BRIEFING
EU Legislation in Progress

European Parliament

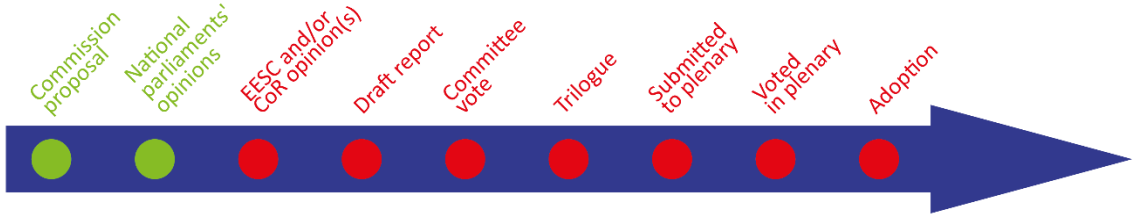
Strategic lawsuits against public participation (SLAPPs)

OVERVIEW

Over the years, techniques to limit freedom of expression have been refined, in innovative ways, often taking advantage of a legal void or grey zones between legal norms. One of these techniques is that of 'SLAPPs' (strategic lawsuits against public participation), a term coined by George Pring and Penelope Canan in the 1980s to indicate an abusive or meritless lawsuit filed against someone for exercising their political rights or freedom of expression in relation to matters of public interest. The purpose of SLAPPs is not to seek justice but to intimidate, silence and drain the financial and physical resources of the targeted victims. Ultimately, SLAPPs have a 'chilling effect' that goes beyond the individual case and undermines the building up of a healthy and pluralistic civic space in which citizens can actively participate. Although originally the SLAPPs phenomenon mainly affected activists, environmentalists and citizens who made themselves heard on matters of social relevance, today it affects all individuals who, in the name of public interest, denounce abuses of various kinds committed by both public and private actors.

On 27 April 2022, the European Commission put forward a proposal for a directive aimed at protecting persons who engage in public participation against manifestly unfounded or abusive civil court proceedings with cross-border implications, which is now being analysed by the co-legislators. The proposal is accompanied by a recommendation to the Member States setting out guidance to address purely domestic cases of SLAPPs.

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')		
Committee responsible:	Legal Affairs (JURI)	COM(2022) 177 final 22.4.20222
Rapporteur:	Tiemo Wölken (S&D, Germany)	2022/0117(COD)
Shadow rapporteurs:	Magdalena Adamowicz (EPP, Poland) Ilana Cicurel (Renew, France) Marie Toussaint (Greens/EFA, France) Jorge Buxadé Villalba (ECR, Spain) Manon Aubry (The Left, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Draft report	



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Introduction

Media freedom and pluralism are part of the rights enshrined in the European Charter on Fundamental Rights (Article 11) and in the European Convention on Human Rights (Article 10 ECHR), together with freedom of expression and information. As frequently stated by the European Court of Human Rights (ECtHR), those freedoms are indissociable from democracy as they protect the pluralism, tolerance and broadmindedness without which democratic societies cannot flourish (*Handyside v. the United Kingdom*, 7 December 1976). In this vein, some say that 'press freedom is the canary in the coal mine', because it is a key indicator of democratic backsliding.

However, media freedom and pluralism has been deteriorating in recent years in the European Union, and physical and online threats and attacks on journalists seem to be on the rise in several Member States. The increasing number of attacks and threats against journalists, human rights defenders and other activists has consistently been documented and reported, including by the Commission's annual rule of law reports (2020, 2021 and 2022) and the Media Pluralism Monitor. For instance, the Media Pluralism Monitor report for 2022, covering the 27 EU Member States and five candidate countries (Albania, Montenegro, North Macedonia, Serbia and Turkey) shows a deteriorating situation regarding protection of journalists. Several countries reported **physical attacks** against journalists as well as **online threats and harassment**. According to the report, in 2021 the number of physical attacks on journalists rose by 61 %, while incidents of harassment and intimidation increased by 57 % in the countries analysed. Two journalists were killed in the EU in 2021, and the number rises to three if the candidate countries are also taken into account. Similarly, the Council of Europe platform to promote the protection of journalism and safety of journalists reports a worrying number of cases of aggression, harassment and impunity towards journalists and professionals working in the media sector in 2021 in the 47 European states covered by its activities. The platform highlighted that, during 2021, six journalists were killed in Council of Europe member states, 56 journalists and media actors were in prison at the end of 2021, and 26 cases of impunity remained active at the end of the year. Following what seems to be a global trend, available data show that, in Europe too, female media workers appear to be subject to more threats, in particular online harassment, than their male counterparts.

One of the techniques used to harass and silence journalists, human rights defenders, activists and other society watchdogs are **'strategic lawsuits against public participation' (SLAPPs)**. SLAPPs are groundless or abusive lawsuits, disguised as defamation actions or alleged constitutional and/or civil rights violations that are initiated against journalists or activists because they exercise their political rights and/or their freedom of expression and information regarding matters of public interest or social significance.[1] They are usually not filed with the intention of pursuing justice, but of intimidating, silencing, and draining the financial and psychological resources of SLAPPs targets. SLAPPs are often characterised by a great imbalance of power between the claimant and the defendant, where one has the resources and ability to effectively silence the other through litigation techniques that amplify the psychological and economic burden of protracted proceedings.

