

CCBE Position on
the draft Directive on protecting persons who engage
in public participation from manifestly unfounded or
abusive court proceedings
and
the Commission Recommendation on protecting
journalists and human rights defenders who engage
in public participation from manifestly unfounded or
abusive court proceedings
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EXECUTIVE SUMMARY

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries and, through them, more than 1 million European lawyers.

With this position paper, the CCBE highlights the most important issues relevant to the protection of persons who are engaged in public participation from manifestly unfounded or abusive court proceedings, including lawyers. By providing its comments and suggestions, the CCBE strives to ensure the right balance between access to justice for everyone and safeguards against manifestly unfounded or abusive court proceedings with cross-border implications.

While welcoming and supporting the general approach and intention of the draft directive, the CCBE cautions that the proposal should not jeopardise the right of access to justice and access to legal proceedings in order to ensure the equal protection of rights. In this regard, the CCBE considers that several aspects of the draft directive requires some further improvement.

In its position paper, the CCBE provides comments and suggestions on several articles of the draft directive, including the subject and scope, definitions, understanding of cross border cases, and articles covering procedural aspects.

The CCBE also highlights that lawyers may be victims of unfounded and abusive court proceedings themselves when strategic lawsuits against their public participation are filed with the purpose to silence lawyers.

In addition, the CCBE submits its comments to the relevant Commission Recommendation and highlights that when carrying out their duties, lawyers shall respect principles of dignity, conscience, integrity and loyalty. These principles are prescribed in the [CCBE Code of Conduct and the Charter of Core principles of the European Legal Profession](#), as well as in the national ethical/deontological rules set by relevant national Bars. This competence of national Bars and Law Societies of Member

States is considered as one of the utmost important cornerstones of self-regulation of the legal profession and should therefore be respected.

The CCBE also agrees that there is a need for awareness raising and training for legal professionals, including for lawyers and the general public. The CCBE calls for an adequate legal aid mechanism in cross-border cases for victims and targets of manifestly unfounded and abusive court proceedings and provision of sufficient funding for legal aid in cross-border cases at EU level.

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers.

The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. Several areas of special concern to the CCBE include access to justice, the development of the rule of law, and the protection of clients through the promotion and defence of the core values of the profession.

The CCBE always places great emphasis on the respect for the rule of law, democratic principles and fundamental rights. Therefore, the CCBE welcomes the commitment and the efforts of the European institutions to strengthen the rule of law, upholding democracy and fundamental rights – priorities which are high on the EU political agenda.

In November 2021, a [resolution of the European Parliament](#) was adopted on strengthening democracy and media freedom and pluralism in the EU. The European Parliament proposed a series of measures to counteract the threat that Strategic Lawsuits Against Public Participation (SLAPPs) pose to journalists, NGOs and civil society in Europe and expressed their worries about the effect of these lawsuits on EU values, the internal market and the EU justice system.

Following this call and based on its political priorities, in the end of April 2022, the European Commission launched two instruments to improve the protection of journalists and human rights defenders from abusive court proceedings and SLAPPs, i.e. against particular forms of harassment used primarily against journalists and human rights defenders to prevent or penalise speaking up on issues of public interest (See the [draft Directive](#) and the [Commission Recommendation](#)).

The Commission Recommendation complements the draft Directive, is directly applicable and according to the Commission “sets out guidance for Member States to take effective, appropriate and proportionate measures to address manifestly unfounded or abusive court proceedings against public participation and protect in particular journalists and human rights defenders against such proceedings, in full respect of democratic values and fundamental rights”.

Draft Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings

General comments

The CCBE has already submitted a first position paper in relation to abusive litigations targeting journalists and rights defenders¹ and also responded to the public consultation on the anti-SLAPP initiative in the beginning of January 2022.

With this position paper, the CCBE highlights the most important issues relevant to the protection of persons who are engaged in public participation from manifestly unfounded or abusive court proceedings, including lawyers.

The CCBE is aware of the possible existence of imbalance of power and resources between parties – claimants and defendants – which may undermine the right to a fair trial. Therefore, while welcoming and supporting the general approach and intention of this proposal, the CCBE strongly calls that this proposal should not jeopardise the right of access to justice and access to legal proceedings in order to ensure an equal approach for everyone to protect their rights. Access to justice cannot be obtained without the instruments of claims and civil law proceedings, which are granting access to justice to those whose rights have been infringed.

