HELSINKI FOUNDATION FOR HUMAN RIGHTS

Directions of proposed legal developments to implement the Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation", or SLAPPs)

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INTRODUCTION

- **The Directive on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("strategic lawsuits against public participation", or SLAPPs) (hereinafter, the "Directive")** lays down minimum standards for the protection of natural and legal persons engaged in public participation against abusive legal proceedings aimed at silencing them and introduces the possibility for Member States to impose sanctions on those who abuse the judicial system to stifle public participation.
- Member States have until May 2026 to transpose the directive into national law. According to the Helsinki Foundation for Human Rights (HFHR), the transposition of the Directive into national law should include amendments to substantive and procedural provisions of civil law as well as amendments to substantive and procedural criminal law provisions, which are to create an effective system of protection against SLAPPs.
- The HFHR is currently developing a conceptual draft for the transposition of the Directive. It is based on an analysis of the provisions of Polish law and the practice of its application in cases involving the HFHR (including cases concerning the defence of journalists and civil society activists), as well as on an analysis of court decisions in other cases. The development of the conceptual draft was guided by a review of SLAPP case law from the European Court of Human Rights (including the judgment OOO Memo v Russia, no. 2840/10), soft law (in particular the Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation and the Commission Recommendation 2022/758), legislative proposals (including the Model Anti-SLAPP Law drafted by the UK Anti-SLAPP Coalition) and anti-SLAPP legislation from other jurisdictions. In addition, the conceptual draft is consulted with judges, attorneys and public prosecutors, as well as with academics and experts, including Prof Marcin Dziurda, Dr Aleksandra Gliszczyńska-Grabias, Prof Piotr Kardas, Prof Ewa Łętowska and Prof Wojciech Sadurski. This document is the first preliminary version of the results of our work to date. The next version of the proposals for the direction of legal changes to implement the Directive will be published after June 2024.

ANTI-SLAPP CONFERENCE

RECOMMENDATIONS

1. How the anti-SLAPP law should be developed

1.1. **Discussion of measures to combat SLAPPs should take place in a diverse group,** that includes legal experts (both academics and practitioners) as well as those who have directly experienced SLAPPs or who are most vulnerable to SLAPPs, i.e. those who speak out on matters of public interest. This category includes in particular the media and activists, but also artists, academics and trade unionists. Without adequate involvement of the people concerned, the solutions developed may not do justice to the actual nature of SLAPPs in Poland.

1.2. **Work on the transposition of the Directive should start as early as possible,** taking into account the urgency of this problem in Poland – a country with one of the highest numbers of SLAPPs in Europe. At the same time, this particular experience can form the basis for the development of appropriately robust legislation that will also set standards for other countries.

2. The scope of anti-SLAPP legislation

2.1. **Anti-SLAPP legislation cannot be reduced to the minimum required by the Directive**. In Polish reality, such limited legislation would not achieve its stated purpose, which is to provide effective protection against abusive court proceedings against public participation.

2.2. **Anti-SLAPP provisions must also apply to proceedings of a purely national (domestic) nature.** Cases with cross-border implications constitute only a very small portion of SLAPPs in Poland (and if the cross-border requirement is to be interpreted narrowly, the number of such cases is downright marginal).

2.3. **Anti-SLAPP measures cannot be limited to civil matters only.** They should also apply to criminal and administrative offences, as a large proportion of SLAPPs in Poland are based on the laws on criminal and administrative offences. Administrative law should also not be disregarded in order to avoid loopholes in the protection system that could be used for measures to suppress public participation.

2.4. **Legislative changes to combat SLAPPs must not be limited to procedural issues, but must also extend to substantive law** – in particular to the provisions of substantive law that are most frequently used for abusive court proceedings against public participation. Even with adequate procedural safeguards, some substantive law provisions can still have a strong chilling effect – all the more so as it often takes time to develop an appropriate practice for the application of new procedures.

