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**EU HARMONISED RULES TO PROTECY PUBLIC WATCHDOGS AGAINST SLAPPS:**

**SOME PRELIMINARY REFLECTIONS***

## I. Background and context: SLAPPs and their incidence in the EU

The term SLAPP stands for Strategic Lawsuits Against Public Participation. It was coined by American scholars in the 1990s[1] to indicate lawsuits filed by powerful subjects (e.g. a corporation, a public official, a high profile business person) against individuals or organisations expressing critical positions on a public matter – for example, an issue of general political interest or social significance.

Targets of SLAPP suits can be sued for expressing critical views on the behaviour, or denouncing wrongdoings, of corporates or authorities through publications, leaflets, artworks or other online or offline forms of expression, or in retaliation for their involvement in campaigns, judicial claims, actions or protests. Research shows that SLAPP suits target a variety of actors.[2] Journalists, human rights defenders, academics, and civil society organisations are among those who are most often targeted.[3]

In practice, SLAPP suits concretise in a variety of legal actions, of a civil or even criminal nature. Whatever the type of action, the aim of a SLAPP suit is not to genuinely assert a right. SLAPP suits are often based on meritless, frivolous or exaggerated claims and are deliberately initiated with the intent to intimidate, drain the financial and psychological resources of their targets, rather than obtaining a redress for a certain wrong. They are tactically carried out to make the litigation expensive, long-lasting and complicated for the defendants, with the ultimate goal of discouraging and silencing them, and exert a chilling effect on other potential critics.

According to a recent study commissioned by the European Commission, SLAPP suits are "increasingly used across EU member states, in an environment that is getting more and more hostile towards journalists, human right defenders and various NGOs".[4] While an insufficient awareness of the issue among EU and national policymakers has prevented a regular and comprehensive mapping of SLAPP suits, and their effects, across the EU, a rising number of SLAPP suits or threats thereof have been exposed in recent years

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* This policy paper was drafted by Linda Maria Ravo, as expert consultant to the Civil Liberties Union for Europe, to feed into the reflections of a working group set up and tasked by the informal NGO EU anti-SLAPP coalition to look into the value added, the feasibility and the key components of possible EU anti-SLAPP legislation.

1 George W. Pring, Penelope Canan, SLAPPs: Getting Sued for Speaking Out (1996).

2 George W. Pring, SLAPPs: Strategic Lawsuits against Public Participation (1989).

3 See for example the cases collected by the Public Participation Project, SLAPP stories and, in the EU context, the examples compiled in the report published by Greenpeace European Unit, Sued into silence. How the rich and powerful use legal tactics to shut critics up (2020).

4 Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context (2020).

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by non-governmental organisations across the whole EU. Countries where prominent cases occurred include Bulgaria, Belgium, France, Italy, Malta, Poland, Portugal, Romania, Slovenia, Spain.[5]

As in other parts of the world, SLAPP suits in the EU take many forms. The reality of SLAPP cases brought across the member states reflects the picture already outlined by well-established research, according to which legal claims on which SLAPP suits are based most typically include defamation but can also concretise in other legal grounds including torts, labour law, injunctions, etc. The abuse of substantive laws is often accompanied by the abuse of procedural rules to prolong the procedure and make it more burdensome on defendants.[6] Research shows that SLAPP suits brought in EU member states are mostly civil and commercial lawsuits, including actions for damages brought in connection with criminal defamation complaints.[7] Cases are brought by private individuals and entities but also by public officials acting in their private capacity as well as by publicly controlled bodies.

While anti-SLAPP statutes exist in several states across the world[8], no EU member state has so far enacted targeted rules to provide protection against SLAPP suits.