Therefore, the CCBE considers that several aspects of the draft directive need some further improvement, especially when it comes to definitions and possible lists of criteria to apply specific procedures suggested by the draft directive. Civil claims per se are not abusive. Civil claims may be considered as being abusive in case the **aim** of the claim is not access to justice, but harassment and silencing of the defendant. Civil proceedings may be abused as mere tactics used by the claimant for other **purposes** than gaining access to justice (as referred to in the Proposal for the Directive under point 2 Legal basis). So, the essence of what makes the **difference** between civil proceedings and claims as instruments granting access to justice on the one hand, and abusive claims and abused civil proceedings on the other hand, is to be seen in the **aim** of a claim and the **purpose** of the civil proceedings **only**: If the aim of the claim is harassment and silencing of the defendant, if civil proceedings are used by the claimant for other purposes than gaining access to justice, the issue of SLAPP is to be tackled (as explained in the Proposal point 2). In both scenarios, there is a need to have objective criteria in order to determine whether the aim or the purposes of a claim are abusive.

In principle, a good intention to mitigate and eliminate the abuse of court proceedings by claimants having a more powerful position than defenders may turn into the risk of limiting access to courts and may result into a denial of justice. Therefore, the CCBE believes that all necessary measures should be taken to mitigate any possible risks and to clarify safeguards foreseen by the draft Directive, which may otherwise lead to possible restrictions for access to justice which would not be acceptable.

By providing its comments and suggestions, the CCBE strives to ensure the right balance between access to justice for everyone and safeguards against manifestly unfounded or abusive court proceedings with cross-border implications.

The CCBE supports commitments and efforts to discourage unfounded or abusive court proceedings brought against natural and legal persons because of their engagement in public participation. The CCBE however at the same time is committed to the rule of law, to the right to access to justice and to a fair trial.

¹ [CCBE position on abusive litigations targeting journalists and right defenders](#) adopted in December 2021.

According to the CCBE, a common legal instrument for cross-border cases would limit any possible forum shopping and the possible multiplication of court proceedings initiated in different EU Member States which may appear due to existing divergencies in terms of national procedures and levels of safeguards in EU Member States.

The legal systems of several Member States already provide instruments to tackle abusive and manifestly unfounded court proceedings. There are instruments to deal with parties' tactics in the proceedings aiming at delaying these proceedings, there are instruments to sanction inadequate behaviour of parties in the proceedings, and there are instruments to discipline claimants (and defendants) not following civil procedural rules or judges' instructions, etc. However, the existence of such specific instruments varies from country to country and the procedural rules of the Member States differ substantially. While some procedural codes already provide for certain instruments that prevent abusive proceedings, this is not a common approach in all Member States. Therefore, the choice of a legal instrument as suggested in the draft Directive needs to leave the individual Member States with a certain flexibility when transposing and implementing the provisions of the directive into national law. Legal instruments tackling abusive claims and court proceedings need to be adequate with regard to the fact that any abusive character of the claim and the court proceedings needs to be first clearly identified before applying the legal instruments suggested.

Moreover, the CCBE indicates that the proposal for the draft directive should be fully in line with the competence of the EU according to Article 81.2.f) TFE. Ensuring the elimination of obstacles to the proper functioning of civil proceedings and "Judicial cooperation in civil matters having cross border implications" as provided for in Art 81.2.f) TFE is referring to civil procedural rules governing civil claims and proceedings, but may not necessarily cover measures to sanction the pre-procedurally set abusive aim of a claim nor the wide definition of cross-border implications as suggested under 4.2 of the Draft Directive.

The CCBE stresses the important role of lawyers representing claimants and defendants in cases possibly related to unfounded and abusive court proceedings. Lawyers, however, might be limited in their ability to identify a potentially abusive aim of a claimant. The CCBE stresses that lawyers should always act respecting the existing ethical and deontological rules.

It is also of the utmost importance to highlight that lawyers may also be victims of unfounded and abusive court proceedings themselves when strategic lawsuits against their public participation are filed with the purpose to silence lawyers.

