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Countering SLAPPs in Hungary, Poland, and the Rest of the EU

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Summary

The European Union countries most affected by a decline in media freedom are Hungary and Poland, whose governments use various means to threaten and destroy free media. This includes strategic lawsuits against public participation (SLAPPs), which are also used against academics, civil society organizations, activists, and whoever voices opinions displeasing the governing parties. SLAPPs drain the financial and psychological resources of their targets, create a chilling effect, and reduce the public's access to information. They threaten the EU's fundamental rights and values. They also undermine the established trust between EU legal systems and scrutiny by independent watchdogs, which affects the effective enforcement of EU law.

This paper reviews how laws have been abused in Hungary and Poland, as well as in Slovenia under its previous government in 2020–2022, by those filing SLAPPs. Notably, defamation is in their criminal codes, making it punishable with a prison sentence. Civil defamation cases are less of a threat, but they are just as psychologically and financially draining for defendants. As in Hungary and Poland the government has captured the judicial system and destroyed the rule of law, prosecutors there are not independent and there is a danger that they act under political pressure in some SLAPP cases.

Only in Australia, Canada, and the United States have anti-SLAPP laws been adopted. Their experience offers lessons for the EU, relating to the importance of laws that stop plaintiffs from picking the jurisdiction with the most welcoming legislation for SLAPPs (forum shopping), to barring corporations from suing for defamation, and to making sure that anti-SLAPP laws do not have a high threshold for demonstrating the intent of plaintiffs.

The European Commission published a proposal for an anti-SLAPP EU directive in 2022. However, in March 2023, the Council of the EU proposed amendments

that water down some key features of the proposed directive. By contrast, the European Parliament might consider amendments of its own that would extend protection from SLAPPs. The paper considers to what extent the proposed directive can address the problem in the three countries studied and elsewhere in the EU.

The European Commission's proposed directive contains key remedies for the victims of SLAPPs, to be implemented by the member states if it is adopted. The most important is the early dismissal of manifestly unfounded cases, which would help to alleviate victims' psychological and financial distress connected to long-standing cases. The remedies in cases that are not dismissed early include compensation of damages, liability for costs, penalties, restrictions on the ability to alter claims with a view to avoiding the award of costs, the right to third-party intervention, and protection against third-country judgments. The proposed directive also has recommendations for nonlegal measures to help counter SLAPPs. These include training for legal professionals and potential SLAPP targets, information campaigns, access to support for SLAPP victims, and data collection on cases. However, it lacks a definition of "cross border", which is necessary to understand which cases might be stopped with it, and it does not cover criminal-law SLAPP cases.

In order to support civil society in Hungary and Poland in the fight against SLAPPs, the European Commission should go beyond its recommendations to member states and promote and fund related information and educational activities that would be organized by nongovernmental organizations in these countries. But the EU will have to above all to deal with their rule of law deficiencies in both countries. As their governments control and influence the captured judiciary, there is no guarantee that, even if they were to introduce one, any anti-SLAPP law would work.

Introduction

The threat to the democratic order in the European Union started after the elections in Hungary in 2010, when the Fidesz party came to power and set about building what its leader, Viktor Orbán, called an “illiberal democracy”.¹ In Poland, Jarosław Kaczyński, the leader of the Law and Justice (Prawo i Sprawiedliwość—PiS) party was influenced by Orbán’s successes and announced “Budapest in Warsaw” as his goal.² Attempts to implement this began in earnest after the PiS victory in the 2015 elections. The success story of Fidesz and PiS have inspired other politicians and parties across Central and Eastern Europe, including more recently Janez Janša, whose Slovenia Democratic Party (SDS) came to power in 2020 and then made different attempts to undermine the rule of law in the country.³ Even though all three countries were earlier praised for their successful transition to democracy and were considered “consolidated democracies”,⁴ they fell into the trap of autocratic tendencies. Hungary and Poland have experienced serious “rule of law deficiencies”.⁵ So far only Slovenia has been able to take a democratic turn again in elections in 2022.

At the same time, media freedom has been in decline in the whole world in recent years.⁶ Even though Europe remains the safest continent for journalists and media outlets, this general trend has also affected it. In the European Union, the most vivid examples are

Hungary and Poland, and more recently Slovenia.⁷ In 2010, Hungary ranked 23rd in the World Press Freedom Index; in 2022, it was ranked 85th.⁸ There has been a similar trend in Poland. In 2015, it ranked 18th; in 2022, it ranked 66th. Meanwhile, in the past ten years, Slovenia has ranked between 34th and 54th in the World Press Freedom Index.

In March 2021, the European Parliament, the European Commission, and Council of the EU discussed the situation of journalists and media outlets in Hungary, Poland, and Slovenia in a plenary session that covered the three countries.⁹ It was observed at the time that the attempts made by these countries’ governments to silence the independent media might bring high costs for the EU. There are multiple ways in which the free media is being targeted in the three countries. Strong anti-journalist rhetoric is used, the public media have been turned into a propaganda arm of the governing party, there is collusion between the political class and media owners, state advertising is weaponized, and government-friendly entities use the free market to take over independent outlets. One crucial but under-studied tool used against the free media that has been widely used is strategic lawsuits against public participation (SLAPPs).

In the face of this growing phenomenon, only in Australia, Canada, and the United States have anti-SLAPP laws been developed and adopted. In the EU, SLAPPs started to be recognized as a problem in 2017, when Daphne Caruana Galizia, a journalist who investigated corruption cases in Malta, was assassinated. At the time of her death, she had around 50 SLAPP cases opened against her.¹⁰ Her family, which established the Daphne Foundation with ending the use of SLAPPs as

1 Gabor Halmai, “Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary”, *Law & Ethics of Human Rights*, Volume 14, Issue 1, 2020.

2 Wojciech Sadurski, *Poland’s Constitutional Breakdown*. Oxford Comparative Constitutionalism, 2019.

3 Valerie Hopkins, [Slovenia’s Jansa follows Hungary down authoritarian path](#), *Financial Times*, May 22, 2021.

4 Kim Lane Scheppele, “On Being the Subject of the Rule of Law”, *Hague Journal on the Rule of Law*, 2019.

5 Ibid.

6 Meera Selva, [Fighting Words: Journalism Under Assault in Central and Eastern Europe](#), Reuters Institute for the Study of Journalism, 2020.

