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DRAFT REPORT

on the strengthening democracy and media freedom and pluralism in the EU:
the undue use of actions under civil and criminal law to silence journalists,
NGOs and civil society
(2021/2036(INI))

Committee on Legal Affairs
Committee on Civil Liberties, Justice and Home Affairs

Rapporteurs: Tiemo Wölken, Roberta Metsola

(Joint committee meetings - Rule 58 of the Rules of Procedure)

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(*) Associated committee – Rule 57 of the Rules of Procedure

CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
ANNEX.....	12

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI))

The European Parliament,

- having regard to the Treaty on European Union (TEU) and in particular Article 2, Article 3, Article 4(3) and Articles 5, 6, 7 and 19 thereof,
- having regard to the Treaty on the Functioning of the European Union (TFEU) and in particular Articles 70, 81, 82, 114 and 352 thereof,
- having regard to the Charter of Fundamental Rights of the European Union,
- having regard to Protocol No 1 on the role of national parliaments in the European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the TEU and the TFEU,
- having regard to the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)¹,
- having regard to the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I)²,
- having regard to Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014³,
- having regard to Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) No 1382/2013⁴,
- having regard to its resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU⁵,
- having regard to its resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law

¹ OJ L 199, 31.7.2007, p. 40.

² OJ L 351, 20.12.2012, p. 1.

³ OJ L 156, 5.5.2021, p. 1.

⁴ OJ L 156, 5.5.2021, p. 21.

⁵ OJ C 55, 12.2.2016, p. 33.

and fundamental rights⁶,

- having regard to its resolution of 19 April 2018 on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level⁷,
- having regard to its resolution of 19 April 2018 on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová⁸,
- having regard to its resolution of 3 May 2018 on media pluralism and media freedom in the European Union⁹,
- having regard to its resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights¹⁰,
- having regard to its resolution of 28 March 2019 on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia¹¹,
- having regard to its resolution of 18 December 2019 on the Rule of Law in Malta, after the recent revelations around the murder of Daphne Caruana Galizia¹²,
- having regard to its resolution of 15 January 2020 on the annual report 2018 on human rights and democracy in the world and the European Union’s policy on the matter¹³,
- having regard to its resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights¹⁴,
- having regard to its resolution of 25 November 2020 on Strengthening Media Freedom: the Protection of Journalists in Europe, Hate Speech, Disinformation and the Role of Platforms¹⁵,
- having regard to its resolution of 26 November 2020 on the situation of Fundamental Rights in the European Union – Annual Report for the years 2018-2019¹⁶,
- having regard to its resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation¹⁷,

⁶ OJ C 215, 19.6.2018, p. 162.

⁷ OJ C 390, 18.11.2019, p. 117.

⁸ OJ C 390, 18.11.2019, p. 111.

⁹ OJ C 41, 6.2.2020, p. 64.

¹⁰ OJ C 363, 28.10.2020, p. 45.

¹¹ Texts adopted, P8_TA(2019)0328.

¹² Texts adopted, P9_TA(2019)0103.

¹³ Texts adopted, P9_TA(2020)0007.

¹⁴ Texts adopted, P9_TA(2020)0251.

¹⁵ Texts adopted, P9_TA(2020)0320.

¹⁶ Texts adopted, P9_TA(2020)0328.

¹⁷ Texts adopted, P9_TA(2020)0360.

- having regard to its resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the Rule of Law conditionality mechanism¹⁸,
- having regard to its resolution of 29 April 2021 on the assassination of Daphne Caruana Galizia and the rule of law in Malta¹⁹,
- having regard to the case law of the Court of Justice of the European Union,
- having regard to the 2021 Commission work programme (COM(2020)0690),
- having regard to the European democracy action plan (COM(2020)0790),
- having regard to the Commission communication of 30 September 2020 on the 2020 Rule of Law Report – the rule of law situation in the European Union (COM(2020)0580),
- having regard to the European Commission’s follow-up to the European Parliament non-legislative resolution of 3 May 2018 on media pluralism and media freedom in the European Union ,
- having regard to the report by the European Union Agency for Fundamental Rights entitled ‘Challenges facing civil society organisations working on human rights in the EU’, published on 17 January 2018, to the bulletins on the fundamental rights implications of the coronavirus pandemic in the EU published in 2020, and to the Agency’s other reports, data and tools, in particular the European Union Fundamental Rights Information System (EFRIS),
- having regard to the Universal Declaration of Human Rights,
- having regard to other UN instruments on the protection of human rights and fundamental freedoms, and to the recommendations and reports of the UN Universal Periodic Review, as well as to the case law of the UN Human Rights Treaty Bodies and the special procedures of the Human Rights Council,
- having regard to the UN Declaration on Human Rights Defenders of 8 March 1999,
- having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the case law of the European Court of Human Rights and the European Committee of Social Rights, and to the conventions, recommendations, resolutions, opinions and reports of the Parliamentary Assembly, the Committee of Ministers, the Human Rights Commissioner, the European Commission Against Racism and Intolerance, the Steering Committee on Anti-Discrimination, Diversity and Inclusion, the Venice Commission and other bodies of the Council of Europe,
- having regard to the declaration of the Council of Europe of 4 July 2012 on the Desirability of International Standards dealing with Forum Shopping in respect of

¹⁸ Texts adopted, P9_TA(2021)0103.

