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SILENCED FOR PARTICIPATION: A COMPARATIVE ANALYSIS OF ANTI-SLAPP REGULATIONS IN THE EUROPEAN UNION AND UNITED STATES

Abstract

Background: The increasing use of legal strategies to impede public participation, i.e. Strategic Lawsuits Against Public Participation (SLAPP or SLAPPs), presents a growing concern within democratic legal frameworks. These lawsuits are generally initiated by more influential parties (authorities and corporations) aiming to suppress critical voices by overwhelming activists or journalists with the financial and emotional burden of litigation until they relinquish their critique.
Research purpose: This analysis delves into the recent legislative measures introduced by the European Union, encapsulated in the Directive adopted on April 11, 2024, which seeks to safeguard public engagement from baseless or vindictive legal actions.
Methods: This study employs a comparative methodology to dissect and compare the protective mechanisms against SLAPPs in the United States and the European Union.
Conclusions: Both regions have implemented procedures allowing for the early dismissal of such lawsuits, crucially shifting the evidentiary burden to the plaintiff to establish that the claims are not without merit. This transfer of burden is vital for protecting defendants from legal intimidation. Nevertheless, the EU's Directive, which mandates plaintiffs to demonstrate that their claims are not manifestly unfounded, falls short of offering full immunity against consecutive abusive legal actions from the same plaintiffs, revealing a gap in protection that could be addressed.

Through this comparative analysis, the paper contributes to the scholarly discourse on the effectiveness and sufficiency of anti-SLAPP measures. It argues that while the EU has made notable legislative progress, the protective scope remains incomplete, inviting further scholarly inquiry and legislative refinement to ensure more comprehensive protection against such abuses in litigation. By examining different legislative frameworks, this study not only highlights the current protective measures but also fosters a broader discussion on enhancing future legal responses to SLAPPs, which are crucial for preserving freedom of expression and supporting democratic engagement.

Keywords: SLAPP, strategic lawsuits.

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1. Introduction

The ever-changing and modernizing world opens new opportunities for abusing procedural rights. A prime illustration of this is the Strategic Lawsuits Against Public Participation (hereafter SLAPPs). These legal maneuvers, often regarded as SLAPP suits, exploit the legal system to intimidate those who engage in public discourse. Journalists produce investigative pieces to raise public awareness and draw attention to pressing social, political and economic issues as part of their mission to promote the public interest. They often expose the non-transparent actions of interest groups, harms caused to society, *etc*. For this reason, natural or legal persons about whom unfavorable information has been disseminated create fictitious legal proceedings of an abusive nature to intimidate the disseminators of the information and to suppress disseminating it.[1] SLAPP is recognized as an abusive legal action against an individual's legitimate exercise of their right to free expression, wherein the plaintiff initiates a lawsuit against the defendant for purportedly harmful actions undertaken by the latter. In cases involving SLAPP, the plaintiff typically aims to intimidate the defendant in order to achieve outcomes that are not directly related to the merits of the case itself. Such objectives may include halting the defendant's lawful activities that the plaintiff deems detrimental to their interests, or effectively silencing the defendant's voice. The main cause of SLAPP claims is the defendant's lawful actions that are unfavorable to the plaintiff (these actions can be carried out either by way of publication, protest or even in court proceedings) and the plaintiff's belief that it has sufficient financial resources or power to create an artificial process by abusing its procedural rights. The objectives of SLAPP actions are several: (i) to silence the defendant and to ensure that embarrassing information is not made public in the future; (ii) to stop the proceedings; (iii) to ensure that the defendant suffers financially as much as possible; and (iv) to frighten the defendant.[2]

Although the origins of SLAPP in the world date back to the 13th century,[3] the new Directive of the European Parliament and of the Council of 11 April 2024 "on protecting persons who engage in public participation from manifestly

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1 **J. Kavaliauskaitė**, *Strateginiai ieškiniai dėl visuomenės dalyvavimo (SLAPP)* [*Strategic Lawsuits against Public Participation (SLAPP)*], Teisė 2024/132, p. 95, https://www.zurnalai.vu.lt/teise/article/view/36813/34748; accessed 12.12.2024.

2 *Ibidem*, p. 104.

3 **D.L. Smith**, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations.* Doctoral dissertation, law, Texas Tech University, 1971, p. 31, http://hdl.handle.net/2346/19658; accessed 12.12.2024.

unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation')" (Directive)[4] was not adopted until 2024. Therefore, this article will continue the scholarly discussion on the regulation of SLAPPs by discussing the new European Union legislation and its main differences from the United States (US) regulatory framework.

The *purpose* of this article is to discuss the new regulatory framework of SLAPPs in Europe. The *objectives* of this article are: (1) to analyze the SLAPP protection model in the US; (2) to analyze the SLAPP protection model in the European Union; and (3) to compare the SLAPP protection models in the US and the European Union. The *subject* of this paper is, therefore, regulatory models for SLAPP protection in the European Union and the USA. For these reasons, in order to adequately illustrate the differences in the regulation of SLAPPs, the article will mainly use a comparative approach (this approach has been applied to the comparison of the regulation of SLAPPs in the US and the European Union).

