ISSN 2533-0632
Judicium
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16 GENNAIO 2025

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Strategic Lawsuits Against Public Participation (SLAPPs) and Forum Shopping in the Digital and Social Media Era. A Comparison of U.S. and EU Anti-SLAPPs Procedural Remedies[1]

1. Introduction

The term SLAPP was first used in late '80s, when professors Penelope Canan and George W. Pring, within the context of the University of Denver's Political Litigation Project, published a joint article titled 'Strategic Lawsuits Against Public Participation'[2]. In their study, they found out that even if the Petition Clause of the First Amendment to the U.S. Constitution protects citizens' rights of political advocacy, every year an increasing number of civil lawsuits were filed with the aim of preventing citizens from exercising their political rights or punishing those who have done so in an inconvenient manner. They call all these cases 'strategic lawsuits against public participation' or 'SLAPPs', regarding them as attempts to use civil tort action to stifle political expression. Indeed, from the authors' perspective, 'political retaliation' was exactly what distinguished SLAPPs from other strategic litigations usually carried out between commercial competitors, business partners, labour and management, and so on[3].

In particular, what emerged from the study was that in SLAPP cases, plaintiffs rarely obtained a favourable ruling in the courtroom. Nonetheless, they frequently achieved their political purposes, as the targeted person, i.e., the defendant, turned out to be 'devastated and depoliticized' at the end of the process, which is exactly what they were looking for at the beginning of the process. This is what professor Pring called the 'chilling effect' of SLAPPs, meaning that such litigations usually have a freezing effect on opposing political opinions, silencing criticism and limiting the exercise of first amendment rights[4].

Over the years, however, the notion of SLAPP has evolved and nowadays is no longer confined to the strictly political sphere. Today, SLAPPs address a wide variety of issues, ranging from zoning to environmental matters, politics, and education. As for their legal basis, SLAPPs are often disguised as standard defamation claims. This is why, in recent years, the rise of online publications and social media has provided a 'vast breeding ground' for

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[1] This contribution constitutes the written and extended version of the lecture given on the occasion of the Ravenna Summer School on Transnational Litigation 2024 Edition "Cross-border litigation and international arbitration", held in Ravenna on July 19, 2024.

[2] P. CANAN and G.W. PRING, Strategic Lawsuits Against Public Participation, in Social Problems, 1988, 35, 5, pp. 506-519. From the same authors, see also P. CANAN and G.W. PRING, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches, in Law & Society Review, 1988, 22, 2, pp. 385-395; G.W. PRING, SLAPPs: Strategic Lawsuits Against Public Participation, in Pace Environmental Law Review, 1989, 7, 1, pp. 3-21; P. CANAN, The SLAPP from a Sociological Perspective, Ibid., pp. 23-32. Ultimately, they published a book on the topic, proposing as well a 'Model Bill' against SLAPPs: see G.W. PRING and P. CANAN, SLAPPs: Getting Sued for Speaking Out, Philadelphia, Temple University Press, 1996.

[3] According to professor Pring, SLAPPs send therefore a clear message: "that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings" (G.W. PRING, SLAPPs: Strategic Lawsuits Against Public Participation, n 1 above, p. 6).

[4] Cf. G.W. PRING, SLAPPs: Strategic Lawsuits Against Public Participation, n 1 above, p. 8.

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SLAPPs[5]. The situation is further exacerbated by the practice of 'forum shopping', which is often enabled by domestic and international jurisdiction rules in defamation cases.

With this in mind, the aim of this study is to investigate how procedural rules have contributed to reducing the number of SLAPPs in the U.S., where the phenomenon originated, and how such rules could help contain the rise of SLAPPs in the EU. Specifically, I intend to focus on how rules concerning international jurisdiction, particularly those laid down in the Brussels I Recast Regulation, may encourage forum shopping in SLAPP cases based on defamation, and which procedural remedies should be adopted to prevent this practice, with particular attention to the new EU Anti-SLAPP Directive.

2. Anti-SLAPPs Laws: Origins and Evolution

Since SLAPPs are possible thanks to a strategic – albeit partly abusive – use of process, it is not surprising that 'anti-SLAPP' remedies should be found first of all within the procedural framework[6].

Delving into the evolution of such remedies, we can trace back to the 1984 Colorado Supreme Court's decision in the *POME v. District Court* case[7]. With a significant shift of the burden of the proof, in that case the court ruled that retaliatory suits, such as SLAPPs, should be promptly dismissed if the plaintiffs cannot prove at the outset that:

a) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion;

b) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and

c) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

As pointed out by Attorney General of the State of New York Robert Abrams, the 'POME three parts test' was an excellent example of how fostering stricter judicial standards for assessing, and promptly dismissing, SLAPPs suits[8]. Moreover, as further outlined by professor Pring, the POME test also opened up a healthy 'reverse chill' effect, considering that

> presumably, a filer who receives a POME-type dismissal faces the even more likely prospect of a successful countersuit (the 'SLAPP-Back') or an attorneys' fees motion for filing a groundless, frivolous suit[9].

A few years later, the state of Washington first enacted its anti-SLAPP statute, as a consequence of the touching case of Brenda Hill. In 1984 Mrs Brenda Hill alerted State revenue officials to Beverly Hills, that the building company Robert John Co had failed to pay real estate taxes on her home and about 300 others he sold in Washington. Thanks to the Brenda whistleblowing, revenue officials collected $477,000 from Robert John Co, who as a result filed a $100,000 defamation suit against Brenda Hill and her husband in July 1987.

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[5] See H. FROSTESTAD KUEHL, Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers, in North Illinois University Law Review, 2016, 36, 3, pp. 28-56.

[6] On the topic see also D.H. MERRIAM and J.A. BENSON, Identifying and Beating a Strategic Lawsuit Against Public Participation, in Duke Environmental Law & Policy Forum, 1993, 3, 17, pp. 23-35.

[7] Cf. Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1364 (Colo. 1984).

[8] See R. ABRAMS, Strategic Lawsuits against Public Participation (SLAPP) Address, in Pace Environmental Law Review, 1989, 7, 1, pp. 33-44.

[9] Cee G.W. PRING, SLAPPs: Strategic Lawsuits Against Public Participation, n 1 above, p. 19.

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The process took six years to come to an end. It was 1993 when the judges of the Clark County Superior Court unanimously ruled in favour of Mrs Hill, whose activity was found not defamatory at all by to the jurors. Nevertheless, during that time, the proceedings cost forced Mrs Hill to bankruptcy and the company took back her house in 1989[10].

The case of Brenda Hill finally touched Rep. Holly Myers, who sponsored the adoption of the so-called 'Brenda Hill Bill'. The new rule was implemented in Chapter 4.24 of the Revised Code of Washington (RCW), stating that

> A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense (section 1)[11].

