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ANTI-SLAPP CURRICULUM FOR LAWYERS IN MALTA

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DISCLAIMER

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Detailed information about the project can be found on: https://www.antislapp.eu/

1. INTRODUCTION

The PATFox Project (Pioneering anti-SLAPP Training for Freedom of Expression) is a project launched by the European Union with the essential aim of combatting the problems caused by Strategic Litigation Against Public Participation – or SLAPPs – by equipping lawyers and other professionals working in the field of free expression with a basic toolbox of defences, so to speak.

This manual has been created for and by Maltese lawyers, with the key aims of assessing the current situation in Malta, analysing what effective legal defences or strategies exist in terms of Maltese law, and offering potential tools for addressing SLAPP situations. Although the manual anchors itself on Maltese law, it will also consider the proposed EU Anti-SLAPP Directive, which is currently making its way through the EU's legislative process – although much depends on the final form that the proposed Directive will eventually take.

The manual incorporates and builds on the "Anti-SLAPP Curriculum for Lawyers in the European Union" authored by the University of Aberdeen's Anti-SLAPP Research Hub in behalf of PATFox.

2. What are SLAPPS, and how can they be identified?

2.1 Definitional Elements

The term 'SLAPP' (Strategic Lawsuit Against Public Participation) was coined by American scholars and mainstreamed in US judicial practice in the 1980s and 1990s in response to misuse of legal proceedings to suppress public scrutiny of matters of public interest.

SLAPPs are distinct from legitimate legal proceedings in that they are used to suppress activities of public interest by transferring legitimate public debate into a matter for private adjudication in which the claimant is significantly better resourced than the respondent.

The purpose of SLAPPs is not usually to win a case in court but to use the expense and disruption of legal proceedings to persuade a respondent to desist in their public interest activity. In addition to their effects on a named respondent, SLAPPs also tend to have a broader chilling effect on public participation in that they stand as an example of the expense and distress which other potential public critics might endure.

The manner in which SLAPPs are defined varies from one legal system to another. The chosen definition will of course have important consequences for the extent to which anti-SLAPP protections are available to clients. Narrower definitions which set a high bar for courts to find that a case is a SLAPP will constrain the scope of anti-SLAPP measures, while broader definitions provide respondents with remedies in situations where they would not otherwise be available.

This section provides an overview of relevant definitions in jurisdictions which regulate SLAPPs, as well as definitions provided in model instruments.

The who, what and why of SLAPPs

There are five elements that characterize the SLAPP phenomenon - the persons filing suit and their targets (*ratione personae*), the subject matter of the legal action (*ratione materiae*), the merit - or lack of it - of the legal claim, the (presumed) intent of the suit and effect of the suit on the SLAPP victim.

Those targeted by SLAPP suits are often those involved in transmitting ideas, information, opinions, and knowledge in the exercise of free speech - journalists, civil society organizations, academics, bloggers, whistleblowers and human rights defenders. A 2022 study of 570 European SLAPP cases found that journalists and media organizations were the defendants in half of the cases recorded.

There is often a serious imbalance of power and resources between the targets of SLAPP suits and those who instigate them. The 2022 study found that that most SLAPP suits were initiated by businesses and businesspeople, politicians and others in public service, followed by those involved with state-owned entities. SLAPPs have been observed in relation to many areas of public interest, including the environment, crime and corruption and political criticism.

SLAPPs are often labelled as meritless lawsuits, not least because that many of those that reach court are either dismissed or won by the defendant (something also borne out in the 2022 study). Notwithstanding that suits that are not entirely without merit may also be conducted in an abusive way that marks them out as SLAPPs, even successfully defended actions often have a harmful impact on defendants, exacting significant financial and psychological costs. The presumed intent of SLAPPs suits is therefore to dissuade defendants, or potential defendants, from continuing their public interest activities.

2.2 United States of America

From the 1990s, a number of US states adopted legislation intended to limit SLAPPs and their chilling effects. To date, almost 30 states have enacted anti-SLAPP legislation, with "SLAPP-back" provisions which provide remedies such as the early-dismissal of SLAPPs and the award of damages to SLAPP respondents. While several states design their laws on tried and tested models, however, there is significant variation in the manner in which SLAPPs are defined. Consequently, the availability of remedies will vary significantly across different statutes.

Some US statutes cover only limited activity. Historically, these included New York where anti-SLAPP mechanisms were limited to activities aimed at procuring favourable government action. Critics of these statutes argued that the limited definition of SLAPPs, and therefore the scope of remedies, excludes the use of the legislation in cases involving media defendants, for example.

In response to those criticisms, the scope of the New York legislation has, since November 2020, been expanded to include "any communication in a place open to the public or a public forum in connection with an issue of public interest", or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." The term '"public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.'

California's Code of Civil Procedure has a longer history of deployment of broader language and has long been held up as an example of good practice. The Code defines SLAPPs as lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances". It goes on to characterise such lawsuits as an "abuse of the judicial process". The broader definition, as well as the numerous refinements to the law as recently as January 2023, has results in far more

extensive deployment of the statute.

California courts deploy a two-prong test to determine whether anti-SLAPP remedies should be granted to the respondent in the main proceedings. First, to establish that a lawsuit falls within the scope of the anti-SLAPP provisions, it must be shown that it concerns a cause of action arising from the exercise of the right to petition or free speech. Secondly, the claimant must have failed to demonstrate the probability of their claim's success.

Consistently with the approach adopted in ECHR case law, Californian courts have identified a public interests in cases concerning public figures, political speech, and a broader range of matters which may be of legitimate public concern.

2.3 Australia

The judiciary and legislatures of a number of common law and mixed jurisdictions outside the United States have recognised SLAPPs as a particular legal category meriting the availability of bespoke remedies.

In Australia, the issue of SLAPP captured the imagination of the public and legislators following the 'Gunns 20' case in which environmental activists were subjected to litigation intended to suppress public interest activity. However, the Australian Capital Territory's Protection of Public Participation Act 2008 is the only example of legislation in force.

While the adoption of legislation is welcome in general terms, the Act establishes a high threshold for the dismissal of claims. Public participation is defined in broad terms as conduct intended "to influence public opinion, or promote or further action by the public, a corporation or government entity in relation to an issue of public interest." However, for anti-SLAPP remedies to be available, it must be established that the plaintiff's suit is motivated by "improper purpose". That improper purpose is demonstrated with reference

to an intention to discourage the defendant or third parties from engaging in public participation, to divert the defendant's resources away from acts of public participation, or to punish or disadvantage the defendant's public participation. The need to establish the claimant's intention is problematic, however, since it requires the respondent in the main proceedings to adduce evidence which is not necessarily readily available. It follows, therefore, that claims which are unreasonable or speculative tend to proceed to a full hearing notwithstanding their deleterious effects on public participation as defined in the Act.

2.4 Canada

The Canadian experience offers more in the way of successful legislative intervention. Anti-SLAPP statutes have been adopted in British Columbia, Ontario and Quebec. Manitoba is also considering the introduction of legislation.

The Ontario and British Columbia legislation are virtually identical, with Ontario's Protection of Public Participation Act 2015 essentially being replicated in British Columbia's Protection of Public Participation Act 2019, and Manitoba seeking to do the same through legislation under consideration there.

