



Jean Monnet Chair

EU Institutions, Rights and Judicial Integration

Working Paper

**Challenging Threats to Free Speech: Assessing the EU's Measures to
Combat SLAPPs**

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**Co-funded by
the European Union**

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Challenging Threats to Free Speech: Assessing the EU's Measures to Combat SLAPPs

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Introduction

In an era marked by the rapid dissemination of information and the digital interconnectedness of societies, the protection of free speech stands as a cornerstone of democratic values. However, among other challenges to freedom of expression and information, the rise of Strategic Lawsuits Against Public Participation (SLAPPs) poses a formidable threat to this fundamental right, threatening to stifle open discourse and impede public participation¹.

SLAPPs are legal actions strategically employed to censor, intimidate, and silence individuals or groups expressing dissenting views on matters of public interest. As these lawsuits exploit legal systems to burden defendants with exorbitant legal costs and protracted legal battles, they undermine the very essence of democratic discourse. The EU, recognizing the severity of this issue, has taken proactive steps to address SLAPPs and safeguard the principles of free expression².

This paper seeks to assess the efficacy of the EU's measures in combating SLAPPs, examining the legal frameworks, policy initiatives, and collaborative efforts aimed at preventing the misuse of legal processes to stifle free speech. By critically analyzing the strengths and potential shortcomings of the EU's approach, this study contributes to the ongoing discourse on the delicate balance between protecting individual rights and preventing the abuse of legal systems to undermine democratic values. As we navigate the evolving landscape of information and communication, understanding the EU's response to SLAPPs becomes crucial in fortifying the foundations of free speech within the European context.

1. Freedom of expression and its significance in democratic societies

Freedom of expression and information is a fundamental human right that is enshrined in a number of national, European and international instruments which promote this political system, recognized as the only one capable of guaranteeing the protection of human rights. In its interpretation of Article 10 of the European Convention on Human Rights, the European Court of Human Rights has held that “*freedom of expression constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual*”³. The Court has emphasized on several occasions the importance of this Article, which is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter

¹ J. HARRISON, S. TORSNER, *Safety of journalists and media freedom: trends in non-EU countries from a human rights perspective*, BRIEFING Requested by the DROI Subcommittee, European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, June 2022, p. 6, available at: [https://www.europarl.europa.eu/thinktank/en/document/EXPO_BRI\(2022\)702562](https://www.europarl.europa.eu/thinktank/en/document/EXPO_BRI(2022)702562). C. CHRISTOPHOROU, N. KARIDES, *Monitoring media pluralism in the digital era – Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, Republic of North Macedonia, Serbia & Turkey in the year 2022 – Country report – Cyprus*, European University Institute, 2023, available at: <https://data.europa.eu/doi/10.2870/298815>.

² R. MANKO, European Parliament, *Strategic lawsuits against public participation (SLAPPs)*, BRIEFING, EU Legislation in Progress, 2023, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)733668](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733668).

³ ECHR, *Vereinigung Bildender Künstler v. Austria*, Application no. 68354/01, 25 January 2007. EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 10 of the European Convention on Human Rights*, 28 February 2023, available at: <https://ks.echr.coe.int/web/echr-ks/all-case-law-guides>. P. NASKOU-PERRAKI, *Human Rights, Global and Regional Protection*, Athens-Thessaloniki: Sakkoula Publications 2019, p. 502 (in Greek).

of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society⁴.

The right to freedom of expression, the right to receive information, and the right to public participation, form essential principles in the European understanding of fundamental rights under Articles 2 and 6 TEU. European instruments such as Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights emphasize these rights as integral to free speech. International human rights law like Article 19 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights protect the right to hold opinions without interference, freedom of expression and the access to information. Additionally, Article 21 of the 1948 Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights affirm the right to participate in the government and public affairs of one's country⁵. According to the European Court of Human Rights, entities enjoying privileged status in knowledge transmission encompass the free press, civil society organizations, including human rights NGOs, and academia. The European Court of Human Rights has recognized the public watchdog role of journalists and NGOs, resulting in special protection granted to them within Strasbourg jurisprudence⁶.

However, it's important to note that the right to freedom of expression is not absolute, and there may be limitations, such as to prevent hate speech, incitement to violence, or the spread of false information that can harm public safety. Striking a balance between free expression and responsible limitations is often a challenge for societies seeking to preserve democratic values while addressing potential harms⁷.

Political theorists have all underscored the importance of free expression in maintaining a healthy democracy⁸. These principles continue to be relevant in contemporary discussions about the role of media in democratic societies. A free press, enabled by freedom of expression, plays a crucial role in holding those in power accountable and ensuring transparency. Freedom of expression and information plays a crucial role in the functioning of a democratic society. It ensures that citizens have the right to voice their opinions, participate in public discourse, and engage in the democratic process leading to a more informed and enlightened society. Also, freedom of expression allows for the questioning of established ideas and practices, fostering a culture of innovation and adaptation⁹.

2. Emergence and prevalence of SLAPPs

Coined in the 1980s by University of Denver Professors Canan and Pring, SLAPP stands for "strategic lawsuit against public participation"¹⁰. Originally defined as "*a lawsuit involving communications made to influence a governmental action or outcome, which resulted in a civil complaint or*

⁴ ECHR, *Handyside v. the United Kingdom*, Application no. 5493/72, 7 December 1976 and ECHR, *Fressoz and Roire v. France*, Application no. 29183/95, 21 January 1999.

⁵ P. NASKOU-PERRAKI, *ibid.*, p. 502.

⁶ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 10 of the European Convention on Human Rights*, *ibid.*, p. 54.

⁷ P. NASKOU-PERRAKI, *ibid.*, p. 505.

⁸ D. BYCHAWSKA-SINIARSKA, *Protecting the right to freedom of expression under the European Convention on Human Rights - A handbook for legal practitioners*, Council of Europe. France 2017, available at: <https://policycommons.net/artifacts/421942/protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights/1392996/> on 02 Mar 2024. CID: 20.500.12592/bk5xtw.

⁹ J. BAYER, P. BARD, L. VOSYLŪTĖ, N.C.LUK, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*, 2021, p. 19, available at: <https://ssrn.com/abstract=4092013>.

