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Il Focus contiene saggi e contributi elaborati a seguito della riflessione realizzata nel Convegno organizzato presso l'Università di Macerata (22 novembre 2023)

Articoli, Commenti e Note

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION AND THEIR GLOBAL RELEVANCE: RECENT DEVELOPMENTS AND PERSISTING GAPS IN HUMAN RIGHTS LAW AND IN (EU) PIL

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1. Introduction: SLAPPs in context

In times of social, economical, political, ethical and environmental challenges, contemporary society is more and more characterized by the coexistence of competing interests, values and voices: thus, the call for social changes determines new instances for public participation, as well as the need to inform and to be informed in order to give voice to petitions and aspirations[1]. In the European Union, pluralism (as well as media

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[1] G. SARTORI, *Understanding Pluralism*, in *Journal of Democracy*, 1997, pp. 58-69; A. MELUCCI, L. AVRITZER, *Complexity, cultural pluralism and democracy: collective action in the public space*, in *Social Science Information*, 2000, pp. 507-527; O. ESCOBAR, *Pluralism and Democratic Participation: What Kind of Citizen are Citizens Invited to be?*, in *Contemporary Pragmatism*, 2017, pp. 416-438; V. KAUL, I. SALVATORE (eds.), *What is pluralism?*, Oxon-New York, 2020. With particular reference to the environmental debate, see E. BRUSH, *Inconvenient truths: pluralism, pragmatism, and the need for civil disagreement*, in *Journal of Environmental Studies and Sciences*, 2020, pp. 160-168.

pluralism)[2], the respect for human rights such as the freedom of expression[3], and the citizenship's participation in the decision-making process[4] have been valorised as characteristics of a society founded on democracy and rule of law[5].

In this context, there is a specific attention in Europe for the phenomenon of strategic litigation against public participation (SLAPP), in which the abuse of lawsuits is used to obstacle the activity of journalists and other "public watchdogs" as members of NGOs, activists and other human rights defenders. More specifically, SLAPPs are civil actions aimed at instituting manifestly unfounded or abusive court proceedings against the abovementioned private subjects, which are designed to obstruct the defendants' actions, undermine their credibility or their communications to the public, by reason of their

[2] On media freedom and media pluralism in EU, see D. WESTPHAL, *Media Pluralism and European Regulation*, in *European Business Law Review*, 2002, pp. 459-487; M. CASTELLANETA, *La libertà di stampa nel diritto internazionale ed europeo*, Bari, 2012; R. PISILLO MAZZESCHI, *Diritto al pluralismo informativo nei media audiovisivi e Convenzione europea dei diritti dell'uomo*, in R. PISILLO MAZZESCHI, A. DEL VECCHIO, M. MANETTI, P. PUSTORINO (eds.), Il *diritto al pluralismo dell'informazione in Europa e in Italia*, Rome, 2012, pp. 23-99; R. SAPIENZA, *Libertà di espressione e limiti convenzionali: il difficile bilanciamento*, in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2016-2020)*, Milano, 2020, pp. 767-784; R. MASTROIANNI, *Freedom of pluralism of the media: an "European value" waiting to be discovered?*, in *Media Laws*, 2022, pp. 1-11; C. MORINI, *Libertà di espressione e tutela della dignità delle giornaliste: il contrasto all'online sexist hate speech nello spazio digitale europeo*, in this *Rivista*, 2022, pp. 67-104; C. HOLTZ-BACHA, *Freedom of the media, pluralism, and transparency. European media policy on new paths?*, in *European Journal of Communication*, 2023, pp. 37-55. In the most recent times, a progress towards the protection of media pluralism has interested the European Union, with the adoption of the Regulation (EU) 2024/1083 of the European Parliament and of the Council, *establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act)*, of 11 April 2024, in OJ L2024/1083, 17 April 2024, pp. 1-37.

[3] S. KAUFMANN, *Freedom of Expression under EU Law*, in *Italian Journal of Public Law*, 2022, pp. 202-224; P. WACHSMANN, *Article 11*, in F. PICOD et al. (eds.), *Charte des droits fondamentaux de l'Union européenne*, *Commentaire article par article*, Brussels, 2020, pp. 291-312; R. MASTROIANNI, G. STROZZI, *Art. 11 Libertà di espressione e di informazione*, in R. MASTROIANNI ET AL. (eds.), *Carta dei diritti fondamentali dell'Unione Europea*, Milano, 2017, pp. 217-237; L. WOODS, *Article 11: Freedom of Expression and Information*, in S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights, Oxford*, 2014, pp. 311-340; P. PIRODDI, *Articolo 11*, in F. POCAR, M.C. BARUFFI, *Commentario breve ai trattati dell'Unione europea*, Padova, 2014, pp. 1693-1702.

[4] On public participation in EU's decision-making process, see V. CUESTA LOPEZ, *The Lisbon's Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy*, in *European Public Law*, 2010, pp. 123-138; G. MORGESE, *Principi e strumenti della democrazia partecipativa nell'Unione europea*, in E. TRIGGIANI (ed.), *Le nuove frontiere della cittadinanza europea*, Bari, 2011, pp. 37-59; J. MENDES, *Participation in EU Rule-Making: a Rights-Based Approach*, Oxford, 2011; R. CAFARI PANICO, *Il processo legislativo dell'Unione europea dopo il Trattato di Lisbona*, in F.L. PACE (ed.), *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona*, Milano, 2012, pp. 93-112; R. PALLADINO, *Equilibrio istituzionale e modelli di partecipazione democratica. Considerazioni in vista della Conferenza sul futuro dell'Europa*, in *Ordine Internazionale e Diritti Umani*, 2021, pp. 363-384; J. ORGAN, *Direct citizen participation in the EU democratic system*, in A. ALEMANNO, J. ORGAN (eds.), *Citizen Participation in Democratic Europe: What next for the EU*, London/New York: ECPR Press/Rowman and Littlefield, 2021, pp. 43-58; P. FOIS, *La Conferenza sul Futuro dell'Europa: una riforma dei trattati 'incentrata sui cittadini'?*, in *Ordine Internazionale e Diritti Umani*, 2022, pp. 31-37.

[5] In general, on the rule of law in the European Union, see *ex multis* K. LENAERTS, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Market Law Review*, 2007, pp. 1625-1659; A. MAGEN, L. PECH, *The Rule of Law and the European Union*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, Cheltenham, 2018, pp. 235-256; T. TRIDIMAS, *The General Principles of EU Law*, Oxford, 2019.

activities and/or their particular position.

According to the latest report from CASE (Coalition Against SLAPPs in Europe), SLAPPs are spreading across Europe, their database having increased from 570 cases in 2022 to over 820 cases in 2023[6]. They represent a well-recognized and potentially dangerous threat for democratic society. The phenomenon can be examined under different focal lenses, since the legal perspective needs to be accompanied by evident political and social considerations: indeed, SLAPPs tackle the right of each individual or group to engage in public participation, as well as the capacity of civil society organizations to act towards their goals. As underlined by the Council of Europe's Commissioner for Human Rights, Dunja Mijatović: "*While this practice primarily affects the right to freedom of expression, it also has a dramatic impact on public interest activities more broadly*"[7].

The development of anti-SLAPP legislations finds their natural origin in common law jurisdictions. In the USA, they represent a long-standing and consolidated subject-matter. Indeed, the very first definition of SLAPP has been elaborated by the North-American legal literature in the 90s: at the time, the concept comprehended lawsuits involving communications made to influence a governmental action or outcome, resulting in a *civil* complaint or counterclaim filed against nongovernmental individuals or organizations on a substantive issue of some public interest or social significance[8]. The objective contours of the matter were delimited by the actions and beliefs protected by the so-called Petition Clause[9]. More recently, the phenomenon has expanded and several State legislations are not limited to the right to petition, but also cover other First Amendment rights, such as the right to speech or to assembly[10]. In 2022, a SLAPP Protection Act proposing a federal discipline has been introduced in Congress, even though its fate remains to be established[11].

In UK, the debate around the introduction of an anti-SLAPP legislation heated up

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[6] CASE, *SLAPPs: A Threat to Democracy Continues to Grow – a 2023 Report Update*, available at https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf.

[7] D. MIJATOVIĆ, *Time to take action against SLAPPS*, Human Rights Comment published on 27th October 2020 on the official website of the Council of Europe (https://www.coe.int/pl/web/commissioner/-/time-to-take-action-against-slapps).

[8] G.W. PRING, P. CANAN, *SLAPPs: Getting Sued for Speaking Out*, Philadelphia, 1996, p. 8.

[9] U.S. Const., amend. I, §10.

[10] For a quick overview on anti-SLAPP laws in USA, see the Legal Guide developed by the Reporters Committee for the Freedom of the Press, available at https://www.rcfp.org/anti-slapp-legal-guide/. In the legal literature, see J.E. BLACK, *SLAPPS and Social Activism: The Wonderland v. Grey2K Case*, in *Free Speech Yearbook*, 2002-2003, pp. 70-82; K. TATE, *California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, in *Loyola of Los Angeles Law Journal*, 2000, pp. 801-886; E.M. LUM, *Hawai'i's Response to Strategic Litigation Against Public Participation and the Protection of Citizens' Right to Petition the Government*, in *Hawaii Law Review*, 2001, pp. 411-440; P. SHAPIRO, *SLAPPs: Intent or Content: Anti-SLAPP Legislation Goes International*, in *Review of European, Comparative & International Environmental Law*, 2010, pp. 14-27; A. FREEMAN, *The Future of anti-SLAPP Laws*, in *SLU Law Journal Online*, 2018, available at https://scholarship.law.slu.edu/lawjournalonline/26/.

[11] H.R.8864 -SLAPP Protection Act of 2022 117th Congress (2021-2022). See L. PRATHER, *SLAPP Suits: An Encroachment on Human Rights of a Global Proportion and What Can Be Done About It*, in *Northwestern Journal of Human Rights*, 2023, pp. 49-100.

around defamation lawsuits brought before the British courts against journalists and in consideration of the attractiveness of the *forum* for plaintiffs filing those kind of actions[12]. In October 2023, an amendment in the Economic Crime and Corporate Transparency act resulted in an anti-SLAPP discipline, although limited to cases involving economic crimes[13].

The phenomenon has taken on relevance in other contexts, also assuming different characteristics in the light of current political and social issues that characterize a particular geographical area[14]. For instance, in many South American countries and in the Asia-Pacific region, the issue of SLAPPS is strongly connected to the exercise of indigenous peoples' rights and environmental issues[15]. Similar situations have also affected the Canadian debate, where the interests of multinational corporations in conducting logging on lands clash with the ancestral rights claimed by indigenous populations[16].

The phenomenon is being under consideration in the EU legal system, the most recent update having been the adoption of the Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (hereinafter, also SLAPPs Directive)[17]. The interests of the EU institutions towards the subject matter occurred against the backdrop of growing pressure from the civil society – especially following the events surrounding the murder of the Maltese journalist Daphne Caruana Galizia[18] – as well as the Council of Europe's increasing focus on the impact of SLAPPs on fundamental rights. The latter has constituted a Committee of Experts on Strategic Lawsuits Against Public Participation (MSI-SLP), which met for

[12] See UK Parliament, *Lawfare and Investigative Journalism (Debate)*, 17 October 2022, available at https://hansard.parliament.uk/Commons/2022-10-17/debates/9EF8B914-AF94-41AE-A792-0242A7414F96/LawfareAndInvestigativeJournalism.

[13] Economic Crime and Corporate Transparency Act 2023, ch. 56, s. 194, available at https://www.legislation.gov.uk/ukpga/2023/56/enacted. The steps towards the adoption of an anti-SLAPP legislation in UK have been described by L. PRATHER, *SLAPP Suits: An Encroachment on Human Rights*, cit., p. 65. See *infra*, para. 4.3.

[14] See J.A. WELLS, *Exporting SLAPPs: International Use of the U.S. SLAPP to Suppress Dissent and Critical Speech*, in *Temple International and Comparative Law Journal*, 1998, pp. 457-502; N. DUTTA, *SLAPPs in the Global South: Features and Policy Responses*, International Center for Not-for-Profit Law, 2020, available at https://www.icnl.org. As concerns South Africa, see also T. MUROMBO, H. VALENTINE, *Slapp suits: an emerging obstacle to public interest environmental litigation in South Africa*, in *South African Journal on Human Rights*, 2011, pp. 82-106.