Subject and scope

The CCBE welcomes the broad approach chosen by the Commission in terms of possible targets of unfounded or abusive court proceedings. Therefore, the CCBE welcomes the suggestion to ensure safeguards for any natural or legal person on account of their engagement in public participation. We consider that under the current approach lawyers, as well as any representative of the legal profession, are covered by this provision as potential victims of unfounded or abusive court proceedings.²

Article 1³ of the draft Directive also refers to two particular examples, using the wording "in particular journalists and human rights defenders".

The CCBE would prefer the wording "e.g." or "for example" instead of "in particular" in order to avoid the wrong impression that other professional groups are not covered by the directive. Furthermore, the CCBE would like to point out the following: If, during the discussions of the draft proposal, it is

² The questionnaire was addressed to the CCBE members in August 2022. According to the answers provided, the CCBE member Bars and Law Societies cannot exclude the possibility that cases where a lawyer can be a victim of unfounded or abusive court proceedings, may happen.

³ Article 1: This Directive provides safeguards against manifestly unfounded or abusive court proceedings in civil matters with cross-border implications brought against natural and legal persons, in particular journalists and human rights defenders, on account of their engagement in public participation.

suggested and decided to amend this list of particular examples with reference to additional professional groups (in Article 1 or other relevant articles of the draft Directive), for example, academics, scientists, NGOs, environment activists, etc., an explicit reference to lawyers should also be included.

As far as the Proposal is excluding, in particular, revenue, customs or administrative matters of liability of the State for facts and omissions in the exercise of the State authority (*acta iure imperii*), the CCBE would suggest clarifying the reasons for such exclusion in order to ensure that similar matters can be treated in a similar way.

Definitions

The CCBE agrees that abusive court proceedings may be used to limit public participation, therefore the CCBE supports the approach taken to provide a definition of “public participation” and “matter of public interest” in the draft Directive.

However, the CCBE considers that the current wording of these terms is not fully comprehensible and clear. Therefore, the CCBE suggests considering the need to clarify these notions in the legal act, inter alia excluding the circular way of defining these terms⁴.

Given the importance of the right to access to justice, the CCBE believes that Article 3.3. is not sufficiently clear and suggests to consider amending the definition of “abusive court proceedings against public participation” by listing such additional indicators which could be of the utmost importance for identifying the aim and the purpose of the abusive claim and court proceedings:

“Indications of such an abusive purpose or aim can be:

- (a) the **manifestly** disproportionate, excessive or unreasonable nature of the claim or part thereof;*
- (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;*
- (c) intimidation, harassment or threats on the part of the claimant or his or her representatives;*
- (d) economic advantage and/or political influence exploited by the claimant putting the pressure on the defendant;*
- (e) partially or fully unfounded arguments relied upon by the claimant;*
- (f) unusually aggressive or disproportionate remedies sought from the defendant;*
- (g) engagement of the claimant in procedural/litigation tactics such as delaying proceedings, causing disproportionate costs to the defendant in the proceedings, selecting a forum in which the law or other aspects of the litigation are favourable, and/or pursuing appeals with little or no prospect of success;*
- (h) the lawsuit targets individuals, or others not directly involved in the initial communication, as well as the organizations they work for;*
- (i) the lawsuit is accompanied by a public relations offensive designed to bully or intimidate actors participating in public debates;*
- (j) a history of legal intimidation (e.g. threats of legal action designed to scare critics into silence without the need of a full-blown lawsuit).”*

The CCBE understands that this list of indicators is meant to be non-exhaustive and to leave a margin of discretion to the court. However, all criteria should be considered in an overall view and it should not be possible for the court to assume ‘abusive court proceedings against public participation’ if not at least one of these criteria is fulfilled.

⁴ For example, see Article 3.2. general part and specific part in subpoint b).

In addition, the CCBE considers that ‘abusive court proceedings against public participation’ could also include actions against lawyers in the context of their duties.

The decision, if a claim is considered to be **unfounded**, is usually taken according to the applicable **substantive** law, which is the basis for the court decision to dismiss the lawsuit. Hence, it is suggested to provide criteria to identify ‘manifestly’ unfounded claims in order to identify them among unfounded claims which are not ‘manifestly unfounded’.

Regarding the possible instruments to identify the potentially abusive aim of the claim and/or the proceedings, it is suggested for the sake of clarification to provide examples and to refer to specific procedural instruments enabling the Courts to identify the abusive aim of the claim and/or procedure.

