

ATHENA


CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Proposed EU Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy

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ABSTRACT

The proposed EU Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“anti-SLAPPs Directive”) is the European Union response to fight strategic lawsuits against public participation (“SLAPPs”). The latter are proceedings where the lawsuit legal instrument is misused to silence activists regarding information activities carried out by them in relation to facts of public interest and, finally, to achieve a chilling effect on the entire society. As a result, SLAPPs represent an obstacle to freedom of expression, participation, activism, and ultimately to democracy. Indeed, democracy is the foundation the EU is based on and can only thrive in a climate where freedom of expression is upheld, in line with the European Convention on Human Rights, including its positive obligations under Article 10, and the Charter of Fundamental Rights of the European Union, highlighting the horizontal (and questionable direct effect) dimension of its Article 11. And for a healthy and prosperous democracy, people need to be able to actively participate in public debate without undue interference and to have access to reliable information. Therefore, the proposed anti-SLAPPs Directive aims to safeguard SLAPPs targets and, in so doing, strengthen democracy. The anti-SLAPPs Directive is tested practically to SLAPPs cases which have interested Daphne Caruana Galizia, a blog editor in Malta whose activism led to her being killed in 2017, as well as tested to other SLAPPs affected story lives. A broader comparative/multidisciplinary look at other human rights protection systems and anti-SLAPPs legislations in the world is offered. At the end, from the overall analysis carried out, it emerges that the anti-SLAPPs Directive has a significant potential for the objectives it aims to achieve, but that is not enough: Member States should consider also to address SLAPPs in domestic cases and to decriminalise defamation.

Keywords: SLAPPs, anti-SLAPPs Directive, democracy, freedom of expression, public participation, Daphne Caruana Galizia

ATHENA

Volume 3.2/2023, pp.209-256

Conference Papers

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/17712>



1. The Issue at Stake: The Proposed EU Directive to Flight SLAPPs

Democracy is the foundation the European Union (“EU”) is based on and can only thrive in a climate where freedom of expression is upheld, in line with the European Convention on Human Rights (“ECHR”)¹ and the Charter of Fundamental Rights of the European Union (“Charter”).² For a healthy and prosperous democracy, people need to be able to actively participate in public debate without undue interference. In order to ensure meaningful participation, people need to have access to reliable information, enabling them to form their own ideas in a public space where different opinions can be freely expressed. Activists, then, play a fundamental role in facilitating public debate and in communicating information, opinions and ideas.

An obstacle to freedom of expression, participation, activism, and ultimately to democracy, is today represented by strategic lawsuits against public participation (“SLAPPs”). The latter are legal proceedings, initiated by powerful individuals, lobby groups, corporations and State organs, and against journalists, academics or activists, regarding information activities carried out by them in relation to facts of public interest. Their goal is to suppress, intimidate, and silence critics by forcing them to pay for legal defence and face negative consequences, psychological and not, until they drop their criticism or opposition. SLAPPs, unlike regular proceedings, are not filed with the intention of exercising the right to access to justice and winning the legal actions or receiving redress. Instead, they are started in order to scare the defendants and deplete their resources. Moreover, the ultimate purpose, by quieting the defendants and discouraging them from continuing their work, is to achieve a chilling effect on the entire society.

In light of the above, the Council of Europe has begun in the last years to deal with SLAPPs problem. And the work done by the Council of Europe has

¹ European Convention on Human Rights, Rome, Nov. 4, 1950.

² Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

been carried forward by the European Commission for the starting point of its proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“anti-SLAPPs Directive”).³ This anti-SLAPPs Directive intends to safeguard SLAPP targets and prevent the issue from spreading further in the EU. By adopting a unified EU understanding on what constitutes a SLAPP and by introducing procedural safeguards, the anti-SLAPPs Directive aims to equip courts with effective tools to deal with SLAPPs and targets with the means to defend themselves.

As a result, the purpose of this work is to analyse the anti-SLAPPs Directive.

The working hypothesis is to carry out this analysis based on a case study represented by Daphne Caruana Galizia. She was editor of one of the most popular blogs in Malta, engaged in numerous investigations and active against corruption. Her story, then, is relevant to this end since her life was continually destroyed by this type of legal proceedings brought to silence her. The originality of this method of analysis lies in submitting this anti-SLAPPs Directive to an effectiveness test, that is to relate the anti-SLAPPs Directive, imagined it as approved and implemented in the EU Member States, to these litigation cases which involved Daphne Caruana Galizia, but not only, to assess if and what could have changed. This analysis will reveal that the anti-SLAPPs Directive is a useful, even if challenging, instrument to protect persons who engage in public participation from manifestly unfounded or abusive court proceedings; however, in order to achieve this aim, it cannot be the only tool.

The following sections are organised as follows: in paragraph 2 an overall picture on SLAPPs is provided; in paragraph 3 an overview of the freedom of expression under the ECHR and the Charter is offered; in paragraph 4 the

³ 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.

proposed Directive on SLAPPs is framed and critically addressed; in paragraph 5 the proposed Directive is related to Daphne Caruana Galizia and other relevant cases; in paragraph 6 a comparative/multidisciplinary reading about the protection of freedom of expression in others human rights protection systems and about other anti-SLAPPs legislations in the world is exposed; finally, the conclusions are presented.

2. SLAPPs

The expression SLAPPs was coined in the United States (“US”) about thirty years ago by George Pring and Penelope Canan (Canan and Pring, 1988, 506; Pring and Canan, 1996, 8) to indicate an abusive or meritless lawsuit filed against someone for exercising their political rights or freedom of expression in relation to matters of public interest (Freeman, 2018, 26; Sheldrick, 2014, 1; Brown and Goldowitz, 2010, 3; Donson, 2010, 83; Shapiro, 2010, 14). Indeed, it refers to legal proceedings initiated against journalists, academics or activists regarding information activities carried out by them in relation to facts of public interest, such as corruptive practices, violations of human rights or environmental offences (Ravo et al., 2020, 3). These are actions, typically brought in civil proceedings but not only, by which the claimant complains mainly about the defamatory nature of the journalistic writings. The request, in the civil arena, is to be compensated for the damage suffered (Requejo Isidro, 2021). The cause of action, then, can be various: they are often grounded as claims based on defamation, but they may also relate to breaches of other rules such as data protection or privacy rules, combined with a request for damages.

The claimant is often an important person on the political or economic global scene, or a large company, investing lots of resources in this initiative. As a result, the "strategic" nature of this proceeding lies in the fact that the claimant, by invoking the defendant's liability, the journalist one, actually aims to make him withdraw from these public interest activities and to

dissuade him and other journalists from carrying out similar ones (Hess, 2022, 23). Consequently, claimant makes use of a legitimate instrument to achieve a different purpose, other than the one to which the tool itself is preordained to by the legal order: in the final analysis, it is proposed to silence a voice deemed uncomfortable because influencing the public debate (Bárd et al., 2020, 4; Bayer et al., 2021, 22).

SLAPPs are by definition legally unfounded and dubious actions. Indeed, claimant does not really expect to get the defendant convicted or sanctioned. The practical purpose of this initiative is achieved at the very moment in which the defendant is brought into a proceeding: due to the distress and costs that participation involves (courts fees and lawyers costs) and the inevitable risk of its outcome, just when filed this proceeding is capable of producing a dissuasive effect, or chilling effect.

SLAPPs, which were first identified as a growing issue in the US in the 1980s, have now become a danger to freedom of expression and information in other countries, including the EU ones. Although the true scope of this phenomenon within the EU is unknown, a 2022 report⁴ by the Article 19 organisation found an increase in SLAPP litigation cases in 11 European States (Belgium, Bulgaria, Ireland, France, Croatia, Hungary, Italy, Malta, Poland, Slovenia, and the United Kingdom), involving journalists, NGOs, and activists, and it was highlighted that none of the countries studied had special domestic anti-SLAPP laws. Similarly, from 2010 to 2021, the Coalition Against SLAPPs in Europe was able to identify 570 SLAPP cases

⁴ Media Freedom Rapid Response (2022). SLAPPs against journalists across Europe, in *Article 19*, <https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf>.

filed in over 30 European States;⁵ and in 2022 another 240 cases were collected.⁶

In the end, initiatives of this kind are capable of compromising the effective exercise of the freedom of democratic participation.⁷

3. Freedom of Expression

SLAPPs today represent an obstacle to freedom of expression, also to participation, activism, and ultimately to democracy.

Article 2 of the Treaty on EU (“TEU”)⁸ states that the Union is founded on the (interdependent) values of respect for, *inter alia*, democracy, the rule of law and human rights (Carrera et al., 2013, 1). And among the latter, the right to freedom of expression is the cornerstone indissociable from democracy (Gerards, 2023, 81),⁹ as it protects the pluralism, tolerance and broadmindedness without which democratic societies cannot flourish (Bhagwat and Weinstein, 2021, 82; Price and Krug, 2007, 94; Stotzky, 2001, 255; Bullinger, 1985, 88).¹⁰

⁵ Bonello Ghio R., and Nasreddin D. (2022). Shutting out criticism: How SLAPPs threaten European democracy, The Coalition Against SLAPPs in Europe, in *The-Case*, <https://www.the-case.eu/wp-content/uploads/2023/04/CASEREportSLAPPsEurope.pdf>; Zuluaga N., and Dobson C. (2021). SLAPPed but not silenced. Defending Human Rights In The Face Of Legal Risks, in *Business and Human Rights Resource Centre*, https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf.

