3]Paulina Milewska & Zuzanna Nowicka, *The Ball is in the Game*, VERFASSUNGSBLOG, (Apr. 24, 2024), https://verfassungsblog.de/the-ball-is-in-the-game/.

[4]*Dopage: Le Football Après le Cyclisme*, LE MONDE, (Dec. 7, 2006, 2:55 PM), https://www.lemonde.fr/a-la-une/article/2006/12/07/dopage-le-football-apres-le-cyclisme_843000_3208.html.

[5]*See* Opinion of Advocate General Szpunar at paras. 15-29, Case C-633/22, *Real Madrid Club de Fútbol, AE v. EE, Société Éditrice du Monde SA* (Feb. 8, 2024).

[6]Council Regulation (EC) No. 44/2001 of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

[7]Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C 303) 1.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

where recognition[8] of a judgment from another Member State is sought, to refuse to enforce that judgment on the basis that it would result in a clear violation of the freedom of expression guaranteed under Article 11 of the Charter, in relation to a penalty imposed on a newspaper publishing house and a journalist for damaging the reputation of a sports club and a member of its medical team through a story published in that newspaper.

This case deserves attention for numerous reasons. First of all, the lawsuit that initiated the proceedings in Spain has some of the characteristics of SLAPP. The main aim of SLAPPs is to discourage legal opponents from taking part in the public debate. SLAPPs are not a new phenomenon but they are currently considered to be one of the biggest threats to the freedom of speech and public debate and seem to be increasingly common.[9] As a response to that threat, in April 2022, the European Commission proposed a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings, "Strategic lawsuits against public participation,"[10] adopted by the European Parliament in April 2024,[11] and presented similar Recommendations.[12] However, despite the opposition of non-governmental organizations, the provisions of the Directive were limited during the legislative procedure.[13] For this reason, the fact that the ECJ will emphasize the importance of protection from SLAPPs is all the more crucial.

The wider context of the case is also worth attention. The case deals with the freedom of expression of journalists who exercise the role of a public watchdog by scrutinizing the activities of government, public institutions, and business.[14] As the ECtHR repeatedly stated, not only does the press have the task of imparting such information and ideas; but the public also has a right to receive them.[15] However, due to many factors, illiberal tendencies and a growing number of SLAPPs being some of them, performing these functions by the press is increasingly difficult. Interestingly, only in the last three years, 2021–2023, Spain's position in the World Press Freedom Index had fallen from 29 to 36. According to the reports without Borders, who comply the Index indicate that one of the reasons why Spain's position changed is the issue of SLAPPs.[16]

In this context, it is all the more important to counteract the chilling effect, or, as referred to by the referring court, the deterrent effect,[17] SLAPPs have. Legal action taken against a journalist, and

[8]*See* Opinion of Advocate General Szpunar at paras. 15-29, Case C-633/22, 32-33, at 4 (stating the Advocate General Szpunar rightly points out in his Opinion on this case despite what the referring court suggests, the case concerns the enforcement of a judgment rather than its recognition. For that reason, this Article will use the former term).

[9]Petra Bárd, Judit Bayer, Ngo Chun Luk & Lina Vosyliute, *Ad Hoc Request: SLAPP in the EU Context*, EU-Citizen: Academic Network on European Citizenship Rights 4 (May 29, 2020), https://commission.europa.eu/system/files/2020-07/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf.

[10]*Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings* (Strategic Lawsuits Against Public Participation), COM (2022) 177 final (Apr. 27, 2022).

[11]Directive 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), 2024 O.J. (L 110) 1.

[12]Commission Recommendation (EU) No. 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), 2022 O.J. (L 138) 30.

[13]Amnesty Int'l, Open letter: We Refuse to let the Anti-SLAPP Directive be a Missed Opportunity, https://www.amnesty.eu/wp-content/uploads/2023/11/Open-Letter_Anti-SLAPP-Coalition.pdf.

[14]W. Lance Bennett & William Serrin, *The Watchdog Role of the Press*, *in* The Institutions of American Democracy: The Press (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

[15]Axel Springer AG v. Germany, App. No. 39954/08, para. 79 (Feb. 7, 2012), https://hudoc.echr.coe.int/fre?i=001-109034.

[16]Reporters Without Borders, *Spain* (2024), https://rsf.org/en/country/spain.

[17]The translation of the term chilling effect is inconsistent under ECJ case law; the following terms were translated into English as chilling effect: *effet dissuasif, effets démoralisants, effet de refroidir*. Moreover, aside of chilling effect, the ECJ also uses the terms deterrent effect, as well as dissuasive effect. More on that subject, see Laurent Pech, *The concept of chilling effect. Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU*, Open Society, European Policy Institute, 2021, 17. For the semantic relationship between these terms, see footnote no. 35.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

their editor or publishing house, especially if exaggerated or unfounded can deter others from speaking out. This phenomenon has a negative impact not only on the freedom of expression of journalists and others playing the role of a public watchdog but also on the right for the public to be informed.

C. Standards on Freedom of Speech

I. Conflict Between the Freedom of Speech and the Right to Reputation

Cases such as the one in the main proceedings, where a journalist, and the editor or publishing house, are sued by the individual(s) to whom the press material pertained, represent a clash of two protected rights: Freedom of expression and the right to reputation. In ruling in favor of the claimant, the Spanish courts prioritized the latter right. The fundamental question is whether, in doing so, the courts complied with international human rights standards that outline how such conflicts between two rights should be resolved.

Freedom of expression is protected by the Article 11 of the Charter. According to this Article, everyone has the right to freedom of expression, which includes the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier. Article 11(2) additionally guarantees respect for the freedom and pluralism of the media.

Freedom of expression is not an absolute right and can be subject to limitations consistent with Article 52(1) of the Charter. Any limitation must be provided for by law and respect the essence of those rights and freedoms. Limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

The ECJ doesn't have extensive jurisprudence regarding freedom of speech, especially concerning the possible conflict with the protection of reputation. However, it's possible to determine the scope of application of Article 11 of the Charter on the basis of the rulings of the ECtHR on Article 10 of the European Convention of Human Rights.[18] According to Article 52(3) of the Charter, in so far as the Charter contains rights that correspond to rights guaranteed by the Convention, the meaning and scope of those rights should be the same as those laid down by the Convention. In consequence, the Articles of the Charter must be given the same scope and meaning as the corresponding Articles of the Convention, as interpreted by the case law of the ECtHR.[19]

When assessing whether there had been a violation of Article 10 of the Convention, the ECtHR applies a three-step test based on the second paragraph of said Article. In order for an interference, for example, a penalty imposed by the national court, to be permissible under Article 10(2) of the Convention it has to be prescribed by law, serve to advance the legitimate aim and it has to be necessary in the democratic society. In the case of Real Madrid v. Le Monde there is no doubt that the two first stages of the test were satisfied - the penalty imposed by the Spanish court was prescribed by law, and it served to advance a legitimate aim, the protection of reputation of both the football club and its medical team. However, determining whether the third stage of the test has been met requires a thorough evaluation.