7 Gabriela Baczyńska, [EU singles out Poland, Hungary, Slovenia over sliding media freedom](#), Reuters, March 10, 2021.

8 Reporters Without Borders, [World Press Freedom Ranking](#).

9 Ibid.

10 Mapping Media Freedom, [List of open defamation cases on 20 October 2020](#).

one goal, is still facing some of those cases.¹¹ This case and the great amount of work done by nongovernmental organizations grouped under the Coalition Against SLAPPs in Europe¹² led to the European Commission drafting a proposal for an anti-SLAPP directive, which was published in 2022.

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Although all EU member states struggle with the threat of SLAPPs, the national political context defines to a great extent which ones are more prone to abuses of the law in such a way. In the “old” member states, SLAPPs are commonly filed by corporations or businesspeople, while in “new” ones like Hungary, Poland, and Slovenia they might serve as a tool for targeting political opponents of the government,¹³ especially independent media outlets.

This does not mean that there are no SLAPPs issued by businesspeople in the backsliding countries or that established democracies are immune to SLAPPs initiated by politicians. However, in the former SLAPPs are one of the tools used by governments and their cronies to destroy the whole independent media landscape, while in the latter they are used against specific journalists or media outlets that tackle specific issues. For example, in an established democracy a corporation selling pesticides could target with SLAPPs a journalist

covering how those are harmful for humans. The goal in such cases is not to destroy the independent press as such but to rather “kill” a topic. Nevertheless, SLAPPs have a chilling effect and threaten press freedom in both types of countries.

Researching SLAPP cases is especially complicated as there is still a considerable amount of fear among targets about bringing cases to public attention, and as there is also a lack of knowledge among them about what SLAPPs are. This paper first examines the extent of SLAPP threats against journalists in Hungary, Poland, and Slovenia, presenting notable examples and the laws being used to initiate cases in each of the countries. It then looks at attempts to counter the use of SLAPPs through legislation in Australia, Canada, and the United States, and what lessons the EU could draw from these. Finally, the paper considers to what extent the newly proposed EU anti-SLAPP directive, together with other nonlegal measures, will be able to address the problem in the three countries studied and elsewhere in the EU.

The Background

The term SLAPP was coined in the 1980s in the United States.¹⁴ Although there is not one definition of what they are, this paper adopts the following one: SLAPPs are “groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties—journalists, civil society organizations, human rights defenders and others”.¹⁵ They are usually filed not in order to win a case but to intimidate and to tire and consume the financial and psychological resources of the target.¹⁶ An additional psychological effect is the shame that surrounds defamation cases; usually journalists and media outlets avoid making

11 Ibid.

12 [The Coalition Against SLAPPs in Europe \(CASE\)](#).

13 Nik Williams, Laurens Hueting, and Paulina Milewska, [The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation](#), in *Unsafe for Scrutiny: How the misuse of the UK's financial and legal systems to facilitate corruption undermines the freedom and safety of investigative journalists around the world*, Foreign Policy Center, 2020.

14 Penelope Canan and George W. Pring, “[Strategic Lawsuits against Public Participation](#)”, *Social Problems*, Vol. 35, No. 5, 1988.

15 Judit Bayer et al, [Ad-Hoc Request. SLAPP in the EU context](#), Academic Network on European Citizenship Right, 2020.

16 Williams, Hueting, and Milewska, *The increasing rise, and impact, of SLAPPs*.

these litigations public for reputational reasons. SLAPP litigants use different laws—concerning typically defamation, but also other torts, labor laws, criminal law, privacy, and data protection—to threaten parties into silence and self-censorship.

Many scholars, activists, and nongovernmental organizations do not consider criminal law cases as SLAPPs. The reason for that is that in most European countries only independent prosecutors can initiate them, which means that the structure of the criminal procedure makes it almost impossible to abuse for SLAPPs. Nevertheless, in the three countries looked at in this paper, criminal cases can be initiated by a private complainant, which makes it possible to initiate a SLAPP by means of criminal law too. Additionally, in Hungary and Poland an illiberal government controls the prosecutor's office and decides which cases proceed. Thus, in this paper some criminal law cases are considered as SLAPPs.

SLAPPs have been a problem in Hungary and Poland for some time while in Slovenia this threat started to rise during Janša's recent term as prime minister. Among three countries, SLAPPs pose the biggest threat in Poland. The country's free media proved mostly resilient as the PiS government tried every possible financial way to destroy their independence. That is why SLAPPs became one of the major tools against independent outlets in Poland: if it is not possible to buy or close them, it is at least possible to make their life harder. In Hungary, Fidesz took control of the media mainly using advertising and buyouts as financial weapons. There are SLAPPs in the country, but they are less frequently used to intimidate outlets. It is indicative of the difference between the two countries that in Poland Kaczyński himself uses SLAPPs while in Hungary Orbán does not. In comparison, attempts to intimidate and silence independent media in Slovenia are relatively new, but they have been said to be espe-

cially blunt.¹⁷ The number of SLAPP cases there is small but it is significant in a small country with an accordingly small media landscape and, alongside other threats against media, could create a serious chilling effect. Since Janša's party lost the 2022 parliamentary elections, civil society experts in Slovenia have hoped that the media will regain its independence.

SLAPPS in Poland

Since 2015, the newspaper *Gazeta Wyborcza* has been targeted with over 90 lawsuits and legal threats. These cases of a criminal and civil nature were brought by powerful state actors, state-owned companies, and individuals with close ties to the governing PiS party. The most prominent plaintiffs include PiS head Kaczyński; Minister of Justice Zbigniew Ziobro; Jacek Kurski, the former head of the state-owned TVP television network now Polish representative to the World Bank; and Daniel Obajtek, the head of the biggest state-owned oil company, Orlen. The lawsuits have usually targeted *Gazeta Wyborcza's* publisher, editor-in-chief, vice editor-in-chief, and journalists. Additionally, the newspaper receives countless letters containing legal threats.

Another prominent victim of SLAPPs is the news and investigative online media outlet OKO.press and its journalists. It has been threatened with a criminal case by Adam Hoffman, a former PiS spokesperson and the co-founder and owner of the R4S public relations agency. OKO.press has also been sued by, among others, Robert Bąkiewicz, the head of the influential Independence March Association, by Konrad Wytrykowski, a judge on the illegal Disciplinary Chamber of the Supreme Court, and by the state-funded National Foundation. The cases against OKO.press have been criminal and civil. Some have already been decided and so far OKO.press has won all of these.

17 Mapping Media Freedom, [Slovenia: SLAPP case sees 39 lawsuits launched against three journalists at Necenzurirano](#); European Parliament Briefing, [Media freedom under attack in Poland, Hungary and Slovenia](#).

