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# The Proposed EU Anti-SLAPP Directive and Existing EU Instruments

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## Agenda

- Defining SLAPPs
  - Human rights considerations
- The Proposed Anti-SLAPP Directive
  - Scope
  - Definitions
  - Early Dismissal
  - Remedies
  - Third Country Judgments
- Intra-EU Private International Law Issues

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## Background

The assassination of Daphne Caruana Galizia prompted NGOs and MEPs to take a closer look at the broader conditions for freedom of expression.

Dozens of vexatious lawsuits instituted against Caruana Galizia in Malta and elsewhere to suppress her journalistic investigations.



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## What are SLAPPs?

- “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”

(CASE Model Law, Art 3(1))



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## Human Rights Considerations

Freedom of expression vs right to privacy

Right to access to courts for both parties

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## Scope of the proposed directive (i)

“This Directive shall apply to matters of a civil or commercial nature with cross-border implications, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).” (Art 2)

“For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised.” (Art 4(2))

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## Scope of the proposed directive (ii)

Where both parties to the proceedings are domiciled in the same Member State as the court seised, 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.



## “Abusive court proceedings against public participation”

“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.”





## Definition of public participation

‘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;



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## Definition of public interest

**'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;



## Early Dismissal of Manifestly Unfounded Proceedings (i)

“Member States shall empower courts and tribunals to adopt an early decision to dismiss, in full or in part, court proceedings against public participation as manifestly unfounded.” (Art 9)

“Member States shall ensure that if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken.” (Art 10)



## Early Dismissal of Manifestly Unfounded Proceedings (ii)

“Member States shall ensure that an application for early dismissal is treated in an accelerated procedure, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial.” (Art 11)

“Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded.” (Art 12)



## Remedies

SLAPP claimant to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant, unless such costs are excessive (Art 14).

SLAPP claimant liable for damages to respondent (Art 15).

Courts to impose “effective, proportionate and dissuasive penalties on the party who brought those proceedings” (Art 16).



## Third Country Judgments

Recognition and enforcement of a third-country judgment refused if manifestly contrary to public policy (Art 17).

SLAPP victim may seek compensation for damages and costs in the Member State of their domicile (Art 18).



## Intra-EU Jurisdictional Issues (i)

A claimant in defamation proceedings may bring an action for damages either

- before the courts of the State of the place where the publisher of the defamatory publication is established, which have jurisdiction for all the harm caused by the defamation, or
- before the courts of each 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 seised.

Case C-68/93 *Shevill* (ECLI:EU:C:1995:61)



## Intra-EU Jurisdictional Issues (ii)

- Claimant must show that their claim satisfies the threshold of harm required for the case to proceed in the relevant jurisdiction.
- Court may not refuse jurisdiction without considering whether the claim is sound.
- Litigation, including possible contestation of jurisdiction may be expensive; costs, both direct and otherwise, may be multiplied through availability of appeals to jurisdictional and substantive decisions.





## Applicable Law in the EU

- No harmonisation of EU law on choice of law in defamation cases.
- Each Member State will apply its own procedural rules to determine which substantive law or laws will apply to the case.
- Respondents in defamation cases may be exposed to multiple national laws.
- Incentive to apply the lowest common denominator of freedom of expression.



## Possible Defences to Recognition and Enforcement

A judgment shall not be recognised if:

- manifestly contrary to public policy;
- judgment given in default of appearance, if the defendant was not served in sufficient time to arrange defence;
- if judgment irreconcilable with earlier judgment.





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