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European Commission's call for action to combat SLAPPs against journalists and human right defenders

How to effectively combat SLAPPs that can be initiated against journalists and human rights defenders when they denounce facts that are upsetting for the targeted persons?

This is the purpose of the European Commission's proposal for a Directive "*on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings*" unveiled on April 27, 2022 which suggests that Member States should strengthen procedural safeguards for those against which SLAPPs are initiated.

The proposed Directive is complementary to Directive 2019/1937 of October 23, 2019 on whistleblowers which provides robust protection to persons reporting information on breaches of European Union law against any form of retaliation.

The Directive proposed by the European Commission specifically protects journalists and human rights defenders who do not have the whistleblower status and aims to effectively combat SLAPPs.

What are SLAPPs?

SLAPPs (Strategic Lawsuits Against Public Participation) are defined as a form of harassment and intimidation used against those involved in "*protecting the public interest*"; their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or

opposition.

The procedures initiated often relate to defamation, but also to breaches of other rules or rights (e.g., breaches of data protection or privacy laws).

At present, it is difficult to combat these procedures, as the right of access to a judge takes precedence over freedom of expression and the abusive nature of an action is rarely acknowledged, especially in defamation matters.

Based on this observation and given the lack of effective national legislation protecting the targets of SLAPPs, the proposed Directive aims to provide national courts with effective means to deal with SLAPPs and targets with the means to defend themselves.

While the proposed procedural safeguards apply only in cases with cross-border implications, which significantly limits its reach, the European Commission invites Member States to review their national situation to ensure that their applicable legal frameworks provide for the necessary safeguards to address SLAPPs.

It is interesting to note that the proposed Directive includes a precise definition of what is considered to be a matter of public interest, a notion that is often debated in courts when it is necessary to demonstrate that the matter in dispute is a matter of general interest that can justify defamatory statements, and provides for procedural safeguards to combat such abusive proceedings.

What does the notion of matter of “public interest” refer to?

Under the proposed Directive, a matter of public interest means *“any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as:*

- *public health, safety, the environment, climate or enjoyment of fundamental rights;*
- *activities of a person or entity in the public eye or of public interest;*
- *matters under public consideration or review by a legislative, executive, or judicial body, or any other public official proceedings;*
- *allegations of corruption, fraud or criminality;*
- *activities aimed to fight disinformation.”*

This notion of public interest is quite similar to that of *“general interest”* which can be relied upon to obtain the acquittal of the journalist being sued when it is shown that the information delivered was a matter of general interest and that it was in the interest of the public to know about it.

In a decision dated March 1, 2017, the *Cour de Cassation* (French Supreme Court) held that the general interest refers to *“matters that affect the public to such an extent that it can legitimately be interested, that arouse its attention or concern it significantly, in particular because they related to the well-being of citizens or the life of the community.”* [\[1\]](#)

In France, defendants sued for defamation and who are acquitted on the grounds of good faith or the truth defense (*exception de vérité* in French), are rarely compensated for their legal costs, as the abusive nature of the proceedings initiated by the plaintiff is hard to be established.

Better procedural safeguards allowing for an accelerated examination of the case and the granting of an advance cost award to the persons targeted by SLAPPs at the beginning of the trial could help avoid any instrumentalization of justice by the plaintiff whose objective would be to silence critics.

The procedural safeguards contemplated by the Proposed Directive

The possibility of being compensated even if the plaintiff withdraws from the proceedings

It happens in some proceedings initiated for facts of public defamation that the plaintiff withdraws his/her action before the hearing, considering that his/her chances of winning the trial are limited and having achieved his/her objective of intimidating and silencing the defendant.

Article 6 of the proposed Directive provides that any subsequent amendments to the claims made by the plaintiff, including the discontinuation of proceedings, in order to avoid a sentence do not affect the possibility for the court to consider that the proceedings are abusive and to grant award of costs, compensation for damages or/and to impose penalties/sanctions.

The possibility of applying for the early dismissal of manifestly unfounded court proceedings

At the request of the defendant, the court may dismiss manifestly unfounded proceedings. In this case, the main proceedings are stayed until a final decision on the application is made.

In this case, the burden of proof is reversed, as the plaintiff will have to demonstrate that the action he/she has brought is not manifestly unfounded.

The defendant may also request that the plaintiff provides a security to cover procedural costs.

The reimbursement of procedural costs and the imposition of penalties/sanctions

A plaintiff who has brought abusive court proceedings can be ordered to pay the full costs of legal representation incurred by the defendant as well as damages for the harm suffered.

The proposed Directive also provides that penalties/sanctions can be imposed on the party who brought the abusive proceedings.

Support from non-governmental organizations acting as third parties in the proceedings

Member States shall take the necessary measures to ensure that non-governmental organizations safeguarding or promoting the rights of persons engaging in public participation may take part in the proceedings, either in support of the defendant or to provide information.

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While the scope of the proposed Directive is limited to cross-border litigation, the procedural safeguards it contemplates should allow for an evolution of national legislation in order to prevent SLAPPs.

For more information:
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0177&from=FR>

[1] *Cour de Cassation*, 1st Civil Chamber, March 1, 2017, No. 15-22.946

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