In dealing with "*Gag Proceedings*", as they are referred to in the Ontario Courts of Justice Act, the legislator sought to safeguard freedom of expression and public participation by discouraging litigation which would have a chilling effect. Anti-SLAPP remedies, including early dismissal and the award of full costs, are available in respect of all proceedings concerning expression on matters of public interest. The law requires expeditious hearings of anti-SLAPP motions with a view to dismissing actions lacking substantial merit or to which the respondent has a valid defence. In addition, judges are required to conduct a balance test to determine whether the harm suffered by the claimant outweighs the public interest in defending the respondent's right to freedom of expression.

Some practitioners lament the complexity of the tests in the Ontario and British

Columbia legislation insofar as it requires SLAPP respondents to develop sophisticated and detailed responses at an early stage in proceedings. They also note the difficulties posed by the need to compare the balance of rights in a context in which the criteria for comparison are not immediately apparent in the absence of a full hearing. These are familiar concerns in anti-SLAPP practice, albeit ones which practitioners recognize are a necessary byproduct of the nature of a plea for early dismissal of a claim which would otherwise proceed to a full and costly hearing.

In contrast to the common law jurisdictions cited above, the Quebec Code of Civil Procedure adopts a distinct approach in keeping with Quebec's mixed legal tradition. The Quebec legislation provides an especially clear systematization of the circumstances in which a court may apply anti-SLAPP measures. Article 51 of the Quebec Code of Civil Procedure now provides as follows:

"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."

It is especially noteworthy that the Quebec code confers ex officio power to dismiss abusive proceedings. It is not necessary for the respondent to raise an anti- SLAPP motion, although they may do so if the court does not act of its own initiative.

For a court to grant early dismissal of an abusive claim, it would need to be satisfied

that the claim is "*clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome*." Equally, early dismissal can be afforded if there is "*use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice*".

Notably, these are not cumulative requirements. In addition, there is no need to demonstrate any improper purpose or intent with reference to subjective indicators. Nor must any actual chilling effect on public participation be demonstrated. It is sufficient to rely on the unfoundedness of the claim, its excessiveness or unreasonableness, or an attempt to defeat the ends of justice.

The Quebec legislation provides a useful example of statutory intervention which is designed to provide clear, systematic guidance on the method of analysis for courts of the civil law school to follow in identifying and responding to SLAPPs. This approach to legal design was transposed, with considerable further elaboration, in the anti-SLAPP Model Directive, which is addressed in the section below.

2.4 Anti-SLAPP Model Directive

The Anti-SLAPP Model Directive 2020 was commissioned and endorsed by an extensive grouping of NGOs involved in public interest activity ranging from advocacy in support of freedom of expression to environmental protection. In 2020, following a period of consultation with legal practitioners, scholars, and SLAPP targets, a coalition of NGOs commissioned the authorship of an anti-SLAPP Directive.

It is the product of extensive consultation with SLAPP victims and lawyers. Its principal purpose was to provide legislators in the European Union with a sound working model on which to build a future EU instrument, and indeed its overarching design is very much in evidence in the EU's draft Anti-SLAPP Directive. The drafters of the Model Directive engaged in comparative analysis of existing instruments, while also drawing on the experience of litigators in relevant jurisdictions to identify both good practice and

potential pitfalls to be avoided. Specialists in the laws of the Member States of the European Union were also consulted in order to identify language and structure which would be readily deployable in the context of the legal traditions of the Member States.

The Model Directive adjusts the language which is typical of US legislation with a view to developing definitions which are as complete as possible, and therefore more amenable to deployment in the jurisdictions of a civil law tradition.

The Model Directive replaces references to 'SLAPP' with bespoke terminology, namely 'abusive lawsuit against public participation'. The authors considered 'strategic lawsuits' to be potentially problematic insofar as use of the phrase could be understood to require evidence of an overarching strategy, as opposed to only requiring evidence of abuse in the context of specified acts of public participation.

The second recital to the Model Directive provides fulsome explanation of the nature of relevant lawsuits, noting particularly that their substantive effect on public participation may arise regardless of the way the claim may be classified in formal terms. The recital also cites the chilling effect of SLAPPs on public participation, whether that effect is actually manifested or only potentially so. Furthermore, the abusive nature of the claim may be identified because the claim lacks legal merits or is otherwise manifestly unfounded, or because the claim abuses procedural rights:

Abusive lawsuits against public participation can materialize in a variety of legal actions. Irrespective of the object and the type of action, these lawsuits are characterised by two common core elements. First, the behaviour from which the claim arises, which expresses a form of public participation by the defendant on a matter of public interest. This exposes the chilling effect which the claim has or may potentially have on that or on similar forms of public participation. Secondly, the abusive nature of the claim that rests in the claim's lack of legal merits, in its manifestly unfounded nature or in the claimant's abuse of rights or of process laws. This exposes the use of the judicial process for purposes

other than genuinely asserting, vindicating or exercising a right, but rather of intimidating, depleting or exhausting the resources of the defendant.

Article 3(1) then provides a more carefully crafted legal definition of abusive lawsuits falling which is amenable to being deployed in courts:

'Abusive lawsuit against public participation' refers to a claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right.

The definition in Article 3(1) raises further definitional questions, including a need to determine what is meant by "public participation" and "matters of public interest". Both terms are defined in keeping with case law of the European Court of Human Rights. This results in a broad definition which avoids unwanted restriction of anti-SLAPP defences and remedies.

Article 3(2) provides that public participation includes both freedom of expression and freedom of association, as well as activities relating to interactions with public administration.

Article 3(3) provides a definition of public interest, which is inclusive of any "political, social, economic, environmental or other concern, also having regard to its potential or actual impact on the welfare of society". It then proceeds to provide an inexhaustive list of matters which are included within that definition, incorporating an understanding of public interest as articulated in case law of the European Court of Human Rights.

In addition, the broader philosophy of the governance of the EU's internal market

is recognised in that the list of examples of matters of public interest recognizes the potential for there to be asymmetries of power between private parties which require recognition of the need for scrutiny of private activity having state-like influence.

In view of concerns raised in jurisdictions having restrictive definitions of SLAPPs, and also noting the case law of the European Court of Human Rights, the legal definition in Article 3(1) does not rely on the chilling effect of the lawsuit. As noted by the ECtHR in Independent Newspaper (Ireland) v Ireland, the chilling effect of abusive litigation is implicit in the way a claim is framed and need not be proved independently.

This avoids concerns noted particularly by Prof Pamela Shapiro, who laments the limiting effects of legislation which refers to the claimant's intention to suppress scrutiny. Shapiro observes that a requirement to demonstrate an actual malicious intention to chill speech creates an insurmountable hurdle to the use of anti-SLAPP laws, allowing all but the most egregious claims to proceed to trial.

The solution identified in Article 6(1) of the Model Directive is to articulate objective factors which show that a claim either lacks merits or is otherwise abusive:

Member States shall take the measures necessary to ensure that the court or tribunal competent to hear the motion [for early dismissal], where it is satisfied with the evidence provided by the defendant that the claim arises from public participation on matters of public interest, shall adopt a decision to dismiss, in full or in part, the claim in the main proceedings if any of the following grounds is established:

(i) the claim does not have, in full or in part, legal merits;
(ii) the claim, or part of it, is manifestly unfounded;
(iii) there are elements indicative of an abuse of rights or of process laws.