⁶ The Daphne Caruana Galizia Foundation on behalf of the Coalition Against SLAPPs in Europe (2023). SLAPPs: A Threat to Democracy Continues to Grow. A 2023 Report Update, in *The-Case*, <https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf>.

⁷ Crego M.D., and Del Monte M. (2022). Strategic lawsuits against public participation (SLAPPs), in *European Parliament*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI\(2022\)733668_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf).

⁸ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

⁹ *Goodwin v. The United Kingdom*, 2002-VI Eur. Ct. H.R. ¶ 39 (1996); *Jersild v. Denmark*, A298 Eur. Ct. H.R. ¶ 31 (1994).

¹⁰ *Handyside v. The United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976); *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) ¶ 33 (1988); *Vogt v. Germany*, 323 Eur. Ct. H.R. (ser. A) ¶ 52 (1995); *Appleby v. United Kingdom*, 2003-VI Eur. Ct. H.R. ¶ 24 (2003).

In this framework, the role played by press as public watchdog is considered essential in democratic societies, thus justifying a higher level of the freedom of expression protection.¹¹ Non-governmental organisations (“NGOs”), researchers and even bloggers or popular users in social media have been granted comparable protection, on the condition that they also play a meaningful societal watchdog function (Zagrebel'sky, 2022, 371; Voorhoof, 2016, 101; Schudson, 2013, 159; Oosterveld and Oostveen, 2013, 146; Traimer, 2012, 1; Fenton, 2010, 153; Jakubowicz, 2009, 9).¹²

Both the ECHR and the Charter, in their respective, guarantee freedom of expression. Let us focus on them.

3.1 Article 10 of the ECHR

Article 10(1) ECHR protects the freedom of expression, comprising the freedom to hold opinions and to receive and impart information and ideas without interference by States (Di Stasi, 2022, 27-28; Grabenwarter, 2014, 252; Mowbray, 2007, 623; Thorgeirsdóttir, 2005, 25; Ridola, 2001, 337). All forms of expression are included, through any medium: this means also via TV and radio interviews, as well as internet (Bychawska-Siniarska, 2017, 11; Rainey et al., 2014, 435).¹³ However, as stated expressly in the wording of Article 10(2) and by the European Court of Human Rights (“ECtHR”), free expression, particularly through the media, is a strong tool, carrying special duties and responsibilities (Oetheimer and Cardone, 2012, 397). While it is critical to protect the right to freedom of expression because of its ability to promote democracy, uncover abuses, and advance political, artistic, scientific, and commercial development, it is also critical to recognise that free expression can be used to violate individual privacy and safety (McGonagle and Andreotti, 2016, 15; Smeth, 2010, 187; Barendt, 2009,

¹¹ *Axel Springer AG v. Germany*, 2012 Eur. Ct. H.R. ¶ 79 (2012); *Pedersen and Baadsgaard v. Denmark*, 2004-XI Eur. Ct. H.R. ¶ 71 (2004); *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. ¶¶ 59 and 62 (1999).

¹² *Magyar Helsinki Bizottság v. Hungary*, 2016 Eur. Ct. H.R. ¶ 109 (2016).

¹³ *Ahmet Yildirim v. Turkey*, 2012 Eur. Ct. H.R. ¶ 54 (2012).

52).¹⁴ Substantive and procedural rules, as dealt with in the case law of the ECtHR (Spatti, 2020, 363),¹⁵ attempt to find a reasonable balance between these opposing interests (Barendt, 2007): for instance, the rules on limitation periods in libel actions that shall be respected by who wants to seek protection for an alleged reputational harm;¹⁶ or the rules on the criteria and procedure for determining the amount of compensation,¹⁷ that should not result in an unreasonably high compensation, in order to avoid an imbalance¹⁸ between the two sides at stake (Franzina, 2021, 808).

In addition to the State's essentially negative duty to refrain from interfering with Convention guarantees (Teitgen, 1993, 3), States are required to take measures to defend these freedoms (Stoyanova, 2023, 7; Pisillo Mazzeschi, 2020, 63; Lavrysen, 2013, 162; Xenos, 2012, 57; Dickinson, 2010, 203; Mowbray, 2005, 78; Bestagno, 2003, 29; Spielmann, 1998, 134; Dijk, 1998, 17; Sudre, 1995, 364; Malinverni, 1995, 125). Such positive obligations under Article 10 arise when private individuals obstruct the enjoyment of the rights protected (McGonagle, 2016, 9; Franchi and Viarengo, 2016, 257; Schabas, 2015, 453; Mowbray, 2004, 192).¹⁹ States are

¹⁴ These rights merit, in principle, equal respect: see *Hachette Filipacchi Associés (Ici Paris) v. France*, 2009 Eur. Ct. H.R. ¶ 41 (2009); *Mosley v. The United Kingdom*, 2011 Eur. Ct. H.R. ¶ 58, 111 (2011); *Von Hannover v. Germany (n. 2)*, 2012 Eur. Ct. H.R. ¶ 106 (2012); *Haldimann and others v. Switzerland*, 2015 Eur. Ct. H.R. ¶ 54 (2015); *Couderc and Hachette Filipacchi Associés v. France*, 2015 Eur. Ct. H.R. ¶ 91 (2015); *Rubio Dosamantes v. Spain*, 2017 Eur. Ct. H.R. ¶ 30 (2017); *Gra Stiftung Gegen Rassismus und Antisemitismus v. Switzerland*, 2018 Eur. Ct. H.R. ¶ 55 (2018).

¹⁵ The balancing activity between the right to information and the right to privacy must be founded on an assessment of a number of factors: the ability of the news, or image, to contribute to a public debate; the notoriety of the person involved and the subject of the news; the subject's previous behaviour; the methods by which the information was obtained and its veracity; the content, form, and impact of the publication; and the gravity of the sanctions imposed.

¹⁶ *Times Newspapers Ltd (nos. 1 and 2) v. The United Kingdom*, 2009 Eur. Ct. H.R. ¶ 45-46 (2009).

¹⁷ *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, 2005-V Eur. Ct. H.R. ¶ 119-124 (2005).

¹⁸ *MGN Limited v. The United Kingdom*, 2011 Eur. Ct. H.R. ¶ 201 (2011).

¹⁹ *Palomo Sánchez and others v. Spain*, 2011 Eur. Ct. H.R. ¶ 58-62 (2011); *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, 2009 Eur. Ct. H.R. ¶ 78-82 and 91 (2009); *Khurshid Mustafa and Tarzibachi v. Sweden*, Eur. Ct. H.R. ¶ 31-32 (2008); *VgT Verein Gegen Tierfabriken V. Switzerland*, 2001-VI Eur. Ct. H.R. ¶ 45 (2001); *Guerra and Others v. Italy*, 1998-I Eur. Ct. H.R. ¶ 52 (1998). *Contra*, in the past, *Gaskin v. The United Kingdom*, A160 Eur. Ct. H.R. ¶ 52 (1989).

required to put in place an effective system to protect authors and journalists (Zagrebel'sky, 2022, 382; Parmar, 2016, 33), as well as to create an environment that encourages all persons involved to participate in public debate without fear of repercussions for expressing and holding opinions that are contrary to both the views of the State authorities and private parties.²⁰

This is clearly referred to by the ECtHR in the *Özgür Gündem* case,²¹ when stating that genuine, effective exercise of this freedom does not rely just on the State's obligation not to intervene, but may necessitate positive measures of protection, even in the realm of relations between individuals. And when it is known that a journalist faces a real risk to his life arising out of exercise of his freedom of expression, a positive obligation to take steps to protect him may arise. When establishing whether or not a positive obligation exists, a fair balance must be established between the general interests of the society and the interests of the individual, a quest for which is intrinsic throughout the Convention. The extent of this obligation will invariably vary due to the variety of conditions that exist in Contracting States, the challenges inherent in regulating modern societies, and the choices that must be taken in terms of priorities and resources. Finally, such an obligation must also not be understood in such a way that it imposes an impossible or disproportionate burden on the authorities (Reid, 2015, 654).²²

3.2 Article 11 of the Charter

The Charter dedicates to freedom of expression and information the Article 11, as interpreted by the Court of Justice of the European Union (“CJEU”),²³

²⁰ *Dink v. Turkey*, 2010 Eur. Ct. H.R. ¶ 137 (2010).

²¹ *Özgür Gündem v. Turkey*, 2000-III Eur. Ct. H.R. ¶ 43-46 (2000); *mutatis mutandis*, *X and Y v. the Netherlands*, 91 Eur. Ct. H.R. (ser. A) ¶ 23 (1985).

²² *Rees v. the United Kingdom*, 106 Eur. Ct. H.R. (ser. A) ¶ 37 (1986); *Osman v. the United Kingdom*, 1998-VIII Eur. Ct. H.R. ¶ 116 (1998).

²³ C-163/10, *Criminal proceedings against Aldo Patriciello*, EU:C:2011:543, ¶ 31; C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, EU:C:2014:238, ¶ 28; C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, EU:C:2016:970, ¶ 93, 101; C-516/17, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:625, ¶ 45; C-511/18, C-512/18 and C-

which is both traditional and innovative. It is traditional in that it assumes the approach taken by prior international conventions on the issue of extending protection to the various components of the freedom in question; indeed, it includes freedom of opinion and freedom of information, the latter both on the "active" side (freedom to communicate information) and on the "passive" side (freedom to receive information) (Piroddi, 2014, 1693). However, it is innovative in that, for the first time in a supranational legal instrument dedicated to fundamental rights, it makes an explicit reference to the freedom and pluralism of the media (Strozzi, 2017, 217).