¹⁰ G.W. PRING, P. CANAN, SLAPPs: *Getting Sued for Speaking Out*, Temple University Press 1996, p. 3. G.W. PRING, P. CANAN, Strategic Lawsuits against Public Participation (SLAPPs): An Introduction for Bench, Bar and Bystanders, 1992, 12 *University of Bridgeport Law Review*, p. 937.

counterclaim filed against nongovernment individuals or organizations on a substantive issue of some public interest or social significance”, it has evolved to cover a broader range of issues. The concept was initially tied to the First Amendment's right to petition, but in our days SLAPPs are now viewed more broadly, especially in California, where they include suits related to speech on any public issue. In the U.S., SLAPPs pose a threat to First Amendment expression, with some jurisdictions making such suits illegal, while others vary in conditions for dismissal. In certain states like California, defendants can counter-sue SLAPP plaintiffs in certain circumstances, known as SLAPPback¹¹.

The issue of SLAPPs gained prominence in Europe following the events in Malta in late 2017. The murder of investigative journalist Daphne Caruana Galizia on October 16, 2017, brought attention to the situation. Caruana Galizia, who faced over 40 civil and criminal defamation suits at the time of her death, was actively uncovering significant information. However, her online reports were systematically disappearing from news portals in Malta. This manipulation leveraged private international law to stifle press freedoms, turning it into a battleground for the foundational principles of freedom of expression and the rule of law within a European Union member state. Despite the transnational significance of Caruana Galizia's revelations, they had not yet garnered global attention. Those implicated in her exposés aimed to keep it that way, especially as they used their Maltese business as a launching pad into other European Union markets during that period. The situation underscored the intricate connection between SLAPPs, international law, and the suppression of journalistic freedom within EU borders¹².

While the true extent of SLAPPs within the EU remains uncertain, a 2022 report¹³ delves into the issue by examining SLAPP litigation against journalists in 11 European countries, including Belgium, Bulgaria, Ireland, France, Croatia, Hungary, Italy, Malta, Poland, Slovenia, and the United Kingdom. The findings reveal a growing number of SLAPP cases targeting journalists, non-governmental organizations (NGOs), and activists. Significantly, none of the countries analyzed had specific domestic legislation addressing SLAPPs. Furthermore, a 2022 report from the Coalition against SLAPPs in Europe¹⁴ identified 570 SLAPP cases filed across more than 30 European jurisdictions from 2010 to 2021, shedding light on the widespread nature of this phenomenon in the region¹⁵. In August 2023, the Coalition Against SLAPPs in Europe (CASE) published a report which presented data on the number of SLAPPs filed around Europe (EU and non-EU Member States) from 2010 to 2023. This report updated earlier research and found that cases had increased from 570 in 2022 to 820 in 2023 – an increase of 161¹⁶.

¹¹ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 22.

¹² J. BORG-BARTHET, *Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union*, Report commissioned by Article 19, Committee to Protect Journalists (CPJ), European Centre for Press and Media Freedom (ECPMF), Reporters Without Borders (RSF) and PEN International, p.2, available at: <https://www.rcmediafreedom.eu/Resources/Academic-sources/Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union>.

¹³ ARTICLE 19, *SLAPPs against journalists across Europe, Media Freedom Rapid Response*, 2022, available at: <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf>.

¹⁴ THE COALITION AGAINST SLAPPS IN EUROPE (CASE), *Shutting Out Criticism: How SLAPPs Threaten European Democracy*, March 2022, available at: <https://www.the-case.eu/latest/how-slapps-increasingly-threaten-democracy-in-europe-new-case-report/>

¹⁵ THE DAPHNE CARUANA GALIZIA FOUNDATION, THE COALITION AGAINST SLAPPS IN EUROPE, *SLAPPS: A Threat to Democracy Continues to Grow*, August 2023, available at: <https://www.the-case.eu/latest/how-slapps-increasingly-threaten-democracy-in-europe-new-case-report/>

¹⁶ R. MAŃKO, *ibid.* p. 2.

Part A: Understanding SLAPPs

The issue of SLAPPs is intricate, even with regard to their definition, and distinguishing between SLAPP suits and legitimate legal proceedings is often complex. The determination should be made on a case-by-case basis, ideally by an independent and well-trained judiciary. An essential element in effectively addressing SLAPP suits involves empowering the judiciary to assess whether a claim constitutes an abuse of the right of access to court¹⁷. It is generally accepted though that SLAPPs distinguish themselves from typical attacks on free speech; their objective is not just to challenge, but to silence critical voices by intimidating and financially exhausting critics, thereby hindering their active participation in public discourse. One defining feature of these actions is the significant power and resource imbalance between the plaintiff and the defendant¹⁸.

3. Definition and Characteristics

According to the Academic Network on European Citizenship Rights, “SLAPP has been variously described in the literature as “attempts to use civil tort action to stifle political expression”, “the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena”, “legally meritless suits designed from their inception to intimidate and harass political critics into silence”, and “the initiation of a lawsuit that has the principal effect of silencing representations being made in the public sphere by the person being sued, when the impugned representations have to do with an issue of social significance”¹⁹.

The definition of SLAPPs varies across legal systems, and the chosen definition significantly impacts the availability of anti-SLAPP protections. Narrow definitions, requiring a high threshold for courts to identify a case as a SLAPP, limit the scope of anti-SLAPP measures. In contrast, broader definitions empower respondents with remedies in scenarios where they might not otherwise be accessible. The nuances in these definitions play a crucial role in shaping the effectiveness of anti-SLAPP provisions²⁰.

SLAPPs consist of two key elements: they encompass legal actions or threats connected to communications regarding matters of public interest, and they employ abusive litigation tactics. These tactics include, but are not limited to, making exaggerated or baseless damage claims, altering or retracting claims or pleadings, taking advantage of appeals procedures, and engaging in forum shopping. Initiated by powerful entities, they target public watchdogs, creating an imbalance in the disputing parties. Although SLAPPs cover various claims, common ones include defamation, breach of privacy, copyright infringement, and data protection. Their purpose is to inflict psychological and financial harm, silencing defendants and chilling freedom of expression. Claimants exploit procedural costs and the threat of disproportionate damages, making even partially founded claims an abuse of legal process. SLAPPs represent a form of “punishment by process”, where defending becomes costlier than settling, removing information, or ceasing reporting. This phenomenon, typically

¹⁷ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 22.