Unlike the Commission's draft Anti-SLAPP Directive, the CASE Model Directive

provides that a respondent need not show that a claim is both lacking in merits and abusive for anti-SLAPP remedies to be available to them. Once it is shown that 'the claim arises from public participation on matters of public interest' and that at least one of the abusive techniques enumerated in lines (i), (ii) or (iii) is present, the remedies will be available to the respondent.

The Model Directive also seeks to provide a user-friendly system in respect of the assessment of the merits of claims and the meaning of "elements indicative of an abuse of rights or of process laws". Article 6(2) provides a non-exhaustive list of matters which a court should consider in its determination of the extent to which the conditions in Article 6(1) are satisfied:

(i) the reasonable prospects of success of the claim, also having regard to the compliance with applicable ethics rules and standards of the conduct constituting the object of the claim in the main proceedings;
(ii) the disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;
(iii) the scope of the claim, including whether the objective of the claim is a measure of prior restraint;
(iv) the nature and seriousness of the harm likely to be or have been suffered by the claimant;
(v) the litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies; (vi) the envisageable costs of proceedings;
(vi) the existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;
(vii) the imbalance of power between the claimant and the defendant; (ix) the financing of litigation by third parties;
(viii) whether the defendant suffered from any forms of intimidation,

harassment or threats on the part of the claimant before or during proceedings;

(ix) the actual or potential chilling effect on public participation on the concerned matter of public interest.

Once the court has considered these elements, it would be empowered to dismiss a claim or to determine that the matter be considered fully in the ordinary way. In this way, the claimant's right to access to courts is only limited where the exercise of that right is characterised by objectively identifiable elements which are indicative of abuse, as opposed to legitimate assertion of a legal claim.

2.5 Identifying SLAPPs

The Solicitors Regulation Authority guidance on "red flags"

Many cross-border SLAPPs are initiated in the UK, where the legal regime favours the protection of reputation. In November 2022, the Solicitors Regulation Authority of England and Wales issued a warning to solicitors and legal firms about the prevalence of SLAPPs.

"We expect you to be able to identify proposed courses of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive, and decline to act in this way. We expect you to advise clients against pursuing a course which amounts to abusive conduct, including making any threats in correspondence which are unjustified or illegal.

The following are red flags or features which are commonly associated with SLAPPs. Although they might not by themselves be evidence of misconduct, nor will they necessarily be present in all cases, they might help you to identify a proposed SLAPP:

- The target is a proposed publication on a subject of public importance, such as academic research, whistle-blowing or investigative journalism;
- Your instructions are to act solely in a public relations capacity, for example

by responding to pre-publication correspondence with journalists about a story which is true and does not relate to private information.

- The client asks that the claim is targeted only against individuals (where other corporate defendants are more appropriate), is brought under multiple causes of action or jurisdictions/fora, and/or in a jurisdiction unconnected with the parties or events."

3. Human Rights implications

3.1 Introduction

The effect of the SLAPP suit is the chilling of political speech, closing down the arena for political discussion and transforming political speech into a more private legal-based dialogue.

SLAPPs interact with a number of fundamental rights which might be invoked by either party to proceedings.

The SLAPP respondent could construct a case in response to SLAPPs which relies in part on arguments concerning violations of the right to a fair trial under Article 6 ECHR and, perhaps more straightforwardly, the right to freedom of expression under Article 10 ECHR. Article 11 ECHR concerning freedom of assembly and association may also be affected.

Lawyers acting on behalf of SLAPP respondents may need to pre-empt arguments by the SLAPP claimant particularly as they relate to the right to access to courts and the right to privacy.

Responding to SLAPPs poses a number of (surmountable) difficulties, however, insofar as the fundamental rights of the claimant are also engaged in relevant proceedings. In the first instance, the right to a fair trial also requires that the claimant have access to an impartial tribunal in which equality of arms is guaranteed. Secondly, the claimants' rights to privacy and family life are engaged in defamation claims.

To this end, it is necessary:

(i) to address the interactions of the rights to privacy and freedom of expression

and

(ii) to delimit the scope of the right to access to courts, noting in particular the distinction between legitimate use of court proceedings and abuse of rights.

It is especially noteworthy that the European Court of Human Rights has, in recent months, demonstrated increased awareness of the SLAPP phenomenon and has responded accordingly with a view to providing enhanced protection to respondents.

In *OOO Memo v Russia*, a judgement delivered in March 2022, the Court cites the SLAPP problem in explicit terms for the first time, recognizing the intimidating effect of vexatious proceedings in which there is a power imbalance between claimant and respondent. The judgement then further delimits the legitimate use of defamation proceedings with a view to curtailing misuse of the law.

Given the dynamic nature of the ECHR, it is submitted that the law should be read in the context of the Court's recognition of the SLAPP problem, which may provide further avenues for SLAPP respondents.

OOO Memo v Russia

The European Court of Human Rights referred to the notion of SLAPP (Strategic Litigation Against Public Participation) for the first time in its March 2022 ruling on a case brought up by the Russian media company OOO Memo. The Administration of the Russian Volgograd Region had brought a civil defamation suit against OOO Memo, in the course of which the media company was ordered to publish a retraction on its website stating that it had published false allegations that damaged the plaintiff's business reputation.

OOO Memo runs the Kavkazskiy Uzel, an online media outlet dealing with the political situation and human rights in the south of Russia. In 2008, Kavkazskiy Uzel published an article based on an interview with an expert on information policy. This article linked a suspension of allocation of subsidies to the City of Volgograd by the

Administration of the Volgograd Region to some of the latter's officials' involvement with a bus factory the City of Volgograd did not buy buses from. The Administration of the Volgograd Region then brought civil defamation proceedings against the editorial board of Kavkazskiy Uzel and OOO Memo, which resulted in a sentencing for defamation.

OOO Memo brought this case to the ECtHR, complaining about an interference with its right to freedom of expression guaranteed by the European Convention on Human Rights. The EctHR declared the media company's application admissible and ruled that the conviction of OOO Memo indeed violated Article 10 of the Convention. The ruling states that executive state agencies cannot be considered in the same way as private, individual persons when instituting civil defamation proceedings, and that interfering with the right to freedom of expression of members of the media on that basis is not a legitimate aim for such institutions.

3.2 Freedom of Expression and Privacy

The European Court of Human Rights established that Council of Europe States have a positive obligation to safeguard the freedom of pluralist media and to 'create a favorable environment for participation in public debate' .

Any restriction of Article 10 ECHR must be prescribed by law, necessary in a democratic society, and must pursue a legitimate aim. Crucially, however, the right to freedom of expression can be constrained in order to protect the reputation or rights of others40. Any such constraints are subject to the principle of proportionality.

The Court has provided avenues to challenge both procedures which may constitute a burden on respondents, and the potential damages to which respondents may be subject.

In Independent Newspapers (Ireland) Ltd v Ireland , the European Court of Human Rights held that unpredictably large damages' awards in libel cases have a 'strong and continuous chilling effect' on freedom of expression. Firstly, while Contracting States to

the Convention enjoy a margin of appreciation in respect of the balance of conflicting rights, namely the rights to privacy and freedom in this case, the exercise of that margin of appreciation must be proportionate. It follows, therefore, that damages awarded in defamation claims must not be excessive when compared to the harm suffered by the respondent.