[18]Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

[19]Case C-400/10 PPU, *J. McB. v. L. E.*, ECLI:EU:C:2010:582, para. 53 (2010). In the opinion on the compatibility of the draft agreement providing for the accession of the EU to the ECtHR, the ECJ stressed the importance of protecting the autonomy of the EU law which requires "that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU." *See* Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights,* ECLI:EU:C:2014:2454, para. 170. However, as some authors note, this should be understood only as the ECJ objection to a "copy and paste" approach and a preference for a "corresponding" interpretation. *See* Allan Rosas, *The Court of Justice of the European Union: A Human Rights Institution?*, 14 J. HUM. RTS. PRAC. 209 (2022).

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

The principles of assessing the necessity of interference in a democratic society were first established in the 1976 case Handyside v. United.[20] ECtHR summarized them in the most succinct way and completely in Stoll v. Switzerland issued in 2007.[21] A preliminary condition is to take all the circumstances of the case into account.

II. Journalistic Standards

Exercising the freedom of speech carries duties and responsibilities, especially for journalists. There is an extensive jurisprudence of the ECtHR on professional ethics and the due diligence expected in responsible journalism. Adherence to these standards is key to determining journalists', and subsequently their editors' and publishers,' liability in defamation or reputational damage cases. A journalist fulfilling the duties and responsibilities, as established in the ECtHR case law, can be exonerated from liability even if the information he reported was not accurate.[22]

To enjoy the protection guaranteed by Article 10, journalists have to act in good faith to provide accurate and reliable information in accordance with the ethics of journalism,[23] or "the tenets of responsible journalism."[24] However, the courts cannot expect journalists to check the information beyond a reasonable extent. Moreover, they are free to report on stories or rumors emanating from other persons under the condition they are not completely without foundation.[25] The ECtHR also allows journalists to recourse to a degree of exaggeration, or even provocation.[26]

Not being a journalistic standard *per se*, it's also important to note, that according to the ECtHR's consistent case law, broader limits of freedom of expression are permitted in relation to issues of public importance.[27] Public debate in this regard should be as unhindered as possible, and any interference requires a strong justification and is possible only in exceptional situations.

Whether a certain subject is a matter of public importance should be evaluated on a case-to-case basis. The term "matter of public importance" covers matters which are capable of giving rise to considerable controversy or which involve a problem that the public would have an interest in being informed about.[28] In the case of Colaço Mestre v. Portugal[29] the ECtHR dealt explicitly with the subject of football, the president of the Portugal league of football being at the same time head of a big football club, noting that there has been an intense debate on that subject at the time and the journalist could not be reproached for dealing with an issue that was of great concern to the public. The ECtHR also warned that a narrowly defined understanding of public interest could have a chilling effect.[30]

[20]Handyside v. United Kingdom, App. No. 5493/72, para. 45 (Dec. 7, 1976), https://hudoc.echr.coe.int/eng?i=001-57499.

[21]Stoll v. Switzerland, App. No. 69698/01, para. 110 (Dec. 10, 2007), https://hudoc.echr.coe.int/eng?i=001-83870.

[22]Colombani & Others v. France, App. No. 51279/99, para. 66 (June 15, 2002), https://hudoc.echr.coe.int/eng?i=001-60532.

[23]*See also* Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors (Apr. 13, 2016).

[24]Bédat v. Switzerland, App. No. 56925/08, para. 50 (Mar. 29, 2016), https://hudoc.echr.coe.int/fre?i=001-161898.

[25]Timpul Info-Magazin and Anghel v. Moldova, App No. 42864/05, para. 36, (Nov. 27, 2007) https://hudoc.echr.coe.int/fre?i=001-83443.

[26]Thoma v. Luxembourg, App. No. 38432/97, para. 46 (Mar. 29, 2001), https://hudoc.echr.coe.int/eng?i=001-59363.

[27]Sunday Times v. The United Kingdom, App. No. 6538/74, para. 65 (Apr. 29, 1979), https://hudoc.echr.coe.int/eng?i=001-57584.

[28]Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, App. No. 931/13, para. 171 (June 27, 2017), https://hudoc.echr.coe.int/eng?i=001-175121.

[29]App. Nos 11182/03 and 11319/03 Eur. Ct. H.R., para 30 (Apr. 29, 2007).

[30]*See* Mosley v. The United Kingdom, App. No. 48009/08, para. 126 (May 10, 2011). https://hudoc.echr.coe.int/eng?i=001-104712. Stating in the judgment:

> ECtHR considered the compatibility of a requirement to pre-notify the subject of the Article about the forthcoming publication with freedom of expression. Only 'public interest' could justify the non-fulfillment of that requirement. The ECtHR observed that a narrowly defined public interest exception would increase the chilling effect of the requirement to pre-notify. Moreover, to minimize the chilling effect on freedom of expression, a reasonable belief that there is a public interest not to pre-notify has to be sufficient, even if *post hoc* no public interest was established. *Id.*

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

D. Strategic Lawsuits Against Public Participation

The acronym SLAPP is commonly used to describe the phenomenon of initiating legal proceedings in response to a statement on a socially relevant topic, with the primary aim of discouraging the legal opponent from speaking out again. SLAPPs often involve allegations that are partially or entirely unfounded, and the initiator could be aware that the case is unlikely to be resolved in their favor. Additionally, the financial demands for damages tend to be disproportionate. However, being forced into participation in court proceedings, even if meritless, imposes financial and psychological burdens and diverts time and attention away from work. Thus, the primary purpose of SLAPPs is not to seek legal protection but to intimidate and silence the opponent by draining their resources.

Initiators of abusive proceedings also often trie to exploit an imbalance of power between the parties. Typically they have more financial resources for legal representation or more social or political influence. Another common feature of SLAPPs is the so-called "forum shopping" meaning *inter alia* bringing the proceedings before a jurisdiction that has the most favorable laws for the initiator of the proceedings. Sometimes the plaintiff decides to bring proceedings in more than one jurisdiction. The need to find representation familiar with another country's—or countries'—legal system is not always simple and creates a big financial burden. Moreover, victims of SLAPPs often face multiple proceedings initiated against them or individuals or organizations affiliated with them in different jurisdictions. Lastly, SLAPPs are often accompanied by a public bullying campaign intended to humiliate the victim in public opinion and discredit his or her work.

SLAPPs can take different forms, such as defamation lawsuits or indictments, as well as less obvious ones like claims of breach of intellectual property rights or data protection.[31] SLAPPs will look different depending on the jurisdiction and for that reason they should be identified on a case-to-case basis, depending on the presence of distinctive features. The Committee of Ministers of the Council of Europe has outlined ten SLAPP indicators, five of which are mentioned above, in Recommendations on countering the use of strategic lawsuits against public participation (SLAPPs).[32] Of course, not every instance of SLAPP will have all of this characteristic.