What is noteworthy about this Article is its horizontal dimension (Gallo, 2018, 333; Walkila, 2016, 261; Leczykiewicz, 2013, 479).²⁴ Without going into the details on the discussed topic of the direct horizontal effect of the rights granted under the Charter (Nascimbene, 2021, 81; Lazzarini, 2022, 173; Vial, 2020, 377; Pollicino, 2018, 263; Dittert, 2014, 177; Platon, 2014, 33),²⁵ the attitude of whether this fundamental right should be applicable solely against the State or whether it can also have application between private actors is to be stressed out. The choice is normally conceptualized in terms of whether the rights-based Charter should only have a vertical application as between individual and State, or whether it can also have a horizontal dimension between private parties (Frantziou, 2019, 82). With

520/18, *La Quadrature du Net and Others v Premier ministre and Others*, EU:C:2020:791, ¶ 113.

²⁴ C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317.

²⁵ C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709, ¶ 75-78; C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, EU:C:2010:21, ¶ 20-27, 43, 50-51, 56; C-447/09, *Reinhard Prigge and Others v Deutsche Lufthansa AG*, EU:C:2011:573, ¶ 63, 76; C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2, ¶ 42-51; C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278, ¶ 22-37; C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871, ¶ 62; C-619/16, *Sebastian W. Kreuziger v Land Berlin*, EU:C:2018:872, ¶ 29; C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874, ¶ 49-57; C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, ¶ 49, 55; C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43, ¶ 76; C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, EU:C:2019:402, ¶ 38, 60, 65.

respect to the effect of Article 11 of the Charter on a counterparty who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility (Lazzerini 2018, 126).²⁶ Indeed, the fact that certain provisions of EU primary law are addressed principally to the Member States does not preclude their (direct) application to relations between individuals.²⁷ Next, the CJEU has, in particular, held on a case by case basis that the provisions laid down under the Charter could be sufficient in themselves to confer on individuals a right which they may rely on as such in a dispute with another individual,²⁸ without, therefore, Article 51(1) of the Charter preventing it. And it could not be otherwise: it is essential that the interpretation of the scope of these rules is aimed at achieving the useful effect of their provisions (Ruggeri, 2018, 317); if not, the genuine and effective exercise for instance of the freedom of expression would be deeply undermined.

4. The Anti-SLAPPs Directive

At the European level, the necessity to respond to the sort of dissuasive practises caused by SLAPPs has primarily resulted in a number of positions expressed by the Council of Europe's Committee of Ministers²⁹ and

²⁶ *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (n 25), ¶ 87.

²⁷ *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (n 25) ¶ 77.

²⁸ *Ibidem* ¶ 76.

²⁹ See, in particular, the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression, in *Council of Europe*,

Parliamentary Assembly³⁰. Their aim is to call on States to ensure, *inter alia*, that their defamation laws are in line with European and international standards, that prison sentences for press offences are only used in exceptional circumstances, and that they take the necessary steps to prevent the malicious use of the law and legal process to intimidate and silence journalists. And another relevant regional organisation active in protecting the freedom is the Organisation for Security and Co-operation in Europe (OSCE). It has a special focus on freedom of the media and internet freedom, based on the consideration of the right to disseminate and to receive information as a basic human right.³¹

Then, to face (and fight) rising concerns about the incidence of SLAPP lawsuits within the EU, the European Commission declared its intention to launch an initiative against abusive litigation targeting journalists and rights

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805ca6ce, and the Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, in *Council of Europe*, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14.

³⁰ See, *inter alia*, the Resolution 1577 (2007) and the Recommendation 1814 (2007), Towards decriminalisation of defamation, in *Council of Europe*,

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>,

and <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>;

the Recommendation 2111 (2017) and Resolution 2179 (2017), Political influence over independent media and journalists, in *Council of Europe*,

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23990&lang=en>

and <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23989&lang=en>;

the Resolution 2212 (2018), The protection of editorial integrity, in *Council of Europe*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24734&lang=en>;

the Resolution 2213 (2018), The status of journalists in Europe, in *Council of Europe*, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24735&lang=en>;

the Resolution 2317 (2020), Threats to media freedom and journalists' security in Europe, in *Council of Europe*,

<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28508&lang=en>;

the Motion for a resolution, Countering SLAPPs: an imperative for the democratic society, in *Council of Europe*,

https://pace.coe.int/en/files/29597/html?__cf_chl_tk=PirvLHUm.ji0lhu6AxVQNdp9aDQYpB381FoubyMa2pI-1644511326-0-gaNycGzNCVE.

³¹ See, in particular, Amsterdam Recommendations on Freedom of the Media and the Internet (2003), <https://www.osce.org/files/f/documents/4/a/41903.pdf>; the Representative on Freedom of the Media at <https://www.osce.org/representative-on-freedom-of-media>, whose activities include efforts to ensure the safety of journalists, and related Joint Declarations on freedom of expression.

defenders in its 2021 work programme,³² under the priority “A New Push for European Democracy”. This objective was reaffirmed in the European democracy action plan,³³ which revealed numerous upcoming ideas to create a more robust EU democracy, including two crucial actions to combat SLAPPs: a) forming an expert committee comprised of legal practitioners, journalists, academics, and civil society members to collect expertise; and b) launching an endeavour to defend journalists and civil society from SLAPPs. Despite being expected in late 2021, the European Commission initiative to protect journalists and civil society from SLAPPs was presented on 27 April 2022 in the form of a proposal for a Directive, i.e. the anti-SLAPPs Directive.

The anti-SLAPPs Directive is based on Article 81(2)(f) of the Treaty on the Functioning of the European Union (“TFEU”),³⁴ which serves as the legal basis for cross-border judicial cooperation in civil matters. The proposal was accompanied by a staff working document,³⁵ which stated that the proposal aimed to provide domestic tribunals and courts with the necessary tools to deal with SLAPPs having a cross-border dimension, as well as to protect journalists, activists, and human rights defenders, and anyone acting as a public watchdog in general. The initiative also intends to gather data on SLAPPs in a more systematic manner, improve SLAPP awareness among experts, and assist victims. The anti-SLAPPs Directive consists of six

³² European Commission, Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2021. A Union of Vitality in a World of Fragility, in *European Commission*, eurlex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_2&format=PDF.

³³ 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.

³⁴ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

³⁵ Commission Staff Working Document analytical supporting document accompanying a 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”) and a Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”), SWD/2022/117 final.

chapters: the first on general provisions; the second on common rules on procedural safeguards; the third on early dismissal of manifestly unfounded court proceedings; the fourth on remedies against abusive court proceedings; the fifth on protection against third-country judgements; the sixth on final provisions (Requejo Isidro, 2022).

Because the anti-SLAPPs Directive is only applicable to cross-border civil SLAPPs, it was accompanied with a non-binding recommendation³⁶ outlining suggestion for Member States to adopt adequate steps to handle with purely domestic SLAPPs based on Article 292 TFEU. Despite being limited to domestic SLAPP cases, the recommendation has a greater scope of application *ratione materiae* than the proposed anti-SLAPPs Directive. It not only urges Member States to align their civil procedural legislation with the proposed EU standards for domestic SLAPPs, but it also includes proposals on criminal law, data protection, and deontological rules guiding the behaviour of legal practitioners. In this trend, the recommendation calls on Member States to abolish prison sentences for defamation, preferring administrative or civil law to deal with defamation cases, to strike a fair balance between data protection rules and the protection of freedom of expression and information, and to ensure that deontological rules for legal professionals discourage SLAPPs. Furthermore, Member States under the recommendation are called to support SLAPP training for legal professionals, to ensure that SLAPP targets have access to individual and independent support, and to collect and report data on the number of SLAPPs initiated in their jurisdiction on a yearly basis beginning by the end of 2023. Member States are required to report on the recommendation's implementation to the European Commission by the same time, and it is for the European Commission to review the recommendation's impact no later than 5 years after its adoption and decide on the next steps.

³⁶ Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') C/2022/2428, OJ L 138, 17.5.2022, p. 30–44.

5. The Anti-SLAPPs Directive to the Test of Daphne Caruana Galizia and Other Cases

Rather than conducting an article-by-article theoretical analysis of the anti-SLAPPs Directive, a more practical one is preferred. And the prime case study is represented by Daphne Caruana Galizia.³⁷

She was editor of one of the most popular blogs in Malta,³⁸ engaged in numerous investigations and active against corruption. Her voice had attracted so much attention in the public debate that it disturbed politics and businessmen. On 16 October 2017, Daphne Caruana Galizia was murdered by an explosive device planted under her car seat outside her home in Malta. Her story has relevance as to SLAPPs because her life was continually destroyed by legal proceedings brought all over in the courts of the world to silence her. Just upon her death, over 47 pending cases resulted.

Via the online portal of the Daphne Caruana Galizia Foundation,³⁹ relevant SLAPPs cases involving the journalist are addressed in order to submit the anti-SLAPPs Directive to an effectiveness test: imagined it as approved and implemented in the EU Member States, this analysis aims at assessing, starting from these Daphne Caruana Galizia litigation cases, if and what could have changed.

The analysis will be dealt with referring to chapters of the anti-SLAPPs Directive.

5.1 General Provisions

Chapter one of the anti-SLAPPs Directive contains rules on the subject matter and the scope of the instrument, some definitions and a provision about when

³⁷ Daphne Caruana Galizia is one of the long series of activists interested by SLAPPs. For a reconstructive database, see at <https://www.business-humanrights.org/en/from-us/slapps-database/>.

