

THE EU ANTI-SLAPP DIRECTIVE: (UN) FOUNDED OPTIMISM?

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In April 2024 the EU adopted the Anti-SLAPP Directive which needs to be transposed by 7 May 2026. Strategic Lawsuits against Public Participation (SLAPPs) target public watchdogs such as journalists and NGOs who express themselves on matters of public interest. The primary objective of these lawsuits is not to win the case but to intimidate victims of SLAPPs with the threat of a procedure's high financial and psychological costs. This produces a 'chilling effect' on public discourse. The EU Anti-SLAPP Directive provides for strong safeguards, yet SLAPPs remain difficult to recognize as such by victims, courts and legal practitioners. This article uses the concept of legal opportunity structures to assess the potential de facto effectiveness of the Directive, focusing on the perspective of defamation SLAPP victims. It argues that a clear definition of SLAPP indicators and explicit provisions are crucial for enabling victims to effectively leverage the remedies established under the Directive. Furthermore, strategic litigation and Anti-SLAPP civil society organizations play a vital role in ensuring the Directive's practical impact.

1 INTRODUCTION

Strategic Lawsuits against Public Participation (SLAPPs) are lawsuits against public watchdogs such as journalists and NGOs who express themselves in a matter of public interest.¹ The principal aim of these lawsuits is to intimidate the defendant with high monetary and moral costs of a procedure.² The idea is that regardless of the outcome of the case, the procedure itself can be sufficient to make them settle and to delete their content from the public sphere – also referred to as a 'chilling effect' on public speech.³ Thereby, a matter of public debate is transformed in a matter of private adjudication, a political debate is moved from the political to the judicial arena, also referred to as 'punishment by process'.⁴

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¹ As described for example in Judit Bayer et al, 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study' [2021] SSRN Electronic Journal 12 <<https://www.ssrn.com/abstract=4092013>> accessed 14 January 2025.

² *ibid.*

³ Peter Coe, Rebecca Moosavian, and Paul Wragg, 'Addressing Strategic Lawsuits against Public Participation (SLAPPs): A Critical Interrogation of Legislative, and Judicial Responses' (2025) 17(1) *Journal of Media Law* 103; Directive 2024/1069 of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') [2024] OJ L2024/1069 (Anti-SLAPP Directive) recital 16; Rebecca Bonello Ghio and Dalia Nasreddin, 'Shutting out Criticism: How Slaps Threaten European Democracy' (The Coalition Against SLAPPs in Europe (CASE, 2020), 46 <<https://www.the-case.eu/wp-content/uploads/2023/04/CASEREportSLAPPsEurope.pdf>> accessed 1 December 2025.

⁴ Penelope Canan, 'The SLAPP from a Sociological Perspective' (1989) 7 *Pace Environmental Law Review* 23, 23; Justin Borg-Barthet and Francesca Farrington, 'The EU's Anti-SLAPP Directive: A Partial Victory for Rule of Law Advocacy in Europe' (2024) 25(6) *German Law Journal* 840, 841; Francesca Farrington

This is not only a restriction of the freedom of speech of the SLAPP victim but harm to society as a whole as it has the consequence of removing information from the public sphere.⁵ This twofold effect is a threat to EU democracies as thereby the space for protest and criticism on issues of public interest shrinks, pluralism is reduced to the benefit of powerful SLAPP initiators.⁶

Main grounds for SLAPPs are civil and criminal defamation, data protection (GDPR) and the violation of privacy rights.⁷ Common litigation tactics include to issue multiple lawsuits, to address the lawsuit to multiple targets or to only target an individual as a puppet and excessive damage claims.⁸

Recently, for example, Greenpeace has been sued by the US company *Energy Transfer* as the puppet of protests against the *Dakota Access pipeline* on grounds of defamation, nuisance, trespass and conspiracy.⁹ If this decision is enforced in the Netherlands, where Greenpeace has its headquarters, it would face bankruptcy.¹⁰

In April 2024 the EU adopted an Anti-SLAPP Directive which needs to be transposed by 7 May 2026. As the scope of the Directive is limited to civil claims with a cross-border implications,¹¹ the proposal has been accompanied with a Commission Recommendation on protecting human rights defenders and journalists who engage in public participation from SLAPPs.¹² Moreover, ten days before the EU Anti-SLAPP Directive was adopted, the Council of Ministers of the Council of Europe issued a Recommendation on countering SLAPPs based on ECtHR case law.¹³ This soft law instrument also provides a definition of abusive lawsuits and requires Member States to decriminalize defamation and to provide training for lawyers and courts.¹⁴

The Directive has the purpose to minimize the chilling effect of SLAPPs on public participation.¹⁵ There is a lot of literature on the effectiveness of the Directive in terms of its established safeguards.¹⁶ However, the existence of that legal instrument and

and Magdalena Zabrocka, 'Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union' (2023) 24 ERA Forum 519, 521; Coe, Moosavian, and Wragg (n 3) 103.

⁵ Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 842.

⁶ Bayer et al (n 1) 19.

⁷ Bonello Ghio and Nasreddin (n 3) 43.

⁸ Justin Borg-Barthet and Francesca Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union' (European Parliament 2023) PE 756.468 37.

⁹ Christina Eckes and Phillip Paiement, 'Silencing Greenpeace' (*Verfassungsblog*, 31 March 2025) <<https://verfassungsblog.de/greenpeace-slapp-energy-transfer/>> accessed 1 April 2025; Prakken d'Oliveira, 'Summons Greenpeace v. EnergyTransfer' <<https://www.greenpeace.org/static/planet4-international-stateless/2025/02/822226e7-summons-gpi-energy-transfer-en-def-redacted.pdf>> accessed 1 December 2025.

¹⁰ 'Greenpeace Faces Bankruptcy After Landmark \$667 Million Judgement' (*3E*, 27 March 2025) <<https://www.3eco.com/article/greenpeace-faces-bankruptcy-after-landmark-judgment/>> accessed 25 April 2025.

¹¹ Anti-SLAPP Directive Art. 1

¹² European Commission, 'Commission Recommendation (EU) 2022/758 on Protecting Journalists and Human Rights Defenders Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation")' (European Commission 2022).

¹³ Council of Europe, 'Recommendation CM/Rec (2024)2 of the Committee of Ministers to Member States on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)' (2024) CM/Rec (2024).

¹⁴ *ibid.*

¹⁵ Anti-SLAPP Directive recital 46.

¹⁶ Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4); Marco Pasqua, 'The Proposed EU

the effective use thereof are two distinct aspects that both determine the *de facto* effectiveness of the Directive. For SLAPPs, the effective application of Anti-SLAPP measures is a particular challenge as SLAPPs are an instrumentalization of the law, a phenomenon that is difficult to detect within legal reasoning typically limited to the merits of the case. In addition, the term ‘SLAPP’ entered the European legal and normative discourse only recently, in the aftermath of the murder of the Maltese journalist Daphne Caruana Galizia in October 2017.¹⁷

In most Member States, there is no definition or statistical assessment of SLAPPs.¹⁸ The lack of awareness of SLAPPs is particularly evident in Poland, where a variety of remedies materially correspond to those set out in the EU Anti-SLAPP Directive already exists but remain largely unused by courts.¹⁹

This raises the question how effectively victims can leverage these remedies, which largely depends on the level of awareness thereof among courts, lawyers and victims themselves. Article 19 of the Directive reflects this idea, requiring that persons engaging in public participation ‘*have access, as appropriate, to information on procedural safeguards and remedies and existing support measures*’.²⁰ Furthermore, this issue of awareness adds another dimension to the question of which implementation measures are required to ensure that practical application matches the legal situation the Directive aims to create.

While civil society organizations commenting on implementation attempts stress the need for explicit and clear safeguards,²¹ all assessments of the potential effectiveness of the Directive so far focus on its black letter remedies, leaving aside their accessibility to victims. This article complements these assessments by examining how the Anti-SLAPP framework established by the Directive presents itself to victims and therefore how effectively it can be utilized in practice. As the situation of victims differs depending on the legal ground used, this analysis is limited to defamation SLAPPs.²² This

Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy’ (2023) 3 *Athena: Critical Inquiries in Law, Philosophy and Globalization* 209; Petra Bard et al, ‘Ad-Hoc Request. SLAPP in the EU Context’ (*Social Science Research Network*, 1 May 2020)

<<https://papers.ssrn.com/abstract=4092853>> accessed 29 January 2025; Birgit van Houtert, ‘The Anti-SLAPP Directive in the Context of EU and Dutch Private International Law: Improvements and (Remaining) Challenges to Protect SLAPP Targets’ (2025) *Nederlands Internationaal Privaatrecht* 651; Zuzanna Nowicka, ‘SLAPP vs. Mutual Trust: Protecting the Public Debate Through Public Policy Considerations’ (2024) 26(4) *German Law Journal* 568.

¹⁷ Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 844; Bayer et al (n 1) 12; European Parliament, ‘Media Pluralism and Media Freedom in the European Union’ (2018) P8_TA(2018)0204 <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0204_EN.pdf> accessed 29 December 2025.

¹⁸ CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons” à l’occasion de La Transposition de La Directive (UE)2024/1096 Du 11 Avril 2024’ (Commission Nationale Consultative des Droits de l’Homme 2025) A-2025-2 6 <<https://www.actu-environnement.com/media/pdf/news-45676-avis-CNCDH-procedures-baillons.pdf>> accessed 29 December 2025.

¹⁹ Radosław Baszuk et al, ‘Co To Są Strategiczne Pozwy Przeciwko Udziałowi W Życiu Publicznym W Polsce I Jak Bronić W Takich Sprawach’ (OKO Civic Control Centre Foundation), 39 <<https://www.antislapp.eu/curriculum-hub/anti-slapp-curriculum-poland-full>> accessed 1 December 2025.

²⁰ Anti-SLAPP Directive Art. 19.

²¹ See for example ‘Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive’, 3 <<https://www.internetconsultatie.nl/antislapp/b1>> accessed 12 June 2025.