¹⁸ R. MAŃKO, *ibid.* p. 2.

¹⁹ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 22.

²⁰ J. BORG-BARTHET, E. FERGUSON, *An Anti-SLAPP Curriculum for Lawyers in the European Union*, PatFOX Project, 2022, p.4, available at: <https://www.antislapp.eu/curriculum-hub/anti-slapp-curriculum>.

associated with criminal justice, extends into civil law, enabled by powerful claimants and legal professionals prolonging litigation²¹.

The literature has concentrated on five definitional indicators to identify SLAPP. For instance, Pring established the following criteria to assess if a lawsuit qualifies as a SLAPP: 1) a civil complaint or counterclaim seeking monetary damages and/or injunction, 2) filed against non-governmental individuals or groups, 3) initiated due to communications to a government body, official, or the electorate, and 4) on an issue of public interest and 5) the (lack of) merit in the legal action undertaken²². Turning the legal process into a form of private punishment, SLAPP claimants not only inflict harm on the individual target but also eliminate information from the public domain. Additionally, they divert energy and resources away from public watchdog and civil society activities²³.

The Annual Report of the Council of Europe Platform²⁴, dedicated to promoting the protection of journalism and safety of journalists, emphasizes the issue of groundless legal actions employed by influential individuals or companies. These actions are intended to intimidate journalists, compelling them to abandon their investigations. In some instances, the mere threat of such lawsuits, often conveyed through letters from powerful law firms, proves sufficient to stop journalistic inquiry and reporting²⁵.

The objective of SLAPPs is not to secure a favorable judgment for the claimant but rather, it is to leverage litigation, or the mere threat of it, to silence the respondent or force them into actions they might not otherwise agree to. Despite domestic and international safeguards, civil cases can be particularly detrimental to defendants who, lacking resources, find themselves stripped of their rights due to the prohibitive costs of defending against a better-resourced party²⁶. SLAPP suits are frequently initiated without regard to their merits or the likelihood of success. Instead, the literature points to other considerations that drive SLAPP applicants to commence legal proceedings against defendants for example, the retaliation for successful opposition on a matter of public interest, the prevention of anticipated future, effective opposition on subsequent public policy issues, the Intimidation with the broader goal of conveying that opposition will be met with punishment and the viewing litigation and the court system as just another tool in a strategy to gain victory in a political and/or economic battle²⁷.

Individuals targeted by SLAPP suits are often those engaged in expressing ideas, disseminating information, sharing opinions, and exercising free speech. This includes journalists, civil society organizations, academics, bloggers, whistleblowers, and human rights defenders. There is typically a notable imbalance in power and resources between the targets of SLAPP suits and those who initiate

²¹ F. FARRINGTON, M. ZABROCKA, Punishment by Process: The Development of Anti-SLAPP legislation in the European Union, *ERA Forum*, 2023, p. 3, available at: <https://doi.org/10.1007/s12027-023-00774-5>.

²² J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 22. S. KAEWJULLAKARN, B. HOMKET, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, United Nations Development Programme Thailand, 2023, p. 9, available at: <https://www.undp.org/thailand/publications/laws-and-measures-addressing-strategic-lawsuits-against-public-participation-slapps-context-business-and-human-rights>.

²³ BORG-BARTHET, E. FERGUSON, *ibid.*, p. 3.

²⁴ PLATFORM FOR THE PROTECTION OF JOURNALISM AND THE SAFETY OF JOURNALISTS, COUNCIL OF EUROPE, *Wanted! Real action for media freedom in Europe, Annual report 2021 by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists*, April 2021, available at: <https://rm.coe.int/final-version-annualreport-2021-en-wanted-real-action-for-media-freed/1680a2440e>.

²⁵ J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, European Parliament's Committee on Legal Affairs, 2021, p. 9, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf).

²⁶ P. MILEWSKA, *Countering SLAPPs in Hungary, Poland, and the Rest of the EU*, GMF Policy Paper, 2023, p. 5, available at: <https://www.gmfus.org/sites/default/files/2023-05/Milewsa%20-%20SLAPPs%20-%20paper.pdf>.

²⁷ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 25.

them²⁸. SLAPPs typically masquerade as civil or criminal claims, such as defamation or libel and share common features²⁹.

SLAPPs have experienced a notable surge globally, finding conducive conditions in specific legal frameworks. The susceptibility of an environment to SLAPPs hinges on various factors, such as the costs of legal proceedings, including damage caps and access to legal aid, the flexibility of laws and the lack of safeguards (e.g., anti-SLAPP statutes or discretionary cost awards to counter abuse of process)³⁰.

According to research findings, the majority of SLAPP suits were instigated by businesses, businesspeople, politicians, and others in public service, with state-owned entities also being involved. SLAPPs have been observed in various areas of public interest, such as the environment, crime and corruption, and political criticism. Often labeled as meritless, many SLAPP suits reaching court are either dismissed or won by the defendant. However, even suits with some merit, when conducted abusively, can be identified as SLAPPs. Successfully defended actions still impose significant financial and psychological costs on defendants. The presumed intent of SLAPP suits is to discourage defendants, or potential defendants, from continuing their public interest activities³¹.

4. Impact

The prevalence of SLAPPs primarily leads to a “chilling effect” on critics, endangering freedom of expression and discouraging democratic discourse. SLAPPs not only aim to restrict criticism but also create a power imbalance favoring powerful applicants who seek to silence critics on issues of public interest³². As the European Commission explains “*a healthy and thriving democracy requires that citizens are able to participate actively in public debate without undue interference by public authorities or other powerful interests. In order to secure meaningful participation, citizens must be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space in which different views can be expressed freely*”³³. In this respect, SLAPPs undermine democracy by limiting informed choices, hindering meaningful debate, and impeding the democratic values enshrined in Article 2 TEU³⁴. Another psychological impact involves the shame associated with defamation cases. Journalists and media organizations often refrain from publicizing these legal disputes due to concerns about their reputation. SLAPP litigants exploit various laws, including defamation, and others related to torts, labor, criminal, privacy, and data protection, to intimidate parties and coerce them into silence and self-censorship³⁵.