³⁸ Daphne Caruana Galizia blog is available at <https://daphnecaruanagalizia.com/>.

³⁹ The website of the Daphne Caruana Galizia foundation is available at <https://www.daphne.foundation/en/>.

a matter is considered to have cross-border implication for the purposes of the anti-SLAPPs Directive.

So, let us consider a case in Daphne Caruana Galizia activities which can be useful to deal with the latter aspects. And the case is represented by the claims carried out by Edgar Bonnici Cachia.⁴⁰ He has been a politician, a Former Labour candidate in the 1981 general elections in Malta. Daphne Caruana Galizia, via her blog site daphnecaruanagalizia.com, had begun to interest in him and his dark past life mainly in three notes, which resulted in three posts. They were about his criminal record: in the past, indeed, he was convicted for defrauding an old lady under his care; he had been jailed in Egypt in the 1980s for his part in a plot to murder the Libyan Prime Minister of the time, Abd al-Hamid al-Bakush, parallel to the Mu'ammar Gheddafi leading Lybia; finally, he was condemned for unpaid bills. To clean up his public image, he filed a complaint to the Maltese Police for these three libels cases requesting a criminal sanction for Daphne Caruana Galizia, being at that time libel a criminal offence under Maltese Press Act.

These three cases seem to fall within the definitions under the anti-SLAPPs Directive. Indeed, first and foremost, “public participation” in Daphne’s activism is at stake, which includes any statement or activity, such as blog posts, made or carried out by her in the exercise of the right to free expression and information on a matter of public interest, as well as any preparatory, supporting, or assisting action directly related thereto. Then, the information reported by Daphne's also are a “matter of public interest”, since they affect the public to such an extent that the public may legitimately take an interest in it, in areas such as the Edgar Bonnici Cachia activities under public consideration by judicial body; they would have be relevant also in cases of

⁴⁰ These three claims resulted in judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 1/15, 16 November 2016, MT:LBL:2016:103516; judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 2/15, 16 November 2016, MT:LBL:2016:103517; judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 4/15, 16 November 2016, MT:LBL:2016:103518. These judgements are available at Sign In - eCourts.gov.mt.

consideration and review by other State function or if related to public health, safety, the environment, climate or enjoyment of fundamental rights, or if concerned allegations of corruption, fraud or criminality or, finally, if activities aimed to fight disinformation. Lastly, the lawsuits filed appear to be “abusive court proceedings against public participation” in so far as they are completely or partially unfounded, being this information relating to Edgar Bonnici Cachia derived from his criminal record, and have the primary goal of preventing, restricting, or penalising public involvement. And indications of such a purpose can be the disproportionate, excessive or unreasonable nature of the claim, such as the criminal one; the existence of multiple proceedings, exactly three, initiated by him in relation to similar matters; intimidation, harassment or threats on the part of the claimant.

However, in these three libel cases it is possible to deduct that the anti-SLAPPs Directive would have no impact. Indeed, the anti-SLAPPs Directive shall apply only to civil or commercial matters, whatever the nature of the court or tribunal, not in criminal issues. As a result, the problem arises to the extent that proceedings relating to defamation can be both civil and criminal in nature. They are governed differently from the substantive point of view by the civil or criminal legislation of the considered Member State. The anti-SLAPPs Directive does not cover all of them, but only those with a civil nature. And not even all the civilian ones but only those having cross-border implications: so, according to the anti-SLAPPs Directive, if at least one of the party is domiciled in another Member State other than that of the court seized; or, failing this, if the act of public participation relates to a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or if the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State. However, this is due to a competence issue: the EU legislator can intervene, under Article 81 TFUE as legal basis on judicial cooperation in civil matters, only in situations having cross-border elements, not in those domestic that are purely internal one. It derives that

these exclusions, both the criminal cases and the civil domestic ones, are a relevant obstacle for the anti-SLAPPs Directive to achieve, at the end, its final objectives.

It is paradoxically, then, that the anti-SLAPPs Directive, named the "Daphne's law" because inspired by her story, would not have protected her. However, there are other cases falling within the aforementioned cross-border meaning where the anti-SLAPPs Directive could have played a role. With reference to the case in which both parties are not domiciled in the same Member State as the court seized, an example is represented by *T&F Trade and Finance v Kyrgyzstani news website 24.kg*.⁴¹ A civil lawsuit was brought against Kyrgyzstani news website 24.kg in relation to an article discussing the breakdown of a business partnership in Kyrgyzstan. One of the companies named in the article, T&F Trade and Finance, argued that 24.kg's claims that they were 'pseudo investors' were defamatory, but instead of pursuing legal action in Kyrgyzstan, in the wake of a "libel tourism" practice, a civil law suit was filed in Austria, where T&F Trade and Finance is registered. Or again, in the event of both parties domiciled in the same Member State as the court seized, the cross-border implication of the act of public participation concerning a matter of public interest relevant to more than one Member State occurs, for instance, in claims against climate change and human rights activists. The anti-SLAPPs Directive could play a role in this context too and there are many cases to refer to:⁴² German coal giant RWE tried suing for 50,000 Euros Ende Gelände, a 24-year-old climate activist for saying coal mines have to be stopped to address the climate crisis; or in Portugal Eucalyptus pulp producer Celtejo who sued activist Arlindo Marquês over accusations that the company pollutes the Tagus River, claiming for 250.000 Euros for compensation; or again in Spain the industrial meat producer Coren

⁴¹ Judgement of Handelsgericht Wien [Commercial Court, Vienna], *T&F Trade and Finance v Kyrgyzstani news website 24.kg*, 25 March 2019.

⁴² For an overview map and cases details, Greenpeace (2020), *Sued Into Silence. How the rich and powerful use legal tactics to shut critics up*, <https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>.

sued activist Manuel García demanding 1 million Euros in damages for saying the company's poor livestock waste management was polluting As Conchas reservoir. Or again, in the event of domicile in the same Member State as the court seized, the cross-border implication in the strategy of filing concurrent court proceedings against the same or associated defendants in another Member State is no less relevant. This occurs on the one hand by initiating separate claims against the journalist and against the newspapers where he published or against the activist and the related NGO; on the other hand, by multiplying the number of claims grounding them on different causes of action. A relevant example, in this sense, is the massive use of claims by Kingdom of Morocco, who filed multiple civil defamation lawsuits before French, German, and Spanish courts against NGOs, newspapers, radio broadcasters and individual journalists and reporters after they published investigative work alleging that the Moroccan administration used Pegasus spyware to spy on the mobile phones of politicians, journalists and activists.⁴³

To get a clearer idea on the subject matter and scope issue, a 2021 comparative study (Bayer, 2021), funded by the European Commission, examined the legal environment of SLAPPs throughout the EU and its Member States, revealing a patchwork picture at the national level. On the one hand, indeed, according to the study, all but six Member States criminalise defamation, and the sanction can be imprisonment in all but one of those. Criminal defamation is said to be more regularly utilised to safeguard one's reputation in ten Member States than civil defamation. And eight Member States continue to impose harsher penalties for public dissemination, notably for the press. On the other, anti-SLAPP legislation is not (so) developed at EU level. The situation at domestic level is similar. According to the staff working document accompanying the anti-SLAPPs Directive, none of the EU Member States have specific safeguards against SLAPPs, and only three of them (Ireland, Lithuania and Malta) were

⁴³ For a brief reference, see The Case (2022), *The European Slapp Contest 2022*, in *The Case*, <https://www.the-case.eu/latest/the-european-slapp-contest-2022/>.

considering (and were about to) the introduction of specific measures to address SLAPPs.

Despite these two important gaps in order the freedom of expression to achieve a full protection, in relation to the criminal relevance it is to be noted that the real “challenge” is played in the civil field, not in the criminal one. In the latter, the public prosecutor indeed guarantees and restores that missing balance between parties. While in relation to domestic cases, falling outside the anti-SLAPPs Directive, it is to be highlighted that Member States are recommended to deal also with them in a way comparable as to the cross-border ones. SLAPP cases in which the defendant is domiciled in a State other than that of the court seized are a relatively small part of the total amount of SLAPP cases documented in Europe (11% of the total documented⁴⁴ from 2010 to 2021, according to the Coalition against SLAPPs in Europe); although, cases dealt with under the anti-SLAPPs Directive, due to the complexities arising out of the cross-border element, are the ones with the major capacity to harm the victim of these abusive proceedings.

Needless to say, the three criminal proceedings under consideration in this paragraph ended up with three judgements in favour of Daphne Caruana Galizia.

5.2 Common Rules on Procedural Safeguards and Remedies Against Abusive Court Proceedings

Chapter two of the anti-SLAPPs Directive contains horizontal provisions on the application for procedural safeguards, its content and other procedural features; while chapter four contains rules on award of costs, compensation of damages and penalties.