Even though the Brenda Hill Bill was undoubtedly an important first step in anti-SLAPPs legislation, the real revolution, from a procedural point of view, dates back to the anti-SLAPPs statute adopted in 1992 in the State of California, considered as "the most ambitious and far-reaching of all the state anti-SLAPP laws" at that time[12].

The new regulation added a Section 425.16 to the Code of Civil Procedure (CCP) of California, according to which a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a 'special motion to strike' without merit[13]. Indeed, as the case of Brenda Hill had demonstrated, the length of process is often the main critical aspect of SLAPPs, forcing the targeted person to face with economic and emotional stress, which make the court victory a defeat. Thus, a procedural instrument allowing the defendant to stop SLAPPs at the very early stage of the process turns out to be of paramount importance. That is why the early dismissal mechanism implemented in the Californian CCP can be considered a real cornerstone in modern anti-SLAPPs legislation[14].

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[10] Information are taken from Whistle-blower gets protection - and also the governor's pen, Seattle Times, May 6, 1989, p. A12 and Whistle-blower breathes sigh of relief, The Oregonian, Monday, March 15, 1993, p. B02, both available at https://www.bmartin.cc/dissent/documents/Hill.html, last accessed on 18 June 2024.

[11] Laws of 1989, ch. 234, Immunity from civil liability reports of possible wrongdoing to government agencies. The statute was then reformed in 2010 with the Washington Act Limiting Strategic Lawsuits Against Public Participation (Laws of 2010, ch. 118, codified at RCW 4.24.525). The new statute was however held unconstitutional by the Supreme Court of the State of Washington in Davis v. Cox, 351 P.3d 862, 875 (Wash. 2015). Finally, a new statute was enacted in 2021 (Uniform Public Expression Protection Act , Laws of 2021, ch. 259, codified at RCW 4.105).

[12] See J.I. BRAUN, California's Anti-SLAPP Remedy After Eleven Years, in McGeorge Law Review, 2003, 34, 4, pp. 731-783.

[13] Act of Sept. 16, 1992, ch. 726, sec. 425.16, § 2, 1992 Cal. Stat. 3522, 3523-24.

[14] In particular, according to the new rule, the special motion to strike should have been filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deemed proper. Unless the court had determined that the plaintiff had established that there was a probability that he or she will prevail on the claim, the motion should then have been noticed for hearing not more than thirty days after service. During such a period, however, all discovery proceedings should have been stayed. Eventually, a prevailing defendant on such a special motion to strike should have been entitled to recover his or her attorney's fees and costs (Cal. Code Civ. Proc. ch. 2, § 425.16 through § 425.18).

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3. Anti-SLAPPs Statutes and Forum Shopping in the U.S.

3.1. U.S. National Anti-SLAPPs Statutes

Since the enactment of Washington and California's anti-SLAPP statutes, other States have adopted similar rules. In 1992, the same did the States of New York[15] and Delaware[16], while the next year it was the turn of Rhode Island[17]. In 1994 anti-SLAPP statutes entered into force in the States of Massachusetts[18], Nebraska[19] and Minnesota[20], while in the next few years such a legislation was implemented in the States of Maine[21] (1995), Georgia[22] (1996), Nevada[23] and Tennessee[24] (1997), Guam[25] and Indiana[26] (1998), and Louisiana[27] (1999). The new millennium marked a consistently increasing of anti-SLAPP statutes in the U.S. The State of Pennsylvania[28] and Florida[29] first adopted such a statute in 2000, followed by New Mexico[30] and Oregon[31] (2001), Hawaii[32] (2002), Maryland[33] and Missouri[34] (2004), Arkansas[35] and Vermont[36] (2005), Arizona[37] (2006), Illinois[38] and Virginia[39] (2007), and Utah[40] (2008). Thus, the last States to adopt anti-SLAPP statutes have been Texas[41] (2011), Oklahoma[42] (2014), Kansas[43] (2016), Connecticut[44] (2018), Colorado[45] (2019), Kentucky[46] (2022) and New Jersey[47] (2023).

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15 NY. Civ. Rights Law § 70-a and § 76-a.
16 Del. Code Ann. tit. 10, § 8136, through § 8138.
17 R.I. Gen. Laws § 9-33-1 through § 9-33-4.
18 Mass. Gen. Laws ch. 231, §59H.
19 Neb. Rev. Stat. § 25-21,243 through § 25-21,246.
20 Minn. Stat. § 554.01 through § 554.06.
21 Me. Rev. Stat. Ann. tit. 14, § 556.
22 Ga. Code. Ann. § 9-11-11.1.
23 Nev. Rev. Stat. § 41.635 through 41.670.
24 Tenn. Code. Ann. § 20-17-101 through § 20-17-110; § 4-21-1001 through § 4-21-1004.
25 Guam Code Ann. tit. 7, § 17101 through § 17109.
26 Ind. Code § 34-7-7-1 through § 34-7-7-10.
27 La. Code Civ. Proc. Ann. art. 971.
28 27 Pa. Consol. Stat. § 8301 through § 8305, and § 7707.
29 Fla. Stat. Ann. §§ 720.304, 768.295.
30 N.M. Stat. § 38-2-9.1 through § 38-2-9.2.
31 Or. Rev. Stat. § 31.150 through § 31.155.
32 Haw. Rev. Stat. § 634F-1 through § 634F-4.
33 Md. Code Ann., Cts. & Jud. Proc. § 5-807.
34 Mo. Rev. Stat. § 537.528.
35 Ark. Code Ann. § 16-63-501 through § 16-63-508.
36 Vt. Stat. Ann. tit. 12 § 1041.
37 Ariz. Rev. Stat. Ann. § 12-752.
38 735 Ill. Comp. Stat. 110/15 through 110/99.
39 Va. Code Ann. § 8.01-223.2.
40 Utah Code § 78B-6-1401 through § 78B-6-1405.
41 Tex. Civ. Prac. & Rem. Code § 27.001 through § 27.011.
42 Okla. Stat. tit. 12, § 1430 through § 1440.
43 Kan. Stat. Ann § 60-5320.
44 Conn. Gen. Stat. Ann. § 52-196a.
45 Col. Rev. Stat. Ann. § 13-20-1101.
46 Ky. Rev. Stat. § 454.460 through 454.478.
47 N.J.S.A. 2A:53A-49 through 2A:53A-59.

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So, considering also the District of Columbia, whose anti-SLAPP statute has been enacted in 2012[48], in the U.S. we can currently find anti-SLAPP statutes in thirty-four jurisdictions, although that of Minnesota, held unconstitutional by the Supreme Court of Minnesota in 2017, is no longer applicable[49].

Even though these statutes can significantly vary from each other in features and scope[50], as we are about to see, by examining them it is possible to identify some key procedural features.

