German Law Journal (2024), **25**, pp. 840–855
doi:10.1017/glj.2024.51

ARTICLE

Special Issue: Strategic Litigation in EU Law

The EU's Anti-SLAPP Directive: A Partial Victory for Rule of Law Advocacy in Europe

Justin Borg-Barthet and Francesca Farrington

University of Aberdeen, Aberdeen, Scotland
Corresponding author: Justin Borg-Barthet; Email: jborgbarthet@abdn.ac.uk

(Received 04 November 2024; accepted 19 November 2024)

Abstract

Strategic Lawsuits Against Public Participation or SLAPPs are abusive lawsuits which have the purpose or effect of suppressing public participation. This Article considers the peculiarities of this form of "strategic litigation" and takes stock of developments in the European Union to combat SLAPPs, noting that while the adoption of an Anti-SLAPP Directive represents an example of effective legal mobilization and a major positive step towards safeguarding the rule of law in the EU, its limitations render it crucial that Member States treat the Directive as a foundation and build national legislation which is more robust in substance and more far-reaching in scope.

Keywords: European Union Law; Freedom of Expression; strategic lawsuits against public participation; SLAPPs; Anti-SLAPP Directive; rule of law

A. Introduction

In parallel with the use of litigation as a transformative force for good, another altogether more sinister form of litigation has taken hold globally. Strategic Lawsuits Against Public Participation ("SLAPPs") are abusive lawsuits which have the purpose or effect of suppressing public participation. This Article takes stock of developments in the European Union to combat SLAPPs. We note that, while the adoption of an Anti-SLAPP Directive is a major positive step towards safeguarding the rule of law in the EU, its limitations render it crucial that Member States treat the Directive as a foundation and build national legislation which is more robust in substance and more far-reaching in scope.

The Article is divided into four main parts. In Section B, we distinguish SLAPPs from other types of strategic litigation considered in this Special Issue, noting that SLAPPs represent an abuse of legal process that demobilizes and further disempowers the target of the SLAPP. Then, in Section C, we provide a brief history of SLAPPs in Europe, noting in particular that the adoption of Anti-SLAPP legislation by the EU was never a foregone conclusion but a result of effective legal mobilization. We argue that the scale of civil society's achievements in this space are noteworthy, and may provide a useful model for stimulating positive legal reform in the future. Despite this significant achievement, we highlight ongoing concerns regarding the scope of the instrument. Section D then turns to examine the common procedural safeguards which all Member States must adopt to give effect to the Directive. We assess the sufficiency of the Directive to counter SLAPPs, in particular, highlighting the strengths and weaknesses of cost-shifting measures. Section E turns briefly to the private international law dimension of SLAPPs. While this Article focuses primarily on the harmonization of certain national procedural laws, private international

law rules may also be engaged by SLAPP claimants to move SLAPPs beyond the reach of effective Anti-SLAPP laws. Therefore, it is important to emphasize the EU's role in regulating the use of private international law, both as between Member States, and in relation to third country SLAPPs. In this regard, we welcome the improvements which the Directive will introduce in this space but argue that more is needed if the EU is to limit the extent to which private international law can be deployed as an instrument to undermine the rule of law. Finally, we argue in conclusion that the successes attained through the synergy of advocacy, political action, and scholarly work should be replicated in ongoing efforts to address the remaining weaknesses in the European Union's Anti-SLAPP defenses.

B. Strategic Litigation Against Public Participation—A Misnomer?

Cebulak, Morvillo, and Salomon define strategic litigation as "a legal action initiated to achieve broader social, political, or economic ends . . . [to] exert influence over policies and political processes."[1] As they observe, strategic litigation can be used by various actors to pursue varying ends. However, strategic litigation is commonly framed as an empowering tool. As such, this Special Issue asks the pressing question—who does strategic litigation in EU law empower? At first blush, SLAPPs could fit comfortably into the analytical framework adopted for this Special Issue, despite the questionable desirability of their normative ends. Recognizing that strategic litigation is, indeed, a normatively ambiguous term, this Section nevertheless distinguishes SLAPPs from the types of strategic litigation that are under consideration in this Special Issue.

SLAPPs are lawsuits or threats of legal action that engage abusive tactics with the aim or effect of stifling public interest discourse. While SLAPPs take many different forms, they share common features: The lawsuit or threat relates to matters of public interest, and the claimant engages in abusive litigation tactics which exact a financial or psychological burden on the respondent at junctures throughout the process of defending a legal action—for example, jurisdictional challenges, requests for discovery, and appeals.[2] This raises the question, are SLAPPs "a form of legal mobilization and a way to exert influence over policies and political processes?"[3]

SLAPPs are designed to remove information of public interest from the public domain, transforming a matter of public debate into a matter of private adjudication.[4] By making information unavailable to the public, pursuers can distort the general public's decision-making capacity, influencing everything from how we vote to what we consume. An infamous and tragic example is the environment for media freedom at the time of the assassination of the Maltese investigative journalist, Daphne Caruana Galizia. In the years leading up to her assassination, she had been subjected to dozens of civil and criminal lawsuits prompted by her reporting on a web of international corruption.[5] At the time of her murder, she was the only Maltese reporter who had not been silenced by SLAPPs. Her peers had removed information and discontinued reporting out of a genuine fear of retaliation from political and private actors who deployed the threat of litigation to alter public discourse and political outcomes. The removal of public interest information on corruption and financial crime among the political and economic elite allowed the

[1]Pola Cebulak, Marta Morvillo & Stefan Salomon, *Strategic Litigation in EU Law: Who Does It Empower?*, 25(6) GERMAN L.J. 800 (2024) (in this Issue).

[2]JUSTIN BORG-BARTHET AND FRANCESCA FARRINGTON, OPEN SLAPP CASES IN 2022 AND 2023: THE INCIDENCE OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION, AND REGULATORY RESPONSES IN THE EUROPEAN UNION (2023) (available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf) [hereinafter OPEN SLAPP CASES IN 2022 AND 2023].

[3]Cebulak, Morvillo and Salomon, *supra* note 1, at 1.

[4]George W. Pring & Penelope Canan, "*Strategic Lawsuits Against Public Participation*" ("*SLAPPs*"): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937 (1991).