Abusive lawsuits might be initiated by private entities who wish to protect their personal, financial or reputational interests, or by public/state entities to protect politicians' or public officials' positions. Ultimately, the result is to suppress scrutiny on issues of public interest. The abusive lawsuits seek to bring expensive and time-consuming court proceedings that will have a **'chilling effect'** on other potential targets, preventing them from reporting abuses and crimes or asserting their rights; suppressing critical discourse; intimidating individuals; and undermining public engagement. Those initiating SLAPPs base their claims on various grounds, most often criminal or civil defamation but also data protection, the protection of privacy and intellectual property. The use of criminal defamation has an undisputed chilling effect on those engaging in public participation, especially when a prison sentence can be imposed on the accused. However, civil defamation lawsuits are also used to silence journalists and other activists, as high compensation for damages can exert a pressure similar to that of a criminal penalty and as the defendant usually

enjoys fewer procedural safeguards in civil proceedings than the accused in criminal ones, offering claimants more possibilities to (ab-)use the procedure to attain their purposes.

Identified as a rising phenomenon in the United States as early as the 1980s, SLAPPs have become a threat to freedom of expression and information in other jurisdictions,[2] including in the EU. Although the **real dimension of this phenomenon within the EU is unknown**, a 2022 report by the organisation Article 19, based on research on SLAPP litigation against journalists in 11 countries across Europe (Belgium, Bulgaria, Croatia, France, Hungary, Ireland, Italy, Malta, Poland, Slovenia, and the UK) found an increasing number of SLAPP cases targeting journalists, NGOs and activists and highlighted that none of the countries analysed had specific domestic legislation on SLAPPs. Similarly, a 2022 report by the Coalition against SLAPPs in Europe (CASE) was able to identify 570 SLAPP cases filed in over 30 European jurisdictions from 2010 to 2021. Moreover, a number of SLAPP cases against European journalists or media are well-known. For instance, when Daphne Caruana Galicia, the Maltese investigative journalist, was assassinated in 2017, 47 defamation cases were pending against her in Malta, the United States and the United Kingdom. The murder shook up public opinion and raised awareness of the need for action, including at EU level. Another example is provided by Polish newspaper *Gazeta Wyborcza*, which was facing more than 60 defamation lawsuits at the end of 2021, as reported by the Council of Europe platform to promote the protection of journalism and safety of journalists.

To respond to growing concerns over the prevalence of SLAPP cases within the EU, the Commission announced its intention to issue an initiative against abusive litigation targeting journalists and rights defenders in its 2021 work programme, under the priority 'A New Push for European Democracy'. This intention was reiterated in the European Democracy Action Plan, which announced a number of forthcoming proposals to promote a more resilient EU democracy, including two key actions to address SLAPPs: 1) the setting up of an expert group including legal practitioners, journalists, academics and members of civil society to collect expertise; and, 2) putting forward an initiative to protect journalists and civil society against SLAPPs. Although initially expected for late 2021, the Commission initiative to protect journalists and civil society against SLAPPs was presented on 27 April 2022 in the form of a proposal for a directive that would only apply to civil SLAPP cases with a cross-border dimension (**anti-SLAPPs Directive**). The legislative initiative is accompanied by a recommendation setting out guidance for Member States to take effective measures to address purely domestic SLAPP cases.

Existing situation

There is currently **no anti-SLAPP legislation at EU level**, and the Commission proposal for an anti-SLAPP directive would fill this legal vacuum. Moreover, the situation at national level is similar. According to the staff working document accompanying the Commission proposal, **none of the EU Member States has specific safeguards against SLAPPs** and only three of them (Malta, Lithuania and Ireland) are considering the introduction of specific measures to address SLAPPs. Without specific legislation aimed at addressing this phenomenon, SLAPPs are treated by national and EU legislation as regular civil or criminal lawsuits and the usual procedural rules are applied.

A 2021 **comparative study** produced with the financial support of the Commission looked at the legal environment of SLAPPs in the EU and its Member States and revealed a patchy situation at national level. According to the study, '**all but six Member States criminalise defamation**, and in all but one of those, the sanction can be imprisonment. In ten Member States, criminal defamation is reported to be more commonly used to protect reputation than civil defamation. Eight Member States maintain higher penalties for public dissemination, particularly for the press. Eleven Member States provide for stricter protection of public officials, monarchs, or heads of states.' Civil defamation exists in all Member States, with most of them allowing both natural and legal persons to sue for damage to reputation – only Finland and Sweden do not allow legal persons to file a lawsuit in these cases. Only Malta seems to have a cap on damages in civil defamation cases.

