



PATFOX GUIDE TO

THE ANTI-SLAPP DIRECTIVE



Co-funded by
the European Union

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This report was developed for the Pioneering anti-SLAPP Training for Freedom of Expression (PATFox). The PATFox project has received funding from the European Union under grant agreement n° 101051559.

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INTRODUCTION

This document is produced as part of the Central Curriculum of the Pioneering antiSLAPP Training for Freedom of Expression Project (the PATFox Project), which seeks to train lawyers defending journalists and media organizations, NGOs and activists against companies and official bodies using lawfare to shut down legitimate criticism.

The Central curriculum, composed by this document and the training materials available on the project webpage, is intended to equip practising lawyers and prospective practitioners in Europe to better represent clients against Strategic Lawsuits Against Public Participation (SLAPP). It will enable lawyers to identify SLAPPs and to consider a number of legal strategies which might assist them both to pre-empt and to respond to threats of litigation which are designed to intimidate or vex their clients, as opposed to legitimate claims intended to enforce a legitimate right.

The Central Curriculum is based on both the law currently in force and the proposed EU Anti-SLAPP Directive, which is currently making its way through the EU's law-making process. This will enable practitioners to deploy new legal instruments as they come into force, thereby ensuring that clients and the general public enjoy the full benefit of the protections which the law may afford to freedom of expression in Europe.

In particular, this Practical Guide summarises the main provisions of the Directive on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), adopted by the European Parliament on the 27 of February 2024.

1. BACKGROUND AND CONTEXT

On 27th April 2022 the European Commission introduced of a **package of anti-SLAPP measures**, including a proposed anti-SLAPP Directive aimed at protecting persons who engage in public participation against manifestly unfounded or abusive civil court proceedings with cross-border implications. The proposal was accompanied by a Recommendation to the Member States setting out guidance to address purely domestic cases of SLAPPs.

On 27 June 2023, the JURI committee of the **European Parliament** adopted its report on the proposal, and then tabled it for the plenary. A day after holding a plenary debate on 11 July 2023, Parliament adopted its amendments to the Commission proposal (at first reading) and referred the file back to the committee responsible (JURI). On 9 June 2023, the **Council** (Justice and Home Affairs) approved a general approach.

Based on the Parliament's position at first reading and the Council's general approach, on 29 November 2023, the European Parliament and the Council of the EU reached a **provisional political agreement** on the text to be adopted. The main changes to the original proposal include a broadening of the scope of application of the directive through two new inclusive definitions – for 'cross-border implications' and 'public participation' – and the introduction of a rule on reimbursement of legal costs incurred by a SLAPP victim, unless it is shown that such costs were excessive.

On 27 February 2024, the European Parliament approved the **compromise text**, which will be soon published in the Official Journal. The EU Member States will then have 2 years to implement the directive, that is, by 2026. In the transposition, Member states are at liberty to extend the scope of national law provide additional protections to SLAPP victims beyond what strictly provided by the Directive. The text is available [here](#).

2. OBJECTIVE

The anti-SLAPP directive is based on Article 81(2)(f) of the Treaty on the Functioning of the European Union (TFEU) – the legal basis for the elimination of obstacles to the proper functioning of cross-border civil proceedings in the Union. More specifically, the legal basis is Article 81(2)(f) TFEU, which empowers the European Parliament and the Council to adopt measures aimed at ensuring “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules of civil procedure applicable in the Member States”.

Therefore, article 1 of the Directive states that its objective is to provide **safeguards against manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications** brought against **natural and legal persons** on account of their **engagement in public participation**.

The purpose of this Directive is, in fact, to eliminate obstacles to the proper functioning of civil proceedings, while providing protection for natural and legal persons who engage in **public participation on matters of public interest**, including journalists, publishers, media organisations, whistle-blowers and human rights defenders, as well as civil society organisations, NGOs, trade unions, artists, researchers and academics, against court proceedings initiated against them to deter them from public participation (Recital n.6).

Though usually referred to as the anti-SLAPP Directive, or Daphne’s Law in honour of assassinated journalist Daphne Caruana Galizia, it does not use the term “strategic lawsuits against public participation” or SLAPP.

3. SCOPE

The Directive applies **only** to:

LEGAL CLAIMS OR ACTIONS OF A CIVIL OR COMMERCIAL NATURE
WITH CROSS BORDER IMPLICATIONS (art.5)¹
<p>The new version introduces a broadened definition of cross-border cases. According to art. 5, a case lacks cross-border implications, and therefore, falls out the scope of the Directive, if both parties are domiciled in the same Member State as the court that will consider the case, and all other essential elements are located only in that Member State. The other elements are not indicated. The broad application of this concept will be left up to the national courts and the Member States.</p> <p>The new version includes also that the domicile should be determined in compliance with the private international law, in particular art. 5 of the Brussels I bis Regulation, which is crucial for the definition of a cross border case. Article 62 of the said regulation provides that in order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court is to apply its internal law (<i>lex fori</i>); thus, the anti-SLAPP directive refers, through the Brussels Ia Regulation, to Member States' national laws, to clarify the understanding of what exactly the 'domicile' of a claimant or defendant is. It is for the court to determine the elements relevant to the situation concerned depending on the particular circumstances of each case, taking into account for</p>

¹ The definition of matters of cross-border implications has been revised.

example, as appropriate, the specific act of public participation or the specific elements indicating a possible abuse, in particular where multiple proceedings are initiated in more than one jurisdiction. Such determination by the court should be carried out irrespective of the means of communication used (Recital 30).

