

## National courts, social media and convergence

Research done within the framework of the COMPACT project examined national court cases on social media and convergence in a selected set of COMPACT countries. The following report discusses the jurisprudence of the higher and appeal courts under review, investigates patterns of judicial reasoning and looks at judicial interaction between courts.

**Our sample includes 147 higher court cases from Bulgaria, Croatia, Greece, Italy, Latvia, Slovakia and Slovenia from between 1/1/2012 – 31/05/2018 and 80 second instance court cases from Bulgaria, Croatia, Greece, Latvia, Portugal, Slovakia and Slovenia from the period 1/1/2012 – 31/12/2017.** It covers cases on social media, blogs, chat rooms and other messaging applications as well as cases on online news media dealing with user-generated content.

### Higher court cases by country

Country	Number of cases
Slovakia	3
Slovenia	3
Bulgaria	4
Greece	3
Latvia	5
Croatia	34
Italy	95
<b>Total</b>	<b>147</b>

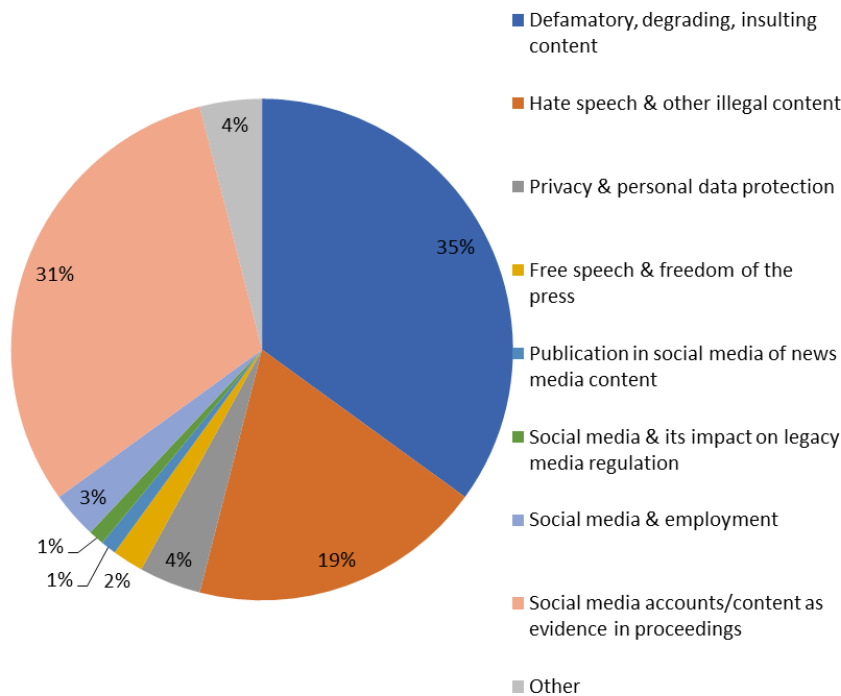
### Second instance court cases by country

Country	Number of cases
Slovakia	7
Slovenia	6
Bulgaria	3
Greece	8
Latvia	13
Croatia	5
Portugal	38
<b>Total</b>	<b>80</b>

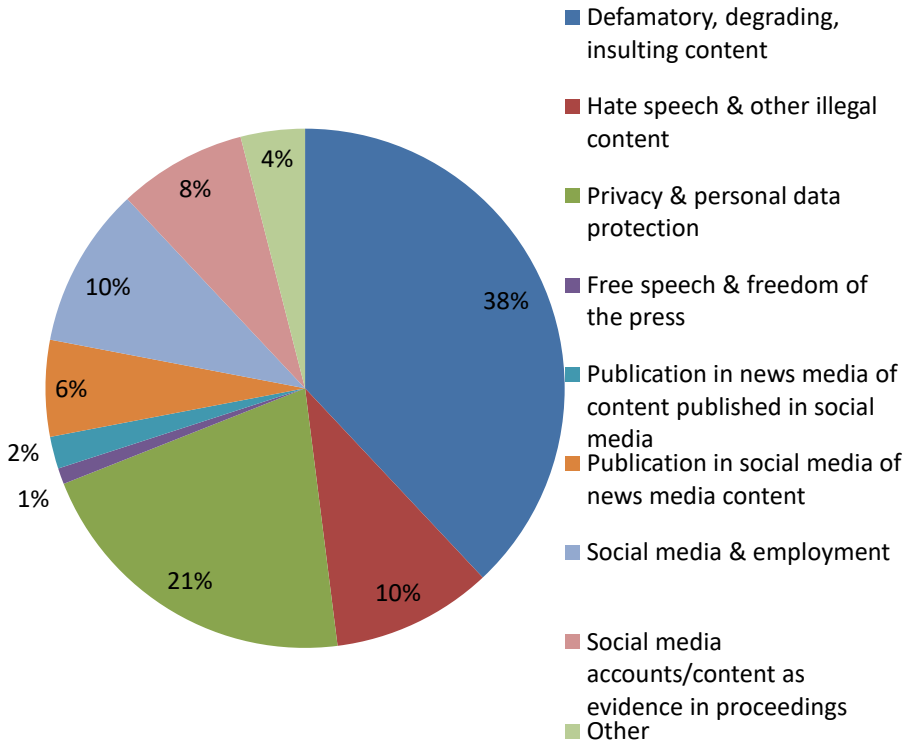
The higher court cases identified were mostly from supreme courts (97%), as opposed to cases from constitutional courts (3%, from Italy, Latvia, Slovakia and Slovenia); the majority were cases decided by the criminal sections of the supreme courts (89%). The majority of the appeal court cases identified also came from criminal courts (61%).