In 20 Member States, the public interest of the matter and good faith are considered a suitable defence in defamation cases, although the formulation varies across Member States. In 20 Member States too, the losing party pays the legal cost of civil proceedings, although this usually takes the form of a reimbursement and may even be received years after the final judicial decision on the case. Legal aid is available in civil defamation cases in 20 Member States, but the study affirms that 'many SLAPP targets cannot benefit from this type of assistance, given the restrictive and narrow scope of the conditionality criteria that apply'. The study also looked at the jurisprudence of the ECtHR and how it is applied in the Member States; consistent application of ECtHR standards was reported in 11 Member States only.

Apart from the patchy situation at national level, **EU private international law** has been criticised for offering claimants the possibility to abuse civil lawsuits in defamation cases, with the consequent impact on public participation with a cross-border component. The Brussels Ia Regulation, the main EU instrument governing the recognition and enforcement of judgments in civil and commercial matters between EU Member States, was designed to prevent 'forum shopping' by vesting jurisdiction in civil and commercial cases in the court most closely connected to the facts of the case, normally that of the domicile of the defendant. However, the regulation allows the claimant, in tort, delict or quasi-delict cases, to unilaterally choose between the forum of the domicile of the defendant or that of 'the place where the harmful event occurred or may occur' (Article 7(2)). This second possibility has been interpreted by the Court of Justice of the EU (CJEU) in defamation cases in a broad way, allowing the claimant to bring actions in all states in which the publication has been distributed for damage arising in that jurisdiction, or to sue the defendant for the whole of the damage caused through the courts of the Member State in which the publisher of that content is established or in the Member State where the claimant has its centre of interest (C-251/20; C-509/09). In the era of online media, this interpretation offers well-financed claimants wide possibilities to develop their litigation strategies and exhaust possible targets of SLAPPs by bringing actions for damages in multiple fora and/or fora that differ from the one in which the defendant resides.[3]

Moreover, as **defamation cases are excluded from the Rome II Regulation**, the main EU instrument governing conflicts of law in non-contractual obligations in civil and commercial matters, the choice of the forum determines the substantive law applicable to the case. Together with the ample possibilities to choose the forum in defamation cases with a cross-border element offered by the Brussels Ia Regulation, the exclusion of defamation from the Rome II Regulation is conducive to forum shopping and libel tourism, as it allows claimants to choose the forum of the state with the lowest standards of protection of press freedom or freedom of expression. The problem is acknowledged in the staff working document accompanying the Commission proposal for an anti-SLAPP directive, which stresses that the SLAPP problem might be amplified by the forum-shopping element because some jurisdictions, including within the EU, are perceived as more claimant-friendly than others. This is why some experts and stakeholders argue that the reform of both Regulations (Rome II and Brussels Ia) would be a necessary complementary measure to counter SLAPPs as threats against press and media freedom. In its European Democracy Action Plan, the Commission committed to examining the cross-border aspects of SLAPPs in the context of the 2022 evaluation of the Rome II and Brussels Ia Regulations.

The **Council of Europe** (CoE) has set standards regarding the protection of journalists and other activists, including against SLAPPs. Although the ECtHR has never directly referred to SLAPPs or expressly mentioned the duty of states to protect journalists against SLAPPs, it has repeatedly affirmed that publications contributing to debates on matters of public interest enjoy a higher level of protection under Article 10 ECHR. Similarly, the **ECtHR has recognised the essential role played by the press as a public watchdog** in democratic societies, thus justifying a higher level of protection of their Article 10 ECHR rights (*Axel Springer AG v. Germany*, 7 February 2012). **NGOs, researchers and even bloggers or popular users of social media have been granted similar protection** on the understanding that they also perform a relevant social watchdog function (*Magyar Helsinki Bizottság v. Hungary*, 8 November 2016).

In addition to the ECtHR case law, in 2014 the CoE launched a Platform to promote the protection of journalism and safety of journalists, while several CoE resolutions and recommendations focus on the protection and safety of journalists, including against SLAPPs. Among others, the 2016 Committee of Ministers Recommendation on the protection of journalism and safety of journalists and other media actors and its 2020 Implementation Guide set clear guidance for CoE member states to address different kinds of threats and attacks faced by journalists and other media actors. The Recommendation calls on states to ensure, inter alia, that their defamation laws conform with European and international standards; that they do **not apply prison sentences for a press offence except in exceptional circumstances**; and that they take the necessary measures **to prevent the malicious use of the law** and legal process **to intimidate and silence journalists**. In line with this Recommendation, the CoE Parliamentary Assembly has urged CoE member states, inter alia, to abolish criminal sanctions for media offences, except in cases where other fundamental rights have been seriously impaired and, more generally, to review their national laws to prevent any misuse that seeks to intimidate journalists (2007 Resolution and Recommendation for the decriminalisation of defamation; 2020 Resolution and Recommendation on media freedom and journalists' security in Europe). Even if CoE organs have been active in this area, in March 2021 more than 100 organisations called on the CoE to issue a self-standing Recommendation on SLAPPs; the Committee of Ministers followed suit, creating a committee of experts tasked with developing a draft recommendation on SLAPPs.