On the merits, the need to strike a fair balance between the plaintiff's and the defendant's fundamental rights, which derives from member states' constitutions and their obligations under the EU Charter of Fundamental Rights and the European Convention on Human Rights, will normally lead courts to dismiss claims which qualify as SLAPP suits. The typical markers of SLAPP suits include the relevance of the defendant's conduct to the public interest, the plaintiff's abusive use of the judicial process and the potential chilling effects on public participation. These elements are bound to favour the defendant's right to an effective remedy and the other fundamental rights the exercise of which gave rise to the claim (for example, freedom of expression) over the plaintiff's right to access to a court and the other fundamental rights of which he or she may claim the violation (such as the protection of one's reputation).[9]

However, the absence of specific procedural safeguards makes national judicial systems vulnerable to SLAPPs and leaves SLAPP targets without sufficient protection. Targets of SLAPP suits in the member states may just rely on existing norms of general or sectorial application, such as provisions on damages and costs and safeguards against abusive practices such as vexatious, frivolous or excessive claims. But a dismissal which comes after a full examination of the merits of the case or the mere application of the loser pays

5 See, for example, the alerts published on the Council of Europe Platform to promote the protection of journalism and the safety of journalists or the cases illustrated in reports such as Greenpeace European Unit, SLAPPs: How the rich and powerful use legal tactics to shut critics up, cited.

6 See in general George W. Pring, Strategic Lawsuits Against Public Participation (SLAPPs) - Protecting Property or Intimidating Citizens (1989) as well as, as regards the EU specifically, Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context, cited.

7 See for example Index on Censorship, A gathering storm - The laws being used to silence the media (2020), as well as Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context, cited.

8 Anti-SLAPP statutes are particularly developed in the states of the United States, Australia and Canada. A comprehensive comparative overview of their main features is included in a study carried out by Ecojustice and the Canadian Environmental Law Association, Breaking the Silence (2010).

9 This is exemplified in the jurisprudence of the European Court of Human Rights (ECtHR) as regards freedom of expression - see to that effect the landmark cases Sunday Times v UK (1979), Lingens v Austria (1986), Thorgeir Thorgeirson v. Iceland (1992), Jersild v. Denmark (1994), McDonald's Corporation v Steel & Morris (1997), Bladet Tromsø v. Norway (1999).

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principle are of no use to prevent a SLAPP suit's harmful and chilling effects. In addition, the level of protection remains very fragmented across member states and uneven across policy areas.

The consequences of this gap in protection are further amplified in the EU context in the light of the legal framework regulating defamation (which is at the origin of the majority of SLAPP cases in the EU). On the one hand, SLAPPs' chilling effect is coupled with the fact that in most member states defamation still constitutes a criminal offence, despite repeated calls for decriminalization by human rights monitoring bodies including the Council of Europe.**10** On the other hand, when it comes to civil defamation lawsuits, the differences among member states in substantive and procedural law are leveraged by SLAPP litigants to their advantage, making the system particularly prone to abuse. As relevant rules of EU private international law applicable to civil and commercial matters currently stand, baseless civil defamation suits can easily be brought in national jurisdictions and under member states' laws having only a tenuous connection to a case, just to take advantage of greatest chances offered by such jurisdictions and laws of achieving the desired result (making the litigation procedure the most burdensome for the defendant).[11]

## II. The case for EU harmonisation

Not only SLAPP suits are an EU wide issue, common across all member states; they represent a threat to the EU legal order, and need as such to be addressed by the EU legislator.

First of all, SLAPP suits are a direct attack to the exercise of fundamental rights such as freedom of expression, freedom of information, freedom of assembly and freedom of association. These are essential tools that allow individuals to participate in their democracies. They thus have a severe chilling effect on democratic participation[12] and are at odds with the basic tenets of the EU's understanding of the concept of democracy. Insofar as they constitute an abuse of the law and of the courts, SLAPP suits also hinder the enjoyment of the right to an effective remedy for defendants in such disputes. Tolerating this practice thus goes against the values which lie at the foundation of the EU in accordance with Article 2 of the Treaty on European Union (TEU), that include democracy, the rule of law and respect for human rights. EU wide rules providing uniform protection against SLAPP suits would make sure that all member states apply the same standards when dealing with this phenomenon in line with their obligation to fully uphold the values enshrined in Article 2 TEU.

Secondly, providing for a high level of protection against SLAPP suits across the EU would substantively contribute to the proper functioning of the internal market, for the following reasons.

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**10** See Council of Europe, OVERVIEW OF GUIDELINES AND ACTIVITIES ADDRESSING THE ISSUE OF DEFAMATION IN RELATION TO FREEDOM OF EXPRESSION.

