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# ANTI SLAPP

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EU action against abusive litigation  
(SLAPP) targeting journalists and  
rights defenders - feedback from  
the PATFox consortium

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# EU action against abusive litigation (SLAPP) targeting journalists and rights defenders

## Feedback from the PATFox consortium

Pioneering Anti-SLAPP Training for Freedom of Expression (PATFox) is an EC-funded project that seeks to train the lawyers defending journalists and media organisations, NGOs and activists, historians and rights defenders against companies and governmental figures using lawfare to shut down legitimate criticism.

Though not used in the substance of the proposed Directive text, the term SLAPP (Strategic Lawsuits Against Public Participation) are used in many jurisdictions to distinguish legal claims that use the judicial process for purposes other than to vindicate a right, and are aimed at suppressing public participation in matters of public interest.

SLAPPs can be manifestly unfounded legal claims, or they may present other kinds of abuse of process, where the claim is not unfounded but there is an exaggerated use of procedure or other aspects of the system to harass and deter the person or entity being litigated against.

The phenomenon of SLAPPs is increasing in Europe as it is elsewhere. CASE's analysis of the available data shows a five fold increase in the number of SLAPPs seen within COE countries since 2015.<sup>1</sup> It is important to note that the CASE figures are based on filed legal cases and do not include, for instance, SLAPPs where the threat of legal action is effective and no further action is taken. These figures therefore considerably underestimate the true scale of the problem.<sup>2</sup>

Overall, we welcome this package of measures, which represents an important first step in defending the work of journalists and other public watchdogs throughout the EU. The proposals go some way beyond anything that currently exists in any EU member state and include include key safeguards and remedies identified in the Model Directive, specifically an early dismissal mechanism (along with reversal of burden of proof, stay of proceedings, accelerated proceedings), a regime of sanctions, and remedial and protective measures (e.g. compensation of costs).

It is important that these proposals are not diluted as the legislative process proceeds.

Equally, efforts to limit SLAPPs must go beyond what is included in the draft legislation. Many of the SLAPP cases we see in PATFox member countries are domestic in nature and therefore fall outside the scope of the draft Directive. National legislators should be encouraged to build on the Commission's proposals along the lines of what it anticipated in the accompanying Recommendation,

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1 <https://www.the-case.eu/slapps-in-europe>

2The Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists – which also records threats that do not reach court - also reports an increasing number of alerts of serious threats to the safety of journalists and media freedom in Europe, including multiple cases of judicial intimidation. The 2021 annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned

building counter-SLAPP measures into domestic legal systems and providing effective training and support for judges, legal professionals and potential SLAPP victims in each EU member state.

With all that in mind, we have the following comments to make about the proposals:

### **1. No artificial distinctions between SLAPP cases**

SLAPPs are distinguished by the use of the legal process itself as a weapon to discourage and intimidate those on the receiving end of those lawsuits. That is, the cost in time and money of defending a case is itself dissuasive to public participation – as well as a distraction from it - and the exercise of democratic rights of expression and assembly.

The draft Directive draws a distinction between ‘manifestly unfounded’ and ‘abusive’ cases, with one important countermeasure, early dismissal, only available against the former. Other important measures, such as security for costs are available in both kinds of cases. We think that creating these two categories is unnecessary and counterproductive.

One reason for that is that ‘manifestly unfounded’ is an inappropriately high bar that would see early dismissal becoming a viable option in only a small number of cases that manifest gross substantive or procedural errors, as it would require the defendant to meet a very high materiality threshold. The Proposed Directive is explicit in that sense as it states that “the claimant [...] only needs to meet the much lower threshold of showing that the claim is not manifestly unfounded in order to avoid an early dismissal” (Recital 30).

In this regard, the threshold of “manifest unfoundedness” fails to capture instances of clearly abusive proceedings as these cases often require a balance of interests and the courts would thus be prevented from accepting an application for early dismissal.

The recent judgment of the High Court of England & Wales in *Banks v Cadwalladr* [2022] EWHC 1417 (QB) illustrates this point: in her ruling the Hon. Mrs Justice Steyn made clear that Aaron Banks’ claim against freelance journalist Carole Cadwalladr was *not* unfounded and it was not inappropriate to bring his case to court.<sup>3</sup>

However, that does not disguise the clearly abusive elements in this litigation that mark out its intention to limit and chill Ms Cadwalladr’s speech. Perhaps most notably in this case, rather than taking issue with anything Ms Cadwalladr had published in the *Observer*, where her work appeared most often, Mr Banks’ case centred around an aside in a public talk and a tweet. Mr Banks’ lawyers would presumably have been aware that Ms Cadwalladr would not have recourse to any institutional support in those instances.

Being sued as an individual imposed a dissuasive and heavy cost on Ms Cadwalladr, who has been obliged to crowdfund her legal fees and stood to lose most of her assets if she had lost. By all accounts, her ability to focus on journalism has been limited for several years due to the pressures of the case.