[15] For an example from the Latin American context, see among others L. ETCHART, *Global Governance of the Environment, Indigenous Peoples and the Rights of Nature Extractive Industries in the Ecuadorian Amazon*, Cham, 2022, p. 121-156. For the Asia-Pacific region, see United Nations Environment Programme, *Environmental Rule of Law and Human Rights in Asia Pacific: Strategic litigation against public participation (SLAPPs). Summary for Decision Makers*, Nairobi, July 2023, available at https://wedocs.unep.org/.

[16] On the topic H. YOUNG, *Canadian anti-SLAPP laws in action*, in *Canadian Bar Review*, 2022, pp. 186-222.

[17] Directive 2024/1069/EU of the European Parliament and of the Council, *on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation')*, of 11 April 2024, in OJ L, 16 April 2024, pp. 1-14.

[18] J. BORG-BARTHET, *"Daphne's Law": The European Commission Introduces an Anti-SLAPP Initiative*, in *EU Law Analysis*, 29 April 2022.

the first time in April 2022 and has recently finalized a Recommendation of the Committee of Ministers on the topic[19].

The aforementioned Directive has been adopted under the legal basis of Article 81 TFEU (judicial cooperation in civil matters) and it addresses SLAPPs initiated through cross-border civil proceedings. The choice of the Commission lies on the fact that – while those strategic lawsuits may be purely domestic – the number of cross-border cases has exponentially increased over time.

As it will be examined, the SLAPPs Directive highlights the coexistence of two dimensions of the phenomenon of SLAPPS, which are strictly interconnected and are an expression of the interplay between Human Rights Law (HRL) and Private International Law (PIL). However, it is doubtful whether the Directive will be able to exercise a significant impact on any of those areas: in fact, the instrument introduces some rules, which consider some aspects of SLAPPs that have a partial impact on PIL. It largely consists of provisions aimed at harmonizing the domestic rules of civil procedural law, such as those concerning the early dismissal of manifestly unfounded proceedings. When presenting the Proposal for a SLAPPs Directive[20], the only two provisions dealing with PIL aspects – namely, the now Articles 16 and 17 of the Directive – have been expressly qualified as incidental to the main purpose of the Directive[21].

While starting from an investigation on the human rights implications of SLAPPs, the final objective of the present contribution is to understand the specific problems surrounding the issue from a private international law perspective, in order to present some reflections *de jure condito* and *de jure condendo*.

2. An overview of the phenomenon: the heterogeneity of the actors involved and the different protection needs

One of the main obstacles in regulating the phenomenon of SLAPPs is the inherent difficulty in providing a precise and circumstantiated legal depiction. In fact, they are characterized by intrinsic indeterminate elements. Notwithstanding the absence of an official definition, a SLAPP is a legal action that can potentially be undertaken (or merely threatened) before civil, administrative or criminal courts: it can be filed as a criminal proceeding for defamation or as a civil claim, usually for compensation for damages[22]. The sole threat of a legal procedure has an important chilling effect on freedom of

[19] The activities of the Committee of Experts can be followed on the official website of the Council of Europe, at https://www.coe.int/en/web/freedom-expression/msi-slp. See also the report by S. SCHENNACH, *Countering SLAPPS: an imperative for a democratic society*, on request of the Parliamentary Assembly of the Council of Europe, Doc. 15869 of 23 November 2023.

[20] 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")*, of 27 April 2022, COM(2022) 177 final.

[21] COM(2022) 177 final, cit., p. 7.

[22] S. SCHENNACH, *Countering SLAPPS*, cit., p. 7.

expression, leading to self-censorship and discouraging journalists and activists from doing their job and continuing their campaign. Thus, a SLAPP is usually identified by the intent of the plaintiff, being characterized by the scope and purpose of the action brought before the judicial authority, which is not the exercise to the right of access to justice, but the misuse of the judicial system in order to shut down acts of public participation on matters of public interests[23]. In addition, the action should be (at least partially) unfounded or present clear indicators highlighting abuse of rights or of process laws[24]. Of course, the necessary existence of those elements, in order to have access to a special protection, constitutes a disadvantage for the defendant: in most cases, the abuse of procedure needs to be proven by the party who is asserting it.

The complexity of the issue is also evident at the subjective level. SLAPPs are characterized by an imbalance of power between the parties. As concerns the plaintiffs, SLAPPs may be initiated by powerful private actors, such as corporations or deep-pocketed individuals, by politicians or people in the public service or also by State-owned entities. As concerns the defendants, the most extensive debate on SLAPPs in the European context has focused on journalists as the main targets of strategic lawsuits. However, the phenomenon has become increasingly multifaceted, reflecting the role acquired by human rights defenders, NGOs and activists in the public debate[25]. The heterogeneity of the SLAPP victims poses different considerations as concerns the necessary balance between access to justice and other fundamental rights that are threatened by those strategic lawsuits. While media freedom is particularly valorised and circumstantiated in the human rights field and is usually threatened through claims for defamation, libel or violation of privacy, where the victims are activists there might be more uncertainty, because their freedom of expression needs to be valorised in its public function and their action is often oriented not only to *inform* the population and to participate in the public debate, but also to obtain a (social or legal) *change*. Moreover,

[23] The notion of "public participation" itself should be subject to further specification.

[24] On this point, there is a slight difference between the definitions of SLAPPs proposed in the context of EU institutions. In the report of J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, Study requested by the European Parliament, Committee on Legal Affairs, 2021, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf, the following definition is proposed: "A claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterized by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right". On the other hand the SLAPPs Directive, in its final version, defines SLAPPs as "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" (Article 4, n. (3)).

[25] As highlighted by CASE, *Shutting Out Criticism: How SLAPPs Threaten European Democracy*, 16 March 2022, p. 16 (available at https://www.the-case.eu): "Most of the existing literature on SLAPPs focuses on journalists as the targets, leaving out important discussions on the effects of SLAPPs on other groups such as human rights defenders and activists, as well as the adverse impact that they have on freedom of association and assembly". As observed by S. SCHENNACH, *Countering SLAPPS*, cit., p. 11 on the basis of the statistics of CASE, human rights defenders, NGOs and activists are mainly targeted on three fields: migrants' rights, LGBT rights and environmental advocacy.

there are other fundamental rights that are at risk to be compressed, such as the freedom of assembly or association[26]. Lastly, there are potentially more lawsuits that can be brought against activists on the basis of their activity: actions for damages (e.g. to property), violation of anti-migration laws or organizing alleged unlawful demonstrations or direct-action protests.

On this point, reference should be made to the Aarhus Convention of 25 June 1998[27]: in fact, SLAPPs are qualifiable as an harmful act for the purposes of Article 3(8) of the Convention[28]. The Aarhus Convention Compliance Committee (ACCC) has specified that "the wording of Article 3, paragraph 8, is not limited in its application to acts of public authorities […], but rather covers penalization, persecution or harassment by any State body or institution, including those acting in a judicial or legislative capacity. It also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent"[29].Despite not being the main focus of the present contribution, a digression should be made on lawsuits brought by a public authority on the basis of the criminal qualification of certain acts such as civil disobedience, which it may not fall within the scope of application of Article 3(8). Indeed, Article 3(8) applies when members of the public have exercised their rights in conformity with the Aarhus convention: even if the wording is interpreted broadly, acts of civil disobedience may not always fall within the definition, because a criminal proceeding or sentence is accepted by activists as a possible consequence for their actions[30]. Indeed, as

[26] See in this regard the Info Note by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (A. Ciampi), *SLAPPs and FoAA Rights*, 2017, available at https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx.

[27] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998 and entered into force 30 October 2001, 2161 UNTS 44. On the Convention, see V. KOESTER, *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, in G. ULFSTEIN et al. (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge, 2007, pp. 179-217; C. PITEA, *Procedures and Mechanisms for Review of Compliance under the 1988 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, T. TREVES et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of the International Environmental Agreements*, The Hague, 2009, pp. 221-274; M. FITZMAURICE, *Note on the participation of civil society in environmental matters. Case study: the 1998 Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters*, in *Human Rights & International Legal Discourse*, 2010, pp. 47-65.

[28] J. GLEESON, *Strategic lawsuits against public* participation, in S. STEC (ed.), *Handbook on Access to Justice under the Aarhus Convention*, Szentendre, 2003, pp. 59-60. In a case involving the municipality of Vienna, some Austrian members of the European Parliament submitted a parliamentary question to the European Commission, asking whether the letter from an attorney of the city of Vienna, prospecting an action for damages against environmental activists who were peacefully demonstrating against a road project, was to be considered a SLAPP. The Commission's response (Parliamentary question E-000470/2022, 13 May 2022, available at https://www.europarl.europa.eu/doceo/document/E-9-2022-000470-ASW_EN.html) was, indeed, elusive: without commenting on the specific case, it was observed that "Currently, there is no EU-wide legal interpretation on what exactly does or not constitute a SLAPP case".

[29] ACCC/C/2014/102 Belarus, par. 70.

[30] On the topic T. WEBER, *Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders*, in *Review of European, Comparative & International Environmental Law*, 2022, pp. 67-76.

underlined by the legal literature, since violent acts could not be protected by the Aarhus Convention, a case-by-case approach, sustained by a proportionality test, is necessary[31]. Hence, the disvalue of a SLAPP suit could be neutralized by the disvalue of the criminal act that national law intends to sanction, at least when the charges are not manifestly unfounded - which of course could revive the qualification of the action as SLAPP - and the criminal sanction is an expected and accepted consequence of the action.

All in all, the wide and potentially blurred definition of the legal actions or proceedings that may be qualified as SLAPPs makes it difficult to address the issue in a systematic way. This circumstances interests not only the adoption of procedural remedies at the national level, but also any reflection on a possible intervention at the PIL level: as it will be examined, it may be difficult to stress-test the application of common rules on jurisdiction or applicable law, when the phenomenon could potentially interest many legal actions on different subject matters. Not only it constitutes a drawback in the process towards the adoption of a legislative response, but it may also constitute an element of weaknesses for the application of any approved measure. While this element should not stop the lawmakers in intervening on the subject matters, it is undoubtful that any legislative measure should be accompanied by an adequate level of awareness in judges and other legal professionals.

3. The Human Rights perspective of SLAPPs

The need to address the issue of SLAPPs stems from their potential in constituting a grave danger for human rights, as protected in the European legal context by the European Convention of Human Rights (ECHR)[32] and by the Charter of Fundamental Rights of the European Union (EU Charter)[33]. Despite having explicitly dealt with SLAPPs relatively recently, as it will be examined in the following paragraphs, the case law of the European Court of Human Rights (ECtHR) has thoroughly addressed many aspects of the topic, setting important standards[34].

[31] T. WEBER, *Are climate activists protected by the Aarhus Convention?*, cit., p. 73.
[32] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953, 213 UNTS 221.
[33] Charter of Fundamental Rights of the European Union, in OJ C 326, 26 October 2012, p. 391.
[34] It is barely worth mentioning that the case-law of the ECtHR informs the interpretation and correct application of the EU Charter. Article 52(3) of the latter establishes that the rights enshrined in the Charter have the same meaning and scope as the corresponding rights guaranteed by the ECHR, in the light of the interpretation provided by the ECtHR. On the equivalence clause, see B. CONFORTI, *La Carta dei diritti fondamentali dell'Unione europea e la Convenzione europea dei diritti umani*, in L.S. ROSSI (ed.), *Carta dei diritti fondamentali e Costituzione dell'Unione europea*, Milano, 2002, pp. 3-17; A. BULTRINI, *I rapporti tra Carta dei diritti fondamentali e Convenzione europea dei diritti dell'uomo dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, in *Il diritto dell'Unione europea*, 2009, pp. 700-720.

3.1. Freedom of expression

In the European context, the freedom of expression – entailing free speech, as well as the right to receive and communicate information – is protected by Article 10 ECHR[35], as well as by Article 11 of the EU Charter[36]. Needless to say, this fundamental right is considered one of the pillars of democracy: already in one of its first judgments on the matter, the ECtHR has stated that "freedom of speech is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'"[37].