The relevance of this article is due to the increasing number of SLAPP cases as well as the unprecedented new regulation of SLAPPs in the European Union, which calls for the issue of SLAPPs to be discussed on a broader scientific level.

The paper's originality lies in the fact that few research studies analyze the SLAPP process at the European level. It is hoped that this article will contribute to the ongoing scholarly debate on the SLAPP process in Europe.

Given the scarcity of scientific literature describing the SLAPP process, the author of this article has mainly relied on foreign scientific doctrine (e.g., D.L. Smith,[5] T. Domej[6]), and on the US and EU legislation.

2. SLAPP Protection Model in the United States

The author of this article has previously analyzed that the nature of strategic claims in the US and Europe is different. Therefore, it is necessary to clarify how the US, a common law jurisdiction, addresses procedural issues related to SLAPPs within its regulatory framework.

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4 Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), https://eur-lex.europa.eu/eli/dir/2024/1069/oj; accessed 12.12.2024.

5 **D.L. Smith**, *The Right*..., *passim*.

6 **T. Domej**, *The proposed EU anti-SLAPP directive: A square peg in a round hole*, Zeitschrift für europäisches Privatrecht 2022/30 (4), pp. 754–781.

Given that, in the US, strategic lawsuits derive from the right to petition, and that SLAPPs often target citizens who have exercised this right[7] as well as journalists, activists, companies, *etc*., the following analysis examines the US state-level legislation governing the process of filing strategic lawsuits. It should be noted that currently, as many as 32 states[8] out of 50 have legislation in place, including the District of Columbia, which regulates strategic lawsuits. Notwithstanding the way in which different US states have dealt with strategic claims, a special institution – the special motion to dismiss – has been created to defend against a strategic claim. In Arizona, for example, the defendant has the right to file in court a motion to dismiss within 60 days after the service of the complaint or other document on which the motion is based,[9] whereas in Colorado, the defendant must file a special motion to dismiss within 63 days,[10] and in Florida as long as 120 days.[11] California state law also provides for the defendant's right to move the court to dismiss a strategic lawsuit if the lawsuit is based on a restriction of the defendant's freedom of petition or free speech and relates to a matter of public concern.[12] Consequently, individual US states have established the institute of a motion to dismiss where the claim is strategic.

To elaborate on the strategic claim defense mechanism in the US, one of the most recent laws regulating strategic claims is analyzed below. The Uniform Public Expression Protection Act (hereafter UPEPA) was proposed by the Uniform Law Commission in 2020 to provide a consistent legal framework across states for dismissing meritless lawsuits against people speaking about matters of public

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7 **J. Kavaliauskaitė**, *Strateginiai…*, *passim*.

8 Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and the District of Columbia.

9 Arizona Revised Statutes (2022), §§ 12–751, https://www.azleg.gov/ars/12/00751.htm; accessed 14.10.2024.

10 Colorado Revised Statutes (2023), § 13–20–1101(5), https://casetext.com/statute/colorado-revised-statutes/title-13-courts-and-court-procedure/regulation-of-actions-and-proceedings/article-20-actions/part-11-actions-involving-the-exercise-of-certain-constitutional-rights/section-13-20-1101-action-involving-exercise-of-constitutional-rights-motion-to-dismiss-appeal-legislative-declaration-definitions; accessed 13.12.2024.

11 Florida Rules of Civil Procedure (1999), § 1.070(j), https://casetext.com/rule/florida-court-rules/florida-rules-of-civil-procedure/rules/rule-1070-process; accessed 14.10.2024.

12 California Code of Civil Procedure (2020), § 425(16), https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CCP; accessed 14.10.2024.

concern.[13] The model act seeks to protect individuals from SLAPP, ensuring that freedom of speech is not stifled by litigation.[14] In April 2022, Kentucky became the second state to adopt a version of the UPEPA, a model anti-SLAPP law.[15] The UPEPA applies to lawsuits concerning a matter of public concern based on a violation of the rights of speech, press, assembly, petition and association.[16] According to the Kentucky Revised Statutes,[17] "Matter of public concern" means *a statement or activity regarding* a) *a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity*; b) *A matter of political, social, or other interest to the community*; *or* c) *a subject of concern to the public*.[18]

It should be noted that the UPEPA applies to a cause of action asserted against a person based on the person's:[19] a) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding; b) Communication about an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or; c) Exercise of the right of free speech or of the free press, the right to assemble or petition, or the right of association, as guaranteed by the United States Constitution or Kentucky Constitution, on a matter of public concern.[20] This law is notable because it specifically states that the law applies to information-gathering activities related to artistic and journalistic work, even if the information is never publicly communicated, and moreover to consumer feedback about companies.[21] Moreover, the law does not apply to claims brought against public officials or any entity acting in a public capacity. Otherwise, when submitting a defense, civil servants or public authorities (and other relevant entities) would have grounds to

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13 Uniform Public Expression Protection Act (2020, https://www.uniformlaws.org/committees/community-home?communitykey=4f486460-199c-49d7-9fac-05570be1e7b1; accessed 14.10.2024).