The groups most frequently targeted by SLAPPs include those who serve as public watchdogs, such as journalists, including citizen journalists, bloggers, human rights advocates, NGOs, and even academics.[33]

SLAPPs harm freedom of expression both on an individual as well as a collective basis. Firstly, taking legal action against those exercising their freedom of expression may discourage them from speaking out again on the subject. On top of that, it can have a chilling effect on other individuals

[31]*See* THE DAPHNE CARUANA GALIZIA FOUNDATION, COALITION AGAINST SLAPPS IN EUROPE, SLAPPS: INCREASINGLY THREATENING DEMOCRACY IN EUROPE 16 (2nd ed. 2023) (identifying 17 different legal bases for SLAPPs in its 2023 report). The acronym SLAPP was first introduced by Penelope Canan and George Pring. *See* PENELOPE CANAN & GEORGE W. PRING, SLAPP: GETTING SUED FOR SPEAKING OUT 3 (1996) ("We coined the name "strategic lawsuits against public participation" in government, or SLAPPs"). Originally, the term referred exclusively to civil proceedings. *See id.* at 8 ("To qualify as a SLAPP for our study ... we required ... a civil complaint or counterclaim ..."). However, to adequately represent the broader phenomenon of using legal proceedings to stifle public debate, the term must be understood more broadly, even beyond its literal meaning. Defamation remains a criminal offense in 23 EU Member States, and a criminal case can share all the characteristics of a SLAPP. *See* PETRA BÁRD ET AL., AD-HOC REQUEST. SLAPP IN THE EU CONTEXT 18 (2022) ("Criminal defamation is still maintained in 23 Member States of the European Union ..."). The same applies to administrative proceedings, such as claims related to data protection breaches. *See* Melinda Rucz, *SLAPPed by the GDPR: Protecting Public Interest Journalism in the Face of GDPR-Based Strategic Litigation Against Public Participation,* 14 J. Media L. 378, 378-405 (2022).

[32]Recommendation CM/Rec(2024)2 of the Committee of Ministers to Member States on Countering the Use of Strategic Lawsuits Against Public Participation (SLAPPs), Adopted by the Committee of Ministers on 5 April 2024, at the 1494th Meeting of the Ministers' Deputies, https://www.coe.int/en/web/freedom-expression/-/council-of-europe-adopts-recommendation-on-countering-the-use-of-slapps.

[33]CASE, *SLAPPs: Increasingly Threatening Democracy in Europe,* at 7, *supra* note 31, at 28.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

as well, either because they belong to the same group—journalists, activists, etcetera—or deal with an identical or similar topic.

Secondly, because they silence journalists and other important contributors to the public debate, SLAPPs also have a negative impact on the level of public information. The European Commission noticed the threat to freedom of public debate posed by SLAPPs in Rule of Law Reports from 2020[34] and eventually, as already mentioned, in April 2024 a Directive addressing the issue of SLAPP was adopted by the European Parliament.

E. Chilling Effect

As already mentioned, the chilling effect,[35] occurs when a person, for example a journalist, refrains from exercising the freedom of speech because of fear of legal action being taken against them.[36] A person can auto censor because they have been sued for defamation or criminal proceedings have been initiated against them. However, as already pointed out, proceedings against someone else could deter others from speaking out, especially if that person belongs to the same professional group or spoke out on the same subject.

In the case of Monnat v. Switzerland[37] the ECtHR observed that even if the decision by the relevant authorities doesn't prevent an individual from expressing himself, for example, because an article he wrote has already been published, the same decision could amount to form of censorship tending to discourage him from speaking out again in future. When assessing the possible chilling effect of a decision, one should anticipate the implications of future behavior outside the case under consideration.[38]

As the European Commission observed in its Recommendations, in paragraph 12, the very possibility of being sued for defamation and the need to participate in the proceedings can have a chilling effect—even if the lawsuit is unfounded, and the defendant will probably win the case.[39] Such proceedings constitute both a financial and mental burden for the defendant. Moreover, because of the time and energy it consumes, it might be difficult or even impossible for the defendant to do his or her job.

However, the court may misapplies—or doesn't apply at all—the standards protecting the freedom of speech. Striking the wrong balance between freedom of speech and, for example, the right to protection of reputation may result in the defendant being ordered to pay unjustifiably high damages, or even the entire case being wrongly decided in favor of the plaintiff. It is on the

[34]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, respectively: 2020 Rule of Law Report, COM (2020) 580 final (Sept. 30, 2020), Rule of Law Report, COM (2021) 700 final (July 20, 2021), 2022 Rule of Law Report, COM (2022) 500 final (July 13, 2022), 2023 Rule of Law Report, COM (2023) 800 final (July 5, 2023).

[35]*See* Jonathan W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1455 (2022). (noting the referring court uses the term "deterrent effect" which is commonly used as the synonym of the "chilling effect". However, some authors indicate, that the chilling effect is more complex, as it not only "deters" individuals but also shapes their behavior; it doesn't only silence but also provokes socially conforming speech).

[36]It is worth noting, that the term "chilling effect" was never clearly defined either in the academic writings or in the jurisprudence. It was first coined in the United States on the background of cases concerning the First Amendment cases. *See* Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963), Freedman v. Md., 380 U.S. 51 (1965) (noting the Supreme Court ruled that a committee cannot compel a witness to disclose a list of members of his organization or that had taken away rating boards' competence to ban a movie). *See also* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 692 B.U. L. REV. (1978) (noting however, the chilling effect can be used generally in about any right or freedom).

[37]Monnat v. Switzerland, App. No. 73604/01, para. 70 (Sept. 21, 2006), https://hudoc.echr.coe.int/eng?i=001-76947.

[38]Judith Townend, *Freedom of Expression and the Chilling Effect*, in ROUTLEDGE COMPANION TO MEDIA AND HUMAN RIGHTS 173 (Howard Tumber & Silvio Waisbord eds., Univ. of Sussex, 2017).

[39]*See* Yaşar Kaplan v. Turkey, App. No. 56566/00, para 35 (Jan. 24, 2006) (noting the same effect but concerning criminal proceedings).

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

based of these types of cases, in which the judgment violates Article 10 of the Convention, that the ECtHR has built the greater part of its jurisprudence concerning the chilling effect.

To summarize, there are two main assumptions underlying the concept of chilling effect.[40] According to the first, the legal system is inherently imperfect and it's impossible to accurately predict the outcome of every proceeding. The second assumption is that unjustified interference with the freedom of speech is more socially damaging than exceeding the limits of this freedom by the person who exercises it, for the reasons highlighted above. According to the Recommendation of Committee of Ministers on the protection of journalism and safety of journalists and other media actors, self-censorship caused by the chilling effect ultimately leads to the impoverishment of public debate, which is to the detriment of society as a whole.[41] And, as observed in a 1999 judgment issued by the House of Lords of the United Kingdom in the case Reynolds v. Times Newspapers Ltd,[42] unpredictability and uncertainty, coupled with the high costs of defending an action, affect a journalist's decision and may "chill" the publication of true statements of fact as well as those which are untrue.

I. The Type of the Sanction

The extent of the chilling effect depends on, among others, the potential sanction. For that reason, criminal proceedings will have a greater potential chilling effect, especially in legal systems where the crime of defamation is punishable by imprisonment. However, civil proceedings can also be harmful to the public debate, in particular when a high compensation is sought.

In the Real Madrid v. Le Monde case the referring court is asking about the chilling effect of a financial penalty.[43] As a general rule, in the ECtHR judgments, the chilling effect of a penalty is conditional not so much on the amount of the penalty itself but on its proportionality.

