Opinion of the European Economic and Social Committee on 'Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")'

(COM(2022) 177 final – 2022/0117 COD)

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Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
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Outcome of vote (for/against/abstentions)	143/2/6

1. **Conclusions and recommendations**

1.1. The EESC welcomes the Commission's initiative; it is a step forward in combating gagging procedures, the number of which has been growing in Europe since 2015 ([1]). Countering strategic lawsuits against public participation (SLAPP), which are 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, is key to building an informed civil society and transparency in public life. As SLAPP cases are also brought forward by parties from outside the EU, anti-SLAPP measures are a contribution to protect European democracy against external threats.

1.2. There is often a significant imbalance of power in SLAPP proceedings — plaintiffs have greater financial or institutional resources, making it relatively easy for them to initiate proceedings. In this context, it is important to ensure that defendants are provided with the right tools to defend themselves in this currently uneven fight.

1.3. It should be stressed that SLAPP actions constitute an abuse of the law and cannot be accepted in democratic states governed by the rule of law. Journalists, especially independent journalists, are the most vulnerable to this threat, but the problem can also affect all other participants in public debate.

1.4. It is also important to separate SLAPP actions from the protection of personal rights and the possibility to defend one's good name in cases of defamation. SLAPP covers conduct that is groundless and aimed at suppressing public debate and silencing its participants. Thus, SLAPP counterclaims do not compromise the exercise of the right to a court of law and do not protect those who disseminate false or defamatory content.

1.5. The EESC welcomes the proposed mechanisms, but in the course of the legislative work it would be worth considering expanding the list. Among the proposals, one could point to the introduction of a preliminary ruling terminating proceedings found to be non-compliant, consolidation of proceedings at the request of the defendant in his/her designated jurisdiction, setting a time limit for the procedure or introducing a fast track or exclusion of the possibility for a person other than the plaintiff to fund the action.

([1]) CASE Report (https://www.the-case.eu/slapps-in-europe).

1.6. In addition to the implementation of new legislation, which with the whole legislative process may take several years, it is worth reviewing national legislation in order to identify mechanisms that could currently serve to counter SLAPPs. Identifying the reasons why existing mechanisms are not being used effectively may help to provide better protection for participants in the public debate.

1.7. The monitoring of SLAPP actions and the effectiveness of implemented solutions is also an important issue. Consideration should be given to who should carry out such assessments, particularly bearing in mind that SLAPP actions may also be brought by public institutions. Thus, delegating this competence to Member States may not adequately achieve the intended objectives.

1.8. At the same time, in order to ensure that the objective of the Directive is achieved as effectively as possible, its application should be evaluated over as short a period as possible. In the EESC's view, a shorter period is more appropriate than the currently proposed five-year period.

1.9. Given the application of the planned Directive only to cross-border proceedings, it is also important to work towards the introduction by individual Member States of analogous initiatives for national proceedings. The restriction to cross-border proceedings will only provide protection for selected participants in the public debate, overlooking in particular local journalists, activists or whistleblowers. Comprehensive action against SLAPPs requires a unified approach in both cross-border and national cases.

1.10. Member States should also be urged to review their national laws with a view to decriminalising defamation. Any proceedings concerning personal rights should be of a civil law nature. Possible criminal liability leads to a situation where participants in the public debate may be more afraid to present their opinions or to denounce wrongdoing.

1.11. The EESC stresses that in addition to legal regulations, it is extremely important to implement appropriate educational measures and training, both for legal professionals (in particular judges and party attorneys) and participants in the public debate — journalists, social activists, human rights defenders, whistleblowers or ordinary citizens.

2. **General comments**

2.1. Freedom of expression, as well as the freedom of the media derived from it, is one of the fundamental values that should be guaranteed by democratic states under the rule of law.

2.2. The right to freedom of expression, as expressed in Article 11 of the Charter of Fundamental Rights of the European Union, includes the freedom to hold opinions and to communicate information and ideas without interference by public authorities and regardless of frontiers. At the same time, respect for media freedom and pluralism is emphasised. Similar guarantees are included in many other pieces of legislation, such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the Directive (EU) 2019/1937 of the European Parliament and of the Council ([2]) on the protection of persons who report breaches of Union law ('Whistleblowers Directive'), and legal acts adopted by the individual Member States, which indicates their universal character and important role.

2.3. Over the past few decades, the development of technology has dramatically changed the form of public debate. Until recently, the main media for conducting this debate were television, radio, and newspapers, created mainly by professional journalists, and whistleblowers. Nowadays, an important role has been taken over by online media, which enables anyone to present their opinions and address them to a wide audience, including anonymously.

([2]) Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

2.4. In the context of media development and technological changes, it is crucial to introduce mechanisms that will ensure real protection of freedom of expression for all participants in public debate, not only professional journalists but also environmental ([3]) and social activists, human rights defenders, non-governmental organisations, whistleblowers ([4]) in the broad sense, engaged citizens, trade unions and all other individuals and organisations that publicly speak out on socially significant issues.