Poland's largest weekly magazine, *Polityka*, and its best-known investigative journalist, Grzegorz Rzeczkowski, have faced lawsuits for covering the wiretapping scandal that led to the victory of PiS in the 2015 elections. In 2021, *Polityka* terminated Rzeczkowski's employment, leading to a protest from international press freedom organizations, which said that his dismissal was maybe due to the rising costs of the SLAPP cases against him.¹⁸

Two years ago, Ringier Axel Springer Polska—which publishes magazines, newspapers, and news websites such as *Newsweek*, *Forbes*, *Fakt*, and *Onet.pl*—claimed to have had more than 100 lawsuits initiated against its outlets and journalists since 2016.¹⁹ However, it was not possible to verify this number.

The Legal Environment

There are many legal tools in Poland that can be used to intimidate critical media voices. The most important ones are criminal and civil defamation. Criminal defamation is enshrined in the Penal Code under Articles 212.²⁰ According to it, defamation of a person, group of people, institution, legal person, or business entity is punishable by a fine or the restriction of freedom. Defamation committed through mass media is punishable by a fine, restriction of freedom, or imprisonment for up to one year. The Penal Code also includes offenses such as criminal blasphemy and criminal defamation of public officials, of the head of state, of the state and its symbols, of foreign heads of state, and of foreign states and their symbols.

Civil defamation is the tool more broadly used in SLAPP cases in Poland. In the Civil Code, reputation and privacy are protected by Articles 2321 and 24.22 According to a Supreme Court judgment of 2019, all of the factual circumstances of a case must be taken into account when a court is deciding on the amount of compensation to be awarded. A court may also decide not to award any compensation. However, the more important and well-known plaintiffs are usually awarded higher compensation.²³ In a 2008 judgment, the Supreme Court stated that awarding compensation to the plaintiff has a deterrent effect on possible future offenders. Although this approach has been disputed in contemporary criminology, it is still reflected in some Polish jurisprudence. A court may also demand the publication of an apology instead of compensation. The cost of this, especially if the apology has to be published in a major daily newspaper, can be higher than that of financial compensation.

SLAPP cases can also be initiated under Articles 31a–33 of the Press Law, which states that it is possible to apply for the “correction of inaccurate or untrue press material”.²⁴ A correction should be submitted within 21 days of the publication. It is possible for the press outlet to refuse such a request under some circumstances. In that case, the party that requested the correction can

18 Article 19, [Poland: Dismissal of SLAPP-targeted journalist sets concerning precedent](#), 2022.

19 Adm, “[Jak pozywa władza? Niemal sto procesów dziennikarzy Ringier Axel Springer Polska w pięć lat](#),” *Rzeczpospolita*, 2021

20 “Article 212. § 1. Whoever imputes to another person, a group of persons, an institution or organizational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.”

21 “The personal interests of a person, such as, in particular, health, freedom, honor, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, scientific, artistic, inventive and rationalizing achievements, shall be protected by civil law independent of protection provided for under other provisions.”

22 “The person whose personal rights are threatened by someone else's action may require stopping that action unless it is not illegal. In case of infringement, one may also require the person who committed the infringement to fulfill the actions necessary to remove its effects, in particular, to make a statement of relevant content and appropriate form. Pursuant to the rules provided for in the Code, one may also require monetary compensation or payment of an appropriate amount of money for the indicated social purpose.”

23 [Media Laws Database: Poland](#), 2017.

24 Act of January 26, 1984 Press Law (J.L.1984, No. 5, item 24, as amended, Articles 31a-33).

bring a legal action within one year of the publication in order to publish the correction.

SLAPPs in Hungary

According to a 2020 study, Péter Erdélyi, the director of business development for 444.hu, reported that the media outlet was sued “basically every week, on average.”²⁵ Cases against 444.hu are mainly brought by oligarchs with close ties to the governing Fidesz party or by Fidesz politicians, though not high-profile ones. Fidesz politicians have also initiated a number of criminal and civil cases against media outlets such as Index.hu and Nyugat.hu.²⁶

The groundbreaking and most important SLAPP case in the country was the one against *Forbes Hungary* in 2019. The magazine had published its annual list of the wealthiest people in the country, using publicly available data. The family that owns Hell Energy Drink started an administrative procedure against *Forbes Hungary*.²⁷ The case was lodged with the National Data Protection and Freedom of Information Authority, which is responsible for handling data-protection complaints. The family also started a civil case against the magazine. The authority found there had been violations of data protection regulations and the magazine was ordered to pay €3,000 in compensation.²⁸ As a result, *Forbes Hungary* had to withdraw all of its December 2019 issue from newsstands all over the country.²⁹ The owners of Hell Energy Drink also petitioned for an injunction against the independent political weekly magazine

Magyar Narancs when it intended to publish an article on them.³⁰

The Legal Environment

Hungary’s Criminal Code contains the offenses of defamation (Article 226)³¹ and libel (Article 227.)³² The penalty is for a basic form of defamation imprisonment up to one year. If defamation is committed “for a malicious motive or purpose” and with great publicity, such as via mass media, or if it causes a great loss to the plaintiff, then the penalty can rise up to two years of imprisonment. In cases of libel, the penalty is usually a fine.³³ After the 2013 amendment of the Criminal Code, making fake videos or sound recordings with the aim of damaging someone’s reputation is punishable by up to two years in prison. If the recording is made public with great publicity or it causes a considerable injury, the offender should be imprisoned for three years.³⁴ The Criminal Code also includes offenses such as criminal defamation of the state and its symbols and defamation against the deceased.

Under the Civil Code, plaintiffs can launch a case claiming their personality rights were violated, and

25 Selva, *Fighting Words*.

26 Bea Bodrogi, *Civil Defamation and Media Freedom in Hungary. Trends and Challenges in Court Practice in Personality Rights Cases*, International Press Institute, 2017.

27 Mapping Media Freedom, *Hungary: The owners of Hell Energy Ltd. issued an administrative complaint procedure against Forbes Hungary*, 2020.

28 Ibid.

29 Associated Press, *Forbes Hungary recalls latest issue due to privacy case*, 2020.

30 Mapping Media Freedom, *Hungary: The owners of Hell Energy Ltd. petitioned for an injunction against Magyar Narancs*, 2020.

31 “226(1) Any person who engages in the written or oral publication of anything that is injurious to the good name or reputation of another person, or uses an expression directly referring to such a fact, is guilty of a misdemeanor punishable by imprisonment not exceeding one year.”

