



## CASE: Expert Brief on the European Commission's EU anti-SLAPP Proposals

*Brussels, June 2022 - The European Commission's proposals represent a crucial first step forward in the fight against SLAPPs in Europe. The CASE expert brief is meant to provide advice to policy makers at the EU institutions and national government level on how to build on the proposals to ensure the strongest possible set of EU and national anti-SLAPP rules*

The Coalition Against SLAPPs in Europe ([CASE](#)) welcomes the European Commission's [anti-SLAPP initiative](#) presented on 27 April 2022 as a **crucial first step forward** in tackling the growing problem of abusive litigation targeting journalists, activists and other public watchdogs across Europe.

Strategic Lawsuits Against Public Participation (SLAPPs) are abusive lawsuits that operate through the litigation process to silence critical speech, shut down accountability, and undermine democratic rights. A recent [report](#) published by CASE shows a **rising cumulative trend in SLAPPs across Europe since 2015**, which casts a shadow on the vital work of public watchdogs.

The Commission's initiative sets solid minimum standards which must be met to ensure public watchdogs, such as journalists and human rights defenders, are protected from the worst impacts of these abusive lawsuits. Civil society organisations are encouraged to see that the core components of the CASE [model directive](#) as well as safeguards we have been advocating for over past years fed into the Commission's initiative. This expert brief highlights the initiative's most ambitious solutions and advises lawmakers at EU and national level on **how to best build on the Commission's proposals to work towards the strongest possible set of anti-SLAPP rules**.

### **A broad material and personal scope**

- What characterises a SLAPP is the **use of the judicial process for purposes other than genuinely asserting, vindicating or exercising a right**, but rather of intimidating, depleting or exhausting the resources of the defendant, with the aim of suppressing public participation. Anti-SLAPP legislation should **protect public watchdogs from the harm of such an improper use of the judicial process, irrespective of what form it takes**. Research on SLAPPs, including the above-mentioned report by CASE, shows that **SLAPPs often concretise in fully, and even manifestly, unfounded lawsuits**. However, SLAPPs may also concretise in **lawsuits which, although having some legal grounds, bear clear hallmarks of abuse of laws or procedural laws**. While the proposed Directive contemplates this, and also acknowledges the key indicators of such abuse (Article 1, Article 3(3) and recital 20 of the proposed Directive), the **dichotomy the Commission proposal creates between "manifestly unfounded" and "abusive" court proceedings against public participation**, in its title and throughout the text, is confusing, and gives rise to substantive differences in the level of protection granted to these two category of SLAPP claims (see further below, regarding procedural safeguards and protective measures). **EU and national lawmakers should avoid this dichotomy** and ensure that the subject matter and scope of anti-SLAPP legislation, and of all safeguards and protective measures provided therein, refers to protection against any court proceedings which rest on an improper use of the judicial process with the aim of suppressing public participation. This could be achieved by favouring, in the

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title and the body of EU and national anti-SLAPP legislation, the use of a “catch-all” term such as “improper”, or “abusive”, court proceedings against public participation, that should be intended, and defined, as referring to both claims against public participation which are unfounded and claims which, although they may have some legal grounds, present clear hallmarks of abuse of laws or procedural laws.

- A **comprehensive understanding of SLAPPs as weapons against any forms of public participation**, as reflected in the Commission’s proposed Directive, is a key feature of any solid anti-SLAPP legislation. EU and national lawmakers should be faithful to such approach, ensuring that EU and domestic legislation: i) considers SLAPPs as **claims brought on account of public participation on matters of public interest** (Article 1 of the proposed Directive); ii) ensures a **broad interpretation of public participation on matters of public interest**, as any form of expression and any preparatory activity thereto - including activities linked to the exercise of freedom of association, assembly, the right to good administration and the right to an effective remedy - on a matter which affects the public to such an extent that the public may legitimately take an interest in it (Article 3(1) and (2) and recitals 16 and 18 of the proposed Directive).
- Anti-SLAPP legislation should have a **broad personal scope**, as reflected in the Commission’s proposed Directive. EU and national lawmakers should be faithful to such approach, ensuring that the personal scope of EU and domestic legislation extends to **claims brought against any natural or legal person engaging – directly or indirectly – in public participation** and brought by **any natural or legal persons, including state organs** (Article 1 and recitals 10 and 13 of the proposed Directive).
- The **limitation in scope to cross-border cases** is an inherent limitation of the Directive proposed by the Commission. Against this background, it is paramount for the European Parliament and the Council to **support the Commission’s comprehensive definition of cases with cross-border implications** for the purpose of anti-SLAPP legislation, which correctly reflects how attempts to limit public participation resonate and impact public interest across borders (Article 4(2) and recital 22 of the proposed Directive). EU lawmakers are also advised to include an additional recital in the future EU Directive to ensure that the **“relevance” of the act of public participation targeted by the SLAPP to more than one Member State** (Article 4(2)(a) of the proposed Directive) **is not interpreted in a formalistic way but is rather anchored in the notion of “public interest”** (Article 3(2) of the proposed Directive): i.e., covering any act of public participation relating to an issue which affects the public of more than one Member State to such an extent that the public may legitimately take an interest in it. When drafting domestic legislation, national law makers should abide by the recommendation that **safeguards be equally applied to all domestic cases** (paragraph 21 of the Recommendation).
- The European Parliament and the Council should uphold the Commission’s efforts to **provide protection from SLAPPs brought in third countries targeting watchdogs in the EU**, by embedding in EU legislation the obligation to refuse recognition and enforcement of rulings arising