²² Defamation in this article is understood in a broad sense, encompassing not only claims based on direct attacks about the reputation of an individual person but also the claim of false or misleading information about both, natural and legal persons. A more narrow understanding excluding the claim of diffusion of

category was chosen because a big share of SLAPPs in the EU are based on defamation. According to recent data, 68.7 % of statistically recorded SLAPPs between 2010 and 2023 are based on criminal or civil defamation.²³ By 2023, 64.3% of SLAPPs examined were brought in civil cases.²⁴

In Section 2, this article gives an overview of the Anti-SLAPP framework and related instruments to provide an understanding of the functioning of the Directive, pointing out the main challenges to SLAPP victims and the remedies provided. This simultaneously gives a comprehensive overview of the debates in literature on the Anti-SLAPP Directive.

Subsequently, it is assessed how these remedies (potentially) translate into the situation of victims, using the concept of 'legal opportunity structures'. Considering comparative aspects and current implementation tendencies, it is analysed how the definition of SLAPPs, the scope of the Directive and the remedies are perceived by a hypothetical victim of a defamation SLAPP. This includes an analysis of the receptivity of the legal system for SLAPP counterclaims and the legal culture in terms of awareness on the phenomenon among courts and lawyers. Moreover, it examines the extent to which information is available to SLAPP victims to enhance visibility of both the phenomenon and available remedies.

This analysis of victims' legal opportunity structures will point to ambiguities in the Directive, blind spots threatening to hamper its effective use and how they can be corrected, providing guidance for courts, legislators and victims.

2 THE *DE JURE* PROTECTION SYSTEM AGAINST SLAPPS IN THE EU

This Section provides an overview of the phenomenon of SLAPPs, including the main challenges for victims as well as the response provided for by the Directive and other Anti-SLAPP instruments in Europe. This will serve as a basis to analyse the legal opportunity structures of victims in the second part of this work.

2.1 DEFINITION OF SLAPPS

Not every case concerning freedom of speech is a SLAPP. The distinctive criterion is that, in a SLAPP, the main purpose of the procedure is not to seek a legal remedy but to use the procedure itself to promote a private interest that is not necessarily protected by the legal order.²⁵ This distinction is not sharp, instead, one always needs to balance the fundamental rights of freedom of expression and information (Art. 11 Charter of Fundamental Rights of the European Union (CFR)) and the right to a fair trial

false or misleading information on a company can be found in CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons" à l'occasion de La Transposition de La Directive (UE) 2024/1096 Du 11 Avril 2024' (Commission Nationale Consultative des Droits de l'Homme 2025) A-2025-2 13 <<https://www.actu-environnement.com/media/pdf/news-45676-avis-CNCDH-procedures-baillons.pdf>> accessed 1 December 2025.

²³ Daphne Caruana Galizia Foundation, 'A 2024 Report on SLAPPs in Europe: Mapping Trends and Cases' (The Coalition Against SLAPPS in Europe (CASE) 2024), 16 <https://www.the-case.eu/wp-content/uploads/2024/12/CASE-2024-report-vf_compressed-1.pdf> accessed 1 December 2025.

²⁴ *ibid.*

²⁵ Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 842.

(Art 47 CFR) of the defendant against the right to a fair trial of the applicant (Art. 47 CFR) and to distinguish between a legitimate exercise of a right and an abuse of the right to process.²⁶ Therefore, there cannot be a general one-fits-all definition of SLAPPs, only indications.²⁷

The Directive differentiates between SLAPPs in the form of manifestly unfounded claims and in the form of abusive lawsuits against public participation with counter measures tailored to the respective category.²⁸ While the Council attempted to include the definition of ‘manifestly unfounded’ as beyond any reasonable doubt,²⁹ the Directive does not contain any definition of that category. The category of abusive SLAPPs requires the court proceedings ‘*have as their main purpose to prevent, restrict or penalize public participation*’.³⁰ The Article contains a non-exhaustive list of indicators for such an intent including disproportionate, unreasonable claims, the existence of multiple proceedings against the same claimant in relation to the same matter, intimidation or threats and procedural tactics used in bad faith such as abusive forum shopping, delaying proceedings and discontinuing cases at a late stage of proceedings.

Second, claims must be unfounded³¹. This deviates from the formulation ‘fully or partially unfounded’ in the Directive proposal.³² Other than one might think, this does not mean that the definition was narrowed. The amendment introducing this change in terminology, filed by the council, was accompanied by a recital, stating that ‘*abusive court proceedings can be either fully or partially unfounded, the concept of full or partial unfoundedness clarifies the fact that the claim does not necessarily have to be completely unfounded for the proceedings to be considered abusive*’.³³ In other words, it is indicated that only the terminology, not the content of the definition was changed. This is confirmed by Recital 29 of the final Directive.³⁴ Thereby, the Directive also covers cases where the violation of a law, for example a personal right is not in dispute, but damage claims are excessive, even though they are not considered typical examples of SLAPP cases.³⁵

²⁶ Farrington and Zabrocka (n 4) 523.

²⁷ Bayer et al (n 1) 22.

²⁸ Anti-SLAPP Directive Art. 1, chapter III, chapter IV.

²⁹ *ibid* recital 13.

³⁰ *ibid* Art. 4(3).

³¹ *ibid* Art. 4(3)

³² European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings (“Strategic Lassuits against Public Participation”)’ (2022) COM (2022) 177 final, Art. 3(3).

³³ European Council, ‘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”) – Presidency Draft Compromise Proposal’ (2023) Rec. 20a <<https://media.euobserver.com/32e2540e1d40a5a019966e17e33ffd0c.pdf>> accessed 27 June 2025.

³⁴ See also the explanations by the German government: Deutsche Bundesregierung, ‘Antwort Der Bundesregierung Auf Die Kleine Anfrage Der Abgeordneten Tobias Matthias Peterka, Stephan Brandner, Fabian Jacobi Und Der Fraktion Der AfD EU-Richtlinie Über Den Schutz Vor Sogenannten SLAPP-Klagen’ (Deutscher Bundestag) Drucksache 20/12883 2.

³⁵ Bard et al (n 16) 39; Prakken d’Oliveira (n 9) para 23.

2.2 SCOPE OF THE DIRECTIVE

As the Directive was adopted based on the competence in Article 81(2)f TFEU, the elimination of obstacles to the proper functioning of civil proceedings with cross-border implications, the claim needs to be civil and have ‘cross-border implications’ for the Directive to apply. These exist ‘*unless both parties are domiciled in the same Member State as the court seized and all other elements relevant to the situation concerned are located in that Member State*’.³⁶

‘Elements relevant to the situation concerned’ are to be determined by the court hearing the case.³⁷ They may include, inter alia, factors set out in the Directive proposal, notably, whether the matter of public interest is relevant in more than one Member State (‘European element’) and whether the claimant has initiated similar proceedings against the same defendants in another Member State.³⁸ For the first aspect, the Coalition against SLAPPs (CASE) found that 85 % of SLAPPs examined related to a matter of public interest with a ‘European element’.³⁹ As pointed out by the French Senate, this criterion could lead to the scope of the Directive covering almost all civil SLAPPs in a Member State.⁴⁰

The second aspect – simultaneous suits in different Member State – is common for online media content. The author can be sued wherever the content is accessible online if the harm occurred there, for example due to the presence of shareholders.⁴¹ This is due to the fact that under the Brussels Ia regulation either court can have jurisdiction, meaning the court of the place either where the harmful event was initiated or where it occurred is possible.⁴²

The mere possibility of choosing different jurisdictions is considered sufficient as a cross-border element by some authors.⁴³ According to a study examining SLAPPs in 2022 and 2023 this covers 91,4 % of examined SLAPPs.⁴⁴ The EP suggested to include in the recitals that an act is to be considered relevant in more than one Member State if it is carried out on the internet.⁴⁵ Yet, Recital 30 in the Directive clarifies that the assessment

³⁶ Anti-SLAPP Directive Art. 5.

³⁷ *ibid* recital 30.

³⁸ European Commission 2022 (n 12) Art. 4. Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 848.

³⁹ Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 29.

⁴⁰ ‘RÉSOLUTION EUROPÉENNE PORTANT AVIS MOTIVÉ Sur La Conformité Au Principe de Subsidiarité de La Proposition de Directive Du Parlement Européen et Du Conseil Sur La Protection Des Personnes Qui Participent Au Débat Public Contre Les Procédures Judiciaires Manifestement Infondées Ou Abusives, COM(2022) 177 Final’ (Sénat 2022) recital 14.

⁴¹ European Commission (n 12) 2; van Houtert (n 16) 655; Joined Cases C-509/09 and C-161/10 *eDate and Martinez* EU:C:2011:685.

⁴² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2015] OJ L351/1 Arts 4, 7(2); Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 26.

⁴³ Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8).

⁴⁴ *ibid* 9.

⁴⁵ European Parliament Committee on Legal Affairs, ‘Report on the 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)0177 – C9-0161/2022 – 2022/0117(COD)) 19, Amendment 24 <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P9_A\(2023\)0223](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P9_A(2023)0223)> accessed 19 June 2025.

of the relevant elements shall be *'irrespective of the means of communication used'*.

In any event, the definition of cross-border cases in the Directive goes far beyond definitions of cross-border in international and European private law, typically referring to the defendant being domiciled or habitually resident in another Member State than the court seized or claimant and defendant not domiciled in the same Member State.⁴⁶ Only 9.4% of SLAPPs between 2010 and 2023 examined by CASE would fall under this definition.⁴⁷

To summarize, a case is cross-border if claimant and defendant are not domiciled in the same Member State. If this is not the case the aspects mentioned above may qualify it if the court considers them relevant in the specific case. Therefore, the term cross-border leads to a (potentially) broad scope for civil cases.

In turn, SLAPPs based on criminal law and administrative law are excluded from the scope⁴⁸ which is a major point of critique.⁴⁹ It is argued that so-called 'SLAPPers' can thereby easily circumvent the safeguards of the Directive choosing another legal basis, defamation for example can be based on civil or criminal law. This issue is acknowledged in the Directive⁵⁰ which is why the Proposal for the SLAPP Directive was accompanied by a Commission Recommendation stating inter alia that Member States should adopt the same safeguards for SLAPPs beyond the scope of the Directive.⁵¹

2.3 REMEDIES FOR SLAPP VICTIMS

Remedies are tailored to the two categories of SAPPs: manifestly unfounded claims and abusive lawsuits against public participation.⁵²

SLAPP procedures are often lengthy and therefore require a lot of time, psychological resilience and resources from victims.⁵³ As a response, SLAPP victims subject to manifestly unfounded claims can apply for early dismissal (Art. 11) where the burden of proof to substantiate that the claim is founded remains on the claimant. Moreover, Article 7 prescribes an accelerated treatment of applications for procedural safeguards.