BROUGHT IN CIVIL PROCEEDINGS

This includes procedures for interim and precautionary measures, counteractions, or other particular types of remedies available under other instruments. Where civil claims are brought in criminal proceedings, this Directive should apply where the consideration of those claims is fully governed by civil procedural law. Therefore, the Directive **does not apply** to revenue, customs or administrative matters or claims arising out of liability of the state for actions or omissions in the exercise of state authority (*acta iure imperii*) or to claims against officials who act on behalf of the state or to liability for acts of public authorities, including liability of publicly appointed office-holders, or to criminal matters or arbitration. On this regard, court proceedings where a state or a public body is a party might still fall within the scope of ‘civil and commercial matters’ when the acts or omissions do not occur in the exercise of state authority, in accordance with established case law of the Court of Justice of the European Union.

AGAINST NATURAL AND LEGAL PERSONS

In its Preamble, the Directive refers to **journalists, publishers, media organisations, whistle-blowers and human rights defenders, as well as civil society organisations, NGOs, trade unions, artists, researchers and academics** (Recital n.6). In addition, it stresses the importance to protect natural or legal persons who, either on a professional or on a personal basis, **support, assist or provide goods or services** to another person for purposes directly linked to public participation on a matter of public interest, such as

lawyers, family members, internet providers, publishing houses or print shops, which face or are threatened with court proceedings for supporting, assisting or providing goods or services to persons targeted by SLAPPs (Recital n.18).

ON ACCOUNT OF THEIR ENGAGEMENT IN PUBLIC PARTICIPATION IN MATTERS OF PUBLIC INTEREST

According to art. 4 of the Directive, **public participation** means the making of any **statement** or the **carrying out of any activity** by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, as well as any **preparatory, supporting or assisting action** directly linked thereto, and which concerns a **matter of public interest**, namely any matter which affects the public to such an extent that the public may legitimately take an interest in it.

The new version broadens the definition of matters of public interest, by including issues such as:

- (a) fundamental rights, public health, safety, the environment or the climate;
- (b) activities of a natural or legal person that is a public figure in the public or private sector;
- (c) matters under consideration by a legislative, executive, or judicial body, or any other official proceedings;
- (d) allegations of corruption, fraud, or of any other criminal offence, or of administrative offences in relation to such matters;
- (e) activities aimed at protecting the values enshrined in Article 2 of the Treaty on European Union, including the protection of democratic processes against undue interference, in particular by fighting disinformation.

ABUSIVE IN NATURE

The Directive defines “abusive court proceedings against public participation” as (art.4 (3)): “*court proceedings which are not brought to **genuinely assert or exercise a right**, but have as their main purpose the **prevention, restriction or penalisation** of public participation, frequently exploiting an **imbalance of power** between the parties, and which pursue **unfounded claims**.” Indications of such a purpose include for example:*

- the **disproportionate, excessive or unreasonable nature** of the claim or part thereof, including the excessive **dispute value**;
- the existence of **multiple proceedings** initiated by the claimant or associated parties in relation to similar matters;
- **intimidation, harassment or threats** on the part of the claimant or the claimant's representatives, before or during the proceedings, as well as similar conduct by the claimant in similar or concurrent cases;
- the use in **bad faith of procedural tactics**, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith

Claims made in abusive court proceedings against public participation can be either fully or partially unfounded. This means that a claim does not necessarily have to be completely unfounded for the proceedings to be considered abusive. For example, even a minor violation of personality rights that could give rise to a modest claim for compensation under the applicable law can still be abusive, if a manifestly excessive amount or remedy is claimed. On the other hand, if the claimant in court proceedings pursues claims that are founded, such proceedings should not be regarded as abusive for the purposes of this Directive (Recital n.6)

4. PROCEDURAL SAFEGUARDS

The Directive establishes the following **procedural safeguards**. Member States will then lay down or maintain the specific rules of procedure, form, and methods for how the court or tribunal seised of the matter should deal with applications for procedural safeguards.

The Directive, also, provides that where the defendant has applied for remedies under this Directive, the decision on such application is taken in an **accelerated manner**, including by making use of already existing procedures under national law for accelerated treatment (art. 7). In addition, the next text requests that Member States shall ensure that natural or legal persons engaging in public participation referred to in Article 6 have **access**, as appropriate, to **information** on available procedural safeguards and remedies and existing support measures such as legal aid and financial and psychological support, where available (art.19).

Security to cover the costs of the proceedings and, where applicable, to cover damages (art. 10)

According to article 10, *“in court proceedings brought against natural or legal persons on account of their engagement in public participation, the court or tribunal seised may require, without prejudice to the right of access to justice, that the claimant provide **security for the estimated costs of the proceedings**, which may include the costs of legal representation incurred by the defendant, and, if provided for in national law, damage”*.