Cross-border implications

Article 4.2.

The scope of the draft Directive refers to cross-border cases, i.e. respecting the national competence of the Member States and the existing procedures at national level. However, the CCBE recognises that the current wording of Article 4.2.a) and b) is excessively broad and therefore suggests deleting Article 4.2 entirely. Such a broad definition of “cross-border” implication seems to be inconsistent with the principle of subsidiarity. The Article 81(2)f of the Treaty on the Functioning of the European Union does not provide sufficient basis for such a broad understanding of “cross-border” implications.

Procedural safeguards

Article 6

The CCBE considers that this Article needs clarification. The civil law proceedings are based on the principle of **party disposition**. Proceedings are opened on the initiative of the claimant only. In case the claimant is not continuing the proceedings, it is **not** up to the judges’ decision to continue the proceedings **ex officio** besides the discontinuation of proceedings by the claimant.

Article 7

There are different limitations prescribed in general procedural rules of different Member States for third-party interventions at national level (such as, for example, existing legal interest of the third party, concrete stage of proceedings, subject matter of the claim, sufficient link to the party, consent of the party, *locus standi*, special nature of cases, etc.), which are assessed before the court takes the decision on an intervention of the third party in proceedings.

Taking into account this divergent approach in Member States, the CCBE stresses the need to respect the existing basic principles of national law and procedural rules for third-party interventions at national level, meaning that the Member States should have wide discretion on how to implement Article 7 into their national law.

In this regard, the CCBE suggests to improve this Article by making a reference to public interest in Article 7, for example:

Member States shall take the necessary measures to ensure that a court or tribunal seised of court proceedings against public participation may accept that non-governmental organisations safeguarding or promoting the rights of persons engaging in public participation may take part in those proceedings **[according to national law and] when such taking part is viewed by the court as being in the public interest**, either in support of the defendant or to provide information.

Article 8

As regards Article 8 and security, the indicators identifying the abusive aim and purpose of the abusive proceedings, as suggested in Art 3.3, should be assessed.

Article 9

As regards Article 9 and early dismissal, the indicators identifying the abusive aim and purpose of the abusive court proceedings, as suggested in Article 3.3, should be assessed.

The CCBE highlights the need to ensure that the right of both sides to be heard during that process, the full reasoning of the decision adopted and the existence of legal remedies for a full review of the case is fully guaranteed by the Member States.

Article 12

The CCBE considers that the current title and wording of Article 12 could be misleading and therefore suggests deleting this Article. As regards the rules covering the burden of proof and the obligation to provide the proof, the existing national substantive law rules and procedural rules would apply.

In case the deletion is not considered, the CCBE would suggest the following rewording of this Article:

*Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to **provide sufficient evidence that the claim has some prospect of success; this does not apply to facts, regarding which the burden of proof lies on the defendant according to national law.***

Article 16

This Article prescribes the introduction of penalty on the party who brought the abusive claim. Since the draft article refers only to such possibility for courts but not as an obligation, the CCBE stresses the importance that this Article must be implemented in accordance with existing national provisions imposing sanctions on parties who are infringing procedural rules or judges' instructions.

Article 17

The CCBE suggests deleting this Article since this provision would result into an instruction, how national courts should interpret "*ordre public*", which would mean an extensive interference with the competence of the courts.

Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings

Deontological rules

Lawyers have a central position in the administration of justice. They defend citizens' rights by assisting and representing them, and liaise between citizens and courts. In this capacity, they hold a key position in ensuring the trust of the public in actions of the courts – the mission of which is fundamental in a democratic system governed by the rule of law. Essential principles guide lawyers' behaviour in all circumstances, including independence, the observance of professional secrecy and confidentiality, the refusal to counsel, assist or defend a client if the lawyer has a conflict of interest. Lawyers shall be competent, devoted, diligent and cautious with their clients. When carrying out their duties, lawyers shall respect principles of dignity, conscience, integrity and loyalty. These principles are prescribed in the [CCBE Code of Conduct and the Charter of Core principles of the European Legal Profession](#), as well as in the ethical regulations of national Bars and Law Societies. In this regard, it is of the utmost importance to ensure that these principles are fully respected.