Let us consider another case in Daphne Caruana Galizia's activism that might be suited in having a beneficial thanks to the anti-SLAPPs Directive on the latter components. Four lawsuits have been filed against the blogger

⁴⁴ Bonello Ghio R., and Nasreddin D. (see note 26).

before the Civil Maltese Courts by two politicians: the deputy leader of the Labour Party and Minister of the Economy, Christian Cardona, and his EU presidency policy officer, Joseph Gerada.⁴⁵ They claim libel damages because of the posts that were published on her website. Those articles reported that both men had been in a brothel, a place for having sex by payment, in Velbert, Germany, just a week before while they were on an official business journey representing the government of Malta as guests of the German government. What is interesting about these cases is that the desire for revenge of these two men was very high. So, they put pressure on her on the economic side. They request the court to order the exceptional measure of precautionary warrants on Daphne's assets. In civil procedure, a precautionary warrant is a sum of money which, upon request of one party and order of the court, must be set aside and becomes not available until a new order or the final judgement; its objective is to anticipate the final judgment on the merits, just for a certain period of time, and, once defined, to ensure that it will be possible to enforce it. As a result, Daphne bank accounts were frozen for 47.460 Euros. This measure paralyzed her life, causing her family lots of problem. And it is precisely the nature of SLAPP that has revealed in these cases. Indeed, these two men reached their objective, that is to silence public participation. Caruana Galizia, family in this case, stopped from presenting the evidence of these two men entering and being in that brothel in Germany. And this proceeding lasted just for the time period of interest by the abusive litigants: these two men, then, satisfied and therefore no longer interested in, simply withdrew their libel requests before court or, anyway, they remained inactive.

The impact of the anti-SLAPPs Directive is very relevant on the economic and support side to these cases, imagining they fall within its scope of application.

⁴⁵ These proceedings (Christian Cardona v. Caruana Galizia Daphne Anne and Joseph Gerada v. Caruana Galizia Daphne Anne) before the Maltese courts are registered as no. 29/2017, 30/2017, 31/2017, 32/2017; the precautionary warrants proceedings are registered as no. 34/2017, 35/2017, 36/2017, 37/2017. However, they seem not accessible at Sign In - eCourts.gov.mt.

It provides for two main tools during the proceeding. The first consists in providing court seized with the option of allowing that NGOs safeguarding or promoting the rights of persons engaging in public participation may take part in proceedings, either in support of the defendant or to provide information. And Daphne, considering this possibility, would certainly have benefited. The second is that the court is empowered to require the claimant to provide security for procedural costs, or for both procedural costs and damages, if the court considers such security appropriate in light of the presence of elements indicating abusive court proceedings and the likelihood of success in the main proceedings is low. And even with this instrument, claimants in these proceedings against Daphne would have had to provide for sums of money during the litigation, thus involving a beginning reflection in deciding carefully whether to file them.

Additionally, the anti-SLAPPs Directive also includes a set of crucial instruments after the conclusion of the proceeding. In relation to award of costs, a claimant who has started a SLAPPs case may be required to cover all the costs of the proceedings, including the defendant's entire legal representation costs. The two politicians, therefore, perhaps would have made different assessments whether to file or not the lawsuit and, in the case of filing, they would have had to indemnify Daphne from all the costs. And the provision on compensation for damages also helps in the dissuasive purpose on the claimant side, by providing that the person who has suffered harm as a result of an abusive court proceedings against public participation shall be able to claim and to obtain full compensation for that harm. And if that weren't enough, the rule on the penalties matter also comes to the rescue, which provides that the author of this abusive litigation will incur in effective, proportionate and dissuasive penalties because of the filing of this proceeding. Finally, subsequent amendments to the claims or the pleadings made by the claimant in the main proceedings, including the discontinuation of proceedings, would not do to circumvent all this legal framework.

From this overview on chapters two and four, as referred to the cases considered, it is evident that the anti-SLAPPs Directive would certainly provide an effective and efficient corrective in countering this type of abusive proceedings. The economic aspect, and related assistance and support, is, indeed, a critical component for the success of these lawsuits. Indeed, even if in only twenty Member States the losing party pays the legal cost of civil proceedings, this normally takes the form of a refund and may be obtained years after the final ruling on the merits.⁴⁶ Furthermore, legal aid is provided in twenty Member States for civil defamation claims, but many SLAPP targets cannot benefit from this type of assistance, given the restrictive and narrow scope of the conditionality criteria that apply.⁴⁷ Therefore, the anti-SLAPPs Directive, taking all this in account, precisely addresses this point.

5.3 *Early Dismissal of Manifestly Unfounded Court Proceedings*

Chapter three of the anti-SLAPPs Directive contains provisions on requirements and procedural safeguards to grant an early dismissal in court proceedings that are manifestly unfounded.

Let us consider another case in Daphne Caruana Galizia's work that might be interested of an improvement via the anti-SLAPPs Directive on the time element. Mark Gaffarena has filed a libel lawsuit against Daphne Caruana Galizia following an article on her blog.⁴⁸ In this post, Daphne Caruana Galizia insinuated he was trafficking drugs in partnership with Antoine Azzopardi, who runs in Malta his restaurant located in a problematic area because without public authorization. Corruption with public officials is involved too. Because of the defamatory nature of these statements, Mark Gaffarena claimed for damages before the Maltese Courts. The proceeding

⁴⁶ Bayer J., Bárd P., Vosyliute L., and Luk N.C. (2021). Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study - EU-CITZEN: Academic Network on European Citizenship Rights, in *European Commission*, https://commission.europa.eu/system/files/2022-04/slapp_comparative_study_0.pdf, 59.

⁴⁷ *Ibidem*.

⁴⁸ This lawsuit resulted in the judgement of the Court of Magistrates (Civil Judicature), *Mark Gaffarena vs Daphne Caruana Galizia*, 174/15, 20 February 2017, MT:CIV:2017:104975.

started on 17 June 2015 and was closed by the judgement on 20 February 2017 with a final decision in favour of Daphne Caruana Galizia, since the proceeding filed by Mark Gaffarena has been considered unfounded. Nevertheless, Daphne Caruana Galizia had to wait about two years with this proceeding pending, before the declaration of the groundless by the court.

The impact of the anti-SLAPPs Directive is also relevant on the time factor to such cases, where they fall within its scope of application.

It provides that early dismissal is granted where the claim presented against the defendant is manifestly unfounded, in whole or in part; Member States may impose time restrictions on exercising the right to file an application for early dismissal that are appropriate and do not render such exercise impossible or too burdensome. If the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken. As a result, an application for early dismissal is treated in an accelerated procedure, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial; to guarantee maximum expediency in the accelerated procedure, Member States may specify time restrictions for hearings or for the court to take a decision, as well as procedures for interim measures. Where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded; however, it does not imply a restriction on access to justice, given that the claimant bears the burden of proof regarding that claim and only needs to meet the much lower threshold of demonstrating that the claim is not manifestly unfounded to avoid an early dismissal. Finally, a decision refusing or granting early dismissal shall be ensured to an appeal.

All these possibilities regarding the time issue certainly affect SLAPPs cases, such as the one major under analysis. Daphne Caruana Galizia had to wait around two years for the final decision on the merits. With these rules, on the other hand, it would have taken limited time, in cases of groundlessness like these, to obtain an early dismissal, in an accelerated procedure and with the burden of proof upon the claimant. And if in this proceeding she had to

wait a few years, there were other SLAPPs cases that affected her where the waiting years have been enormously higher.⁴⁹ And waiting a pending proceeding is dangerous: because it causes anxiety for the defendant, it involves spending lots of money, it silences the journalist voices and, ultimately, it undermines public participation and democracy.

5.4 Protection Against Third-Country Judgements

Chapter five of the anti-SLAPPs Directive contains remedies to protect the defendant against abusive court proceedings brought in third countries' courts.

Let us consider a different case in Daphne Caruana Galizia's life that might be relevant to this issue. Pilatus Bank, and its majority shareholder Ali Sadr, sued Daphne Caruana Galizia in the US, precisely before the Arizona courts (Borg-Barthet et al. 2021, 35).⁵⁰ The lawsuit arose from the statements made by the defendant, Daphne Caruana Galizia, about the claimants on her blog, which they regarded untrue and defamatory: the statements are related to circumstances that essentially occurred in Malta and were presented by the journalist as relevant to the island's political life, such as the fact that the bank's staff had received orders from its top management to hide certain information to Maltese enforcement authorities on money laundering. The decision to file the lawsuit in Arizona, i.e. in a forum wholly unconnected to the subjective or objective elements of the dispute, may be part of the claimants' dissuasive strategy. Pilatus and his shareholder justified the jurisdiction of the Arizona courts by relying on the choice-of-court agreement contained in the general terms and conditions of the hosting services company

⁴⁹ Let us consider, for instance, the case before the Civil Court, First Hall, Malta, *Vella Dr Mario Et Noe vs Caruana Galizia Daphne*, no. 1934 / 1999 / 1, which has been registered in 1999 and is pending still today; after continuous referrals, a final judgement is awaited. But there are lots of other examples as well: the case before the Court of Magistrates (Civil Judicature), Malta, *Mizzi Dr Konrad et vs Caruana Galizia Daphne*, no. 365 / 2014, pending since 2014, or the case before the Court of Magistrates (Civil Judicature), Malta, *Gambin Lindsey vs Caruana Galizia Daphne*, no. 366 / 2014, pending since 2014.

⁵⁰ Superior Court of Arizona, County of Maricopa, or Maricopa County Superior Courts, *Pilatus Bank PLC and Ali Sadr v. Daphne Caruana Galizia*, 23 October 2017, no. [...]7457.

(GoDaddy.com LLC) - based in Phoenix, to be precise – used by the journalist (like thousands of other bloggers around the world) to run her blog. Leaving aside this groundless legal reasoning on jurisdiction, by choosing Arizona as where to litigate, the claimants wanted to attract Daphne Caruana Galizia to a forum in which she would probably have struggled to defend herself, due to the geographical distance, to the high costs of legal assistance and to the difficulty of giving an account of the complex political and economic events to a court completely alien to the Maltese environment. A forum, furthermore, where the defendant would have been exposed to more serious consequences than she might have faced if a comparable proceeding had been started elsewhere. And, finally, a forum where claimants sought the Arizona courts, *inter alia*, that the journalist to be ordered to pay a sum for punitive damages.