With reference to journalists and media professionals, the Court has highlighted the importance of their role in a democratic society, precising that the freedom of expression, *sub specie* freedom of the media, enjoys a special status[38]. At the same time, journalists are subject to accepted standards of journalistic practice and ethics, since their public function comes with "duties and responsibilities"[39]. As a testimony of the progressive consolidation of media freedom and pluralism in this context, as well as its special role

[35] See T. MENDEL, *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, Centre for Law and Democracy, undated, available at https://rm.coe.int/16806f5bb3; E. BARENDT, *Freedom of Speech*, Oxford, 2007; M. VERPEAUX, *Freedom of Expression in Constitutional and International Case Law*, Strasbourg, 2010; M. OETHEIMER, A. CARDONE, *Art. 10*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, pp. 397-418; W.A. SCHABAS, *Article 10. Freedom of expression/Liberté d'expression*, in W.A. SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, 2015, pp. 444-482; A. BHAGWAT, J. WEINSTEIN, *Freedom of Expression and Democracy*, in A. STONE, F. SCHAUER (eds.), *The Oxford Handbook of Freedom of Speech*, Oxford, 2021, pp. 82-105; M.E. VILLIGER, *Freedom of Expression (Article 10 of the Convention)*, in M.E. VILLIGER, *Handbook on the European Convention on Human Rights*, 2022, pp. 508-547; J. GERARDS, *The right to freedom of expression and of information*, in J. GERARDS (ed.), *Fundamental Rights: The European and International Dimension*, Cambridge, 2023, pp. 81-115.

[36] See the contributions cited above fn. 3.

[37] European Court of Human Rights, judgment of 7 December 1976, application no. 493/72, *Handyside v. UK*, par. 49. The same considerations are to be found in European Court of Human Rights, judgment of 26 November 1991, application no. 13585/88, *Observer and Guardian v. UK*, par. 59; European Court of Human Rights, judgment of 8 July 1986, application no. 9815/82, *Lingens v. Austria*, par. 41.

[38] European Court of Human Rights, judgment of 23 April 1992, application no. 11798/85, *Castells v. Spain*; European Court of Human Rights, judgment of 23 September 1994, application no. 15890/89, *Jersild v. Denmark*; European Court of Human Rights, judgment of 27 March 1996, application no. 17488/90, *Goodwin v. UK*; European Court of Human Rights, judgment of 20 May 1999, application no. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; European Court of Human Rights, judgment of 17 December 2004, application no. 49017/99, *Pedersen and Baadsgaard v. Denmark*; European Court of Human Rights, judgment of 7 February 2012, application no. 39954/08, *Axel Springer AG v. Germany*. Other judgments on the topic can be found in the Guide on Article 10 of the European Convention of Human Rights, available at https://ks.echr.coe.int. See on the topic D. VOORHOOF, *The European Convention on Human Rights: the right to freedom of expression and information restricted by duties and responsibilities in a democratic society*, in *Human rights*, 2015, pp. 1-40.

[39] This formula, to be found in Article 10 ECHR, is not to be found in any other provision of the convention. On the topic see European Court of Human Rights, judgment of 29 March 2001, application no. 38432/97, *Thoma v. Luxembourg*; European Court of Human Rights, judgment of 27 February 2001, application no. 26958/95, *Jerusalem v. Austria*.

which is worthy of particular focus, an evident evolution has been marked by the EU Charter, where Article 11(2) makes an explicit reference to the matter[40].

Although the role of "public whatchdog" has been first attributed to journalists, the ECtHR has also recognized that the principles relating to media professionals may apply *mutatis mutandis* to human rights defenders, NGOs and activists, since they also play a relevant role in the public debate, their role needs to be protected in a democratic society and they operate within matters of public concern[41]. This, provided that the "duties and responsibilities" inherent in the freedom of expression should apply also to those subjects, who should act in good faith in order to provide accurate and reliable information[42].

Nevertheless, freedom of expression needs to be balanced with other rights protected by the ECHR, as well as by the EU Charter, such as the right to private and family life (Article 8 ECHR), which encompasses the right to personal and professional reputation[43]. Moreover, Article 10(2) ECHR establishes the limits within which contracting States may interfere with the exercise of the right: as usual, the measures shall be prescribed by law, shall be considered necessary in a democratic society and shall pursue at least one of the legitimate aims specified in the provision[44]. Among the latter, confirming the link between Article 10 and Article 8 ECHR, the right to freedom of expression can be

[40] On the provision see specifically P. CAVALIERE, *An Easter Egg in the Charter of Fundamental Rights: The European Union and the Rising Right to Pluralism*, in *International Journal of Public Law & policy*, 2012, pp. 357-396; B. NASCIMBENE, F. ROSSI DAL POZZO, *L'evoluzione dei diritti e delle libertà fondamentali nel settore dei media. Diritto dell'Unione europea, orientamenti giurisprudenziali e recenti interventi normativi*, in *Eurojus*, 2023, pp. 1-24.

[41] See European Court of Human Rights, judgment of 22 April 2013, application no. 48876/08, *Animal Defenders International v. the United Kingdom*, par. 103; European Court of Human Rights, *Medžlis Islamske Zajednice Brčko and Others*, cit., par. 86; European Court of Human Rights, judgment of 29 January 2019, application no. 24973/15, *Cangi v. Turkey*, par. 35; European Court of Human Rights, judgment of 14 April 2009, application no. 37374/05, *Tarsasag a Szabadsagjogokert v. Hungary*, par. 26; European Court of Human Rights, judgment of 27 May 2004, application no. 57829/00, *Vides Aizsardzi bas Klubs v. Latvia*, par. 42. In European Court of Human Rights, judgment of 17 July 2008, application no. 42211/07, *Riolo v. Italy*, par. 63, the Court has stated the same position with reference to a university researcher who had written an article for publication in a newspaper. In European Court of Human Rights, judgment of 15 February 2005, application no. 68416/01, *Steel and Morris v. the United Kingdom*, par. 89, the Court has also held that "[e]ven small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment".

[42] European Court of Human Rights, judgment of 8 November 2016, application no. 18030/11, *Magyar Helsinki Bizottság v. Hungary*, par. 159.

[43] The provision finds its equivalent in Article 7 EU Charter.

[44] Article 10(2) ECHR: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". With specific reference to Article 11 EU Charter, provided that the latter shall be interpreted in accordance with Article 10 ECHR, authoritative legal doctrine has observed that Article 11(2) EU Charter does not have a specific correspondence within Article 10 ECHR. As a consequences the provision is only subject to the limitations provided by Article 52(1) EU Charter: B. NASCIMBENE, F. ROSSI DAL POZZO, L*'evoluzione dei diritti e delle libertà fondamentali nel settore dei media*, cit., p. 8.

lawfully interfered with the aim to protect the reputation or rights of others[45]. In this case, the proportionality test is applied by the Strasbourg Court in order to verify whether the domestic authorities struck a fair balance when protecting the two values guaranteed by the ECHR which may come into conflict with each other[46].

Indeed, according to the ECtHR, States have not only a negative obligation not to interfere with the right to freedom of expression, but also a positive obligation to safeguard it, in particular through the creation of a favorable environment for participation in public debate[47]. More specifically, the Court has determined that actions that may result in unpredictably large damages' award are likely to have a chilling effect on the press and they therefore require the most careful scrutiny, other than very strong justification[48]. With specific reference to criminal charges against journalists, the Court held that ineffective domestic safeguards against disproportionate awards in defamation lawsuits may constitute a breach of freedom of expression. In fact, the ECtHR has repeatedly warned of the potential chilling effect caused by the mere existence of prison sentences for defamation, which is likely deter journalists from contributing to public discussion of issues affecting the life of the community[49]. Provided that proportional sanctions are legitimate whether the conduct of the press does not respect ethical standards and is not accompanied by an adequate fact-checking, detention in relation to a press defamation conduct, which has harmful effects on the reputation of others, would only be compatible with Article 10 ECHR in the presence of exceptional circumstances relating to serious violations of fundamental rights (such as the dissemination of hate speech or incitement

[45] D. VOORHOOF, *Freedom of Expression versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism*, in S. SMET et al (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?*, Oxford, 2017, pp. 148-170; M. SPATTI, *La Corte EDU sui conflitti fra libertà d'informazione e privacy. Tra criteri applicativi e margine di apprezzamento*, in *Diritto pubblico comparato ed europeo*, 2020, pp. 363-384.

[46] See among others European Court of Human Rights, *Axel Springer AG v. Germany*, cit., par. 83; European Court of Human Rights, *Medžlis Islamske Zajednice Brčko and Others*, cit.

[47] European Court of Human Rights, judgment of 29 January 2015, application no. 54204/08, *Uzeyir Jafarov v. Azerbaijan*, par. 68; European Court of Human Rights, judgment of 14 September 2010, applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, *Dink v. Turkey*, par. 137.

[48] European Court of Human Rights, judgment of 15 June 2017, application no. 28199/15, *Indipendent Newspapers (Ireland) Limited v. Ireland*.

[49] The Court has pronounced various times on the topic with reference to the Italian legal system: see European Court of Human Rights, judgment of 24 September 2013, application no. 43612/10, *Belpietro v. Italy*; European Court of Human Rights, judgment of 8 October 2013, application no. 30210/06, *Ricci v. Italy*; European Court of Human Rights, judgment of 7 March 2019, application no. 22350/13, *Sallusti v. Italy*. Indeed, with the decision No. 151 of 12 July 2021, the Italian Constitutional Court has declared Article 13 of the Italian Press Law (No. 47 of 8 February 1948) unconstitutional, because it provided for the necessary application of the punishment of imprisonment from one to six years for the offence of defamation in the press consisting in the attribution of a specific fact. On the contrary, the necessary balance between the right to reputation and freedom of expression implies that detention may be applied only in cases of exceptional gravity. See A. GULLO, *Diffamazione e legittimazione dell'intervento penale: contributo a una riforma dei delitti contro l'onore*, Roma, 2013; M. CASTELLANETA, *La revisione della normativa italiana sulla sanzione del carcere nei casi di diffamazione a mezzo stampa dopo l'ordinanza n. 132/2020 della Corte Costituzionale*, in *Rivista di diritto internazionale*, 2020, pp. 1043-1065; S. LONATI, *Diffamazione a mezzo stampa e applicazione della pena detentiva: ancora qualche riflessione a margine del cd. caso Sallusti in (perenne) attesa di un intervento del legislatore*, in *Media Laws*, 2020, pp. 69-83.

to violence)[50].

3.2. Access to justice and the right to a fair trial

Since SLAPPs have the purpose to use litigation to silence the defendants or to obstacle their activities, they constitute an abuse of legal process. In regulating the phenomenon a necessary balance should be made with the right to a fair trial and to access to a court, protected by Article 6 ECHR and Article 47 of the EU Charter. On the one hand, defendants should be protected by costly, lengthy and burdensome proceedings, which not only are unfounded, but would be likely characterized by an imbalance of power and resources between the parties. On the other hand, any legislative measure, but also any decision or practice adopted by the judiciary, shall not undermine access to justice for plaintiffs carrying legitimate claims. In this regard, any restriction to the right shall pursue a legitimate aim and shall satisfy the necessity and proportionality test.

An autonomous component of the right to a fair trial is the so-called "equality of arms" principle, developed by the case-law of the ECtHR[51]. It consists in the right of each party in civil or criminal proceedings to be afforded a reasonable opportunity to present his case, under conditions that do not place him at a "substantial disadvantage" *vis-à-vis* the other party[52].

Perhaps the most significant judgment on the matter, with reference to the issues under consideration, is *Steel and Morris v. UK* (also known as "McLibel case")[53]. The case originated from the lawsuit filed by the McDonald's Corporations before English courts, against two environmental activists affiliated to an informal group (London Greenpeace) who produced and distributed on the streets of London a leaflet critical to the company. The accusation of libel, claiming damages of up to GBP 100 thousand,

[50] See also European Court of Human Rights, judgment of 17 December 2004, application no. 33348/96, *Cumpănă and Mazăre v. Romania*.

[51] European Court of Human Rights, judgment of 22 February 1996, application no. 17358/90, *Bulut v. Austria*; European Court of Human Rights, judgment of 18 March 1997, application no. 22209/93, *Foucher v. France*; European Court of Human Rights, judgment of 11 January 2001, application no. 38460/97, *Platakou v. Greece*; European Court of Human Rights, judgment of 17 July 2007, application no. 68761/01, *Bobek v. Poland*.