Comparative elements

Several other countries have introduced legislation to address the increasing SLAPPs phenomenon, including some US states, Canada (Quebec, British Columbia, and Ontario) and Australia.[4] In March 2022, the UK Ministry of Justice opened a call to collect evidence on the use of SLAPPs in the country, and has committed to introducing targeted legislative reforms to address the phenomenon.

Parliament's starting position

Parliament has consistently called for action to ensure respect for and enhancement of fundamental EU values (Article 2 of the Treaty on European Union), including media freedom. In 2018, a Parliament resolution highlighted how journalists were still the target of deadly attacks, and recalled the importance of ensuring media freedom and pluralism, also taking into account online platforms. Member States were urged to set up an independent and impartial regulatory body to report violence and threats against journalists and to ensure the protection and safety of journalists at national level, stressing the importance of ensuring efficient legal recourse procedures for journalists whose freedom to work had been threatened, so as to avoid self-censorship. The same year, another resolution focused on the case of the Slovak investigative journalist Ján Kuciak, who was murdered together with his fiancée Martina Kušnírová.

In 2019, the situation of journalists in Malta and Slovakia was on Parliament's radar, and another resolution followed the revelations concerning the murder of Daphne Caruana Galizia. A 2020 resolution on 'Strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms' called on the Commission to take action against the use of SLAPPs. The same call was repeated in April 2021 in a resolution which stressed how journalists, and particularly investigative journalists, were increasingly victims of SLAPPs with the sole aim of hindering public scrutiny and preventing public accountability. In June 2021, Parliament expressed, once again, its concerns regarding the erosion of media freedom and it referred again to SLAPPs as an instrument to limit public watchdogs' independence and to produce chilling effects.

In November 2021, Parliament adopted, by a large majority (444 votes in favour, 48 against and 75 abstentions), an **own-initiative report** **focusing on SLAPPs**. The resolution called on the Commission to propose a package of both soft and hard law to address the increasing number of SLAPPs against journalists, NGOs, academics and civil society within the Union. Parliament proposed legislative measures in the areas of civil and criminal procedural law, such as an early dismissal mechanism for abusive civil lawsuits; the right to full award of costs incurred by the defendant; and the right to compensation for damages. Proposed non-legislative actions included, inter alia, adequate training for judges and legal practitioners on SLAPPs, a specific fund to provide financial

support for the victims of SLAPPs and a public register of relevant court decisions on SLAPP cases. In addition, Parliament called for the revision of the Brussels Ia and Rome II Regulations in order to prevent 'libel tourism' or 'forum shopping' by establishing that 'the court having jurisdiction and the law applicable to criminal or civil lawsuits concerning defamation, reputational damage and protection of an individual's reputation should, in principle, be that of the place in which the defendant is habitually resident'.

More recently, in December 2021, Parliament adopted a resolution on the situation of fundamental rights and the rule of law in Slovenia; inter alia, Parliament expressed its concerns regarding 'smear campaigns, slander, criminal investigations, as well as strategic lawsuits against public participation (SLAPPs)'. Parliament pointed to the importance of decriminalising defamation, which 'can have a chilling effect on the freedom of expression and on the reporting of abuses by those in public office, and can lead to self-censorship'.

Council starting position

On 21 June 2022, the Council adopted conclusions on the protection and safety of journalists and media professionals. It stressed the need to ensure a safe environment for journalists and media professionals, particularly female journalists, to enable them to work freely and independently. The Council recalled that an increasing number of journalists and media professionals are killed, harassed and intimidated as a result of their professional activity. It invited Member States and the Commission, among others, to keep exchanging best practices on the protection and safety of journalists; to strengthen funding for independent and investigative journalism; to take action to protect female journalists and to tackle online threats. Prior to that, in December 2020, the Council adopted conclusions on safeguarding a free and pluralistic media system.

Preparation of the proposal

From 4 October to 1 November 2021, the Commission launched an open **public consultation** to collect stakeholders' input to feed the upcoming legislative proposal on SLAPPs. The consultation received 178 replies (70 from NGOs and 60 from citizens) from 22 Member States. National authorities (from seven Member States), regional authorities (from two Member States) and two national Ombudsmen also sent their contributions. A **targeted consultation** of national judges through the European Judicial Network in civil and commercial matters followed from 12 November 2021 to 10 January 2022. The consultation received 130 replies from individual national judges, a large majority of whom were not familiar with SLAPP cases (79 out of 130 replies), and revealed that 'there is no legal definition of SLAPP or SLAPP-specific system of safeguards in the Member States of respondents'. In November 2021, the Commission organised a **stakeholders' workshop**, in which 34 interested organisations, the Council of Europe and the Fundamental Rights Agency took part.

The changes the proposal would bring

The Commission proposal for an anti-SLAPPs directive is based on Article 81(2)(f) TFEU, which is the legal basis for judicial cooperation in civil matters having a cross-border dimension. The proposal was not accompanied by an impact assessment but by a staff working document, indicating that the proposal aimed to provide domestic tribunals and courts with the necessary tools to deal with SLAPPs with a cross-border dimension, protect journalists, activists and human rights defenders, and, more generally, whoever acts as a public watchdog. The proposal also aims to collect data on SLAPPs in a more systematic way, raise awareness about SLAPPs among professionals and provide support to victims.