SLAPP actions might have negative implications for democratic public participation, fundamental rights and the rule of law, core values the European Union and the Member States share and are obliged to respect and promote³⁶. In 2021, the Council of Europe's Commissioner for Human Rights

²⁸ J. BORG-BARTHET, E. FERGUSON, *ibid.*, p. 4.

²⁹ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 17.

³⁰ S. KAEWJULLAKARN, B. HOMKET, *ibid.*, p. 10.

³¹ J. BORG-BARTHET, E. FERGUSON, *ibid.*, p. 4.

³² F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 3.

³³ EUROPEAN COMMISSION, 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”), COM(2022) 177 final, explanatory memorandum.

³⁴ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 19.

³⁵ J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *ibid.*, p. 4.

³⁶ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 20.

noted that although SLAPPs are not a novel occurrence, their prevalence is growing, posing a significant threat to freedom of expression³⁷. The European Court of Human Rights held that unpredictably large damages' awards in libel cases have a "strong and continuous chilling effect" on freedom of expression³⁸. As Fiona Donson observes "*The effect of the SLAPP suit is the chilling of political speech, closing down the arena for political discussion and transforming political speech into a more private legal-based dialogue*"³⁹.

SLAPPs also, pose a threat to the right to a fair trial. While those initiating SLAPP cases may claim to be safeguarding their own access to justice and fair trial rights, their actual intent is often to curtail the rights of the opposing party. On one hand, SLAPPs aim to restrict the defendant's freedom of speech, and on the other hand, these cases may distort the fair trial rights of the respondent or suspect. Equality of arms, a fundamental principle in the right to a fair trial under Article 6 of the ECHR, Article 47 of the Charter, and national European constitutions, becomes compromised when there is a significant power imbalance between parties, leading to one party being able to exercise their rights while the other cannot, often due to financial burdens in SLAPP cases. The primary goal of a SLAPP suit is not to seek legal remedies but to silence and intimidate through the legal process, thereby undermining fair trial rights. The abuse of legal procedures and one's power position, beyond the reach of anti-SLAPP laws or judicial interpretation, further jeopardizes the fair trial rights of individuals.

It's worth mentioning that regulating SLAPPs presents several challenges, particularly since the fundamental rights of the claimant are implicated in the proceedings. Firstly, ensuring the right to a fair trial demands that the claimant has access to an impartial tribunal with guaranteed equality of arms. Secondly, defamation claims engage the claimants' rights to privacy and family life⁴⁰.

Part B: Responding to SLAPPs – The EU's approach

In the face of this growing phenomenon, only in Australia, Canada, and the United States have anti-SLAPP laws been developed and adopted⁴¹. In the United States, legislation and case law addressing SLAPPs are well-developed, recognizing them as a violation of citizens' rights under the First Amendment, specifically free speech and the right to petition the government for the redress of grievances. Common law and mixed jurisdictions outside the United States have also acknowledged SLAPPs both through judicial decisions and legislative measures. In contrast to the U.S. Constitution's First Amendment provisions, other jurisdictions place greater emphasis on finding a balance between freedom of expression and competing rights, such as privacy and reputation⁴².

Currently, no EU country has enacted targeted rules that specifically shield against SLAPP suits⁴³. Nevertheless, several provisions of EU law and the European human rights protection system seem to be applicable.

³⁷ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 7.

³⁸ J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *ibid.*, p. 5.

³⁹ F. DONSON, Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs, *Review of European Community & International Environmental Law (RECIEL)* (2010) 19(1), p. 83.

⁴⁰ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 8.

⁴¹ P. MILEWSKA, *ibid.*, p. 3.

⁴² J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *ibid.*, p. 14-18.

⁴³ R. MAŃKO, *ibid.* p. 3.

5. Human Rights approach

As mentioned earlier, SLAPPs engage with various fundamental rights that could be invoked by either party involved in the dispute. Primarily, SLAPPs have an impact on the targeted individual's freedom of expression, as outlined in Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights (ECHR). They also affect the right to freedom of assembly, safeguarded by Article 11 ECHR and Article 12 of the Charter. Additionally, the SLAPP target or defendant may argue a violation of their fair trial rights, protected by Article 6 ECHR and Article 47 of the Charter⁴⁴.

The European Court of Human Rights has consistently emphasized the vital role fulfilled by the press as a “watchdog” in a democratic society. It has linked the press's responsibility in disseminating information and ideas on all subjects of public interest to the public's right to access and receive such information⁴⁵. Acknowledging the significance of endeavors in the realm of human rights, the Court asserts that the principles safeguarding journalists and media professionals could be applied, with necessary adaptations, to the prolonged pretrial detention of human rights defenders, leaders, or activists associated with such organizations. This applicability arises when pretrial detention is imposed on them in connection with criminal proceedings directly related to activities focused on the defense of human rights⁴⁶. The Court also acknowledges that whistleblowers fulfill a similar role⁴⁷. Similarly, academic researchers and authors addressing matters of public concern also benefit from a high level of protection. Recognizing the pivotal role of the Internet in expanding public access to news and facilitating information dissemination, the Court has observed that bloggers and influential users of social media may also be considered akin to “public watchdogs” concerning the protection afforded by Article 10⁴⁸.

When the freedom of the “press” is under threat, authorities are constrained in their discretion to determine whether a “pressing social need” exists. In other words, national authorities have a limited margin of appreciation in determining the existence of a “pressing social need” that justifies state interference with freedom of expression⁴⁹. The European Court of Human Rights has acknowledged that excessively substantial damages awards can stifle media freedom and amount to a violation of freedom of expression. Moreover, when the disseminated information pertains to a politician or public figure, the harm to reputation must be balanced against the interests of fostering open discussion on political matters⁵⁰.

On the opposing side of the dispute, the SLAPP claimant—the individual initiating the abusive lawsuit—may assert a violation of their right to access the courts (as safeguarded by the aforementioned fair trial rights) or claim interference with their right to private and family life, recognized in Article 8 of the ECHR and Article 7 of the Charter. Consequently, in both aspects of the dispute, there might be an explicit or implied assertion that fundamental human rights are being

⁴⁴ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 8. J. BORG-BARTHET, *ibid.*, p. 14.