It has to be noted, however, that the ECtHR's reasoning regarding the chilling effect falls into a kind of *circulus vitiosus:* A penalty will be considered disproportionate if it's of a nature to induce chilling effect and at the same time the fact that it could induce a chilling effect is due to its disproportionality. In the case Cumpănă and Mazăre v. Romania,[44] the ECtHR points out that the chilling effect should be taken into account when assessing the proportionality, while in Dupuis and others,[45] for example the Court conversely seems to deduce the chilling effect from the fact that the sanction was disproportionate.

The proportionality of the penalty imposed is above all dependent on its amount. However, many different elements also have to be taken into account, like the economic situation of the person on which the penalty is imposed on, and the damage it can cause.[46] The ECtHR case law on that matter distinguishes between natural persons, for example journalists, and legal persons, for example press companies, as the latter generally have more assets at their disposal.

[40]Frederick Schauer, 688, *supra* note 36, at 34.

[41]Recommendation CM/Rec(2016)4, adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies. https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2016-4-of-the-committee-of-ministers-to-member-states-on-the-protection-of-journalism-and-safety-of-journalists-and-other-media-.

[42]Reynolds v. Times Newspapers Ltd [1999] UKHL 45.

[43]The term "penalty" is used here as an autonomous term under the Convention describing a financial sanction regardless of the type of proceedings—criminal, civil, administrative.

[44]Cumpănă and Mazăre v. Romania, App. No. 33348/96, para. 111 (December 17, 2004), https://hudoc.echr.coe.int/eng?i=001-67816.

[45]Dupuis and Others v. France, App. No. 1914/02, para. 49 (June 7, 2007), https://hudoc.echr.coe.int/eng?i=001-80903.

[46]It's worth pointing out that in the Real Madrid v. Le Monde case when refusing the enforcement of the judgment, the Court of Appeal in Paris noted that under French law the defamation of individuals was punishable only by a maximum fine of EUR 12,000. *See Real Madrid*, Case C-633/22.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

When it comes to natural persons, the ECtHR "puts the penalty into perspective," for example by comparing its amount to the applicant's monthly income,[47] the average income in a certain professional field[48] or by using as a reference amount the monthly minimum wage in given country.[49]

For a penalty not to have a chilling effect on a legal person it cannot be so high that it threatens its economic foundations. Following that reasoning, in cases where it doesn't have any harmful effect on the company's business model, the ECtHR could judge the interference proportionate.[50] On the other end of the spectrum, there are cases in which the penalty, even if not very high in objective terms, had caused a newspaper or another news outlet to shut down. As the Court has put it, the penalty imposed discouraged the open discussion on matters of public concern by "silencing a dissenting voice altogether."[51]

The ECtHR also sometimes takes into account the amount of penalties typically imposed by the national courts in proceedings involving a similar matter.[52] However, it seems that this factor can only be treated as subsidiary. In a situation where the penalty is not higher from those typically imposed, but is high in relation to earnings, the ECtHR will still consider it disproportionate.[53]

What is however crucial, the ECtHR also emphasized the possible chilling effect of a relatively light sanction, the so-called "one franc in symbolic compensation."[54] Any unjustified interference with the freedom of expression can have a chilling effect that the relatively moderate nature of a said interference would not suffice to negate.[55]

Of course, the amount of the penalty must be evaluated in relation to the aspects of the case, mainly the conduct of the person exercising the freedom of speech. In cases like the one at hand, adherence to the journalistic standards is decisive. Consequently, a light sanction will only constitute a violation if the behavior of the person enjoying protection under Article 10 of the Convention was beyond reproach.[56]

It's worth to mention that the ECtHR also considers other sanctions as potentially having a chilling effect on the freedom of expression: Deprivation of the right to exercise the profession of journalist,[57] order to identify anonymous sources,[58] a search.[59] The ECtHR generally sees imposition of a prison sentence for a non-violent speech crime as incompatible with Article 10 of

[47]Sokołowski v. Poland, App. No. 75955/01, para. 51 (Mar. 29, 2005).

[48]Sorguç v. Turkey, App. No. 17089/03, para. 37 (June 23, 2009), https://hudoc.echr.coe.int/fre?i=001-93161.

[49]Tolmachev v. Russia, App. No. 42182/11, para. 57 (June 2, 2020), https://hudoc.echr.coe.int/eng?i=001-202634.

[50]Delfi AS v. Estonia, App. No. 64569/09, paras. 160-61 (June 16, 2015), https://hudoc.echr.coe.int/eng?i=001-155105.

[51]Timpul Info-Magazin & Anghel, App. No. 42864/05 at para 39.

[52]Público - Comunicação Social, S.A. & Others v. Portugal, App. No. 39324/07, para. 55 (Dec. 7, 2010). Refusing the enforcement of the judgment in the case at hand, the Paris Court of Appeals noted "that it was extremely rare for damages awarded for harm done to somebody's honour or good name to exceed EUR 30 000 since under French law the defamation of individuals was punishable only by a maximum fine of EUR 12 000", opinion of Advocate General Szpunar, para 24, *supra* note 5, at 5.

[53]Steel & Morris v. United Kingdom, App. No. 68416/01, para. 96 (Feb. 15, 2005), https://hudoc.echr.coe.int/eng?i=001-68224.

[54]Brasilier v. France, App. No. 71343/01, para. 24 (Apr. 11, 2006), https://hudoc.echr.coe.int/eng?i=001-73200.

[55]*Dupuis and Others*, App. No. 1914/02 at para. 48.

[56]*See Brasiler*, App. No. 71343/01, *supra* note 54, at 52. *See also* Paturel v. France, App. No. 54968/00 (Dec. 22, 2005), https://hudoc.echr.coe.int/eng?i=001-71837; Desjardin v. France, App. No. 22567/03, Eur. Ct. H.R. (Nov. 22, 2007). *A contrario*, in A contrario, in Chauvy & Others v. France, App. No. 64915/01, Eur. Ct. H.R. (June 29, 2004) the ECtHR found there has been no violation of Article 10 of the Convention, taking into account (among others) the 'relatively modest' levels of the fines and orders to pay the damages, as well as the fact that the applicants did not fulfill the duties and responsibilities which individuals take on when they disseminate their opinions to the public.

[57]Kaperzyński v. Poland, App. No. 43206/07, para. 74 (Apr. 3, 2012), https://hudoc.echr.coe.int/eng?i=001-110171.

[58]Sanoma Uitgevers B.V. v. Netherlands, App. No. 38224/03, para. 71 (Sept. 14, 2010) https://hudoc.echr.coe.int/eng?i=001-100448.

[59]*See* Görmüş & Others v. Turkey, App. No. 49085/07, paras. 73-74 (Jan. 19, 2016), https://hudoc.echr.coe.int/eng?i=001-163484.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

the Convention[60] but in the past also judged a suspended prison sentence as having a chilling effect by its very nature.[61]

Lastly, it has to be noted that the mere fact of the occurrence of the chilling effect is something negative. If the ECtHR considers a penalty disproportionate, it will state that it's "not of such a kind as to have a chilling effect"[62]—contrary to saying that the chilling effect it could cause is negligible.

II. The Reach of the Chilling Effect

The ECtHR jurisprudence covers at least three dimensions of the chilling effect a singular sanction could have—in relation to a particular individual, in relation to a newspaper, or a different media outlet, and in relation to the media landscape in general.