As the proposed directive is only applicable to civil SLAPPs with a cross-border component, it was **presented together with a non-binding recommendation** setting out guidance for Member States to take effective measures to address **purely domestic SLAPPs** (based on Article 292 TFEU). Although only applicable to domestic cases of SLAPPs, the **recommendation has a broader scope of application *ratione materiae* than the proposed directive**, as it not only calls on Member States

to ensure that their civil procedural laws are in line with the proposed EU rules for domestic SLAPPs, but it also includes recommendations relating to criminal law, data protection and deontological rules governing the conduct of legal professionals. In this vein, the recommendation calls on Member States to remove prison sentences for defamation from their legal framework, favour the use of administrative or civil law to deal with defamation cases, strike a fair balance between data protection rules and the protection of freedom of expression and information, and ensure that deontological rules for legal professionals discourage SLAPPs. Moreover, the recommendation calls on Member States to support training on SLAPPs for legal professionals, and to ensure that SLAPP targets have access to individual and independent support and that data on the number of SLAPPs initiated in their jurisdiction is collected and reported to the Commission on a yearly basis starting by the end of 2023. By the same deadline, Member States are required to report on the recommendation's implementation to the Commission, which will assess the impact of the recommendation by no later than 5 years after its adoption and decide on the next steps.

Scope of application of the proposed directive

The proposed directive will apply to unfounded or abusive court proceedings against natural or legal persons in **civil and commercial matters** with cross-border implications only (Article 2). Revenue, customs and administrative matters, and liability cases concerning acts and omissions by a state in the exercise of state authority (*acta iure imperii*), remain outside its scope of application (Article 2). The proposed directive would not apply to **criminal cases** either.

Although excluded from the scope of application of the proposed directive, **criminal defamation** cases have been subject to the scrutiny of the ECtHR. Considering their chilling effect on public debate, the ECtHR has consistently held that state parties to the ECHR have a margin of appreciation to decide whether criminal measures are needed to address cases of defamation, but they must show restraint when resorting to criminal penalties, especially when a matter of public interest is involved. Imposing a prison sentence for the exercise of the freedom of expression would therefore only be considered compatible with Article 10 ECHR when other fundamental rights are severely impaired, e.g. cases of hate speech or incitement to violence (*Atamanchuk v. Russia*, 11 February 2020). Moreover, the imposition of a criminal penalty, even a minor one (and thus not imprisonment), has been consistently considered by the ECtHR as a violation of Article 10 ECHR in cases involving public interest matters, due to its dissuasive effect on the exercise of freedom of expression and information (*De Carolis and France Télévisions v. France*, 21 January 2016).

In addition to limiting the scope of application of the proposal to only civil and commercial matters, Articles 2 and 4 also make it clear that the proposal would only apply to **cases with cross-border implications**. Although SLAPP cases in which the defendant is domiciled in a country other than the court seized are a relatively small part of the total amount of SLAPP cases documented in Europe (11 % of the total documented from 2010 to 2021, according to the Coalition against SLAPPs in Europe), the proposal defines matters with cross-border implications in a broad way. In this vein, a case would be considered to have cross-border implications **unless both parties and the court seized are domiciled in the same Member State**. However, even in this latter case, the same article provides for two exceptions. The matter would also be considered as having cross-border implications when: 1) the **act of public participation** against which the court proceedings are initiated is **relevant to more than one Member State**; or 2) the **same claimant** (or associated entities) **has brought a case against the same defendant in more than one Member State** in parallel or at an earlier stage (Article 4). Therefore, a SLAPP case would be covered by the proposal if, for example, it is linked to the publication of information relating to corruption cases affecting several Member States or a transnational company, or if the claimant has already initiated proceedings in several Member States against the defendant, even if both parties are domiciled in the same Member State of the court seized. Purely domestic cases not falling within the broad definition provided by the proposal would be covered by national law, although the non-binding recommendation accompanying the proposal calls on Member States to align their national laws with the proposal, and that may well be the case in Member States wishing to treat equally purely domestic cases and those with cross-border implications, as defined by the proposed directive.

Defining abusive court proceedings against public participation

The proposed directive seeks to address the SLAPPs phenomenon and protect those engaged in public participation by, inter alia, establishing a number of common procedural rules that seek to dissuade claimants from initiating abusive or manifestly unfounded court proceedings against public participation. In this vein, Article 3 of the proposal defines three key concepts for the future application of the proposed directive: 1) **public participation**; 2) **matter of public interest**; and 3) **abusive court proceedings against public participation**. It is worth mentioning that the proposal uses the term SLAPPs several times in the preamble only, not in its operative part.

Public participation is defined broadly as any activity that a natural or legal person carries on 'in the exercise of the right to freedom of expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto'. According to recital 17, commercial advertisement and marketing activity are normally not covered by the proposal because they usually are 'not made in the exercise of freedom of expression and information'. In any case, the concept of public participation is clearly linked to the exercise of the freedoms of expression and information regarding matters of public interest by any person, thus not restricting the scope of application *ratione personae* of the proposal to journalists or the media and allowing some other society watchdogs (i.e. human rights defenders, civil society organisations, academics, etc.) or individuals exercising their freedom of expression to also benefit from the proposal.