Granting of security *pendente lite* serves as a **precautionary measure** to safeguard the effects of a final decision which determines that there has been an abuse of procedure, and to cover the costs and, if provided for in national law, the potential damage caused to the defendant, particularly where there is a risk of irreparable harm.

This measure should be available regardless of whether the SLAPP is manifestly unfounded. The court or tribunal seized should be able, if it considers it appropriate, to order the claimant to provide security if there are elements that indicate that the proceedings are abusive or if there is a risk of the defendant not being reimbursed or in view of the economic situation of the parties or other such criteria laid down in national law.

Early dismissal of manifestly unfounded claims (art. 11-13)

According to art.11, by adopting new rules or applying existing rules under national law, Member States shall ensure that courts and tribunals may dismiss, after appropriate examination, claims against public participation as **manifestly unfounded**, in accordance with national law. The text **does not provide** a definition of manifestly unfounded claim.

Where the defendant has applied for the dismissal of the claim as manifestly unfounded, the court or tribunal should deal with that application in an accelerated manner. The new version of the text makes it clear that the **burden of proving** that the claim is well founded rests on the claimant who brought the action (art.12). The decision that grants early dismissal should be a decision on the merits and should take place at the earliest possible stage in the proceedings, but that moment could occur at any time during the proceedings depending on when the court or tribunal has received such information. The decision should be subject to an **appeal** (art.13).

Remedies against abusive court proceedings - Award of costs (art. 14)

The new version of the text includes a compromise version of the rule on reimbursement of costs incurred by SLAPP targets, prescribing that, where the court has found the proceedings to be abusive, costs should include all types of costs of the proceedings that can be awarded under national law, including the full costs of legal representation incurred by the defendant unless such costs are excessive.

Remedies against abusive court proceedings - Penalties (art. 15)²

Member States shall ensure that courts or tribunals seized of **abusive cases** may impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, including the **payment of compensation for damages** or the publication of the court decision, where provided for in national law, on the party who brought those proceedings.

Where the court has found the proceedings to be abusive, such penalties or other equally effective appropriate measures should be determined on a case by case basis, should be proportionate to the nature of, and to the elements indicating, the abuse identified and should take into account the potential for a harmful or chilling effect of those proceedings on public participation or the economic situation of the claimant that has exploited the imbalance of power

Restrictions on the ability to alter claims (art. 8)

² The prior version of the Proposal included a provision dedicated to compensation of damages which has been fully removed as a result of the political agreement reached in November 2023. The previous art. 15 provided a natural or legal person who has suffered harm as a result of a SLAPP case to be capable of claim and to obtain full compensation for that harm.

Member States shall ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation any subsequent amendments to the claims or the pleadings made by the claimant, including the withdrawal of claims, do not affect the possibility for the defendant to apply for remedies.

Right to third party intervention (art. 9)

In order to provide a more effective level of protection, associations, organisations, trade unions and other entities which have, in accordance with the criteria laid down by national law, a legitimate interest in safeguarding or promoting the rights of persons engaging in public participation, should be able to support the defendant in court proceedings brought in relation to public participation, with the defendant's approval, thereby contributing to the assessment by the court of whether a case is **abusive** or a claim is **manifestly unfounded**.

Therefore, Member States shall that third parties may support the defendant, where the defendant so approves, or provide information in those proceedings in accordance with national law.

5. PROTECTION AGAINST THIRD-COUNTRY JUDGMENTS

The Directive establishes protection against SLAPPs adjudicated in third countries, as follows:

Grounds for refusal of recognition and enforcement of a third-country judgment (art. 16)

The Directive provides that the recognition and enforcement of a third-country judgment in court proceedings against public participation by a natural or legal person domiciled in a Member State should be refused if those proceedings are considered manifestly unfounded or abusive according to the law of the Member State in which recognition or enforcement is sought.

It is for Member States to choose whether to refuse the recognition and enforcement of a third country judgment as manifestly contrary to **public policy** (*ordre public*)³ or on the basis of a separate ground for refusal (Recital n.43).

Jurisdiction for actions related to third-country proceedings (art. 17)

This Directive creates a new **special ground of jurisdiction** in order to ensure that targets of SLAPPs domiciled in the European Union have an efficient remedy available in the EU against abusive court proceedings against public participation brought in a court or tribunal of a third country by a claimant domiciled outside the EU.

³ In the previous version, the provision established that the recognition and enforcement of a third country judgment had to be refused for being as manifestly contrary to public policy.

Member States shall ensure that person who is the target of these abusive proceedings may seek, in the courts or tribunals of the place where that person is domiciled, compensation for the damage and the costs incurred in connection with the proceedings before the court or tribunal of the third-country. It should apply irrespective of a decision having been rendered or of a decision being final (Recital 44).

The new text of the Directive includes a new paragraph, providing that Member States may limit the exercise of the jurisdiction while proceedings are still pending in the third country (art.17.2).