The reach of the chilling effect is dependent on many factors. Certainly, one of them is the proportionality of the imposed sanction. What may also matter is how many proceeding have been initiated in relation to a particular article, interview, etcetera. Taking legal action not only against the author but also against the editor and the publishing house, as well as taking legal simultaneously in more than one country will certainly increase the reach of the chilling effect.

The greater the reach of the chilling effect, the more damaging the impact on the public debate. This is not to say that cases in which one journalist is deterred from speaking out should be trivialized. Press representatives shouldn't be ever held accountable for the diligent performance of their functions.

F. Summary—Part I

The preliminary condition when resolving a case involving a conflict of rights is that all circumstances of the case have to be taken into account. Proper application of the above mentioned standards—independently of the procedural safeguards described in the second section of this Article—can significantly reduce or even neutralize the negative effect abusive lawsuits have on the public debate.

What's important in the context of the Real Madrid v. Le Monde case, these standards are applicable not only when ruling on a case. They are also crucial when determining whether a case has been decided with due respect of the freedom of expression. If a court is assessing if enforcement of a judgment will have a chilling effect it can see if these standards were taken into account in the sentencing. If the journalist was obliged, together with his publisher, to pay compensation for an article on a subject of social importance, written accurately and based on reliable sources, such judgment, as well as its enforcement would certainly have a chilling effect. It would be different if the article contained baseless accusations or false information the journalist could easily verify.

G. EU Regulations Concerning SLAPPS

In the next section of this Article, I will focus on whether current European regulations establish an obligation not to enforce a judgment similar to the Real Madrid v. Le Monde case. However,

[60]Murat Vural v. Turkey, App. No. 9540/07, para. 66 (Oct. 21, 2014), https://hudoc.echr.coe.int/eng?i=001-147284. (stating that this principle however doesn't seem to apply when the person exercising the freedom of speech doesn't contribute to the public debate, as the conviction won't "engender any obviously detrimental chilling effect") (citing Perrin v. United Kingdom, App. No. 5446/03 (Oct. 18, 2005), https://hudoc.echr.coe.int/eng?i=001-70899).

[61]Mariapori v. Finland, App. No. 37751/07, para. 68 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-99778.

[62]Pedersen & Baadsgaard v. Denmark, App. No. 49017/99, para. 93 (Dec. 17, 2004) (noting the cited jurisprudence), https://hudoc.echr.coe.int/eng?i=001-67818.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

before delving into that, it is worth briefly evaluating the adequacy of the recently adopted anti-SLAPP directive by the European Parliament.

The directive relates to civil cases with a cross-border matter—this limitation being the consequence of the EU's restricted competence in this area, provided in Article 81(2) of the TFEU. Thankfully, the definition of a case with cross-border implications, provided in Article 5, is quite broad. A case will be considered cross-border unless both parties reside in the same Member Country and all other elements relevant to the situation concerned are located only in that It leaves room for a broad interpretation: for example, an activist sued by a domestic company over actions related to factory-induced water contamination could be argued to have cross-border implications, as it pertains to a universal matter like environmental protection.

The directive compels Member States to introduce procedural measures that would allow them to deal with SLAPPs swiftly—shorter proceedings are less time—and money-consuming, and less psychologically burdensome for the victim. Early dismissal, found in Articles 11–13, limits the chilling effect SLAPPs have, not only on who they're directed against but also on other individuals participating in the public debate. After the implementation, the courts should also have the possibility to require that the claimant provide security for the estimated costs of the proceedings and damages, as provided by Article 10. Other measures that are meant to dissuade individuals from initiating SLAPP-like proceedings include ordering the claimant to bear the costs of the proceedings—including the full costs of legal representation, as governed by Article 14—payment of compensation for the harm encountered by the defendant, and imposing proportionate and dissuasive penalties on the claimant as provided for in Article 15. The directive also offers protection in Articles 15–16 against third-country judgments.

Overall, the implementation of the directive and its concrete provisions should be assessed positively. The European Union noticed an issue and acted, even taking into account its limited competencies, boldly. However, there are several issues worth mentioning. First of all, not all SLAPPs have cross-border implications, even with the wide definition provided for in the directive. This leaves out a lot of cases involving journalists reporting on local issues.[63] The importance of subnational media should not be underrestimated, as it plays a crucial role in "upholding democracy at the local and regional levels and in fostering the communities they serve."[64] SLAPP-like proceedings can be especially harmful for local journalists who typically have more limited financial resources they can devote to legal representation, not to mention that big news organizations have their legal teams. Additionally, local journalism is more vulnerable to modern threats facing traditional media, such as declining readership, disinformation, and the growing role of social media in spreading news.[65] In order to prevent its further decline and the emergence of local news deserts, the issue of "national" SLAPPs has to be addressed.

Secondly, as the European Commission rightly noticed in its Recommendation, paragraph 10, not only civil tools are used to stifle the public debate. SLAPPs can be criminal in nature—most Member State still criminalize defamation—or administrative[66]. CASE, the Coalition Against

[63]Some of that kind of cases are described here: D. Bychawska-Siniarska, Z. Nowicka, *From Zero to Hero*, VERFASSUNGSBLOG (September 4, 2024), https://verfassungsblog.de/anti-slapp-legislation-poland/.

[64]The Congress of Local and Regional Authorities, *Recommendation 498 (2023)1: Local and Regional Media: Watchdogs of Democracy, Guardians of Community Cohesion.*

[65]This decline of local journalism is usually studied in respect to one country, for United Kingdom, *see* Tor Clark, *From The Silent Watchdog to the Lost Watchdog: The Decline of the UK Regional Press' Coverage of Local Government over 40 Years*, 27 *Media History* 177, 177–196 (2020), and for Germany Fabio Ellger, Hanno Hilbig, Sascha Riaz & Philipp Tillmann, *Local Newspaper Decline and Political Polarization: Evidence from Germany*, OSF Preprints (2021).

[66]In Hungary, GDPR was instrumentalized as a SLAPP strategy. *See* Melinda Rucz, *SLAPPed by the GDPR: Protecting Public Interest Journalism in the Face of GDPR-Based Strategic Litigation Against Public Participation*, 14 J. OF MEDIA LAW. 378, 378–405 (2022).

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

SLAPPs in Europe, identified 17 different legal bases for SLAPPs after analyzing 570 different cases.[67]

Implementing the directive while keeping its limited scope is inadequate to safeguard public debate from SLAPPs. It is up to Member States to, when implementing the directive, to extend it provisions to wider array of cases than just civil cases with cross-border implications. However, the process of implementation is not always timely or effective. In the absence of appropriate procedural provisions in criminal or administrative proceedings, courts need to apply alternative measures to protect SLAPP victims.

Last but not least, in order to use the provisions introduced by the directive, national courts first need to recognize a SLAPP. And this should be done by taking into account all the different standards introduced in the first section of this Article . Additionally, as I argue below, in some circumstances even non-enforcement of a judgement is not a viable remedy, if the issuing court mishandled a SLAPP case.