Consistently with this approach, article 3(2) of the proposal borrows the definition of **'matters of public interest'** crafted by the ECtHR case law, indicating that a matter is to be considered as such when it 'affects the public to such an extent that the public may legitimately take an interest in it' (e.g. *Satakunnan Markkinaporssi Oy and Satamedia Oy v. Finland*, 27 June 2017, para 71). It can touch upon public health, climate, fundamental rights, and allegations of crimes such as corruption or fraud, matters under consideration by any branch of government, legislative, executive or judicial. Concerning the balance between the freedom of expression and the right to privacy, the staff working document accompanying the proposal states that domestic provisions, as well as the case law of Member States' courts and tribunals, are influenced by the case law of the ECtHR resulting 'in a certain level of harmonisation among Member States concerning the limitations of the right to privacy in favour of the freedom of expression'.

Finally, Article 3(3) of the proposal defines **'abusive court proceedings against public participation'** as proceedings related to public participation that are fully or partially unfounded and whose main purpose is 'to prevent, restrict or penalise public participation'. According to the provision, two elements would be needed for a court proceeding against public participation to be considered abusive: i) the **unfounded or meritless** character of the suit and, ii) the fact that the **claimant's main purpose** is not to obtain redress, compensation or repair for the damages suffered, but 'to prevent, restrict or penalise public participation'. As identifying the intent hidden behind a lawsuit may be challenging, article 3(3) provides a non-exhaustive list of elements to help identify it, such as the disproportionate nature of the claim, the existence of multiple concurrent cases in relation to similar matters or the existence of intimidation, harassment or threats on the part of the claimant.

Although SLAPPs are frequently characterised by literature as meritless lawsuits, in which the claimant does not seek justice but to punish the defendant for the exercise of their fundamental rights, academics have raised the issue of whether the **claimant's intent** should be one of the criteria for defining the scope of application of anti-SLAPP legislation, or whether the focus should only be on the defendant's activity and whether it constitutes protected freedom of expression or information.[5] Requiring proof of the claimant's intent may put an additional burden on the defendant, making the case more complex and lengthy and thus adding to the chilling effect of this type of litigation. Thus, the proposal for a uniform anti-SLAPP law put forward by the Uniform Law Commission in the US context recommends focusing on the defendant's activities and proposes to define the scope of application of anti-SLAPP legislation by taking into account whether the defendant has exercised their freedom of speech or of the press, the right to assemble or petition, or the right of association, as guaranteed by the federal or state constitution, on a matter of public concern.

Early dismissal of manifestly unfounded lawsuits

Following the approach taken by existing anti-SLAPP legislation,[6] the proposed directive seeks to reduce the financial and personal burden posed by SLAPPs on those exercising their freedom of expression and information by providing for the speedy dismissal of civil lawsuits. According to article 9 of the proposal, Member States' courts should be empowered to decide on the **early dismissal of a court proceeding against public participation as manifestly unfounded**. Early dismissal would therefore only be available for 'manifestly unfounded' proceedings, but not for 'abusive' proceedings as defined in article 3 of the proposal (being unfounded and taking into account the claimant's intent). Although the threshold required for the early termination of SLAPP cases ('manifestly unfounded' lawsuit) seems to pursue the protection of possible claimants' right to access courts, it has been argued that early dismissal should also be extended to 'abusive' lawsuits to dissuade behaviour that is considered abusive by the Commission itself.

Even if the extension of early dismissal to 'abusive' lawsuits could be considered a more protective measure for those engaging in public participation, the early dismissal mechanism included in the proposal presents other characteristics designed to protect the interest of possible SLAPPs targets. According to article 5(3) of the proposal, decisions on early dismissal would be made by the courts seized either on the basis of an **application made by the parties** in the proceeding or ***ex officio***, if the national law implementing the proposed directive provides for such a possibility. Member States are free to establish time limits for exercising the right to apply for early dismissal, although if they decided to establish time limits they should be proportionate.

In addition, the application for early dismissal will be treated through an **'accelerated procedure'** (article 11), during which the main proceeding is suspended until a final decision on the request for an early dismissal is taken (article 10). If an application for early dismissal is made, the proposal foresees a **reversal of the burden of proof**, i.e. it would be for the claimant of the main proceeding (and not for the defendant applying for the early dismissal) to prove that the action is not manifestly unfounded (article 12). Finally, the Member States would have to ensure that the decision on the early dismissal **can be appealed** (article 13). The reversal of the burden of proof, the immediate appeal, and the stay of the main proceedings until a final decision on the early dismissal is taken, may become relevant deterrents for SLAPP claimants as they would have to prove at a very early stage of the proceeding that their claim is not manifestly unfounded. If they are unable to prove it and the claim is dismissed, the decision on appeal may take years in many Member States and the main proceedings will be halted until the decision is made, thus protecting potential SLAPPs targets.