14 Uniform Public Expression Protection Act, *passim*.

15 **A. Vining**, **S. Matthews**, *Overview of Anti-SLAPP Laws*, Reporters Committee For Freedom Of The Press, Washington, D.C., 2022, https://www.rcfp.org/introduction-anti-slapp-guide/; accessed 14.10.2024.

16 Uniform Public Expression Protection Act, § 2(1)(b)(3).

17 Kentucky Revised Statutes (2022), §§ 454.460–45 https://casetext.com/statute/kentucky-revised-statutes/title-42-miscellaneous-practice-provisions/chapter-454-miscellaneous-civil-practice-provisions/uniform-public-expression-protection-act 4.478; accessed 14.10.2024.

18 Kentucky Revised Statutes, § 454.460(1)(d).

19 *"Person"* means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity (Kentucky Revised Statutes, § 454.460(5).

20 Kentucky Revised Statutes, §§ 454.462(1)(a)–(c).

21 *Ibidem*, § 454.462(2)(b)(1).

claim that the action is strategic, with the result that exercising a person's right to criticize the actions of the public authorities would be completely precluded.

The legislation also outlines a process for classifying a claim as a SLAPP action. Respondents who believe that the claim is a SLAPP must file a special motion for expedited relief to dismiss the cause of action in whole or in part within 60 days of filing the lawsuit.[22] Upon motion, all other proceedings between the moving party and responding party, including discovery and any pending hearing or motion, shall be stayed. However, the court may authorize the disclosure of limited information if the parties need it to support or oppose the application.[23] The court must schedule a hearing on the motion within 60 days of it being filed unless the court sees a need to carry out the investigation for other important reasons, which may result in a hearing being scheduled later.[24] Also, the law stipulates that the court must rule on a motion within 60 days after a hearing.[25] Such a legal regulation ensures the efficiency and expeditiousness of the proceedings, because of which the defendant, who is the subject of a strategic claim, does not have to attend a series of court hearings and submit different procedural documents.

For a strategic claim to be rejected, the defendant must prove that their statements fall within the scope of the law protecting their freedom of expression or petition, and the applicant fails to prove the contrary.[26] Once the limits of proof have been established, the claimant bears the burden of establishing a *prima facie* case for each claim. Where the applicant fails to prove their claims, the court shall dismiss the action. It should be noted that the law is designed in such a way that, even if the claimant meets the burden of proof, the court may still dismiss the action if the claimant does not state a clear cause of action on which the claim can be based or if there is no genuine dispute as to any material fact.[27] If the court grants the defendant's motion for dismissal, the plaintiff shall reimburse the defendant for the costs of the proceedings,[28] but in the event that the court rejects the defendant's motion for dismissal, and finds that it was unjustified, the defendant shall be liable to reimburse the claimant's legal expenses incurred.[29]

22 *Ibidem*, § 454.464.
23 *Ibidem*, § 454.466(4).
24 *Ibidem*, § 454.468.
25 *Ibidem*, § 454.474.
26 *Ibidem*, §§ 454.474(1)(a)–(b).
27 *Ibidem*, § 454.474(1)(c).
28 *Ibidem*, § 454.478(1).
29 *Ibidem*, § 454.478(2).

It is important to note that any party retains the right to appeal against such a judgment.[30] From the foregoing, the greater procedural burden lies with the claimant, who must prove to the court (at a stage when the dispute has not yet been brought on its merits) that each of the claims in the action is lawful and well-founded. The defendant, on the other hand, needs only apply for dismissal of the action.

In the author's view, this procedural mechanism prevents the plaintiff from pursuing the objectives of SLAPP claims, with the result that the plaintiff is unable to stop the process it wants to pursue (e.g. the defendant's publication of information on the plaintiff). The defendant is also not financially disadvantaged, as the costs of the proceedings are reimbursed and are not significant as the defendant's lawyers only prepare one procedural request. The expeditious handling of these special applications results in a very rapid conclusion of the proceedings, which does not lead to 'irreparable' consequences for the defendant or for the defendant's activities, which are the subject matter of the strategic claim.

To summarize the US strategic claims process, once a defendant receives a strategic claim, they have the right to file a special motion for dismissal with the court within 60–120 days (depending on the jurisdiction in which the claim is filed). Such a motion must be based on the grounds that the plaintiff's claim is frivolous, infringes the defendant's freedom of petition or speech, or is contrary to the public interest. If the court grants such an application, the action is dismissed, and the defendant is usually ordered to pay the costs of the proceedings.

3. The European Union's anti-SLAPP model

On 3 December 2020, the European Commission adopted the European Democracy Action Plan. The European Democracy Action Plan (hereafter the Plan)[31] is aimed at the EU institutions and Member States to ensure the proper functioning of the democratic process. One of the main objectives of the Plan is to support free and independent media. For this reason, the Plan sets the objective to convene an expert group on SLAPPs as early as 2021 and to present a measure in 2021 to protect journalists and civil society from SLAPPs.[32] Consequently, on 27 April

[30] *Ibidem*, § 454.476.

[31] Communication on the European Commission action plan, 2020, https://commission.europa.eu/document/63918142-7e4c-41ac-b880-6386df1c4f6c; accessed 14.10.2024.

[32] *Ibidem*.