[5]*Defence Against Frivolous and Vexatious Libel Suits*, DAPHNE CARUANA GALIZIA FOUND., https://www.daphne.foundation/en/justice/vexatious-libel-cases.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

government to continue violating the rule of law with the result that organized crime came to dominate Maltese political and economic life.[6]

Outside of the EU, in the UK, Catherine Belton and her publishers Harper Collins were subjected to numerous defamation and privacy actions in relation to allegations that the pursuers had acted as political and economic agents for the Russian president.[7] The cases were ultimately settled or discontinued. Despite the settlement or discontinuation of the cases, the publisher and author had already faced complex, lengthy, and expensive litigation. Further, they endured reputational harm as the mere fact of widely publicized litigation cast a shadow of doubt over the reliability of the publication. In many respects, the litigation achieved its purpose of distorting the public understanding of how the Russian state exerts influence in the UK.[8]

These cases illustrate how SLAPPs arguably satisfy the condition of seeking to influence policies and political processes through the legal system.[9] This fits with the more "normatively open" view of strategic litigation adopted in the United States, which is neutral to the goals achieved through the misuse of court process.[10] Given that the term SLAPPs originates in the United States, it is somewhat unsurprising that the wording "strategic litigation" was adopted in the context of abusive court proceedings. There is some merit in this "normatively open" approach which recognizes that "strategic litigation can be deployed by actors who already hold significant power in the society or economy and pursue their private but generalized interests; or it can be used by disempowered actors who pursue general public interest."[11] As a consequence, Cebulak, Morvillo, and Salomon adopt a broad definition of strategic litigation as "the use of legal action in judicial or quasi-judicial fora to achieve broader (i.e. beyond the specific case) social, political, or economic ends."[12] However, Cebulak, Morvillo, and Salomon emphasize that even a normatively open conception of strategic litigation has its boundaries. In particular, Cebulak, Morvillo, and Salomon highlight that strategic litigation pursues "a generalizable interest which transcend[s] the purely individual interest of the applicant."[13] In contrast, SLAPPs are usually engaged to promote the private interests of the applicant, interests which are arguably not generalizable. Therefore, SLAPPs do not sit comfortably within the bounds of either a normatively open—or closed—conception of strategic litigation.

The European Union eschews the term SLAPPs in substantive provisions of the Anti-SLAPP Directive, deploying instead the term "abusive court proceedings against public participation."[14] The emphasis on abuse as opposed to strategy may reflect a more "normatively closed" understanding of "strategic litigation"—signaling that SLAPPs are contrary to the common good. In many respects, the EU's approach is laudable as it attempts—but as we explore later, ultimately falls short—to draw a distinction between a genuine legal dispute and an abuse of legal rights. The former involves the reliance on legal rules in the pursuit of a legal remedy recognized by law[15] while the latter involves the abuse of court process to promote a private interest rather than a legal right.

[6]Justin Borg-Barthet, *Daphne Caruana Galizia and the Rule of Law: A Note to Law Students*, ABERDEEN U. SCH. L. (Oct. 24, 2017), https://www.abdn.ac.uk/law/blog/daphne-caruana-galizia-and-the-rule-of-law-a-note-to-law-students/ [hereinafter *Daphne Caruana Galizia*].

[7]*Case: In Focus - Catherine Belton*, UK ANTI-SLAPP COAL., https://antislapp.uk/project/catherine-belton/ (last visited June 14, 2024).

[8]*Id.* It is worth noting that after Russia invaded Ukraine all the claimants who brought cases against Belton and HarperCollins were sanctioned. *Id.*

[9]Cebulak, Morvillo and Salomon, *supra* note 1, at 800.

[10]*Id.* at 5.

[11]*Id.* at 8.

[12]*Id.* at 9.

[13]Cebulak, Morvillo and Salomon, *supra* note 1, at 806.

[14]Council Directive 2024/1069, art. 14, 2024 O.J. (L 2024/1069) (EU) [hereinafter Anti-SLAPP Directive].

[15]*See* Christoph Schreuer, *What Is a Legal Dispute?*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 959 (Isabelle Buffard et al. eds., 2008).

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

The distinction between strategic litigation and abusive litigation sits somewhat more comfortably with Handmaker's differentiation between lawfare and legal mobilization.[16] Legal mobilization extends beyond strategic litigation and includes the use of law-based strategies ranging from public campaigns to court-based public interest litigation.[17] Likewise, the term lawfare encompasses more than abusive court proceedings, and in many respects captures the hidden depths of SLAPPs which often involve threats of legal action that are sufficient to chill criticism—without recourse to court proceedings. One of the key distinctions that Handmaker draws between lawfare and legal mobilization is that the latter is used as a "form of legitimate counterpower" while the former is used as an "illegitimate form of legal instrumentalism."[18]

The focus on power dynamics is particularly useful in the context of SLAPPs—and goes to the heart of the question this Special Issue asks—who does strategic litigation seek to empower? We may understand power as entailing the ability of an actor to pursue their interests, to the exclusion of others, through their capacity to control societal or institutional agendas.[19] As a consequence, power may "involve the unintentional or unconscious repression of certain people's interests through the establishment of social structures, forms and institutions that embed and reinforce certain systemic and unconscious biases."[20] In the context of SLAPPs, repression is both conscious and intentional. However, the legitimacy of legality is invoked to conceal these intentions. In contrast, *empowerment* has been defined in this issue as a "shift or a redistribution of power among the actors involved in the relevant practice."[21] A further distinction has been drawn between concentrated and dispersed power. The former involves the pursuit of legal change through an enforceable judicial decision while the latter refers to the broader social consequences of a judicial decision—whether favorable or otherwise. Dispersed power captures the potential for even unsuccessful litigation to result in social change by igniting public debate and mobilizing the general public to "challenge the status quo."[22]

SLAPPs sit somewhat uncomfortably within the concept of either concentrated or dispersed power. The goals pursued by SLAPP claimants are not dependent on the award of a favorable judicial decision; neither is the litigation motivated by the intention to mobilize the general public to challenge the status quo. Rather, SLAPP pursuers abuse court process to maintain the status quo and consolidate their power. As the above cases illustrated, SLAPP pursuers intend to influence public opinion. However, rather than seeking to *mobilize* they usually seek to *demobilize* the general public.

Therefore, we distinguish between a view of SLAPPs as merely another form of strategic litigation and rather suggest that SLAPPs are better understood as abusive court proceedings against public participation. In many respects, framing SLAPPs as a form of *strategic litigation* may ultimately lend SLAPP pursuers an air of legitimacy. In other words, once framed as a form of strategic litigation, the debate shifts to whether the aims pursued through the legal system are normatively desirable rather than whether they are a legitimate and permissible use of the legal system. Therefore, we would suggest that SLAPPs do not constitute a "form of legitimate counterpower" but rather an "illegitimate form[] of legal instrumentalism."[23]

[16]Jeff Handmaker, *Researching Legal Mobilisation and Lawfare* 1, 1 (Int'l Inst. of Soc. Stud., Working Paper No. 641, 2019), https://repub.eur.nl/pub/115129/wp641.pdf.

[17]*Id.* at 5.

[18]*Id.*

[19]Business and Society: A Critical Introduction 92 (Kean Birch et al. eds., 1st ed. 2017).

[20]*Id.*

[21]Cebulak, Morvillo and Salomon, *supra* note 1, at 808.

[22]*Id.* at 9–10.

[23]Handmaker, *supra* note 16, at 5.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

C. Mobilizing EU Law to Counter SLAPPs: Legal Basis, Scope, and Key Definitions

If SLAPPs are not properly understood as a form of legal mobilization, specifically a type of strategic litigation, then the movement that has emerged to counter SLAPPs certainly could be. In this Section we consider the mobilization of EU law to counter SLAPPs in Europe, beginning with a grassroots movement of NGOs, academics, lawyers, and politicians who lobbied the EU institutions to recognize SLAPPs as a threat to the rule of law and the internal market, and to empower SLAPP defenders to repel the threat of litigation.

I. History and Legal Basis of the Anti-SLAPP Directive

Following the murder of Daphne Caruana Galizia, the realization that the mere threat of vexatious transnational litigation by corporate litigants was altering the public record to Orwellian degrees, prompted a deeper examination of the state of EU laws relating to free expression.[24] Ultimately, some four decades after SLAPPs first became part of legal and socio-legal discourse in the United States, the widespread misuse of litigation in Europe became a central concern for academics—including the present authors—press freedom NGOs, and a small cross-party grouping of MEPs in Europe.