For these reasons, other regulations, as well as the case law of the ECJ and the ECtHR are still crucial for the protection of the public debate. The Real Madrid v Le Monde case is a perfect example—the directive provides for a possibility, or even an obligation, of non-enforcement of a third country judgement because of infringement of the freedom of expression but remains silent as to the judgment of other Member States. This is of course not surprising in any way as Member Sates function in a mutual recognition regime. In that regard, it's necessary to look elsewhere for guidance—some remarks on that are included in the next section of the Article.

H. The Positive Obligation of States

The standards mentioned in the first section of this Article refer to the state's duty not to interfere with the freedom of expression. However, fulfilling the obligation imposed by Article 1 of the ECtHR to secure everyone within their jurisdiction the rights and freedoms will sometimes require positive action.

About Article 10 of the ECtHR, according to the Council of Europe Recommendations as well as the jurisprudence of the ECtHR,[68] it means that ensuring the effective exercise of freedom of expression may require taking positive measures, also in the relations between individuals.[69] States are obliged to create a favorable environment for participation in public debate by all the persons concerned.[70] However, what exactly constitutes a "favorable environment"—and consequently what exactly are States' obligations—especially given the ever-changing political, legal and social landscape is open to interpretation.

[67]The Daphne Caruana Galizia Foundation, *SLAPPs: A Threat to Democracy Continues to Grow*, on behalf of the Coalition Against SLAPPs in Europe, August 2023, https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf.

[68]It should be noted that the ECtHR case law on positive obligations of the States concerns cases in which States failed to protect journalists whose lives were in danger - see Dink v. Turkey, App. Nos. 2668/07, 6102/08, 30079/08, Eur. Ct. H.R. (Sept. 14, 2010), Gongadze v. Ukraine, App. No. 34056/02, Eur. Ct. H.R. (Nov. 8, 2005), Kiliç v. Turkey, App. No. 22492/93, Eur. Ct. H.R. (Mar. 28, 2000).

[69]The ECtHR first observed that the States' obligation may involve the adoption of measures designed to secure respect of a right guaranteed in the ECtHR in the sphere of the relations of individuals between themselves in the case relating to the right to respect for private and family life, *see* X & Y v. Netherlands, App. No. 8978/80, para. 23 (Mar. 26, 1985), https://hudoc.echr.coe.int/fre?i=001-57603.

[70]*See* Dink, App. Nos. 2668/07, 6102/08, 30079/08, *supra* note 61, at para. 137 ("States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favorable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter").

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

According to the living instrument doctrine the Convention is a living instrument and must be interpreted in the light of present-day conditions.[71] This means that what states have to do in order to secure the freedom of expression changes with time. Consequently, the positive obligations should be interpreted considering new threats to public debate, such as SLAPPs and the chilling effect they can cause.

The Committee of Ministers of the Council of Europe noticed the threat to the freedom of expression posed by the misuse of legal tools in the already mentioned Recommendation from 2016. As indicated in the Recommendation, the frivolous, vexatious, or malicious use of the law and legal process, with the high legal costs required to fight such law suits, can become a means of pressure and harassment, especially in the context of multiple lawsuits. In this context, the Committee of Ministers recalled the need to ensure that both sides have the opportunity to present their case effectively and to enjoy equality of arms. States are required to take appropriate measures, including the institution of a legal aid scheme, to ensure that each side is afforded a reasonable opportunity to present his or her case. These measures are crucial to offset the imbalance of powers often found in SLAPPs, where journalists or activists are being sued by extremely wealthy businesspeople or state-owned companies.

An even earlier Declaration concerns the problem of libel tourism which is interlinked with SLAPPs.[72] Libel tourism occurs when a person files a complaint with a court thought most likely to provide a favorable judgment. Moreover, to the detriment of the defendant, having to attend proceedings in a foreign country is not only stressful but generates additional costs, including legal representation and travel expenses.

However, it's worth mentioning that since the adoption of said Recommendation legal harassment, including SLAPPs has become even more common. In 2017 a Maltese journalist, Daphne Caruana Galizia was murdered. At the time of her death, she was facing over 40 civil and criminal defamation suits.[73] Her case was her case was not an isolated one. This change in the media landscape should be taken into account when assessing what the positive obligations of the states include. It was not a coincidence that the Commissioner for Human Rights, Dunja Mijatović, mentioned the concept of positive obligations of the States in her comment *Time to take action against SLAPPs.*[74] According to the Commissioner, effective countering SLAPPs requires three elements: Preventing the filing of SLAPPs by allowing early dismissals, introducing measures to punish abuse, particularly by reversing the costs of proceedings, and minimising the consequences of SLAPPs by giving practical support to those who are sued.

Lastly, as already mentioned Council of Europe, adopted a Recommendation of the Committee of Ministers to Member States on countering the use of SLAPPs. The measures can be seen as a concretization of the Human Right Commissioner's comment and are in substance similar to the directive. The Recommendation calls on Member States to adopt regulations allowing early dismissal of SLAPPs, claims against public participation, as well as to implement other procedural safeguards: The possibility for the courts to require security for procedural costs and impose dissuasive penalties on parties bringing SLAPPs and award procedural costs awarded against them, including the full costs of legal representation of the other party. According to the Recommendation, the victims of SLAPPs should also be able to claim compensation for both of the material and immaterial damages caused by the proceedings.

[71]The doctrine was first formulated in Tyrer v. the United Kingdom, App. No. 5856/72, para. 31 (Apr. 25, 1978), https://hudoc.echr.coe.int/fre?i=001-57587.

[72]Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to ensure Freedom of Expression, Adopted by the Committee of Ministers on 4 July 2012 at the 1147th meeting of the Ministers' Deputies.

[73]*See* https://www.daphne.foundation/en/justice/vexatious-libel-cases.

[74]Dunja Mijatović, *Time to Take Action Against SLAPPs* (Oct. 27, 2020), https://www.coe.int/pl/web/commissioner/-/time-to-take-action-against-slapps.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

In light of deteriorating conditions for a public debate, among others the growing popularity of SLAPPs, the positive obligation of the states to create a favorable environment for the participation in the public debate should be understood as extending to enact legislation introducing measures like the one recommended in the Recommendation. Of course, such a requirement is more difficult to meet than the mere obligation to refrain from unjustified interference with said freedom as "law is far more effective in defending negative freedom than conferring positive liberty; it can restrain the state but rarely compel it."[75]

In this context, against the background of the Real Madrid v. Le Monde case question arises whether the positive obligation extends to non-recognition of a judgment violating freedom of expression.[76] As already indicated, the mere need to take part in the proceedings can deter someone from speaking out in the future, but the chilling effect depends primarily on the order to pay compensation and its proportionality. Non-enforcement limits or even completely neutralizes chilling effect in this aspect, which also has been noted by the Committee of Ministers of the Council of Europe: According to paragraph 13 of the Recommendation, Member States should also provide effective protection against third-state judgments, bearing in mind, as relevant, emerging European and international standards in this respect. The anti-SLAPP Directive also provides for the possibility of refusing to execute a judgment which would harm the public debate. According to Article 16, courts should refuse recognition of a judgment if those proceedings would have been considered manifestly unfounded or abusive if they had been brought before the courts or tribunals of the Member State where recognition is sought. However, this provision only concerns third-country judgments issued on account of public participation by natural or legal persons domiciled in the EU.