2022, the European Commission presented a proposal for a Directive.[33] A reform of jurisdiction and of conflict-of-laws rules for personality rights infringements or, even better, a harmonization of substantive law at the EU level could help to create more legal certainty as well as to achieve a better balance between the competing rights that are affected in such cases.[34] The successful adoption of the Directive in 2024 raises the need to analyze the content of the Directive and assess how the provisions of the Directive can be implemented in the Member States' legal systems.

3.1. Application of the Directive

Article 1 of the Directive states that the:

> Directive provides safeguards against manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications brought against natural and legal persons on account of their engagement in public participation.

Article 4(1) of the Directive also defines the concept of public participation:

> "public participation" means the making of any statement or the carrying out of any activity by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, and any preparatory, supporting or assisting action directly linked thereto, and which concerns a matter of public interest.

As we can see, the EU definition of public participation is similar to the one used in US law. The EU's choice of public participation refers to any lawful action taken in the exercise of freedom of expression or freedom of information, which leads to a broader range of subjects being protected. Therefore, the abstract

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[33] European Commission proposal of 27 April 2022 for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') COM/2022/177, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177; accessed 14.10.2024. The Explanatory Memorandum to the proposal for a Directive state that the chosen instrument is a Directive that will provide for binding and consistent procedural safeguards in Member States. This will avoid differences in existing safeguards between Member States, which could lead to the risk of seeking more advantageous legislation in other Member States. At the same time, the choice of a Directive will allow Member States to adapt specific procedural safeguards to their national civil and procedural law, which still varies considerably between Member States.

[34] **T. Domej**, *The proposed…*, p. 763.

nature of the concept of public participation enshrined in the Directive will enable Member States to adopt national laws protecting not only journalists, but also social activists, non-governmental organizations, and individuals involved in public participation in the broadest sense, from SLAPPs. As a result, EU legislators will have the opportunity to ensure that no entity that is the victim of an abusive process is left without a legal remedy.

Among other things, the Directive addresses the very concept of a matter of public interest. The Directive defines a matter of public interest as:

> any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as[35]:
> a) fundamental rights, public health, safety, the environment or the climate;
> b) activities of a natural or legal person that is a public figure in the public or private sector;
> c) matters under consideration by a legislative, executive, or judicial body, or any other official proceedings;
> d) allegations of corruption, fraud, or of any other criminal offence, or of administrative offences in relation to such matters;
> e) activities aimed at protecting the values enshrined in Article 2 of the Treaty on European Union, including the protection of democratic processes against undue interference, in particular by fighting disinformation.

Hence, public interest issues can be categorized from the fundamental, such as health and human rights, to allegations of criminal offences. The chosen classification does not seem to cover all possible public interest issues, and the areas covered are interrelated (for example, activities to stop disinformation could be considered as a fundamental right). This classification was chosen given the most common categories of abusive processes, such as when journalists report on allegations of corruption or other crimes. On the other hand, Member States will have the discretion to define public interest issues on the grounds of national legislation or jurisprudence.

The Directive also defines the concept of abusive public participation proceedings. Article 4(3) of the Directive provides that:

> abusive court proceedings against public participation' mean court proceedings which are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalisation of public participation, frequently exploiting an imbalance of power between the parties, and which pursue unfounded claims.

[35] Directive 2024/1069, § 3(2).

It also defines the possible characteristics to distinguish a process of abusive nature against public participation:

(i) the disproportionate, excessive or unreasonable nature of the claim or part thereof, including the excessive dispute value;
(ii) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
(iii) intimidation, harassment or threats on the part of the claimant or the claimant's representatives, before or during the proceedings, as well as similar conduct by the claimant in similar or concurrent cases;
(iv) the use in bad faith of procedural tactics, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith[36].

In the author's view, all the characteristics are broadly consistent with the concept of a SLAPP, but the third characteristic relates to the objectives of strategic lawsuits and, therefore, cannot be considered a characteristic. It should be recalled that one of the main objectives of strategic actions is to intimidate the defendant by forcing it to cease its activities, delete a publication or a printed matter, *etc*. In this regard, the legislator did not consider the observations of academics and social activists.

The author also identifies certain threats. Member States are left with wide discretion to decide how to specify the list of SLAPP features that would help national courts identify abusive claims. On the one hand, Member States could adapt such a list to their national legislation, on the other hand, the attributes of SLAPPs should be harmonized at the EU level. Considering that the Directive also applies to cases with an international element, it is considered that the criteria for national courts to distinguish between SLAPP claims should be harmonized.

3.2. Anti-SLAPP defense mechanisms

The Directive also addresses possible defense mechanisms against SLAPPs. Chapter II of the Directive covers the plaintiff's bond, the shifting of the burden of proof to the plaintiff, and the involvement of NGOs in the proceedings. In addition, the Directive introduces the institution of early termination of the proceedings, which would ensure that the defendant against whom a strategic claim is brought would not be obliged to litigate unreasonably.[37] Accordingly, the

[36] *Ibidem*, § 3(3)(a)–(d).
[37] *Ibidem*, Chapter III.

Directive proposes to provide remedies for the defendant, such as the payment of costs, compensation for damages, and the imposition of fines on the plaintiff.[38] In this context, the substantive mechanisms proposed to protect the defendant in SLAPP proceedings should be discussed.

