BRIEFING
EU Legislation in Progress

European Parliament

Strategic lawsuits against public participation (SLAPPs)

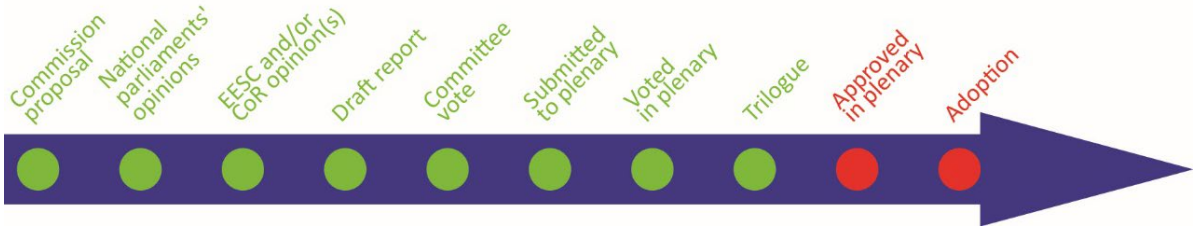
OVERVIEW

On 29 November 2023, the European Parliament and the Council of the EU reached a compromise on the proposed directive to protect journalists and human rights activists from abusive cross-border civil proceedings, known as strategic lawsuits against public participation (SLAPPs). The directive's aim is to enable judges to identify SLAPPs and order their early dismissal, and thus spare the journalists or activists targeted by such proceedings the need to defend the manifestly unfounded claim brought against them in bad faith with the sole purpose of harassing them.

The main changes to the original proposal include a broadening of the scope of application of the directive through two new inclusive definitions – for 'cross-border implications' and 'public participation' – and the introduction of a rule on reimbursement of legal costs incurred by a SLAPP victim, unless it is shown that such costs were excessive. Although journalists are also targeted by criminal SLAPPs, this directive would only apply to civil litigation, and only in cross-border cases.

Parliament is expected to approve the compromise text during its session in the week of 26 February 2024, which would allow it to be published in the Official Journal in the spring. The EU Member States will then have 2 years to implement the directive, that is, by 2026.

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 22.4.2022
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) Gilles Lebreton (ID, France) Manon Aubry (The Left, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Vote on provisional text in plenary	



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Introduction

Media freedom and pluralism are among the rights enshrined in the EU Charter of Fundamental Rights (Article 11) and the European Convention on Human Rights (Article 10), together with freedom of expression and information. As the European Court of Human Rights has ruled, 'freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man' (*Handyside v UK*, para. 49). However, media freedom and pluralism has been deteriorating in recent years in the EU, 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 European 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.

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), i.e. 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 SLAPP 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 wanting 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, particularly 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.

Although the **real scale of this phenomenon within the EU is unknown**, a 2022 report based on research on SLAPP litigation against journalists in 11 countries across Europe – Belgium, Bulgaria, Ireland, France, Croatia, Hungary, Italy, Malta, Poland, Slovenia and the United Kingdom (UK) – found an increasing number of SLAPP cases targeting journalists, non-governmental organisations (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 was able to identify 570 SLAPP cases filed in over 30 European jurisdictions from 2010 to 2021. 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 several forthcoming proposals to promote a more resilient EU democracy, including two key actions to address SLAPPs: i) the setting up of an expert group including legal practitioners, journalists, academics and members of civil society to collect expertise; and ii) 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 and commercial 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

Currently, **no anti-SLAPP legislation exists at EU level**, and the Commission proposal for an anti-SLAPP directive would fill this legal vacuum. The situation at national level is similar. According to the staff working document accompanying the Commission proposal, **none of the EU Member States had specific safeguards against SLAPPs**, and only three of them (Ireland, Lithuania and Malta) were considering the introduction of specific measures to address SLAPPs. After the publication of the Commission's staff working document, Lithuania amended Article 154 of its Criminal Code and Articles 95, 142, 296 and 297 of its Code of Civil Procedure to introduce specific measures to address criminal and civil SLAPP cases. Ireland and Malta (bill to amend the Maltese Constitution and bill to amend other laws to strengthen the protection of the media and journalists) are still considering legislative proposals to address SLAPPs. Without specific legislation aimed at addressing this phenomenon, SLAPPs are treated in most Member States 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.