Secondly, the Court noted that the lack of predictability in Irish jury awards in defamation cases was especially problematic. In other words, it was not only the quantum of damages itself which could fall foul of the Convention, but the fact that respondents could not predict their exposure to damages or identify the reasoning upon which the valuation of damages might be founded. The Court held that any system which allowed 'unpredictability high damages' required 'the most careful scrutiny and very strong justification'.

The Court has also found that substantive defamation law should distinguish between the right to privacy of members of the general public, and the more limited privacy rights of individuals and entities in the public eye. Examples of national courts falling foul of the obligation to strike a fair balance between freedom of political expression, especially that of public interest, and the right to respect for privacy of the other party include Falzon v Malta.

Consistently with long-established principle, the Court was clear about the essential role of a free press in a democratic society. In respect of persons of public interest, it distinguished the frivolous reporting of details of private life from the reporting of facts which could contribute to a wider democratic debate.

Additional weight was given to the fact that as a politician, the subject of the allegedly libelous article was open to close scrutiny of journalists and the public. Consequently, it was concluded that the Convention placed a very high bar for reasons capable of lawfully restricting debates on questions of public relevance and interest (see

also Olafsson v Iceland ; Kharlamov v Russia).

In Reinboth v Finland , the complainants argued that their convictions for violating the right to respect for private life of a politician breached their rights under Article 7 and Article 10. The Court partially upheld the complaint due to finding the interference with the right to freedom of expression not necessary in a democratic society. In Radio Twist AS v Slovakia, it was held that a judgement in favour of a senior politician in a defamation claim against a broadcaster violated the complainant's right to free expression as the broadcast concerned a public figure open to public scrutiny, and a matter of public interest.

Substantively, a violation of the right to freedom of expression may also be found where courts hold an individual liable for defamation without due regard to the distinction between verifiable statements of fact and unverifiable value-judgements. A respondent is less likely to expose themselves to credible defamation claims where a reasonable explanation is provided in support of conclusions or arguments which are not capable of verification with absolute certainty (Flux v Moldova).

In establishing a balance between conflicting fundamental rights, while the Court notes that the Contracting States enjoy a wide margin of appreciation, it tends to favour a proportionality test which avoids undue restriction of freedom of expression. In Bladet Tromso v Norway, the Court found that an exercise of freedom of expression which amounted to a debate of public relevance is capable of prevailing over a claimant's right to reputation. It was held, however, that Article 10 does not give the press carte blanche to publish defamatory material. The protections of the Convention are to be balanced in the context of a need for journalism which operates in good faith and with due diligence.

Nevertheless, on balance, the Court is mindful that when dealing with conflicts of rights under Article 8 and Article 10, due weight must be given to policy concerns such as the fact that suppressing freedom of expression may, and often does, have a detrimental effect on ensuring transparency, promoting open public debate, pluralism, and democracy.

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To lawfully restrict qualified rights such as those granted under Article 8 and Article 10 ECHR, the measure must be necessary in a democratic society, meaning the employed means have to be proportionate to the legitimate aim pursued (see e.g. Fatullayev v Azerbaijan; Marchenko v Ukraine; Filipovic v Serbia ; Dyuldin v Russia ; Standard Verlags GmbH v Austria ; Grinberg v Russia).

When balancing conflicting interests of two individuals or an individual and the public, the Court will assess all facts, circumstances, and relevant considerations to the case. In situations where one party attempts to protect its right to privacy or claim compensation for defamation, while the other exercises its freedom of expression and refers to matters of public interest, a key consideration would be the interest of the public in a democratic society as often represented by the side exercising its Article 10 rights.

Based on the case law, as outlined above, it can be concluded that there is a tendency to stand by freedom of expression as a tool of 'keeping tabs' on potential misconduct and questionable practices.

Furthermore, the protection of freedom of expression is not contingent on the professional activity of the person claiming a breach of that right. In the case of Steel & Morris, commonly known as McLibel, rejected arguments by the UK government that applicants should be afforded a lower level of protection as they were not journalists. The ECtHR stated that:

> [I]n a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.

Similarly, to other cases on freedom of expression, it was made clear in McLibel that journalists, when reporting on matters of general public interest, are to act in good faith and with due diligence. Nevertheless, the Court held that large public companies, regardless of their interest in protecting their commercial success and viability, have by their very nature, opened themselves up to public scrutiny, especially when considering issues such as health, environment, employees' rights and other subjects of public concern.

Accordingly, although the State enjoys a certain margin of appreciation in the balance of rights, when it decides to grant a course of action and a remedy to a corporate body, it must ensure that countervailing interests of freedom of expression are properly safeguarded. The measure of procedural fairness, effects for open debate in society as well as equality of arms must also be borne in mind. The next section turns to procedural concerns in particular.

3.3 The Right to an Effective Remedy and to a Fair Trial

Article 47 of the EU Charter of Fundamental Rights guarantees, within the scope of EU law, the rights to a fair trial and an effective remedy. In addition, the Charter codifies the case law of the European Court of Human Rights insofar as the right to a fair trial also includes the right to legal aid for parties to civil litigation who lack sufficient resources to ensure effective access to justice:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

As with the ECHR, the Charter right is applicable to cases concerning both civil and criminal litigation. The key distinction in civil cases is that both claimant and respondent are usually private parties. It follows, therefore, that courts must be mindful of the rights of both parties in civil claims.

The case law of the European Court of Human Rights addresses the respondent's right to access to courts primarily from the perspective of the costs of proceedings. In particular, although the Convention text refers only to the right to legal aid of a defendant in a criminal matter, the Strasbourg Court has found that litigants in civil cases may also be entitled to legal aid (See e.g. Steel and Morris v United Kingdom) .

The Court has found that the right to a fair trial is limited by practicalities such as availability of legal aid, and in accordance with Article 6(1)-(3) (a-e), requires a fair procedure, including in respect of the process leading to a hearing. In Airey v Ireland it was held that individuals must have effective access to courts, which in case of SLAPP is strategically blocked by targeting defendants in a way that prevents them from accessing justice .

The process should also be timely. The Strasbourg case law makes plain the object of the reasonable time requirement:

to ensure that accused persons do not lie under a charge for too long and that the charge is determined…to protect a defendant against excessive procedural delays and

prevent him remaining too long in a state of uncertainty about his fate…to avoid delays which might jeopardise the effectiveness and credibility of the administration of justice (HM Advocate v Watson, Burrows and JK).

The McLibel case is perhaps the most iconic example of how domestic laws have tended to lean towards an applicant's favour and fail to address the detriment that a defendant may be put to when exercising their freedom of expression. The lack of legal aid and the procedural unfairness and inequality of arms in this case resulted in a breach of both the right to access to courts and, consequently, the right to freedom of expression as a consequence of a disproportionate outcome:

As regards the complexity of the proceedings, the trial at first instance had lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing had lasted 23 days.

The factual case which the applicants had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue.

It is noteworthy, however, that the right to access to courts is also enjoyed by the claimant. When seeking to contest a SLAPP, including through the cutting short of legal proceedings, lawyers must note that the general presumption is that parties should be able to have their claim heard fully by an impartial tribunal. To this end, lawyers for SLAPP victims would need to demonstrate that the claim is not in fact a legitimate action which benefits from the protections afforded by the Convention.