3.2.1. Early termination of legal proceedings

Chapter III of the Directive provides for the possibility to include in national law a provision on the early termination of manifestly unfounded legal proceedings. Article 11 of the Directive provides that:

> Member States shall ensure that courts and tribunals may dismiss, after appropriate examination, claims against public participation as manifestly unfounded, at the earliest possible stage in the proceedings, in accordance with national law.

This rule is particularly relevant in SLAPP cases, as the main objective of the safeguard mechanism is to ensure that the defendant incurs the minimum administrative and legal burden and financial costs. National legislators should ensure that an unfounded claim is dismissed. One way of doing this is that the defendant in a SLAPP case should have the right to apply a motion that the SLAPP claim should be declared inadmissible because the claim is manifestly groundless and involves public participation.

As early as 2022, the European Commission's recommendations on the SLAPP Directive included the suggestion that *if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken*.[39] However, the legislator has considered the observations of academics and activists by deleting this provision in the final text of the Directive, leaving the discretion to stop the process to national legislators. Given that applications for termination of proceedings are to be dealt with expeditiously, there is no longer any need for a stay of proceedings. If the Court decides not to grant the defendant's motion for dismissal based on the SLAPP, the time limits could be calculated from the date of such a procedural document of the Court, and the defendant would be obliged to file a statement of defense in the usual way.

Dr. T. Domej points out that, theoretically, it would be possible to decouple the assessment of whether a lawsuit should be dismissed as abusive from its chances of success on the merits. In some cases, the enforcement of an existing

[38] *Ibidem*, Chapter IV.

[39] Proposal for a Directive, § 10.

right can indeed be abusive. Yet such situations are rare, even with SLAPP lawsuits. In a jurisdiction governed by the rule of law, a reasonable prospect of success on the merits normally must rule out early dismissal.[40] While the author does not see the need for a stay of proceedings under national law when the issue of termination of proceedings is at stake, the most effective means of early termination of proceedings is perhaps the most effective way to ensure that the defendant in a SLAPP proceeding suffers the least possible prejudice. This objective can be achieved by regulating the procedural rules in such a way that, following the defendant's application for discontinuance on the grounds of a SLAPP, the time limits are as short as possible and in line with the principles of reasonableness and proportionality. Thus, a stay of proceedings in this type of case would be inappropriate, giving the applicant additional time to find legal solutions to continue the unjustified proceedings.

3.2.2. Shifting the burden of proof to the claimant

Article 12(1) of the Directive states that:

> the burden of proving that the claim is well founded rests on the claimant who brings the action.

Article 12(2) of the Directive also provides that

> Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to substantiate the claim in order to enable the court to assess whether it is not manifestly unfounded.

This shifts the burden of proof to the person bringing the action. This means that if the defendant applies for the proceedings to be discontinued, it is for the claimant to prove that the action is not manifestly unfounded. While the reversal of the burden of proof to the more powerful party in the SLAPP process is logical, it is accompanied by reasonable doubts as to the practicality of such a reversal.

In the author's view, the plaintiff should not prove the merits of the claim, but rather that the action is not SLAPP action to the defendant's motion to dismiss. Since the burden of proof for the claimant is limited to proving that the claim is not manifestly unfounded, it will be sufficient for the claimant to submit a few pieces of evidence, such as documentary evidence (e.g. emails) or a questionable expert's report, which will be enough to prove the alleged

[40] **T. Domej**, *The proposed…*, p. 764.

validity of the claim with the result that the proceedings will go further. It follows that the mere reversal of the burden of proof will not ensure that the proceedings are artificially paused or terminated prematurely, since the courts will have to apply the rules of relevance and admissibility when assessing the evidence adduced by the claimant with the result that some evidence, such as an expert report presented by the claimant, will be recognized as relevant and admissible evidence. This will serve as a 'green light' for additional litigation.

The author's doubts about the effectiveness of revering the burden of proof are supported by the position of other scholars such as Professor Dr. Tanja Domej, who have studied the Directive. In the opinion of scholars, even with a shift of the burden of proof at the preliminary stage, the practical impact would probably be limited – provided that the plaintiff has sufficient funds to cover the additional costs of this stage of the proceedings. Presumably, most courts will be reluctant to dismiss a claim as manifestly unfounded because of the plaintiff's inability to disprove something that would have to be proven by the defendant in the main proceedings at the outset of the proceedings. Nonetheless, if Article 12 of the proposed Directive does imply a shift of the burden of proof, this would seem like a significant interference of EU law in an area where the autonomy and diversity of Member State's laws so far has been jealously defended.[41] This scholarly position is accepted since a reversal of the burden of proof to the plaintiff is necessary, but first, it is necessary to weigh up the risks involved, especially since one of the identifying features of the plaintiffs in SLAPP cases is their power and the availability of financial resources. The aim of protecting the defendant must be secured by actual legislation, not by fiction. It follows that there is a clear need to ensure that the courts of the EU Member States are guided by clearly defined criteria that make it possible to identify SLAPPs even where it is not entirely clear whether the claim is strategic.