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 before 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 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.[2]

Moreover, as **defamation cases are excluded** from the Rome II Regulation, the main EU instrument governing conflicts of laws 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 above-mentioned 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 the Rome II and Brussels Ia Regulations would be a necessary complementary measure to counter SLAPPs. 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 Rome II and Brussels Ia.

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 through several parliamentary resolutions (2021, 2020, 2017). Its main ideas on how SLAPPs should be addressed in the EU are collected in an own-initiative report adopted on 11 November 2021 by a large majority (444 votes in favour, 48 votes against, and 75 abstentions). 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 in the EU. 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 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 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'.

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 **stakeholder 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) of the Treaty on the Functioning of the European Union (TFEU) – the legal basis for the elimination of obstacles to the proper functioning of cross-border civil proceedings in the Union.[3] The proposal was accompanied not 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 aims also to collect data on SLAPPs in a more systematic way, raise awareness about SLAPPs among professionals and provide support for 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**. 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 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.

In addition to limiting the proposal's scope of application 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: i) the **act of public participation** against which the court proceedings are initiated is **relevant to more than one Member State**; or ii) 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: i) **public participation**; ii) **matter of public interest**; and iii) **abusive court proceedings against public participation**.

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, § 71). It can touch on 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 above-mentioned 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 relating 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.

Early dismissal of manifestly unfounded lawsuits

Following the approach taken by existing anti-SLAPP legislation,[4] 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 the proposal's Article 3 (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 SLAPP 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 envisages 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 SLAPP 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 SLAPP targets. Considering the financial burden that court proceedings have for SLAPP 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 NGOs 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 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 to harmonise the penalties that could be imposed on claimants initiating abusive court proceedings against public participation. Member States would be free to choose the penalties they deem appropriate. However, under CJEU case law, **punitive measures** cannot be considered '**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 setting **different types of penalty** (e.g. administrative fines, non-pecuniary administrative penalties, criminal penalties, whether financial or other) for infringements of EU law, provided that the national legislation upholds the principles settled in 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.

Advisory committees

The European Economic and Social Committee issued its opinion on 26 October 2022.

National parliaments

The subsidiarity deadline for national parliaments to submit their reasoned opinions was 1 July 2022. Whereas 18 parliamentary chambers examined the proposal, 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 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 (an NGO that supports and defends freedom of expression and freedom of information), Eurocadres (a European cross-sectoral trade union) and the **European Network of National Human Rights Institutions** (ENNHRI) have also welcomed the Commission proposal as an important step to fight abusive lawsuits against public watchdogs in the EU.

Legislative process

Parliament

The Commission proposal falls under the ordinary legislative procedure in Parliament and the Council. In Parliament, the **Committee on Legal Affairs** (JURI) was appointed the lead committee, and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) was associated under Rule 57 of Parliament's Rules of Procedure. Tiemo Wölken (S&D, Germany), who was appointed rapporteur for the proposal in the JURI committee, presented his draft report on 2 March 2023. The draft report sought to **strengthen the protection of SLAPP victims**, *inter alia* by broadening the scope of application of the proposal (broader definition of 'matters of public interest' and broader notion of 'cross-border implications'), ensuring that the most expeditious procedure available in national law is used to decide on applications concerning early dismissal of manifestly unfounded cases, obliging Member States to provide those engaging in public participation with access to support measures, including legal aid, obliging Member States to ensure full coverage of the costs of legal representation when the defendant has been targeted by abusive proceedings.