[52] In general, on the equality of arms principle in the context of Article 6 ECHR, see M. CHIAVARIO, *Commento all'art. 6*, in S. BARTOLE, B. CONFORTI, G. RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 234; D. HARRIS, M. O'BOYLE, C. WARBICK, *Law of the European Convention of Human Rights*, New York, 2009, p. 251; S. NEGRI, *The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure*, in *International Criminal Law Review*, 2005, pp. 513-571; R. CHENAL, F. GAMBINI, A. TAMIETTI, *Art. 6*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla CEDU*, Padova, 2012, p. 173; A. DI STASI, *Il diritto all'equo processo nella CEDU e nella Convenzione americana sui diritti umani*, Torino, 2012, p. 97; M.I. FERODOVA, *The Principle of Equality of Arms in International Criminal Proceedings*, Antwerp, 2012; M. MRČELA, *Adversarial Principle, the Equality of Arms and Confrontational Right – European Court of Human Rights Recent Jurisprudence*, in *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 2018, pp. 15-31.

[53] European Court of Human Rights, *Steel and Morris v. the United Kingdom*, cit. Comments the decision M.C. LILLARD, *McGoliath v. David: The European Court of Human Rights Recent "Equality of Arms" Decision*, in *German Law Journal*, 2005, pp. 895-908.

resulted in proceedings which lasted nearly ten years, for which the estimated expenses for the plaintiffs were around GPB 10 million[54]. The defendants were denied legal aid, because it was not available for defamation proceedings in UK. Although receiving significant *pro bono* assistance, they sustained their own expenses. McDonalds was awarded GPB 76 thousand by the Court of Appeal, but the decision was never enforced.

The ECtHR recognized a breach both of the right to a fair trial under Article 6, para. 1 ECHR, and to the right to freedom of expression under Article 10. The judgment is relevant because it mainly focused on the "equality of arms" principle, which is central to the concept of a fair trial[55]. Firstly, the Court concluded that, given the length and exceptional complexity of the case, the denial of legal aids to the applicants had determined a violation of Article 6, para. 1 ECHR. In fact, "the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal"[56].

Secondly, the findings of the ECtHR concerning the violation of Article 10 are also centered around the disparity existing between the parties in the defamation lawsuit. If large multinational company may also be entitled by States to file defamation lawsuits, having the right to defend themselves from damaging allegations, the ECtHR considers essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for[57]. According to the ECtHR, there was no correct balance between the need to protect the applicant's freedom of expression and the need to protect McDonald's rights and reputation. Moreover, the award of damage was considered disproportionate as well, especially considering that the claimants in the defamation proceedings, according to English law, did not need to prove that they had in fact suffered any financial loss as a result of the publication and distribution of the leaflets[58]. In the light of the above, the lack of procedural fairness and the inequality experienced by the applicants in the proceedings before English courts resulted in a disproportionate interference under Article 10 ECHR.

[54] From the reading of the ECtHR ruling, it is also revealed that McDonald's hired seven private investigators from two different companies to infiltrate London Greenpeace with the aim of finding out who was responsible for drafting, printing and distributing the leaflet and organizing the anti-McDonald's campaign.
[55] W.A. SCHABAS, *Article 6. Right to a fair trial/Droit à un procès équitable*, in W.A. SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, 2015, p. 288.
[56] European Court of Human Rights, *Steel and Morris v. the United Kingdom*, cit., par. 69.
[57] European Court of Human Rights, *Steel and Morris v. the United Kingdom*, cit., par. 95.
[58] European Court of Human Rights, *Steel and Morris v. the United Kingdom*, cit., par. 96.

3.3. The recent developments in the ECtHR case law: *OOO Memo v. Russia* and a brand new approach

In the judgment given in 2022 in the case of *OOO Memo v. Russia*[59], the ECtHR had explicitly mentioned for the first time to the notion of SLAPP. Indeed, the Court did not make reference to SLAPPs in its reasoning, nor has it explicitly qualified the lawsuit in dispute as such: however, the Human Rights Comment of 27 October 2020 of the Council of Europe Commissioner for Human Rights ("Time to take action against SLAPPs") has been cited as part of the relevant legal framework. The case concerned a civil defamation lawsuit brought by a Russian regional State body (the Administration of the Volgograd Region) against a media company, owning an online media outlet ("Kavkazskiy Uzel") devoted to the political and human rights situation in the south of Russia. The dispute arose over an article commenting the decision of the Administration to suspend the allocation of subsidies from the regional budget to the City of Volgograd. The Ostankinskiy District Court of Moscow, with a decision that was further upheld in appeal, upheld the plaintiff's claim and condemned OOO Memo to publish on the website of the journal a retraction to the effect that the statements at issue were false and tarnished the Administration of the Volgograd Region's business reputation.

The ECtHR accepted that the interference was prescribed by law, based on Article 152 of the Russian Civil Code, conferring the right to bring civil defamation proceedings, *inter alia*, in order to protect the business reputation of a legal person. In determining whether such an interference with the right to freedom of expression was proportionate and in compliance with the criteria established by Article 10(2) ECHR, the Court stated that the legitimate aim to protect one's reputation is "inapplicable to a body vested with executive powers and which does not engage as such in direct economic activities"[60]. Departing from its previous case-law[61], in which the Court had indeed admitted that also public bodies can pursue a legitimate aim by seeking a legal protection of their reputation, the judgment has considered the serious impact that local and national authorities may have on the freedom of the media. On this basis, the analysis of the Court has focused on

[59] European Court of Human Rights, *OOO Memo v. Russia*, Application no. 2840/10, judgment of 15 March 2022. For a comment on the decision, see D. VOORHOF, *OOO Memo v. Russia: ECtHR Prevents Defamation Claims by Executive Bodies*, in *Strasbourg Observers*, 1° April 2022, available at https://strasbourgobservers.com/2022/04/01/ooo-memo-v-russia-ecthr-prevents-defamation-claims-by-executive-bodies/; S. DUMONT, A. TIOURIRINE, *La protection de la réputation d'une autorité publique: un objectif (parfois) illégitime*, in *Revue Trimestrielle des Droits de l'Homme*, 2023, pp. 535-553.

[60] European Court of Human Rights, *OOO Memo v. Russia*, cit., par. 40.

[61] This *revirement* has been criticized in the Joint Concurring Opinion of judges Ravarani, Serghides and Lobov, who observed that "Notwithstanding the policy considerations that prompted the majority's novel approach (paragraph 43 of the judgment), we are not convinced that there were good reasons for the Chamber to deviate in such a radical way from numerous previous judgments that had accepted the applicability of the aforementioned legitimate aim to various public entities and authorities in different countries, in both criminal and civil contexts" (para. 2 of the Joint Concurring Opinion). Nevertheless, the Opinion agreed on the violation of Article 10 ECHR on the basis that the domestic authorities failed to demonstrate the proportionality between the interference on freedom of expression and the legitimate aim pursued.

the proportionality of the interference, in the light of the imbalance of powers undoubtedly existing between the plantiff and the defendant.

The decision given in the *OOO Memo* case represents a remarkable step towards a better consideration of SLAPPs in the context of the ECtHR case-law. On the other hand, the judgment concerns a very specific factual situation and is strongly based on the fact that the plaintiff in the defamation case was a public body (*i.e.*, a local administration). Indeed, the Court explicitly differentiated between public or State-owned companies – which rely on their reputation towards the customers to engage in competitive activities in the marketplace – and executive bodies vested with State powers, as in the case at hand. In fact, "by virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right of natural persons to a reputation and the reputational interests of legal entities, private or public, that compete in the marketplace"[62].

Therefore, while the new approach of the ECtHR may prevent other public bodies from engaging in defamation lawsuits, it is unlikely that the Court will adopt a similar, clear-cut approach in cases where the claimant is an individual or a company. In the latter mentioned cases, the balance between the right to reputation and the right to freedom of expression still needs to be done and the question would be solved in the light of the positive obligations incumbent on States and arising from the ECHR. On the other hand, the fact that the Court referred to "the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy"[63] may be an alert signal for future judgments on the matter.

4. The Private International Law perspective

In the European Union, the SLAPPs phenomenon has also been analysed from the perspective of Private International Law (PIL). This is due to the fact that civil litigation systems in some countries create particularly beneficial conditions for SLAPPs, while others have developed anti-SLAPPs provisions or are perceived as a less attractive forum[64]. Moreover, it has been observed that EU PIL rules such as the Brussels I bis Regulation (as concerns jurisdiction)[65] and the current asset of the conflict-of-laws

[62] European Court of Human Rights, *OOO Memo v. Russia*, cit., par. 46.
[63] European Court of Human Rights, *OOO Memo v. Russia*, cit., par. 43.
[64] See J. BAYER, P. BÁRD, L. VOSYLIUTE, N. CHUN LUK, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study*, 30 June 2021, available at https://commission.europa.eu/document/d8024bf5-5c15-48fb-bbfc-5cc54bca518e_en?prefLang=it.
[65] Regulation (EU) No 1215/2012 of the European Parliament and of the Council, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)(Brussels I bis)*, of 12 December 2012, in OJ L 351, 20 December 2012, pp. 1-32.

discipline[66] may indeed encourage those kind of practices[67].

Notwithstanding the difficulties in tracking abusive litigation and to build a qualitative analysis, and despite the relatively low number of cross-border SLAPPs registered so far[68], those kind of actions may have a significant impact compared to purely domestic ones: defendants may find themselves involved a lawsuits abroad, with subsequent additional complications and higher costs, or even in multiple proceedings in different countries[69].

In the light of the above, there is the need to balance the interests of the claimants and of the defendants, also in relation to international jurisdiction and to the conflict-of-laws rules. On the other hand, this undertaking may be far from simple. In this context, the SLAPPs Directive[70] is to be welcomed, but it does not resolve all the existing PIL issues on the matter.

4.1. The recent developments: the EU SLAPPs Directive

SLAPPs are considered to be an obstacle to the proper functioning of civil justice, as their objective is not to obtain access to justice, but to produce the intimidating and dissuasive effects, as well as to cause obstacles of a practical nature that may interfere with the activities of defendants. Those aspects justified, in the view of the European Commission, not only the appropriateness of an intervention on the subject, but also the

[66] Reference is mainly made to the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199, 31 July 2007, pp. 40-49.

[67] See J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, cit., p. 33; T.C. HARTLEY, *'Libel Tourism' and Conflict of Laws*, in *International and Comparative Law Quarterly*, 2010, pp. 25-38; E. ÁLVAREZ-ARMAS, *Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs*, in *Conflict of Laws*, 25 January 2021, available at https://conflictoflaws.net/2021/alvarez-armas-on-potential-human-rights-related-amendments-to-the-rome-ii-regulation-i-the-law-applicable-to-slapps/.

[68] See the Commission staff working document of 27 April 2022 accompanying the Proposal for a SLAPPs Directive, SWD(2022) 117 final, p. 6.

[69] Those aspects are highlighted in the *Roadmap* that preceded the adoption of the Proposal by the European Commission, Ares(2021)6011536 of 4 October 2021, available online at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders_en. On the topic, from a broader perspective, see A. DORI, V. RICHARD, *Litigation costs and procedural cultures – new avenues for research in procedural law*, in B. HESS, X.E. KRAMER, *From Common Rules to Best Practices in European Civil Procedure*, Baden-Baden, 2018, pp. 303-352.

[70] Directive 2024/1069/EU of the European Parliament and of the Council, on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), cit. On the proposal which conducted to the adoption of the SLAPPs Directive, see C. KOHLER, *Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs ('Strategic Lawsuits Against Public Participation')*, in *Rivista di diritto internazionale privato e processuale*, 2022, pp. 813-827; M. PASQUA, *The Proposed EU Directive on SLAPPs: A (First) Tool for Preserving, Strenghtening and Advancing Democracy*, in *Athena*, 2023, pp. 209-256.

recourse to the legal basis of Article 81(2)(f) TFEU[71].

The SLAPPs Directive can find its place within Article 81 TFEU if one considers the contemporary conception of private international law, the rules of which are not 'neutral', but rather bearers of values and capable of actively inserting themselves into the regulation of economic and social phenomena in a given legal context[72]. At the same time, this approach lends itself to some perplexities[73]. Firstly, the choice for this legal basis automatically ruled out the possibility of also addressing the phenomenon from a criminal justice perspective. Secondly, despite being adopted in the field of judicial cooperation in civil matters, the initiative departs – from many points of view – from the contents characterizing the existing European PIL framework.