3.2.3. Assistance by NGOs in the judicial process

Given that journalists, public figures and other NGO activists are the victims of unjustified SLAPP suits,[42] there is a clear need to ensure maximum protection and assistance to such persons in litigation. For this reason, Article 9 of the Directive provides that:

> Member States shall ensure that a court or tribunal seised of court proceedings brought against natural or legal persons on account of their engagement in public participation may accept

[41] *Ibidem*, p. 768.

[42] **J. Kavaliauskaitė**, *Strateginiai…*, *passim*.

> that associations, organisations, trade unions and other entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in safeguarding or promoting the rights of persons engaging in public participation, may support the defendant, where the defendant so approves, or provide information in those proceedings in accordance with national law.

It is not entirely clear to the author in what form, according to Directive, NGOs could get involved in the process to 'support' the defendant: whether as an active observer, a participant in the process, or a representative of the defendant. It should be noted that various countries of the EU have different regulations giving NGOs different roles in civil proceedings. For example, according to the Civil Procedure Code of the Republic of Lithuania,[43] NGOs can legally represent their members in court cases related directly to the organization's objectives with the representation carried out by duly authorized representatives such as members of the management, employees with higher legal education, or lawyers. According to the Polish Code of Civil Procedure,[44] NGOs, within the scope of their statutory tasks and with written consent from the individual, can initiate lawsuits or join ongoing proceedings on behalf of individuals or entrepreneurs in specific areas such as alimony, environmental protection, consumer protection, industrial property rights, and anti-discrimination, and they can also provide the court with opinions relevant to the case expressed by their duly authorized bodies.

According to Professor Domej, while it is difficult, maybe even impossible, to find a cure-all for these issues, the professed goals of the proposal might be better served by addressing the structural inequalities between SLAPPers and SLAPP targets instead of introducing new barriers to access justice. One possible approach would be improving the access to legal aid.[45] While the national laws of each Member State impose varying procedural rules, it is recognized that NGOs, when intervening as third parties on behalf of defendants such as activists or journalists, might face challenges in proving the legal interest of the supported party in the outcome of the proceedings. However, allowing NGOs to represent such defendants in national courts could mitigate litigation costs for these individuals. The role and powers of NGOs as participants in the civil procedure are more clearly defined in the Polish Civil Procedure Code and

[43] Civil Procedure Code of the Republic of Lithuania, § 56, https://www.infolex.lt/ta/77554:str56; accessed 16.12.2024.

[44] Polish Code of Civil Procedure, § 61–63, https://www.wipo.int/wipolex/en/legislation/details/22373; accessed 16.12.2024.

[45] **T. Domej**, *The proposed…*, p. 778.

Code of Civil Procedure of the Republic of Lithuania, which could serve as a useful reference for ensuring effective and functional NGO assistance. NGO participation in SLAPP proceedings will effectively safeguard the interests of SLAPP victims and reduce litigation costs.

This means that to ensure effective remedy of violated rights, EU Member States should be encouraged to ensure that any NGO whose activities include the defense of human rights can become a representative in court or that Member States can ensure that free legal aid is provided to victims of SLAPP proceedings. This would fulfil the objective of Article 9 of the Directive, which is to allow interested NGOs to support the defendant.

3.2.4. Measures to secure legal costs and damages

The adoption of Article 10 of the Directive by the European Parliament makes it possible to require the claimant to lodge a deposit. This Article provides that:

> Member States shall ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation, the court or tribunal seised may require, without prejudice to the right of access to justice, that the claimant provide security for the estimated costs of the proceedings, which may include the costs of legal representation incurred by the defendant, and, if provided for in national law, damages.

Member States must therefore ensure that their national procedural laws include a provision that allows courts to require claimants to deposit a specified amount into the court's escrow account or a similar bank account designated by the Member State. In this way, the claimant would ensure that, if the court were to declare the claim unfounded, the claimant would be liable to reimburse the other party for the costs incurred.

Although a measure to secure procedural costs and damages might partially stop a claimant from bringing an unjustified action, it is considered that such requirements would not stop the claimants, who are highly influential entities with substantial financial resources. It should be recalled that one of the main objectives of a SLAPP action is to stop a defendant from taking a particular action that is unfavorable to the claimant. It follows that claimants will seek to ensure that the defendant is restrained at all costs, which means that a claim for damages or costs will be easily defeated by the claimant. The author's views are supported by Dr T. Domej's analysis of the European Commission's proposal for a Directive. According to Dr T. Domej, while the obligation to post security may act as a deterrent to suing, it does little to help the defendant with the ongoing costs. The proposed Directive would not interfere with the Member States' rules

on litigation funding. Therefore, unless more is done by the Member States on their own initiative, those defendants that have access to sufficient funds to pay upfront for an expensive defense would mainly benefit.[46] In view of the above, it is reasonable to argue that the enforcement of procedural costs and damages would not be effective as an anti-SLAPP measure.