2.5. **The question of how the directive should be transposed still needs to be examined further. This can either take the form of an amendment to the current legislation or the adoption of a separate law.** The arguments in favour of regulation by a separate law relate to the protection of the stability and coherence of the legal codes; this approach has already been applied by the national legislator when transposing other EU directives concerning procedural rules.

3. Definition of a SLAPP

3.1. **SLAPPs should be defined by law** – for reasons of legal certainty and to facilitate the application of anti-SLAPP safeguards in practice.

3.2. **The definition of SLAPP in the Directive provides a good starting point – but requires some changes** resulting, inter alia, from the existing practice of interpretation of certain terms by Polish courts.

3.3. **The definition of a SLAPP should refer to abusive court proceedings against various forms of public participation, i.e. participation in the exercise of freedom of expression (including artistic and scientific freedom), freedom of assembly and freedom of association.**

3.4. **Total "unfoundedness" and even more so "manifest unfoundedness" should not be part of the SLAPP definition.** The law should protect against proceedings against public participation when such proceedings are abusive – regardless of whether they are totally or manifestly unfounded. This is all the more important as previous court practice indicates that Polish courts interpret similar terms in an extremely restrictive manner: this interpretation is so narrow that its transposition into anti-SLAPP legislation could deprive it of any practical meaning.

3.5. **The law should provide for a non-exhaustive and sufficiently comprehensive list of grounds, the existence of which may indicate that the proceedings in question are, in fact, a SLAPP.** This list should include circumstances with varying degrees of specificity – both those of a general nature and those that are more clearly defined. Such a legislative technique would, on the one hand, provide sufficient flexibility to apply such provisions to different sets of facts and, at the same time, provide practical guidance to facilitate the stable application of such provisions by the courts. In this respect, it is worth taking into account the grounds mentioned in other legal acts, in particular the list set out in the Recommendations of the Committee of Ministers of the Council of Europe of 5 April 2024.

4. Early termination of proceedings ("early dismissal")

4.1. **The legal institution of early termination of SLAPP proceedings (the "early dismissal") is a particularly important means of protection against such procedures.**

4.2. **None of the existing domestic institutions based on civil, criminal or administrative offences law offer sufficiently strong guarantees to effectively end SLAPP proceedings.** Legislative changes in this area are necessary.

4.3. In the realm of civil law, **a simplified and expedited procedure** need to be introduced that can be applied when a court determines that a case may be a SLAPP. This procedure should be able to be initiated both **at the request of a party and ex officio. The taking of evidence in such a case should be considerably limited** in order to shorten the duration of the proceedings and minimise inconvenience (the exclusion or subsidiary applicability of certain means of evidence should be considered). At the same time, the **claimant's right to be heard** in such proceedings **must be guaranteed.** Each party should have the **possibility to challenge the decision on early termination.**

4.4. **In the area of criminal law, the institution of early termination of a SLAPP should have a similar form, adapted to the nature of the criminal proceedings.** A helpful starting point could be the existing mechanism for referring a case to a preliminary review hearing in the situation of the need to discontinue the proceedings - but this facility needs to be adapted to SLAPP-type proceedings.

4.5. Regardless of the type of proceedings, it is necessary to introduce **a reversal of the burden of proof** – the burden of proving that the case is not a SLAPP should lie with the party initiating the proceedings.

4.6. **The early termination mechanism should not be limited exclusively to those SLAPPs that are manifestly unfounded.** The abusive nature of the case against public participation should be reason enough to end it at an early stage. Further analysis is necessary with regard to the possibility of introducing some sort of test whereby early dismissal would not be permitted if the person bringing the proceedings establishes the claim and proves that the harm suffered or threatened to be suffered by the person as a result of the defendant's (or accused's) actions is so serious that the public interest in continuing the proceedings outweighs the public interest in bringing the proceedings to an early conclusion.