When first asked by a cross-party group of MEPs to exercise legislative initiative to combat SLAPPs, the European Commission took the view that the Union lacked competence to adopt Anti-SLAPP legislation. Former Commissioner Timmermans argued that the adoption of measures to address SLAPPs was either impossible due to lack of legislative competence, or unnecessary because Member States were able to act independently to repel third country SLAPPs.[25] Unusually, in an argument concerning the extent to which EU law was capable of being mobilized to further common EU values in the Member States, the Commission was of the view that EU law was incapable of being deployed. MEPs and NGOs were not persuaded by Timmermans's firm "no," and sought our advice on whether and, if so, how the Union could act to respond to SLAPPs. The advice provided a preliminary analysis of EU competence to legislate on laws affecting SLAPPs, and articulated how EU law enabled the abuse of defamation laws to suppress press freedom and activism.[26] We observed that EU law itself is capable of being deployed in a manner which undermines the process of European integration through law, ultimately interfering with the values that underpin the EU legal system. We recommended that existing EU private international law should be amended, and that there should be further analysis of substantive and procedural laws affecting public participation with a view to the Union exercising the competences which we argued it did indeed have.

Due to the efforts of NGOs to collect data on SLAPPs in Europe, there was a growing recognition that SLAPPs are not restricted to defamation claims and are deployed against civil society actors other than media actors.[27] In 2021, the European Parliament commissioned academics at the University of Aberdeen—including one of the present authors—to conduct a more encompassing analysis of SLAPPs, including the compatibility of anti-SLAPP legislation

[24]Manuel Delia, *Pilatus Bank Bullies the Local Press. We Will Not Be Silenced*, Truth be Told (Oct. 24, 2017), https://manueldelia.com/2017/10/pilatus-bank-bullies-local-press-will-not-silenced/. This may be understood as an example of the type of strategic litigant which Cebulak et al term "the corporation." Cebulak, Morvillo, & Salomon, *supra* note 1, at 811.

[25]Letter from Frans Timmermans, First Vice President of the Eur. Comm'n, to Members of European Parliament (June 12, 2018), https://www.anagomes.eu/PublicDocs/974f0440-6c8c-48e3-bee4-80e6ced9735e.pdf.

[26]Justin Borg-Barthet, *Advice Concerning the Introduction of Anti-SLAPP Legislation to Protect Freedom of Expression in the European Union*, Aberdeen Ctr. Priv. Int'l L. (May 19, 2020), https://aura.abdn.ac.uk/bitstream/handle/2164/16449/2020.05.19_Anti_SLAPP_advice.pdf?sequence=1 [hereinafter *Advice Concerning the Introduction of Anti-SLAPP Legislation*].

[27]*See generally* Coalition Against SLAPPs in Europe, SLAPPs: A Threat to Democracy Continues to Grow (2023) [hereinafter CASE, SLAPPS: A Threat]. The Coalition Against SLAPPs in Europe ("CASE") has been working tirelessly to collect and analyze SLAPPs commenced in Europe since 2010. *Id.* CASES's most recent report identified 820 cases between 2010–2023. *Id.*

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

with EU law. Alongside recommending that an Anti-SLAPP law should be adopted, and that the EU had competence to do so, we also recommended that the Brussels Ia[28] and Rome II Regulations[29] should be recast to limit the incidence of SLAPPs.

In relation to the EU's competence to legislate on SLAPPs, it was suggested that the justifications for deployment of multiple legal bases in relation to the Whistleblower Directive were, generally, equally relevant to the adoption of Anti-SLAPP measures.[30] In addition, the study noted that the very foundations of the EU legal system as a distinct legal order relies for its effectiveness on an active citizenry and the safeguarding of a facilitative environment for freedom of expression.[31] In the absence of the free circulation of information and ideas, the capacity of public watchdogs to enforce EU law is considerably restricted. In other words, in a Union which relied to a great extent on legal mobilization for the enforcement of EU law, legislative intervention was now needed to remove an existential threat to that mobilization. Considering all these factors, it was suggested that an Anti-SLAPP Directive could be grounded in either Article 114 TFEU which allows the EU to legislate to ensure the proper functioning of the internal market or Article 81 TFEU which allows the EU to adopt measures concerning judicial cooperation in civil matters having cross-border implications.[32] The study concluded that reliance on Article 114 provided a clearer route for the adoption of harmonizing measures, and proposed that a directive would be the most appropriate legislative instrument as it would allow Member States to transpose legislation in a manner that reflects their legal tradition and civil procedural rules.[33]

Having established that the EU did have competence to legislate in this area, the effort to persuade the Commission to initiate legislation continued to gather pace through workshops and conferences in Berlin, Aberdeen, Brussels, and Amsterdam, ultimately resulting in the coalescence of a broader coalition of advocacy for Anti-SLAPP laws. In tandem with data collection and awareness-raising efforts tailored to each Member State, that coalition, which came to be known as The Coalition Against SLAPPs in Europe ("CASE"), commissioned a model EU law on SLAPPs in 2020.[34] In addition to identifying the key markers of robust Anti-SLAPP laws, the model law included innovations to respond specifically to weaknesses in the EU system. In particular, the authors were anxious to address the susceptibility of smaller media organizations—especially in microstates—to third country litigation, and to enable the development of a critical mass of Anti-SLAPP expertise by empowering third parties to intervene in support of SLAPP respondents.[35] Equally, however, the authors were conscious of potential political concerns which could stand in the way of legislation. The model law was therefore designed in a manner which was both legally sound and politically feasible.

Ultimately, both the political and administrative arms of the Commission were persuaded of the need for legislation and the plausibility of its adoption. Vice President Jourová, Frans Timmermans's successor, was determined to adopt legislation which would stand as a testament to the Union's commitment to freedom of expression.[36] In due course, the various advocacy inputs

[28]*See generally* Council Regulation 1215/2012, 2012 O.J. (L 351) (EU).

[29]*See generally* Commission Regulation 864/2007, 2007 O.J. (L 199) (EC).

[30]Justin Borg-Barthet, Bernadetta Lobina and Magdalena Zabrocka, The Use of SLAPPs to Silence Journalists, NGOs and Civil Society 45–47 (2021). The Commission had identified seventeen legal bases for the introduction of the Whistleblower Directive in its original proposal with a particular focus on the internal market effects of whistleblower protection. *Id.* at 45–47.

[31]*Id.* at 10 (citing ECJ, Case 26/62, NV Algemene Transport— en Expeditie Onderneming van Gend & Loos v. Neth. Inland Revenue Admin., ECLI:EU:C:1963:1 (Feb. 5, 1963), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61962CJ0026).

[32]*Id.* at 45–47.

[33]*Id.* at 47.

[34]*See generally* Linda Maria Ravo, Justin Borg-Barthet and Xandra Kramer, Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law (2020).

[35]*Id.* at arts. 18, 24.

[36]Věra Jourová, Vice President of Eur. Comm'n for Values and Transparency, Remarks on Abusive Lawsuits Against Journalists and Human Rights Defenders (Apr. 27, 2022).