⁴⁵ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 10 of the European Convention on Human Rights*, *ibid.*, p. 53. ECHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, 27 June 2017.

⁴⁶ ECHR, *Animal Defenders International v. the United Kingdom*, Application no. 48876/08, 22 April 2013. EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 10 of the European Convention on Human Rights*, *ibid.*, p. 54.

⁴⁷ ECHR, *Međžlis Islamske zajednice Brčko and Others v. Bosnia and Herzegovina*, Application no. 17224/11, 31 August 2016.

⁴⁸ ECHR, *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11, 8 November 2016.

⁴⁹ ECHR, *Stoll v. Switzerland*, Application no. 69698/01, 10 December 2007.

⁵⁰ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 10 of the European Convention on Human Rights*, *ibid.*, p. 54.

hindered⁵¹. The heightened protection granted to "public watchdogs," especially the press, under Article 10 is contingent upon their adherence to the duties and responsibilities associated with the role of a journalist. This entails an obligation of "responsible journalism"⁵².

Recently, in *OOO Memo v Russia*, the Court explicitly referred to SLAPPs in a civil defamation suit brought by a Russian regional state body against a media company. The Court found that although civil defamation proceedings were open to private or public companies to protect their reputation in the marketplace, this could not be the case for a large, taxpayer-funded, executive body like the plaintiff in this case. The proceedings and the consequent interference had therefore not had a "legitimate aim" under the Convention. The Court found that allowing executive bodies to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media. This could have an inevitable chilling effect on the media in the performance of their task as purveyor of information and as public watchdog⁵³.

Additionally, the Court has underscored that Article 8 cannot be invoked to protest a tarnished reputation resulting from one's own actions, such as the commission of a criminal offense⁵⁴. In this respect, the measures implemented must be proportional, construed strictly, and their necessity convincingly established. The Court has outlined a non-exhaustive set of principles to govern its evaluation of whether interference in this domain was warranted, taking into account factors such as the contribution the communication makes to a public interest debate. The Court interprets public interest broadly, encompassing "*matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community*"⁵⁵.

Article 6 of the European Convention of Human Rights safeguards the right to a fair trial in both civil and criminal proceedings, ensuring access to a court, an effective remedy, and a fair procedure. Anti-SLAPP legislation doesn't inherently limit a court's jurisdiction over public interest claims but prevents abuse by allowing early assessment of the claim's legitimacy. The Court of Strasbourg recognizes breaches of fair trial rights due to factors like lack of legal aid, prolonged proceedings, and an imbalance of power. This balance necessitates affording each party a reasonable opportunity without significant disadvantage. Denying legal aid may violate equality of arms principles, especially in cases where power imbalances are common in SLAPPs⁵⁶.

Notably, certain scholars position Article 17 of the European Convention on Human Rights at the forefront of anti-SLAPP initiatives⁵⁷. Article 17 prohibits the destruction of and excessive limitation on the rights and freedoms outlined in the Convention. It is applicable to States, groups, and individuals, with its text originating from Article 30 of the Universal Declaration of Human Rights. Similar provisions to Article 17 are present in the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. This fundamental provision aims to safeguard the Convention-listed rights by protecting the free operation of democratic institutions. Article 17 was included in the Convention to prevent individuals or groups from exploiting the

⁵¹ ECHR, *Couderac and Hachette Filipacchi Associés v France*, Application no 40454/07, 10 November 2015.

⁵² F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 6.

⁵³ ECHR, *OOO Memo v Russia*, Application no. 2840/10, 15 March 2022.

⁵⁴ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 6.

⁵⁵ ECHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13, 27 June 2017. F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 6.

⁵⁶ ECHR, *Kress v. France*, Application no. 39594/98, 7 June 2001. F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 7.

⁵⁷ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 36-42.

Convention's rights to conduct activities intended to destroy those very rights. The link between the Convention and democracy is evident, with Article 17 preventing totalitarian or extremist groups from exploiting Convention principles for their own interests⁵⁸. The concept of "democracy capable of defending itself" is associated with Article 17, emphasizing the need for a balance between defending democratic society and individual rights within the Convention system. The prohibition of the "abuse of rights" under Article 17 provides democracies with the means to combat acts and activities that destroy or unduly restrict fundamental rights and freedoms, regardless of whether they are carried out by a State, group, or individual. Additionally, Article 17 reflects the concern for protecting the Convention mechanism⁵⁹.

To determine if a specific behavior constitutes an abuse of rights, the European Court examines the aims pursued by the applicant when invoking the Convention and whether these aims are compatible with the values and spirit of the Convention⁶⁰. Article 17 is applicable when the applicant seeks to undermine a right guaranteed by the Convention from its true purpose by using the right to justify, promote, or execute actions that: a) are contrary to the text and spirit of the Convention⁶¹, b) are incompatible with democracy or other fundamental values of the Convention⁶², c) violate the rights and freedoms recognized in the Convention⁶³, and d) if allowed, would contribute to the destruction of the rights and freedoms defined in the Convention⁶⁴. It should be noted that the European Court of Human Rights has made it clear that Article 17 applies only in exceptional and extreme cases⁶⁵.

True, so far Article 17 has been invoked by the Court in the context of Articles 10 and 11 of the Convention, more specifically in cases that concern totalitarian ideologies⁶⁶, incitement to hatred and hate speech, historical negationism, support or attempts to revive nationalist movements, or when political organizations engaged in activities inspired by non-democratic ideas⁶⁷. It should be noted that the jurisprudence of the European Court of Human Rights regarding the application of Article 17 is quite limited compared to other provisions of the Convention, and there is no systematic approach to its application⁶⁸.

Based on the above, in the context of SLAPPs, the abuse is directed towards the access to courts, which is considered an implicit right under Article 6 of the European Convention on Human Rights as well as the right to a remedy under Article 13. In this respect, Article 17 comes into play when individuals or entities attempt to exploit the rights granted by the Convention for purposes that run counter to its objectives. In other words, in the case of SLAPPs, where the right of access to courts is

⁵⁸ C. HANNES, D. VOORHOOF, *The Abuse Clause and freedom of expression in the European human rights convention: An added value for democracy*, *Netherlands Quarterly of Human Rights*, vol. 29, no. 1, 2011, p. 57, available at: <http://www.corteidh.or.cr/tablas/r25909.pdf>.