The right to a fair trial is engaged where the claimant has an arguable case; the threshold, therefore, is not that the claimant will be successful but that they may state a tenable argument (Grzęda v.Poland [GC], 2022, §§ 268- 269).

Accordingly, a SLAPP respondent would need to show that the claimant has submitted their claim is not tenable as submitted and constitutes an abuse of the right to courts which does not benefit from the protection afforded by the Convention.

4. The Proposed EU Anti-SLAPP Directive

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

The legislative proposal is based, in part, on a Model Law which has been discussed earlier in Chapter 2.

4.1 What is the legal basis and scope of the Directive?

The Commission's draft proceeds on the basis that Article 81 of the Treaty on the Functioning of the European Union (TFEU) confers competence in respect of judicial cooperation in civil matters.

In identifying whether a matter falls within the scope of the proposed directive, it therefore necessary in the first instance to establish that the claim concerns matters of a civil or commercial nature. Criminal matters are excluded, as are fiscal claims and matters concerning 'the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)'. Other than these matters, all civil or commercial claims are covered by the directive. In other words, it does not matter how the claimant classifies their argument provided it is a civil or commercial claim concerning the respondent's public participation in matters of public interest.

It is also necessary to establish that the case has cross-border implications, however. Purely internal matters are excluded from the scope of the directive, notwithstanding that they may be civil or commercial claims which constrain public

participation.

The Commission's proposal begins with a classic private international law formulation which refers to the domicile of the parties. A case lacks cross-border implications, and therefore falls outwith the scope of the proposed directive, if the parties are both domiciled in the Member State of the court where the case will be considered.

This, however, is subject to a far-reaching caveat in Article 4(2):

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.

The Commission's proposal adopts an innovative formulation, the breadth of which is commensurate to the internal market and EU governance implications of SLAPPs. The law accounts for the fact that cross-border implications do not flow only from the circumstances of the parties but also from transnational public interest in the underlying dispute.

It is also noteworthy that the proposed directive is a minimum harmonization measure. In other words, the Member States may go further in affording protections to SLAPP victims than is strictly required by the EU instrument. In their transposition of the proposed directive in national law, the Member States are at liberty to extend the scope of national law beyond what is strictly required by the provisions addressed above. Indeed,

the European Commission recommends that Member States extend national transposition measures to matters falling within the scope of the Directive to apply also to purely domestic cases . This would avoid the prospect of reverse discrimination against SLAPP victims in domestic disputes. It would also minimize opportunistic litigation concerning the precise meaning of '[relevance] to more than one Member State' in Article 4(2)(a).

4.2 How are SLAPPs defined?

Once a SLAPP respondent has established that the litigation at issue falls within the material and geographic scope of the proposed directive, it is then necessary to establish that the claim is indeed a SLAPP for the purposes of EU law.

Other than in the title and preamble, the proposed Directive does not deploy the term 'SLAPPs'. Instead, it deploys familiar language and focuses on the abusive nature of the proceedings. Rather than referring to SLAPPs, therefore, the text of the draft directive uses the term 'abusive court proceedings against public participation'.

In addressing definitional questions, it is first necessary to establish that a matter concerns 'public participation' on a matter of 'public interest'. The Commission's draft provides broad definitions of both these terms. In particular, it is informed by ECHR case law which acknowledges the breadth of the right to freedom of expression, as well as the distinctions to be drawn between matters which are purely private and other matters in which the public may take a legitimate interest. Insofar as potential targets of SLAPPs are concerned, the draft acknowledges the fact that it is not only journalistic activity which may be affected, but also civil society, NGOs, academics, and others.

Public participation and public interest are therefore defined broadly as follows in Article 3:

1. '*public participation*' means any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of

expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto. This includes complaints, petitions, administrative or judicial claims and participation in public hearings;

2. '*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:

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

If a case concerns public participation in matters of public interest, it is then necessary to establish that the proceedings are abusive in accordance with the definition in Article 3:

3. '*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.

There are therefore two key elements to the notion of abuse:

(i) claims may be abusive because they are fully or partly unfounded, or
(ii) they may be abusive because of vexatious tactics deployed by claimants.

The implications of a finding of abusiveness will vary depending on the type of abuse identified in the proceedings, with more robust remedies available where the claim is manifestly unfounded in whole or in part.

4.3 Main legal mechanisms to combat SLAPPs

Once a court has established that proceedings constitute SLAPPs falling within the directive's scope, three key remedies will be available to the respondent in the main proceedings:

(i) the provision of security for costs and damages while proceedings are ongoing,
(ii) the early dismissal of proceedings, and
(iii) payment of costs and damages.

Speedy dismissal of claims is considered the cornerstone of anti-SLAPP legislation. Accelerated dismissal deprives the SLAPP claimant of the ability to extend the financial and psychological costs of proceedings to the detriment of the respondent (Art. 9-13). Early dismissal of cases must, of course, be granted only with great caution given it is arguable that this restricts the claimant's fundamental right to access to courts.

The solution provided in the draft directive is to restrict the availability of this remedy to claims which are manifestly unfounded in whole or in part. Where a defendant has applied for early dismissal, it is for the claimant in the main proceedings to prove that their claim is not manifestly unfounded (Art 12). The Commission's draft does not provide a definition of manifestly unfounded claims, though it can be assumed that this will be

subject to an EU interpretation rather than varying according to the diverse understandings of the term in the laws of the Member States.

Early dismissal is not available where the claim is not found to be manifestly unfounded, even if its main purpose is 'to prevent, restrict or penalize public participation' (as evidenced by '(i) the disproportionate, excessive or unreasonable nature of the claim…the existence of multiple proceedings [or] intimidation, harassment or threats on the part of the claimant').

This is mitigated somewhat by the other remedies, namely the provision of security pendente lite (Article 8) and liability for costs, penalties, and compensatory damages (Articles 14-16), which are available regardless of whether the SLAPP is manifestly unfounded or merely characterized by abuse of rights.

These financial remedies are especially useful insofar as they give the respondent some comfort that they will be compensated for the loss endured through litigation. They are also expected to have a dissuasive effect on SLAPP claimants who would be especially loathe to the notion of rewarding the respondent whose legitimate exercise of freedom of expression they had sought to dissuade or punish. Nevertheless, it bears repeating that the EU approach to early dismissal differs from that adopted in legal systems where additional remedies to compensate harm supplement the principal preventive remedy of early dismissal.

In addition to these main devices to dissuade the initiation of abusive proceedings against public participation, the draft directive includes a number of further procedural safeguards.

These include restrictions on the ability to alter claims with a view to avoiding the award of costs (see Recital 24 and Article 6) , as well as the right to third party intervention (Article 7) which will enable NGOs to submit amicus briefs in proceedings concerning

public participation. While this may appear to be a minor innovation at first blush, it could have substantial positive implications insofar as it would equip more vulnerable respondents (and less expert courts) with valuable expertise and oversight.

5. Private International Law and SLAPPs

5.1 Private International Law provisions of the anti-SLAPP Directive

While the provisions discussed above would limit the attractiveness of SLAPPs in EU courts, there would remain a significant gap if EU law did not provide protection against the institution of SLAPPs in third countries.

Article 17 of the draft Directive provides that the recognition and enforcement of judgments from the courts of third countries should be refused on grounds of public policy if the proceedings bear the hallmarks of SLAPPs . While Member States were already empowered to refuse recognition and enforcement in such cases, the inclusion of this article ensures that protection against enforcement of judgments derived from vexatious proceedings is available in all Member States.