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

cited above resulted in an Anti-SLAPP Directive which is, in many respects, a product of effective legal mobilization.

II. Scope and Key Definitions

Despite the recommendation to rely on Article 114 TFEU, the Commission decided to rely on the specific competence to regulate judicial cooperation in civil matters having cross-border implications in Article 81 TFEU. By necessity, the decision to rely on Article 81 has a number of limiting effects on the Directive's scope, some of which became the subject of significant debate during the legislative process. Geographically, the instrument does not apply automatically to Denmark due to its exclusion from the Area of Freedom Security and Justice. Materially, the Directive is limited to civil and commercial matters and therefore excludes revenue, customs, administrative, and criminal matters, as well as claims arising out of the liability of the state for acts or omissions in the exercise of state authority.[37]

The exclusion of criminal matters from the scope of the Directive is particularly troubling. Notwithstanding the development of an international consensus in human rights law that the criminalization of speech should be reserved to only the most egregious cases,[38] defamation and insult remain subject to criminal penalties in several Member States. Our report on open SLAPP cases found that criminal defamation made up 14% of reported cases, with particularly liberal use of prosecutorial powers in some jurisdictions such as Italy.[39] Beyond criminal defamation we identified SLAPP cases based on breach of privacy (2.1%), criminal indecency (2.1%), hate crimes (2.1%), and the crime of offending religious sentiment (6.3%).[40]

Equally, the exclusion of administrative law from the scope of the Directive is potentially problematic insofar as the executive powers can be deployed to suppress scrutiny of the executive itself, as well as the activities of private persons of public interest. For instance, the potential for the GDPR to suppress public interest journalism has been of particular concern.[41] By way of example, in Romania, a media outlet was investigated by the Romanian data protection authority after it published early findings on an investigation into the misuse of EU subsidies by a political leader.[42] Likewise, data protection laws were successfully deployed in both civil lawsuits and administrative proceedings by the owners of a Hungarian energy drink manufacturer to prevent Forbes from reporting on their rise in economic power, the role of state subsidies in facilitating this rise, and the company's ties to the Hungarian government.[43] As Rucz notes, these cases illustrate the potential for GDPR laws to "be misused and instrumentalised to obstruct those engaging in public interest journalism."[44]

In recognition of the use of criminal and administrative laws to suppress public participation on matters of public interest, the Commission adopted a recommendation that Member States extend Anti-SLAPP remedies to their domestic criminal and administrative laws.[45] Nevertheless,

[37]Anti-SLAPP Directive, *supra* note 14, at art. 2.

[38]United Nations Hum. Rts. Off. High Comm'r, The Impact of SLAPPs on Human Rights & How to Respond (2024), https://www.ohchr.org/sites/default/files/documents/publications/briefer-the-impact-slapps-hr-how-resond.pdf (last visited June 16, 2024).

[39]C.p. art. 595.

[40]Justin Borg-Barthet & Francesca Farrington, Open SLAPP Cases in 2022 and 2023, *supra* note 2, at 8.

[41]*Commission Evaluation Report on the Implementation of the General Data Protection Regulation Two Years After its Application* (2020/2717(RSP)), (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0111_EN.pdf (last visited June 13, 2024).

[42]Melinda Rucz, *The GDPR Enters the SLAPP Scene: GDPR Proceedings as Emerging Forms of Strategic Litigation Against Public Participation*, Eur. Law Blog (Feb. 22, 2022), https://www.europeanlawblog.eu/pub/the-gdpr-enters-the-slapp-scene-gdpr-proceedings-as-emerging-forms-of-strategic-litigation-against-public-participation/release/1.

[43]*Id.*

[44]*Id.*

[45]Commission Recommendation (EU) 2022/758, 2022 O.J. (L 138) 75.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

it will be for future EU legislation to transform that recommendation into a binding legal obligation.

Further, for a civil matter to fall within the scope of the Anti-SLAPP Directive it must have a cross-border dimension. There was significant debate between the Parliament and Council on the appropriate definition of cross-border element, with Parliament favoring a broader definition that would increase the Directive's capacity to act as an effective counterpower to SLAPPs.[46] The Commission proposed a broad definition of cross-border implications as being present where one of the following conditions was satisfied: At least one of the parties was domiciled in another Member State to the court seized; the public interest matter was relevant to more than one Member State; or related proceedings had been initiated by the claimant in another Member State.[47] The EU Parliament observed that SLAPP cases in which the respondent is domiciled in a different country to the court seized made up a relatively small proportion of cases and supported a broad definition of cross-border implications.[48] However, the Council recommended excising the definition of cross-border matters altogether, which would have either allowed Member States unilaterally to define the scope of the Directive, or would have resulted in prolonged uncertainty pending authoritative interpretation from the Court of Justice.[49]

In the course of our study on open SLAPP cases in 2022–2023 the European Parliament's JURI Committee asked us to consider the consequences of various definitions of cross-border implications on the scope of protection afforded under the Directive.[50] Our study found that a definition based solely on at least one of the parties being domiciled in a different member state to the other or the court seized would have captured only 10% of the identified cases. A definition which focused on the place where the alleged harmful event originated, or the alleged harm was felt would have captured 90% of cases. Finally, of the forty-seven cases identified, 85% of cases had a European element—such that the public interest matter was relevant to EU governance or to more than one Member State.[51]

As a result, we cautioned that the effectiveness of an EU instrument to combat SLAPPs would be contingent on the manner in which a cross-border element was defined.[52] We were particularly concerned that the removal of a definition of cross-border element could lead to divergent approaches among Member States or the adoption of a narrow definition which focused on the domicile of the parties, potentially excluding 90% of cases.[53] Our concerns were equally shared by CASE who found that of the 820 SLAPPs identified in Europe between 2010–2023 only 9.5% would come within a classification of cross-border as meaning that the plaintiff and defender were domiciled in different countries.[54]

The mobilization of political, academic, and non-governmental organization ("NGO") commentary appears to have had the intended effect. Article 5 of the Directive defines a matter as having "cross border implications unless both parties are domiciled in the same Member State as the court seized *and* all other elements relevant to the situation concerned are located in that Member State."[55] Therefore, if the matter has any connections whatsoever to more than one

[46]*See* Borg-Barthet & Farrington, Open SLAPP Cases in 2022 and 2023 *supra* note 2, at 14–18 (providing an overview).

[47]*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")*, at art. 4, COM (2022) 177 final (Apr. 27, 2022) [hereinafter Proposed Anti-SLAPP Directive].

[48]Rafał Mańko, EU Legislation in Progress: Strategic Lawsuits Against Public Participation (SLAPPs) 5 (2024).

[49]Borg-Barthet & Farrington, Open SLAPP Cases in 2022 and 2023 *supra* note 2, at 47–48.

[50]*Id.*

[51]*Id.* at 41–42, 47–48.

[52]*Id.* at 47–48.

[53]*Id.* at 47.

[54]*See generally* CASE, SLAPPS: A Threat, *supra* note 27.

[55]Anti-SLAPP Directive, *supra* note 14, at art. 5 (emphasis added).

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

Member State then the claim will fall within the scope of the Directive, regardless of whether the parties are domiciled in the same Member State. This appears to go further even than the Commission's original draft, which referred to the act of public participation's relevance to more than one Member State, thereby appearing to allude to cross-border public interest only. While reliance on Article 81 TFEU is, by necessity, constraining, the coalescence of various inputs resulted in the deployment of an especially broad understanding of cross-border matters which are governed by the instrument.