The fact that early dismissal is only available for manifestly unfounded claims is criticized on the ground that abusive lawsuits have a similar effect on SLAPP victims.⁵⁴

⁴⁶ See for example Council Directive_2002/8/EC of 27 January 2003_to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41 Art. 2; van Houtert (n 16) 659; Daphne Caruana Galizia Foundation (n 23) 8.

⁴⁷ Daphne Caruana Galizia Foundation (n 23) 18.

⁴⁸ Anti-SLAPP Directive Art. 2.

⁴⁹ Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 840; Pasqua (n 16) 225; Piotr Kladoczny and Barbara Namysłowska-Gabrysiak, 'Strategic Lawsuits Against Public Participation (SLAPP) in Light of Disclosed Sexual Violence at Universities in Poland - General Reflections Relating to Legal Regulation and Practice' (2023) 100 *Studia Iuridica* 164

<<https://studiajuridica.pl/resources/html/article/details?id=620329>> accessed 6 February 2025; Stefanie Egidy, 'Einschüchterung Ist Das Ziel Stefanie Egidy Strategische Klagen Gegen Öffentliche Beteiligung (SLAPPs) in Deutschland' (*OBS-Arbeitspapier*, 19 March 2025), 77, 79 <<https://www.otto-brenner-stiftung.de/einschuechterung-ist-das-ziel/>> accessed 1 December 2025.

⁵⁰ Anti-SLAPP Directive recital 17.

⁵¹ European Commission 2022 (n 12) 4.

⁵² Anti-SLAPP Directive Art. 1, chapter III and chapter IV.

⁵³ Bonello Ghio and Nasreddin (n 3) 3; Anti-SLAPP Directive recital 16.

⁵⁴ Farrington and Zabrocka (n 4) 530.

Yet, it also needs to be considered that abusive lawsuits might be partially founded, the right to fair trial of the claimant (Art. 47 CFR) would be restricted if the claim would nevertheless be subject to early dismissal. It is argued that this could be justified in analogy of the abuse of rights concept (Art. 17 ECHR) stressing that early dismissal is not a denial of access to court.⁵⁵ Another point of critique is that ‘manifestly unfounded’ is a high threshold. Even though the definition of the council as a claim being ‘so obviously unfounded that there is no scope for any reasonable doubt’ was not adopted, it might be easy for the claimant to substantiate that the claim is not manifestly unfounded.⁵⁶

Addressing the high financial burden of a SLAPP,⁵⁷ the Directive obliges Member States to ensure that courts seized in a SLAPP can require the plaintiff to provide security for the estimated costs of the proceedings.⁵⁸

In the case of an abusive lawsuit, the claimant can be awarded all costs of the abusive proceedings, including the costs of legal representation even beyond statutory fee tables.⁵⁹ Moreover, Member States have to ensure that proportionate and dissuasive penalties may be ordered against the claimant.⁶⁰ This may not only entail financial compensation but also the publication of the court decision.⁶¹ Member States shall ensure that the award of these remedies cannot be affected by the subsequent modifications of the claim by the plaintiff.⁶²

As there is no reason why SLAPPers using manifestly unfounded claims should not be subject to these costs and penalties, it is puzzling that the phrasing of these remedies only refers to abusive court proceedings. In literature it is held that these remedies apply to both categories,⁶³ possibly because manifestly unfounded claims fall in most cases also under the definition of abusive lawsuits against public participation in Article 4(3). In other words, manifestly unfounded claims might be a sub-category of abusive claims, not a separate category.

If the claim is manifestly unfounded or abusive, Article 9 allows for third-party interventions by organizations having a legitimate interest in safeguarding the rights of persons engaging in public participation.⁶⁴

EU and Private international law amplify the danger of SLAPPs and the asymmetry of power between claimant and defendant.⁶⁵ As explained above, the Brussels Ia regulation provides for a broad choice of the forum in defamation cases which enables ‘libel tourism’, filing a lawsuit in the jurisdiction where the outcome is most likely to be positive.⁶⁶ Adding

⁵⁵ Bayer et al (n 1) 41.

⁵⁶ Farrington and Zabrocka (n 4) 530; Pamela Shapiro, ‘SLAPPs: Intent or Content: Anti-SLAPP Legislation Goes International’ (2010) 19(1) *Review of European, Comparative & International Environmental Law* 14, 25; Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 848.

⁵⁷ Bonello Ghio and Nasreddin (n 3) 49.

⁵⁸ Anti-SLAPP Directive Art. 10

⁵⁹ *ibid* Art. 14

⁶⁰ *ibid* Art. 15.

⁶¹ *ibid*.

⁶² *ibid* Art. 8.

⁶³ Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 849; Farrington and Zabrocka (n 4).

⁶⁴ For further analysis of this measure see Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 851.

⁶⁵ *ibid* 852; Nowicka, ‘SLAPP vs. Mutual Trust’ (n 16).

⁶⁶ Nowicka, ‘SLAPP vs. Mutual Trust’ (n 16) 12; Council of Europe, ‘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’ (Council of Europe) Decl.(04/07/2012).

to the disadvantage of the legal system chosen by the plaintiff, being sued in a foreign jurisdiction adds a linguistic barrier, a geographical dimension, and drives up legal costs even further for the victim.⁶⁷ This is exacerbated by ‘mosaic litigation’, the suing of the victim in multiple Member States on the basis of the same ‘infringement’.⁶⁸ This issue is on the Commission’s agenda; currently it is debated to include specific rules of jurisdiction for defamation claims in the Rome II regulation.⁶⁹ However, until now there has not been consensus on that among Member States.⁷⁰

What if a SLAPP, a claim designed to intimidate, is successful, even though objectively speaking it might be abusive or manifestly unfounded? If the judgment is issued in a third country, the Directive provides protection against the enforcement of third country SLAPP judgments as EU Anti-SLAPP measures could otherwise be circumvented by private international law.

Member States shall ensure to refuse the enforcement if, under its domestic law, the proceedings are considered manifestly unfounded or abusive (Art. 16). Moreover, the respective national court has jurisdictions to award damages incurred through the SLAPP (Art. 17). Thereby the protection of EU SLAPP victims is not limited to the EU.⁷¹ Greenpeace for example, in its case against Energy Transfer, relies on a conjunct reading of national tort law with Article 17 of the Directive,⁷² while it will also need to rely on Article 16 to prevent the enforcement of the US decision.⁷³

If, in turn, an EU court gives a judgment based on claims that would be considered manifestly unfounded or abusive under the law of another Member States, there is no such possibility of non-enforcement. While this corresponds to the principle of mutual trust (Art. 82 (1) TFEU), it is problematic, especially in light of issues with judicial independence in the EU.

Yet, in *Le Monde vs RealMadrid*, the CJEU interpreted Article 34 of the Brussels I regulation, the ground of ‘public policy’ to refuse the execution of a judgment issued by a court in another Member State, as meaning that enforcement must be refused if it would constitute a manifest breach of a fundamental right, notably the freedom of expression.⁷⁴

This exception is not restricted to SLAPPs. Yet, it places particular emphasis on excessive damage claims, one indicator for SLAPPs under Article 4(3) a of the Anti-SLAPP Directive. The CJEU follows upon the ECtHR, which held in *Steel vs Morris* that excessive

⁶⁷ European Commission, ‘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”)’ (2022) SWD (2022) 117 final 6; Anti-SLAPP Directive recital 30.

⁶⁸ van Houtert (n 16).

⁶⁹ ‘Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Regulation (EC) No 864/2007 on the Law Applicable to Noncontractual Obligations (Rome II Regulation)’ (European Commission 2025) 16.

⁷⁰ *ibid* 20.

⁷¹ Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 858.

⁷² Prakken d’Oliveira (n 9) para 139.

⁷³ *ibid* para 124.

⁷⁴ Case C-633/22 *Le Monde vs Real Madrid* EU:C:2024:843 para 74.

damage claims may make the interference of a judgment with the freedom of speech disproportionate.⁷⁵ The CJEU held that the executing court needs to examine, also in light of the ECtHR case law, whether the damages are capable of ‘discouraging the participation of the press in debates over matters of legitimate public concern and, therefore, have a deterrent effect on the exercise of the freedom of the press in respect of such matters’.⁷⁶ Whilst, under the principle of mutual trust, it is not on the executing court to review the decision of the issuing court, the CJEU stressed that it is for the executing court to review the proportionality of damages considering all relevant aspects.⁷⁷ In other words, SLAPP-victims that are subject to a SLAPP decision abroad may rely on non-enforcement.

In sum, the Directive is in principle welcomed as an important step to counteract SLAPPs and a result of effective legal mobilization by civil society.⁷⁸ The feared restrictions by the Council are not reflected in the final Directive.⁷⁹ While its scope is limited, it encompasses civil cross-border cases, a kind of SLAPP that is perceived as particularly threatening.⁸⁰ Statistical assessments suggest that 85% of SLAPPs in the EU might have a European element and therefore fall within the scope of the Directive.⁸¹

The Directive provides for remarkable safeguards. Yet, the effectiveness of the Directive is not only about what tools there are but about how effectively they are used by courts.⁸² This also applies for legal professionals and – most importantly – victims. It is vital that persons engaging in public participation ‘have access, as appropriate, to information on procedural safeguards and remedies and existing support measures’.⁸³ Therefore, the subsequent Section assesses how the Directive impacts the legal situation perceived by victims.

3 LEGAL OPPORTUNITY STRUCTURES OF DEFAMATION SLAPP VICTIMS

How the remedies in the Directive (potentially) translate to the situation of victims can be assessed with the ‘legal opportunity structures’ (‘LOS’) approach. It is used in political science and social movement studies to better understand the interplay between legal strategies, legislative decisions and public policies.⁸⁴ Put differently, it assesses why social movements mobilize the law and engage in strategic litigation and why they succeed or fail.⁸⁵

⁷⁵ Bayer et al (n 1); *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) para 95.