Article 18 provides a further innovation by establishing a new harmonized jurisdictional rule and substantive rights to damages in respect of SLAPPs in third countries. The provision confers jurisdiction on the courts of the Member State in which a SLAPP victim is domiciled regardless of the domicile of the claimant in the SLAPP proceedings . This would provide an especially robust defense against the misuse of third country courts and reduce the attractiveness of London and the United States as venues from which to spook journalists into silence.

5.2 The Brussels IA and Rome II Regulations

Except to the extent that the definition of abusive proceedings in Article 3(3) of the draft Directive refers also to the institution of multiple proceedings, private international law provisions of the draft Directive address only matters which relate to proceedings instituted in third countries.

Currently, within the European judicial area, the Brussels IA Regulation (and the

Lugano Convention 2007 in respect of EFTA States) concerning jurisdiction, recognition and enforcement of judgments,71, and the Rome II Regulation concerning choice of law in non-contractual matters continue to apply in the usual way72. These instruments, which have been adopted with a view to providing legal certainty and predictability in cross-border litigation, afford SLAPP claimants with ample opportunity to engage in forum shopping through which to exert an advantage over the respondent.

This section explains the current state of the law, highlighting the risks posed by the operation of the regulations, and noting the limited tools available to SLAPP respondents.

The Brussels IA Regulation establishes the grounds upon which a court of the Member States may be seized of civil and commercial disputes in respect of respondents domiciled in the European Union. Generally, in civil or commercial matters, Article 4(1) provides that a defendant may be sued in the Member State in which they are domiciled. In other words, the default position is that a natural person should be sued in the place in which they live. For a legal person, domicile refers to the place in which the entity's statutory seat, central administration, or principal place of business. The principle that a person is to be sued in the place of their domicile is predicated on the notion that the claimant should not be empowered to seek an unfair advantage by suing another person in an unconnected and unfamiliar forum.

However, in matters relating to tort, delict or quasi-delict, the courts of the place in which the harmful event occurred or may occur may also be seised of a claim. Article 7(2) of the Regulation allows the claimant to choose whether to sue in the place of the defendant's domicile or the place where the harmful event occurred.

In defamation proceedings, the choice afforded to the claimant also has important implications concerning which national laws will be applied to the substance of the claim. The Rome II Regulation, which harmonises national laws on the applicable law to contractual obligations does not include a rule on choice of law in defamation and privacy

cases. It follows that national courts will apply their own divergent choice of law rules, and therefore that the claimant's choice of a venue in which to pursue their claim will be crucial in establishing which substantive law or laws will be applicable to a dispute. In practice, this means that respondents are exposed to the laws of multiple legal systems, requiring them to apply the lowest common denominator of freedom of expression.

The meaning of 'the place in which the harmful event occurred or may occur' in the Brussels IA Regulation required judicial interpretation to clarify whether it referred to the place in which the act giving rise to the damage occurred or to the place in which the resulting damage was felt. By way of example, if pollutants are disposed of in a river in one Member State, and the river carries those pollutants downstream, causing damage in another Member State, the terminology used in the Regulation itself is not entirely clear about whether the harmful event refers to the disposal of pollutants in one Member State or the resultant harm in another Member State.

In Bier v Mines de Potasse d'Alsace the Court of Justice of the European Union held that the term could refer to either of the two meanings73. It is for the claimant to choose whether to initiate proceedings in one Member State or the other. It follows, therefore, that in tort cases, the pursuer is able to choose as between three potential venues for litigation in tort cases, namely:

(i) the place of the domicile of the defendant,
(ii) the place in which the harmful act was committed,
(iii) the place in which the effects of the harmful act were manifested.

This has important implications for freedom of expression in a transnational context since it means that it is difficult for a person to predict their exposure to court proceedings in respect of acts of public participation.

In the case Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, also referred to as the Shevill Case, the CJE held that the Bier Principle covering the dual meaning of the place where the harmful event occurred is equally applicable to defamation claims. It follows that, in addition to the ability to sue in the place of the defendant's domicile, a claimant in a defamation case may sue in the place of publication or the place (or places) in which the resulting reputational harm occurred:

> *On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized.*

For a case to be pursued in a national court in a State in which it is argued that damage has occurred or could occur, the claimant must satisfy the court the threshold of harm required for the case to proceed has been satisfied in accordance with relevant national law.

Where a SLAPP involves the misuse of jurisdictional rules, the respondent could argue that the threshold of harm has not been met. Nevertheless, often, this is of limited benefit. Where a claimant submits that they have suffered damage in a particular place, the court may not refuse jurisdiction without considering whether the claim is sound. Moreover, the threshold for assuming jurisdiction will vary from one Member State to another. In some jurisdictions, the national courts are required to presume that damage did indeed occur or that it could occur, and must therefore assume jurisdiction.

It follows that, regardless of the persuasiveness of the pursuer's claim, the respondent may be called upon to contest the jurisdiction of the Court and, potentially, to litigate the substantive claim.

Contesting jurisdiction alone may be an expensive process in and of itself; costs, both direct and otherwise, may be multiplied through the availability of appeals where the pursuer fails to persuade a court of first instance that it should exercise jurisdiction. This is in addition to the psychological cost of proceedings in an unfamiliar forum, as well as the associated difficulty in quantifying the risk to which the respondent is exposed.

The Shevill judgment is especially problematic the claimant may argue that there is more than one place in which damage occurred. If a publication is available in multiple Member States, it is arguable that the resulting harm is manifested in each of those States. The CJEU held that, in these circumstances, the claimant may adopt what is known as the 'mosaic approach'. This means that, rather than suing the respondent in one place for the entire claim, the claimant could sue in multiple States for the alleged damage occurring in each State.

This should not, in principle, have any effect on the total quantum of damages, although it certainly could do so in the absence of harmonisation of choice of law rules under the Rome II Regulation. However, the immediate problem for respondents is, of course, that this could expose them to the costs of litigation in each of those states notwithstanding the fact that the pursuer could, in principle, sue for the entire claim in the state of the defendant's jurisdiction.

Exposure to the 'mosaic approach' is especially problematic where it is averred that damage occurred through online reporting and commentary. Given that online content may be viewed in every Member State of the Union, it is arguable that any resulting reputational harm may be felt in every Member State.

In order to address concerns regarding potential universal jurisdiction in defamation cases, the CJEU developed further conditions governing which parts of the claim each court can hear.

In the case eDate Advertising GmbH and Others v X and Société MGN LIMITED and in the case Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB78 it was established that the global claim for damages can only be heard in the place of the defendant's domicile under Article 4, or in the place of the claimant's centre of interests under Article 7(2). The centre of interests is defined as follows in Svensk Handel:

As to the identification of the centre of interests, the Court has stated that, with regard to a natural person, this generally corresponds to the Member State of his habitual residence. However, such a person may also have his centre of interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State (judgment of 25 October 2011, eDate Advertising and Others, C 509/09 and C 161/10, EU:C:2011:685, paragraph 49).

As regards a legal person pursuing an economic activity, such as the applicant in the main proceedings, the centre of interests of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities. While the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis.