Indeed, it is now clear that the instrument is a minimum harmonization Directive, since it enables Member States to adopt or maintain more favourable provisions, including national rules establishing more effective procedural safeguards[74]. Already when a provisional political agreement between the Council and the Parliament was reached on 30 November 2023, some stakeholders had already commented the text as a "watered-down" compromise[75].

The SLAPPs Directive aims at addressing the issue in a broad sense. Instead of enlisting the (natural and legal) persons who may be the potential victims of this practice[76], the text offers wide definition of "public participation", as "the making of any statement or the carrying out of any activity by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, and any preparatory, supporting or assisting action directly linked thereto, and which concerns a matter of public interest"[77]. The latter is, in turn, defined in broad terms with non-exhaustive list of areas where a matter of public

[71] Article 81(2)(f) TFEU, as is well known, allows the European Union to adopt measures to ensure "the elimination of obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".

[72] On the topic see A. MILLS, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge, 2009; H. MUIR WATT, *The Relevance of Private International Law to the Global Governance Debate*, in H. MUIR WATT, D.P. FERNÁNDEZ ARROYO (eds.), *Private International Law and Global Governance*, New York, 2014, pp. 2-19; H. VAN LOON, *The Present and Prospective Contribution of Global Private International Law Unification to Global Legal Ordering*, in F. FERRARI, D.P. FERNÁNDEZ ARROYO (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance*, Cheltenham, 2019, pp. 214-234.

[73] It was precisely in the light of the difficulties encountered in identifying the basis of the Union's competences in this field that the European Commission was, at least initially, reluctant to work on an initiative of this kind: see the letter from Frans Timmermans, Vice-President of the European Commission, 12 June 2018, available online at https://www.anagomes.eu/PublicDocs/974f0440-6c8c-48e3-bee4-80e6ced9735e.pdf. On this issue M. REQUEJO ISIDRO, *Proposal for a Directive on Protecting Persons Who Engage in Public Participation from SLAPPs*, in *EAPIL Blog*, 9 May 2022.

[74] Article 3 of the SLAPPs Directive.

[75] See for instance the comments released by the European Federation of Journalists (EFJ) on 9 June 2023, available at https://europeanjournalists.org/blog/2023/06/09/eu-council-adopts-watered-down-position-on-anti-slapp-directive/, and by CASE Europe on 8 January 2024, available at https://www.the-case.eu/latest/anti-slapp-directive-case-statement-on-the-political-agreement/.

[76] A description of potential SLAPPs victims that the Directive intends to protect is indeed provided in recital 6.

[77] Article 4, no. (1) of the SLAPPs Directive.

interest is at stake[78].

Some of the contents of the Directive and the obligations that it introduces for Member States have been considered as being too vague and general[79]. As a general overview, Member States are asked to introduce measures to ensure certain procedural safeguards against SLAPPs. Firstly, it is provided that associations, organizations or other entities with a legitimate interest may be able to intervene in the proceedings against a natural or legal persons on account of their engagement in public participation, to support the defendant (with his or her approval) or to provide information[80]. Secondly, the defendants should be able to apply for security to cover the costs of the proceedings, which may include costs for legal representations and, if provided for by national law, damages[81]. Thirdly, the seized court should be able (following a request from the defendant or *ex officio*) to dismiss manifestly unfounded claims at the earliest possible stage[82]. In this case, it is the claimant who has to substantiate the claim, in order to prove that it is well founded[83]. Fourthly, the Directive introduces some remedies against abusive court proceedings, namely the possibility for the seized court: *i)* to order the claimant to bear all the costs of the proceedings, including the costs of legal representation (unless they are excessive)[84]; *ii)* to impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, including the payment of compensation for damages or the publication of the court decision, where provided for by national law[85]. Those remedies shall be available also in the event of a subsequent amendment or even withdrawal of the claims by the plaintiff. Lastly, it is established that all the applications for security, early dismissal of manifestly unfounded claims and remedies should be treated in an accelerated manner, in accordance with national law, taking into account the circumstances of the case, the right to an effective remedy and the right to a fair trial[86].

In line with the limitations of Article 81 TFEU, the SLAPPs Directive is intended to apply to matters with cross-border implications[87]. At the same time, the initiative is complementary to the Commission Recommendation (EU) No. 2022/758 adopted the same day, inviting the Member States to introduce similar measures to combat SLAPPs

[78] Article 4, no. (2) of the SLAPPs Directive. See also recitals 23-27.
[79] Emphasizes the vagueness of some provisions of the proposal B. HESS, *Strategic Litigation: A New Phenomenon in Dispute Resolution*, in *MPILux Research Paper Series*, No. 2022(3), p. 25.
[80] Article 9 of the SLAPPs Directive.
[81] Article 10 of the SLAPPs Directive.
[82] Article 11 of the SLAPPs Directive.
[83] Article 12 of the SLAPPs Directive. In addition, according to Article 13, the decision granting the request for early dismissal shall be subject to appeal. There is no analogous provision for decisions refusing the early dismissal.
[84] Article 14 of the SLAPPs Directive.
[85] Article 15 of the SLAPPs Directive.
[86] Article 7 of the SLAPPs Directive.
[87] R. CLERICI, *Commento all'Articolo 81 TFUE*, in F. POCAR, M.C. BARUFFI (eds.), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, pp. 500-505; E. RODRÍGUEZ PINEAU, *Article 81 [Judicial Cooperation in Civil Matters]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union - A Commentary*¸ vol. I, Cham, 2021, p. 1551.

in their national law, applicable also in the absence of the cross-border element[88]. An express definition of the cases in which cross-border involvement was to be considered to exist is provided in Article 5 of the Directive. Indeed, the original proposal had adopted an innovative and extremely broad notion[89]. According to the final wording of the Directive, resulting from the political compromise, a matter is considered to have cross-border implications *unless* both parties are domiciled in the same Member State as the court seized and all other elements relevant to the situation concerned are located only in that Member State[90]. It is specified that domicile shall be determined in accordance with the Brussels I *bis* Regulation[91].

The application of the Directive only to cases with cross-border implications is both a supporting element of the legal basis and a circumstance that could weaken the arguments justifying the relevance of the initiative. Indeed, an element of internationality can assume a great relevance in the context of SLAPPs, especially from the point of view of the consequences that such actions are likely to have on the persons who are their "target"[92]. On the other hand, also in the light of the fact that the Directive largely consists of provisions aimed at harmonising the rules of national civil procedural law, many of the detrimental consequences arising from SLAPPs are common to domestic and cross-border proceedings. Therefore, especially if not accompanied by further actions by Member States following the aforementioned Recommendation[93], the Directive would leave a substantial percentage of cases unprotected. Moreover, given that most of the provisions relate to procedural aspects, it might be complex for Member States to introduce such measures, while at the same time limiting their effectiveness to cross-border proceedings only.

Another peculiar characteristic of the Directive, in the light of the chosen legal basis,

[88] Commission Recommendation (EU) 2022/758, *on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation')*, of 27 April 2022, in OJ L 138 of 17 May 2022, pp. 30-44.

[89] According to Article 4 of the original proposal, a matter was considered to have cross-border implications *unless* both parties to the proceedings were domiciled in the same Member State as the court seized. Even in the hypothesis that the parties did not share a domicile, cross-border relevance was deemed to exist if (*i)* the act of public participation against which the court proceedings are brought was relevant for more than one Member State, or if *(ii)* the plaintiff or entities associated with it had initiated parallel court proceedings in more than one Member State. In view of the implications that SLAPPs might have on the proper functioning of the internal market or for European society as a whole, it is certainly worth considering that cross-border implications might arise not only from the circumstances affecting the parties, but also from the transnationality of the underlying public interest in the dispute. On the other hand, this formulation, due to its vagueness, could have been the subject of dispute in civil proceedings and lead to conflicting interpretations.

[90] Article 5, para. 1, of the SLAPPs Directive.

[91] Article 5, para. 2, of the SLAPPs Directive. Despite the absence of any further indications in the text or in the recitals of the Directive, reference shall be made to Article 4 of the Brussels I bis Regulation, laying down the general rule for jurisdiction in civil and commercial matters, as well as to Articles 62 and 63 of the aforementioned Regulation.

[92] P. FRANZINA, *Sinergie tra cooperazione giudiziaria e armonizzazione materiale e processuale in Europa: il caso delle azioni bavaglio,* in A. ANNONI, S. FORLATI, P. FRANZINA (eds.), *Il diritto internazionale come sistema di valori - Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 809.

[93] Commission Recommendation (EU) 2022/758 of 27 April 2022, cit.

is that Article 81(2)(f) TFEU does not give the European Union indiscriminate power to harmonize civil procedural law, but provides for the adoption of measures to facilitate cross-border proceedings. It is true that judicial cooperation in civil matters "may include the adoption of measures for the approximation of the laws and regulations of the Member States", but such measures - according to the wording of Article 81 TFEU - should be complementary to those of private international law. This is not the case in the proposal under consideration, which thus seems to reverse the logic. Indeed, the only two provisions relating to aspects of private international law - namely, Articles 16 and 17 of the proposal – are systematically placed in Chapter V of the Directive and have been expressly qualified, in the proposal, as "ancillary to the main objective of the initiative"[94]. Moreover, they concern only proceedings before the courts of third States (as the title of Chapter V, "Protection against third-country judgments", suggests).

In particular, Article 16 addresses judgments coming from third countries. It provides that Member States shall refuse to recognize and enforce decisions handed down as a result of proceedings which are to be considered manifestly unfounded or abusive under the law of the Member State in which such recognition or enforcement is sought. As an important specification, the provision applies only to decisions issued at the end of proceedings against persons domiciled in a Member State. Indeed, the Commission's original proposal provided that the refusal of the recognition or enforcement should have been based on public policy: the final text, on the contrary, leaves it to the Member States to decide which ground for refusal to apply, leaving open the possibility of introducing a separate and new one[95].

On the other hand, the Directive does not deal with the aspects relating to the circulation of judgments given by the courts of the Member States. Indeed, the obligation not to recognise judgments resulting from abusive litigation could be imposed *a fortiori* within the EU judicial area. The reasons behind the decision not to mention the intra-EU circulation of judgments are not clear. It is possible that the European lawmaker did not want to call into question the high degree of mutual trust between the judicial systems of the Member States[96], eventually (but not necessarily) allowing the introduction of new grounds for refusal other than the ones provided by the Brussels I bis Regulation[97]. Nevertheless, a gentle reminder would have been consistent with the Directive's scope and objectives.

The following Article 17 introduces a special ground of jurisdiction in favour of EU courts, to which the victims of a SLAPP brought in a third State will be able to apply for

[94] See the proposal for a SLAPPs Directive, COM/2022/177 final, cit., p. 7.
[95] A clear indication in this sense is to be found in recital 43 of the proposal: "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".
[96] On the relationship between mutual trust, recognition of judgments in civil and commercial matters, and the protection of fundamental rights see G. BIAGIONI, *Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, pp. 579-596.
[97] Reference is made to Article 45 Brussels I bis Regulation.

compensation for the damages suffered[98]. More specifically, the provision applies where abusive proceedings against public participations have been brought by a claimant domiciled outside the Union before a court of a third country, against a natural or legal person domiciled in a Member State. In that case, the injured party will be able to initiate proceedings before the courts of the Member State where he or she is domiciled, in order to claim for damages and reimbursement of costs incurred in connection with the SLAPP. The aim is to ensure an effective remedy in favour of persons domiciled in the European Union.

Thus, Article 17 effectively introduces a new ground for jurisdiction, which applies when the defendant in the action for compensation (*i.e.* the original claimant in the SLAPP) is domiciled in a third country: as already observed by the legal doctrine, Member States are obliged to introduce in their domestic law a *forum actoris*, which would normally be considered exorbitant[99]. Moreover, the recourse to the ground for jurisdiction of Article 17 may be hindered by the participation of the EU or Member States to bilateral and multilateral conventions (such as the 2007 Lugano Convention[100]): in fact, according to Article 18 of the Directive, international treaties already in force before the entry into force of the new instrument will not be affected[101].