32 “227(1) Any person who, apart from what is contained in Section 226, makes a false publication orally or in any other way: a) tending to harm a person’s reputation in connection with his professional activity, public office or public activity; or b) libelously, before the public at large; shall be punishable for a misdemeanor by imprisonment not exceeding one year.”

33 International Press Institute, *Media Laws Database: Hungary*, 2017.

34 Ibid.

request and be awarded monetary compensation.³⁵ There is no need to prove that an injury has been suffered as a result of the violation of the personality rights—there is a presumption that one has been. The amount of the compensation that can be granted by a court depends on the weight of the evidence.³⁶

Slovenia

Janša's backsliding government attacked the media for the relatively short period that it was in office (2020–2022) and there is no widespread knowledge in the country of what SLAPPs are. The most prominent incident was initiated in 2020 by Rok Snežič, a tax expert and unofficial financial advisor to the prime minister. He brought 39 defamation lawsuits against three journalists—13 each for Primož Cirman, Vesna Vukovic, and Thomas Modica. The lawsuits were initiated following articles published by the investigative news website *Necenzurirano*. The three journalists had published over three years more than 30 different articles that focused on or mentioned Snežič. They argued that the nature and number of these spurious defamation cases were aimed at silencing *Necenzurirano* and intimidating its staff. In 2021, the Slovene Association of Journalists published a statement expressing concern about what it called the “systematic persecution” of the portal's journalists by Snežič.³⁷ It underlined that plaintiffs might use defamation lawsuits in order to exhaust the psychological and financial resources of journalists and ultimately introduce a chilling effect.

Although 39 defamation lawsuits against three journalists might not appear a significant number, as noted

above this can produce a profound chilling effect in a small country with a small media sector.

The Legal Environment

Slovenia's Criminal Code contains the offenses of insult,³⁸ defamation,³⁹ slander,⁴⁰ calumny,⁴¹ and malicious false accusation of crime.⁴² The punishment for each varies between fines or prison sentences of three months, six months, and a year. The sentence depends on different factors, and especially if the offense was committed via mass media and if it had “grave consequences”.⁴³ The Criminal Code also includes offenses such as criminal defamation of the head of state, of the state and its symbols, of foreign heads of state, and of foreign states and their symbols.

The Obligation Code of Slovenia also regulates defamation. Article 183 says that a court should award a plaintiff a financial compensation in a situation of defamation of their good name. This is in addition to the compensation for the financial damages caused by the defamation, which is regulated in Article 177.

35 “Section 2:43: [Specific personality rights] Violation of personality rights means in particular a) harm to life, physical integrity and health; b) violation of personal liberty and privacy, and trespass; c) discrimination against a person; d) defamation or violation of good reputation; e) violation of the right to keep personal secrets and the right to the protection of personal data; f) violation of the right to a name; g) violation of the right to the protection of one's image and recorded voice.”

36 International Press Institute, [Media Laws Database: Hungary](#).

37 Novinar, “[Napad na Necenzurirano](#)”, 2021.

38 “Article 158 (1) Whoever insults another person shall be punished by a fine or sentenced to imprisonment for not more than three months.”

39 “Article 160 (1) Whoever asserts or circulates any thing false about another person, which is capable of causing damage to the honor or reputation of that person, shall be punished by a fine or sentenced to imprisonment for not more than three months.”

40 “159 (1) Whoever asserts or circulates any thing false about another person, which is capable of damaging his honor or reputation and which he knows to be false, shall be punished by a fine or sentenced to imprisonment for not more than six months.”

41 “Article 161 (1) Whoever asserts or circulates any matter concerning personal or family affairs of another person, which is capable of injuring that person's honor and reputation, shall be punished by a fine or sentenced to imprisonment for not more than three months.”

42 “Article 162 (1) Whoever calumniated another person by asserting that he has committed a criminal offense or been convicted for the same with the intention of exposing that person to scorn, or whoever communicates such a fact to a third person with the same intention shall be punished by a fine or sentenced to imprisonment for not more than three months.”

43 International Press Institute, [Media Laws Database: Slovenia](#), 2017.

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Among three analyzed countries SLAPPs create the biggest threat in Poland. In Poland, Slovenia and Hungary defamation remains in the criminal code. This situation is contrary to the standards promoted by the Council of Europe and many international and local nongovernmental organizations. Additionally, all three countries' criminal codes included defamation against the head of state. The situation is thus one where there is a broad possibility of bringing defamation cases under different articles. Similarly to the rest of the EU member states, Poland, Hungary, and Slovenia do not have anti-SLAPP laws. The situation could improve in Slovenia following the change in government in 2022, whereas in Hungary and Poland the prospects for improvement are dim while they have anti-democratic governments.

Countering SLAPPs Through Law

Only in some jurisdictions of Australia, Canada, and the United States are there anti-SLAPP laws.

United States

Most US states have an anti-SLAPP law, making the United States the most important example of how countering vexatious lawsuits with legal means works in practice.

In their seminal work on SLAPPS in the 1980s, Penelope Pring and George W. Canan examined over 100 lawsuits from all over the United States to see if and how they influenced the "political values and participation in American society".⁴⁴ As they argued, "the Petition Clause of the First Amendment to the Constitution protects the citizens' rights of political advocacy". Although the language of the First Amendment only forbids Congress to make laws abridging, among other things, people's right "to petition the government for a redress of grievances", this protection has since

been extended to any legal and peaceful attempt to promote or discourage government actions.⁴⁵

The cases Pring and Canan examined were initiated against individuals and nongovernmental organizations exercising their First Amendment rights by

circulating petitions, writing letters to public officials, reporting violations or making complaints to government bodies, conducting elections, filing lawsuits, testifying at public hearings, demonstrating in public, and conducting boycotts intended to influence governmental action.⁴⁶

Since the plaintiffs aggrieved by citizens or groups speaking on a public issue could not base a lawsuit on grounds that would run up against the fact that the latter exercised their First Amendment rights, the legal basis was therefore usually common torts like defamation, business torts, and conspiracy, as well as judicial process abuse, constitutional rights, and nuisance. A successful defense against these SLAPP lawsuits depended on whether or not it was possible to claim protection under the First Amendment, which outweighs the claim of tortious injury.

As noted above, the threat of SLAPPs has been recognized in most US states, which has led to the introduction of state laws to counter them, with the first adopted in 1989. However, these laws have not entirely stopped the use of SLAPPs.