5. Remedies: penalties, compensation, increased costs of proceedings, publication of the judgment

5.1. **The court must be able to apply various remedies if it considers the proceedings to be a SLAPP.** The law should provide for the possibility of imposing a penalty on the person who initiates SLAPP, the possibility of demanding compensation from such a person, the possibility of ordering such a person to reimburse the full costs of the proceedings and the possibility of ordering a given person to publish a judgment (to make the judgment public). Only a sufficiently broad range of possible measures will make it possible to adapt the type and manner of response appropriately to the circumstances of a particular case.

5.2. **The court should be able to impose the remedies listed above in the judgment terminating the SLAPP proceedings, i.e. without the need to initiate separate proceedings.** Otherwise, the person affected by SLAPP will be unnecessarily burdened with the need to enforce their rights. At the same time, this solution should not deprive the person affected by SLAPP of the possibility of pursuing additional legal remedies beyond those awarded in the judgment terminating the SLAPP proceedings.

5.3. **The mechanisms currently in place in the domestic law that allow for the imposition of a penalty on a person who abuses procedural rights are not sufficient** – they are not effective, proportionate and dissuasive in the context of SLAPP. It would be advisable to consider **introducing the possibility of imposing penalties, which would provide for the admissibility of a greater variation in their amount** depending on the circumstances of a particular case. Further analysis would require, for example, the possibility of imposing penalties relating to a multiple of the average monthly salary or a fraction of the total annual turnover of a given legal person or an organisational unit without legal personality, or a multiple of the court costs.

5.4. **The possibility of awarding compensation from the person initiating SLAPP to the person affected by such proceedings cannot be limited only to compensation under Polish law (as a literal reading of the directive would wrongly suggest) – it must at least also include non-pecuniary damages, i.e. refer to both pecuniary and non-pecuniary damage.** Another issue worth considering is **the introduction of a special compensation institution in this context,** which would not refer to the institution of compensation and non-pecuniary damages within the meaning of the Civil Code, but would represent an independent form of compensatory sanction (in accordance with the principle of autonomous interpretation of the concepts of EU law).

5.5. The **mechanism for ensuring the possibility of awarding the full costs of proceedings**, in particular the possibility of awarding the full costs of legal representation in excess of the limits provided for attorneys' and legal advisers' fees and the forms of their assessment must also be further analysed.

6. Security

6.1. It is necessary **to examine how the possibility of providing security to cover the estimated costs of the proceedings and the estimated compensation can be guaranteed.** In terms of civil proceedings, it may be advisable to refer to the institution of a security deposit to secure the costs of the trial.

7. Exclusion of right of action of the State Treasury and local government units in cases involving the protection of a good name

7.1. **The law should preclude the State Treasury or local government units from seeking judicial protection of their good name.** These entities should, by definition, be subject to public scrutiny and have many more effective forms of response to criticism rather than the use of public funds to initiate court proceedings against speakers in matters of public interest. Practice in Poland has shown that these entities often initiate SLAPP proceedings. This type of exclusion of the right of action clearly follows from the case law of the European Court of Human Rights (judgments in the cases of *OOO Memo v. Russia* of 15.03.2022 and in the case of *Novaya Gazeta and Others v. Russia* of 10.01.2023).

8. Revision of criminal law provisions used to initiate SLAPP proceedings

8.1. **A change in procedures alone will not be sufficient to protect against SLAPPs if criminal laws that have a significant chilling effect on public debate remain in force.** It is necessary to link procedural changes to changes in substantive law, including the repeal of certain criminal law provisions or changes in their wording.

8.2. **In particular, it is necessary to decriminalise defamation (deletion of Article 212 of the Criminal Code).** It should be considered whether the decriminalisation of defamation should be accompanied by facilitating the civil enforcement of the protection of the good name, in particular with the introduction of the so-called 'John Doe Lawsuit', if the identity of the person who impairs the good name is unknown.

8.3. **It is also advisable to repeal or modify other criminal law provisions that are incompatible with international standards for the protection of freedom of expression**, such as provisions granting enhanced protection of honour of public officials (including the offence of insulting the president) or providing for criminal sanctions for insulting national or religious symbols that have nothing to do with incitement to hatred (including the offence of insulting the state symbol or insulting an object of religious veneration).