**11** Indeed, the reform of the Brussels Ia and the Rome II Regulations has long been advocated as another, complementary measure to counter SLAPP suits in the EU. Such reform should be aimed at grounding jurisdiction in the courts of the place the defendant's domicile and to introduce predictable choice of law formulae for defamation cases. For a comprehensive legal analysis of the matter, see Justin Borg-Barthet, The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform (2020). Similar findings are confirmed in the study commissioned by the European Commission, Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context, cited.

**12** Penelope Canan, The SLAPP from a sociological perspective (1989).

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The existence of strong safeguards in all member states providing protection against SLAPP suits is necessary to tackle the threats that this abusive practice poses to the enforcement of EU law. As already recognised by the EU legislator in relation to the protection of whistleblowers[13], publicly exposing threats or harm to the public interest is one upstream component of enforcement of EU law and policies. Similar to whistleblowers reports, the disclosure, dissemination and promotion of information, ideas and opinions on matters of public interest by individuals or organisations engaging in public participation contributes to the detection, investigation and prosecution of breaches of the law, including EU law. Their aim and effect being primarily that of dissuading engaged individuals and organisations from freely expressing views on matters of public interest, SLAPP suits frustrate the flow of information which can serve to inform the enforcement of EU rules by the European Commission and competent national authorities. For the same reason, SLAPP suits hinder the effective legal protection of rights under EU law, which member states shall ensure pursuant to Article 19 TEU.**14** Indeed, public participation is a key tool to help rights holders to exercise vigilance to protect their rights, and demand legal protection in case of breach.

In addition, SLAPP suits can threaten the effectiveness of EU law. Research shows that such lawsuits in the EU are sometimes construed on abusive interpretations of EU provisions, such as rules on data protection and intellectual property, going against the intentions of the EU legislator.[15] EU wide rules deterring and providing protection against SLAPP suits would therefore contribute to secure the correct and uniform application of EU law across the member states.

A uniform protection from strategic lawsuits against public participation also would have a direct beneficial impact on the enjoyment of internal market freedoms by individuals and organisations most vulnerable to such claims: journalists, media outlets and civil society organisations would in fact be able to operate more confidently across the EU if the same level of protection against SLAPP suits were provided in all member states' jurisdictions. In addition, it could contribute to a more effective functioning of national justice systems, which are negatively affected by such improper use of the judicial process.

Finally, introducing EU rules providing harmonised protection against SLAPP suits in all member states would strengthen the effectiveness, fairness and coherence of the EU space of judicial cooperation. Indeed, SLAPP suits in the EU can easily be construed as cross-border disputes. Those cross-border elements are taken advantage of for forum shopping, as plaintiffs make use of applicable rules of private international law to select the jurisdiction where the likelihood of achieving the desired result is the greatest instead of the one that has the closest connection to the dispute. While reflections are ongoing on the reform of relevant private international law instruments, and in particular the Brussels Ia and the Rome II Regulations, the harmonization of protection from strategic lawsuits against public participation through common minimum standards is a necessary complement of such reform. The existence of uniform safeguards applicable in all member states would reduce the attractiveness of libel tourism and thus constitute a necessary complement to the reform of EU private international law rules applicable to

13 Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law (2019).

14 This is also one of the findings of the recent report by the EU Agency for Fundamental Rights (FRA), BUSINESS AND HUMAN RIGHTS – ACCESS TO REMEDY, where FRA identifies protection against SLAPPs as an urgent and necessary measure to ensure an effective access to a remedy for victims, given the role of individuals and NGOs in bringing cases against or monitoring business activity and its impact on fundamental rights.

15 See Index on Censorship, A gathering storm - The laws being used to silence the media, cited.

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defamation cases.**16** At the same time, it would contribute to reinforce mutual trust, preventing situations where courts refuse the enforcement of rulings issued by other member states' courts based on their own national standards on what constitute abusive claims.**17**

## III. Legal basis, subsidiarity and proportionality: what can, and should, harmonization achieve

By contributing to the enforcement of Union law, enhancing the legal protection of rights under Union law, safeguarding the effectiveness of Union law, facilitating the enjoyment of internal market freedoms and preserving the effective functioning of national justice systems and of the common space of judicial cooperation, protection from strategic lawsuits against public participation substantively contributes to the proper functioning of the internal market.