Costs, damages and penalties

The proposed directive also provides for a number of remedies that would only be available in cases of abusive court proceedings against public participation and seek to compensate for the harm suffered by SLAPPs targets. Considering the financial burden that court proceedings have for SLAPPs targets, the proposal obliges Member States to ensure that claimants can be ordered to bear **all the costs of the proceedings** incurred by the person targeted by abusive court proceedings, unless such costs are excessive (Article 14). No specific provision on legal aid is included in the proposal, so the question of whether those targeted by abusive court proceedings against public participation can benefit from legal aid seems to be left to national legislators. However, Article 7 of the proposal provides for **the right of third-party intervention**, enabling non-governmental organisations promoting the rights of those engaging in public participation to take part in SLAPP cases to support the defendant or to provide information. This possibility may help to address the frequent imbalance of power and resources between claimants and defendants in SLAPP cases.

In addition to providing for the possible award of costs to the defendant, the proposal obliges Member States to ensure that natural and legal persons targeted by abusive court proceedings can claim and obtain **compensation for damages** (Article 15). The right to compensation covers both material and immaterial damages (i.e. psychological harm caused by the abusive lawsuit, suffering

and emotional distress). Courts and tribunals in the Member States should also have the possibility to impose **'effective, proportionate and dissuasive penalties'** on the claimant when the court proceedings are considered abusive (article 16). Moreover, Member States' courts and tribunals should also have the possibility to impose security *pendente lite*, i.e. the possibility to ask the claimant to provide security for procedural costs and damages, in the presence of elements indicating the abusive nature of the lawsuit (article 8).

The proposal does not seek harmonisation of the penalties that could be imposed on claimants initiating abusive court proceedings against public participation, thereby allowing Member States to freely choose the penalties which they deem appropriate. However, according to CJEU case law, **punitive measures** cannot be considered to be **'effective, proportionate and dissuasive'** if they go beyond what is necessary to attain the objectives legitimately pursued by the relevant legislation, or if their severity does not correspond to the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while at the same time respecting the general principle of proportionality (C-452/20; C-303/20; C-384/17). Therefore, EU legislation does not preclude national legislators from providing **different types of penalties** (e.g. administrative fines, non-pecuniary administrative penalties, criminal penalties, whether financial or other) for infringements of EU law, provided that the national legislation respects the principles settled in the CJEU case law.

Third-country judgments

Article 17 touches on the **grounds for refusal of recognition and enforcement of third-country (i.e. non-EU) judgments in SLAPP cases**. The provision would oblige Member States to ensure that third-country judgments on cases related to public participation are considered 'manifestly contrary to **public policy (*ordre public*)**' and therefore not recognised or enforced in Member States, on two conditions: i) the defendant is a natural or legal person domiciled in a Member State (i.e. not only the Member State where enforcement is sought, but any EU Member State); ii) the case would have been considered manifestly unfounded or abusive if it had been brought before the courts of the Member State where recognition of the third-country judgment is sought. In addition, Article 18 of the proposal recognises the right of a SLAPP target to seek compensation for the damages and costs incurred in connection with a court proceeding on account of engagement in public participation before a third country in the Member State where the person is domiciled 'regardless of the domicile of the claimant in the proceedings in the third country'. However, the possibility is only open for 'abusive court proceedings' and not for those considered manifestly unfounded (an approach that is consistent with the treatment of domestic SLAPPs) and does not extend to the possibility of imposing penalties on claimants initiating abusive court proceedings in third countries.

The proposal expressly indicates that it does not affect the application of the 2007 Lugano Convention, providing for a quasi-automatic regime of **recognition and enforcement of judgments in civil and commercial matters between EU Member States and three EFTA states** (Iceland, Norway and Switzerland). Although not expressly mentioned in the proposal, it can also be assumed that the proposal does not affect the application of the Brussels Ia Regulation either, thus leaving untouched those two special regimes of recognition and enforcement of foreign judgments. However, even under those special regimes, the recognition and enforcement of a judgment given in another state bound by the corresponding legal text can be refused on grounds of public policy (*ordre public*) (Articles 45 and 58 of the Brussels Ia Regulation and Articles 34 and 57 of the 2007 Lugano Convention).
In the context of the Brussels Ia Regulation, the CJEU has indicated that a Member State may have recourse to the **public-policy (*ordre public*) clause** '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' (C-568/20). According to the CJEU, such an infringement 'may inter alia lie in the fact that the party against whom enforcement is sought was not able to defend him or herself effectively before the court of origin and to challenge the decision sought to be enforced' in another Member State (C-568/20; C-394/07). As SLAPP cases usually involve the exercise of fundamental rights by their targets and a great imbalance of power between parties, possibly affecting the rights of the defendant, it seems plausible for Member States to have recourse to the *ordre public* clause to refuse the recognition of a judgment handled in another Member State if that Member State did not protect effectively the rights of SLAPP targets.

Advisory committees

The legal basis for the Commission proposal is Article 81(2)(f) TFEU, which does not envisage consultation of the European Economic and Social Committee (EESC) and the Committee of the Regions. The EESC is, however, expected to issue an opinion on the proposal.