D. Common Procedural Safeguards

Anti-SLAPP instruments are designed to deter and remedy abuses of court procedure in matters relating to public participation. In many respects, Anti-SLAPP laws may be understood as a way to remedy imbalance in the scales of justice by empowering courts to dismiss and penalize illegitimate uses of court process. Protective measures further enable a defender to engage in legitimate public interest discourse without fear of retaliation. By providing for early dismissal and cost-shifting measures, Anti-SLAPP laws redistribute power between the parties by limiting the effects of economic asymmetry. However, the extent to which an Anti-SLAPP law achieves this empowering purpose is dependent not only on the scope of protection—as considered above—but also the nature of the remedies available and the burden placed on a respondent.

I. Early Dismissal and Cost-Shifting Mechanisms

The Anti-SLAPP Directive takes the unfortunate position of differentiating between the remedies available in manifestly unfounded court proceedings and abusive court proceedings. The early dismissal mechanism is only available in manifestly unfounded proceedings.[56] The Council had proposed a burdensome definition of "manifestly unfounded" as constituting cases which are "so obviously unfounded that there is no scope for any reasonable doubt."[57] If this definition had been adopted, it would have circumscribed Member States' ability to adopt higher standards of protection for public participation.[58] More fatally, we cautioned that such a restrictive definition would put the early dismissal mechanism beyond the reach of most respondents.[59] Likewise, CASE[60] and the European Federation of Journalists[61] lamented the proposed weakening of remedies against abusive court proceedings and noted that few cases fell within the scope of the Council's proposal. CASE went as far as to state that the Council's proposed definition of manifestly unfounded rendered the proposed early dismissal mechanism "useless."[62]

While the Council's definition of manifest unfoundedness did not make it into the final Directive, the distinction between abusive court proceedings and manifestly unfounded proceedings remains, with the early dismissal mechanism only being available to respondents in the latter class of claim. However, the Directive is clear that it establishes minimum standards

[56]*Id.* at art. 11.

[57]*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")*, at Recital 13a, COM 2022(0117) (June 29, 2023).

[58]Borg-Barthet & Farrington, Open SLAPP Cases in 2022 and 2023 *supra* note 2 at 49.

[59]*Id.* at 49–50.

[60]Case Legal Experts, *Governments' Agreed Stance on EU Anti-SLAPP Directive—A Disappointing Failure to Support the Adoption of Robust Safeguards for Public Watchdogs*, Coal. Against SLAPPs in Europe (Jun. 12, 2023), https://www.the-case.eu/latest/governments-agreed-stance-on-eu-anti-slapp-directive-a-disappointing-failure-to-support-the-adoption-of-robust-safeguards-for-public-watchdogs/.

[61]*EU Council Adopts Watered-Down Position on Anti-SLAPP Directive*, Eur. Fed'n Journalists (June 9, 2023), https://europeanjournalists.org/blog/2023/06/09/eu-council-adopts-watered-down-position-on-anti-slapp-directive/.

[62]Case Legal Experts, *supra* note 60.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

for the protection of public participation.[63] Therefore, Member States may adopt higher levels of protection, including through the extension of early dismissal to all abusive claims, even if partially founded.

Further remedies are available to respondents in both manifestly unfounded proceedings and abusive court proceedings, including full award of costs,[64] and the imposition of effective, proportionate, and dissuasive penalties—including the payment of compensation for damages.[65] Abusive court proceedings against public participation are defined as court proceedings which are not brought to genuinely assert or exercise a right, but have as their *main purpose* to prevent, restrict, or penalize public participation, frequently exploit an imbalance of power between the parties, and pursue unfounded claims.[66] A non-exhaustive list of indicators includes the disproportionate, excessive, or unreasonable nature of the claim, the existence of multiple proceedings, or evidence of intimidation, harassment, or threats.[67]

The reference to *main purpose* may be construed in one of two ways: (i) Implying a subjective test which requires the respondent to show that the SLAPP pursuer brought the proceedings with the primary intention of restricting their public participation or (ii) implying an objective test where the main purpose of the proceedings is inferred from objective factors such as the presence of abusive litigation tactics. An objective test would fit more closely with the drafters' intentions when opting for the term "abusive" rather than "strategic." The decision to remove the word "strategic" from the substantive provisions of the Directive was motivated by concerns that SLAPP targets might be expected to show that the claimant had the subjective intention of attaining outcomes which extended beyond the specifics of their claim. If we understand SLAPPs as a form of abusive litigation then it is more appropriate to adopt an objective test which focuses on the key indicators of a SLAPP, namely elements of abuse of court process. For this reason, it is also appropriate to dispense with the distinction between manifestly unfounded and abusive court proceedings—as the Council of Europe has done.[68]

Despite these shortcomings, the Anti-SLAPP Directive does provide significant cost-shifting measures in abusive court proceedings against public participation—beyond those already mentioned. Many of these are quite commonplace measures. For instance, Article 10 provides that claimants may be required to provide security for the estimated costs of defending the action and, if provided by national law, for damages.[69] While this provision gives respondents some security, they would still need to come up with the upfront cost of defending litigation; for many this presents an insurmountable burden. Therefore, it is somewhat unsurprising that legal aid has been identified by journalists as one of the most important cost-shifting mechanisms when faced with a legal threat.[70]

As such, it would appear significant that Article 19 provides that Member States ensure that legal aid in cross-border civil proceedings is provided in accordance with Council Directive 2003/8/EC—the "Legal Aid Directive."[71] However, the Legal Aid Directive defines cross-border disputes as one where the party applying for legal aid is domiciled or habitually resident in another Member State to the court seized.[72] To recall, the Anti-SLAPP Directive employs a much broader

[63]Anti-SLAPP Directive, *supra* note 14, at art. 3.

[64]*Id.* at art. 14.

[65]*Id.* at art. 15.

[66]*Id.* at art. 4.

[67]*Id.* at art. 4.

[68]Committee of Ministers, *Recommendation CM/Rec(2024)2 to member States on countering the use of strategic litigation against public participation (SLAPPs)*, Adopted by the Committee of Ministers on April 5, 2024.

[69]Anti-SLAPP Directive, *supra* note 14, at art. 10.

[70]Susan Coughtrie & Poppy Ogier, Foreign Pol'y Ctr., Unsafe for Scrutiny: Examining the Pressures Faced by Journalists Uncovering Financial Crime and Corruption Around the World 3 (2020).

[71]Anti-SLAPP Directive, *supra* note 14, at art. 19(2); Council Directive 2002/8/EC, 2003 O.J. (L 26).

[72]Council Directive 2002/8/EC, *supra* note 71, at art. 2.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

definition of cross-border disputes. It appears that Article 19(2) simply serves as a reminder to Member States of their existing obligations under the Legal Aid Directive rather than extending the provisions of that Directive to all matters falling within the scope of the Anti-SLAPP Directive. As mentioned above, a narrow definition of cross-border based on the domicile of the parties would only capture a fraction of SLAPP cases. If Article 19(2) only serves as a reminder to states of their existing obligations, then this provision would be of very little use to most SLAPP defenders.