First of all, the defendant is usually entitled to file a special motion to obtain an early dismissal of the claim without merit ('anti-SLAPP motion'). If such a motion is granted, it should then heard promptly, along with a stay or limitation of discovery until the court's decision on it.

Second, after the motion is granted, anti-SLAPP statutes usually provide a shift in the burden of proof when it comes to demonstrate the frivolous nature of the issues at stake. Indeed, after the defendant has proved that the case falls under anti-SLAPP regime, it is up to the plaintiff to demonstrate that the claim is meritorious, meaning that it is sufficient well-grounded to hypothetically prevail at the end of the trial. Then, if the court ruled in favour of the defendant, the case is dismissed and the defendant is usually entitled to recovery attorney's legal fees and costs (as well as to file a SLAPP-back, pursuing the claimant for the damages the SLAPP have caused to them). Otherwise, if the plaintiff prevails on the motion to strike, the defendant is usually granted to leave an interlocutory appeal against the court's ruling.

Moving from these common issues, in 2020 the Uniform Law Commission (ULC) published the Uniform Public Expression Protection Act (hereinafter UPEPA), aiming at harmonizing the variety of anti-SLAPP statutes through uniform rules that allow SLAPPs to be challenged and fairly assessed in an expedited manner[51].

Relying on these rules, in 2023 the Institute for Free Speech (IFS) drafted a Report Card, mapping and ranking all U.S. anti-SLAPP statutes[52]. In particular, the Report assigns an overall grade from 'A+' to 'D-' to each State's anti-SLAPP law, subscoring as well the scope of speech covered by the statutes (two-third of the overall grade) and the procedural remedies provided for defendants (one-third of the overall grade)[53]. Bearing in mind that each subscore is based on how closely a statute corresponds with the rules laid down in the UPEPA model, when it comes to anti-SLAPP procedural remedies the maximum score is 100, divided as follow:

a) Suspension of Court Proceedings Upon an anti-SLAPP Motion (20 points);
b) Burden of Proof on Plaintiff to Defeat an anti-SLAPP Motion (12 points);
c) Right to an Immediate (Interlocutory) Appeal (25 points);
d) Award of Costs and Attorney Fees (40 points); and
e) Expansive Statutory Interpretation Instruction to Courts (3 points).

Takin into account these five elements, differences among statutes can be huge, moving from States ranked 'A+', like Georgia, Hawaii, Kentucky, Utah and Washington with 100 points each, to States like Delaware, Florida, Maryland, Nebraska and Virginia, ranging from 27 to 10 points and ranked 'D-'. This leads to another procedural

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[48] D.C. Code § 16-5501 through § 16-5505.

[49] Cf. Leiendecker v. Asian Women United of Minnesota, 895 N.W.2d 623, 635-37 (Minn. 2017).

[50] For a brief overview on some of these differences see D.L. HUDSON Jr., Anti-SLAPP Coverage and the First Amendment: Hurdles to Defamation Suits in Political Campaigns, in American University Law Review, 2020, 69, pp. 1541-1558.

[51] The UPEPA model full text is available at https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1, last accessed on 18 June 2024. The model has been enacted in the anti-SLAPP statutes of Washington (2021 SB 5009), Kentucky (2022 HB 222), Hawaii (2023 SB 3329), Utah (2023 SB 18), Oregon (2023 SB 305), New Jersey (2023 2802/A 4393) and Maine (2024 LD 870).

[52] Anti-SLAPP Statutes: A Report Card, by D. Greenberg, D. Keating and H. Knowles-Gardner, October 2023, available at https://www.ifs.org/anti-slapp-report/, last accessed on 18 June 2024.

[53] The seventeen U.S. States with no anti-SLAPP law each received 0 points in the study and an overall grade of 'F', as well as the state of Minnesota, whose anti-SLAPP statute has held unconstitutional (n 48 above).

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strategy in this kind of litigation, which is forum shopping, suggesting plaintiffs to start proceedings before the court best suited to their SLAPP, using frivolous grounds to establish its jurisdiction.

3.2. The Practice of Forum Shopping

When it comes to establish personal jurisdiction on a defendant which is not present within the territorial jurisdiction of the court seized, such a defendant must have certain 'minimum contacts' with the forum State in order to be subject to a judgment *in personam without violating the Due Process Clause (14th Amendment)*[54]. *In evaluating such minimum contacts, in accordance with the U.S. Supreme Court case law, a court must properly focus on the relationship among the defendant, the forum, and the litigation, while the* plaintiff cannot be the only link between the defendant and the forum[55].

In defamation cases by means of media the minimum contact requisite was deepened by the U.S. Supreme Court in the *Calder v. Jones* case, when a professional entertainer who lived and worked in California and whose career was centred there, brought suit in California Superior Court, claiming that she had been libelled in an article written and edited in Florida and then published in a national magazine having its largest circulation in California. The court's ruling, also known as 'Calder test', essentially stated that libellers whose intentionally actions are expressly aimed at one State ('purposeful direction'), must reasonably anticipate being sued into court there, that is enough to establish a minimum contact with that forum State[56].

With the rise of online publications, however, the doctrine of minimum contact increases the risk of forum shopping. And this because plaintiffs can strategically start litigation before courts of States with very weak anti-SLAPP statutes, claiming that they have been libelled by means of online publications intentionally directed in such States. Of course, this may not be true at all, but in any case it forces defendants to move from the State where they usually live or carry out their activities to seek dismissal of the claim. And this requires time and costs, as a part of the SLAPP procedural strategy.

The case of Devin Nunes, a former Member of the U.S. House of Representatives from California from 2003 to 2022, might be a fitting example of this strategy. Indeed, since 2017, Nunes has filed several defamation suits, all of which are considered as many SLAPPs.

As a first case, we can mention the defamation lawsuit against Twitter Inc., Elizabeth A. 'Liz' Mair and her Mair Strategies LLC, as well as some anonymous twitter account holders like 'Devin Nunes' Mom' (@DevinNunesMom) and 'Devin Nunes' Cow' (@DevinNunesCow). The lawsuit was filed in March 2019 and sought $25 million for damages suffered by the plaintiff to his political reputation due to defamatory content posted on social media by some users, such as Liz Mair. The plaintiff was a citizen from California and Twitter a Delaware corporation headquartered in California, while only Liz Mair and Mair Strategies were from Virginia, Arlington County. Nonetheless, the claim was filed in Virginia, in the Circuit Court for the County of Henrico[57]. Indeed, as affirmed by Nunes' lawyers in the summons:

> Twitter is ubiquitous. Twitter is at home in Virginia. Twitter is registered to transact business in Virginia […]; it maintains a registered officed office and registered agent in Glen Allen, Virginia (Henrico County); millions of Virginians have Twitter accounts and use Twitter on a daily basis; Twitter targets Virginians every

[54] Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), § 316.
[55] Cf. Shaffer v. Heitner, 433 U.S. 186 (1997), § 204.
[56] Cf. Calder v. Jones, 465 U.S. 783 (1984).
[57] Cf. Nunes v. Twitter Inc. et al., CL 19001715-00 (Va. Cir. Ct., Henrico Cty. 2019).