The introduced pieces of legislation have sought to balance the protection of First Amendment rights and "the interest in remedying private injuries under state tort law".⁴⁷ Under most of the state laws, courts have to analyze potential SLAPP cases and dismiss them at an early stage if they are defined as one. Introducing these state laws has not guaranteed full protection

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Colin Quinlan, "Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court. After Shady Grove", *Columbia Law Review*, 2014.

⁴⁴ Canan and Pring, *Strategic Lawsuits against Public Participation*.

from SLAPP lawsuits, as the problem arises again when cases are brought before federal courts. The federal courts, which are bound by the Erie doctrine⁴⁸ and the Rules Enabling Act,⁴⁹ either do not apply state anti-SLAPP laws or apply them partly.⁵⁰ According to Erie doctrine, “the federal courts must look to the state law [of the state in which they sit] for the rules of decision governing adjudication of state law claims.”⁵¹ The Rules Enabling Act authorizes the Supreme Court “to prescribe general rules of practice and procedure”. In 1965, the Supreme Court in *Hanna v. Plumer* analyzed the potential conflicts between state laws and federal rules and ruled that “to raise the Erie doctrine [...] the effect of a procedural rule on the outcome of a case must abridge, enlarge, or modify the substantive law.”⁵²

The situation did not change dramatically after the Supreme Court in 2010 ruled in a case that a state legislature cannot prohibit federal courts from using a federal class action rule for a state law claim and cannot dictate civil procedure in federal courts.⁵³ As this was a split ruling with four justices issuing a dissenting opinion, federal courts hold various interpretations of which part of the ruling they should follow.

It has been argued that federal courts should and can apply anti-SLAPP state laws.⁵⁴ This is supported by the fact that federal courts already use several doctrines that allow for the early dismissal of some types of claims, similarly to anti-SLAPP laws. The obligation to protect First Amendment rights would also support the primacy of anti-SLAPP laws since federal rules should always be considered inferior to the constitution.⁵⁵ Congress could also introduce federal anti-SLAPP

legislation or amend existing federal legislation in a way that would secure equal treatment of the anti-SLAPP state laws by federal courts.⁵⁶

Nevertheless, it is not clear if such changes would be enough to stop the use of SLAPPs. Even in case of federal courts using the anti-SLAPP state laws, the plaintiff might claim jurisdiction in a state lacking such regulations.⁵⁷ This is especially dangerous for those potential SLAPP victims who post their work online, such as journalists, academics, or some activists.

According to one expert, the case of *New York Times v. Sullivan* shows why a federal anti-SLAPP law would best protect media outlets from SLAPPs.⁵⁸ The case was brought by a policeman who claimed that an advertisement in the newspaper harmed his reputation. In its ruling on the case in 1964, the Supreme Court established

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁵⁹

Although the ruling was criticized by some, it provided a substantive protection for freedom of expression and free press at the time.⁶⁰

Starting from the 1980s, there was a shift in the courts’ approach toward defamation cases with a “dramatic proliferation of highly publicized libel actions brought by well-known figures who s[ought], and often receive[d], staggering sums of money.”⁶¹ This trend

48 Quinlan, Erie and the First Amendment.

49 The Rules Enabling Act, 28 U.S.C. § 2071-2077.

50 Quinlan, Erie and the First Amendment.

51 Ibid.

52 [Hanna v. Plumer](#).

53 *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*

54 Ibid.

55 Quinlan, Erie and the First Amendment.

56 Ibid.

57 Alexandra M. Gutierrez, “[The Case for a Federal Defamation Regime](#)”, *The Yale Law Journal Forum*, 2021.

58 Gutierrez, *The Case for a Federal Defamation Regime*.

59 Ibid.

60 Ibid.

61 Rodney A. Smolla, “[Let the Author Beware: The Rejuvenation of the American Law of Libel](#)”, *University of Pennsylvania Law Review*, 1983.

was connected to the fact that the media started to become more national and to a Supreme Court ruling in 1984 that established that outlets can be sued in any state where their material is generally accessible. Plaintiffs try to have their cases decided by state courts as “the average final state-court award against a media defendant since 2010 was nearly twenty times the average federal-court award, at \$16.5 million in state court compared to \$830,000 in federal court”.⁶²

One example is the case of Beef Products Inc. (BPI) against the Walt Disney Company as the owner of ABC News. In 2012, Disney settled to pay BPI \$177 million in return for dropping a \$1.9 billion defamation suit.⁶³ This was despite ABC News until the end standing by its reporting in question, which *The Columbia Journalism Review* described as “well sourced”.⁶⁴ The reason for Disney signing such an exorbitant settlement was the fact that the case was supposed to be decided by a South Dakota state court, even though it had tried to move the case to a federal court.⁶⁵ The plaintiff asserted more than 20 counts, among them defamation as well as disparagement, which is specifically penalized in South Dakota.⁶⁶

Although the input of the Supreme Court was priceless, the actor that can stop forum shopping for SLAPPs is Congress by enacting a new law.⁶⁷ Federal regulation could fit the Internet era better than the precedents and doctrines described above.⁶⁸

Australia

Australia has a similar history of SLAPP threats as the United States. In the 1980s and 1990s, corporations and businesspeople targeted various nongovernmental

organizations, activists, journalists, and academics were targeted with mainly defamation lawsuits.⁶⁹ It was argued that the first substantive protection from SLAPPs was the constitution. Although the protection of freedom of speech is not explicitly mentioned in the constitution, the Supreme Court decided in 1994 that citizens “had an interest in receiving information to inform their choice of representatives and therefore there was an implied protection for statements on government and political matters”.⁷⁰ This protection established by the Supreme Court was rather weak, however, as it was limited to the informed choice of representative and did not extend to informing the public about particular issues.⁷¹

In 2006, a new, uniform defamation law was introduced, after being passed in various state parliaments.⁷² It stopped corporations, except for “excluded corporations”,⁷³ from using defamation lawsuits.⁷⁴ This law included additional instruments to protect free speech, such as

the ability to stop litigation or have a defense by making a reasonable offer to make amends prior to litigation, the extension of the defense of truth to all jurisdictions, the abolition of exemplary damages and the capping of damages for non-economic loss at AUD\$250,000.⁷⁵

62 Gutierrez, *The Case for a Federal Defamation Regime*.

63 Christine Hauser, “ABC’s ‘Pink Slime’ Report Tied to \$177 Million in Settlement Costs”, *New York Times*, 2022.

64 Gutierrez, *The Case for a Federal Defamation Regime*.

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 Greg Ogle, “Anti-SLAPP Law Reform in Australia, *Review of European*”, *Comparative & International Environmental Law*, 2010.