⁵⁹ T. STAVRINAKI, Article 17, in L.A. SISILIANOS (ed.), *European Convention on Human Rights, Interpretation by Article*, Nomiki Vivliothiki, Athens 2013, p. 640-652 (in Greek).

⁶⁰ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 17 of the European Convention of Human Rights*, 1st edition – 31 March 2019, p.14. available at: https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf

⁶¹ ECHR, *M'Bala M'Bala v. France*, Application no. 25239/13, 20 October 2015.

⁶² ECHR, *Garaudy v. France*, Application no. 65831/01, 24 June 2003

⁶³ ECHR, *Perinçek v. Switzerland*, Application no. 27510/08, 15 October 2015. ECHR, *Pavel Ivanov v. Russia*, Application no. 35222/04, 20 February 2007. ECHR, *Norwood v. the United Kingdom*, Application no. 62824/16, 16 November 2004. ECHR, *Kasymakhunov and Saybatalov v. Russia*, Applications nos. 26261/05 and 26377/06, 14 March 2013.

⁶⁴ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 17 of the European Convention of Human Rights*, *ibid.*, p. 9. J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 36-42.

⁶⁵ EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 17 of the European Convention of Human Rights*, *ibid.*, p. 14.

⁶⁶ ECHR, *Kühnen v. Germany*, Application No. 12194/86, 12 May 1988.

⁶⁷ ECHR, *X. vs Federal Republic of Germany*, Application No. 9235/81, 16 July 1982, ECHR, *F.P. vs Germany*, Application No. 19459/92, 29 March 1993, ECHR, *Otto E.F.A. Remer vs Germany*, Application No. 25096/94, 6 September 1995. C. HANNES, D. VOORHOOF, *ibid.*, p. 60.

⁶⁸ D. KEANE, *Attacking Hate Speech Under Article 17 Of The European Convention On Human Rights*, 25 *Netherlands Quarterly on Human Rights*, 2007, p. 644.

misused, Article 17 applies. This provision prevents the abusers from invoking the very rights they are abusing. In essence, Article 17 can be invoked to curb attempts to manipulate the legal process in order to stifle public participation and free expression⁶⁹.

Apart from the case law of the European Court of Human Rights, numerous text adopted at the framework of the Council of Europe explicitly address the issue of SLAPPs or other forms of intimidating and vexatious litigation targeting journalists and media outlets, including those operating online. For instance, the Recommendation on the roles and responsibilities of internet intermediaries, endorsed by the Committee of Ministers in March 2018, explicitly advises that state authorities should consider the adoption of appropriate legislation to prevent SLAPPs or abusive and vexatious litigation against users, content providers, and intermediaries which is intended to curtail the right to freedom of expression. Furthermore, the 2012 Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation addresses a specific aspect of SLAPPs, namely "libel tourism". This term refers to the practice where litigants strategically file defamation complaints in a jurisdiction perceived to be most favorable to their case, often choosing locations where legal proceedings are easily initiated. This declaration aims to ensure freedom of expression by discouraging such forum shopping practices in defamation cases⁷⁰.

6. The European Union and the issue of SLAPPs

Traditionally viewed as one of the safest and freest regions for journalists globally, the European Union is facing growing challenges to press freedom. Escalating pressures have compelled EU institutions to explore avenues to urge the member states to uphold their commitments to freedom of expression and the rule of law⁷¹.

6.1. Current legal framework

At the EU level, The European Media Freedom Act (EMFA), approved by the European Parliament and Council on December 15, 2023, builds upon the revised Audiovisual Media Services Directive, aiming to fortify the internal market's integrity and safeguard media pluralism and independence within the Union. Proposed in September 2022, the EMFA encompasses a comprehensive set of provisions to address various aspects of media freedom and responsibility. The EMFA prioritizes the protection of editorial independence, compelling Member States to ensure the effective editorial freedom of media service providers. Additionally, it seeks to enhance the safeguarding of journalistic sources, particularly against the use of spyware. Recognizing the crucial role of public service media, the EMFA ensures their independent functioning by guaranteeing adequate, sustainable, and predictable financial resources. In response to the evolving digital landscape, the EMFA addresses challenges posed by Very Large Online Platforms, designated under the Digital Services Act⁷². It

⁶⁹ J. BAYER, P. BARD, L. VOSYLIŪTĖ, N.C.LUK, *ibid.*, p. 40-42.

⁷⁰ COUNCIL OF EUROPE, COMMISSIONER FOR HUMAN RIGHTS, *Time to take action against SLAPPs*, 27 October 2020, available at: <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

⁷¹ COMMITTEE TO PROTECT JOURNALISTS, *Fragile Progress- The struggle for press freedom in the European Union*, available at: <https://cpi.org/reports/2023/04/fragile-progress-the-struggle-for-press-freedom-in-the-european-union/>.

⁷² EUROPEAN COMMISSION, *The Digital Services Act package*, available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

incorporates safeguards against the unwarranted removal of media content that adheres to professional standards but may be deemed incompatible with platform terms and conditions. To assess and mitigate the impact of key media market concentrations on media pluralism and editorial independence, Member States are required to conduct media pluralism tests, ensuring a diverse and independent media landscape⁷³.

Also, the European Democracy Action Plan, adopted by the Commission, aligns with the EMFA's objectives, focusing on improving journalist safety, providing sustainable funding, promoting transparent state advertising allocation, fostering media diversity, and developing a European approach to the prominence of audiovisual media services⁷⁴. Also, the Rule of Law Mechanism plays a crucial role in assessing media freedom and pluralism, examining regulatory authorities, media ownership transparency, government interference, and the framework for journalist protection⁷⁵.

Finally, the revised Audiovisual Media Services Directive, which aligns with the EMFA, reinforces legal safeguards in various areas covered by the Media Pluralism Monitor, such as online content moderation, media regulator independence, transparency of media ownership, and media literacy⁷⁶.