2.5. It is important to stress not only the importance of media freedom but also the need to ensure media pluralism. The EESC reiterates its conclusions on 'securing media freedom and diversity in Europe' ([5]). Open debate, not restricted in any way, is the foundation of a participatory society, without which democracy cannot function properly ([6]). The exclusion of any voice from the public debate can lead, and has in the past led, to social tension and violence. The media should not be understood narrowly as a specialised group of entities engaged in media activities on a professional basis, but also as the active participation of individuals who share opinions or make their positions available, regardless of their source: internet, forums, blogs, or podcasts. This is particularly important in countries with public media controlled by ruling political parties or countries with private media controlled by few owners, which try to dominate the message and limit the diversity of public debates.

2.6. Within the EU, shrinking civil spaces undermine the ability of civil society organisations to play a vital role in the functioning and protection of democracy and the rule of law. Strategic Litigation against Public Participation (SLAPP) is one instrument that is used to silence critical civil society. The EESC welcomes the European Parliament's resolution on measures to fight the shrinking of civil spaces ([7]) and considers the proposed Directive not only as one measure in the EU's toolbox but also as a decisive step to end these practices.

2.7. Wider opportunities for publication of statements, alerts and increased social activism make it possible not only to broaden the public debate but also to overcome socially worrying phenomena by revealing abuses of power by state or private institutions, including corruption or the misappropriation of public funds. The EESC points out that the media (broadly defined, including professional and amateur activities by participants in public debates), as the 'fourth estate', have the task not only of shaping opinion but also of monitoring the activities of public authorities and private actors. Thus, the protection of the 'fourth power' is extremely important to ensure democratic standards and the rule of law.

2.8. The abuse of legal proceedings to stifle public debate is an increasingly common phenomenon in the Member States. Influential individuals, institutions and companies with wide financial and organisational resources use their powers to silence critics, using innovative instruments like abusing GDPR laws, or demanding disclosure of journalists' sources of information, while these critics, including individual journalists and civil society actors acting as whistleblowers, often lack the financial or organisational resources to defend themselves against unjustified litigation. Some of the natural and legal persons using SLAPP against citizens and civil society actors in the EU are from outside the Union. In times of increasing geopolitical tensions, the EU must be equipped with a toolbox of measures to protect its democracy against external threats, including anti-SLAPP measures.

([3]) NAT/824 — Information report of the European Economic and Social Committee on Environmental protection as a prerequisite for respect for fundamental rights.

([4]) SOC/593 — Opinion of the European Economic and Social Committee on Strengthening whistleblower protection at EU level (OJ C 62, 15.2.2019, p. 155).

([5]) SOC/635 — Opinion of the European Economic and Social Committee on Securing media freedom and diversity in Europe (own-initiative opinion) (EESC 2021/01539) (OJ C 517, 22.12.2021, p. 9).

([6]) REX/545 — Information report of the European Economic and Social Committee: Supporting the independent media sector in Belarus.

([7]) EP Resolution on the shrinking space for civil society in Europe (2021/2103(INI)) (OJ C 347, 9.9.2022, p. 2).

2.9. SLAPP proceedings do not come under the right to a court; their aim is not to enforce the rights of the plaintiff but to intimidate and weaken the opposition and drain the resources of the defendant. Lawsuits are often brought without merit, in a repeated way, and their actual effect is to intimidate and silence the accused organisations, individuals or even their relatives in public debate and discourage further activity. The consequence of failing to counteract such chilling effects on activity may be the emergence of monopolisation or oligopolisation of the media, which is incompatible with the ideals of the democratic rule of law.

2.10. Given the key role of the media, non-governmental organisations, other entities and whistleblowers involved in building civil society and acting in the public interest, it is extremely important to ensure that they are adequately protected in the event of violations or attempted violations of freedom of expression, especially in a situation of an obvious imbalance of power and resources. The latter may lead to negative effects in terms of the defendant's refusal to continue to participate in the public debate and to denounce any abuse or corruption or human rights violation. The high costs of litigation, further increased by strategic behaviour to prolong proceedings, constitutes a significant problem for those who are obvious targets of SLAPP.

2.11. Sometimes, strategic actions aimed at stifling public debate are accompanied by other reprehensible activities, such as intimidation, harassment, and threats against the defendant. These actions, too, are destructive to civil society and public interest and should be met with a harsh and immediate response, regardless of the financial resources or privilege of the actors involved.