¹⁹ Texts adopted, P9_TA(2021)0148.

Defamation, ‘Libel Tourism’, to Ensure Freedom of Expression,

- having regard to the recommendation of the Council of Europe of 28 November 2018 on the need to strengthen the protection and promotion of civil society space in Europe (CM/Rec(2018)11),
 - having regard to the recommendation of the Council of Europe to Member States of 7 March 2018 on media pluralism and transparency of media ownership (CM/Rec(2018)1),
 - having regard to the 2021 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists,
 - having regard to the recommendations and reports of the Office for Democratic Institutions and Human Rights, the Representative on Freedom of the Media and other bodies of the Organization for Security and Co-operation in Europe (OSCE),
 - having regard to the call for an anti-SLAPP directive by a coalition of non-governmental organisations²⁰,
 - having regard to the study commissioned by the European Parliament Policy Department entitled ‘The Use of SLAPPs to Silence Journalists, NGOs and Civil Society’ of June 2021,
 - having regard to its briefing entitled ‘European added value of an EU mechanism on democracy, rule of law and fundamental rights - Preliminary Assessment’ of 23 April 2020,
 - having regard to Rule 54 of its Rules of Procedure,
 - having regard to the joint deliberations of the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs under Rule 58 of the Rules of Procedure,
 - having regard to the opinion of the Committee on Culture and Education,
 - having regard to the report of the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs (A9-0000/2021),
- A. whereas independent journalism and access to pluralistic information are key pillars of democracy; whereas civil society is essential for any democracy to thrive;
- B. whereas Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits or other legal actions (e.g. injunctions, asset-freezing) based on civil and criminal law, as well as the threats of such actions, with the purpose of preventing reporting on breaches of Union and national law, corruption or other fraudulent practices or of blocking public participation;
- C. whereas SLAPPs have become an increasingly widespread practice used against

²⁰ <https://rsf.org/en/news/rsf-and-60-other-organisations-call-eu-anti-slapp-directive>

journalists, academics, civil society and NGOs, as demonstrated by many cases throughout the Union, such as the chilling case of investigative journalist Daphne Caruana Galizia, who was reportedly facing 47 civil and criminal defamation lawsuits, (resulting in the freezing of her assets) on the day of her strongly condemned assassination on 16 October 2017, and the lawsuits her heirs continue to face; whereas other illustrative and alarming cases include Realtid Media, which was repeatedly threatened with a lawsuit in a different jurisdiction from where the reporting in question took place, and Gazeta Wyborcza, which continues to be sued by a number of public entities and officials on a regular basis;

- D. whereas SLAPPs within the Union are often cross-border in nature, which results in reporting delays as illustrated in many cases, often relating to cases of environmental protection, financial fraud and/or corruption, where they constitute a clear attempt to delay publication of information by halting or discrediting the work of individual journalists and publishing entities, hence depriving citizens of their right to information;

Effects on fundamental rights and the rule of law

1. Highlights that SLAPPs are a direct attack on the exercise of fundamental rights and freedoms; underlines that fundamental rights and democracy are linked to upholding the rule of law, and that undermining media freedom and public democratic participation threatens Union values as enshrined in Article 2 of the TEU; welcomes the fact that the rule of law report includes SLAPP lawsuits in its assessment of media freedom and pluralism across the Union, and points to best practices in countering them; calls for the annual report to include a thorough assessment of the legal environment for the media, and investigative journalism in particular;

Effects on the internal market

2. Emphasises that public participation also has an important role to play in the proper functioning of the internal market, as it is often through public participation that breaches of Union law, corruption and other practices threatening the proper functioning of the internal market are made known to the public;

Effects on justice systems

3. Points out that SLAPPs constitute a misuse of Member States' justice systems and legal frameworks, especially for successfully addressing ongoing common challenges outlined in the Justice Scoreboard, such as caseload administration and case backlogs; recalls that a properly functioning justice system delivers judgements without undue delay, and manages judicial resources so as to maximise efficiency, and that this is only possible where judges and judicial bodies are not burdened with the handling of claims that are later on dismissed as abusive and lacking in legal merit;
4. Stresses that judicial independence is integral to judicial decision-making and is a requirement resulting from the principle of effective legal protection set out in Article 19 of the TEU;