Courts other than that of the plaintiff's centre of interests may hear the part of the claim regarding the portion of the global damages resulting in that State, but they may not

determine the global damages or order the removal of content. This means that a claimant may avoid the need to litigate wherever damage has occurred, and may opt instead to concentrate a claim and thereby limit the cost of litigation.

That choice remains with the claimant, however. Claimants remain at liberty to choose a number of different fora, and with that a number of different litigation tactics. In the hands of a claimant who wishes to vex the respondent, this is particularly problematic.

Under existing laws, respondents could seek to persuade a court that the use of the mosaic approach could constitute a breach of the right to freedom of expression.

There is some support for an argument proceeding on that basis in the ECtHR judgment in Ali Gürbüz v Turkey. In that case, multiple criminal defamation proceedings had been instituted against Mr Gürbüz. The Court found that the constant threat posed by litigation, no matter how little chance it had of leading to a conviction, had a chilling effect on free speech, and therefore constituted a violation of Article 10 of the ECHR . The case is distinguishable from civil defamation, of course, insofar as there is no threat of depravation of liberty in a civil claim.

Nevertheless, insofar as the reasoning of the ECtHR identifies a chilling effect of multiple proceedings, the judgment has the potential to be transposed to a situation in which a claimant brings several potentially ruinous civil proceedings in a number of states.

While the respondent is not faced with potential deprivation of liberty, the opportunity cost of time and money invested in defending a plurality of civil suits has the same effect on the attractiveness of the exercise of free speech. The mischief of a chilling effect on freedom of expression therefore remains, and, it is submitted, equally constitutes an infringement of Article 10 ECHR.

However, it must be noted that human rights defences to the operation of the jurisdictional rules in defamation cases remain an underexplored possible route for litigants.

This may appear to be surprising given the fact that the Regulation has been deployed to undermine the right to access to courts, and by extension the right to freedom of expression, as guaranteed in the EU Charter of Fundamental Rights.

The reticence to explore this route may be motivated by a number of factors. Firstly, litigants might lack the resources to pursue a challenge to the jurisdictional threat and choose instead to settle a defendable claim. Secondly, the CJEU's overarching philosophy in the interpretation of the Brussels Ia Regulation tends towards rigid application of rules to reinforce predictability. The Court tends to reject analyses of jurisdictional justice in individual cases in favour of the legislator's judgement concerning systemic justice in a predictable instrument.

The Anti-SLAPP Directive could provide another route to challenge use of the mosaic approach, however. In particular, the definition of abuse in Article 3(3) refers to the excessiveness or unreasonableness of a claim as well as the institution of multiple proceedings concerning the same matter. A respondent could argue that excessive use of the mosaic approach, including through the formulation of exaggerated claims concerning the harm suffered, could merit the deployment of anti-SLAPP remedies concerning abusive claims. It is worth recalling that this might not meet the threshold for early dismissal.

However, other remedies could be deployed in this context, and this could limit the threat of misuse of jurisdictional grounds.

5.3 Recognition and Enforcement of Judgments

Judgments in civil and commercial matters delivered by a Court of a Member State are subject to the rules of recognition and enforcement in the Brussels Ia Regulation. The

Regulation provides only limited grounds for the refusal of recognition and enforcement in Article 34. These do not include a review of the exercise of jurisdiction by the court of origin:

> A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
> 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
> 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
> 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Public policy offers the most promising avenue for a SLAPP respondent to argue that a judgment should not be enforced against them. The judgment debtor would have to show that the enforcement of the judgment "would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental within that legal order" (Case C-559/14 Meroni ECLI:EU:C:2016:349) .

6. Freedom of Information and Subject Access Requests

6.1 What is freedom of information?

Freedom of information (FOI) laws give the public access to information held by public authorities and, in some cases, designated private bodies that perform public functions or provide public services.

In 1990, only 13 countries had FOI legislation in place, but that number has rapidly increased, and as of August 2021 132 countries have enacted FOI laws or similar provisions. Public access to official information is increasingly recognized as an essential feature of democratic societies, due to its role in supporting the transparency and accountability of institutions, reducing corruption, and enhancing public participation in democratic governance.

This brief guide provides an introduction to how the 'right to know' works in practice and how FOI and other information access laws can be used to obtain information to defend against strategic lawsuits against public participation (SLAPPs).

6.2 How does FOI work?

FOI laws have been used to obtain a variety of information, including correspondence between government officials, meeting agendas, statistical datasets, and details of the expenses claimed by politicians. However, not all information will be covered under FOI. Most FOI laws will include some exemptions that allow information holders to either partially or completely withhold information.

These exemptions include national security and defense, information provided in confidence, and personal information or data. The details of the exemptions will vary between jurisdictions, so it will be necessary to refer to the legislation you are using to obtain information. When making an information request, it is useful to consider the

potential exemptions that might be engaged and whether narrowing the request would help to ensure the timely disclosure of relevant information.

Most information requests will be made by following the procedures set out in domestic FOI legislation. However, there are other avenues for information access, including the Treaty on the Functioning of the European Union (TFEU), human rights law, and data protection laws that give individuals the right to information held about themselves.

6.3 Domestic FOI legislation

Each European jurisdiction has its own FOI laws, sometimes at both federal and state levels. Some jurisdictions, such as Greece, guarantee the right to information in their constitutions. There is considerable variation between jurisdictions, but each will set out the procedures for making and responding for information requests.

For example, the UK's FOI laws require requests to be made in writing. Information holders then have 20 business days to respond to the request. They must confirm whether the information is held, and if the information cannot be provided in part or in full, they must explain which exemption is engaged.

6.4 Information Access in the EU

Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) grants EU citizens and residents the right to access the documents of the European Parliament, the Council, and the European Commission . This includes legislative texts, official documents, and meeting minutes. Requesters must apply for information in writing in one of the official EU languages. Institutions must respond within 15 business days to either grant or refuse access, based on specified exceptions.

The EU General Data Protection Regulation 2016/679 (GDPR) imposes obligations on organizations that collect or store information on individuals living in the EU. It sets out

the principles for the protection of personal data and the rights of data subjects. Article 15 of the GDPR protects the right of access by the data subjects to obtain information from the data controller, including the right to request erasure of personal data and the right to lodge a complaint with a supervisory authority.

6.5 Article 10 and the Right to Information

Article 10 of the European Convention on Human Rights (ECHR) confers a limited right to information.

The 2016 European Court of Human Rights (ECtHR) decision in Magyar Helsinki Bizottság v Hungary confirmed that Article 10 can include a positive obligation on States to provide information when the information requester is performing a social watchdog function – e.g., a journalist or non-governmental organization (NGO) .

Article 10 does not impose a positive obligation on States to impart information, but the Court has recognized that a right to information might arise when disclosure has been imposed by judicial order and when access to information is instrumental for the exercise of freedom of expression and withholding information would interfere with that right.

6.6 FOI and SLAPPs

Likewise, it is important to consider when information laws can be used to stifle the public interest and/or to initiate SLAPPs.

For example, a Hungarian corporation complained that a magazine investigating its activities and links to the Hungarian government had processed personal data without a legal basis, contrary to the GDPR.

FOI and data protection laws can therefore be powerful tools in defending against SLAPPs, but they can also be used by the opposition. Anyone subject to information laws, including domestic FOI legislation and GDPR, should ensure that they have full knowledge

of the laws and the compliance requirements.