3.2.5. Payment of procedural costs, damages and fines

Another measure to protect against SLAPPs is contained in Chapter IV of the Directive. Member States are offered possible ways of protecting the defendant from financial burdens. In the first case, the claimant may be obliged *to bear all types of costs of the proceedings that can be awarded under national law, including the full costs of legal representation incurred by the defendant unless such costs are excessive*.[47] This method of protecting the defendant is adopted from the laws governing strategic actions in the Anglo-Saxon countries and, at the same time, guarantees that the defendant will not suffer financially. In the author's view, the Member States should have discretion as to the level of costs to be recovered and, therefore, the part of Article 14 of the Directive concerning the non-recovery of excessive costs should be deleted. This is supported by Article 14(2) of the Directive, which provides that:

> where national law does not guarantee the award in full of the costs of legal representation beyond what is set out in statutory fee tables, Member States shall ensure that such costs are fully covered, unless they are excessive, by other means available under national law.

In the author's view, the Member States should have the sole discretion regarding the level of legal costs.

Article 15 of the Directive provides that:

> Member States shall ensure that courts or tribunals seized of abusive court proceedings against public participation may impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, including the payment of compensation for damage or the publication of the court decision, where provided for in national law, on the party who brought those proceedings.

It should be noted that the institution of damages for unjustified claims is derived from the legal systems of the Anglo-Saxon countries, such as the US, demonstrating its proven effectiveness. The Directive does not specify that only

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46 *Ibidem*, p. 771.

47 Directive 2024/1069, § 14(1).

the defendant may be awarded damages. Therefore, it is understood to allow any party involved in the proceedings, including third parties who have incurred damages due to a SLAPP claim, to seek such damages from the claimant. Interestingly, the Directive does not regulate compensation for non-pecuniary damage. The explanatory memorandum to the Recommendations to the Directive states that it is not only pecuniary but also non-pecuniary damage that should be compensated. Material damage in this case would include:

> lawyers' fees, where these are not reimbursed as legal costs, travel costs, and medical expenses (such as psychological support) if they are causally linked to the legal proceedings. Non-pecuniary damage would include various forms of physical and/or psychological damage, such as pain and suffering or emotional distress, impairment of life or relationships, damage to reputation and, in general, non-pecuniary damage of any kind.

This would mean that the person against whom the strategic action is brought would not only be protected from financial expenses but also from damages, including non-material damages, which is why this proposal was very positive. However, the Directive creates an incentive for Member States to provide psychological support to victims of SLAPP.[48] Nevertheless, the author of the article notes the lack of direct references to the non-pecuniary damage suffered by the victim of the SLAPP and its compensation. However, in light of the text of the Directive, the assessment of the damage suffered by the defendant is left to the discretion of the Member States, where both material and non-material damages are usually awarded.

3.3. Final remarks

It is expected that the Directive will ensure that persons subject to strategic claims are protected not only in individual Member States but also in cross-border disputes. In addition, the Directive is expected to help stop unjustified SLAPP proceedings by preventing them at an early stage, but the Directive remains open to improvement. The shifting of the burden of proof to the claimant[49] is welcomed, but there are potential pitfalls in failing to establish a list of general elements of a SLAPP to be applied by the courts and in deciding on the subject matter to be proved. It is also not clear how NGOs can be fully empowered in the Member States to provide 'support' to the defendant.[50]

[48] *Ibidem*, § 19(1).
[49] *Ibidem*, § 12.
[50] *Ibidem*, § 9.

The objective of an effective defense could be achieved by NGOs acting as representatives of defendants in proceedings or by Member States providing free legal aid to victims of SLAPPs. In any case, Member States should assess, before adopting amendments to their laws, whether such amendments will be useful in combating strategic lawsuits against public participation and whether such amendments will ensure adequate protection of subjects.

4. Comparison of the US and European Union SLAPP protection mechanisms

The content of the Directive shares similarities with the previously discussed legislation from the US. It should be noted that the definition of participation at the EU level is broadly similar to the definition used in the US (see Table 1). Moreover, both the EU and the US provide for the possibility of filing a similar application for termination of the proceedings, which leads to a convergence of practices across borders, which may provide even more effective protection for defendants against abusive procedural claims. Both the US and the EU shift the burden of proof to the plaintiff, but at the EU level, it is regulated that the plaintiff only has to prove the merits of its claims, whereas in the US the plaintiff has to prove either a *prima facie* case for each claim or the relevance of the proceedings, the serious prejudice caused by the defendant's conduct, the legal validity of the claim, *etc*. Among other things, in the EU the defendant is entitled to costs and damages just as in the US.

TABLE 1: *Comparison of anti-SLAPP regulation in the US and the EU*

	US	**EU**
	1	2
Concept of public participation	"Matter of public concern" means a statement or activity regarding a) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; b) A matter of political, social, or other interest to the community; or c) a subject of concern to the public	"Public participation" means the making of any statement or the carrying out of any activity by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, and any preparatory, supporting or assisting action directly linked thereto, and which concerns a matter of public interest

	1	2
A procedural tool when the claimant abuses the process	Special motion for dismissal of the action.	Application for interim measures, application for discontinuing proceedings.
Which entity initiates a hearing on abuse of process?	Defendant.	Defendant.
Obligations of the claimant	Must establish a *prima facie* case for each claim.	prove that the action is not manifestly unfounded.
Obligations of the *r*espondent	the burden of proving that his statements fall within the scope of the law protecting his freedom of speech or petition, and the burden is on the applicant to prove otherwise.	–
At what stage in the proceedings can a procedural tool be used to stop an abuse of process by the claimant?	Within 60 days of filing the action.	Left to national discretion.
How many days does it take to resolve a procedural tool?	60–120	Left to national discretion.
Is the case stayed while the abuse of process issue is considered?	Yes.	No.
Shall the claimant be ordered to pay the costs of the proceedings?	Yes.	Yes.
Should the defendant be compensated for the damage suffered?	Yes.	Partially.