According to Article 17, para. 2, Member States *may* limit the exercise of the jurisdiction while proceedings are still pending in the third country: besides adopting a rather nebulous wording, which does not provide for any binding obligations upon national courts, this provision makes it is evident that Article 17 is conceived as an *ex post* remedy, which may not be able to function when the SLAPP is still ongoing. Another element, which may weaken the deterrent and protective effects of the provision, is that Article 17 does not affect SLAPPs initiated in a third country by claimants who are domiciled in a Member States[102]. Extending the remedy also to the last mentioned situation could have discouraged attempts to circumvent the EU anti-SLAPPs rules, by instituting proceedings in a third country.

4.2. The persisting gaps: applicable law and jurisdiction under EU PIL

The legal literature has already stress-tested the application of PIL rules on

[98] Article 17(1) of the SLAPPs Directive: "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".

[99] C. KOHLER, *Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs*, cit., p. 819.

[100] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano II Convention), of 30 October 2007, in OJ L 339 of 21 December 2007, pp. 3-41.

[101] C. KOHLER, *Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs*, cit., p. 820.

[102] This was not the solution initially adopted by the Commission: Article 18 of the original proposal would have applied "irrespective of the domicile of the claimant in the proceedings in the third country".

transnational jurisdiction and applicable law which may be relevant in the context of SLAPPs, underlying the many issues that arise in such an ambiguous and multifaceted context[103]. The large majority of the lawsuits under consideration fall within the scope of civil liability. While the complexities of the subject-matter, for instance as concerns defamation, has been interesting PIL scholars for a long time[104], a contemporary element of complication is that a lot of non-contractual obligations – the breach of which is usually invoked in strategic lawsuits – are contextualised in the digital world[105].

The first and most evident open issue is applicable law. In the EU judicial space, the Rome II Regulation expressly excludes from its scope of application "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation"[106]. It has been observed that the absence of a uniform conflict rule may induce the applicants to exploit the different options offered by the jurisdiction rules. Moreover, as it will be examined in the following, defendants in SLAPPs may be faced with multiple lawsuits in different countries, whose PIL rules may imply the application of different laws: this may result in more burdensome, complicated and costly proceedings.

A possible introduction of European conflict rules on this subject has never found its way in the Council of Ministers[107]. Despite the various proposals, the differences between

[103] Other than the legal literature cit. *supra*, note 64, see also P. FRANZINA, *Sinergie tra cooperazione giudiziaria e armonizzazione materiale e processuale in Europa*, cit., p. 812; C. KOHLER, *Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs*, cit., p. 821; E. BENVENUTI, *Azioni strategiche tese a dissuadere la partecipazione pubblica e tutela delle libertà di espressione e informazione nel diritto internazionale privato dell'Unione europea*, in this *Rivista*, 2024, p. 138.

[104] P.B. CARTER, *Defamation*, in C. MCLACHLAN, P. NYGH, *Transnational Tort Litigation: Jurisdictional Principles*, Oxford, 1996, p. 105.

[105] See E. PRÉVOST, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member States*, Council of Europe Study DGI(2019)04, September 2019.

[106] Article 1(2)(g) Rome II Regulation, examined by P. MANKOWSKI, *Article 1*, in U. MAGNUS, P. MANKOWSKI (eds.), *Rome II Regulation*, Köln, 2019, pp. 56-129. See also P. IVALDI, *La regola generale di conflitto nel Regolamento Roma II fra tradizione e 'nuove' esigenze di flessibilità*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds.), *La tutela dei 'soggetti deboli' tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, pp. 185-211; F. MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, 2013, p. 206.

[107] See, even before the Rome II Regulation, the proposal developed by GEDIP during its Eighth Meeting in Luxembourg, 25 to 27 September 1998, in M. FALLON, P. KINSCH, C. KOHLER (eds.), *Le droit international privé européen en construction: vingt ans de travaux du GEDIP*, Cambridge, 2011, pp. 192-224. In the legal literature A. WARSHAW, *Uncertainty From Abroad: Rome II and the Choice of Law for Defamation Claims*, in *Brooklin Journal of International Law*, 2006, pp. 269-309; O. FERACI, *La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria*, in *Rivista di diritto internazionale*, 2009, pp. 1020-1085; J.-J. KUIPERS, *Towards a European Approach in the Cross Border Infringement of Personality Rights*, in *German Law Journal*, 2011, pp. 1681-1706; C. CAMPIGLIO, *La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)*, in *Rivista di diritto internazionale privato e processuale*, 2015, pp. 857-866; D. KENNY, L. HEFFERNAN, *Defamation and privacy and the Rome II Regulation*, in P. STONE, Y. FARAH, *Research Handbook on EU Private International Law*, Cheltenham, 2015, pp. 315-343; F.M. MEIER, *Unification of choice-of-law rules for defamation claims*, in *Journal of Private International Law*, 2016, pp. 492-520. See also the *Rome II and Defamation: Online Symposium* hosted by *ConflictofLaws.net*, all contributions available at https://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium/.

the Member States could not be solved and the debate on a future recast of the Regulation is still ongoing within the EU institutions[108]. A uniform discipline may contribute to the discouraging of libel tourism[109]. Indeed, it should be highlighted that any approach to a choice-of-law rule on defamation requires a careful balance between the right to reputation and freedom of expression: it is therefore not an easy task to identify a "one size fits all" rule[110]. Since the conflict rule would not apply exclusively with reference to SLAPPs, it would be equally unbalanced to build the discipline exclusively from that perspective[111].

In the present situation, in absence of a uniform conflict rule among EU Member States[112], each court applies the PIL discipline of the *forum*: therefore, applicable law is a consequence of jurisdiction. The domicile of the defendant determines the relevant legal framework: as a general rule, if the defendant is domiciled in a Member State, jurisdiction is disciplined by the Brussels I bis Regulation; if the defendant is not domiciled in any EU country, domestic rules will apply[113]. As known, the Brussels I bis Regulation offers multiple fora. Other than the general rule of Article 4 (domicile of the defendant), the special ground of jurisdiction provided by Article 7(2) localizes the claim in the Member States where the harmful event occurred or may occur. The settled case-law of the Court of Justice of the European Union (CJEU), which has specified that the "place where the harmful event occurred" is to be interpreted as both the place of the event giving rise to the tort, or the place where the (primary) damage occurred, which may be geographically

[108] D. WALLIS, *Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)*, 23 May 2011, Committee on Legal Affairs, European Parliament DT/820547EN.doc., available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/836/836983/836983_en.pdf. See also the Non-legislative Resolution of the European Parliament presented on 10 May 2012, with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)), P7_TA(2012)0200, available at https://www.europarl.europa.eu/doceo/document/TA-7-2012-0200_EN.pdf. More recently, see the study requested by the European Commission by E. LEIN, S. MIGLIORINI, C. BONZÉ, S. O'KEEFFE, *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, 2021, JUST/2019/JCOO_FW_CIVI_0167, available at https://op.europa.eu/en/publication-detail/-/publication/11043f63-200c-11ec-bd8e-01aa75ed71a1. The study explicitly addresses SLAPPs at p. 11.

[109] See however the position of T. HARTLEY, *Hartley on The Problem of "Libel Tourism"*, in *ConflictofLaws.net*, 19 July 2010, available at https://conflictoflaws.net/2010/hartley-on-the-problem-of-libel-tourism/.

[110] See on the topic E. BENVENUTI, *Azioni strategiche tese a dissuadere la partecipazione pubblica e tutela delle libertà di espressione*, cit., p. 149.

[111] See E. ÁLVAREZ-ARMAS, *Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I)*, cit.

[112] A panorama is offered by the European Commission, *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to the personality* ("Mainstrat Study"), JLS/2007/C4/028, Final Report, February 2009.

[113] Article 6, para. 1, Brussels I bis Regulation. As known, there are indeed important exceptions, such as exclusive jurisdiction grounds, which is not possible to examine here. Moreover, it is necessary to specify that the subject matter may fall under the scope of application of bilateral or multilateral conventions to which a Member States is party *vis-à-vis* third countries: for instance, the domicile of the defendant in one of the EFTA States will determine the application of the 2007 Lugano Convention.

distinct[114]. The provision is inspired by the objective to guarantee a good administration of justice, ensuring both a certain degree of predictability and the proximity between the judicial authority and the claim.

The case-law of the CJEU on jurisdiction in matters relating to tort, delict or quasi-delict – in particular on the infringement of personality rights – as well as on the interpretation of the "place where the harmful event occurred", has showed its drawbacks in the specific context of SLAPPs. The main implications derive from the so-called "mosaic approach", developed with reference to actions for compensation of damages caused through the press[115]. This approach has also been extended, albeit with some variations, to unfair competition[116] and to violations of intellectual property rights[117].

The abovementioned case-law is quite fragmented[118]. It has been subsequently developed, in the contexts of "cyber torts", with the *eDate* judgment, concerning the infringement of personality rights through the internet[119]. Indeed, in the last mentioned case, the CJEU went further than the mosaic approach, in favour of an even more victim-friendly solution: it has established that an action for compensation can be brought, in respect of all the damage caused, either before *i)* the courts of the Member State of the place of establishment of the person who posted that content, or *ii)* the courts of the

[114] CJEU, 30 November 1976, case 21/76, *Handelskwekerij G. J. Bier BV contro Mines de potasse d'Alsace SA*. On the principle of ubiquity and the subsequent CJEU case law confirming this position, see P. MANKOWSKI, *Article 7*, in U. MAGNUS, P. MANKOWSKI (eds.), *Brussels I bis Regulation*, Köln, 2016, p. 276.

[115] Court of Justice, judgment of 7 March 1995, *Fiona Shevill v. Presse Alliance*, case C-68/93.

[116] Court of Justice, judgment of 21 December 2021, *Gtflix Tv*, case C-251/20.

[117] See Court of Justice, judgment of 22 January 2015, *Pez Hejduk v. EnergieAgentur.NRW GmbH*, case C-441/13 as concerns violation of copyright; Court of Justice, judgment of 19 April 2012, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, case C-523/10 as concerns trademarks.

[118] On the topic G. ZARRA, *Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo internet*, in *Rivista di diritto internazionale*, 2015, pp. 1234-1262; S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Torino, 2016, p. 139; S. CARREA, *L'individuazione del* forum commissi delicti *in caso di illeciti cibernetici: alcune riflessioni a margine della sentenza Concurrence Sàrl*, in *Diritto del commercio internazionale*, 2017, pp. 543-571; F. MARONGIU BUONAIUTI, *La disciplina della giurisdizione nelle controversie civili relative ad attività on-line: coerenza e varietà di orientamenti nei principali ambiti di rilievo*, in *Nuovo diritto civile*, 2018, pp. 71-105; B. HESS, *Reforming the Brussels I bis Regulation*: *Perspectives and Prospects*, in *MPILux Research Paper Series*, 4/2021, p. 9.

[119] Court of Justice, judgment of 25 October 2011, *eDate Advertising GmbH and Others v. X and MGN Limited*, joined cases C-509/09 and C-161/10. See also Court of Justice, judgment of 17 October 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v. Svensk Handel AB*, case C-194/16.

Member State in which his or her "centre of interests" is situated[120]. The latter has been considered a *forum actoris*, not consistent with the general approach[121]. At the same time, the mosaic approach survives. Instead of an action for compensation for all the damage caused, the victims may also bring an action before the courts of any Member State on the territory of which information placed online is or has been accessible and where they suffered injury to their reputation, provided that such jurisdiction is limited to damages caused in that country.

The more recent judgment in *Mittelbayerischer Verlag*[122], while considering many controversial aspects surrounding the criterion of the victim's centre of interests, does not explicitly refuse the mosaic approach, nor the *eDate*'s conclusions. It still leaves many issues open[123]. However, it is worth mentioning because it has stressed the importance of predictability and the necessity of a close, objective and verifiable link between the dispute and the seized court[124].

From this brief overview, the extensive possibility to potentially start many lawsuits in different *fora* is evident. The special ground(s) of jurisdiction provided by Article 7(2), as interpreted by the case law of the CJEU, potentially creates a "cluster bomb" effect, which encourages libel tourism and may be highly detrimental for the defendants. In the particular context of SLAPPs, it seems that the objectives of proximity and predictability stated by recital 16 of the Brussels II bis Regulation are being frustrated[125].