Based on the EU's competences as established by the Treaties, the EU legislator could introduce harmonised rules to guarantee a high and uniform standard for the protection of natural and legal persons targeted by SLAPP suits of a civil and commercial nature across the EU. Such rules would respond to the objective of ensuring the proper functioning of the internal market by means of ensuring effective access to justice and promoting the compatibility of the rules on civil procedure applicable in the Member States to eliminate obstacles to the proper functioning of civil proceedings. They could thus be adopted on the basis of Articles 114 and 81(2)(e) and (f) of the Treaty on the Functioning of the European Union (TFEU).

The introduction of such harmonised rules would be in accordance with the principle of subsidiarity, as the objective of ensuring a high and uniform standard for the protection of persons targeted by civil and commercial SLAPP suits across the EU may only be achieved at EU level. Indeed, individual or uncoordinated initiatives at national level would likely perpetuate fragmentation of protection and the related negative impact of such fragmentation on the EU legal order.

The introduction of harmonised rules by means of setting minimum standards of protection, to be implemented in accordance with national judicial systems and leaving to member states the possibility to introduce or retain provisions more favourable to SLAPP targets, would secure the proportionate nature of the EU legislative intervention. To that effect, a minimum harmonisation directive is the appropriate instrument to achieve the objectives pursued.

## IV. Key elements of an EU anti-SLAPP directive

An EU anti-SLAPP directive should introduce appropriate procedural safeguards against SLAPPs, provide for supportive and protective measures for SLAPP targets and include deterrent and awareness raising measures.

Substantive safeguards should be crafted with due regard to procedural autonomy and taking into account differences in member states' legal and judicial traditions. EU rules should be without prejudice to existing national rules establishing safeguards, remedies or redress mechanisms providing, in the national context,

16 Such reform should be aimed at grounding jurisdiction in the courts of the place the defendant's domicile and to introduce predictable choice of law formulae for defamation cases. See Justin Borg-Barthet, The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform, cited.

17 See for example this CASE reported by the French newspaper Capital.

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for a level of protection which is equal or superior to that envisaged by EU harmonisation. Member states should also remain free to extend protection under national law beyond the scope of EU rules.

Based on relevant literature, existing and model anti-SLAPP statutes, relevant judicial practice as well as the experience of lawyers litigating SLAPP suits in the EU, the following could be identified as key elements of an EU anti-SLAPP directive:

❖ ***Acknowledging SLAPPs' common core elements***

The starting point around which EU anti-SLAPP rules should revolve should be acknowledging that, whatever the legal action through which they are brought, SLAPP suits are generally characterised by certain common core elements, which are:

(1) the identification of the behaviour from which the claim arises as public participation on a matter of public interest;

(2) the limited prospects of success of the claim (normally due to its unfounded, excessive, unreasonable nature);

(3) the use of the judicial process, having regard to the scope and nature of the claim or the litigation tactics deployed, for purposes other than that of genuinely asserting, vindicating or exercising a right, but rather that of intimidating, depleting or exhausting the resources of the target, with the ultimate aim of dissuading the behaviour at the origin of the claim or other forms of public participation.

❖ ***An approach based on the balance of rights***

Harmonisation should be directed at achieving a fair balance between the rights of the parties in disputes arising from public participation on matters of public interest, having regard to the public interest at stake, and to secure the enjoyment of the right to an effective remedy for both plaintiffs and defendants in such disputes, without prejudice to the right to access to a court. With a view to such balance, provisions should be included to prevent and sanction the abuse of the safeguards provided.

❖ ***A broad definition of what constitutes public participation on matters of public interest***

Public participation should be defined in a comprehensive manner. The definition should encompass any behaviour of a natural or legal person directed at engaging on a matter of public interest through the disclosure, dissemination or promotion to the public in any form of information, findings, ideas, opinions or testimonies, and any preparatory action thereof. This should include the exercise of freedom of expression and information, assembly, association and of other rights relevant to participation, such as access to justice.