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> minute of every day with advertisements of all kinds and earns millions of dollars in revenues from its Virginia source customers[58].

So, there was sufficient reasons to consider that the defendants were subject to personal jurisdiction in Virginia, being engaged in continuous and systematic business in Virginia and all having minimum contacts with that State. In May 2019, both Twitter and Liz Mair filed a motion to dismiss the claim on ground of *forum non conveniens*, proposing as well that Nunes was afforded to re-file his claim in California according to Virginia Code §9.01-265. Nevertheless, the Circuit Court for the County of Henrico dismissed the claim only on August 2021, concluding that Nunes had failed to adequately alleged any conspiratorial agreement and underlying tort by Liz Mair[59].

Interestingly, the same story was repeated a few months later with the $150 million defamation lawsuit filed by Devin Nunes against the McClatchy Company, Liz Mair and the Mair Strategies LLC. In this case, in particular, the McClatchy Company was pursued by Nunes because it was the owner of the Fresno Bee, a local Californian newspaper which in 2016 had published an article about a yacht party, involving cocaine and prostitution, organised by a company partly owned by Nunes. Also in this case, even though both McClatchy and the Fresno Bee were headquartered in California, the lawsuit was filed in Virginia, Albemarle County Circuit[60]. And this because, on the one hand, McClatchy was an investor in Moonlighting Inc., an IT startup based in Charlottesville, Virginia, Albemarle County, and because 'McClatchy publishes hundreds of stories a year on matters of unique concern to Virginians', on the other[61].

Of course, all these kind of minimum contacts with the forum State were used maliciously by Nunes, in order to avoid the application of the California's strict anti-SLAPP statute, as a part of his procedural strategy. After all, the so-called Virginia anti-SLAPP statute is really strong on substantive side, ranked 100 so A+, providing a broad notion of the speech covered by the immunity. But when it comes to procedural remedies, it only provides that

> any person who has a suit against him dismissed or […] otherwise prevails in a legal action, pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs (Va. Code Ann. § 8.01-223.2.)[62].

That is the reason why the Virginia anti-SLAPP law procedure is ranked D- with just 10 points, i.e., the minimum score for States with anti-SLAPP statutes[63].

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[58] The summons is available at https://www.courthousenews.com/wp-content/uploads/2019/05/nunes-complaint.pdf, last accessed on 18 June 2024.

[59] The order is available at https://www.documentcloud.org/documents/21047923-nunes-vs-twitter-mair-dismissal, last accessed on 18 June 2024. In the meantime, the claim against Twitter had previously been dismissed on the basis of Twitter's motion to dismiss based on preemption and immunity under 47 U.S.C. 230 filed in January 2020.

[60] Cf. The McClatchy Company et al., CL 19000629-00 (Va. Cir. Ct., Albemarle Cty. 2019).

[61] See T. BIASOTTI, The real costs of Devin Nunes's defamation lawsuit, in Columbia Journalism Review, 12 April 2019, available at https://www.cjr.org/united_states_project/mcclatchy-fresno-bee-devin-nunes.php, last accessed on 18 June 2024. The lawsuit was then withdrew by Nunes following the bankruptcy of the company.

[62] The rule has been updated from 1 July 2023. Before, to obtain the recovery of cost the defendant must have the suit against him 'dismissed'. Since such a result was not always easy to achieve, they finally granted attorney fees and costs recovery to any person who prevails in a legal action as a result of anti-SLAPP immunity laid down in the Section.

[63] Actually, as a result of these rumored cases – as well as the case of Jonny Depp and his former wife Amber Heard, filed in Fairfax County Circuit (John C. Depp, II v. Amber Laura Heard, CL-2019-2911 Va. Cir. Ct., Fairfax Cty. 2019) – in early 2020 Virginia lawmakers presented separate bills mirroring California's anti-SLAPP statute, albeit unsuccessfully.

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3.3. Anti-SLAPP Remedies at Federal Level

The practice of forum shopping does not only involve national courts, but also federal ones. To continue with the case of Devin Nunes, for instance, between 2019 and 2020 he initiated two defamation lawsuits against the Cable News Network Inc. (CNN) and The Washington Post, seeking $435 million and $600 million in damages respectively. Even though CNN was headquartered in New York and The Post in Washington DC, Nunes filed both cases before the U.S. District Court for the Eastern District of Virginia, Richmond Division, claiming that the alleged defamatory articles could had been accessed on the internet in Virginia and some of the alleged reputational injury had occurred in Virginia[64].

In this case, with two different orders of 21 May 2021, the court granted the CNN's and the Washington Post's motions to transfer and the cases were transferred to the Southern District of New York and to the District of Columbia, respectively. Indeed, according to the judge's opinion

> the Court has significant concerns about forum shopping, especially given that Nunes works in Washington, D.C., not in Virginia. As the Court has explained to Plaintiff's counsel on numerous occasions, the 'Court cannot stand as a willing repository for cases which have no real nexus to this district'.

While the mere fact that the articles were accessible on the internet from Virginia was not sufficient to warrant Nunes' choice of forum any significant preference, since internet access has no limiting principle when it comes to online publications. Indeed, if accepted, that notion would mean that, in similar cases involving online publications, a plaintiff's choice of forum would be given significant weight in virtually any judicial district because the internet is everywhere.

The fact remains, however, that this kind of disputes raise the problem of the application of national anti-SLAPP statutes before federal courts exercising diversity jurisdiction under Article 28 U.S. Code §1332. According to the *Erie* doctrine, indeed, federal courts should apply substantive national law and federal procedural law, i.e., the Federal Rules of Civil Procedure (hereinafter Fed. R. Civ. P.)[65]. So, establishing if anti-SLAPP statutes involve substantial or merely procedural issues is of utmost importance, having in mind that such a 'outcome-determination' test cannot be read without reference to the twin aims of the *Erie* rule, that is to say discouraging forum shopping and avoiding inequitable administration of the laws[66]. Moreover, even considering anti-SLAPP national rules as substantive laws, the *Shady Grove* doctrine requires as well to test if federal rules are sufficiently broad to control the issue at stake before the court. And when they are, they govern, unless they exceed statutory authorization under the Rules Enabling Act or Congress's rulemaking power under the Constitution[67].