Source: own work.

Finally, it should be noted that the new regulation of SLAPPs in the European Union, although it does not allow avoiding future proceedings from the same abuser and does not give a party any guarantee that further proceedings will not be initiated using differently, albeit similar, arguments, can be considered as a basis for the improvement of legal regulation. This regulation is the beginning of the process of defending freedom of expression, which is infringed, but it is still an incomplete process. Therefore, we need to continue the academic debate on how the SLAPP model should continue to evolve to provide adequate protection for the victims of SLAPPs.

5. Conclusions

1. The concept of public participation at the EU level is broadly similar to that in the US. Moreover, both the EU and the US provide for the possibility of making a similar motion for dismissal; the comparable legislation essentially allows the injured party to seek compensation for both costs and damages. These similarities point to a convergence of practices across borders, which may provide even more effective protection for defendants in SLAPP cases against abusive procedural claims.
2. While both the US and the EU shift the burden of proof to the plaintiff, the EU level requires the plaintiff to only prove that the claim is not manifestly unfounded. The shifting of the burden of proof to the plaintiff to prove that the claim is not manifestly unfounded when the plaintiff has to produce several pieces of evidence that satisfy the rules of admissibility and relevance, as regulated by the Directive, leads to further litigation, which is not in line with the objectives of the anti-SLAPP process.
3. The new SLAPP regulation in the EU, although it does not prevent future proceedings from being brought by the same abuser, nor does it give a party any guarantee that further proceedings will not be brought based on a different, albeit similar, argument, can be seen as a basis for improving the legal framework. This regulation is the beginning of the process of defending infringed freedom of expression, but it is still an incomplete process. Therefore, we need to continue the academic debate on how the SLAPP model should continue to evolve to provide adequate protection for the victims of SLAPPs.

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PARTYCYPACJA PUBLICZNA: ANALIZA PORÓWNAWCZA REGULACJI ANTY-SLAPP W UNII EUROPEJSKIEJ I STANACH ZJEDNOCZONYCH

Abstrakt

Przedmiot badań: Coraz częstsze stosowanie strategii prawnych w celu utrudnienia partycypacji publicznej, to jest Strategic Lawsuits Against Public Participation (SLAPP lub SLAPPs), budzi coraz większe zaniepokojenie. Pozwy, celem których jest stłumienie głosów krytycznych poprzez przytłoczenie aktywistów czy dziennikarzy finansowym i emocjonalnym ciężarem postępowania sądowego dopóki nie zrezygnują ze swojej krytyki, są składane zazwyczaj przez bardziej wpływowe od nich podmioty, w szczególności władze i korporacje.
Cel badawczy: Niniejsza analiza skupia się na niedawno wprowadzonych przez Unię Europejską rozwiązaniach prawnych, zawartych w Dyrektywie przyjętej 11 kwietnia 2024 r., celem której jest ochrona osób działających w interesie publicznym przed bezzasadnymi lub złośliwymi krokami prawnymi.
Metoda badawcza: W artykule zastosowano metodę porównawczą w celu rozłożenia na czynniki pierwsze i porównania mechanizmów ochronnych przed SLAPP w Stanach Zjednoczonych i Unii Europejskiej.
Wyniki: Na obu obszarach zostały wdrożone procedury umożliwiające szybkie oddalenie pozwów strategicznych, co zasadniczo przeniosło ciężar dowodu na powoda. To przeniesienie ciężaru ma kluczowe znaczenie dla ochrony pozwanych przed zastraszeniem. Niemniej jednak dyrektywa UE, która nakazuje powodom wykazanie, że ich roszczenia nie są ewidentnie bezpodstawne, nie zapewnia pełnej odporności na kolejne nadużycia prawa ze strony tych samych podmiotów. Wskazuje to na istnienie luki w ochronie, która powinna zostać usunięta. Poprzez tę analizę porównawczą artykuł jest głosem w dyskusji na temat skuteczności i wystarczalności środków anty-SLAPP. Twierdzi się w nim, że chociaż UE poczyniła znaczne postępy legislacyjne, ochrona pozostaje niekompletna, co zachęca do dalszych badań i udoskonalenia ustawodawstwa w celu zapewnienia bardziej kompleksowej ochrony przed nadużyciami w sporach sądowych. Poprzez analizę różnych ram prawnych badanie to nie tylko wskazuje obecnie istniejące środki ochronne, ale sprzyja szerszej dyskusji na temat wzmocnienia rozwiązań, które mają kluczowe znaczenie dla zachowania wolności słowa i wspierania demokratycznego zaangażowania.

Słowa kluczowe: SLAPP, strategiczne pozwy.