⁷⁶ *Steel and Morris v the United Kingdom* (n 75) para 61.

⁷⁷ *ibid* paras 68, 69.

⁷⁸ Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 840.

⁷⁹ ‘Governments’ Agreed Stance on EU Anti-SLAPP Directive – a Disappointing Failure to Support the Adoption of Robust Safeguards for Public Watchdogs’ (CASE 2023) <https://www.amnesty.eu/wp-content/uploads/2023/06/CASE_EU-anti-SLAPP-directive.pdf> accessed 31 January 2025.

⁸⁰ Daphne Caruana Galizia Foundation (n 23) 27; European Commission 2025 (n 69) 5; Bard et al (n 16) 37.

⁸¹ Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 29.

⁸² Dominika Bychawska-Siniarska and Zuzanna Nowicka, ‘From Zero to Hero’ (*Verfassungsblog*, 4 September 2024) <<https://verfassungsblog.de/anti-slapp-legislation-poland/>> accessed 16 January 2025; Bayer et al (n 1).

⁸³ Anti-SLAPP Directive Art. 19.

⁸⁴ Francesca Colli, ‘Legal Opportunity Structures: Social Movements in the European Courts’ in Rossana Deplano et al (eds), *Interdisciplinary Research Methods in EU Law* (Edward Elgar Publishing 2024) 105.

⁸⁵ Lisa Vanhala, ‘Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental

Legal opportunity structures are composed of the receptivity of the legal system (the ‘legal stock’) as well as resources accessible to victims, including expertise.⁸⁶

While LOS research typically also examines standing and potential costs,⁸⁷ the aspect of standing is not an issue for SLAPP victims, as they are respondents. In this research, the aspect of potential costs is not examined in particular as it is understood as part of the remedies accessible to victims, the legal stock.

LOS research understands social movements as rational actors.⁸⁸ If one leaves aside identity and agency aspects, SLAPP victims can be assumed to make a similar rational analysis of their possibilities when they decide between (a) settling and removing the information from the public or (b) defending themselves in court.⁸⁹ Yet, the use of this concept for the purpose of this research needed adaptation. First, SLAPPs can be categorized as so called non-aligned strategic litigation as they seek to demobilize, not to mobilize for a public cause.⁹⁰ Therefore, they fall under the category of non-aligned strategic litigation. Consequently, other than common LOS research, this assessment does not take the perspective of the initiator of strategic litigation but of the respondent.

A common research design under the LOS framework contains a concrete description of the legal opportunity structures and an assessment of whether the LOS and the decision to litigate correlate positively.⁹¹ That second part of the assessment – the decision to litigate – is difficult to assess as cases where the SLAPP victim settled are of very little visibility: it is inherent to the phenomenon of SLAPPs that many of them end in the pre-litigious phase as the target might at that point already be sufficiently intimidated.⁹² Out of fear, these SLAPP victims might prefer to remain silent on the case.⁹³

Therefore, the use of the concept cannot give any indications on the explanatory value of legal opportunity structures but only illustrate what is legally possible. Based on the presumption that there is a chilling effect that can be mitigated by favourable legal opportunity structures, this analysis contributes to assessing the effectiveness of the Directive in minimizing the chilling effect of SLAPPs.

As the legal opportunity structures resulting from a Directive are an amalgam of the EU level, and national level, both need to be assessed.

As the Directive is yet to be implemented, the analysis needs to be based on preliminary observations of implementation attempts. Nonetheless, the insights are

Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy’ (2018) 51(3) *Comparative Political Studies* 380, 380; Colli (n 84) 101.

⁸⁶ Colli (n 84) 102; Vanhala, ‘Is Legal Mobilization for the Birds?’ (n 85) 384.

⁸⁷ *ibid.*

⁸⁸ Colli (n 84) 101, 103.

⁸⁹ Canan (n 4) 7.

⁹⁰ As categorized in Joana Setzer and Catherine Higham, ‘Global Trends in Climate Change Litigation: 2024 Snapshot’ (London School of Economics 2024) 7 <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>> accessed 1 December 2025. Other scholars don’t consider SLAPPs as strategic litigation, see Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 843.

⁹¹ Colli (n 84); Teresa Weber, ‘KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis’ (2024) 11 *Austrian Law Journal* 1 101116. For a more abstract examination of legal opportunity structures see Vanhala, ‘Is Legal Mobilization for the Birds?’ (n 85).

⁹² Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 28; Daphne Caruana Galizia Foundation (n 23) 11.

⁹³ Bonello Ghio and Nasreddin (n 3) 13.

valuable as they point to pitfalls of the effectiveness of the Directive in the implementation phase. Bearing in mind these limitations, this research will assess legal opportunity structures as they present themselves to a hypothetical defamation SLAPP victim in the implementation phase of the Directive. Insights from draft implementation acts will be used for a preliminary assessment on how shortcomings of the Directive might be corrected on the Member State level. However, as the focus remains on the effectiveness of the Anti-SLAPP Directive, these national (draft) implementing acts are examined only with regard to a potential corrective function with respect to the shortcomings of the Directive.

The assessment of implementation acts is not complete as not every Member State has published implementation attempts yet, and a comprehensive assessment of all 27 MS would be beyond the scope of this research. It will nevertheless identify general tendencies based on insights on Poland (a Member State with a severe SLAPP issue in decline), Malta (a Member State with high numbers of SLAPPs and a legal environment identified as favourable to SLAPPs), France (a Member State with a high number of SLAPPs filed by corporations), Belgium, the Netherlands and Germany (Member States where few SLAPPs are identified).⁹⁴

The analysis will be based on any primary documents available on the implementation in Member States. Where available, it also included secondary sources on these attempts, mainly drafted by NGOs. Given the variety of possible SLAPP targets⁹⁵ legal opportunity structures can differ drastically. This will be taken into account in the subsequent analysis, taking note of cases against different actors.

3.1 LEGAL STOCK

The legal stock refers to the receptivity of the legal system⁹⁶ for the claim (here the defence against a SLAPP.) This receptivity is determined by the claims alignment with the body of law in the particular field, existing litigation and the cultural stock of norms, i.e. how the topic is handled by courts.⁹⁷ If, for example, there exist clear provisions designed for SLAPP victims and clear indicators for SLAPPs as well as a general awareness of courts of the issue, the victim will feel reassured to defend itself.

The body of law on the EU level has been illustrated in Section 2. However, the existence of that legal body and the perception of that legal body are two distinct aspects.

3.1 [a] Perception of the definition of SLAPPs

Purpose of the lawsuit

To recall, abusive lawsuits against public participation need to have the prevention,

⁹⁴ Daphne Caruana Galizia Foundation (n 23) 14; Bonello Ghio and Nasreddin (n 3).

⁹⁵ Bonello Ghio and Nasreddin (n 3); Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8); Coe, Moosavian, and Wragg (n 3) 8.

⁹⁶ Colli (n 84) 102; Jan Beyers, Rainer Eising, and William A Maloney (eds), *Interest Group Politics in Europe* (Routledge 2013) 1131.

⁹⁷ Colli (n 84) 102, 107; Vanhala, 'Is Legal Mobilization for the Birds?' (n 85) 348.

restriction or penalization of public participation as their main purpose which is to be determined based on objective indicators.⁹⁸ The Directive provides a non-exhaustive list of four indicators:

- (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof, including excessive dispute value;
- (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matter;
- (c) 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;
- (d) 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.

SLAPPs can present themselves in very different ways given the variety of possible targets, initiators and grounds.⁹⁹ Therefore it is important for the indicators to represent that variety so that victims in various situations can assess whether they might be a SLAPP victim. Indicators in the final Directive cover typical appearances of SLAPPs.¹⁰⁰ Yet, during the legislative procedure, the EP suggested further indicators: (1) the extent to which the claim is manifestly unfounded; (2) a previous early dismissal of a similar claim as abusive and (3) the exploitation of preponderance in terms of economic power, legal resources or political or social influence in order to restrict the public participation of the defendant resulting in an imbalance of power.¹⁰¹ The latter criterion, an asymmetry of power between the claimant and the defendant, is archetypical. A study found that it characterizes 89.5% of SLAPPs in its sample.¹⁰² The criteria suggested by the EP correspond to the indicators used by CASE, the network of Anti-SLAPP NGOs that mobilized for an EU Anti-SLAPP Directive.¹⁰³

The Indicators in the Committee of Ministers Recommendations further include that the legal action might be accompanied with a public relations offensive against the defendant (g) and the systematic refusal to engage in non-judicial mechanisms to resolve the claim (j). Moreover, the fact that the legal action deliberately targets individuals rather than the responsible organizations (f) is seen as an indicator.¹⁰⁴ The latter criterion might seem counterintuitive as SLAPP victims that are part of an organization seem less vulnerable. Yet, also the individualization of proceedings in the form of a suit against both, (typically) the journalist and its employer were found to have significant adverse effects on the individual concerned, such as psychological stress, reliance on their employer and legal

⁹⁸ Anti-SLAPP Directive Art. 4(3).

⁹⁹ Coe, Moosavian, and Wragg (n 3) 8; Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 8.

¹⁰⁰ Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 852; Nowicka, 'SLAPP vs. Mutual Trust' (n 16); Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 37; Bard et al (n 16) 17; Council of Europe, 'Declaration of the Committee of Ministers on the Desirability of International Standards Dealing with Forum Shopping' (n 66).

¹⁰¹ European Parliament Committee on Legal Affairs (n 45) 104.

¹⁰² Bonello Ghio and Nasreddin (n 3) 30.

¹⁰³ *ibid* 15.