So, following our Nunes common thread, it could happen that U.S. District Courts like that of the Northern District of Iowa – where in 2019 Nunes filed complaint for defamation against the political journalist Ryan Lizza and Hearst Magazine Media, Inc., the publisher of the Esquire – affirm that California anti-SLAPP statute does not apply in federal courts because it is pre-empted by the Federal Rules of Civil Procedure. Namely, because the procedural mechanisms created by Rules 12 and 56 Fed. R. Civ. P., governing motions to dismiss and motions for summary judgment respectively, are 'sufficiently broad' to control the means by which a defendant can challenge a claim before trial, and thus leave no room for the operation of the motion-to-strike procedure[68].

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[64] Cf. Devin G. Nunes, v. Cable News Network, Inc., Civil Action No. 3:19-cv-889 (E.D. Va.) and Devin G. Nunes v. WP Company, LLC, et al., Civil Action No. 3:20-cv-146 (E.D. Va.).
[65] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
[66] Hanna v. Plumer, 380 U.S. 460, 468 (1965).
[67] Shady Grove Orthopedic Associates, P. A. v. Allstate Insurance Co, 559 U.S. 393, 398 (2010).
[68] Cf. Devin G. Nunes v. Ryan Lizza and Hearst Magazines, Inc., 19-CV-4064-CJW-MAR (N.D. Iowa Aug. 5, 2020).

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A different solution, however, comes from the U.S. Ninth Circuit, considering that a motion brought on national anti-SLAPP statutes can either be analogous to a motion to dismiss or a motion for summary judgment under Articles 12 and 56 Fed. R. Civ. P., respectively. Thus, when anti-SLAPP motions to strike challenge only the legal sufficiency of a claim, district courts should apply the standard of Rule 12(b)(6) Fed. R. Civ. P., i.e., the standard for motions to dismiss, and consider whether a claim is properly stated. On the other hand, when anti-SLAPP motions to strike challenge the factual sufficiency of a claim, then the standard of Rule 56 Fed. R. Civ. P., i.e., the standard for motions for summary judgment, should apply. In the latter case, however, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court[69]. Which eliminates inconsistency between national anti-SLAPP statutes – in that case the Californian one – and Federal Rules of Civil Procedure.

Notwithstanding this, the issue is still being discussed among courts of Federal Circuit and disagreement centres on whether Federal Rules of Civil Procedure preclude the operation of anti-SLAPP motions in federal proceedings[70]. Called upon to address the issue at stake several times, the U.S. Supreme Court has always denied the writ of certiorari[71].

Of course, such a situation encourages malicious forum shopping in SLAPP cases and calls for a uniform anti-SLAPP law to be applied before federal courts, the adoption of which was last presented to Congress in 2022[72].

4. SLAPPs and Forum Shopping in the EU

4.1. Mapping SLAPP Cases in Europe

Turning to Europe, the phenomenon of SLAPPs appears to be more recent, at least in terms of social concern.

In this regard, a key event was the murder of the Maltese journalist and blogger Daphne Caruana Galizia in 2017 due to her engagement in anti-corruption investigations in Malta. At the time of her assassination, by an explosive device planted under her car seat outside her home in Bidnija, Daphne was facing forty-three civil and five criminal libel suits. Thus, with the aim of continuing her 'fight for press freedom and liberal democracy and against populism, corruption and impunity in Malta and internationally', in 2018 the Daphne Caruana Galizia Foundation was founded. The Foundation was then allocated €86,700 to coordinate the Coalition Against SLAPPs in Europe (hereinafter

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[69] See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 833–34 (9th Cir. 2018).

[70] For the positive answer cf. Roslyn La Liberte v. Joy Reid, 966 F.3d 79 (2d Cir. 2020); Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019), as revised (Aug. 29, 2019); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1357 (11th Cir. 2018); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015); Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013), aff'd, 791 F.3d 729 (7th Cir. 2015); Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 672-73 (10th Cir. 2018). On the other hand, for the application of anti-SLAPP statutes before Federal Courts cf. CoreCivic v. Candide Grp., 20-17285, (9th Cir. 2022), reaffirming U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999); Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010); Block v. Tanenhaus, 815 F.3d 218, 221 (5th Cir. 2016). On the topic see also W.J. SEIDLECK, Anti-SLAPP statutes and the federal rules: why preemption analysis shows they should apply in federal diversity suits, in University of Pennsylvania Law Review, 2018, 166, 2, pp. 547-577; K.E. SANER, Getting SLAPP-ed in federal court: applying state anti-SLAPP special motions to dismiss in federal court after 'Shady Grove', in Duke Law Journal, 2013, 63, 3, pp. 781-822.

[71] Cf. Clifford v. Trump, 818 Fed. Appx. 746, (9th Cir. 2020), cert. denied, 141 S. Ct. 1374 (2021); Yagman v. Edmondson, 723 Fed. Appx 463 (9th Cir. 2018), cert. denied, 139 S. Ct. 823 (2019); Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 897 F.3d 1224 (9th Cir. 2018), cert denied, 139 S. Ct. 1446 (2019).

[72] H.R.8864 - SLAPP Protection Act of 2022, 117th Congress (2021-2022), A Bill To amend Title 28, United States Code, to establish a procedure to dismiss, punish, and deter strategic lawsuits against public participation, and for other purposes, text available at https://www.congress.gov/bill/117th-congress/house-bill/8864, last accessed on 18 June 2024. Previously, other proposal had been introduced in Congress but without success, such as the Citizen Participation Act of 2009 (H.R.4364), the Free Press Act of 2012 (112 S. 3493) or the Speak Free Act of 2015 (114 H.R. 2304).

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CASE) and map SLAPP cases in twenty-nine European jurisdictions (namely Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Kosovo, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom, and Ukraine) from 2010 to 2021[73]. The first anti-SLAPP Report was finally published in March 2022 and then upgraded in 2023, considering also the year 2022 and including the jurisdictions of Georgia, North Macedonia, Greece, Cyprus, Moldova, Czech Republic, and Sweden[74].

According to the last Report, in 2010 only four cases in Europe were recorded as SLAPPs, while in 2022 SLAPP cases were 161, the highest amount in the reported period which counts 820 cases in total, the majority of which filed as many ordinary defamation lawsuits (590 cases)[75]. Of all these cases, only 81 (i.e., 9.5%) are classified as cross-border cases by the Report, which, however, adopts a narrow definition of cross-border cases, including only cases in which the claimant and the defendant are domiciled in different States. Of course, this reflects the dominance of exclusively-domestic SLAPP cases within the European context. Nevertheless, such a definition does not include those cases in which plaintiffs strategically file lawsuits in a third forum State, regardless of the parties' domicile.

Things change considerably when considering grounds of jurisdiction under 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 judgments in civil and commercial matters (hereinafter Brussels I Recast Regulation), in which the cross-border elements are not limited to the parties' domicile, but also include the facts of the case, which allow for special ground of jurisdiction. With regard to defamation lawsuits, in particular, facts of the case are relevant under Article 7(2) of the Brussels I Recast Regulation, which in matters related to tort provides for special jurisdiction of the courts of the place where the harmful event occurred or may occur, regardless of the parties' domicile.