It's important to highlight that numerous scholars have expressed concerns regarding the potential abuse of private international law. Presently, within the European judicial area, the Brussels I Regulation, and the Lugano Convention 2007 for EFTA States, addressing jurisdiction, recognition, and enforcement of judgments, along with the Rome II Regulation addressing the choice of law in non-contractual matters are in effect. These instruments, designed to ensure legal certainty and predictability in cross-border litigation, provide SLAPP claimants with significant opportunities for forum shopping, allowing them to gain an advantage over the respondent⁷⁷. The Brussels I regulation lets claimants in tort cases unilaterally choose the forum, either the defendant's domicile or "*the place where the harmful event occurred or may occur*" (Article 7(2)). In defamation cases, the EU Court of Justice interprets this broadly, allowing claimants to sue in states where the publication was distributed or where the defendant or claimant is based. This flexibility in choosing forums, combined with defamation's exclusion from the Rome II Regulation and broad choices in the Brussels Ia Regulation, encourages forum shopping and libel tourism. Recognizing this issue, the Commission, in its European Democracy Action Plan, pledged to assess cross-border aspects of SLAPPs in the 2022 evaluation of Rome II and Brussels Ia, signaling a need for comprehensive reforms⁷⁸.

The Court of the European Union has encountered challenges in reconciling general jurisdiction rules for tort with the specific issue of defamation. While the Court has shown awareness of the need to curb forum shopping in online defamation cases, overall, the EU judiciary seems less attuned to two critical aspects of transnational litigation. Firstly, there's a lack of sustained consideration for the impact on freedom of expression and access to courts stemming from the misuse of jurisdictional rules. Secondly, due to a failure in engaging in specific policy and human rights analysis for

⁷³ EUROPEAN COMMISSION, *European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504.

⁷⁴ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS On the European democracy action plan, COM(2020) 790 final.

⁷⁵ EUROPEAN COMMISSION, *Rule of law mechanism*, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

⁷⁶ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, PE/33/2018/REV/1, OJ L 303, 28.11.2018, p. 69–92.

⁷⁷ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 15. J. BORG-BARTHET, *ibid.*, p. 9.

⁷⁸ J. BORG-BARTHET, *ibid.*, p. 6.

defamation, the Court tends to follow a path established in *Bier*⁷⁹, which assumes jurisdictional rules based on the involuntary nature of the legal relationship, overlooking their use in extracting negotiating advantages. Considering the implications for free speech and the rule of law in investigative journalism, a more nuanced approach is needed to break from this established path. In the *Shevill* case⁸⁰, the Court reiterated that a claimant can sue in any state where a publication caused damages. This aligns with the Bier principle, providing a choice between the place of publication and the locations where the resulting damage occurred in libel cases⁸¹.

6.2. The new proposed anti-SLAPP Directive

The European Commission published a proposal for an anti-SLAPP EU directive in 2022. As explained in the Explanatory memorandum of the proposed Directive “*The prevalence of SLAPPs has been identified as a matter of serious concern in some Member States in the context of the 2020 and 2021 Rule of Law Reports. The Council of Europe’s Platform to Promote the Protection of Journalism and Safety of Journalists also reports an increasing number of alerts of serious threats to the safety of journalists and media freedom in Europe, including multiple cases of judicial intimidation. The 2021 annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned. More broadly, information collected on the European Media Pluralism Monitor also shows a deterioration in journalists’ working conditions. In 2021, the Media Freedom Rapid Response (MFRR) documented 439 alerts (with 778 persons or entities related to media being attacked) in 24 EU Member States in 12 months, including SLAPPs*”⁸².

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), which is the legal basis for judicial cooperation in civil matters having a cross-border dimension. The proposed SLAPP Directive focuses on cross-border cases, complemented by a non-binding recommendation for purely domestic SLAPPs under Article 292 TFEU. While the Directive addresses civil procedures, the recommendation has a broader scope, extending to criminal law, data protection, and ethical rules for legal professionals. It urges Member States to eliminate prison sentences for defamation, encourage the use of administrative or civil law for defamation cases, and strike a balance between data protection and freedom of expression. Additionally, it recommends training for legal professionals, support for SLAPP targets, and data collection on SLAPPs. Member States must report on the recommendation's implementation by the end of 2023, with the Commission assessing its impact within five years⁸³.

The proposed directive aims to tackle SLAPPs and safeguard public participation by establishing common procedural rules to discourage abusive court proceedings. Article 3 defines key concepts: public participation, matter of public interest, and abusive court proceedings against public participation. *Public participation* broadly covers activities in exercising the right to freedom of expression and information on public interest matters. Commercial advertisement and marketing are

⁷⁹ CJEU, Case 21-76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 30 November 1976, ECLI:EU:C:1976:166.

⁸⁰ CJEU, C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse, Alliance SA*, 7 March 1995 ECLI:EU:C:1995:61.

⁸¹ J. BORG-BARTHET, *ibid.*, p. 9-11.

⁸² COM(2022) 177 final.

⁸³ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 15.

generally excluded. The concept is linked to the exercise of these freedoms by any person, extending the proposal's scope beyond journalists to include human rights defenders, civil society organizations, academics, and individuals expressing their freedom of expression⁸⁴.

Article 3(2) of the proposal adopts the European Court of Human Rights case law's definition of "*matters of public interest*". It qualifies as such when it "*affects the public to such an extent that the public may legitimately take an interest in it*"⁸⁵. These matters can include public health, climate, fundamental rights, and allegations of crimes like corruption or fraud, as well as topics under consideration by any branch of government (legislative, executive, or judicial). The proposal also acknowledges a certain level of harmonization among Member States concerning the limitations of the right to privacy in favor of freedom of expression, influenced by the case law of the European Court of Human Rights.

Article 3(3) of the proposal defines "abusive court proceedings against public participation" as proceedings related to public participation that are either fully or partially unfounded and primarily aimed "*to prevent, restrict, or penalize public participation*". To qualify as abusive, two conditions must be met: i) the lack of merit or foundation in the lawsuit, and ii) the claimant's primary objective not being redress, compensation, or repair for damages suffered but rather "*to prevent, restrict, or penalize public participation*". Recognizing the challenge of identifying hidden intent, the article includes a non-exhaustive list of elements to assist in its determination, such as the disproportionate nature of the claim, the presence of multiple concurrent cases on similar matters, or instances of intimidation, harassment, or threats from the claimant⁸⁶.