¹⁰⁴ Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 8.

ambiguities when for example a settlement is only agreed upon with the employer.¹⁰⁵

The more indicators are present in legislation, the easier it is for victims to recognize that they are victims of a SLAPP. In light of the proven relevance of the indicators suggested by the EP and the Council of Europe, their omission from the Directive is difficult to explain. The argument that a too broad definition of SLAPPs runs the risk of preventing plaintiffs from the legitimate exercise of their rights (i.e. under Art. 47 CFR)¹⁰⁶ only applies to a limited extent as these are non-exhaustive indications, it is still on the court to weigh all individual circumstances.¹⁰⁷

Looking at implementation measures, only the Belgium Model Anti-SLAPP law, drafted by a NGO and submitted by the opposition,¹⁰⁸ includes all indicators of the Directive and of the Council of Europe Recommendations in its Explanatory Memorandum.¹⁰⁹ The French national consultative commission on Human Rights (CNCDH), an independent public institution,¹¹⁰ published an opinion on the transposition of the Directive in which it recommends to the French legislator to do the same.¹¹¹ The Dutch implementing Act does not contain its own definition of SLAPPs, it only refers to Article 4 of the Directive.¹¹² The Polish, Maltese and Irish draft implementing Acts adopted only the indicators of the Directive.¹¹³ In the Maltese Act, the syntax has been changed from ‘*abusive court proceedings [...] meaning court proceedings which are not brought to assert or exercise a right [...] and pursue unfounded claims. Indicators for such a (abusive) purpose include*¹¹⁴ to ‘*abusive lawsuits are lawsuits which are not brought to assert or exercise a right [...] and which pursue unfounded claims, including [...]*’.¹¹⁵ It is suggested that this adds another ambiguity as one could then understand the indicators as examples of unfounded claims, not as indicators for abusiveness.¹¹⁶ However, as the indicators (see above) are clearly unrelated to the

¹⁰⁵ Emma Bergmans and Jasmin de Zeeuw, ‘Een Onderschat Probleem: Disproportionele Juridische Druk Op de Nederlandse Journalistiek’ (Free Press Unlimited 2024) 12, 48.

¹⁰⁶ Coe, Moosavian, and Wragg (n 3) 19.

¹⁰⁷ Anti-SLAPP Directive Art. 4 (3)

¹⁰⁸ Anastasiia Vorozhtsova, ‘Belgium: Bill for the Transposition of the EU Anti-SLAPP Directive’ (*Global Freedom of Expression*, 26 March 2025) <<https://globalfreedomofexpression.columbia.edu/updates/2025/03/belgium-bill-for-the-transposition-of-the-eu-anti-slapp-directive/>> accessed 15 May 2025.

¹⁰⁹ ‘Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings’ (Anti-SLAPP working group Belgium 2025) 3.

¹¹⁰ ‘Présentation’ (CNCDH) <<https://www.cncdh.fr/presentation>> accessed 15 May 2025.

¹¹¹ CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons”’ (n 18) 7.

¹¹² ‘Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version’ 224 (A) <<https://europadecentraal.nl/praktijkvraag/wat-is-een-bnc-fiche/>> accessed 1 December 2025.

¹¹³ Ireland: ‘Defamation (Amendment) Bill 2024’ Art. 34A <<https://www.oireachtas.ie/en/bills/bill/2024/67/>> accessed 1 December 2025; Malta: ‘Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ [2024] Government Gazette of Malta No. 21, 292 4 <<https://legislation.mt/eli/ln/2024/177/eng>> accessed 1 December 2025.

¹¹⁴ Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (‘Strategic lawsuits against public participation’) [2024] OJ L2024/1069.

¹¹⁵ ‘Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ (n 113) 2.

¹¹⁶ Repubblica, Daphne Cuarana Galizia Foundation, ‘Re: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ (Repubblica, Daphne Cuarana Galizia Foundation 2024) 2 <<https://www.daphne.foundation/documents/letters/letter-on-anti-SLAPP-Directive-transposition.pdf>> accessed 1 December 2025.

concept of unfoundedness, this paper argues that the resulting ambiguity is negligible.

Unfounded claims

The second criterion for a lawsuit to be abusive is that it pursues ‘unfounded claims’.¹¹⁷ This includes partially unfounded cases (see above), typical for defamation SLAPPs. Critical acts of public participation often address a certain behaviour of, for example, a company, and thereby include a negative statement on the latter, which might be classified as a slight violation of personality rights of both natural and legal persons.¹¹⁸ SLAPPs based on defamation often combine (the possibility of) such a slight violation of personality rights with excessive damage claims which makes them partially unfounded.¹¹⁹ Yet, the term ‘unfounded’ is misleading as it is commonly understood as a synonym to ‘meritless’.¹²⁰ This is exacerbated by the fact that the initial formulation was ‘partially or fully unfounded’.¹²¹ One could thereby wrongfully think that the new Directive narrowed the definition with the term ‘unfounded’.

The Commission Recommendations to counter SLAPPs were published with the Anti-SLAPP proposal and therefore also use the terminology ‘partially or fully unfounded’. A similar terminology is used by the Council of Europe Recommendations of the Committee of Ministers.¹²² Scholarship does not provide clarification in that regard as many articles are based on the Proposal while articles on the final Directive don’t address the new terminology and the issue of ambiguity. SLAPP victims, attorneys and courts are confronted with these distinctive terms concerning unfoundedness:

Term	Meaning and specificities	Use
Partially unfounded court proceedings	Some of the claims have legal merit	Art. 3(3) Anti-SLAPP Proposal; recital 8 Committee of Ministers recommendations (‘arguments’ instead of ‘proceedings’), Council of the EU draft compromise recital 20a, recital 20 of the Directive
Fully unfounded court proceedings	All claims lack legal merit	Art. 3(3) Anti-SLAPP Proposal, recital 8 Committee of Ministers recommendations (‘arguments’ instead of ‘proceedings’) Council of

¹¹⁷ Anti-SLAPP Directive Art. 4(3).

¹¹⁸ For example Case C-633/22 *Le Monde vs Real Madrid* EU:C:2024:843.

¹¹⁹ Anti-SLAPP Directive recital 29.

¹²⁰ See Cambridge dictionary ‘Unfounded’ (14 May 2025)

<<https://dictionary.cambridge.org/dictionary/english/unfounded>> accessed 15 May 2025.

¹²¹ European Commission, ‘(n 32) 3.’

¹²² Council of Europe, ‘Recommendation CM/Rec (2024)2’ (n 13) 8.

Term	Meaning and specificities	Use
		the EU draft compromise recital 20a, recital 20 of the Directive
Manifestly unfounded (Art. 1 Alternative 1)	Own category of SLAPPs, no definition	Art. 1 Alternative 1 Anti-SLAPP Directive, Art. 1 Alternative 1 Anti-SLAPP proposal
Partially unfounded claims	Some of the claims have legal merit	Recital 29 of the Anti-SLAPP Directive
Unfounded (Art. 4(3)) claims	At least some of the claims are unfounded ¹²³ Includes both categories: Partially and fully unfounded claims	Art. 4(3) Anti-SLAPP Directive

This misleading formulation can already have consequences for SLAPP victims using the Directive as a basis for their argumentation¹²⁴ and the implementation of the Directive by MS. While Greenpeace, a large NGO experienced in Strategic Litigation and frequent SLAPP victim,¹²⁵ was able to hire a law firm that conducted an analysis of the Directive, finding that ‘unfounded’ also includes partially founded claims,¹²⁶ individual defamation SLAPP victims might stop their inquiry when reading ‘pursues unfounded claims’ in Article 4(3) of the Directive. A recent study that interviewed 50 Dutch journalists and editors found that it is a common misconception about SLAPPs that they need to be manifestly unfounded.¹²⁷ Furthermore, in German legal scholarship, there are doubts about the term ‘unfounded’.¹²⁸ This illustrates that the term might also be misinterpreted by courts, leading to a de facto narrowing of the definition.¹²⁹

The confusion can be corrected in the implementation of the Directive. Polish Anti-SLAPP experts stress the need for the national legislator to use the terminology ‘partially or fully unfounded’ used in the Proposal and by the Council of Ministers.¹³⁰ German Anti-SLAPP experts equally recommend align the definition of SLAPPs with the recommendation by the Council of Ministers.¹³¹

¹²³ Anti-SLAPP Directive recital 29.

¹²⁴ Prakken d’Oliveira (n 9) para 91.

¹²⁵ Tribunal Judiciaire de Paris Case N° RG 23/06215 *Total Energies vs Greenpeace France* (2024).

¹²⁶ Prakken d’Oliveira (n 9) para 123.

¹²⁷ Bergmans and de Zeeuw (n 105) 12.

¹²⁸ Johannes Maurer, ‘Kein SLAPP-Back’ (*Verfassungsblog*, 8 July 2025) <<https://verfassungsblog.de/anti-slapp-gesetz/>> accessed 14 July 2025.

¹²⁹ As noted for Poland by Paulina Milewska et al, ‘Propozycje Zmian Prawnych w Celu Wdrożenia Dyrektywy w Sprawie Ochrony Osób, Które Angażują Się w Debata Publiczną, Przed Ewidentnie Bezpodstawnymi Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi („strategiczne Powództwa Zmierające Do Stłumienia Debata Publicznej”) Tzw. SLAPP’ (Helsińska Fundacja Praw Człowieka 2024) 14 <<https://www.Art.19.org/wp-content/uploads/2024/11/SLAPP-rekomendacje-09.2024-FINAL.pdf>> accessed 15 May 2025.

¹³⁰ *ibid.*

¹³¹ Egidy (n 49) 44; ‘Stellungnahme von Reporter Ohne Grenzen e.V. (RSF) Zur Umsetzung Der Richtlinie (EU) 2024/1069 Des Europäischen Parlaments Und Des Rates Vom 11. April 2024 Über Den Schutz von

In Ireland, the Draft Defamation Act, containing provisions for defamation SLAPPs,¹³² adopted the wording of the Directive ‘unfounded claims’. Yet, it inserted the clarification that ‘claim’ ‘includes part of a claim’,¹³³ thereby providing the necessary clarification.