It then seems that the answer is yes: If recognition of a judgment issued with disregard for the international standards concerning freedom of expression would create a chilling effect, the states should refuse such recognition to fulfill their obligation to create a favorable environment for everyone to participate in the public debate.

I. Non-enforcement in the Light of EU Regulations

This however leads to another question: If such a non-enforcement is possible between Member States of the EU where mutual recognition is a rule.

According to the Brussels I regulation, recognition of a judgment given in another Member State can be denied, if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed. However, under Article 52 of said regulation, under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed, prohibition of *révision au fond*. Both ECtHR and ECJ explained how this prohibition relates to examining whether human rights are protected.

[75]Richard L. Abel, Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994, 538 (Routledge, Taylor & Francis Grp. 1995).

[76]It has to be noted that the distinction between negative and positive obligations of the States is sometimes unclear, and non-recognition is an example that is difficult to categorize. *See* Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2), App. No. 32772/02, para. 82 (June 30, 2009), https://hudoc.echr.coe.int/eng?i=001-93265. The Applicant, an animal-protection association claimed a violation of Article 10 of the Convention about to a refusal to broadcast a commercial and won (application no VgT Verein gegen Tierfabriken v. Switzerland, App. No. 24699/94, para. 3 (June 28, 2001), https://hudoc.echr.coe.int/fre?i=001-59535). Referring to the ECtHR judgment, the applicant unsuccessfully applied to the Swiss Federal Court to review the national ruling prohibiting the broadcast. The applicant lodged the second application to challenge the ruling of the Swiss Federal Court, as well as to challenge a new refusal of the Swiss authorities. In this context, the Court observed that the "boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition." *Id.*

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

According to the Bosphorus presumption established by the ECtHR,[77] State action taken to fulfill an obligation arising from membership in an international organization and leaving no discretion to the State, such as recognition of judgments under the Brussels I regulation, will be considered compatible with the Convention. That's because as already indicated, human rights are presumed to be equally protected by EU law as by the ECtHR system. However, this presumption can be rebutted if, "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."[78]

In a later judgment in the Avotiņš v. Latvia case,[79] the ECtHR directly addressed the principle of mutual recognition of judgments and presented a slightly more nuanced view than in the Bosphorus case. That is, if a serious and substantiated complaint that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by the EU law is raised during the enforcement proceedings, the court cannot refrain from examining that complaint on the sole ground that they are applying EU law. This means that in specific cases—when a party is claiming a serious violation of a convention right—the principle is not to presume the equal level of protection, but precisely to examine whether this protection has been provided.

ECJ originally held a completely different position. Its interpretation of the prohibition of *révison au fond* was much narrower and didn't provide an exception for human rights. According to its opinion on the draft agreement providing for the accession of the EU to the Convention, the requirement to check if another State has observed fundamental rights despite the rule of mutual trust is "liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[80]

In its later jurisprudence the ECJ, took a different approach, allowing in some cases for an individual assessment of human rights protection against the rule of mutual trust.[81] This reasoning could be applied *mutandis mutatis* to cases concerning enforcement of a judgment; it concerns cases where the breach of human rights could take place in the future, which can only be determined with a certain degree of probability.[82] Assessing if such a breach had already taken place is comparatively simpler and more objective. In cases similar to Real Madrid v. Le Monde it would mainly consist of checking if adequate standards have been observed when issuing the judgment.

As the ECJ explained in its jurisprudence, recourse to the *ordre public* clause is permissible only if recognition of the judgment were to constitute a manifest infringement of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order.[83]

[77]*See generally* Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, App. No. 45036/98 (June 30, 2005), https://hudoc.echr.coe.int/eng?i=002-3835.

[78]Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, App. No. 45036/98, para. 156.

[79]Avotiņš v. Latvia, App. No. 17502/07, para. 116 (May 23, 2016), https://hudoc.echr.coe.int/fre?i=001-163114.

[80]*Accession of the European Union,* Opinion 2/13, *supra* note 16, at para. 194.

[81]ECJ, Joined Cases 404 & 659/15 PPU, Aranyosi & Căldăraru, ECLI:EU:C:2016:198, reinforced in Case C-216/18 PPU, *L.M.*, ECLI:EU:C:2018:586. According to this judgment, a court of a Member State can suspend the execution of a European Arrest Warrant on the basis of systemic deficiencies of human rights protection in the issuing Member State but also taking into account the individual circumstances of the case. *Id.*

[82]The Aranyosi test consists of two cumulative conditions: non-enforcement is permissible if, firstly, there are systemic or generalised deficiencies of human rights protection confirmed by objective, reliable, specific, and proper and secondly there are substantial grounds to believe that the individual concerned by the European Arrest Warrant will be exposed a real risk of inhuman or degrading treatment. In the case of non-enforcement of a judgment, the presence of systemic deficiencies is irrelevant—the court only has to assess whether there has been a violation of human rights in the particular case.

[83]The court of the Member State where the recognition is sought is also prohibited from reviewing the accuracy of the findings of law or fact made by the court which issued the judgment. *See* Case C-7/98, *Krombach*, EU:C:2000:164, para. 37; Case C-681/13, *Diageo Brands*, EU:C:2015:471, para. 44, and the case law cited.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

Again, it seems that the answer is yes, enforcement of a judgment can be denied on the ground of violation of the freedom of expression, as it certainly constitutes a fundamental right in all Member States of the EU. At the very end should be added that the criterion of a manifest infringement has to be assessed on a case to case basis. As already indicated, an inadequate handling of a SLAPP case can amount to such an infringement.

This raises the question of whether an enforcing court has the competence to verify whether the issuing court adhered to freedom of speech standards, given the prohibition against reviewing the substance of the case. However, this issue can be framed differently. One could argue that the court where enforcement is sought is not revisiting the merits of the original judgment but is instead looking ahead, attempting to foresee whether enforcing the judgment will have a chilling effect on public debate. In that context, the concern about staying outside the scope of *revision au fond* becomes irrelevant. This is also the line of reasoning adopted in the ECJ judgement, as explained in the next part.

Lastly, it has to be noted that this issue is of great importance in the context of the reopened negotiations on EU's accession to the ECtHR. According to Article 5b of the Consolidated version of the draft Accession Instruments[84], the Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union.[85] In this context, the protection of human rights guaranteed by the Convention shall be ensured. The explanatory report refers explicitly to the Avotins v. Latvia judgment stating that "with regard to the mutual-recognition mechanisms under EU law, the Court also held that it must verify that the principle of mutual trust is not applied automatically and mechanically to the detriment of human rights."[86] The *Real Madrid v. Le Monde* case presented a valuable opportunity for the ECJ to align its jurisprudence with that of the ECtHR, particularly in light of the planned accession. The ECJ took advantage of this opportunity to some extent, as I explain below.