The impact of the anti-SLAPPs Directive is also relevant in this protection needed against third-country judgements.

It requires Member States to ensure that the recognition and enforcement of a third-country judgment in court proceedings arising from public engagement by a person domiciled in a Member State is refused as manifestly contrary to public policy if those claims would have been deemed clearly unfounded or abusive if brought before the courts of the Member State where recognition or enforcement is sought and those courts would have applied their own law (Kohler, 2022, 817). This would undoubtedly provide protection to the activist victim of this litigation such as Daphne Caruana Galizia: imagining the proceeding in the third country going on, and ultimately a possible decision ordering to pay for damages, the latter would not be recognised and enforced in the Member State where that person is domiciled, such as Malta, i.e. where her assets may be located that creditors would like to foreclose.

In addition, Member States are required to provide for an additional remedy against a third-country judgement. Where abusive court proceedings against public participation have been brought against a person domiciled in a Member State in a court of a third country, that person can claim for the

damages and the costs incurred in connection with the litigation before the court of the third country, irrespective of the domicile of the claimant in the proceedings in the third country (Kohler 2022, 818). This tool creates a new special ground of jurisdiction in order to ensure that targets of abusive litigation who are domiciled in the EU have an efficient remedy available in the Member States against abusive court proceedings brought in a third country court. This remedy has a significant impact as well: being able to claim for both compensation and costs for these abusive third country proceedings directly ‘at home’ facilitates the victim. Daphne Caruana Galizia might simply resort to the Maltese court, rather than filing a new and additional lawsuit in a third country. And the benefits are numerous: economically; then, in terms of direct managerial profile of the dispute; ultimately, also in relation to the legal expertise about the claim.

6. A Broader Look at Other Human Rights Protection Systems and Anti-SLAPPs Legislations in the World

The ECHR system on the human rights protection, such as for the right to the freedom of expression, is not the only one; in parallel, other human rights protection systems come to the attention. Likewise, the anti-SLAPPs Directive is not the legislation that first tries to discipline this issue in the world, since there are other previous and parallel ones.

As a result, to better evaluate the protection of the freedom of expression in cases of SLAPP within the European territory, a look at other human rights protection systems is appropriate; equally, then, a framework on other anti-SLAPPs legislation in the world can be helpful to be addressed.

6.1 Freedom of Expression (and SLAPPs) in Other Human Rights Protection Systems

The institutional reality of internationally recognized human rights is today organized in a “universal system”, managed by the United Nations (“UN”),

and in "regional systems", operating in the functional sphere of regional organizations such as the Council of Europe, the Organization of American States, the African Union and the League of Arab States (Zanghì and Panella, 2019, 145; Pisillo Mazzeschi, 2021, 179).

Within the universal system, the right to freedom of expression is protected under Article 19 of the Universal Declaration of Human Rights ("UDHR") (Brown, 2021, 81; Hannikainen and Myntti, 1993, 275)⁵¹ and under Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") (O'Flaherty, 2012, 636; Joseph and Castan, 2013, 18.22-7),⁵² as monitored by the Human Rights Committee ("HRC").⁵³ These rights can be subjected only to restrictions which are prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others (Ciampi, 2017, 2). Resolution 24/5 of the Human Rights Council⁵⁴ stresses that "(...) respect for the[se] rights to freedom (...), in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as the environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights". It also reminds States of "their obligation to respect and fully protect the rights of all individuals (...), and to take all necessary measures to ensure that any restrictions on the free exercise of the[se] rights to freedom (...) are in accordance with their obligations under international human rights law". The imperative of the obligations to respect and protect these rights is underscored

⁵¹ Universal Declaration of Human Rights, Paris, Dec. 10, 1948.

⁵² International Covenant on Civil and Political Rights, New York, Dec. 16, 1966.

⁵³ *Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993(1996) HRC (1996), ¶ C.8; *Gauthier v. Canada*

U.N. Doc. CCPR/C/65/D/633/1995 HRC (1999); *Mohamed Rabbae v. The Netherlands*, U.N. Doc. CCPR/C/117/D/2124/2011 HRC (2016), ¶ 10.4; *Claudia Andrea Marchant Reyes and Others v. Chile*, U.N. Doc. CCPR/C/121/D/2627/2015 HRC (2017), ¶ 7.4.

⁵⁴ Human Rights Council, Resolution 24/5. *The rights to freedom of peaceful assembly and of association*, UN Doc. A/HRC/RES/24/5, 8 October 2013, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G13/171/79/PDF/G1317179.pdf?OpenElement>.

by the “destruction of rights” provisions contained, *inter alia*, in Articles 30 of the UDHR and 5 of the ICCPR. In this framework, it is fundamental to recall the States’ positive obligation to facilitate the exercise of the right to freedom of expression which includes, among others, the duty to establish and maintain an enabling environment for civil society to operate freely.⁵⁵ To this end, the Committee on Economic, Social and Cultural Rights has developed the States’ obligation to protect individuals under their jurisdiction from interference by third parties in its General comment No. 24 (2017),⁵⁶ where it states that “the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners”. And precisely on the issue of SLAPPs, it specifies that “the introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation’s reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies”. This statement is based on the previous work set out by the Special Rapporteur on the situation of human rights defenders, where noted that “the consolidation of more sophisticated forms of silencing their voices

⁵⁵ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27, 21 May 2012, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

⁵⁶ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOUuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSubw6ujlnCawQrJx3hlK8Odk6DUwG3Y>.

and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalize and stigmatise their activities. These patterns not only endanger the physical integrity and undermine the work of human rights defenders, but also impose a climate of fear and send an intimidating message to society at large”.⁵⁷ This States’ duty is also recalled in a 2015 report by the former Special Rapporteur on the rights to freedom of peaceful assembly and association;⁵⁸ it insists on the duty of States to enact robust national laws that specify the rights and responsibilities of all, to establish independent and effective enforcement, oversight, and adjudicatory mechanisms, to ensure effective remedies for violations of rights, and to promote awareness of, and access to, relevant policies and practises related to natural resource exploitation. In the same line, according to a joint report of 2016, “business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit”.⁵⁹ Finally, in its Guidance on National Action Plans on Business and Human Rights, the Working Group on Business and Human Rights advised for States to establish anti-SLAPPs laws to guarantee that human rights defenders are not exposed to legal responsibility for their activities.⁶⁰

⁵⁷ Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/25/55, 23 December 2013, ¶ 59, <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>.

⁵⁸ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/29/25, 28 April 2015, ¶ 14, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=24900.

⁵⁹ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, 4 February 2016, ¶ 84, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/13/PDF/G1601813.pdf?OpenElement>.

⁶⁰ Guidance on National Action Plans on Business and Human Rights, United Nations Working Group on Business and Human Rights, December 2014, UNGP 25, p. 37, https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

Coming now to the regional human rights protection systems, one of them is represented by the African one (Centre for Human Rights 2021, 1). Under the aegis of the Organisation of African Unity, the concerned right to information and freedom of expression is dealt with in Article 9 of the African Charter on Human and Peoples' Rights ("ACHPR")⁶¹ (Evans and Murray 2008, 219),⁶² as interpreted by the African Court on Human and Peoples' Rights ("ACtHPR").⁶³ On the same line, under the aegis of the Council of the League of Arab States, Articles 30 and 32 of the Arab Charter on Human Rights ("ACHR")⁶⁴ protects the freedom of expression (Zerroughui, 2011, 7; Rishmawi, 2005, 361).⁶⁵

However, in relation to freedom of expression, and specifically SLAPPs, the inter-American regional system has gone farther. Within the framework of the Organization of American States, the American Convention on Human

⁶¹ African Charter on Human and Peoples' Rights (Banjul Charter), Nairobi, 27 June 1981.

⁶² On the relevance of the topic, see High Court of South Africa (Western Cape Division, Cape Town), *Mineral Sands Resources (Pty) Ltd et al. v. Christine Reddell et al.*, 9 February 2021, Case No 7595/2017. See also African Commission on Human and Peoples' Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR /Res.62(XXXII)02, 23 October 2002, <https://www.refworld.org/pdfid/51949e234.pdf>; African Commission on Human and Peoples' Rights, Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, Comm. No. 05/93, 128/94, 130/94 and 152/96, 1998, ¶ 54, <https://www.globalhealthrights.org/wp-content/uploads/2014/07/Media-Rights-Agenda-v.-Nigeria.pdf>; African Commission on Human and Peoples' Rights, The Law Offices of Ghazi Suleiman / Sudan, No. 228/99, 2003, ¶ 49-50, <http://hrlibrary.umn.edu/africa/comcases/Comm228-99.pdf>. See, also, in this framework, the Special Rapporteur on Freedom of Expression and Access to Information, whose works are available at <https://achpr.au.int/en/mechanisms/special-rapporteur-freedom-expression-and-access-information>.

⁶³ *XYZ v. Republic of Benin*, Afr. Ct. H P.R., App. No. 010/2020, ¶ 112 (Nov. 27, 2020); *Alex Thomas v. United Republic of Tanzania*, Afr. Ct. H P.R., App. No. 005/2013, ¶ 154 (Nov. 20, 2015); *Ingabire Victoire Umuhoza v. The Republic of Rwanda*, Afr. Ct. H P.R., App. No. 003/2014, ¶ 132 (Nov. 24, 2017); *Lohé Issa Konaté v. Burkina Faso*, Afr. Ct. H P.R., App. No. 004/2013, ¶ 145 (Dec. 5, 2014).