The Polish Draft Implementing Act does not refer to unfoundedness of abusive claims in the legislative text, thereby avoiding the misconception that they need to be fully unfounded. The explanatory memorandum clarifies that abusive lawsuits can be partially legitimate.¹³⁴

The French CNCDH is ambiguous, using the term ‘unfounded’ in its report while it also cited the Council of Ministers recommendations that use the terminology ‘partially or fully unfounded’.¹³⁵

The Maltese Implementing Act, the Belgian Model Anti-SLAPP law and the German draft implementing Act do not provide clarification, using the terminology of the Directive for its definition of abusive lawsuits against public participation, namely that claims need to be ‘unfounded’.¹³⁶

The Dutch Draft Implementing Act also only refers to the definition in the Directive.¹³⁷ Contrary to the finding of ambiguity in this research, the explanatory memorandum states that the ‘Directive does provide the necessary guidance for the assessment of a SLAPP, both in the provisions and the recitals’.¹³⁸

Yet, the lack of a definition of SLAPPs in national law leads to less awareness for both, victims and practitioners. The counterargument provided in the Explanatory Memorandum is that it is assumed that awareness of the phenomenon will increase thanks to a newly established focal point (‘central information point’), understanding it as a purely political, not a legislative task.¹³⁹

Personen, Die Sich Öffentlich Beteiligten, Vor Offensichtlich Unbegründeten Klagen oder Missbräuchlichen Gerichtsverfahren („strategische Klagen Gegen Öffentliche Beteiligung“) (Reporter ohne Grenzen) 33.

¹³² Ireland: ‘Defamation (Amendment) Bill 2024’ (n 113).

¹³³ *ibid* 17.

¹³⁴ ‘Explanatory Memorandum to the Polish Draft Implementing Bill (Uzasadnienie Do Ustawy o Ochronie Osób Uczestniczących w Debacie Publicznej Przed Oczywście Bezzasadnymi Roszczeniami Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi) UC 94’ 5
<<https://www.gov.pl/web/premier/projekt-ustawy-o-ochronie-osob-uczestniczacych-w-debacie-publicznej-przed-oczywscie-bezzasadnymi-roszczeniami-lub-stanowiacymi-naduzycie-postepowaniami-sadowym>> accessed 24 June 2025.

¹³⁵ CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons”’ (n 18) 7.

¹³⁶ ‘Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings’ (n 109) 9; ‘Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ (n 113) 2; Bundesministerium der Jusitz und für Verbraucherschutz, ‘Referentenentwurf Eines Gesetzes Zur Umsetzung Der Richtlinie (EU) 2024/1069 Über Den Schutz von Personen, Die Sich Öffentlich Beteiligen, Vor Offen-Sichtlich Unbegründeten Klagen Oder Missbräuchlichen Gerichtsverfahren’ 4
<https://www.bmjv.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Anti_SLAPP.pdf?__blob=publicationFile&v=4> accessed 1 December 2025.

¹³⁷ ‘Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version’ (n 112) 224.

¹³⁸ ‘Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive’ (n 21) 8.

¹³⁹ *ibid*.

3.1 [b] Perception of the scope

For Greenpeace, it was clear that they fall under the scope as they were sued in a third country, the situation that Articles 16 and 17 of the Directive are tailored to.¹⁴⁰ For cases where the defendant and the court seized are in the same Member State, this might be more difficult as an element relevant to the situation concerned needs to be located outside that Member State (Art. 5). However, they might still fall within the scope if the matter of public interest on which the SLAPP target expressed itself concerns more than one Member State (see above, Section 2.2). This may include any matter within the competence of the EU.¹⁴¹ The Directive Proposal named the examples of cross-border pollution or allegations of money laundering with potential cross-border involvement.¹⁴² In literature, the examples of EU-Russia relations, misuse of EU grants, cybersecurity, migration, extradition, access to the Eurozone, organised crime and international drug trafficking are identified.¹⁴³ It will be interesting to see where the line will be drawn, especially since the scope is understood broadly in reactions to the Directive (see above).

Climate mitigation, for example, is regulated by the EU to the extent that there is an EU reduction target.¹⁴⁴ Would a SLAPP concerning emissions, such as the case *Total Energies France v Greenpeace*¹⁴⁵ or *Gaz System S.A. vs Ciborska and Zielone Wiadomości*¹⁴⁶ thereby be related to an EU public matter? Zuzanna Nowicka argues that there is room for an even broader interpretation: where the matter of public participation relates to water contamination for example this could constitute a cross-border element as environmental protection is a universal matter, regardless of a concrete EU competence.¹⁴⁷

In any way, it is unclear to SLAPP victims in which circumstances they can rely on that ‘European element’. Therefore, when sued in their country of residence, it might not even occur to them to refer to EU Anti-SLAPP safeguards which is especially crucial if Member States opt for minimum implementation, leaving victims of purely domestic SLAPPs without safeguards.¹⁴⁸ As it is for the court seized to decide which matters are relevant to the case this criterion will need to be concretised in litigation.¹⁴⁹

3.1 [c] Legal culture: SLAPP definition and Remedies after implementation

For the implementation of directives, Member States are free to choose ‘form and

¹⁴⁰ Prakken d’Oliveira (n 9) para 154.

¹⁴¹ Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 25.

¹⁴² European Commission, ‘Proposal for a Directive of the European Parliament and of the Council’ (n 32) 13.

¹⁴³ Borg-Barthet and Farrington, ‘The Incidence of Strategic Lawsuit Against Public Participation’ (n 8) 39.

¹⁴⁴ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’) [2021] OJ L243/1.

¹⁴⁵ *Total Energies vs Greenpeace France* (n 125).

¹⁴⁶ Safety of Journalists Platform, ‘N°252/2023 – Gaz System Sues Zielone Wiadomości for Defamation’ <<https://fom.coe.int/en/alerte/detail/107640255>> accessed 27 June 2025.

¹⁴⁷ Nowicka, ‘SLAPP vs. Mutual Trust’ (n 16).

¹⁴⁸ Such as Malta see Zuzanna Nowicka, ‘Op-Ed: “The Anti-SLAPP Directive, One Year On”’ (*EU Law Live*, 9 May 2025) <<https://eulawlive.com/op-ed-the-anti-slapp-directive-one-year-on/>> accessed 15 May 2025.

¹⁴⁹ Anti-SLAPP Directive Art. 5.

methods'.¹⁵⁰ Nevertheless, the implementation in national law needs to make it sufficiently clear for the individual what their rights are. Moreover, Article 19 of the Directive particularly prescribes transparency and access to information on their procedural safeguards.

Some Member States consider that there is no need for legislative amendments as general provisions of civil procedural law and tort law already provide for the remedies required by the Directive, such as Germany or the Netherlands.¹⁵¹ It is beyond the scope of this research to examine whether the existing law provides *de jure* for the required safeguards. Yet, it is important to note that for Germany, scholars warn that especially the German tort law is not sufficient in terms of the Anti-SLAPP Directive.¹⁵² For the Netherlands, the Dutch Anti-SLAPP working group also found that existing laws were not sufficient.¹⁵³ Even if the remedies prescribed in the Directive were already established in general tort and procedural law, there is a need for explicit, SLAPP-specific provisions.¹⁵⁴ This is important for victims to see their situation reflected in legislation to understand their rights without the need to engage in judicial creativity.

Moreover, it affects the receptiveness of the legal system for the claim in terms of legal culture, how effectively they are used by courts.¹⁵⁵ It is important for courts and legal practitioners to become aware of the phenomenon and to be able to examine whether remedies are applicable.¹⁵⁶ If they are not, the chilling effect on victims increases as it is costly and nerve wrecking to file appeals, especially if the risk persists that higher courts will also fail to accommodate the phenomenon.¹⁵⁷ This legal culture will now be examined in more detail.

Abusive lawsuits are an anomaly, clashing with legal culture.¹⁵⁸ SLAPPs are different from 'normal' claims, as they are a political instrumentalization of the law.¹⁵⁹ Therefore, legal remedies that do not take account a potential instrumentalization are not an adequate response, neither for detecting them nor for countering them.¹⁶⁰

First, there are epistemic limitations in the assessment of SLAPP indicators by courts

¹⁵⁰ Treaty on the Functioning of the European Union Art. 288 (3).

¹⁵¹ This is based on insights from a stakeholder meeting with the Commission on the implementation of the Anti-SLAPP Directive. 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 1. In Germany there is no official stance on this (yet), however the argument is prominent, see for example 'Der rechtliche Beirat der No SLAPP Anlaufstelle im Gespräch: Christian Löffelmacher' (*NO SLAPP Anlaufstelle*) <<https://www.noslapp.de/neuigkeiten/der-rechtliche-beirat-der-no-slapp-anlaufstelle-im-gesprch-christian-lffelmacher>> accessed 7 February 2025.

¹⁵² Egidy (n 49) 75.

¹⁵³ Dutch Anti-SLAPP workgroup, 'Input by the Dutch Anti-SLAPP Working Group on the Draft Implementing Act of the Anti-SLAPP Directive' (2024) <<https://www.internetconsultatie.nl/antislapp/reactie/e95f79af-f15c-4499-98fa-f5975a2769b3>> accessed 1 December 2025.

¹⁵⁴ *ibid.*

¹⁵⁵ Bychawska-Siniarska and Nowicka (n 82).

¹⁵⁶ See also 'Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)' (n 131) 35; Egidy (n 49) 75

¹⁵⁷ Which can be seen at the example of Rafal Remont in Bychawska-Siniarska and Nowicka (n 82).

¹⁵⁸ Here I concur with CASE who argues that general provisions make the exercise of these rights arduous per se – Coalition against SLAPPs Europe (CASE), 'Statement on the Transposition of the Anti-SLAPP Directive in the Netherlands' 2 <<https://www.internetconsultatie.nl/antislapp/reactie/cfbd0ec5-e6ab-45f4-9f0c-504b23cbcd51>> accessed 1 December 2025; Dutch Anti-SLAPP workgroup (n 153) 2.

¹⁵⁹ Coe, Moosavian, and Wragg (n 3) 1; Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 841; Farrington and Zabrocka (n 4) 521

¹⁶⁰ Egidy (n 49) 45.

as its examination is limited to the merits of the case.¹⁶¹ In some Member States, several indicators are not part of the legal test in national procedural or civil law which is why, without specific provisions, these may remain below the radar of courts or, even if they are invoked, courts have no means to include them in their reasoning.¹⁶² In Germany, it has been found that there are no provisions enabling courts to test SLAPP indicators.¹⁶³

Whereas the disproportionate, excessive or unreasonable nature of the claim¹⁶⁴ is typically subject to the control of courts because it is linked to the merits, SLAPP indicators such as the ‘*existence of multiple proceedings initiated by the claimant or attributable to the claimant*’¹⁶⁵ or ‘*intimidation, harassment or threats before or during the proceedings [...]*’¹⁶⁶ are typically not part of the legal test prescribed by laws. The same applies for the additional indicators (see above) of ‘asymmetry of power’, the existence of a public relations offense and whether the action deliberately targets an individual instead of the corporation behind it.