II. Legal Mobilization Through Amicus Curiae Interventions

The Directive also provides for some more innovative protections that respond to the imbalance of power between SLAPP respondents and claimants. Article 9 obligates Member States to empower a tribunal seized in a matter relating to public participation to accept submissions from third parties who have a "legitimate interest in safeguarding or promoting the rights of persons engaging in public participation" and who seek to support the respondent.[73] From the perspective of the sound administration of justice, particularly in smaller jurisdictions which might lack a critical mass of case law, the provision grants courts access to "specific expertise of such entities [which] can be brought to bear in such proceedings, thereby contributing to the assessment by the court of whether a case is abusive or a claim is manifestly unfounded."[74] More generally, this provision establishes an avenue for legal mobilization in support of SLAPP defenders and acts as a "form of legitimate counterpower" in abusive court proceedings. Krommendijk and Van der Pas, for instance describe third party interventions "as a more subtle form of strategic litigation"[75] and a form of "legal mobilization."[76] However, as we explain presently, Article 9 runs contrary to the "traditional view" of *amicus curiae* as representatives of the public interest and/or servicing the limited interests of the court.[77]

Third party interventions are "traditionally" viewed as a way to introduce concerns beyond those articulated by the disputing parties; essentially, introducing the broader public interest into the proceedings.[78] For instance, the Court of Appeal of England and Wales found that interventions were particularly important "where aspects of the public interest in a legal issue of general importance may be represented by neither of the two parties before the court."[79] In Scotland, third party interventions will only be permissible where they avoid the "mere repetition of the arguments made already by the parties."[80] Indeed, the term *amicus curiae*—often used interchangeably with third-party interventions[81]—translates to "friend of the court," recognizing that non-party litigants are allowed to intervene to provide the court with information that is not already available from the parties.[82] As such, third-party interveners or *amicus curiae* are often

[73]Anti-SLAPP Directive, *supra* note 14, at art. 9.

[74]*Id.* at recital 35.

[75]Jasper Krommendijk & Kris Van der Pas, *Third-Party Interventions before the Court of Justice in Migration Law Cases*, EU Immigr. L. Blog (Nov. 29, 2022), https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/.

[76]Jasper Krommendijk & Kris van der Pas, *To Intervene or Not to Intervene: Intervention Before the Court of Justice of the European Union in Environmental and Migration Law*, 26 Int'l J. Hum. Rts. 1394, 1396–1397 (2022).

[77]Astrid Wiik, Amicus Curiae Before International Courts and Tribunals 73–122 (2018).

[78]Krommendijk and Van der Pas, *supra* note 76; Wiik, *supra* note 77.

[79]Chris McCorkindale & Paul Scott, *Public Interest Judicial Review in Cross-Border Perspective*, 26 King's L.J. 412, 433 (2015) (citing Roe v. Sheffield City Council [2003] EWCA (Civ) 1, [2004] QB 653 [84] (Eng.)).

[80]*Id.* at 437 (citing E (A Child) v. Chief Constable of the Royal Ulster Constabulary [2008] UKHL 66, [2009] 1 AC (HL) 536 (appeal taken from N. Ir.)).

[81]Laura Van den Eynde, *Amicus Curiae: European Court of Human Rights*, Max Planck Encyclopedias of International Law (2019).

[82]This is also the position in the United States. *See, e.g.*, Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890*, 20 Const. Comment. 111 (2003) (finding that in practice an amicus often reflects the interests of one party).

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

presumed to serve the function of representing the public interest in the litigation. On this understanding, third party interventions would not alter the balance of power between the parties by favoring one party above the other. Rather they alter the dynamics of the court room by introducing a third perspective into a typically adversarial arena.

However, before the ECtHR, *amicus curiae* submissions are permitted where it is deemed necessary for the "proper administration of justice."[83] While many *amici* provide views beyond those presented by the disputing parties, it has been noted that "impartiality does not play a significant role and amici may openly support one of the parties."[84] Indeed, CJEU procedure recognizes the need in some cases to allow associations representing specific interests to intervene in cases on behalf of a party to the dispute.[85] While this is motivated in part by CJEU-specific concerns relating to the limited *locus standi* of individuals before the Court, it also demonstrates the potential for a range of legitimate uses of third-party intervention.

As such, it is noteworthy that Article 9 of the Directive does not provide a general mechanism for third parties representing the broader "public interest" to intervene but rather focuses solely on the respondent's interests. This is particularly noteworthy as, while SLAPPs directly affect the respondent's rights to public participation, they also indirectly affect the general public's right to access information. Accordingly, while it is arguable that it may have been useful to open third party intervention to groups who would represent the broader public interest without reference to the respondent, the legislative choice reflects the view that the public interest and that of the SLAPP target coincide.

With these considerations in mind, Article 9 is, nonetheless an important provision. The inclusion of this provision without the caveats we see elsewhere in the Directive—subject to national law or without prejudice to access to the courts—places this provision on firm footing. In essence, this creates a presumption that the provision is not to be prejudiced by unilaterally adopted national measures. Perhaps, more importantly, it affirms that third party support in SLAPP cases does not represent a breach of fair trial rights. In other words, third party support does not run contrary to the requirement for procedural fairness in civil proceedings; nor does it produce an impermissible inequality of arms between the parties.[86] Rather it serves the more general purpose of redressing the procedural imbalances which are characteristic in SLAPPs and enables strategic litigation in response to lawfare.

E. The Private International Law of SLAPPs

Even if they do not meet the full expectations of advocates for legal reform, the protections which the Directive provides are welcome in that they raise the floor for procedural safeguards against lawfare. However, there remains an outstanding issue of considerable importance. In full circle, we return now to where we began with our preliminary advice on the capacity for private international law rules to exacerbate power asymmetries. Private international law is often viewed as enabling private actors to coordinate cross-border activity while simultaneously remaining neutral on the allocation of power between actors in a globalized world.[87] As Abou-Nigm and Michaels observe, private international law is often incorrectly positioned as indifferent to substantive questions of normative significance.[88] More recently, scholars have challenged this

[83]Van den Eynde, *Amicus Curiae*, *supra* note 81.

[84]*Id.*

[85]Krommendijk and Van der Pas, *supra* note 76.

[86]*See generally* Regner v. Czech Republic, App. No. 35289/11, (Sept, 19, 2017), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11674%22]}. Equality of arms implies a fair balance between the parties, meaning each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the other party.

[87]*See generally* Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 Transnat'l Legal Theory 347 (2011).

[88]Ralf Michaels & Veronica Ruiz Abou-Nigm, *Towards Private International Law for Everyone*, 23 Max Planck Inst. for Compar. & Int'l L. 1 (2023).