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3 <https://www.judiciary.uk/wp-content/uploads/2022/06/Banks-v-Cadwalladr-130622-Judgment.pdf>

This is arguably exactly the kind of case where early dismissal would have been the appropriate response.

Making early dismissal available to the whole spectrum of SLAPP cases would also help provide an incentive to litigants to limit the potential for abuse in their planning. Given that – almost by definition – SLAPP litigants tend to have access to competent legal advice, it can be anticipated that most would be able to avoid meeting the threshold of a ‘manifestly unfounded’ claim.

Given that it is always possible to pursue legitimate claims in the courts in a non-abusive manner, the availability of early dismissal for all abusive claims would not, in our opinion, reduce access to the courts. It would in fact provide a welcome incentive for litigants to initiate their claims in a proportionate manner, or adjust claims to remove elements of abuse.

In other respects, we recognise that the legislation contains strong dissuasive elements (such as on costs) and welcome innovations that enable the court to hear representations on the public interest (such as amicus briefs from third parties).

## **2. Maintaining the broad sense of what constitutes a ‘cross-border’ case**

The Proposed Directive addresses SLAPPs with a cross border element, which represent about 10% of recorded cases, according to the recent CASE research.

Within the inherent limitations of jurisdiction, we are encouraged by the breadth of the conception of cross border in the draft legislation, which envisage that the Directive applies in areas where the public interest in more than one state is engaged, even if the parties are domiciled in one.

This could be strengthened by including an additional recital in the future EU Directive to ensure that the “relevance” of the act of public participation targeted by the SLAPP to more than one Member State (Article 4(2)(a) of the proposed Directive) is not interpreted in a formalistic way but is rather anchored in the notion of “public interest” (Article 3(2) of the proposed Directive): i.e., covering any act of public participation relating to an issue which affects the public of more than one Member State to such an extent that the public may legitimately take an interest in it. When drafting domestic legislation, national law makers should abide by the recommendation that safeguards be equally applied to all domestic cases (paragraph 21 of the Recommendation).

## **3. The proposed Directive should apply to pending cases**

In accordance with the settled principle *tempus regit actum*, as interpreted by the Court of Justice of the EU<sup>4</sup>, the applicability of new rules conceived to prevent SLAPPs should especially apply to current, pending cases. This would be a robust response to the ever increasing number of SLAPPs brought across the EU over the last years. As a matter of fact, stakeholders in civil society facing SLAPPs would not be ensured with effective protection, should anti-SLAPP rules not apply to those cases which were initiated or continued at the time of the entry into force of the new rules.

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4 Case No C-610/10, European Commission v Kingdom of Spain

#### 4. The measures in the Recommendation are key

Many key measures are not addressed in the Proposed Directive but in a separate Recommendation which does not have the same normative value vis-à-vis a Directive, due to its non-binding character. Elements of the recommendation respond directly to issues we see on the ground and, of course, we are tackling some parts of these ourselves as part of PATFox, which will produce an innovative European anti-SLAPP curriculum and deliver training to legal professionals through 2022-23.

Several PATFox partner organisations report seeing increasing SLAPP problems associated with the use of the criminal and administrative law. When drafting domestic legislation, national lawmakers should abide by the recommendation that comparable safeguards be included in legal frameworks governing criminal and administrative proceedings (paragraph 20 of the Recommendation) and review the relevant legal frameworks to provide for necessary safeguards to address SLAPP in respect of fundamental rights (e.g. rights to freedom of expression, the right of access to justice and the right to the protection of personal data and democratic values).

This may require significant changes in the civil and administrative procedures of some member states and we recommend the Commission provides financial support for the review process that will have to take place in those jurisdictions. In addition we recommend that the Commission prompt these Member States to begin as soon as possible the process of reviewing their legal and judicial as well as regulatory framework in an effort to ensure that the Directive will be transposed more efficiently and effectively.

Possible changes include the following:

- Defamation cases should be addressed under administrative or civil law rather than criminal law. For instance, in 2021 Italy enacted a bill proposing the removal of prison sentences for defamation (increasing financial penalties instead). The bill also established a safe harbor for publishers and editors, who can no longer be punished if they rectify their statements before criminal proceedings are initiated, after the Constitutional Court declared certain provisions of the Press Law as unconstitutional.
- Affirming academic freedoms and ensuring domestic anti-SLAPP measures also apply fully to academics and researchers, who themselves fulfill a public watchdog role and are increasingly subjected to vexatious lawsuits.<sup>5</sup>
- Introducing rules to protect journalists that are held in prison/provisional detention. Reference is made to limits on how long journalists can be held in provisional detention. This is in line with the ECtHR judgment in the Mehmet Hasan Altan case, in which the court found that the provisional detention of Turkish journalists Şahin Alpay and Mehmet Altan for more than a year and a half was neither necessary nor proportionate, ordering Turkey to pay damages.<sup>6</sup>

5 See, for example: <https://www.article19.org/resources/appeal-court-slapp-sadurski/>**Error! Hyperlink reference not valid.**