On 27 June 2023, the JURI committee adopted its report on the proposal, and then tabled it for the plenary. A day after holding a plenary debate on 11 July 2023, Parliament adopted its amendments to the Commission proposal (at first reading) and referred the file back to the committee responsible (JURI), as envisaged under Rule 59(4), for interinstitutional negotiations.

The main amendments include:

- addition of a minimum harmonisation clause;
- redefinition of the directive's scope to include matters of a civil or commercial nature having cross-border implications, including interim and precautionary measures, counteractions or other particular types of remedies available under other instruments, whatever the nature of the court or tribunal;
- clarification of the definition of 'public participation' to mean any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression and information, academic freedom, or freedom of assembly and association on a matter of public interest;
- a modified definition of 'matters of public interest' covering matters that affect the public in areas such as: fundamental rights, including gender equality, media freedom and consumer and labour rights, as well as public health, safety, the environment or climate; activities of a person or entity in the public eye or of public interest, including governmental officials and private entities; allegations of corruption, fraud, embezzlement, money laundering, extortion, coercion, sexual harassment and gender-based violence, or other forms of intimidation, or any other criminal or administrative offence, including environmental crime; activities aimed at protecting the values enshrined in Article 2 TEU and the principle of non-interference in democratic processes, and at providing or facilitating public access to information with a view to fighting disinformation; academic, scientific, research and artistic activities;

- the requirement on Member States to ensure that natural or legal persons engaging in public participation have access to support measures, including information, advice, legal aid, legal counselling, financial assistance and psychological assistance;
- a provision stipulating that the court seized should have the power to require the claimant to provide security for the costs incurred throughout the proceedings, including the full costs of legal representation incurred by the defendant and the full costs of damages, if it considers such security appropriate;
- a provision stipulating that a natural or legal person who has suffered harm – whether material or non-material –as a result of a SLAPP, should be able to claim and to obtain full compensation for such harm, without having to initiate separate court proceedings to this end;
- addition of rules on private international law, whereby in defamation claims or other claims based on civil or commercial law that may constitute a claim under the directive, the domicile of the defendant should be considered to be the sole forum, having due regard to cases where the victims of defamation are natural persons. In claims regarding a publication as an act of public participation, the applicable law should be considered to be the law of the place to which that publication is directed;
- providing for a 'one-stop shop', consisting of dedicated national networks of specialised lawyers, legal practitioners and psychologists, which targets of SLAPPs can contact, and through which they can receive guidance and easy access to information on and protection against SLAPPs, including regarding legal aid and financial or psychological support;
- the requirement for Member States to recommend the inclusion of the topic of SLAPPs in legal training;
- the requirement for Member States to cooperate together in combating SLAPPs;
- the requirement for each Member State to establish a publicly accessible national register of court rulings on SLAPPs that would then feed into an EU-wide register run by the Commission.

Council

In the Council, the Commission proposal was referred to the **Justice and Home Affairs** configuration. It has been discussed in the Working Party on Civil Law Matters (JUSTCIV), where delegations discussed several compromise proposals drafted by the Presidency. The Justice and Home Affairs Council held a first policy debate on the proposal on 9 December 2022. **Member States voiced broad support** for the future directive's aim, but flagged the need to protect the right to access to justice and ensure that anti-SLAPP measures do not prevent legitimate claims from being pursued in court. Anti-SLAPP measures should therefore be carefully targeted, and the future directive should ensure that courts examine the case appropriately before dismissing it or granting the remedies provided for in chapter IV of the proposal.