Adopting such a different criterion to identify cross-border cases, a study commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament found out that 91.4% of total SLAPPs carried out in the EU Member States between 1st January 2022 and 31st August 2023 (i.e., 47 cases) had a cross-border elements[76].

Thus, considering that the majority of SLAPPs in Europe are founded on civil defamation laws (74.5% of total cases) and that the Brussels I Recast Regulation applies in 27 EU Member States, it comes as no surprise that the way of applying the special jurisdiction grounds for tort law under Article 7(2) of the Brussels I Recast Regulation plays a key role within the European context of SLAPPs.

4.2. 'Libel Tourism' Under Brussels I Recast Regulation

When it comes to the rationale of Article 7(2) of the Brussels I Recast Regulation, Recital No 16 of the Regulation states that:

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[73] CASE is a coalition of non-governmental organisations (NGOs) from across Europe united in recognition of the threat posed to public watchdogs by SLAPPs. CASE was funded by the Open Society Foundations (OSF) with a grant of €300,000 and it is hosted by the European Centre for Non-for-Profit Law (ECNL). The first Report was published by The Daphne Caruana Galizia Foundation, together with Greenpeace International and Amsterdam Law Clinics. For more information visit https://www.the-case.eu/, last accessed on 18 June 2024.

[74] SLAPPS: A Threat to Democracy Continues to Grow. A 2023 Report Update by The Coalition Against SLAPPs in Europe (CASE), July 2023, available at https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf, last accessed on 18 June 2024.

[75] Actually, the Report includes also criminal lawsuit, which constitute 20.9% of the SLAPPs recorded during the period, and injunctions (6.5%). In this study, however, we focus on civil lawsuits only.

[76] Open SLAPP cases in 2022 and 2023. The incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union, Policy Department for Citizens' Rights and Constitutional Affairs. Directorate-General for Internal Policies. PE 756.468 - November 2023, available at https://data.europa.eu/doi/10.2861/435693, last accessed on 18 June 2024.

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> In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

As clarified by the Court of Justice of the European Union (hereinafter CJEU) in *Bier*, however, the meaning of the expression 'place where the harmful event occurred' must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the 'place where the damage occurred' or the 'place of the event giving rise to it' (so-called 'ubiquity solution')[77].

In this light, when it comes to defamation by means of newspapers distributed in several Member States, in *Shevill* the CJEU pointed out that:

> […] the victim may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised[78].

The so-called 'mosaic solution' was then upheld by the CJEU in *eDate* after the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) came into effect and applied also to online defamation in the following terms:

> […] in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the 'centre of his interests' is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised[79].

Eventually, in *Gtflix* the CJEU clarified that Article 7(2) of the Brussels I Recast Regulation

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[77] CJEU, case C-21/76, Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA, Judgment of 30 November 1976, ECLI:EU:C:1976:166, referring to Article 5(3) of the 1968 Brussels Convention.

[78] CJEU, case C-68/93, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, Judgment of 7 March 1995, ECLI:EU:C:1995:61, referring to Article 5(3) of the 1968 Brussels Convention.

[79] CJEU, joined cases C-509/09 and C-161/10, eDate Advertising GmbH v X and Olivier Martinez, Robert Martinez v MGN Limited, Judgment of 25 October 2011, ECLI:EU:C:2011:685, referring to Article 5(3) of the Brussels I Regulation. The 'mosaic solution' has later been confirmed in CJEU, case C-194/16, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, Judgement of 17 October 2017, ECLI:EU:C:2017:766, which excluded it only for claims of rectification and correction of the defamatory information.

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> […] must be interpreted as meaning that a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning him or her but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal[80].

Of course, this requires plaintiffs to demonstrate the alleged damages in the State's territory of the court seized in order to have their claim granted by the court. Nonetheless, we know that in SLAPPs plaintiffs usually do not aim at winning the case on its merits, but rather at making the litigation as burdensome as possible for the defendant. Thus, the 'mosaic solution' turned out to be excellent picklock to open the doors of SLAPPs in Europe, by creating so many artificial 'close connections' between foreign courts and the facts of the case in defamation claims (so-called 'libel tourism'). Which definitely undermines the 'sound administration of justice' that the Brussels I Recast Regulation aims at facilitating, as stated in the aforementioned Recital No 16[81].

I. *4.3. Examples of Forum Shopping in Defamation Cases*

In this light, it comes as no surprise that according to the first CASE Report the majority of cross-border SLAPPs were filed in the UK, where high legal costs and convoluted rules of procedure are particular attractive to plaintiffs[82]. This was the case, for instance, of the lawsuit filed in 2018 before the High Court of Justice, Queen's Bench Division, by Wafic Rida Saïd, a Syrian-Saudi-Canadian businessman, residing in the Principality of Monaco, against *L'Express*, a French magazine, and its director. The French magazine was sued because of article speaking about smuggling activities of Mr Saïd, under the title '*Le Diplomate aux mallettes de cash*' (The Diplomat with Briefcases full of cash). Based on the witness statement of an employee in the legal department of the magazine, it turned out that 214 copies of the magazine were sold to subscribers in the UK, while about 65 copies were sold at newsagents or kiosks each month (including Scotland and Northern Ireland). In addition, *L'Express* also operated a website on which an online version of the magazine was distributed and a very similar article was published. According to the witness statement, there were 252 website visits to such article from within the UK. On the other hand, the global circulation of the printed version of the magazine was about 300,000 copies and the global number of visitors to the online article over 32,000. Thus, the decision of Mr Saïd to sue *L'Express* in the UK was clearly questionable, because of the very limited number of people who read the article in that country, at least compared to those who read it elsewhere. Nonetheless, the High Court of Justice affirmed that it had jurisdiction over the case according to the CJEU case law over Article 7(2) of the Brussels I Recast Regulation, and finally held that the claimant had demonstrated a good arguable case for the cause of action[83].

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[80] CJEU, case C-251/20, Gtflix Tv v DR, Judgment of 21 December 2021, ECLI:EU:C:2021:1036.

[81] On the topic see also J. BORG-BARTHET, The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform, Centre for Private International Law Working Paper Series, No. 7, University of Aberdeen, 2020.

[82] Cf. Shutting Out Criticism: How SLAPPs Threaten European Democracy. A report by The Coalition Against SLAPPs in Europe (CASE), March 2022, p. 65, available at https://www.the-case.eu/wp-content/uploads/2023/04/CASEreportSLAPPsEurope.pdf, last accessed on 18 June 2024. Event though the 2013 Defamation Act has introduced the requirement of 'serious harm' for defamation lawsuit (Article 1), it remains a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true (Article 2).