However, some national laws contain provisions that require courts to consider factors linked to the abuse of a law. Criterion (c) of the SLAPP Definition, ‘*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*’¹⁶⁷ is in a grey zone as some national laws include it as a defence. In the Netherlands for example, under instruments such as ‘the abuse of power’¹⁶⁸ it is examined whether the right was invoked for something other than its purpose.¹⁶⁹ Yet actions beyond the courtroom such as threats are not examined under this provision.¹⁷⁰ French, Polish and Irish law contain a similar provisions¹⁷¹ that have already been invoked in SLAPP cases.¹⁷² The notion of abuse of procedure in French law includes indicators similar to the ones in the Directive: lack of legal merits (corresponding to SLAPP indicator (a)), an evident malicious character of the proceedings, the intention to harm or the intent to multiply the engaged procedures (SLAPP indicator (b)).¹⁷³ Yet, it is not clear whether an asymmetry of power or pre-litigious behaviour can be taken into account in that legal test.

¹⁶¹ For Germany see Egidy (n 49) 45. For the Netherlands see Dutch Anti-SLAPP workgroup (n 153) 3.

¹⁶² Dutch Anti-SLAPP workgroup (n 153) 3.

¹⁶³ Egidy (n 49) 46. While § 826 (intentional immoral damage) enables courts to consider all circumstances, SLAPPs do not fit the logic of that claim see Jan Kalbhenn et al, ‘Der Kommissionsentwurf Zu Einer Richtlinie Zum Schutz Vor Strategischen Klagen Gegen Öffentliche Beteiligung (“SLAPP”)? [2022] ZUM 705, 711.

¹⁶⁴ Anti-SLAPP Directive Art. 4(3)a).

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ Anti-SLAPP Directive Art. 4(3)c).

¹⁶⁸ Art. 3:13 in conjunction with Art. 3:15 Burgerlijk Wetboek Boek 3; ‘Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive’ (n 21) 9.

¹⁶⁹ Coalition against SLAPPs Europe (CASE) (n 158); Dutch Anti-SLAPP workgroup (n 153) 3.

¹⁷⁰ *ibid.*

¹⁷¹ France: Art. 31 code de procédure civile and Art. 1240 code civil; Poland: Art. 4 and Art. 226(2) § 2 226(2) § 2 kodeks postępowania cywilnego; Ireland: Law Society of Ireland, ‘Submission on the Draft Recommendation of the Committee of Ministers on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)’ 11 <<https://www.lawsociety.ie/globalassets/documents/submissions/lisubmission-to-coe-on-slapp-recommendation-08.08.2023.pdf>> accessed 25 June 2025.

¹⁷² *Total Energies vs Greenpeace France* (n 125); Baszuk et al (n 19) 45.

¹⁷³ ‘Les Procédures-Bâillons : Une Menace Démocratique ? L’État Du Droit (2de Partie) – Infractions de Presse’ <<https://legipresse.com/011-51999-les-procedures-baillons-une-menace-democratique-letat-du-droit-2de-partie.html>> accessed 22 June 2025; cited in CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons”’ (n 18) 22. Invoked in *Total Energies vs Greenpeace France* (n 125).

In order to incite court to consider all circumstances of the case that may point to the existence of a SLAPP, it is important to make the indicators for abusive procedures part of the legal test.¹⁷⁴ Looking at implementation measures, the indicators of the Directive would be part of the legal test under the Irish, Polish and Maltese draft implementing acts.¹⁷⁵ Under the Belgium model law¹⁷⁶ and the Dutch draft implementing Act they are not.¹⁷⁷

Second, in addition to this epistemological blindness for SLAPP indicators, the term ‘SLAPP’ only recently entered the European legal and normative discourse: in the aftermath of the murder of the Maltese journalist Daphne Caruana Galizia in 2017 scholars started to raise concern.¹⁷⁸ The EP first referred to SLAPPs in a resolution in May 2018.¹⁷⁹ The ECtHR first used the term in 2022 in *OOO Memo v Russia* while the CJEU has not used it until this day. In most Member States, there is no definition or statistical assessment of SLAPPs.¹⁸⁰ The German Government stressed that until date there was no reason for German courts to assess whether a case is a SLAPP.¹⁸¹

The lack of awareness of SLAPPs is particularly evident in Poland, where a variety of remedies materially correspond to those set out in the EU Anti-SLAPP Directive already exists but remain largely unused by courts.¹⁸² The Council of Europe also stressed the need to give more prominence to the issue.¹⁸³ Safeguards explicitly referring to SLAPPs would remind courts of their existence and incite them to apply the remedies provided for by the Directive, also at their own initiative.¹⁸⁴ This would align with the Commission Recommendation to train the judiciary and lawyers to better detect and act upon SLAPPs.¹⁸⁵

The Belgium Model SLAPP law includes explicit SLAPP remedies.¹⁸⁶ In Poland, the Draft Implementing Act foresees explicit provisions for securities, the participation of third parties, penalties and legal costs in the case of abusive lawsuits.¹⁸⁷ Moreover, there is a provision pointing to the possibility to apply the clause on ‘abuse of procedure’ to

¹⁷⁴ Coalition against SLAPPs Europe (CASE) (n 158); Dutch Anti-SLAPP workgroup (n 153) 3. German experts for example stress the need to adopt an explicit definition of SLAPPs under German Law also ‘Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)’ (n 131) 35; Egidy (n 49) 75

¹⁷⁵ Ireland: ‘Defamation (Amendment) Bill 2024’ (n 113); Malta: ‘Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ (n 113) 4.

¹⁷⁶ ‘Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings’ (n 109) 3.

¹⁷⁷ ‘Draft Law Implementing the Anti-SLAPP Directive - Consultation Version’ 224 (A) <<https://europadecentraal.nl/praktijkvraag/wat-is-een-bnc-fiche/>> accessed 1 December 2025.

¹⁷⁸ Borg-Barthet and Farrington, ‘The EU’s Anti-SLAPP Directive’ (n 4) 844; Bayer et al (n 1) 12.

¹⁷⁹ European Parliament, ‘Media Pluralism and Media Freedom in the European Union’ (n 17).

¹⁸⁰ CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons”’ (n 18) 6.

¹⁸¹ Deutsche Bundesregierung (n 34) 2; CNCDH, ‘Avis “Lutter Contre Les Procédures Bâillons”’ (n 18) 6; ‘Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive’ (n 21) 5.

¹⁸² Baszuk et al (n 19) 39.

¹⁸³ Council of Europe, ‘Recommendation CM/Rec (2024)2’ (n 13) 57.

¹⁸⁴ ‘Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)’ (n 131) 35; Egidy (n 49) 75

¹⁸⁵ European Commission 2022 (n 12) 27; Council of Europe, ‘Recommendation CM/Rec (2024)2’ (n 13) 57.

¹⁸⁶ ‘Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings’ (n 109).

¹⁸⁷ ‘Polish Draft Implementing Bill (Ustawa o Ochronie Osób Uczestniczących w Debacie Publicznej Przed Oczywiste Bezzasadnymi Roszczeniami Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi)’.

SLAPPs.¹⁸⁸ Thereby, if the Act is adopted – which seems unlikely given the veto power of the president – visibility of the phenomenon and accessibility will very likely be enhanced. The Maltese Implementing Act entails specific remedies for SLAPP victims.¹⁸⁹ Ireland’s implementation for defamation cases entails specific clauses for SLAPPs concerning early dismissal, costs, security and dissuasive penalties in the form of the publication of the decision.¹⁹⁰ The victim can apply for a declaration that the claim is a SLAPP.¹⁹¹ (This declaration shall then be taken into account by the court when making an award of costs. In contrast, the Dutch Draft Implementing Act only contains a new provision for the possibility of the court to require securities for the anticipated procedural costs.¹⁹²

In the explanatory memorandum, the necessity for a *lex specialis* on early dismissal for SLAPPs is rejected with the argument that this would *materially* not change the situation of the defendant because also in that case the complex assessment of whether it is a SLAPP is required.¹⁹³ This omits the problem preceding any material assessment, namely the lack of awareness on SLAPPs among both victims and courts, which could be mitigated with the introduction of an explicit *lex specialis*. Interestingly, the memorandum mentions that *increasing the knowledge* on SLAPPs in legal practice might lead to SLAPP victims raising the existing general defences more often so that judges will examine whether there is a SLAPP.¹⁹⁴

Legal culture can also change with enhanced assessment. For example, Article 20 of the Directive requires Member States to submit data on the amount and characteristics of SLAPPs to the commission where available. Precedents could also change the legal culture and visibility of SLAPPs for courts, lawyers and victims.¹⁹⁵ Yet, in some countries like Germany, court decisions are systemically not published.¹⁹⁶ In France and the Netherlands, civil decisions are generally published, yet not collected under the term SLAPPs, which is why they might not immediately generate more visibility for the issue. Therefore, the Recommendations by the Council of Europe require the establishment of a public register of SLAPP cases.¹⁹⁷ The Irish and Maltese Draft Implementation Acts prescribe that decisions of abusive proceedings need to be published.¹⁹⁸

Concluding on the legal stock, the Directive uses the ambiguous formulation ‘pursues unfounded claims’ which can be corrected by implementing acts. The criterion of ‘cross-border implications’ under Article 5 of the Directive is vague and will remain so after implementation as it is for courts to determine which factors are relevant in that regard.¹⁹⁹ Hence, it needs to be developed by case-law. Both, the development of the

¹⁸⁸ Polish Draft Implementing Bill (n 187) 7.

¹⁸⁹ Repubblica, Daphne Cuarana Galizia Foundation (n 116) 4.

¹⁹⁰ ‘Defamation (Amendment) Bill 2024’ (n 113) Art. 34 E.