2.12. At the same time, we cannot ignore the problem of false information or obvious hate speech, which should be subject to verification and, if found to be violations, removed from the public space. However, the EESC demands the strict and correct use of the existing protocols, derived from the application of the Directive 2012/29/EU of the European Parliament and of the Council ([8]), because the actions related to this must not lead to restrictions on freedom of speech in a situation where the information and opinions conveyed do not constitute fake news and do not incite hatred ([9]). In any case, these practices cannot serve as an excuse to limit the right to freedom of expression.

2.13. The EESC welcomes the European Commission's proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ([10]) and the Commission Recommendation (EU) 2022/758 ([11]) on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings.

2.14. The EESC calls on the European Parliament and the Council to adopt the Directive without delay, as the implementation of measures to protect journalists, civil society actors and other persons engaged in public participation is a matter of urgency.

2.15. The EESC welcomes the decision of the Government of Ireland to take part in the adoption and application of the proposed Directive. In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland can decide to notify and take part in the adoption and application of this Directive.

2.16. In addition to the recommendations of the Commission's regulation on SLAPP, the EESC encourages the Government of the Kingdom of Denmark to adopt national legislation which ensures the same level of protection of persons engaged in public participation against strategic litigation as provided by the proposed Directive. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not take part in the adoption of this Directive and will not be bound by it or subject to its application.

([8]) Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57).

([9]) SOC/712 — Opinion of the European Economic and Social Committee on Communication from the Commission to the European Parliament and the Council — A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime (EESC 2022/00299) (OJ C 323, 26.8.2022, p. 83).

([10]) COM(2022) 177.

([11]) Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') (OJ L 138, 17.5.2022, p. 30).

2.17. In the EESC's view, the adopted measures may not unduly restrict the right to justice and should only be used in cases of abuse and misuse.

2.18. In the EESC's view legal measures inhibiting the use of unfounded and abusive court proceedings should be complemented with educational measures and a network of organisations providing legal support for persons and institutions against which such actions are brought. In particular, for their important role, legal professionals — both judges and lawyers acting as defence counsel in proceedings — need appropriate training because their decisions and actions are crucial for the objective and guarantee freedom of expression.

3. **Specific comments**

3.1. The spread of the negative phenomenon of strategic actions aimed at stifling public debate (SLAPPs) is a serious problem — hence the great importance of the action taken by the European Commission and the European Parliament to combat this phenomenon, which is essential to provide adequate protection for participants in public debates where the right to legal proceedings has been abused to create a chilling effect that silences defendants and discourages them from continuing their activities.

3.2. The protection against SLAPP actions should be provided to all participants in the public debate regardless of whether the SLAPP actions are domestic or cross-border in nature. The EESC agrees that litigation brought in one Member State's jurisdiction against a person resident in another Member State is usually more complex and costly for the defendant. However, the same problem can also apply to suing in another city or using procedural tactics to make proceedings in the same country longer and more costly. Restricting regulation only to cases with cross-border effects may lead to unjustified differentiation in the rights of individuals and organisations whose actions have a local impact, thus usually involving limited financial, personnel, and organisational resources.

3.3. In order for the Directive to function properly, it is necessary to define an appropriate and unambiguous legal basis for the action to be taken. It should be noted that the main purpose of the anti-SLAPP mechanisms is not to ensure the proper conduct of the proceedings (which can take place properly in accordance with national procedures), but to protect the rights of defendants who may not have adequate legal and financial means. The EESC's view is to equip defendants, who are usually in a weaker position than plaintiffs, with mechanisms that will allow them to defend themselves in the face of unmeritorious claims that constitute an abuse of the right to a court.

3.4. The EESC points out that the introduction of a cross-border condition makes it necessary to examine on a case-by-case basis (1) whether both parties to the proceedings are domiciled or established in the other Member State, (2) whether the act of participating in a public debate on a matter of public interest is relevant to more than one state, or (3) whether parallel or previous legal proceedings have been brought by the claimant or related entities against the same or related defendants in another Member State. In particular, the second condition may lead to a discretionary assessment and limitation of the protection afforded to the defendant.

3.5. The EESC shares the view that SLAPP protection should not be directed solely at civil matters. Particular attention should be paid to the positions of international organisations (UN Human Rights Committee, Organisation for Security and Cooperation in Europe, Council of Europe) on the removal of defamation from criminal law. The measures taken to date have not had the expected results, because in some Member States defamation is still an offence, punishable by both a fine and imprisonment. It is impossible to take part freely in public debate on pain of criminal prosecution. The EESC recommends that effective and efficient measures be taken to ensure that the Member States remove criminal defamation as a relic of a shameful past that threatens freedom of speech and expression.

3.6. Criminal law sanctions, regardless of their ultimate application, have a deterrent purpose. As such, they are even more likely to curb public debate than civil proceedings. The abandonment of protection under the criminal law regime may result in a deliberate shift of actions from civil to criminal actions in the absence of additional protection for the defendant in the latter case.