[83] See Saïd v Groupe L'Express & Anor [2018] EWHC 3593 (QB) (21 December 2018). On the other hand, in accordance with Bolagsupplysningen (n 78 above) the High Court of Justice denied to grant an injunction to restrain publication of the article on the internet, given that the claimant had not shown a good arguable case that his centre of interests was in England and Wales. For other examples of

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Of course, after Brexit the UK is no longer part of the EU and therefore no longer subject to the rules on jurisdiction laid down in the Brussels I Recast Regulation. But other courts within the EU remains more attractive for SLAPPs as well, depending on the plaintiffs' strategy, bearing in mind that no EU Member State has so far enacted targeted legislation to provide protection against SLAPPs[84].

Recognizing that anti-SLAPP legislation is of utmost importance to ensure the protection of media freedom in the EU, on April 2018 a cross-party group of Members of the European Parliament (MEPs) encouraged the European Commission to propose such a legislation[85]. With a Resolution of 11 November 2021, the European Parliament did the same, urging the Commission to present a proposal for a measure to address SLAPPs, by analysing anti-SLAPP best practices applied outside the EU, and namely in the U.S. In particular, the Resolution stressed the need for the early dismissal rule, requiring that in SLAPP cases plaintiffs justify why their claim should not be considered abusive[86].

4.4. The Directive (EU) 2024/1069 ('Daphne's Law')

Largely based on a draft proposed by a coalition of different NGOs from across Europe[87], a Proposal for a Directive on protecting persons involved in SLAPPs was finally adopted on April 2022[88]. The Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), also known as 'Daphne Law' (hereinafter Anti-SLAPP Directive), was then enacted on 11 April 2024 and came into force on 6 May 2024.

As stated in its Article 1,

> this Directive provides safeguards against manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications brought against natural and legal persons on account of their engagement in public participation[89].

SLAPPs filed in the UK cf. Kumlin & Anor v Jonsson & Ors [2022] EWHC 1095 (QB) (11 May 2022) and Euroeco Fuels (Poland) Ltd & Ors v Szczecin And Swinoujscie Seaports Authority SA & Ors [2018] EWHC 1081 (QB) (09 May 2018).

[84] Moreover, it is worth noting that non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, are excluded from the scope of 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). So that the absence of procedural anti-SLAPPs remedies is even more exacerbated by the lack of uniform conflict-of-laws rules when it comes to defamation lawsuits.

[85] See D. Casa (EPP), A. Gomes (S&D), M. Macovei (ECR), M. Pagazaurtundúa (ALDE), S. Kouloglou (GUE) and B. Javór (Greens), correspondence with Vice-President Timmermans, 11 April 2018 (https://www.anagomes.eu/PublicDocs/88ffcc68-5169-4486-9614-105aab81d82a.pdf, last accessed on 18 June 2024).

[86] European Parliament resolution of 11 November 2021 on 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)), available at https://www.europarl.europa.eu/doceo/document/A-9-2021-0292_EN.html, last accessed on 18 June 2024.

[87] Protecting public watchdogs across the EU: A proposal for an EU anti-SLAPP law, https://www.mfrr.eu/protecting-public-watchdogs-across-the-eu-a-proposal-for-an-eu-anti-slapp-law/, last accessed on 18 June 2024.

[88] 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'), Brussels, 27.4.2022, COM(2022) 177 final, 2022/0117 (COD), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0177, last accessed on 18 June 2024. On the topic see also F. FARRINGTON and M. ZABROCKA, Punishment by Process: The Development of Anti-SLAPP legislation in the European Union, ERA Forum (2023), https://doi.org/10.1007/s12027-023-00774-5, last accessed on 18 June 2024.

[89] According to Article 4(3) Anti-SLAPP Directive,

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

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As for the meaning of 'cross-border implications' for the purposes of the Directive, Article 5 states that

> […] a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised and all other elements relevant to the situation concerned are located only in that Member State.

This means that merely domestic SLAPPs are excluded from the application of the Directive, even if all EU Member States are strongly encouraged to also apply the procedural safeguards laid down in the Directive to their domestic SLAPP cases.

As for such procedural safeguards, the rules for early dismissal of manifestly unfounded claims provided by Chapter III of the Directive are of course the core part of the new legislation. Indeed, according to Article 11 of the Anti-SLAPP Directive,

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

As per Article 12 of the Anti-SLAPP Directive,

> The burden of proving that the claim is well founded rests on the claimant who brings the action. Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to substantiate the claim in order to enable the court to assess whether it is not manifestly unfounded.

When it comes to remedies, on the other hand, Article 14(1) of the Anti-SLAPP Directive provides for the award of costs, ensuring that

> […] a claimant who has brought abusive court proceedings against public participation can be ordered to bear all types of costs of the proceedings that can be awarded under national law, including the full costs of legal representation incurred by the defendant unless such costs are excessive.

Still, in accordance with Article 15 of the Anti-SLAPP Directive,

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

Last but not least, acknowledging that the threat of SLAPPs in third-countries courts may also affect persons engaged in public participation who are domiciled in the EU (Recital No 43), the Directive also provides for special protection against third-country judgments.

In particular, Article 16 of the Anti-SLAPP Directive establishes new grounds for refusal of recognition and enforcement of a third-country judgment, stating that

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> Member States shall ensure that the recognition and enforcement of a third-country judgment in court proceedings against public participation by a natural or legal person domiciled in a Member State is refused, if those proceedings are considered manifestly unfounded or abusive under the law of the Member State in which such recognition or enforcement is sought[90].

In addition, Article 17(1) of the Anti-SLAPP Directive provides for a new ground of jurisdiction for actions related to third-country proceedings, by stating that

> Member States shall ensure that, where abusive court proceedings against public participation have been brought by a claimant domiciled outside the Union in a court or tribunal of a third-country against a natural or legal person domiciled in a Member State, that person may seek, in the courts or tribunals of the place where that person is domiciled, compensation for the damage and the costs incurred in connection with the proceedings before the court or tribunal of the third-country[91].

Of course, the Anti-SLAPP Directive marks an important step forward to the implementation of anti-SLAPP laws in Europe[92]. The EU Member States shall indeed bring into force any provisions necessary to comply with the procedural safeguards laid down in the Directive by 7 May 2026. Consequently, by that date, we might find much more uniform procedural remedies against SLAPPs in the EU than we currently have in the U.S. The fact remains, however, that 'libel tourism' within the EU could be probably better challenged by overcoming the 'mosaic solution' that the CJEU has derived from Article 7(2) of the Brussels I Recast Regulation when it comes to defamation by means of online publications. That is, by limiting the jurisdiction in such cases to only the courts of the State where the defendant is domiciled, according to the general rule under Article 4 of the Brussels I Recast Regulation. The EU legislator, however, seems to be aware of this, expressly recommending that any future review of the Regulation (EU) No 1215/2012 should assess the SLAPP-specific aspects of the rules on jurisdiction (Recital No 51)[93].