The Directive creates a system of powerful procedural safeguards for cross-border SLAPP cases. The existence of these safeguards will equip courts to deal with abusive litigation but will also deter potential claimants from engaging in such practices. The new rules will include a) the early dismissal of manifestly unfounded claims, b) remedies against abusive court proceedings including the full award of costs and penalties or other appropriate measures and c) protection against third country judgments which will not be recognised or enforced in the EU⁸⁷.

The speedy dismissal of claims is a crucial element in anti-SLAPP legislation. This rapid resolution prevents SLAPP claimants from prolonging proceedings to impose financial and psychological burdens on the respondent. However, early dismissal should be approached with caution, considering its potential impact on the claimant's fundamental right to access the courts. In cases falling under the proposed Directive's scope, the defendant can seek a remedy, and the nature of the remedy depends on whether the proceedings are manifestly unfounded or abusive. For manifestly unfounded cases, early dismissal through an accelerated process is an option. The burden of proof lies with the claimant to demonstrate that the claim is not manifestly unfounded. The main proceedings are suspended until a final decision on the dismissal motion is reached. Member States must allow for an appeal of the early dismissal decision. The proposed Directive provides common remedies for both manifestly unfounded and abusive court proceedings, including a full award of costs, full compensation for damages, and the imposition of effective penalties. Article 8 grants

⁸⁴ R. MAŇKO, *ibid.* p. 5.

⁸⁵ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 11.

⁸⁶ COM(2022) 177 final.

⁸⁷ F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 11.

courts the authority to demand security of costs when abuse is suspected, and the chances of success in the main proceedings are low⁸⁸.

In addition to the primary measures discouraging abusive proceedings against public participation, the draft directive introduces further procedural safeguards. These encompass restrictions on altering claims to evade cost awards⁸⁹, as well as the right to third-party intervention⁹⁰. This provision allows NGOs to submit amicus briefs in proceedings related to public participation, potentially providing valuable expertise and oversight for less experienced courts and more vulnerable respondents⁹¹.

Regarding private international law rules, the proposed Directive introduces safeguards against third-country judgments. Member State courts must refuse recognition and enforcement on public policy grounds if the judgment arises from abusive court proceedings against public participation. Additionally, the Directive mandates Member States to enable individuals or entities domiciled in a Member State to seek compensation for damages or costs related to abusive court proceedings. These provisions address concerns about forum shopping and proximity to jurisdictions known for being claimant-friendly in defamation cases⁹².

In March 2023, the Council of the EU suggested amendments that weaken certain crucial aspects of the proposed directive. In contrast, the European Parliament put forth its own amendments seeking to broaden protection against SLAPPs. On 27 of February 2024 **the European Parliament approved with an overwhelming majority the final text of the Directive**⁹³. The final text needs to be endorsed by member states' representatives within the Council (Coreper). If approved, the text will then need to be formally adopted by both the Council and the European Parliament⁹⁴.

Concluding remarks

The rising concern over Strategic Lawsuits Against Public Participation (SLAPPs) has prompted both the European Union (EU) institutions and Member States to address this issue and safeguard freedom of expression and public participation. The European Media Freedom Act, stands out as a comprehensive initiative aiming to protect media pluralism and independence. By addressing issues such as editorial independence, transparency of media ownership, and protection against unwarranted content removal by large online platforms, the EMFA seeks to reinforce the integrity of the internal market. In April 2022, the Commission proposed a Directive specifically targeting SLAPPs, emphasizing the need to combat abusive court proceedings designed to hinder public participation. The Directive outlines common procedural rules and safeguards against such practices, promoting the early dismissal of manifestly unfounded claims and providing remedies for victims of abusive proceedings.

⁸⁸ R. MAÑKO, *ibid.* p. 6. F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 12.

⁸⁹ COM(2022) 177 final, article 14.

⁹⁰ COM(2022) 177 final, article 7.

⁹¹ R. MAÑKO, *ibid.* p. 6.

⁹² F. FARRINGTON, M. ZABROCKA, *ibid.*, p. 13.

⁹³ N. WEATHERALD, *Anti-SLAPP law gets final seal of approval from EU Parliament*, 27 February 2024, available at: <https://www.euractiv.com/section/media/news/anti-slapp-law-gets-final-seal-of-approval-from-eu-parliament/>

⁹⁴ COUNCIL OF THE EU, *Council and EU Parliament reach provisional agreement on EU law protecting journalists and human rights defenders*, 30 November 2023, available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/11/30/council-and-eu-parliament-reach-provisional-agreement-on-eu-law-protecting-journalists-and-human-rights-defenders/>

Despite these initiatives, challenges remain, particularly in the realm of private international law. The current legal frameworks, including the Brussels IA Regulation and Rome II Regulation, may inadvertently facilitate forum shopping, allowing claimants to exploit jurisdictional rules for their advantage. The potential for abuse underlines the need for a nuanced approach, ensuring that the right to access courts is preserved while preventing vexatious litigation.

In this respect, the EU should strive to enact robust legislative measures, ensuring that the final text of the SLAPP Directive maintains its effectiveness in preventing abusive court proceedings without compromising access to justice. Also, a comprehensive review of private international law rules, particularly within the Brussels IA Regulation and Rome II Regulation, is crucial to counter forum shopping effectively. Harmonization efforts should strike a balance between protecting freedom of expression and preventing abuse.

Increasing public awareness of SLAPPs and their detrimental impact on freedom of expression is essential. NGOs, media organizations, and civil society should actively engage in advocacy efforts to garner support for legislative measures and raise awareness about the consequences of SLAPPs. Regular assessments and monitoring of the anti-SLAPP measures will help identify challenges and provide insights for potential adjustments to the legal frameworks. Training legal professionals is a proactive step toward creating an informed and empowered legal community capable of upholding the principles of freedom of expression while guarding against the misuse of legal processes for strategic purposes. Finally, international cooperation will enhance the effectiveness of measures against cross-border abusive litigation.

In conclusion, while the EU has taken commendable steps to combat SLAPPs, continued vigilance, public engagement, and refined legal frameworks are crucial to effectively protect freedom of expression and public participation across Member States.