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

dualism of private international law as simultaneously an empowering but neutral framework of procedural rules.[89] Rather, they argue that private international law has abandoned "political" matters to its public international law counterpart, and in doing so has left the private causes of crisis and injustice unaddressed.[90] In particular, these scholars attempt to "de-closet" the effect of private international law on the "balance of informal power in the global economy"[91] highlighting the power imbalances that arise from the operation—or absence—of private international law rules in fields such as human rights,[92] feminist legal theory,[93] and global migration governance[94]—among others.[95]

In this vein, we draw attention to the power distributing function of private international law in the context of SLAPPs, before turning to consider the sufficiency of the Anti-SLAPP Directive to act as a form of counterpower in this sphere. Private international law rules determine the competence of a court to hear a cross-border dispute, the substantive law that will apply to determine the dispute and where any judgment may be enforced. As mentioned, we typically think of private international law as reducing inefficiencies in cross-border transactions by, for instance, reducing the risk of irreconcilable judgments, lengthy disputes on jurisdictional competence, and allowing parties to predict the outcome of a dispute in advance by knowing which law will apply. In the context of SLAPPs, private international law may be used for precisely the opposite purpose—to increase the financial and psychological cost of defending a dispute.

By way of example, FPC reported that Paul Radu, the co-founder of the Organised Crime and Corruption Reporting Project ("OCCRP"), became the subject of a defamation claim relating to Radu's reporting on corruption and money laundering implicating politicians and the financial systems in several EU Member States.[96] Despite the fact that Radu is a Romanian national, OCCRP is a U.S. registered outlet, the claimant was an Azerbaijani MP and the subject matter related primarily to members of the Azerbaijani political elite—the London courts were nonetheless seized of the matter. While the case ultimately settled on the eve of the two-week trial, it took two years of hearings to reach that point and cost Radu a reported $500,000 on travel and other fees, despite having had pro bono legal support.[97] As such, the transnational nature of the proceedings increased the cost of defending the litigation. This case illustrated how the well-resourced claimant can afford to engage in forum shopping to amplify the power imbalance between the parties. The case further illustrates how matters of political concern to European governance could be removed from the scope of the Anti-SLAPP Directive through the use of private international law rules. However, as we explore later, the EU Directive introduces some protections against third country SLAPPs. These are not entirely satisfactory; and the powerful can still harness private international law to pursue their ends to the exclusion of others, exacerbating existing power inequalities.

The Anti-SLAPP movement in Europe was inspired to a great extent by the effects of cross-border litigation in the EU, and threats of litigation in non-EU jurisdictions. Procedural costs and

[89]*See e.g.*, Muir Watt, *supra* note 87; Michaels & Ruiz Abou-Nigm, *supra* note 88; PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

[90]Muir Watt, *supra* note 87, at 347.

[91]*Id.*

[92]Peter T. Muchlinski, *Human Rights and Multinationals: Is There a Problem?*, 77 INT'L AFFS. 31 (2001).

[93]Mary Keyes, *Feminist Approaches to Private International Law*, *in* RESEARCH METHODS IN PRIVATE INTERNATIONAL LAW (Xandra Kramer & Laura Carballo-Pineiro eds., 2024).

[94]Verónica Ruiz Abou-Nigm, *Unlocking Private International Law's Potential in Global (Migration) Governance*, *in* PRIVATE INTERNATIONAL LAW (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

[95]*See generally* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 89.

[96]*Paul Radu, Co–Founder of the Organised Crime and Corruption Reporting Project (OCCRP)*, FOREIGN POL'Y CTR. (Feb. 15, 2023), https://fpc.org.uk/paul-radu-co-founder-of-the-organised-crime-and-corruption-reporting-project-occrp/; PAUL RADU, KHADIJA ISMAYILOVA AND MADINA MAMMADOVA, *The Influence Machine*, ORGANISED CRIME & CORRUPTION REPORTING PROJECT (Sept. 4, 2017), https://www.occrp.org/en/azerbaijanilaundromat/the-influence-machine.

[97]*Paul Radu*, FOREIGN POL'Y CTR., *supra* note 96.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

the threat of exorbitant damage awards, particularly in the United States of America and the United Kingdom, often pose an insurmountable barrier to the mounting of an effective legal defense.[98] It follows that, had the procedural innovations discussed above not been complemented by protections in respect of third country courts, EU progress in addressing the suppression of public participation could have been bypassed in its entirety simply by opting to take proceedings before a non-EU court. To address this issue, drawing on CASE's Model Directive, the Anti-SLAPP Directive includes two key provisions, one concerning recognition and enforcement of judgments, and the other providing for limited "SLAPP back" opportunities in respect of third country proceedings.[99]

Article 16 on refusal of recognition and enforcement is a relatively straightforward provision which requires Member States to refuse recognition and enforcement of judgments arising from manifestly unfounded or abusive proceedings brought in third countries. This is a significant departure from the Commission's original position which advocated the retention of Member State discretion in relation to litigation outside of the European judicial area.[100] There remains, however, the threat of litigation itself. The CASE Model Directive therefore included a far-reaching provision which would have required Member States' courts to award damages in respect of proceedings brought outside of the EU while those proceedings were ongoing. The Directive transposes this innovation through a watered-down jurisdictional rule in Article 17 which grants jurisdiction to the courts of the Member State in which the SLAPP respondent is domiciled to award damages in respect of proceedings brought by a non-EU domiciled claimant before the court of a third country.[101]

Member State discretion to limit the exercise of jurisdiction while foreign proceedings are ongoing, as provided in Article 17(2), is lamentable in that the provision in its original form was specifically designed to address ongoing proceedings to pre-empt rather than merely remedy harm. Equally, the restriction of the remedy to cases in which the claimant is not domiciled in the EU is baffling in that it denies the courts of the Member States the ability to respond to cases which are most intimately connected with the Union. The rationale for limiting the jurisdiction of EU courts to cases with fewer connections to the Union is far from clear, whether from a policy or legal perspective. The rule is limited in scope and is capable of being bypassed through the use of EU-based entities, or bogged down in unnecessary factual wrangling over the extent to which it can be claimed that a claimant lacks an EU domicile. Nevertheless, the broader policy decision to provide Anti-SLAPP remedies in respect of third countries is welcome in that the EU legislator demonstrates awareness of the need for shared minimum standards to restrain claimants' misuse of non-EU courts. It is also a testament to the effectiveness of mobilization through advocacy wedded with subject-specific expertise.

There remains, however, a further significant gap in the legislation insofar as EU rules on jurisdiction, recognition, and enforcement of judgments provide claimants with ample room for forum shopping which may in and of itself have the effect of suppressing public participation. The Brussels Ia Regulation empowers the claimant in tort proceedings to choose to bring an action either in the Member State of the respondent's domicile (Article 4), or in the Member State from which the harm originated or that in which it was felt (Article 7(2)).[102] In relation to online publications, the latter ground of jurisdiction is especially prone to misuse insofar as it is arguable, at a minimum, that online material can result in harm in any Member State in which the allegedly defamatory material is accessed, resulting in exposure to the simultaneous jurisdiction of multiple

[98]Ravo, Borg-Barthet and Kramer, *supra* note 34, at art. 33–37.
[99]Ravo, Borg-Barthet and Kramer, *supra* note 34, at art. 24.
[100]Letter from Frans Timmermans, *supra* note 25.
[101]Ravo, Borg-Barthet and Kramer, *supra* note 34, at art. 24.
[102]*See, e.g.*, Case 21/76, Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, 1976 E.C.R. 1735.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

courts for the portion of harm arising in the jurisdiction in question.[103] While the Court of Justice may protest that this does not establish universal jurisdiction in respect of online defamation,[104] the effect on respondents' exposure to the litigation costs in complex, expensive and unfamiliar proceedings is considerable.[105]

The jurisdictional concerns are compounded further by a lack of harmonization of choice of law rules in relation to defamation, which was excluded from the Rome II Regulation.[106] Because each national court applies its own rules on how to choose the substantive law of a defamation claim, the seizing of a court includes a choice of that court's probable designation of a substantive law of defamation. From a publisher's perspective, this means that they must be mindful of contact with multiple legal systems, resulting in their adherence to the lowest standard of press freedom to which they might reasonably be exposed.[107] In its current form, therefore, EU law is ideally placed for claimants to weaponize the law against public participation.