National parliaments

The subsidiarity deadline for national parliaments to submit their reasoned opinions was 1 July 2022. Eighteen parliamentary chambers examined the proposal, but only the French Senate issued a 'reasoned opinion', stating that the proposal does not comply with the subsidiarity principle. The Senate regretted the absence of an impact assessment accompanying the proposal, highlighting that this made it impossible to assess the magnitude of the problem addressed. Moreover, it questioned the compatibility of the accelerated procedure for 'manifestly unfounded court proceedings' with the right to a fair trial, questioned the legal basis chosen, and contested the definition of 'matters with cross-border implications' used by the proposal.

Stakeholder views

The **Coalition Against SLAPPs in Europe** (CASE) welcomed the Commission proposal, which follows a previous policy brief CASE published in March 2022. In this vein, the organisation praised the Commission proposal for its broad personal scope that would cover anyone exercising their freedom of speech in relation to issues of public relevance, and for the key safeguards and remedies included in the initiative, which partially matched some of the safeguards included in the model anti-SLAPP Directive proposed by the organisation, together with 65 others. It also welcomed the Commission's approach in defining SLAPPs with cross-border implications, and praised the recommendation to Member States to ensure that safeguards required for cross-border cases would also be applied to purely domestic SLAPPs.

Along similar lines, the **European Federation of Journalists** (EFJ) welcomed the Commission proposal to set minimum standards and invited Member States to do their part and ensure effective protection for journalists, human rights defenders, NGOs and civil society organisations that are committed to ensuring democratic oversight.

The Article 19 organisation, which supports and defends freedom of expression and freedom of information, welcomed the Commission proposal as 'a crucial first step forward' to fight abusive lawsuits against public watchdogs in the EU.

Eurocadres (a European cross-sectoral trade union) also welcomed the proposal, which responds to many of their requests, notably for a directive protecting the victims of SLAPPs, which aims to prevent forum shopping; impose sanctions on abusive legal actions; and provide financial, legal and psychological support for SLAPP victims.

The **European Network of National Human Rights Institutions** (ENNHRI) welcomed the proposal and stressed the role of the national human rights institutions when it comes to raising awareness about abusive lawsuits, to training and to collecting data.

Legislative process

The Commission proposal follows the ordinary legislative procedure in Parliament and the Council. In Parliament, the Committee on Legal Affairs (JURI) is responsible for this proposal, with the Committee on Civil Liberties, Justice and Home Affairs (LIBE) asked to give an opinion. Tiemo Wölken (S&D, Germany) has been appointed as rapporteur in the JURI committee. In the Council, the Commission proposal has been referred to the Justice and Home Affairs configuration and is currently being discussed at the level of the Working Party on Civil Law Matters (JUSTCIV).

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2021.

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Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study, EU-CITZEN: Academic Network on European Citizenship Rights, June 2021.

SLAPP in the EU context, EU-CITZEN: Academic Network on European Citizenship Rights, May 2020.

ENDNOTES

1 Pring G. and Canan P., *SLAPPs: Getting Sued for Speaking Out*. Temple University Press, 1996; Canan P. and Pring G., 'Strategic Lawsuits against Public Participation', *Social Problems*, Vol. 35 (5), 1988, pp. 506-519.

2 Ogle G., 'Anti-SLAPP Law Reform in Australia', *Review of European, Comparative & International Environmental Law*, Vol. 19 (1), 2010, pp. 35-44; Scott M. and Tollefson C., 'Strategic Lawsuits Against Public Participation: The British Columbia Experience', *Review of European, Comparative & International Environmental Law*, Vol. 19 (1), 2010, pp. 45-58; Landry N., 'From the Streets to the Courtroom: The Legacies of Quebec's anti-SLAPP Movement', *Review of European, Comparative & International Environmental Law*, Vol. 19 (1), 2010, pp. 58-70; Nadarajah R. and Griffin R., 'The Failure of Defamation Law to Safeguard against SLAPPs in Ontario, *Review of European, Comparative & International Environmental Law*, Vol. 19 (1), 2010, pp. 70-83.

3 However, CJEU case law seems more restrictive for actions seeking the rectification of the information published and the removal of the content placed online – not actions for damages. In those cases, actions can only be brought before either the court of the place of establishment of the publisher or the court within whose jurisdiction the centre of interests of the claimant is situated, but not before all states where the publication has been distributed, as is the case for actions for damages (C-251/20).

4 Ogle G., op.cit., pp. 35-44.

5 EU-CITZEN: Academic Network on European Citizenship Rights, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study, 2021, pp. 25-27; Shapiro P., 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International', *Review of European Community & international environmental law*, Vol.19 (1), 2010, pp. 14-27.

6 For the US, see: Daday C., '(Anti)-SLAPP Happy in Federal Court? The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection against SLAPPs', *Catholic University Law Review*, vol. 70(3), 2021, pp. 441-468; O'Neill J., 'The Citizen Participation Act of 2009: Federal Legislation as an Effective Defense against SLAPPs', *Boston College Environmental Affairs Law Review*, vol. 38(2), 2011, pp. 477-507.

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