On the other hand, there are some inherent difficulties in working on a recast of the Brussels I bis Regulation and on possible amendments to Article 7(2). Any attempt to limit the operativity of the latter ground of jurisdiction, with reference to lawsuits connected to violation of personality rights, seems to bring undesired side effects. Undoubtedly, the issue partially falls into the broader debate on PIL rules concerning civil

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[120] On *eDate*, see M. BOGDAN, *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case*, in *Yearbook of Private International Law*, 2011, pp. 483-491; M. HO-DAC, *La violation des droits de la personnalité sur Internet en droit international privé: les solutions de l'arrêt eDate Advertising et Olivier Martinez*, in *Revue des affaires européennes*, 2011, pp. 815-821; O. FERACI, *Diffamazione internazionale a mezzo Internet: quale foro competente? Alcune considerazioni sulla sentenza eDate*, in *Rivista di diritto internazionale*, 2012, pp. 461-469; S. MARINO, *La violazione dei diritti della personalità nella cooperazione giudiziaria civile europea*, in *Rivista di diritto internazionale privato e processuale*, 2012, pp. 363-380; J. OSTER, *Rethinking Shevill. Conceptualising the EU private international law of Internet torts against personality rights*, in *International Review of Law, Computers & Technology*, 2012, pp. 113-128; E. GABELLINI, *La competenza giurisdizionale nel caso di lesione di un diritto della personalità attraverso «internet»*, in *Rivista trimestrale di diritto e procedura civile*, 2014, pp. 271-290.

[121] P. MANKOWSKI, *Article 7*, cit., p. 324.

[122] Court of Justice, judgment of 17 june 2021, *Mittelbayerischer Verlag KG v. SM*, case C-800/19.

[123] S. LINDROOS-HOVINHEIMO, *Jurisdiction and personality rights – in which Member State should harmful online content be assessed?*, in *Maastricht Journal of European and Comparative Law*, 2022, pp. 201-214.

[124] Court of Justice, *Mittelbayerischer Verlag KG v. SM*, cit., par. 36.

[125] Recital 16 Brussels II bis Regulation: "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".

liability in the context of the Internet, on which a reform has been extensively invoked[126]. The abovementioned case-law of the CJEU on jurisdiction over actions for infringements of personality rights is controversial. However, reconsidering the mosaic approach or the centre of interests' test could be equally difficult[127]. Those rules are not reflected in black and white in the wording of the Regulation. A different orientation of the CJEU would be needed[128], but it is not possible to say with certainty that this will happen.

The proposal presented in the Study on SLAPPs requested by the European Parliament was to restrict jurisdiction in defamation claims, leaving only the possibility to sue in the Member State of the defendant's domicile[129]. This solution has been criticized by the legal literature, because it is considered too drastic[130].

Another solution could be to create a specific rule, exclusively dedicated to actions for violations of personality rights, which would make the operation of the special ground of jurisdiction conditional on the circumstance that the tortfeasor has taken action to disseminate the defamatory/libellous content in that Member State[131]. This solution would be similar to the one adopted in the context of consumer contracts, where the professional may be sued in the State of the consumer's domicile only if he has, at least, directed his activities in that country[132].

In reality, as already observed with reference to applicable law, any attempt to amend Article 7(2) of the Brussels I bis Regulation by taking SLAPPs as the sole point of view

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[126] On this extensive topic, which is not possible to comprehensively address here, see T. LUTZI, *Internet Cases in EU Private International Law - Developing A Coherent Approach*, in *International and Comparative Law Quarterly*, 2017, pp. 687-721; ID., *Private International Law Online – Internet Regulation and Civil Liability in the EU*, Oxford, 2020; P. DE MIGUEL ASENSIO, *Conflict of Laws and the Internet*, Cheltenham, 2020; D.J.B. SVANTESSON, *Private International Law and the Internet*, Alpen aan den Rijn, 2021; B. HEIDERHOFF, *Producer's Liability for Autonomous Systems and AI in EU Private International Law*, in B. HEIDERHOFF, I. QUEIROLO (eds.), *New Approaches in Private (International) Law*, Napoli, 2021, pp. 13-42; S. DOMINELLI, *Emoji and Choice of Court Agreements: a Legal Appraisal of Evolutions in Language Methods Through the Prism of Art 25 Brussels Ia Regulation*, in *Rivista di diritto internazionale private e processuale*, 2022, pp. 900-918.

[127] It should be highlighted that, in this complex scenario, there equally are strong arguments in favour of maintaining the mosaic approach: see among others P. DE MIGUEL ASENSIO, *Conflict of Laws and the Internet*, cit., p. 176.

[128] A reconsideration of the CJEU's approach had been invoked by Advocate General Bobek in its Opinion of 13 July 2017, within the *Bolagsupplysningen* case, cit., par. 91. See also E. MÀRTON, *Violations of Personality Rights through the Internet: Jurisdictional Issues under European Law*, Baden-Baden, 2016, p. 173; E. LEIN, *Art. 7(2)*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015, p. 155.

[129] J. BORG-BARTHET, B. LOBINA, M. ZABROCKA, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, cit., p. 42.

[130] B. HESS, *Reforming the Brussels I bis Regulation*, cit., p. 10; P. FRANZINA, *Sinergie tra cooperazione giudiziaria e armonizzazione materiale e processuale in Europa*, cit., p. 816.

[131] A similar solution is proposed by T.C. HARTLEY, *'Libel Tourism' and Conflict of Laws*, cit., p. 36. See also T. LUTZI, *Private International Law Online*, cit., p. 184, which addresses the topic from a broader perspective. The same approach results from the Resolution of the Institut de Droit International, *Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments*, 31 August 2019, available at https://www.idi-iil.org/app/uploads/2019/09/8-RES-EN.pdf. On the latter, see S.C. SYMEONIDES, *Cross-Border Infringement of Personality Rights Via the Internet: A Resolution of the Institute of International Law*, Leiden, 2021.

[132] Article 17(1)(c) Brussels I bis Regulation.

is potentially problematic. In this background, with specific reference to violation of personality rights, it is not easy to identify a "weaker party" in absolute terms: the relationship between the plaintiffs and the defendants may present imbalances in a significative number of cases, but this disequilibrium may burden one or the other party depending on the circumstances. Indeed, the CJEU has clarified that the special rule on jurisdiction provided by Article 7(2) do not pursue the same objective as the discipline provided for in Chapter II, Sections 3 to 5 of the Brussels I bis Regulation, which are inspired by the protection of the weaker party[133]. Moreover, in interpreting the jurisdiction rules of the Brussels I bis Regulation, the same Court has usually valorised access to justice, providing plaintiffs with numerous *fora* to bring their climes, instead of restricting their possibilities[134].

Therefore, establishing who is the weak party in defamation or libel lawsuits as a whole brings the risk to fall into unnecessary generalizations which would not serve the legitimate interests of any party. Moreover, an instrument such as the Brussels I bis Regulation should remain neutral, as far as possible, and it should not go in too much detail in addressing any possible scenario[135]. Preventing forum shopping requires different approaches and may not be sufficient when the objective is to contrast the abuse of process. In fact, the total or partial unfoundedness of a claim, as well as the abusive nature of the lawsuit, are almost impossible to recognize *a priori*, before the lawsuit is filed[136].

4.3. (*continue*) EU PIL and third countries

A further aspect to consider is that the risk of SLAPPs is not limited to the EU judicial space. There are third states that can exert an attractive force, as they are considered an appealing forum for SLAPPs. Indeed, plaintiffs may deliberately bring a SLAPP in another jurisdiction outside Europe, once a EU-wide, protective discipline is adopted.

The most notorious – albeit not the only – *forum* is the United Kingdom, whose position has considerably changed after Brexit (and following the end of the transitional

[133] Court of Justice, *Mittelbayerischer Verlag KG v. SM*, cit., par. 33; Court of Justice, *Bolagsupplysningen OÜ and Ingrid Ilsjan v. Svensk Handel AB*, cit., par. 39; Court of Justice, judgment of 25 October 2012, *Folien Fischer and Fofitec*, case C-133/11, par. 46.
[134] T. LUTZI, *Private International Law Online*, cit., p. 103.
[135] On the necessary "technological neutrality" of PIL legislation see Y. EL HAGE, *Le droit international privé à l'épreuve de l'internet*, Paris, 2022, p. 113.
[136] Moreover, it is not unrealistic to consider that actors who wish to pursue such a path will find a way to do so, even in presence of stricter rules on jurisdiction. The well-known case of Daphne Caruzana Galizia is a well-fitting example: Pilatus Bank had sued the Maltese journalist for defamation in Arizona (USA), on the basis of the fact that the blog on which Caruzana Galizia was publishing the alleged defamatory content was hosted by a company based in Phoenix.

period)[137]. English courts usually retain jurisdiction over defendants who are non-resident in England, but only as concerns publications that have been distributed in the territory[138]. The rule has also been extended to online publications. The situation has partially changed after the adoption of the Defamation Act of 2013, which was an attempt to end London's position as the global libel litigation capital[139]. Indeed, the requirement would be that the tort must have a real and substantial connection with England, the latter clearly being "the most appropriate place in which to bring an action in respect of the statement"[140]. At the same time, English law is applicable under the so-called "double actionability rule"[141]: for publications distributed in England, the defamation shall be actionable under English law; for publications distributed abroad, the actionability needs to be assessed both under English and foreign law[142]. As a last update, the very first anti-SLAPPs legislation has been adopted in UK with the Economic Crime and Corporate Transparency Act (ECB2), which is limited to those speaking out on economic crime[143]. The Act provides for the inclusion, in the civil procedure rules followed by courts in England and Wales, of provisions ensuring the early (pre-trial) dismissal of SLAPPs, if the claimant fails to show that it is more likely than not that the claim would succeed at trial. Furthermore, a court may not order the defendant to pay the claimant's costs in respect of a SLAPP unless the defendant's misconduct justifies such an order.

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[137] For a PIL perspective on Brexit, see *ex multis* G. RÜHL, *Judicial cooperation in civil and commercial matters after Brexit: which way forward?*, in *International and Comparative Law Quarterly*, 2018, pp. 99-128; A. BRIGGS, *Brexit and Private International Law: an English Perspective*, in *Rivista di diritto internazionale privato e processuale*, 2019, pp. 261-283; C.E. TUO, *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks*, in *Rivista di diritto internazionale privato e processuale*, 2019, pp. 302-218; J. UNGERER, *Consequences of Brexit for European Private International Law*, in *European Papers*, 2019, pp. 395-407; A. DAVÌ, A. ZANOBETTI, *"Brexit": lo spazio giudiziario europeo in materia civile e commerciale all'alba dell'"exit day"*, in *Federalismi*, 2020, pp. 4-23; L. GILLIES, *Appropriate adjustments post Brexit: residual jurisdiction and forum non conveniens in UK courts*, in *Journal of Business Law*, 2020, pp. 161-183; P. BEAUMONT, *Some reflections on the way ahead for UK private internationallaw after Brexit*, in *Journal of Private International Law*, 2021, pp. 1-17; M. AHMED, *Brexit and the Future of Private International Law in English Courts*, Oxford, 2022; V. LAZIĆ, C. OKOLI, *Private international law and cooperation in civil and commercial matters after Brexit - legislative gaps and future developments*, in A. LAZOWSKI, A. CYGAN (eds.), *Research Handbook on Legal Aspects of Brexit*, Cheltenham, 2022, pp. 221-239.

[138] On the topic T.C. HARTLEY, *'Libel Tourism' and Conflict of Laws*, cit., p. 25.

[139] Defamation Act 2013, available at https://www.legislation.gov.uk/ukpga/2013/26/contents. On the topic see J. PRICE, F. MCMAHON, *Blackstone's Guide to the Defamation Act 2013*, Oxford, 2013; M. COLLINS, *Collins on Defamation*, Oxford, 2014, 1.35; A. MILLS, *The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in Facebookistan?*, in *Journal of Media Law*, 2015, pp. 1-35; D. HOOPER, *How the Court Will Interpret Whether England is the Most Appropriate Place to Bring a Libel Action*, in *Entertainment Law Review*, 2016, pp. 102-104; P.B. BAKER, *Legal Update: Media: Libel Actions – Here or the United States?*, in *Law Society Gazette*, 2018, p. 28.