5. Conclusion: Worldwide Dimension of SLAPPs

We have seen how strategic lawsuits against public participation are made possible through an abusive use of procedural rules. Thus, tackling the problem means first of all seeking for procedural remedies.

Faced to the increase of SLAPPs during the 1980s, in the U.S. national anti-SLAPP statutes began to be enacted in early 1990s. Nonetheless, lack of uniformity has caused the growing of another typical procedural strategy used in

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[90] As stated in Recital No 43 Anti-SLAPP Directive,
> It is for Member States to choose whether to refuse the recognition and enforcement of a third-country judgment as manifestly contrary to public policy (ordre public) or on the basis of a separate ground for refusal.

[91] According to Article 17(2) Anti-SLAPP Directive, however,
> Member States may limit the exercise of jurisdiction while proceedings are still pending in the third-country.

[92] In this regard, an anti-SLAPP law is currently under discussion also in the UK Parliament: Strategic Litigation Against Public Participation Bill, Originated in the House of Commons, Session 2023-24 (https://bills.parliament.uk/bills/3544, last accessed on 18 June 2024).

[93] See J. Borg-Barthet, B. Lobina and M. Zabrocka, The Use of SLAPPS to Silence Journalists, NGOs and Civil Society, European Parliament study, 2021, 51, available at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)694782, last accessed on 18 June 2024. Even though with particular regard to the violation of privacy rights on the internet, the need for overcoming the mosaic solution under Article 7(2) of the Brussels I Recast Regulation is also suggested in B. HESS et al., The Reform of the Brussels Ibis Regulation - Additional Proposals, Vienna Working Paper, 20 March 2024, p. 28. Moreover, the problem of SLAPPs is also addressed in the Final report of the European Commission Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation, Publications Office of the European Union, 2023, available at https://data.europa.eu/doi/10.2838/14604, last accessed on 18 June 2024 (Question 11).

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SLAPP cases, which is forum shopping. Indeed, by creating artificial and frivolous 'minimum contacts' with a certain State forum, plaintiffs started to sue targeted people far away from their home country seeking not only their personal discomfort, but also the most favourable procedural context to lodge their SLAPP.

From this point of you, while the U.S. legal framework remains very fragmentated, in Europe – where SLAPPs have increased more recently – national laws of the Member States are likely to achieve a high level of uniformity in the near future. Indeed, the Anti-SLAPP Directive provides for minimum standards of procedural safeguards to be achieved by every Member States by 2026, such as early dismissal, security for costs, support for the defendant in court proceedings by a third-party, award of costs and penalties.

Nowadays, however, SLAPPs are no more limited to continental boundaries. When it comes to defamation by means of online publication, cross-border disputes can indeed have a worldwide dimension, allowing plaintiffs to play their game on a global chessboard.

A few months before her assassination, for instance, Daphne Caruana was facing a SLAPP filed by Pilatus Bank and its owner Ali Sadr Hasheminejad, as a consequence of an article she posted on her blog 'Running Commentary Daphne Caruana Galizia Notebook'. The claim was based on defamation and tortious interference with business expectancy, as a result of the alleged 'defamatory statements' published by Daphne, asserting that Mr Sadr had created and used Pilatus Bank for the purpose of criminal money laundering. Even though both the defendant and the Bank were from Malta, and Mr Sadr from the District of Columbia, the lawsuit was filed in the Superior Court of the State of Arizona, County of Maricopa. Indeed, according to the summons, the action arose out of defendant's false and defamatory statement published on her blog, located on the word wide web at daphnecaruanagalizia.com and registered with Registrar GoDaddy.com LLC[94]. Thus, upon registering the domain name, the defendant had agreed to be bound by the GoDaddy Universal Terms of Service Agreement, which among others states:

> GoDaddy and you agree that any controversy […] shall be filed only in the Superior Court of Maricopa County, Arizona, or the United States District Court for the District of Arizona, and each party hereby irrevocably and unconditionally consents and submits to the exclusive jurisdiction of such courts for any such controversy. You also agree to waive the right to trial by jury in any such action or proceeding.

We will never know the issue of the process, since Daphne was killed before its commencement and the lawsuit dismissed. What we certainly know, however, is that if Daphne had not been killed, she would likely have had to defend herself before the court in Maricopa, in the U.S., a State with one of the lowest anti-SLAPP statutes, graded only 'D' by the IFS Report with regard to procedural safeguards.

On the other hand, it is worth noting that in such cases, in the near future, protection against third-country judgments under Article 16 of the Anti-SLAPP Directive could certainly helps defendants like Daphne. Indeed, if the strategy of suing targeted persons out of Europe cannot be avoided at all, refusing the recognition and enforcement of a third-country judgment when the proceedings are considered manifestly unfounded or abusive might be the most appropriate counter-strategy. And this, considering that Article 17 of the Anti-SLAPP Directive also allows persons domiciled in the EU and involved in any SLAPP proceedings outside the EU to claim damages and costs incurred in connection with those proceedings in the courts of the Member State where they are domiciled. Which is of paramount importance when targeted people are sued in legal system where the 'loser-pays' principle does not apply, like in the U.S.

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[94] The summon is available at https://www.maltatoday.com.mt/news/national/84142/pilatus_wanted_jury_trial_in_the_us_against_caruana_galizia_for_millions_in_damages, last accessed on 18 June 2024.

ISSN 2533-0632
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Of course, the essence of what 'abusive court proceedings against public participation' are will have to be further shaped by European courts. On the other hand, the standards of 'manifestly unfounded' and 'abusive' to deny recognition and enforcement of foreign judgments definitely rely on the national laws of each Member State. Nonetheless, Article 4(3)(d) of the Anti-SLAPP Directive suggests some elements which usually characterize a SLAPP, and namely the use in bad faith of 'procedural tactics', such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith. Which demonstrates, once again, the ultimate relevance of procedural issues when it comes to identifying a SLAPP.

As one of the most eminent Italian proceduralists wrote in 1950s, the process is a game, and the parties' ability consists precisely in winning by using procedural rules to their greatest advantage[95] – which holds true. However, when these rules result in blatantly unfair play, they must be adapted to ensure a fairer balance between the parties. When such a game is played on a global scale, these adaptations must include transnational solutions to address the issue. In today's Digital and Social Media Era, SLAPPs and anti-SLAPP remedies must be approached with this perspective in mind.

[95] See P. CALAMANDREI, Il processo come giuoco, in Rivista di Diritto Processuale, 1950, 1, pp. 23-51.