70 *Theophanous v. Herald and Weekly Times Ltd*, [1994] 182 CLR 184.

71 Ogle, *Anti-SLAPP Law Reform in Australia*.

72 Standing Committee of Attorneys-General, *Model Defamation Provisions*, 2005.

73 “An excluded corporation includes a not for profit or a company which employs fewer than 10 people.” Gordon Legal, *Defamation law in Australia: A quick guide*.

74 Nicolee Dixon, *Uniform Defamation Laws in Queensland Parliamentary Library*, Research Brief No 2005/14, 2005.

75 Ogle, *Anti-SLAPP Law Reform in Australia*.

Even though activists and human rights lawyers welcomed the uniform law, it did not solve the problem of SLAPPs. Corporations still could use other legal avenues to target their victims with SLAPPs, and employees or heads of corporations could argue they were being personally defamed when activists or journalists wrote about their corporation.⁷⁶

Another important step toward addressing the problem of SLAPPs came out of the *Gunns 20* case.⁷⁷ *Gunns Ltd.* was at the time the biggest timber and wood-chip company in Australia, responsible for the controversial logging of the old Tasmanian forest.⁷⁸ The issue was sensitive politically and there was public outrage when the company targeted 20 environmentalists with an exorbitant lawsuit of A\$6 million. The first claim of *Gunns Ltd.* against the activists ran to 216 pages and contained allegations such as conspiracy against the company, interfering with its business and contractual relations, and vilification of the company to media outlets and potential clients.⁷⁹ The case lasted six years before *Gunns* backed down and paid A\$155,000 toward the legal costs of the four remaining defendants.⁸⁰

This case led to a national discussion about SLAPPs and how to prevent them. Nevertheless, because of lack of political will, the only Australian jurisdiction that took action was the Australian Capital Territory, which enacted the Protection of Public Participation Act 2008.⁸¹ Section 6 of the act states:

a reasonable person would consider that the main purpose for starting or maintaining the proceeding is: (a) to discourage the defendant (or anyone else) from engaging in public participation; or (b) to divert

the defendant's resources away from engagement in public participation to the proceeding; or (c) to punish or disadvantage the defendant for engaging in public participation.

Section 7 defines public participation but the law does not establish it as a positive right.⁸²

According to one expert, putting the balance on the question of the "improper purpose" of cases misses the point of stopping SLAPPs.⁸³ The problem lies in the lack of the mechanism for quickly dealing with vexatious claims and the fact that there are no more good options for defendants once a trial has started as the proceedings will be costly, stressful, and "a deterrent to public participation".⁸⁴

Canada

Even though there are anti-SLAPP laws in some parts of Canada, the data and expert analysis from this country is less robust than in the case of Australia and especially the United States.

Canada's first anti-SLAPP law was introduced in the province of Ontario in 2015, with that of British Columbia following suit in 2019. Ontario's Protection of Public Participation Act amended the Courts of Justice Act.⁸⁵ It focuses on protecting public-interest speech. Section 137.1 states:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

76 Ibid.

77 *Gunns v. Marr & Ors*, Supreme Court of Victoria 9575 of 2004.

78 Oliver Milman, "Australian logging company *Gunns* goes into liquidation", *The Guardian*, 2013.

79 *Gunns v. Marr & Ors*, Supreme Court of Victoria 9575 of 2004.

80 Milman, Australian logging company *Gunns* goes into liquidation.

81 Australian Capital Territory Protection of Public Participation Act 2008, A2008-48, Republication No 5.

82 Ogle, Anti-SLAPP Law Reform in Australia.

83 Ibid.

84 Ibid.

85 Protection of Public Participation Act, SO 2015, c 23 [On PPPA] at s. 3 creating s. 137.1(1) of the Courts of Justice Act, R.S.O. 1990, c. C-43 [CJA].

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that, (a) there are grounds to believe that, (i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding; and (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Since SLAPPs tend to be destructive for their victims because cases might take years before being finally decided, under the Ontario law the motion must be heard within 60 days of the notice of motion being filed.⁸⁶ Additionally, all of the proceedings are stopped until the judge decides on the anti-SLAPP motion.⁸⁷ The defendant is entitled to full-costs indemnity if successful, while the plaintiff will not get their cost covered if successful in proving that the case is not a SLAPP.⁸⁸

The law enacted in British Columbia is the copy of the Ontario one. Both have been criticized for placing a high bar for plaintiffs, who have to prove their case at an early stage of the proceedings under the threat of the case being dismissed.⁸⁹

* * *

The experiences of countering SLAPPs through legislation in Australia, Canada, and the United States offer some lessons for the EU. The example of the United States shows that journalists, activists, and academics are under threat without laws that stop plaintiffs from picking the jurisdiction with the most welcoming legislation for SLAPPs. The laws in Australia exclude corporations (with some exceptions) from suing for defamation. The one state law targeting

SLAPPs focuses on the "improper purpose" of defamation cases. It lacks a strong protection of freedom of expression as a hidden purpose of the plaintiff is hard to prove and sometimes impossible. In British Columbia and Ontario anti-SLAPP laws offer an example of strong protection for the potential SLAPP victim. On the other hand, as in the United States, the fact that just two provinces implemented this creates an opportunity for defamation forum shopping within the country.

Dealing with SLAPPs at the EU Level

SLAPPs are not only a worrying issue for individual EU member states; they are also a threat to the EU's legal order. They endanger human rights and democracy by impairing the right to freedom of expression of individuals who speak in the public interest. Additionally, because SLAPPs abuse and distort the system of civil-law remedies, they undermine the established trust between EU legal systems. This poses a serious threat to access to justice and judicial cooperation across the EU.⁹⁰ A further problem is that SLAPPs undermine scrutiny by independent watchdogs, which might result in an inability to effectively enforce EU law.⁹¹

Currently, there is no unified law in the EU that would counter SLAPPs, yet they pose a significant legal threat in every member state.⁹² A large grouping of civil society organizations, the Coalition Against SLAPPs in Europe, has been advocating for the EU to take the necessary steps to combat this threat. Its recommendations are to reform EU regulations "to end forum shopping and regulate applicable law in defamation cases" and to "enact an anti-SLAPP Directive".⁹³

The 2020 European Democracy Action Plan underlines the fact that SLAPPs can produce "chilling effects", dissuading or preventing journalists, academics, activ-

86 Ibid, s. 137.1(2).

87 Ibid, s. 137.1(5).

88 Ibid, s. 137.1(7).

89 Brian Radnoff, "A 'SLAPP' in the Face to Defamation Plaintiffs", Law. Daily, 2017.

90 Williams, Hueting, and Milewska, The increasing rise, and impact, of SLAPPs.

91 Ibid.

92 Bayer et al, Ad-Hoc Request. SLAPP in the EU context.

93 Ibid.

ists, and media outlets from pursuing their work in the public interest”.⁹⁴ It also promised the presentation of an initiative against SLAPPs for 2021. The European Commission in 2021 set up a group of experts to assist in the preparation of relevant legislative proposals and policy initiatives. In April 2022, the group of experts together with European Commission Vice President for Values and Transparency Věra Jourová presented a proposal for an anti-SLAPP EU directive.