3.7. The EESC points out that SLAPP actions can be taken not only by private law bodies or institutions but also by state bodies, such as the public prosecution service and that consequently the scope of the Directive must apply to all of these institutions. The EESC calls for the protection of natural and legal persons engaged in public debate and their sources to be applied accordingly in such cases too. In this connection, particular attention should be paid to the monitoring of SLAPP actions. Delegating this task to the Member States, when public authorities can also be plaintiffs in SLAPP proceedings, raises legitimate questions. Consideration should be given to involving independent organisations in these activities or to introducing a monitoring procedure at supranational level.

3.8. It is important that people considered at risk of SLAPP lawsuits cannot comprise only journalists or human rights defenders, although these professions should be considered particularly vulnerable to such actions. The target group should be defined functionally (based on the activities undertaken) rather than by education or occupation. In this way, it is also possible to protect not only people who are not directly involved in media activities but also, for example, committed citizens who publicise abuses in their local communities or other types of whistleblowers in a broader context.

3.9. The procedural guarantees proposed in the draft Directive — safeguards, early dismissal of manifestly unfounded claims in court proceedings, remedies for abusive litigation, protection against judgments given in third countries — are to be welcomed. However, consideration should be given to the possibility of introducing further measures that would complement and facilitate the work of the judiciary, e.g. facilitating or ordering the consolidation of different actions against the same defendant in the case of actions brought by the same or related plaintiffs.

3.10. In the EESC's view, it would also be valuable to introduce a degree of automaticity, in the form of a 'preliminary ruling', in which court cases are deemed to be non-compliant if they evidently fulfil the criteria of SLAPP. This would even make it possible not to initiate legal proceedings in obvious cases. This would reduce costs (not only private but also public costs) and limit the number of cases that could be taken further.

3.11. It is also worth considering additional solutions, modelled on existing mechanisms, such as:

— consolidation of proceedings at the request of the defendant in his/her designated jurisdiction;

— setting a time limit for the procedure or introducing a fast track (along the lines of electoral proceedings);

— exclusion of the possibility for a person other than the plaintiff to fund the action (third party funding).

3.12. In view of the growing number of SLAPPs, the EESC recommends that the temporal application of the new anti-SLAPP rules contained in the Directive be applied by the Member States to cases in progress or initiated when the new rules come into force.

3.13. At the same time, it is necessary to review national legislation on current measures to counter SLAPP actions. The effectiveness of the mechanisms in place may make it possible to improve the planned measures and actually provide protection for those at risk. If there are already tools in national legislation that could at least partially address the problem concerned, it would be necessary to identify the reasons why they are not adequately applied. Such an analysis could, on the one hand, irrespective of the planned Directive, improve the situation of the participants in the social debate who are threatened by SLAPP actions and could be an interesting study in the drafting and implementation of new legislation.

3.14. As the proposed Directive does not cover domestic cases, the EESC welcomes the Recommendation (EU) 2022/758 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings and urges the Member States to provide the same level of protection as set out in the proposed Directive. However, EU activities should not be limited to recommendations but require the Member States to harmonise their legislation in this area to provide an equal level of protection against SLAPP in all Member States. This applies in particular to legal definitions and the scope of protection in the case of SLAPPs, to avoid differing interpretations and different levels of protection in the Member States.

3.15. Given the dynamics of the problem of strategic actions aimed at stifling public debate, the EESC recommends that the application of the Directive be reviewed after a maximum of three years, instead of the five years currently provided for. Member States should thus provide the Commission with information regarding the application of the Directive two years after its transposition. The Commission should submit the report on the application of the Directive one year after that, that is to say three years after its transposition.

3.16. The EESC calls on the Commission to consult journalists and all stakeholders, social partners, and civil society organisations when preparing the review in order to complement the information provided by Member States with independent assessments of the application of the Directive.

3.17. It is crucial to implement the educational measures indicated in Recommendation (EU) 2022/758. In particular, there is a need for appropriate training for legal professionals (both judges and lawyers acting as defence counsel in proceedings), as well as broader educational activities aimed at the general public of the Member States, any member of which may become a participant in the public debate threatened by a SLAPP action. These educational measures should pay sufficient attention to SLAPP with a transnational dimension, which is covered by the proposed Directive. In addition, general campaigns must be organised in all Member States, for the dissemination and promotion of the rights and freedoms of expression, as a complement to and reinforcement of the Directive.

3.18. An important element of the system for countering strategic actions aimed at stifling public debate should also be the provision of free legal assistance to individuals and organisations at risk. The EESC supports the establishment and development of legal institutions at universities and by legal professional associations as well as other entities that can provide such support. However, it must be ensured that the bodies recommended by the Member States to carry out these activities are credible, independent, and professional, and that their activities are subject to appropriate independent verification by the authorities of the Member State concerned.

Brussels, 26 October 2022.

The President
of the European Economic and Social Committee
Christa SCHWENG