6 Case No 132237/17, *Mehmet Hasan Altan v. Turkey* [20 March 2018] ECtHR.

- Reforming the code of civil procedure to give courts the possibility to declare a pleading as abusive, on an application or by their own motion. For instance, Anti-SLAPP legislation has been passed in Quebec granting this prerogative to its courts (see Article 51 of the Quebec Code of Civil Procedure). The Quebec legislation is a useful example of a statutory intervention designed to provide clear, systematic guidance on the method of analysis of the court in dealing with anti-SLAPP remedies.
- Creating caps on the amount of defamation compensation. For instance, in Belgium the maximum amount that can be claimed for legal costs in relation to legal actions relating to non-monetary claims is 10,000 euros.<sup>7</sup>
- Introduce rules to protect journalists who assist whistle blowers. For instance, EU Member States had until 17 December 2021 to implement the EU Whistleblowing Directive, but many have not completed the process, and some have not yet started. As of today, only Sweden, France, Portugal, Netherlands, Cyprus, Croatia, Latvia and Lithuania have a final national legislation in place.
- Introducing specific criminal law rules to protect journalists in their dealings with the police (to protect them from attacks, harassment and intimidation of journalists by the police). Conflicts between journalists and police forces can lead to their attacks, detention and imprisonment, harassment and intimidation. This can include by way of example, journalists being arrested while reporting, confiscation of filming equipment, as well as flyers inciting hatred against journalists being made available in police stations. Measures recognizing the importance of journalism can minimize those situations. For instance, in the UK journalistic material is treated differently under legislation relating to police searches.<sup>8</sup>
- Allow journalists who are victims of SLAPPs to sue their authors (before a criminal court) as well as to claim damages. This is a fundamental feature of Anti-SLAPP legislation. The legal or natural person who initiated a legal action which was found to be abusive, should be liable to pay a proportionate penalty in compensation of the instrumentalisation of the judiciary, and compensation for the damages caused to the victim, beyond the costs of the procedure. Most Member States allow counterclaims against authors of SLAPPs.
- Ensure that the cap for the fines for the authors of SLAPPs is not too low. For instance, according to Article 73 of the Latvian Civil Procedure Law, if a court recognizes that a particular case is a SLAPP litigation, a fine may be imposed on the claimant. However, the maximum penalty amounts only to 1,200 euros, which would be too low to actually deter natural or legal persons from submitting false claims.

7 See Bayer, J. Bárd P., and Others, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study, EU-Citizen, p. 32. [Available at: https://ec.europa.eu/info/sites/default/files/slapp\\_comparative\\_study.pdf](https://ec.europa.eu/info/sites/default/files/slapp_comparative_study.pdf).

8 See Hate crime laws: Final Report, Law Commission, para. 10.553. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1041169/Hate-crime-report-accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041169/Hate-crime-report-accessible.pdf).

- Apply the rules stemming from the directive to civil cases that have no cross-border implications (and would therefore be out of scope of the Directive). For instance, extend the scope of application of procedural safeguards, protective measures and remedies against abusive court proceedings stemmed from the Proposed Directive to all SLAPP cases in both civil and criminal matters and irrespective of the existence of cross-border effects.

Finally, the Recommendation also encourages Member States to support training activities to ensure judges and legal professionals are appropriately trained about unfounded and abusive court proceedings in order to increase their knowledge and awareness. At the early stages of the PATFox project it is already clear that there is a large untapped demand for anti-SLAPP training in many EU member states, and that this extends to citizens and specific groups likely to become targets of SLAPPs, as well as legal professionals.

### **Signed:**

Blueprint for Free Speech (Germany)  
Aditus Foundation (Malta)  
FIBGAR (Spain)  
Foundation for Civic Monitoring OKO, publisher of OKO.press (Poland)  
Gong (Croatia)  
Maria Kapardis, Technical University of Cyprus  
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### **Note**

This feedback document has been prepared by Blueprint for Free Speech, a non-profit charity that works internationally to promote the right to freedom of expression without undue interference or intrusion on behalf of the PATFox consortium. Our research and advocacy strive to defend Article 19 of the Universal Declaration of Human Rights, which asserts the right to freedom of opinion and expression for all people.

Blueprint is a member of the EC funded PATFox consortium - Pioneering AntiSLAPP Training for Freedom of Expression - which is developing an Anti-SLAPP legal curriculum and will be rolling out training for legal professionals in 11 EU member states through 2022-23.<sup>9</sup> Among those countries where the project is operating are some where the SLAPP problem is most acute.

Blueprint is also part of the Coalition Against in SLAPPs in Europe - the civil society coalition campaigning for action against SLAPPs from the European institutions. The position of CASE's members prior to publication of the EC's proposals was reflected in the CASE Model Directive published in March 2021.<sup>10</sup> We have drawn on the Expert Brief produced by CASE in the production of this response and we adopt their suggestions where not stated here.<sup>11</sup>

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9 <https://antislapp.eu>

10 <https://www.the-case.eu/campaign-list/the-need-for-an-eu-anti-slapp-directive>

11 <https://www.the-case.eu/case-expert-policy-brief>