

EXECUTIVE SUMMARY

Study for the JURI committee

The Use of SLAPPs to Silence Journalists, NGOs and Civil Society

The European Convention on Human Rights establishes a positive obligation to safeguard the freedom of pluralist media and to 'create a favourable environment for participation in public debate'. Strategic Lawsuits Against Public Participation (SLAPP), a form of retaliatory lawsuit intended to deter freedom of expression on matters of public interest, constitute a significant threat to the fulfilment of this obligation.

By restricting scrutiny of matters of public interest, whether of economic or political concern, SLAPPs also have a deleterious effect on the functioning of the internal market, as well as the rule

of law in the European Union. However, while several jurisdictions outside the European Union have adopted anti-SLAPP legislation, no Member State of the Union has yet done so. Nor has the Union itself yet adopted any legislation which would dissuade the institution of SLAPPs. There is therefore a significant gap in the integrity of the legal order of the Union.

In 2021, the Council of Europe's Commissioner for Human Rights observed that, while SLAPPs are not a new phenomenon, the extent of the problem is increasing and poses a substantial threat to freedom of expression. There is therefore a need for robust legislative intervention in the European Union with a view to stemming the flow of litigation which is intended to suppress public participation in matters of public interest.

While legislative models adopted in the United States, Canada and Australia are instructive insofar as the overarching structure of EU legal reform is concerned, EU legislation would require the careful articulation of bespoke definitions and methods of analysis. This should be characterised by a distinctive approach which draws on good practice from jurisdictions outwith the European Union, but which recognises nevertheless the unique characteristics of the EU legal order and the legal traditions of its Member States.

Furthermore, legislative intervention must be formulated in a manner which empowers national courts to attain the intended outcome of expeditious dismissal of cases without harming potential claimants' legitimate rights to access courts. Properly framed anti-SLAPP legislation affords the claimant the opportunity to present legitimate claims to the court and therefore satisfies the requirements of Article 6 ECHR. Far from stultifying access to courts for the parties, anti-SLAPP legislation would dissuade the misuse of civil procedure in a manner

which prevents respondents from articulating a defence in accordance with EU law and international human rights instruments.

In addition to the adoption of an anti-SLAPP Directive, it is recommended that the Brussels Ia Regulation concerning jurisdiction, recognition and enforcement of judgments be recast with a view to adopting a specific rule concerning defamation claims, and thereby to distinguish jurisdiction in defamation cases from ordinary torts. This would restrict the availability of opportunities for forum shopping arising from the Regulation as presently framed. To this end, it is recommended that jurisdiction should be grounded in the forum of the defendant's domicile, unless the parties agree otherwise. This would enable public interest speakers to foresee where they will be expected to defend themselves, and would be in keeping with the core values of the Brussels Ia Regulation, namely predictability and the limitation of forum shopping.

Greater predictability as to the outcomes of choice of law processes is also needed to dissuade meritless litigation intended to suppress public participation. Accordingly, it is recommended that a new rule be included in the Rome II Regulation which would harmonise national choice of law rules in defamation cases. It is proposed that this rule should focus in the first instance on the closest connection with the publication and its audience, namely the law of the place to which the publication is directed.

The adoption of anti-SLAPP legislation is an especially pressing concern in the context of a Union which is currently facing unprecedented challenges to the rule of law and democracy. Reforms which recognise the central role of journalists, NGOs and civil society in safeguarding the rule of law would constitute a meaningful contribution to the advancement of democratic values where so much else has failed.

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