The CCBE strongly stresses that the setting of ethical/deontological rules is the competence of national Bars and Law Societies of Member States and is considered as one of the utmost important cornerstones of self-regulation of the legal profession. In addition, it should be underlined that deontological rules are applicable and obligatory for all lawyers – members of the relevant Bars.

This has already been recognised by the relevant case law of the European Court of Justice and the European Court of Human rights.⁵

Moreover, already existing deontological rules at national level for lawyers directly or indirectly already forbid or discourage the initiation of manifestly unfounded or abusive court proceedings and govern the conduct of lawyers in such cases, including, in certain circumstances, prescribing relevant disciplinary procedures followed by relevant disciplinary sanctions.

The CCBE has gathered information on the relevant national ethical/deontological rules regulating abusive behaviour of lawyers and referring to manifestly unfounded or abusive court proceedings. The CCBE will analyse in detail the gathered information and consider whether there is an (additional) need to issue specific policy guidance on this aspect.

The CCBE can see the positive intention of the Commission when inviting the Member States to encourage "self-regulatory bodies and associations of legal professionals to align their deontological standards, including their codes of conduct, with the relevant Recommendation" of the Commission. The recommendation allows the Commission to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. The CCBE assumes these

⁵ For example:

The European Court of Justice underlined the "need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience" (Reisebüro Broede (case C-3/95), 12.12.1996, § 38; Wouters (case C-309/99), 19.02.2002, § 97).

The European Court of Human Rights recognised the significance of self-regulation by considering "that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount" (ECtHR, Jankauskas v. Lithuania (case n° 50446/09), 27.06.2017, § 78).

recommendations are of a non-binding nature and lack legal consequences. However, it should be acknowledged that such invitation and encouragement may give a wrong impression that the Commission is inviting the Member States to govern and influence the self-regulatory bodies, thereby undermining the independence of the legal profession and accordingly negatively influencing the independence of the judicial system as such, while it is one of the basic elements for the rule of law.

This recommendation could also give a wrong impression that currently there are no ethical or deontological rules forbidding and discouraging the initiation of manifestly unfounded or abusive court proceedings or governing the conduct of lawyers in such cases, including, in certain circumstances, prescribing relevant disciplinary procedures. Moreover, since the final provisions of the Commission recommendation oblige Member States by the end of 2023 to transmit to the Commission a report on the implementation of the recommendation, the binding political and practical nature of this Recommendation should be however recognised.

Training and awareness raising

The CCBE agrees that there is a need for awareness raising and training for legal professionals, including for lawyers and the general public as potential targets and victims of manifestly unfounded or abusive court proceedings to improve their knowledge and skills to effectively deal with these court proceedings.

The CCBE notes the identified and listed aspects in the Recommendation which could be covered by training.⁶ In this regard, the CCBE calls for a need to ensure that relevant EU funding is available for such awareness raising and training activities as mentioned in the Recommendation.

The CCBE also recognises its role on promoting the importance and need of such training among lawyers.

Support mechanisms

As regards the call of the Commission to the Member States to ensure that targets and victims of manifestly unfounded and abusive court proceedings have access to support, the CCBE stresses the importance to ensure that the provided legal support and assistance is of a high quality. In this regard, there is a strong role for lawyers to provide this assistance.

The Commission stresses that legal assistance should be provided in an affordable and easily accessible manner. In this regard, the CCBE calls for a need to ensure adequate and relevant legal aid mechanism in cross-border cases for victims and targets of manifestly unfounded and abusive court proceedings and foresee and provide relevant and sufficient funding for legal aid in cross-border cases at EU level.

⁶ [COMMISSION RECOMMENDATION of 27.4.2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings \("Strategic lawsuits against public participation"\)](#). See Recommendation 12 and 13:

Training should cover the relevant aspects of the EU Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. It should include practical guidance on how to apply Union law, national case law, the case law of the Court of Justice of the European Union and the case law of the European Court of Human Right, on ascertaining that restrictions to the exercise of the freedom of expression meet the requirements provided for, respectively, by Article 52 of the Charter and by Article 10(2) of the European Convention on Human Rights as well as on the articulation of freedom of expression and information, and with other fundamental rights.

Training should also cover the procedural safeguards against manifestly unfounded or abusive court proceedings against public participation, where available, as well as jurisdiction and relevant applicable law in fundamental rights, criminal, administrative, civil and commercial matters.