¹⁹¹ *ibid.* Art. 34 F.

¹⁹² ‘Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version’ (n 112) 1.

¹⁹³ ‘Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive’ (n 21) 10.

¹⁹⁴ *ibid.*

¹⁹⁵ Anti-SLAPP Directive recital 47 and Art. 19(3).

¹⁹⁶ Egidy (n 49) 78.

¹⁹⁷ Council of Europe, ‘Recommendation CM/Rec (2024)2’ (n 13) 48.

¹⁹⁸ Defamation (Amendment) Bill 2024’ (n 113) 34; Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order’ (n 113) 12.

¹⁹⁹ Anti-SLAPP Directive Art. 5.

criteria in case-law and the effective use of remedies are contingent upon explicit implementation measures, otherwise the remedies run the risk of remaining under the radar of courts and SLAPP victims that have no or limited access to legal expertise on that matter. Strategic litigation could be vital in that regard. Social movements can shape the law.²⁰⁰ LOS research on environmental movements in the UK, for example, has shown that for these organizations, due to their strong intrinsic willingness to take policy battles to court, the decision to litigate is quite robust against bad legal opportunity structures, including potentially high financial losses.²⁰¹ They create their own legal opportunities, being an important agent for their change.²⁰² Greenpeace, for example, a NGO experienced in Strategic Litigation and targeted by SLAPPs before,²⁰³ makes use of the Directive in its case against Energy Transfer, thereby showing possible legal avenues for defences and potentially also setting an important precedent.

This brings up the next factor of legal opportunity structures, resources.

3.2 RESOURCES

A victim's financial resources, expertise and access to legal advice also determine how effectively they can leverage the legal stock for their claim.²⁰⁴ Information is an important resource, especially in light of the previously explained ambiguities, vague criteria and the lack of awareness of the phenomenon of SLAPPs. Moreover, there appear to be serious misperceptions of the concept among victims. In a study where Dutch journalists and editors were interviewed, several respondents stated that a case can only be considered a SLAPP if it has not been won or if the target is part of a large publisher or broadcaster.²⁰⁵

Complementary to the obligation to provide access to information under Article 19 of the Directive, the Commission Recommendation urges Member States to establish central national focal points that gather and share information on SLAPPs and provide individual support.²⁰⁶ Until now, fourteen Member States established such a focal point.²⁰⁷ Some designated their Ministry of Justice but also civil society organizations or organizations representing media enterprises got appointed as focal points.²⁰⁸

Among the countries examined in this research, Ireland, Malta and Poland have not yet established a focal point.²⁰⁹ In the Netherlands, in light of the decision not to introduce

²⁰⁰ Colli (n 84) 99.

²⁰¹ Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Review* 523, 544.

²⁰² *ibid* 525.

²⁰³ *Total Energies vs Greenpeace France* (n 125).

²⁰⁴ Colli (n 84) 102.

²⁰⁵ Bergmans and de Zeeuw (n 105) 12.

²⁰⁶ European Commission 2022 (n 12) 38.

²⁰⁷ European Commission, 'Commission Staff Working Document on the Follow-up to the 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")' (European Commission 2024) SWD(2024) 292 final <<https://data.consilium.europa.eu/doc/document/ST-5801-2025-INTT/en/pdf>> accessed 25 June 2025.

²⁰⁸ *ibid* 3.

²⁰⁹ European Commission, 'List of Member State's Nominated Focal Points According to Point 25 of the

a definition of SLAPPs or explicit safeguards in national law, emphasis is placed on the focal point as the central actor to raise awareness and to ensure that victims are informed in line with Article 19 of the Directive.²¹⁰ Nevertheless, the Dutch focal point does not have a website yet.²¹¹ Moreover the French focal point at the Interministerial Delegation for Victim Support does not refer to SLAPPs on its website.²¹² The German national focal point, integrated into the Ministry of Justice, is more visible, yet has a limited understanding of its tasks, stating that its main purpose is the exchange with other focal points.²¹³ For information and awareness it refers to an NGO, the German No SLAPP contact point.²¹⁴ A similar structure can be found in Belgium where the federal institute for the protection and promotion of Human Rights refers to the national Anti-SLAPP working group to report SLAPPs to.²¹⁵

In other words, victims do not yet receive information and support directly from Member States but from civil society organizations. In general, it can be observed that national civil society organizations are well connected in national Anti-SLAPP working groups that cooperate on the EU level via CASE.²¹⁶ They provide (potential) SLAPP victims with a preliminary assessment on their situation.²¹⁷ Moreover, they can help with the search for lawyers specialized in SLAPPs.²¹⁸

Interestingly, in Malta, the court seized shall ensure that the victim has access to all information required under Article 19 of the Directive *after* the victim applied for a specific remedy against SLAPPs.²¹⁹ It is not clear how the victim is supposed to obtain this information in the first place. Yet, given the explicit provisions in the Draft Implementing Act, the phenomenon and the remedies available are visible to the victim.

Another aspect of information is the visibility of decisions on SLAPPs. Due to the lack of or only limited publication of SLAPP decisions issued by courts in Member States, civil society organizations contribute to the awareness of SLAPPs with public

Commission's 2022 Anti- SLAPP Recommendation'
<https://commission.europa.eu/document/d357f321-540d-427a-9a5a-aae261486463_en> accessed 27 June 2025.

²¹⁰ 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 8.

²¹¹ European Commission, 'List of Member State's Nominated Focal Points According to Point 25 of the Commission's 2022 Anti- SLAPP Recommendation' (n 209).

²¹² 'La délégation interministérielle à l'aide aux victimes (DIAV) - Vous avez été victime de terrorisme (FR - en - es)' (*info.gouv.fr*) <<https://www.info.gouv.fr/guide-victimes/deleguee-interministerielle-a-l-aide-aux-victimes-diaav>> accessed 27 June 2025.

²¹³ 'Bfj - Aufgaben Des Focal Point SLAPP'
<https://www.bundesjustizamt.de/DE/Themen/FocalPointSLAPP/Aufgaben/Aufgaben_node.html> accessed 26 June 2025.

²¹⁴ *ibid.*

²¹⁵ 'What Does FIRM-IFDH Do against SLAPP? | FIRM-IFDH'
<<https://www.federalinstitutehumanrights.be/en/what-does-firm-ifdh-do-against-slapp>> accessed 27 June 2025.

²¹⁶ For example in Ireland, Belgium, Germany, Malta and the Netherlands.

²¹⁷ The German no SLAPP contact point for example provides a questionnaire 'are you a SLAPP victim' where one receives an answer by an expert. 'NO SLAPP Anlaufstelle' (*NO SLAPP Anlaufstelle*, 11 June 2025) <<https://www.noslapp.de>> accessed 27 June 2025. The Belgium workgroup has a similar too: 'What Is SLAPP? | ANTI-SLAPP WORKING GROUP BELGIUM' <<https://slapp.be/en/what-is-slapp>> accessed 27 June 2025.

²¹⁸ 'Expertise' (*NO SLAPP Anlaufstelle*) <<https://www.noslapp.de/expertise>> accessed 27 June 2025.

²¹⁹ Repubblica, Daphne Cuarana Galizia Foundation (n 116) 12.

campaigns on SLAPP cases, thereby also destigmatizing the victim.²²⁰ Moreover, NGOs that are SLAPP victims can play a corrective role. Besides showing legal possibilities to defend oneself against SLAPPs, they can further add to the destigmatization of SLAPP victims. The small German environmental NGO *Rettet den Regenwald e.V.*, for example, which was SLAPPED by the oil and timber group Korindo, made a campaign about the lawsuit. In solidarity with a SLAPPED German newspaper, they shared their story on how they successfully defended themselves.²²¹

4 CONCLUSION

This research has recalled material shortcomings of the Directive, most pressingly the limitation of the scope to civil cases and the lack of an amendment of jurisdiction rules in light of libel tourism and mosaic proceedings. Nonetheless, the Directive can be perceived as materially strong. However, when considering its effectiveness in terms of minimizing the chilling effect on victims of defamation SLAPPs, not only the *de jure* situation but also the legal opportunity structures perceived by victims need to be considered.

The Directive contains the misleading formulation of ‘unfounded claims’. This needs to be corrected by Member States, using the formulation of ‘partially or fully unfounded claims’ instead. Moreover, Member States need to provide specific Anti-SLAPP remedies to ensure that they are used by courts and victims.

The criterion of ‘cross-border implications’ under Article 5 of the Directive is vague and will remain so after implementation as it is for courts to determine which factors are relevant in that regard. It needs to be developed by case-law. Integrating the concept of SLAPPs in national legal cultures is challenging because national laws limit courts epistemologically in their assessment of SLAPP indicators. Moreover, the phenomenon is new, multifaceted and atypical. Therefore, the effective use of remedies in SLAPP cases by courts is contingent on specific, explicit implementation measures. Moreover, such measures enhance the visibility of remedies for SLAPP victims that have no or limited access to lawyers specialized on that matter.

The less explicit national legal provisions, the more important are precedents. NGOs may take on a corrective role in that regard as they are common SLAPP targets but, thanks to their enhanced agency and experience in strategic litigation, they may pave the way for smaller, less well-resourced SLAPP victims. Therefore, it is important that decisions on SLAPPs are published as prescribed by the Directive. Civil society organizations specialised in SLAPPs contribute a lot to minimize the chilling effect, providing comprehensive support and information for victims as well as raising awareness in the public.

²²⁰ ‘The People’s Choice Award: European SLAPP Contest 2025 – CASE’ (24 March 2025) <<https://www.the-case.eu/latest/the-peoples-choice-award-european-slapp-contest-2025/>> accessed 27 June 2025; ‘Fallbesprechung: Royal Knitting Workers & Clean Clothes Campaign’ (*NO SLAPP Anlaufstelle*) <<https://www.noslapp.de/neuigkeiten/fallbesprechung-royal-knitting-workers-amp-clean-clothes-campaign>> accessed 27 June 2025.

²²¹ ‘„Einschüchterung misslungen“ (Rettet den Regenwald e.V.) <<https://www.regenwald.org/news/13513>> accessed 16 May 2025.

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