⁶⁴ Arab Charter on Human Rights, May 22, 2004.

⁶⁵ In this framework, see the Declaration on Media Freedom in the Arab World, 3 May 2016, https://www.ifj.org/fileadmin/user_upload/Arab-Declaration.Explanatory-Memo-EN.pdf; Cairo Declaration on Human Rights in Islam, 5 August 1990, <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/05/cairo-Declaration-on-Human-Rights.pdf>; UNESCO, General Conference - Twenty-ninth Session, Paris, 1997, Implementation Of 150 Ex/Decision 3.1, Part III, concerning The Sana'a Declaration, <https://unesdoc.unesco.org/ark:/48223/pf0000109085>.

Rights (“ACHR”)⁶⁶ (Medina Quiroga and David Contreras, 2022, 5) dedicates Article 13 to freedom of thought and expression (Hennebel, 2007, 559). If the content of the latter is based on the lines already analysed, what is noteworthy is the interpretation that the Inter-American Court of Human Rights (“IACtHR”) has made of it.⁶⁷ In the *Emilio Palacio Urrutia* case,⁶⁸ the IACtHR determined that the State of Ecuador infringed Emilio Palacio Urrutia and other people's right to freedom of expression, as protected under Article 13 of the ACHR. The IACtHR argued that the criminal convictions and civil sanctions imposed on the aforementioned individuals for the publication of the article ‘NO a las mentiras’, which criticised President Rafael Correa, were disproportionate and could have a chilling effect on the free exchange of ideas, opinions, and information. The IACtHR further determined that article was a kind of protected expression worthy of exceptional protection since it was an opinion piece regarding a public figure and an issue of public interest. In doing so, it further stated that the use of criminal defamation cases by public officials to silence criticism on subjects of public concern is a danger to free expression. For the first time, it noted that these forms of proceedings, known as SLAPPs, are an abusive use of judicial mechanisms that require regulation and control by States in order to ensure the effective exercise of freedom of expression. It emphasised the importance of reflecting on the need for (and importance of) anti-SLAPP measures as a means of avoiding strategic demands whose purpose is to censor critical opinion, as well as the need to continue strengthening the ACHR's robust protection of freedom of expression by fostering the protection of opinion speech and freedom of expression on matters of public

⁶⁶ American Convention on Human Rights (Pact of San José), San José, Nov. 22, 1969.

⁶⁷ “La Última Tentación de Cristo” v. Chile, Inter-Am. Ct. H.R., (ser. C) No. 73, ¶ 61-68 (Feb. 5, 2001); Lagos del Campo v. Peru, Inter-Am. Ct. H.R., (ser. N/A) No. N/A, ¶ 117 (Aug. 31, 2017); Herrera-Ulloa v. Costa Rica, Inter-Am. Ct. H.R., (ser. C) No. 107, ¶ 113 (Jul. 2, 2004); Bedoya Lima v. Colombia, Inter-Am. Ct. H.R., (ser. C) No. 431, ¶ 107 (Aug. 26, 2021); Mémoli v. Argentina, Inter-Am. Ct. H.R., (ser. C) No. 265, ¶ 123 (Aug. 22, 2013); Álvarez Ramos v. Venezuela, Inter-Am. Ct. H.R., (ser. C) No. 380, ¶ 100 (Aug. 30, 2019).

⁶⁸ Emilio Palacio Urrutia et al. v. Ecuador, Inter-Am. Ct. H.R., (ser. C) No. 446 (Nov. 24, 2021).

interest. As a result, this ruling reflects the IACtHR's first articulated approach in case law to conceptualising the obligation of States to defend freedom of speech through anti-SLAPPs measures or laws. In this way, it opens the door for the creation of procedural mechanisms that prevent lawsuits from silencing or disproportionately affecting those who are sued, especially journalists or the media. Therefore, even if Article 13 ACHR does not expressly provide for this obligation, it is essential that the interpretations of the scope of the ACHR is aimed at achieving the useful effect of its provisions.

After this overview on freedom of expression, and SLAPPs, in universal and regional human rights protection systems, the possibility arises as to their harmonisation of jurisprudence; furthermore, the extent to which the UN human rights treaty monitoring bodies and regional human rights courts and commissions have cited one another's jurisprudence/practice has been identified to this end in recent scholarship (Cheeseman 2016, 595). This harmonisation process would make it possible to benefit worldwide from the prevailing wisdom at the expense of fragmentation; it would ensure that universality which is at the core promise of human rights; it would avoid divergences, which only serve to undermine the protection; lastly, it would spread best reasoned jurisprudence. And precisely on the topic of SLAPPs it is even more appropriate: indeed, there are no reasons that justify a divergent treatment at different latitudes of the globe, since SLAPPs represent a generalized problem not coloured (and affected) by local particularisms.

6.2 Anti-SLAPPs Legislations in the World

The anti-SLAPPs Directive is not one of the first legislation that deal with the SLAPPs issue. Since this phenomenon was originally detected in the US, it is appropriate to have a look overseas.

An excellent comparative reference is represented by a new published report which evaluates and assesses the effectiveness of anti-SLAPP legislations in 37 jurisdictions of the world that provide for legal protection

against these abusive proceedings (Brander and Turk, 2023, 7).⁶⁹ The Centre for Free Expression, which oversaw the completion of this research, assessed and ranked every anti-SLAPP law considered based on a standard set of criteria. The strongest anti-SLAPP laws share several common features:

-a wide scope of application: effective anti-SLAPP rules apply extensively to any case involving expression on a public interest issue. The weakest legislations, on the other hand, are limited in scope, applicable exclusively to a single matter or to statements made before certain government authorities.

-staying proceedings: when a request to dismiss the case is filed, all proceedings between the parties, including discovery, are stayed. Without such a safeguard, discovery and other proceedings might drag on, possibly incurring significant expenses on the defendant before the SLAPP is dismissed.

-onus probandi: the defendant has a limited obligation to demonstrate that the litigation is a matter of public interest under effective anti-SLAPP laws. The burden then shifts on the plaintiff to demonstrate that the case has substantial merit, and that the defendant has no reasonable defence.

-expedited hearing: effective anti-SLAPP legislations require courts to schedule an anti-SLAPP motion hearing within a reasonable period following filing.

-provision for costs: effective anti-SLAPP rules require courts to fully reimburse prevailing defendants for the expenses of the motion while shielding the defendant from costs if the motion is refused.

-right to an immediate appeal: effective anti-SLAPP legislations allow a defendant to appeal a denial of an anti-SLAPP motion as of right and on an expedited basis.

⁶⁹ For additional references on anti-SLAPPs legislations, see <https://www.rcfp.org/>.

Based on the examination of the latter elements, Ontario⁷⁰ and British Columbia⁷¹ result having the strongest anti-SLAPP rules in the world, with each province's law receiving a score of 75 out of a potential total of 79 points; their legislation combines a broad scope with effective processes for achieving an expedient decision on a SLAPP proceeding, as well as reasonable defendant safeguards. The anti-SLAPP laws of New York,⁷² Texas⁷³ and California⁷⁴ are towards the top of the rankings; these measures, too, combine broad applicability with all of the necessary procedural features

⁷⁰ Protection of Public Participation Act, 2015, S.O. 2015, c. 23 - Bill 52, introducing sections 137.1 to 137.5 to Ontario's Courts of Justice Act ("CJA"). On its application side, see 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 (CanLII), [2020] 2 SCR 587, <https://canlii.ca/t/j9kjz>, retrieved on 2023-07-05; Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129 (CanLII), <https://canlii.ca/t/jvtb0>, retrieved on 2023-07-05.

⁷¹ Protection of Public Participation Act, S.B.C. 2019, c. 3 (PPPA). On its application side, see *Mawhinney v. Stewart*, 2023 BCSC 419.

⁷² New York Consolidated Laws, Civil Rights Law - §§ 70-a, 76-a, and New York Civil Practice Law and Rules §§ 3211(g), 3212(h). On its application side, see *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020); *NOVAGOLD Res., Inc. v. J Cap. Rsch. USA LLC*, No. 20-CV-2875 (LDH) (PK), 2022 WL 900604 (E.D.N.Y. Mar. 28, 2022); *Kesner v. Buhl*, No. 20-CV-3454 (PAE), 2022 WL 718840 (S.D.N.Y. Mar. 10, 2022); *Shahidullah v. Shankar*, No. 20-CV-3602 (DLB), 2022 WL 286935 (D. Md. Jan. 31, 2022); *Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231 (LAK), 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); *Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 551 F. Supp. 3d 320, 333 (S.D.N.Y. 2021); *Sweigert v. Goodman*, No. 18-CV-8653 (VEC) (SDA), 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021); *Goldman v. Reddington*, No. 18-CV-3662 (RPK) (ARL), 2021 WL 4755293 (E.D.N.Y. Apr. 21, 2021); *Coleman v. Grand*, 523 F. Supp. 3d 244, 257-58 (E.D.N.Y. 2021); *Great Wall Med. P.C. v. Levine*, 163 N.Y.S.3d 783 (Sup. Ct. N.Y. Cnty. 2022). For other cases, see <https://www.rcfp.org/anti-slapp-guide/new-york/>. Cases are accessible at <https://casetext.com>.

⁷³ Texas Citizens Participation Act, introducing Texas Civil Practice and Remedies Code §§ 27.001, 27.002-9. On its application side, see *U.S. Lending Grp. v. Winstead PC*, 2021 WL 1047208 (Tex. App.-Tyler Mar. 18, 2021), as for the Court of Appeals, and *U.S. Lending Grp. v. Winstead PC*, No. 21-0437 (Tex. May. 19, 2023), as for the Supreme Court of Texas; *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133-34 (Tex. 2019); *S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018) (quoting *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015)); *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 45-46 (Tex. 2021). Cases are accessible at <https://casetext.com>.