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from SLAPP claims against targets domiciled in a member state and to allow targets to claim damages arising from a SLAPP brought in a third country in the EU member state of domicile, as proposed by the Commission (Articles 17 and 18 of the proposed Directive). National lawmakers and courts should **already take steps to ensure that relevant private international law rules are interpreted and applied to that effect**. EU and national lawmakers may also explore the opportunity to foresee **additional remedies** to those proposed by the Commission, such as the possibility to rely on the new special ground of jurisdiction created by Article 18 of the proposed Directive to allow the SLAPP defendant to seek, from the courts or tribunals of the place where he is domiciled, **a declaratory judgment** recognising the proceedings brought in third countries as improper, or abusive (depending on the term chosen), court proceedings against public participation.

- The European Parliament and the Council should ensure that harmonised safeguards apply, as a minimum, to **any claims on civil and commercial matters, without exceptions**, as proposed by the Commission (Article 2 of the proposed Directive). This should notably include civil claims brought in criminal proceedings as well as interim and precautionary measures, counteractions or particular type of remedies (recital 14 of the proposed Directive). In this context, the European Parliament and the Council are advised to include a recital in the future EU Directive clarifying that **the exception concerning “administrative matters” should be interpreted narrowly**, as referring to claims involving a public administration acting in the exercise of State authority – so as to avoid frustrating protection in relation to claims grounded in provisions which may, in certain cases, be regarded as having an administrative nature, such as data protection rules.
- When drafting domestic legislation, national lawmakers should abide by the recommendation that **comparable safeguards be included in legal frameworks governing criminal and administrative proceedings** (paragraph 20 of the Recommendation).
- Considering the increasing number of SLAPPs brought across the EU over recent years, the **temporal application of new anti-SLAPP rules** should extend to pending cases. The European Parliament and the Council, as well as national lawmakers, should therefore ensure, in accordance with the general principle *tempus regit actum*, as interpreted in [settled case-law](#) of the Court of Justice of the EU, that newly introduced EU and national anti-SLAPP rules are taken to apply to **all cases commenced or continued at the time of the new rules’ entry into force**, so that watchdogs facing SLAPPs can immediately benefit, to the extent possible, to the procedural safeguards and protective measures provided for therein.

### Key procedural safeguards to fight back any SLAPPs

- The possibility to obtain the **early dismissal of a SLAPP claim** is a key procedural safeguard allowing targets to counter and minimise the harmful effects of SLAPPs. The European Parliament and the Council, as well as national lawmakers, should ensure that, as proposed by the Commission, this mechanism (Article 9 of the proposed Directive) – and related procedural

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safeguards, including the stay of main proceedings (Article 10), the application of an accelerated procedure (Article 11) and the reversal of the burden of proof (Article 12) – feature in future EU and domestic anti-SLAPP legislation. It is however important that, **unlike what proposed by the Commission, early dismissal is made available to fight back against any SLAPPs, and not only SLAPPs which concretise in “manifestly unfounded” claims.** Indeed, as already mentioned above, the objective of anti-SLAPP legislation is to protect public watchdogs from the harm of SLAPPs, irrespective of what form the SLAPP takes. The threshold of “manifest unfoundedness” would greatly reduce the value added of the early dismissal safeguard: these cases will often require a balance of interests and this may prevent the court to qualify the case as “manifestly unfounded”, even if it is clear that the claim is unlikely to prevail at trial, and/or there are clear indicators of abuse of laws or procedural laws which warrant for its early dismissal. EU and national lawmakers should therefore **extend the possibility to request early dismissal beyond that proposed by the Commission, to cover all court proceedings against public participation.**