The analysis below looks at the measures in the European Commission’s proposal in the context of the experience of Hungary, Poland, and Slovenia to establish whether they can stop the SLAPPs threat there or in other countries.

The initial problem with introducing the proposal was based on the discussion of whether the European Commission has competence in this area. Eventually the commission recognized the relevance of SLAPPs when it comes to judicial cooperation in civil matters, as well as adopting a more stringent approach to the rule of law and human rights implications of SLAPPs.

The term SLAPP is not used in any of the proposed directive’s articles. Instead, the proposal refers to “manifestly unfounded or abusive court proceedings.” According to one analyst, this formulation might be unhelpful, with “potential confusion resulting from the word ‘strategic’, which could be understood to require evidence of said strategy”.⁹⁵

The proposal mentions two criteria to identify such lawsuits: if a case concerns public participation in matters of public interest or if the proceedings are abusive. According to it,

‘Abusive court proceedings against public participation’ mean court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to

prevent, restrict or penalize public participation. Indications of such a purpose can be: a) the disproportionate, excessive or unreasonable nature of the claim or part thereof; b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; c) intimidation, harassment or threats on the part of the claimant or his or her representatives.

Courts should establish whether or not individual cases fall under the scope of the proposed directive. The European Commission’s accompanying recommendations for the member states underline that they should set standards similar to those of the proposed directive for dealing with domestic SLAPP cases.⁹⁶

The proposed directive contains key remedies for the victims of SLAPPs.

The proposed directive contains key remedies for the victims of SLAPPs. The most important one is the early dismissal of cases, which would help to alleviate victims’ psychological and financial distress connected to long-standing cases. However, since it interferes with plaintiffs’ right to access to courts, early dismissal is limited to cases that are manifestly unfounded in whole or in part, which is the responsibility of the defendant to prove. The remedies in cases that are not dismissed early include the provision of security, compensation of damages, liability for costs, penalties, restrictions on the ability to alter claims with a view to avoiding the award of costs, and the right to third-party intervention.

The European Commission’s proposed directive is heavily based on Article 81 of the Treaty on the Functioning of the European Union, which covers judicial

94 European Commission, [Communication on the European democracy action plan](#), December 2, 2020.

95 Justin Borg-Bareth, “Daphne’s Law”: [The European Commission introduces an anti-SLAPP initiative](#), EU Law Analysis, 2022.

96 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’), C/2022/2428.

cooperation in civil cases. According to an orthodox reading of Article 81, a cross-border element is necessary for a case to fall within the scope of the directive. In what might be described as a revolutionary move, Article 4(2) of the proposed directive states:

Where both parties to the proceedings are domiciled in the same Member State as the court seized, the matter shall also be considered to have cross-border implications if: (a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or (b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.

Thus, the proposed directive defines cross-border cases to include ones where the domicile of the parties is in the country of the court deciding the matter.

Articles 17 and 18 of the proposed directive provide one last important safeguard. This deals with matters related to third countries. Recognition and enforcement of judgments from the courts of third countries should be refused if they are recognized as SLAPP cases. Additionally, in a situation where the claimant has a domicile in a third country the case should be decided in the place of the domicile of the defendant in the EU.

As the proposed directive is limited to cases with a cross-border element some solutions at the national level are needed as well to counter SLAPPs. In its recommendations, the European Commission advised member states to adopt legislation, similar to the proposed directive. In this, the focus should be on the early dismissal of manifestly unfounded cases. The European Commission also recommended that the member states raise awareness about SLAPPs through information campaigns targeted at the general public and through training for legal specialists and potential victims. Another recommendation is for every member state to collect data on SLAPPs, which would

be submitted yearly to the European Commission. So far, the European Centre for Press and Media Freedom and other organizations under the CASE coalition have collected some SLAPP cases from all over Europe, which have been published on the Mapping Media Freedom Platform.⁹⁷ The last recommendation focuses on the legal defense of SLAPP victims, who should have access to individual and independent support; for example, from law firms offering pro bono legal support.

Risk of Watering Down

The European Commission's proposed anti-SLAPP directive is now going through the complex process for its adoption, with the European Parliament and the Council of the EU making their own proposals and recommendations. There is a risk, as always in this process, that the welcome steps proposed by the European Commission will be watered down, although it is also possible that they will be improved. In March 2023, the Presidency of the Council of the EU issued a draft compromise proposal for the anti-SLAPP directive.⁹⁸ The changes this proposes to the European Commission's text would water down the directive in important ways. At the same time, by contrast, the Committee on Legal Affairs of the European Parliament issued its draft rapport on the directive, which rather extends the protection contained in the European Commission's proposal.⁹⁹

In the version of the directive proposed by the Council of the EU—the body representing the views and interests of member-state governments—"manifestly unfounded" SLAPP cases are defined as ones

⁹⁷ [Mapping Media Freedom Platform](#).

⁹⁸ Council of the EU, [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](#), March 2, 2023.

⁹⁹ European Parliament, Committee on Legal Affairs, [Draft 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 \("Strategic lawsuits against public participation"\)](#), March 2, 2023.

“so obviously unfounded that there is no scope for any reasonable doubt”. If adopted, this high threshold would make it near impossible for most SLAPP defendants to prove a case is unfounded and would make the whole mechanism almost useless. The council’s proposed changes also remove the provision regarding compensation for damages, which leaves the articles on the compensation of damages and penalties to provide the proper amount of money to the victim and to act as a deterrent against SLAPPs. But, as these articles have also been weakened by the council, it unclear if and to what extent the financial sanctions against SLAPPs plaintiffs would work if this version of the directive is adopted.