The Directive does provide some potential routes to limit the effectiveness of forum shopping insofar as courts are able to provide remedies short of early dismissal. This is especially the case when courts are of the view that the claimant has engaged in abusive procedural tactics, including "abusive forum shopping" or the institution of multiple claims.[108] The effectiveness of those remedies in practice will be contingent upon courts breaking out of the straitjacket of the Brussels Ia Regulation's traditional rigidity. To this end, the inclusion of "abusive forum shopping" among the indicators of SLAPPs should be read as a steer to national courts to depart from the presumption that any use of jurisdictional rules in the Brussels Ia Regulation is intrinsically legitimate. If courts were to take the view that they could not consider the use of jurisdictional grounds under Brussels Ia to be indicative of abuse, the reference to abusive forum shopping in the Anti-SLAPP Directive would be deprived of all meaning.[109]

It appears, therefore, that the Directive introduces a jurisdictional filter to the application of the rules in Brussels Ia to safeguard freedom of expression from the misuse of private international law.[110] Taken together, the private international law interventions demonstrate legislative responsiveness to the legal mobilization efforts identified in Part C of this Article. Nevertheless, it is noteworthy that several gaps remain in the tapestry of Anti-SLAPP protections, and a degree of

[103]*See generally* ECJ, Case C-68/93, Shevill v. Presse Alliance SA, ECLI:EU:C:1995:61 (Mar. 7, 1995), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0068; ECJ, Case C-509/09, eDate Advertising v. X, EU:C:2011:685 (Oct. 25, 2011), https://curia.europa.eu/juris/liste.jsf?num=C-509/09&language=en; Case C-194/16 Svensk Handel EU:C:2017:766; Case C800/19 Mittelbayerischer Verlag KG v. SM ECLI:EU:C:2021:489.

[104]*Svensk Handel Case*, C-194/16 at ¶ 48.

[105]Borg-Barthet, Lobina and Zabrocka, *supra* note 30, at 34–42. *See generally* Alex Mills, *The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in 'Facebookistan'?*, 7 J. Media L. 1 (2015); Lorna Gillies, *Jurisdiction for Cross-Border Breach of Personality and Defamation: Edate Advertising and Martinez*, 61 Int'l & Compar. L. Q. 1007 (2012); Tobias Lutzi, *Internet Cases in EU Private International Law—Developing a Coherent Approach*, 66 Int'l & Compar. L. Q. 687 (2017); Edoardo Benvenuti, *Azioni Strategiche Tese a Dissuadere La Partecipazione Pubblica e Tutela Delle Liberta Di Espressione e Informazione Nel Diritto Internazionale Privato Dell*, Freedom Sec. & Just.: Eur. Legal Stud. 135 (2024).

[106]Diana Wallis, *Working Document on the Amendment of Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II)*, 2–3 (2010); Benvenuti, *Azioni Strategiche*, *supra* note 105.

[107]Borg-Barthet, Lobina and Zabrocka, *supra* note 30, at 42–44; Mills, *supra* note 105.

[108]Anti-SLAPP Directive, *supra* note 14, at art. 4.

[109]*Id.* at art. 3(d).

[110]C-633/22, Real Madrid Club de Fútbol v. Société Éditrice du Monde SA, ECLI:EU:C:2024:127 (Feb. 8, 2024), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62022CC0633. Advocate General Spzunar's Opinion in Real Madrid suggests that the Court of Justice may be persuaded to become more sympathetic to national courts adopting a more robust approach to the protection of freedom of expression from misuse of private international law. Spzunar's Opinion concerns recognition and enforcement of judgments, rather than the exercise of jurisdiction itself. He argues that the enforcement of judgments which would have a deleterious effect on freedom of expression would be contrary to European Union public policy.

https://doi.org/10.1017/glj.2024.51 Published online by Cambridge University Press

academic and practitioner orthodoxy in relation to the purported neutrality of the law remains to be overcome.

F. Conclusion

The Anti-SLAPP Directive may be imperfect; however, its significance should not be underestimated, whether as an empowering instrument or a product of legal mobilization. In many respects, the Anti-SLAPP Directive stands as a testament to the effectiveness of legal mobilization to counter abuse of power. Without the efforts of civil society actors across Europe, it is unlikely that the Directive would have materialized. As mentioned in the introduction, the realization of the scale of the threat to free speech arising from events around Daphne Caruana Galizia's assassination did not make EU intervention a foregone conclusion. Indeed, there was a clear lack of political will in the early stages of campaigning. However, through the provision of strong evidence-based, solution-driven research and advocacy campaigning, political sentiment shifted quite quickly. When presented with the true scale of the threat SLAPPs posed to the proper functioning of the European Union, the ways in which EU law contributed to the problem, and the competence of the EU to legislate on SLAPPs, EU institutions became responsive and committed to tackling SLAPPs.

However, advocates for reform should not become complacent. The effectiveness of the Anti-SLAPP Directive will turn once again on the issue of political will at the transposition stage. In particular, political will is needed to raise the standard of protection afforded to SLAPP targets over and above the minimum requirements set out in the Directive, and to address the shortcomings identified throughout this article. Effective transposition will require another round of legal mobilization both at a national and regional level, while continued work will be required at a supranational level to address the shortcomings in private international law regulations. The success of the synergies developed by the Anti-SLAPP movement to date provides a model for those future reform efforts. There is value in academics working in tandem with advocacy groups to provide advice on the most appropriate way to adapt the Directive to the legal traditions of the individual Member States while pursuing the highest level of protection for the rule of law. In addition, we are mindful that powerful actors will find new ways to weaponize the law beyond the existing arsenal. Therefore, there remains a need for vigilance to new abuses of legal process and rights; and where necessary and appropriate, mobilization to counter continued abuses of power.

Acknowledgements. The authors are grateful to Yardley Borten and the editorial team at the German Law Journal, the editors of this special issue, Virginia Passalacqua and participants at the Conference on Strategic Litigation in Europe for their helpful comments on earlier drafts of this paper. Thank you also to our colleagues Erin Ferguson, Seamus B Mallia, and Sidney P Farrington for insightful discussions regarding SLAPPs. The usual disclaimer applies.

Competing interests. Justin Borg-Barthet is a member of the European Commission Expert Group Against SLAPP. Francesca Farrington is a TrialWatch expert at the Clooney Foundation for Justice. Both authors have acted as consultants to the European Parliament, the Office of the United Nations High Commissioner for Human Rights, and the Coalition Against SLAPPs in Europe.

Funding statement. No specific funding has been declared in relation to this Article.

Cite this article: Borg-Barthet J, Farrington F (2024). The EU's Anti-SLAPP Directive: A Partial Victory for Rule of Law Advocacy in Europe. *German Law Journal* **25**, 840–855. https://doi.org/10.1017/glj.2024.51