- The opportunity for non-governmental organisations to take part in SLAPPs proceedings to support the defendant or provide information through **third party interventions**, as proposed by the Commission (Article 7 of the proposed Directive), is an important provision which EU and national lawmakers should uphold. It would be advisable for such possibility to be extended to any entity bearing an interest in the defence of the public participation activity targeted by the claim, including **professional associations.**

### Effective protective measures

- In line with recommendations made above, any measure to protect public watchdogs from the harm of SLAPPs should be granted irrespective of what form the SLAPP takes. EU and national lawmakers should therefore ensure that, **unlike what proposed by the Commission,** protective measures provided for in the proposed Directive can be applied in **all court proceedings against public participation**, rather than their scope being limited to cases which present hallmarks of abuse of laws or procedural laws.
- The possibility for the court to require the claimant to provide **security for costs and damages**, foreseen by the Commission (Article 8 of the proposed Directive) is an important protective measure for SLAPP targets. Indeed, SLAPPs are usually characterised by an imbalance of power between the parties and can typically involve excessive or unreasonable damage claims and/or litigation tactics used in bad faith, including causing disproportionate costs to defendants, who may also be the subject of multiple proceedings in retaliation to their engagement in public participation. This can put SLAPP targets under great financial strain. EU and national lawmakers should therefore not only uphold but **go beyond the Commission’s proposal** and ensure that security: i) is ordered by the court on its own motion; ii) refers to both direct and indirect costs (including full costs of legal representation and associated costs); iii) always includes security for both costs and damages.

- As regards the **award of costs**, EU and national lawmakers should not only uphold, but **go beyond the Commission's proposal** (Article 14 of the proposed Directive) and ensure that ordering a claimant who has brought abusive court proceedings against public participation to bear all the costs of such proceedings is an **automatic feature of the court's decision**. The exception as regards excessive costs may be maintained only insofar as it is made clear that the notion of "excessive" duly takes into account the nature and complexity of the claim and the litigation tactics used.
- It is commendable that **compensation for damages** in the Commission's proposal is intended as **full compensation for harm, including physical and psychological harm** (Article 15 and recital 31 of the proposed Directive). EU and national lawmakers should therefore uphold this provision. In this context, they are also advised to clarify that a request for compensation of damages **should by no means imply the filing of a separate formal claim** on the side of the SLAPP target.

## A comprehensive regime of penalties and other dissuasive measures

- The **possibility for the court to impose penalties** for initiating abusive court proceedings against public participation provided for in the Commission's proposal (Article 16 and recital 32 of the proposed Directive) is welcome and should be upheld. EU and national lawmakers are also advised to clarify, in this context, that the determination of the penalty should have **due regard to the amount of the claim and the financial situation of the claimant**.
- Legal professionals are instrumental actors in the use and rise of SLAPPs. Building on the Commission's proposal (paragraph 26 of the Recommendation), the European Parliament and the Council should include in the future EU Directive an obligation for member states to **encourage self-regulatory bodies and associations to review deontological standards and corresponding disciplinary sanctions** to dissuade legal professionals from engaging in conduct which go against the integrity of the legal process in particular in relation to claims against public participation. This should be accompanied by the integration of **awareness raising and training on SLAPPs** within the training curricula of legal professionals, judiciary and judicial staff, as also recommended by the Commission (paragraph 27 of the Recommendation).

## A parallel review of the legal framework on defamation

- While EU and national lawmakers work towards the adoption of a comprehensive set of anti-SLAPP rules, parallel efforts must be made to **review the existing legal framework on defamation**, which is routinely exploited to bring SLAPPs against watchdogs. In particular, the European Commission should work towards a **comprehensive proposal of reform of the Brussels I and Rome II Regulations**, in order to reduce the plaintiffs' favourable position and limit the possibilities of so-called 'libel tourism' offered by existing private international law provisions applicable to defamation cases. Building on the Commission's proposal (paragraphs 22 to 24 of the

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Recommendation), national lawmakers should also engage in a **review of civil and criminal national defamation laws** to ensure alignment with international human rights standards. As regards criminal defamation in particular, national lawmakers should, as already recommended by other regional and international bodies, including the UN, the OSCE and the Council of Europe, consider the decriminalisation of defamation or the elimination of the possibility for private criminal prosecution in relation to such offences; or, at the very least, take steps to remove prison sentences for defamation from their legal frameworks.

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