Hate speech

5. Highlights that in recent years online hate speech has become increasingly widespread against journalists, NGOs, academics and civil society, including those defending LGBTIQI rights, thus threatening media freedom, freedom of expression and public safety given that online hate speech can incite real-world violence;

Current situation in the Union

6. Stresses that SLAPPs are often meritless, frivolous or based on exaggerated claims, and that they are not initiated for the purposes of obtaining a favourable judicial outcome but rather only to intimidate, harass, tire out, put psychological pressure on or consume the financial resources of journalists, academics, civil society and NGOs, with the ultimate objective of blackmailing and forcing them into silence through the judicial procedure itself; points out that this chilling effect can lead to self-censorship, suppressing participation in democratic life, and also discourages others from similar actions, from entering into these professions or from proceeding with relevant associated activities;
7. Points out that litigants that resort to SLAPPs use and abuse criminal defamation laws, civil lawsuits for libel, protection of one's reputation or based on intellectual property rights such as copyright, but also that a variety of other instruments is used to silence public participation, such as labour sanctions (dismissal), criminal charges of tax fraud, tax audit procedures and abuse of data protection rules;
8. Underlines that an imbalance of power between the claimant and the defendant in terms of financial resources is a common feature of SLAPPs;
9. Stresses, with regard to this problem, that all Member States lack harmonised minimum standards to protect journalists, academics, civil society and NGOs and to ensure that fundamental rights are upheld in the Member States;

SLAPPs at global level

10. Regrets that no Member State has so far enacted targeted legislation to provide protection against SLAPPs; notes however that anti-SLAPP legislation is particularly well-developed in the states of the United States, in Australia and Canada; encourages the Commission to analyse anti-SLAPP best practices currently applied outside the EU which could provide valuable inspiration for Union legislative and non-legislative measures on the matter; underlines the importance of committing to the most ambitious legislation and best-practices currently in force which would discourage the use of SLAPPs in the Union;

Need for legislative action

11. Agrees with the numerous academics, legal practitioners and victims who point to the need for legislative action against the growing problem of SLAPPs; urgently calls,

therefore, for the Brussels I and Rome II Regulations to be amendments in order to prevent ‘libel tourism’ or ‘forum shopping’; urgently calls for the introduction of a uniform choice of law rule for defamation, as well as for proposals for binding Union legislation on harmonised and effective safeguards for victims of SLAPPs across the Union, including through a directive; argues that without such legislative action, SLAPPs will continue to threaten the rule of law and the fundamental rights of freedom of expression, association and information in the Union; is concerned that if measures only address lawsuits regarding information, actions based on other civil matters or criminal procedures may still be used;

Legal base

12. Affirms that legislative measures at Union level could be based on Article 81 of the TFEU (for cross-border civil lawsuits) and Article 82 of the TFEU (for threats of lawsuits in cross-border cases), and separately on Article 114 of the TFEU to protect public participation in order to ensure the proper functioning of the internal market by exposing corruption and other distortions; asserts that the latter measure could also address attempts to prevent investigation and reporting on breaches of Union law using the same legal base as Directive (EU) 2019/1937 (the ‘Whistleblower Directive’);

General protective rules

13. Considers that it is essential to adopt a legislative measure protecting the role of journalists, academics, civil society and NGOs in preventing breaches of Union law and ensuring the proper functioning of the internal market; urges the Commission to present a proposal for legislation that sets out safeguards for persons investigating and reporting on these matters of public interest;

Civil justice

14. Urges the Commission to present a proposal for a measure that develops judicial cooperation in civil matters so as to address cross-border SLAPP cases by providing for rules on the dismissal of abusive lawsuits and other actions in court that have the purpose of preventing public participation, which should include sanctions, consideration of abusive motives even if the lawsuit or action is not dismissed, costs and damages; calls on the Commission, further, to address questions giving rise to forum shopping and libel tourism in a forthcoming review of the Brussels I Rome II Regulations;

Criminal justice

15. Urges the Commission to present a proposal for measures to ensure that defamation, libel and slander, which constitute criminal offences in most Member States, cannot be used for SLAPPs, including through private prosecution; underlines the calls of the Council of Europe and OSCE for the decriminalisation of defamation; invites the Commission to address the question of the seriousness of threats of SLAPPs in a

legislative proposal; notes that defendants often face criminal charges while at the same time being sued for civil liability allegedly arising from the same conduct;