**Most of the higher and appeal court cases collected dealt with issues related to defamatory content, social media content as evidence in proceedings, privacy and personal data protection, hate speech and other illegal content, and social media and employment.**

### Higher court cases – subject matter



## Second instance court cases – Subject matter



In our sample, the legal sources defining the background of the cases were, besides national rules, supranational rules and jurisprudence, with a preference for the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the rulings of the European Court of Human Rights (ECtHR).

### Higher court cases: Mentions of European law and jurisprudence

	EU directives, CFR and CJEU jurisprudence	ECHR and ECtHR jurisprudence
Mentioned	9	12
	6%	8%
Not mentioned	138	135
	94%	92%
<b>Total</b>	<b>147</b>	<b>147</b>

## Second-instance court cases: Mentions of European law and jurisprudence

	EU directives, CFR and CJEU jurisprudence	ECHR and ECtHR jurisprudence
Mentioned	13 16%	18 23%
Not mentioned	67 84%	62 77%
<b>Total</b>	<b>80</b>	<b>80</b>

With respect to judicial reasoning, our findings show that the judicial treatment of social media cases heavily draws on the existing ‘generic’ legal framework. Generic rules, ranging from rules on defamation and incitement to hatred to misleading advertising, dismissal from work, the protection of personal data and trademark legislation, have been applied in social media cases. However, national courts have refrained from bringing social media within the scope of existing rules concerning the press. Cases indicating changes in judicial reasoning and cases casting light on the interpretation of technology neutrality incorporated into national legislation were also observed.

Judicial reasoning with a fundamental rights dimension is not always present in social media cases. The percentage of higher and second-instance court cases with a fundamental rights component is 15% and 34% respectively. When courts incorporate a fundamental rights perspective, constitutional provisions were the backbone of their reasoning, although often just as a reference. Our sample reveals no use of the CFR with an impact on judicial reasoning and use of the ECHR mostly in conjunction with domestic constitutional provisions.

Turning to judicial dialogue, that is, engagement with the case law of other courts (i.e. national courts, European courts or foreign courts), the share of judicial dialogue within our sample was 10% for higher court cases and 35% for second-instance court cases. With respect to European court cases in particular, our findings indicate a clear preference towards the use of the jurisprudence of the European Court of Human Rights (ECtHR), mostly as a supporting argument. Use of the case law of the Court of Justice of the European Union has been limited. This is also the case for the use of foreign case law.

## Our recommendations

→ On social media regulation:

- Statutory regulation that specifically targets social media must rest on a careful assessment of the regulatory potential of the existing legal framework.

→ For judges:

- Judges' training on sector-specific jurisprudence could facilitate engagement in fundamental rights reasoning.
- Judges could benefit from training on the use of judicial dialogue techniques and their added value.
- Judges could benefit from increased use of the preliminary reference procedure before the CJEU.

→ For legal practitioners:

- Judicial training of legal practitioners could bolster the use of fundamental rights arguments in the parties' pleadings, encouraging judicial reasoning of fundamental rights

**Compiled by ELIAMEP (2019) from:**

Evangelia Psychogiopoulou, Federica Casarosa, Anna Kandyla, 'National courts, social media and convergence', Report for the COMPACT project, 2019, deliverable D2.2.