GDPR used against the public interest in Hungary

In late 2019, one of the owners of the Hungarian energy drink manufacturer Hell Energy secured a ruling in court that Forbes magazine was not allowed to publish his name on the annual list of the richest Hungarians. Similar to other recent cases in Hungary, the Hell Energy plaintiff based his case on the General Data Protection Regulation (GDPR): arguing that reporting on him personally and his wealth as a shareholder of Hell Energy constituted a violation of his privacy rights.

The Budapest-Capital Regional Court accepted this argumentation and ruled Forbes to remove the then current issue of the magazine from circulation. The owner's name also had to be deleted from the online version. Forbes appealed against this injunction, claiming that "the source of the data processed for journalistic purposes was the publicly accessible, official company register, and that these data could be used for journalistic purposes “

The Hungarian Supreme Court upheld the ruling in August 2020, pointing out "that in deciding upon an interim measure, it is not possible to balance between the freedom of press and data protection, because would amount to prejudge the merits of the (would-be) case”. A further objection against the injunction is pending at Hungary's Constitutional Court. Forbes is still prevented from publishing the report in question.

7. The Maltese Context

The development of SLAPP in Malta has been largely shaped by the events that led to, and followed, the assassination of Daphne Caruana Galizia in October 2017. Ms Caruana Galizia was a journalist who operated a popular news-blog where, amongst other things, she published investigative stories of public interest that frequently focused on government corruption. At the time of her death, she was defending just under 50 civil and criminal libel suits filed primarily by politicians, especially from the government's side, and high-profiled Maltese business owners.

Even if, for argument's sake, one had to set aside the legal and factual merits of each case, it was more than evident that a large number of these cases had been filed against her purely to harass her. For instance, one businessman had filed nineteen libel suits against her at once, all concerning the same issue – when one suit could easily have grouped all the issues collectively and served as a perfectly valid vehicle through which justice could have been restored between the parties.

Ms Caruana's Galizia's writings therefore exposed the weaknesses of the press laws in Malta, which offered little to no protection to journalists and which were open to abuse by those with sufficient political or financial clout.

7.1 Press Law

Malta introduced a new 'Media and Defamation Act' in 2018, which was modelled closely on the English Defamation Act of 2013. Some of the measures of protection that it offers to defendants are the following:

a) The Single Publication Rule

The Act now sets down the rule that writings that are published online can only be

prosecuted once, no matter how many times they are republished, reposted or otherwise left online. This therefore means that journalists and authors cannot be sued over and over for the same publication by the same person; and that the prescriptive period for filing an action commences on the date when the writing is first published online, and not when it is republished or reposted.

b) Pre-trial measures

The Act also set down the rule that the first hearing for any action filed within the same Act to be scheduled for first hearing within twenty days from the defendant's deadline for filing any defence pleas – thus ensuring that libel suits are not left to languish or join a long queue of cases that are waiting to be scheduled for hearing, but are fast-tracked to the front of the queue, so to speak. This serves both parties interests, in the sense that the claimant may look forward to having the case heard and decided while the subject of debate is still current, and the defendant is assured that they are not kept waiting to be judged for more than is necessary.

The second pre-trial measure was the faculty provided to the presiding Court to direct the parties to seek an out-of-court settlement via formal mediation procedures or for an apology to be made; in which case the award of damages is limited to not more than EUR 1,000. This measure therefore allowed the Court to form a prima facie assessment of the case before it, and to expedite its settlement in the event that the matter was either trivial or not significantly contentious. Prior to this provision, Courts would be obliged to hear the case in full unless the parties themselves wished to resolve the matter amicably or otherwise withdraw/admit the case.

7.2 General Legal Defences

Pending the introduction of the EU's anti-SLAPP Directive, Maltese law lacks specific defences that can result in the early dismissal of a case. It is possible to file a defence plea claiming that the claim is without legal merit; but in practice the Court has no choice but to hear the case out in full before it can decide whether that defence plea is

justified or not.

For this reason, therefore, early dismissal defences remain alien to Maltese law unless they are either introduced via the EU's proposed Directive, or otherwise introduced by means of ad hoc amendments to the existing Media and Defamation Act.

The same can be said for the larger part of the defences contemplated in the proposed Directive. These currently have no parallel in Maltese law, and until they are introduced, there is next to no way a defendant may successfully request a case to be dismissed early on the basis that it is intended purely to harass or to punish the defendant for exercising their right to free speech.

7.3 Forms of counterclaim

The Maltese Criminal Code contains extensive provisions that criminalise the misuse of electronic equipment when this is used as a tool for harassing, threatening or otherwise causing harm to any individual. Although a worrying trend has been observed, and claimants are increasingly opting to use these provisions of the Criminal Code to silence journalists who publish their writings online, they also remain an effective tool for journalists or participants in public life to control those who threaten them or their work. Journalists and activists would do well to adopt a 'zero tolerance' policy for any harassment that is perpetrated via electronic means, and to seek the prosecution of those who attempt to silence them in this way.

The Maltese context has also demonstrated the effectiveness of drawing media attention to any attempt of harassment or bullying by those seeking to silence them – in other words, deliberately creating a 'Streisand Effect' over the story or item of public debate that the claimant wishes to silence and shut down. A concerted effort by journalists who show that any attempt to silence a valid story will be met with increased attention to that story has a deterrent effect that often goes beyond any provision that can be offered by any law. Journalists and their legal counsel are advised to use this avenue judiciously.

7.4 Freedom of Information Claims

In recent years in Malta, the focus of SLAPP has moved away from libel suits to Freedom of Information (FOI) requests and the appeal process that follow them. There is a clear pattern of behaviour where requests made legitimately in terms of the Freedom of Information Act are routinely refused, usually on some spurious basis, upheld by the Information and Data Protection Commissioner, and then appealed against by the public authority from whom the information was requested. There are two chief consequences from this: (a) journalists and media houses are being forced to put up financial and human resources to obtain information that should have been provided straightforwardly and free of charge in the first place; and (b) the inevitable delay that the process engages from start to finish ensures that the lifespan of the news-cycle is exhausted and that by the time the information is eventually obtained, it is redundant or obsolete.

Maltese law currently lacks any safeguards or serious punitive measures to prevent these SLAPPs from occurring, and unless either the Freedom of Information Act is amended, or the proposed EU Directive is widened to contemplate SLAPPs other than libel suits, then the system appears unlikely to change for the better.

7.5 SLAPP's and Data Protection

Journalists may find themselves facing requests to shut down, redact or withdraw stories following a claim that an individual's data protection rights are being violated. Journalists are reminded that the General Data Protection Regulation provides for an exception, which allows journalists to carry on with their work provided that this is in the public interest, and that their work does not exceed the limits of reasonableness and does not overly impinge on the data subject's rights.

Journalists and their legal counsel are therefore advised to consider:

a) That personal data processed by journalists is kept to a needs-must basis, and does not exceed elements of proportionality and necessity. In other

words, journalists should process the personal data that is needed for the story and not go beyond those limits;

b) The personal data used must be clearly and demonstratively linked to some public interest; and that the public interest is not purely a desire to satisfy curiosity, but a necessity to know in favour of some common good or the broader interest of a democratic society.

In order to avail themselves of this defence, therefore, journalists must ensure that they carefully filter through the personal data that is strictly needed for the purposes of the investigative story, and that the public interest that they aim to address is one that is more compelling that simple public curiosity.