On 9 June 2023, the Council (Justice and Home Affairs) approved a general approach. The main changes in the general approach, compared with the text of the proposal, include:

- a minimum harmonisation clause, allowing for a higher level of protection in the laws of the Member States;
- a modified definition of abusive court proceedings as 'proceedings brought in relation to public participation that have as their main purpose the prevention, restriction or penalisation of public participation and which pursue unfounded claims';
- the removal of the definition of cross-border cases (Article 4), which would mean that it would be up to the courts to decide if the case had a cross-border character or not;
- a new rule requiring Member States to ensure that an application for early dismissal is treated in an accelerated manner in accordance with national law, taking into

account the circumstances of the case, the right to an effective remedy and right to a fair trial;
- the removal of the rule on damages (Article 15);
- a provision that the directive must not affect the application of bilateral or multilateral conventions or agreements between a third State and the Union or a Member State, concluded before the date of entry into force of this directive (and not only the Lugano Convention).

Trilogue negotiations and their outcome

Based on the Parliament's position at first reading and the Council's general approach, both of which were described above, the co-legislators negotiated the final text, reaching a compromise on 29 November 2023. The Council's Committee of Permanent Representatives (Coreper) accepted the compromise text on 18 December 2023, and the Committee on Legal Affairs (JURI), which is responsible for the file in Parliament, voted on approving the finalised compromise text on 24 January 2024. The compromise text modifies the Commission proposal as follows:

- **It introduces a broadened definition of cross-border cases** (Article 4), according to which a case is considered to be of a cross-border nature *unless* it is shown that both parties are domiciled in the same Member State and all other relevant elements are connected to that country; as stated in amended recital 21:'It is for the court to determine the elements relevant to the situation depending on the particular circumstances of each case, also taking into account, as appropriate, the specific act of public participation or the specific elements indicating a possible abuse, in particular where multiple proceedings are initiated in more than one jurisdiction'.
- **It adds (in Article 4(2)) a reference to the** Brussels Ia Regulation **as regards the understanding of the notion of 'domicile'**, which is crucial for the definition of a cross border case; Article 62 of the said regulation provides that in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court is to apply its internal law (*lex fori*); thus, the anti-SLAPP directive refers, through the Brussels Ia Regulation, to Member States' national laws, to clarify the understanding of what exactly the 'domicile' of a claimant or defendant is.
- **It broadens the definition of 'matters of public interest'** (Article 3(2)), which now covers, among other things, EU values, as proposed by Parliament.
- **It introduces an explicit rule on the burden of proof** (Article 12), which makes it clear that it is the claimant who must prove that the claim they brought is indeed founded, rather than the defendant having to prove that it is unfounded.
- **It introduces a compromise version of the rule on reimbursement** of costs incurred by SLAPP victims, according to which if national law does not guarantee full coverage of the costs of legal representation beyond the statutory fees, Member States would have to ensure that such costs are fully covered, *unless they are excessive*.
- At the Council's request, **it deletes the rule on compensation for SLAPP victims** (Article 15) and, as a compromise, **introduces 'payment of compensation for damages'** in Article 16 ('Member States shall ensure that courts or tribunals seized of abusive court proceedings against public participation can impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, *including the payment of compensation for damages* or the publication of the court decision, where provided for in national law, on the party who brought those proceedings.')
- At Parliament's request, **it introduces the requirement towards Member States to provide SLAPP victims with access to information** and to publish the judgments delivered by the highest courts in SLAPP cases in an electronic format (Article 19(a)(1) and (3)).

Next procedural steps

During its February II 2024 plenary session, Parliament is expected to vote on the compromise text (as already approved by the JURI committee). Then, once the Council also approves the text (as already approved by Coreper), the legislative act will be signed formally. Once translated into all official EU languages, it will be published in the Official Journal and enter into force.

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, 2021.

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OTHER SOURCES

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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, 2021.

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

ENDNOTES

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

2 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 publisher's place of establishment 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).

3 On the legal basis for harmonising civil procedure in Europe see two EPRS in-depth analyses: R. Mańko, Europeanisation of civil procedure: Towards common minimum standards?, 2015, and R. Mańko, EU competence in private law: The Treaty framework for a European private law and challenges for coherence, 2015.

4 For the US, see: C. Daday, '(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; J. O'Neill, '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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