Matters of public interest should be referred to as including any matter which can be regarded as indicative of a political, social, economic, environmental or other concern to the public, also having regard to its potential or actual impact on the welfare of society or part of it. This may include issues affecting particular communities or minorities.

❖ ***Early dismissal of SLAPP claims as a key procedural safeguard***

The possibility to obtain the early dismissal of the claim is a key procedural safeguard to counter the harmful effects of SLAPP suits and redress the imbalance between parties in such cases.

EU harmonization should aim at ensuring that procedural tools exist in all member states to allow a court or tribunal before which a claim is asserted that arise from the defendant's public participation on matters

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of public interest, to consider a motion for dismissal as soon as possible after proceedings have commenced. Certain exceptions may be foreseen to preserve an overriding public interest that may be inherent to certain actions.

EU rules should harmonise the conditions under which claims should be dismissed, based on the identified SLAPPs' common core elements, and provide guidance for the courts' assessment. A reverse burden of proof should be applied to put it on the plaintiff to demonstrate the elements supporting a decision not to dismiss. Pending a final decision on dismissal, EU rules should require member states to ensure that the main proceedings – as well as other related actions – be stayed. At the same time, measures to ensure procedural expediency should be foreseen.

If granted, dismissal should terminate proceedings without the need of further action by the defendant.When dismissal is granted, it shall serve as a presumption of the meritless and improper nature of the claim for the purpose of other actions against the same defendant and/or for the same public participation conduct.

❖ ***A fair award of costs and relief***

EU rules should include measures to ensure that SLAPP litigants who see their claim dismissed are ordered to pay costs to the defendant on a full indemnity basis. Member states should also be required to empower courts to impose pecuniary and non-pecuniary damages, including non-compensatory damages as appropriate. At the same time, the possible award of damages to the plaintiff should be foreseen as a deterrent to the abuse of the proposed safeguards.

❖ ***Strengthened safeguards for claims affecting the exercise of freedom of expression***

EU rules should include specific safeguards for SLAPP claims brought in relation to the exercise of freedom of expression, such as defamation claims, as in the light of available research these constitute the majority of SLAPP suits brought across the Union. These may consist in strengthened safeguards applicable in the context of the dismissal procedure, and/or rules applicable to these type of claims as such (for example, caps on damages).

❖ ***Assistance, support and protection for SLAPP targets***

EU harmonization should include measures to ensure that SLAPP targets can be provided with assistance, support and protection both within and outside the judicial process. This may include financial assistance to enable effective rexercise of the right of defence, the possibility for third parties, in particular nonb-governmental actors, to intervene in court proceedings, access to support services and protection from further intimidation and retaliation.

❖ ***Deterrent measures***

EU rules should make sure that the provision of procedural safeguards and of measures of assistance, support and protection for SLAPP targets be accompanied by deterrent measures. These may incude the imposition of penalties and limitations on instituting other proceedings on SLAPP litigants, to be applied in the event of a dismissal decision; and/or measures to ensure publicity of court decisions exposing SLAPPs.

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Member states should be encouraged to extend penalties to SLAPP suits other than civil and commercial actions. This is of particular relevance to criminal complaints, also having regard to the fact that many SLAPP suits in the EU are grounded in claims for criminal defamation.

❖ ***Awareness raising***

EU rules should include a strong awareness raising component. Raising awareness on strategic lawsuits against public participation is key to sensitise both the public and legal professionals, in particular judges and lawyers, to the issue.

Member states should be required to facilitate the provision of both general and specialist training to judges and lawyers to increase their awareness of SLAPP suits. Integrating ethics rules and standards, including by providing for disciplinary measures, may be envisaged to deter lawyers from engaging in such litigation. At the same time, training can substantively contribute to build knowledge and capacity in how to deal with such lawsuits, and the threat thereof. Targets and potential targets should also benefit from training on their rights and obligations.

Member states should also be required to support independent bodies capable of hearing complaints from and providing assistance to persons threatened or faced with SLAPP suits, such as ombudspersons.

With a view to gaining a better overview of SLAPP suits in the EU, member states should be asked to regularly transmit comprehensive quantitative and qualitative statistics on relevant court decisions and the application of measures provided for by EU rules.