⁷⁴ California Code of Civil Procedure - §§ 425.16, 425.17 and 425.18. on the application side, see *Hill v. Heslep et al.*, Case No. 20STCV48797 (Apr. 7, 2021, L.A. Cnty. Super. Ct.); *Muddy Waters, LLC v. Superior Court*, 62 Cal. App. 5th 905 (2021); *Verceles v. Los Angeles Unified School District*, 63 Cal. App. 5th 776 (2021); *Appel v. Wolf*, 839 F. App'x 78 (9th Cir. 2020); *Dyer v. Childress*, 55 Cal. Rptr. 3d 544 (Cal. Ct. App. 2007); *Rivero v. Am. Fed'n of State, Cty., & Mun. Emps.*, 130 Cal. Rptr. 2d 81, 89-90 (Cal. Ct. App. 2003); *Braun v. Chronicle Publ'g Co.*, 61 Cal. Rptr. 2d 58 (Cal. Ct. App. 1997). For other cases, see <https://www.casp.net/california-anti-slapp-first-amendment-law-resources/caselaw/california-supreme-court/>. Cases are accessible at <https://casetext.com>.

of effective anti-SLAPP legislation. Pennsylvania,⁷⁵ Virginia⁷⁶ and Australia⁷⁷ have the weakest legislations; these laws pertain to a specific subject matter, lack crucial procedural aspects, or remove certain causes of action from their scope (just for instance, Australia's anti-SLAPP legislation excludes defamation lawsuits from its scope, thus reducing its efficacy).

And because this phenomenon has received so much attention in the US, it has also been disciplined at the federal level.⁷⁸ Indeed, the existing patchwork of State-based anti-SLAPPs laws, which some but not all US States have, provides troubling openings for aggressive plaintiffs to forum shop, for example, calculating where to sue with the fewest anti-SLAPP constraints. This sort of behaviour undermines the aim of State legislation and creates scenarios in which plaintiffs can litigate on their own terms, no matter how unfair. As a result, a federal anti-SLAPP act closes the gap that allows retaliatory litigants to bring State-based claims in areas with less safeguards or federal claims in federal court.

Some other anti-SLAPPs legislations, which are outside the referred report, remain around the world.

⁷⁵ 27 Pennsylvania Consolidated Statutes §§ 7707, 8301 – 8305. Pennsylvania has a narrow anti-SLAPP law that applies only to individuals petitioning the government about environmental issues. On its application side, see *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 433–34 (Pa. Commw. Ct. 2005).

⁷⁶ Virginia Code Annotated § 8.01-223.2(A) (amendments of 2020). Virginia's (unofficially recognized) anti-SLAPP law creates immunity from civil liability for individuals facing claims of SLAPPs type. However, it fails to identify any special procedures allowing a defendant to invoke these protections at an early stage of the proceedings; it does not provide protection for statements made with knowledge of, or reckless disregard for, whether they are false; and it does not address whether a trial court's decision on an anti-SLAPP motion is immediately appealable. See, on the weakness, the alleged widespread speculation in *Depp v. Heard*, No. CL-2019-2911 (Va. Cir. Ct. Jul. 25, 2019). Its impact is slowly changing thanks to selective amendments made in 2023.

⁷⁷ Protection of Public Participation Act 2008, Bill 138. There are several major exclusions from the scope of Australia's law; notably, it does not apply to causes of action for defamation. The law does not shift the burden to the plaintiff to defeat an anti-SLAPP motion, proceedings are not stayed on filing of the motion, and a court may award costs to either prevailing party. In relation to SLAPP cases, see *Gunns v Burling & Ors*, [2004] VSC 9575; or cases over the Hindmarsh Island bridge in South Australia and over development on Hinchinbrook Island in Queensland. Collections of cases are available at https://www.sourcewatch.org/index.php/SLAPP%27s_in_Australia.

⁷⁸ H.R.8864 - SLAPP Protection Act of 2022 117th Congress (2021-2022). It provides a procedure to dismiss, punish, and deter SLAPPs.

In the United Kingdom, for instance, a policy paper has been adopted with the goal of intervening in this area.⁷⁹ But even in Southeast Asia this problem has been approached in various ways: starting from Indonesia, where protection is offered both in civil and criminal matters to environmental activists;⁸⁰ then passing to the Philippines, where, once again in environmental matters, an explicit anti-SLAPP protections enables courts to dismiss SLAPPs in a summary hearing before advancing to a full trial;⁸¹ ending then in Thailand, where a reference to the protection of defenders' rights to freedom of expression against SLAPPs has been made, allowing the court to dismiss any criminal case at the filing stage of the lawsuit if the court determines that the cause of action stems from ill intention to harass to take advantage over a person to gain any unlawful benefits or to achieve any corrupt underlying objectives.⁸² Finally, there are many States where protection against SLAPPs is offered using common rules, and not via rules special for these proceedings which have not yet been adopted.⁸³

7. Conclusions

Following this thorough examination, a final overall assessment of the anti-SLAPPs Directive is provided.

⁷⁹ The policy paper is available at <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps>.

⁸⁰ See Law No. 32/2009 on Environmental Protection and Management, and Law No. 18/2013 on the prevention and eradication of Forest Destruction, both available at <https://www.ecolex.org>.

⁸¹ The Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, available at <https://www.lawphil.net>.

⁸² Section 161/1 of the Criminal Procedure Code. References available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Reprisals/GoodPractices/THAILAND.pdf>.

⁸³ See, for instance, the Indian case. Order 7 Rule 11 of the Civil Procedure Code deals with the dismissal of the claim in case it fails to disclose any cause of action, or Section 250 Criminal Procedure Code allows the court to order the complainant to pay monetary compensation to the accused in case the accused persons are acquitted. They are both available at <https://www.indiacode.nic.in>.

The anti-SLAPPs Directive is interesting since it represents the EU's attempt to respond to the need to strengthen democracy and, to close the circle, to protect fundamental human rights, from which this contribution started. On the one hand, the horizontal (and questionable direct effect) dimension of the fundamental right under Article 11 of the Charter is stressed in order to ensure its effectiveness, resulting in a dual dimension: the vertical one (authority v. freedom) and the relevant horizontal one (relations between private individuals). On the other, Article 10 of the ECHR, which creates a series of obligations for States, both negative and positive. Among the positive ones, the anti-SLAPPs Directive tool, which is peculiar in that it combines two elements: on one side, placing the State as a legislator on the level of relations between private individuals, it guarantees freedom of expression, as provided for by international and EU law, in its horizontal dimension (person v. person, rather than the traditional vertical dimension State v. person); on the other side, by protecting that right, the benefit is not only for the single individual involved, but for the entire society, thus for the functioning of democracy.

The anti-SLAPP Directive appears to be well tailored to deal with a specific issue, which is a reverse situation with respect to the traditional civil litigation. Usually, the claimant is the person entitled to legal protection in the legal order, who is obliged to file a lawsuit before the court because he or she is unable to seek justice on his or her own and cannot secure spontaneous fulfilment of obligations from the defendant. Instead, in SLAPPs cases, the emphasis appears to shift: it is no longer the claimant who has to be protected, but the defendant.

The fundamental challenge, though, is that this strategic litigation looks to be like many others; only later will it be clear if it is truly founded or not. Meanwhile, it realises its chilling influence from the beginning (even in the pre-trial phase). And, as a result, the regulatory area of action can only be limited: in the case it is excessively restricted, it prevents and impedes access to justice even for individuals claiming damages against journalists and

activists who truly defame people. Thus, the relevance of the guarantees established by Article 6 ECHR on the right to a fair trial in civil matters, which includes, among other things, the right to access to justice, to be concreted and effective, independence and impartiality, reasonable time, and so on. It is about balancing the rights derived from the fair trial for both sides (claimant and defendant) without favouring one over the other. Even though the needle of the balance on procedural rules can slightly move in light of the reverse litigation type dealt with in this contribution.

The anti-SLAPPs Directive seems to be well-designed for functioning and achieving its objectives: the scope of application is wide; a staying procedure is addressed; the *onus probandi* is reallocated; hearings shall be expedited; rules on costs are provided; and the right to an appeal is guaranteed. If it is still a proposal at the moment, the aim is that the work in the legislative process does not undermine, but rather improve, its effectiveness (Franzina, 2023; Pasqua, 2023); and, in any event, because SLAPPs are a global problem, it is also hoped that their discipline will occur globally. However, although the anti-SLAPPs Directive is a first step in combating this dark litigation side, it cannot work alone. To truly eradicate SLAPPs cases, it has to be accompanied by two other fundamental tools: the protection should be provided by Member States also in domestic actions, not only in the cross-border ones; defamation should only be a civil matter, not a criminal one, hence Member States should also be urged to review their national legislations in order to decriminalise defamation.

Quoting freely David Sassoli, we are immersed in epochal transformations which, in order to be governed, need new ideas and the courage to be able to combine great wisdom and maximum audacity. Since SLAPPs are a constant threat and a negative reality that undermine ultimately democracy in Europe (and elsewhere), anti-SLAPPs legislation is required. If procedure is the backbone of (substantive) law, this *ad hoc* legislation replies to this peculiar situation in which the procedure becomes substance and the proceduralisation

becomes effective substantive protection. Therefore, for States time to (en)act has come.

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