Legitimate interest of claimants

16. Declares that the protection of legitimate rights arising from Union law must be ensured by Member State courts and cannot be jeopardised, including the rights which are routinely cited in abusive lawsuits; defends at the same time and without prejudice to such protection, that it is necessary to prevent any abusive use of those rights in a manner which is manifestly contrary to the legislators' intention when conferring them upon natural or legal persons; considers that preventing such abuse is equally necessary for the correct and uniform application of Union law, thereby safeguarding its effectiveness;

Possible soft law measures

17. Underlines the urgent need for a robust fund for supporting victims of SLAPPs; stress the importance for victims and potential victims of SLAPPs to have easy and accessible information about these type of cases, legal aid and support;
18. Considers that support for independent bodies that can hear complaints and provide assistance to potential victims of SLAPPs and adequate training of judges and lawyers can substantively contribute to building knowledge and capacity in how to detect and deal with SLAPPs and the threat of SLAPPs;
19. Considers it necessary to collect data on SLAPP cases and raise awareness about the detrimental effects of SLAPPs;

Complementarity with other instruments and policies

20. Welcomes the Union Strategy to tackle Organised Crime 2021-2025, and calls for efforts to be stepped up efforts in this regard; notes that legislative and soft law measures cannot be effective in Member States where there are concerns about the independence of the judiciary or the fight against corruption;
21. Recalls the importance of Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, which has applied to all commitment and payment appropriations since 1 January 2021;
22. Stresses that Union level measures to combat SLAPPs should be complementary and consistent with other available tools, such as the mechanism for the protection of democracy, the rule of law and fundamental rights, policies on combating corruption and current financial programmes to support civil society and justice systems;

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23. Calls on the Commission to come forward with proposals on the basis of the annex to this resolution;
24. Instructs its President to forward this resolution to the Council and the Commission.

ANNEX

1. A package of both soft law and hard law

Legislative measures - a package addressing SLAPPs should include proposals:

- for general rules providing protection against SLAPPs;
- specifically addressing questions of civil justice;
- addressing in particular issues of criminal justice

Non-legislative measures - this package should further include:

- adequate training of judges and legal practitioners on SLAPPs;
- assessment of the interplay between different fields of law, such as national media laws and constitutional laws in this context;
- the creation of a specific Union fund to provide financial support to victims of SLAPPs;
- support for independent bodies (such as ombudspersons) able to deal with complaints from persons threatened or faced with SLAPP suits, and to provide assistance to them;
- a publicly accessible Union register of relevant court decisions;
- a ‘one-stop-shop’/support hub which victims of SLAPPs can contact and where they can receive guidance and easy access to information on SLAPPs, including regarding ‘first aid’, legal aid, financial and psychological support, including through peer exchange networks;

2. General rules

A proposal for a general protection measure would have the dual aim of protecting persons investigating or reporting:

- (a) breaches of Union law;
- (b) practices that threaten the proper functioning of the internal market.

The legislative measure should also provide rules on:

- (a) confidentiality of investigations and reports, including of information sources;
- (b) the prohibition of retaliation and effective penalties against SLAPP actions;
- (c) support measures, including:
 - (i) effective assistance, information and practical advice and support provided by a ‘one-stop-shop’ for ‘first aid’ to SLAPP victims;
 - (ii) legal and financial aid;

(d) effective measures to protect against retaliation.

3. Civil procedure

A proposal for a civil procedure measure applicable in cross-border cases should include:

- (a) the obligation for the claimant in cases concerning public participation to specify and provide means of proof of why the action is not abusive;
- (b) the obligation for courts to summarily dismiss abusive lawsuits;
- (c) the obligation for courts to consider the abusive element in any final decision;
- (d) the possibility for third parties to intervene and subrogate to the defendant's rights and obligations;
- (e) the obligation for courts to consider the public interest when assessing costs and the award of damages;
- (f) means to protect victims against SLAPPs brought outside the Union;
- (f) the right to the full award of costs;
- (g) the right to damages.

A proposal from the Commission following the review of private international law instruments should establish:

- (a) the habitual residence of the defendant as the sole forum;
- (b) that the applicable law is the law of the place where the investigation or reporting took place.

4. Criminal procedure

A legislative proposal regarding criminal law aspects of SLAPPs, should:

- (a) specify that defamation, libel and slander constitute criminal offences in most Member States, and cannot be used for SLAPPs, in particular through private prosecution;
- (b) specify that prosecution cannot be used to silence journalists, academics, civil society and NGOs;
- (c) facilitate mutual recognition of judgements and judicial decisions, and police and judicial cooperation in criminal matters.

These measures should be complementary to current Commission activities, legislation already adopted and future initiatives.