The article in the European Commission’s proposal defining matters with cross-border implications has also been dropped by the Council of the EU, whose version does not provide information or guidance that could guarantee a harmonized implementation of the directive. According to the CASE coalition, this would lead to a situation where the directive offers a lower protection than most of the current legal systems in member states as they “already have pre-trial mechanisms in place to remove meritless cases from the court system, and in most cases the threshold included in the compromise proposal represents a lower hurdle for SLAPP plaintiffs than existing mechanisms”.¹⁰⁰

The rapporteur for the proposal in the Committee on Legal Affairs of the European Parliament, which is responsible for this matter, presented his draft Legislative Resolution on March 2, 2023.¹⁰¹ It seeks to extend the protection for SLAPP victims by, among other things, clarifying the definition of “abusive court proceedings against public participation” and “matters of public interest”, providing a broader definition of matters with cross-border implications, and creating a

public EU register of all relevant SLAPP cases. At the time of writing, the European Parliament was expected to hold a plenary debate on the anti-SLAPP directive on July 10, 2023.

Conclusion

In Hungary, Poland, and Slovenia, SLAPPs have been mostly used as a weapon by governments and people with connections to the government to silence the free media. While the situation in the first two backsliding countries remains unchanged, in Slovenia things could improve under the government elected last year. Moreover, the judiciary system in Poland and Hungary is not independent anymore. In Poland the majority of judges remain resilient in the face of government pressure while in Hungary the situation is more challenging, partly due to the fact that Fidesz has been in power longer than PiS has. It is up to individual judges to be able to remain independent enough, and in SLAPP cases to make impartial decisions against government wishes.

Even though the European Commission’s recommendations to the EU member states with regard to its proposed directive could stop some number of cross-border SLAPPs and help those who have been targeted by them, there is no reason to believe that the government of Hungary or Poland would introduce them. Doing so would threaten the autocratic ambitions of Kaczyński and Orbán. In Slovenia, at least some of the recommendations might be introduced.

In order to support civil society in Hungary and Poland in the fight against SLAPPs, the European Commission should go beyond its recommendation to member states to organize related information and educational activities to create a budget for these, which would be organized by nongovernmental organizations. This would enable civil society in these two countries to educate the public about the SLAPP threat, which their government will not do. Victims of SLAPPs would have a chance to overcome the stigma connected to defamation cases. Judges and lawyers

100 CASE, [European Anti-SLAPP Directive under threat](#), 2023.

101 Legislative Train Schedule, European Parliament, [Initiative against abusive litigation targeting journalists and rights defenders](#). In “A New Push for European Democracy”, April 20, 2023.

who are more knowledgeable about SLAPPs would be able to respectively issue rulings and defend clients better. In the case of Hungary and Poland, creating a database of SLAPP cases could be also done by civil society. As this would be an ambitious task requiring a large amount of work, the European Commission should support it financially.

Even if it is enacted, it is not certain the government in Hungary or Poland and Hungary will implement the directive.

Whether the European Commission's proposed anti-SLAPP directive will be enacted remains an open question. It has strong support from key EU figures, such as European Commission Vice President for Values and Transparency Věra Jourová and European Parliament President Roberta Metsola, but the legislative process in the EU is long and has many actors involved. And, even if it is enacted, it is not certain the government in Hungary or Poland and Hungary will implement the directive. In both countries, it is the government, state-owned companies, and people with close ties to the government who are major users of SLAPPs.

The innovative definition of "cross-border cases" in the directive proposed by the Commission would help to tackle at least some SLAPP cases in Hungary and Poland. It is crucial that this definition is retained in the final draft of the directive that will be adopted. Research by the University of Amsterdam has shown that only 10 percent of SLAPPs concern a cross-border situation.¹⁰²

When it comes to the proposed directive's provision for SLAPP cases being dismissed at an early stage, it is important to consider changing the scope to do so from cases that are "manifestly unfounded" to cases that are "unfounded". The former definition would allow for only a small percentage of cases to be dismissed,

which would in their case happen anyway—there is simply no ground for this type of cases to be accepted by the court. The provision of relief for victims of SLAPPs would also be less impactful than intended if the EU's legislators stick to the "manifestly unfounded" criterion. As a bare minimum, it is necessary that the definition of "manifestly unfounded" in the European Commission's text is retained in the final version of the directive. There must be certainty that at least some SLAPP cases will fall under the scope of the directive once it is adopted, instead of having the Council of the EU's proposed threshold that would mean only a small number of cases would be dismissed early.

The Code of Civil Procedure of the Canadian province of Quebec offers a good example of how to change the content of the proposed directive in this regard. Section 51 of the code states:

The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.

Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person's freedom of expression in public debate.¹⁰³

There are more types of cases that can be quickly dismissed in Quebec than would be the case in the proposed directive.

As SLAPPs are not just limited to civil cases and as the use of criminal cases has a huge potential to cause a chilling effect, it is important that the guarantees provided in the proposed directive be extended to criminal proceedings. A recommendation from the

¹⁰² Vitor Teixeira, [European Anti-SLAPP Directive under threat](#), Transparency International EU, 2023.

¹⁰³ [Code of Civil Procedure](#).

European Commission regarding SLAPP criminal cases will not be enough. The best way to do so would be the introduction of an additional anti-SLAPP directive relating to criminal proceedings. The legal framework set out by the Lisbon Treaty provides opportunities for the development of EU legislation on criminal law.

Additionally, the concept of “penalty” included in the directive is typical for criminal law but not for civil law. Therefore, additional protective mechanisms should be established against SLAPPs in the directive within the meaning of Article 47.1 of the Charter of Fundamental Rights. Additionally, the discretion left to the courts to grant specific remedies in the proposed directive might prove to be problematic. The compensation of damages should be retained in the final text of the directive. If it is not, the lawmakers have to make sure nonetheless that the text of the directive makes it clear that those filing SLAPPs will be sanctioned and what form the sanctions will take.

Ultimately, the most important way in which the European Commission can counter SLAPPs in Hungary and Poland is to use all of the legal and political tools at its disposal in order to support the restoration of the rule of law and the independence of the judiciary in both countries. An independent judiciary is necessary to decide impartially on SLAPP cases. The most refined legislation will not have an expected influence in a country where the judiciary has been captured and whose rulings might be ordered by politicians. What is more, it will not be possible for the EU to counter the threat of SLAPPs without all of the member states respecting the values enshrined in Article 2 of the Treaty on European Union, such as democracy, the rule of law, and human rights. Otherwise, while the proposed anti-SLAPP directive might work in the democratic member states, plaintiffs might still try to initiate cases in Hungary and Poland where the courts are not independent.

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