[140] Defamation Act 2013, s 9. Indeed, the provision seems to retain some inherent weaknesses: see A. DICKINSON, *A boost for libel tourism*, in *The Law Quarterly Review*, 2022, pp. 357-362.

[141] The double-actionability rule dates back to *Philips v. Eyre* (1870-71) LR 6 WB 1 (Ex Ch), an analysis of which can be found in U. GRUŠIĆ, A. MILLS, *Phillips v Eyre (1870)*, in W. DAY, L. MERRETT (eds.), *Landmark Cases in Private International Law*, Oxford-New York-Dublin, 2023, pp. 109-138.

[142] LORD COLLINS et al., *Dicey, Morris & Collins. The Conflict of* Laws, 2012, 35.118-35.120; T.C. HARTLEY, *'Libel Tourism' and Conflict of Laws*, cit., p. 27; A. MILLS, *The Law Applicable to Cross-Border Defamation on Social Media*, cit., p. 7.

[143] Economic Crime and Corporate Transparency Act 2023, cit. fn. 13.

It goes without saying that the United Kingdom is only one of the possible jurisdictions to be considered. The coordination with extra-EU legal systems has been partially addressed by the SLAPPs Directive, through the already examined Articles 16 and 17. Those interventions are indeed coherent with the objectives and aims of the EU competences in the field of judicial cooperation in civil matters: it is now generally accepted that EU PIL legislation can in principle extend to situations linked to third countries, not being strictly limited to intra-EU matters[144]. Nevertheless, the aforementioned provisions remain rather peculiar and represent an attempt to unilaterally (an partially) regulate the phenomenon.

Indeed, having achieved a high level of coherence and mutual trust between Member States, EU judicial cooperation is paying increasing attention to relationships with third countries: the debate on whether the EU should approach this aspect in a more complete and balanced way has been going on for at least a decade[145]. At the same time, at least as far as SLAPPs are concerned, "global" judicial cooperation runs up against the difficulties that have always plagued the negotiation of common rules on defamation, privacy and related issues. An illustrative example is provided by one of the most acclaimed initiatives in the field of transnational civil litigation: the 2019 Hague Judgments Convention excludes defamation, privacy and intellectual property from its material scope of application[146]. This is another, yet significative, example of the persistent difficulties in establishing a binding international framework for defamation and related subject matters, being a sensitive topic for many States, since it touches on freedom of expression

[144] This assumption is sustained by the case-law of the CJEU: see in particular the Opinion of the Court (Full Court) 1/03 of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. On the topic T. BAUME, *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006*, in *German Law Journal*, 2006, pp. 705-716; A. BORRÁS, *Competence of the Community to conclude the revised Lugano convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Opinion 1/03 of 7 February 2006: comments and immediate consequences*, in *Yearbook of Private International Law*, 2006, pp. 37-52; M. CREMONA, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, European University Institute, Working Paper Law No 22, 2006, pp. 1-40; N. LAVRANOS, *Opinion 1/03, Lugano Convention*, in *Common Market Law Review*, 2006, pp. 1087-1100; G. VILLALTA PUIG, C. DARCIS, *The Development of European Union Implied External Competence: The Court of Justice and Opinion 1/03*, in *Anuario Espanol de Derecho Internacional*, 2009, pp. 501-519; L. TOMASI, *The Application of EC Law to non-Purely intra-Community Situations*, in A. MALATESTA, S. BARIATTI, F. POCAR (eds.), *The External Dimension of EC Private International Law in Family an Succession Matters*, Padova, 2008, pp. 87-95; P. FRANZINA, *The Interplay of EU Legislation and International Developments in Private International Law*, in P. FRANZINA (ed.), *The External Dimension of EU Private International Law After Opinion 1/13*, Cambridge, 2017, pp. 183-209.

[145] See A. TRUNK, N. HATZIMIHAIL, *Conclusions*, in A. TRUNK, N. HATZIMIHAIL (eds.), *EU Civil Procedure Law and Third Countries: Which Way Forward?*, Baden-Baden, 2021, pp. 271-305.

[146] Article 2, lett. (k), (l) and (m) of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, entered into force on 1 November 2023. The official text of the Convention, as well as the status table, are available on the official website of the Hague Conference on Private International Law, www.hcch.net. See F. GARCÌMARTIN, G. SAUMIER, *Explanatory Report on the 2019 HCCH Judgments Convention*, The Hague, 2020, para. 60.

and may therefore have constitutional implications[147].

4.4. (*continue*) The enhancement of cooperation mechanisms between judicial authorities

In the light of the above, the SLAPPs Directive well grasped the need for action on the procedural harmonisation side, perhaps also in awareness of the difficulties described above as concerns possible interventions on the Rome II and the Brussels I bis Regulations.

At the same time, there are indeed some aspects of judicial cooperation that may still be considered in tackling the phenomenon of SLAPPs. At least the threat of parallel or multiple proceedings may be discouraged through a stronger and more efficient cooperation between the judicial authorities of the Member States[148]: for instance, the Brussels I bis regulation already foresees instrument such as *lis pendens* or the possibility to coordinate related actions[149]. The latter may be particularly useful, since it provides that lawsuits pending at first instance in different Member States may be reunited before the court first seized. However, two requirements must be met, namely that *i)* the court in question has jurisdictions over all the actions, and *ii)* domestic law permits the consolidation of the proceedings. This may not always be the case if the actions are instituted on the basis of the mosaic approach, since each judicial authority is competent exclusively for the damages that occurred within its territorial jurisdiction.

A stronger cooperation between judicial (and administrative) authorities of the Member States would also be useful in recognizing and eventually stopping multiple SLAPPs, on the basis of the existence of parallel proceedings and other identifying elements. In this regard, promoting an effective cooperation is one of the main concerns of the EU lawmaker in the recent years: this not only results from the most recent PIL regulations adopted under Article 81 TFEU[150], which have progressively broadened their scope from traditional PIL issues, but also from the latest development on digitalization. Reference is made to the creation of a digitalised communication system for cross-border civil and criminal proceedings ("e-CODEX"), enabling the exchange of documents and information between national systems using standard digital forms, to which all the EU

[147] C.M. MARIOTTINI, *The Exclusion of Defamation and Privacy from the Scope of the Hague Draft Convention on Judgments*, in *Yearbook of Private International Law*, 2017/2018, pp. 475-486.
[148] P. FRANZINA, *Sinergie tra cooperazione giudiziaria e armonizzazione materiale e processuale in Europa*, cit., p. 818.
[149] Articles 29 and 30 Brussels I bis Regulation.
[150] See L. CADIET, *The Emergence of a Model of Cooperative Justice in Europe: Horizontal Dimensions*, European University Institute - Centre for Judicial Cooperation, Distinguished Lecture 2014/04, pp. 1-19; F. HEINDLER, *The digitisation of legal co-operation - reshaping the fourth dimension of private international law*, in T. ROHN, R. GULATI, B. KOEHLER (eds.), *The Elgar Companion to the Hague Conference on Private International Law*, Cheltenham, 2020, pp. 428-438.

PIL Regulations are being adapted[151]. If accompanied by adequate strategies and initiatives, the enhancement of a digital judicial network could be one of the keys for addressing SLAPPs in a coordinated way and for sustaining the correct application of the SLAPPs Directive and the implementing national legislation[152].

5. Conclusions

The analysis of the phenomenon in the EU context, under the different lenses of Human Rights Law and Private International Law, has shown the necessity to consider the global relevance of SLAPPs.

From the point of view of Human Rights Law, there is a growing attention towards this subject-matter, which touches upon many fundamental rights. Furthermore, the issue is considered in all its different aspects, because it could potentially affect both criminal and civil law. While the case-law of the ECtHR on the topic is still embryonal, it lays over the consolidated basis of decisions protecting, in particular, freedom of expression. Indeed, it is possible that the ECtHR would come back to the topic soon. At the same time, notwithstanding its importance in monitoring compliance with the rights enshrined in the ECHR and in influencing the legal systems of the contracting States, the intervention of the ECtHR remains an *ex post* remedy.

Form the perspective of PIL, the regulatory function of the latter may play an important, albeit circumscribed role in addressing SLAPPs[153]. As correctly guessed by the EU lawmaker when elaborating the SLAPPs Directive, PIL rules alone would not be able to counter the phenomenon in all its complexity, if only because SLAPPs produce their effects at a very embryonic stage: it is difficult to realise that there is a SLAPP until it is underway and the damage has already been done.

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[151] Reference is made to the Regulation (EU) 2023/2844 of the European Parliament and of the Council, *on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*, of 13 December 2023, in OJ L 2023/2844 of 27 December 2023, pp. 1-29, as well as to the Directive (EU) 2023/2843 of the European Parliament and of the Council, *amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalization of judicial cooperation*, of 13 December 2023, in OJ L 2023/2843 of 27 December 2023, pp. 1-13. On the topic see A. LEANDRO, *L'assunzione delle prove all'estero in materia civile nell'era dell'innovazione digitale. La rifusione delle norme applicabili ai rapporti fra gli Stati membri dell'Unione europea*, Torino, 2021; C.E. TUO, *Digitalizzazione e Unione europea a 27: gli effetti sulla cooperazione giudiziaria civile*, in *Quaderni AISDUE*, 2022, pp. 303-329; E.A. ONȚANU, *The digitalisation of European Union procedures: A new impetus following a time of prolonged crisis*, in *Law, Technology and Humans*, 2023, pp. 93-110.

[152] The SLAPPs Directive only mentions digitalization in recital 48, while considering its potentials in monitoring the existence and growth of SLAPPs, providing authorities and other relevant stakeholders with information to quantify and better understand the phenomenon and help them to provide the necessary support to targets.

[153] See the view of C. KOHLER, *Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs*, cit., p. 827.

As concerns EU PIL, there currently is a high level of fragmentation of the heads of jurisdiction and conflict-of-laws provisions, with particular reference to defamation and other infringements of personality rights. On the other hand, the existence of multiple fora, as well as the potentially attractive force of a particular jurisdiction to perpetrate SLAPPs, is only part of the overall scenario. It is true that further homogeneity and structure of EU PIL in the field, in its capacity to address the phenomenon within the EU judicial space, would be an added value. It is equally true that third States are also involved and that an adequate response requires a global approach. Since SLAPPs are not confined in the EU judicial space, it results that there are some jurisdictions that are more appealing than others for plaintiffs seeking to obstacle public participation.

The participation of the EU and its Member States, together with third countries, to global PIL instruments such as those concluded under the auspices of the Hague Conference on Private International Law, would certainly be beneficial to a better degree of coordination and homogeneity, thus reducing the risks of abuse of proceedings. This would indeed find the obstacles that have surrounded the adoption of binding PIL rule on defamation and related matters so far. The difficulties encountered both at the EU and international level are due to the sensitivity of the subject matter, which touches upon freedom of expression: for this reason, international cooperation on SLAPPs – as well as on the abovementioned subject matters – needs to appreciate the synergies between civil litigation and human rights[154], in order to promote and "anti-SLAPP" culture in Europe and fostering the adoption of multilateral conventions on the topic.

ABSTRACT: The contribution analyses the phenomenon of SLAPPs (Strategic Lawsuits Against Public Participation) from the different, yet synergic, perspectives of Human Rights and Private International Law, in the light of the "anti-SLAPPs" Directive 2024/1069/EU. After analysing the phenomenon in the implications and possible future developments of the case law of the European Court of Human Rights (ECHR), the paper discusses the aspects of Private International Law that concern not only the European instruments of civil judicial cooperation (Brussels I bis and Rome II Regulations), but also the perspective of relations with third countries, in order to formulate some reflections *de jure condito* and *de jure condendo*. The thesis sustained in the contribution highlights the necessity to consider the global relevance of SLAPPs: while further homogeneity and structure of EU private international law in the field – in its capacity to address the phenomenon within the EU judicial space – would be an added value, it is equally true that SLAPPs are not confined to the EU judicial space and international cooperation may be required.

[154] Distinctively on the topic J. FAWCETT, M. NÍ SHÚILLEABHÁIN, S. SHAH, *Human Rights and Private International Law*, Oxford, 2016, p. 480.

KEYWORDS: Strategic Lawsuits Against Public Participation (SLAPPs) – EU anti-SLAPPs Directive – Right to Freedom of Expression and to Information – ECHR – EU PIL and Third Countries.