J. ECJ's Judgment

The ECJ delivered its judgement on 2 October 2024. In the judgment, the ECJ largely adhered to the opinion of AG Szpunar.[87] The opinion underscores the delicate balance between mutual trust in the EU's judicial cooperation framework and the need to safeguard fundamental rights, particularly freedom of expression. It emphasizes that while the Brussels I Regulation promotes mutual recognition of judgments across Member States, it cannot come at the expense of core democratic values. AG Szpunar argued that if enforcing a judgment would have a chilling effect on public debate, it may be justified to invoke the public policy exception under Article 45(1) of the Regulation.[88]

Building on Szpunar's analysis, the ECJ concluded that a Member State court may refuse enforcement only if it would result in a manifest breach of a rule of law or a right—such as a Charter right—recognized as fundamental within that legal order, in paragraphs 29–44. Interestingly, the ECJ also allowed for a partial non-enforcement—as regards only one of the applicants or one of the defendants referred to in those judgments, as provided for in paragraph 72.

As to the remarks about the mutual recognition regime presented above, the ECJ remained strict regarding the exceptions. Significantly, Opinion 2/13 is referenced to emphasize that courts may not verify whether the other Member State has upheld fundamental rights in a specific case,

[84]Consolidated version of the draft Accession Instruments (as of 2 February 2023), 46+1(2023)31 16 February 2023.

[85]Accession of the European Union to the Convention shall not affect the application of the principle ofmutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

[86]Consolidated version of the draft Accession Instruments (as of 2 February 2023), 46+1(2023)31 16 February 2023, appendix 5 Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paras. 74b-74c.

[87]*See generally* Opinion of Advocate General Szpunar, *supra* note 5.

[88]*Id.*

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

except in rare situations.[89] What I believe is missing are guidelines on the types of situations where a national court should verify this. The ECtHR is more explicit in this regard, pointing to cases where a party claims a serious violation of a Convention right.

As to Article 11 of the Charter, the ECJ, extensively referencing its previous judgments, reinforced its significance as "one of the essential foundations of a pluralist, democratic society, and one of the values on which, under Article 2 TEU, the European Union is founded,, while pointing to ECtHR case law as the minimum standard for its protection.[90]

The ECJ also provided guidance as to how to asses if enforcement of a judgement would result in a manifest breach of Article 11 of the Charter. The court of the country where the enforcement is sought should establish, if the damages awarded are of the nature to cause a deterrent effect of the coverage of similar matters or even on the exercise of the freedom of the press This requires assessing the proportionality of the judgment by considering various factors, such as the amount awarded in similar cases, the resources of the individuals against whom the judgment is issued, their conduct—including the fulfillment of journalistic obligations and responsibilities—and the extent of the harm caused. However, regarding the latter two elements, the court cannot substitute its assessment for the findings made by the court that issued the judgment.

This essentially means that if a court in a Member State imposes a financial penalty proportionate to the poor conduct of the journalists being sued, but the conduct was misjudged by the issuing court, refusing enforcement is not a viable remedy. That is another argument for promoting ECtHR standards regarding freedom of speech in the judiciary. Although the ECtHR primarily serves as persuasive authority in this context, adhering to its judgments could help prevent the mishandling of SLAPP cases.

Overall, the most important step taken by the ECJ in relation to the protection of the public debate is a shift from permission to obligation. By the first question, the referring court in essence sought to establish whether a manifest breach of freedom of expression *can* constitute a ground for refusing to recognize and enforce a judgment. The ECJ takes it a step further, stating that enforcement in such circumstances *must* be refused.

The judgment might seem like a missed opportunity to explicitly address the phenomenon of SLAPPs. However, if the ECJ has indicated that the referring court cannot delve into the details of proceedings in another Member State due to the prohibition of *révision au fond*, it is equally difficult to expect the ECJ to evaluate whether the lawsuit initiating the proceedings constituted a SLAPP. The ECJ's role remains limited to interpreting and applying EU law, without assessing the national court's handling of the facts or merits. The judgment is nevertheless crucial in relation to SLAPP cases, as it allows for non-enforcement

Overall, it's difficult to overestimate the significance of this judgment. It represents not only a crucial step in protecting SLAPP victims and safeguarding public debate but also in upholding fundamental rights more broadly. The ECJ demonstrated flexibility and an ability to adapt to contemporary challenges.

K. Concluding Remarks

In conclusion, regardless of the implementation of the Anti-SLAPP Directive—whose importance should not be underestimated—it is imperative that courts within EU Member States apply the freedom of expression standards established by the ECtHR when adjudicating cases. This approach is essential to safeguarding a free and open public debate, which forms the cornerstone of democratic societies.

In this context, the ECJ judgment in the Real Madrid v. Le Monde case presented a crucial opportunity to reinforce these principles at the EU level. Thankfully, the ECJ seized this moment

[89]*Accession of the European Union,* Opinion 2/13, *supra* note 16.

[90]ECJ, Case C-633/22, Real Madrid Club de Fútbol, AE v. EE, Société Éditrice du Monde SA, *supra* note 2, paras. 49 and 52.

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press

to issue clear guidelines for Member State courts on when non-enforcement is required to maintain open and unhindered public debate.

It is a different question whether this will be the case. It's almost a truism to say that the ECtHR's and the ECJ play different roles. The ECtHR role is to hold states responsible for human rights violations and remedy these violations by remedy these violations by requiring states to adopt individual measures or general measures, such as amending or adopting adequate regulation. The ECJ, conversly, was meant to ensure uniform application of EU law for further integration of the EU, which was primarily established as an economic union. The protection of human rights in European Union was not an end in itself but is rather aimed facilitating the flow of capital and goods between Member States. Dean Spielmann calls the *pro-integratione* approach to human rights.

Nevertheless, this approach is changing. The EU increasingly acts as a union of values, including human rights.[91] As Gráinne de Búrca and Claire Kilpatrick rightly point out, the international human rights protection system requires not only accountability of duty-bearers to rights-holders, but also of duty-bearers to one another, the approach is also known as horizontal Solange.[92] By making a broader exception for the protection of human rights at the detriment of the principle of mutual trust, the ECJ strengthened the mutual monitoring of human rights observance between Member States.[93] The landmark judgment also seems fundamental from the perspective of the EU's accession to the ECtHR.

Acknowledgements. The author would like to thank Przemysław Pałka for his continuous support, as well as all the participants of the Work in Progress seminar at Jagiellonian Univeristy in February 2023 for their thoughtful and insightful comments.

Competing Interests. The author declares none.

Funding Statement. There is no specific funding associated with this Article.

[91]In this context, consider, for example, the infringement proceedings initiated by the European Commission against Hungary. The Commission alleges violations of Article 2 TEU, as well as Articles 1, 7, 11, and 21 of the Charter. Notably, this marks the first instance where the European Commission has invoked Article 2 TEU as a self-standing ground. The action was brought on December 19, 2022, under case number C-769/22.

[92]Iris Canor, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"*, 50 COMMON MKT. L. REV. 383, 383–421 (2013).

[93]Gráinne de Búrca & Claire Kilpatrick, *Resisting External Accountability: The European Union and Human Rights*, in EU EXTERNAL RELATIONS AND THE POWER OF LAW: ESSAYS IN HONOUR OF MARISE CREMONA (Kenneth A. Armstrong, Joanne Scott & Anne Thies eds., Hart 2024).

Cite this article: Nowicka Z (2025). SLAPP vs. Mutual Trust: Protecting the Public Debate Through Public Policy Considerations. *German Law Journal* **26**, 568–585. https://doi.org/10.1017/glj.2024.46

https://doi.org/10.1017/glj.2024.46 Published online by Cambridge University Press