



Michel Forst
UN Special Rapporteur on environmental defenders under the Aarhus Convention

12 July 2023

Excellency,

I have the honour to address you in my capacity as UN Special Rapporteur on Environmental Defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

With the commencement today of the trilogue negotiations on the draft European Union Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic Litigation against Public Participation”), I take this opportunity to address you on the draft Directive, within the scope of my mandate.

As you may be aware, article 3 (8) of the Aarhus Convention requires that “each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.” As a Party to the Aarhus Convention, the European Union is bound by its provisions, including article 3 (8).

At its seventh session (Geneva, 18–21 October 2022), the Meeting of the Parties to the Aarhus Convention adopted decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention.¹ Decision VII/9 establishes the rapid response mechanism in the form of an independent Special Rapporteur on environmental defenders under the authority of the Meeting of the Parties. At its third extraordinary session (Geneva, 23 – 24 June 2022), I was elected, by consensus, by the Meeting of the Parties as the Convention’s Special Rapporteur on environmental defenders.

In accordance with my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention, I make the following comments on the current text of the draft Directive, including the amendments proposed in the Report of the European Parliament published on 29 June 2023 (the Parliament’s Report), and the General Approach of the Council of the European Union agreed on 9 June 2023:

1. Welcome the European Union’s timely and necessary legislative proposal

As I set out in my “Vision for the Mandate” which I delivered to Parties and interested stakeholders on 23 November 2022,² the use of SLAPPs against environmental defenders has been on the rise across Europe and the Aarhus region. I therefore specifically identified action

¹ Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf

² Available at: [Vision for mandate.pdf \(unece.org\)](https://unece.org/sites/default/files/2022-11/Vision_for_the_mandate.pdf)

against such abuse of court proceedings as a key component of my mandate.³ I accordingly warmly welcome and congratulate the European Union on its timely and very much needed legislative proposal.

Through the present legislative process, the European Union has the opportunity to establish itself as the global pioneer in efforts to combat SLAPPs around the world. This however will only happen if, in the current negotiations, the European Union takes strong and far-reaching efforts to ensure a broad and truly effective directive against SLAPPs. If it does, the directive will serve not only as a model for all member States but for countries elsewhere too. If however the European Union falters in its level of ambition now, it will, quite simply, fail to protect those persons who act each day to protect us all.

2. Include explicit references to “environmental defenders” in the Directive

I welcome the Parliament’s proposed amendment to expand the protective scope of the draft Directive to any “natural and legal persons who engage in public participation on matters of public interest”, followed by an illustrative list of potential victims of SLAPPs.⁴ This is preferable to the Commission’s original draft and the Council’s General Approach, which focuses in particular on journalists and human rights defenders and thereby risks to overlook the wide range of potential victims of SLAPPs who experience persecution for exercising their rights of public participation.

However, neither the Commission’s legislative proposal nor the Council’s General Approach mention environmental defenders, who are far too often subjected to SLAPPs. In keeping with the Parliament’s proposed recital 7, the Directive must acknowledge the vulnerable position of environmental defenders and their status as frequent targets of SLAPPs. While I therefore welcome the Parliament’s proposed amendment to recital 7, it is critical that the wording of recital 7 be revised to make clear that environmental defenders are themselves human rights defenders and are thus entitled to all the rights and protections granted to all human rights defenders. This is in line with the proposal in the Opinion of the Committee on Civil Liberties and Home Affairs, which added a new recital 7b to specifically address the situation of environmental defenders.⁵

³ Ibid, pages 7 and 9.

⁴ See recital 4 and article 1 of the Report of the European Parliament on the 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 (COM(2022)0177 – C9-0161/2022 – 2022/0117(COD)) (hereinafter, the “Parliament’s Report”), available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0223_EN.html.

⁵ See pdf-page 60 of the Parliament’s Report, available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0223_EN.html.

3. Delete the Council’s proposed recital 4a concerning “bad faith” public participation

In its General Approach, the Council introduces a new recital 4a which states that “it is necessary to bear in mind that public participation is not always conducted in good faith”.⁶ This assertion is gravely concerning and runs directly counter to the objective of the Aarhus Convention to ensure broad public participation in environmental matters and protect civic space and fundamental freedoms. The provisions in the draft Directive provide sufficient safeguards to ensure that natural or legal persons not acting in good faith will not be entitled to protection.

I am also concerned that the Council’s proposed recital 4a bestows unfettered discretion on national courts to determine whether protection under the Directive is warranted under any given circumstances. By granting “the court or tribunal seised with the matter the discretion in order to consider whether the application of the relevant safeguards is appropriate in a particular case”,⁷ this single sentence potentially undermines the entire objective of the Directive. Rather, national courts should be required to interpret the Directive to give it the broadest possible scope to protect victims of SLAPPs. The drafters of the Directive should ensure that this intention is clearly reflected in the text of the Directive and serves as the guiding principle for national courts in the exercise of their discretion.

Based on the foregoing considerations, I recommend that the Council’s proposed recital 4a is deleted in its entirety.

4. Clarify definition of “abusive court proceedings”

I have several concerns regarding the definition of “abusive court proceedings” as currently proposed in article 3 (3) of the draft Directive.

In its current form, the draft Directive appears to distinguish “manifestly unfounded” claims and “abusive court proceedings” as two distinct categories. However, since Chapter IV of the draft Directive addresses “Remedies for abusive proceedings”, it is critical that the definition of “abusive court proceedings” in article 3 (3) makes clear that “manifestly unfounded claims” are a form of “abusive court proceedings”. This point is currently not fully clear and could lead to significant confusion in practice, including an argument that the remedies provided for under Chapter IV are unavailable to “manifestly unfounded” claims. It is hard to believe that this would reflect the intention of the drafters of the Directive.

Additionally, in its current version, article 3 (3) requires the “main purpose” of the abusive proceedings to be the “prevention, restriction or penalization of public participation”. Such a “main purpose” requirement opens the door to lengthy litigation in each case on whether the prevention, restriction or penalization of public participation was in fact the claim’s “main

⁶ Available at: <https://data.consilium.europa.eu/doc/document/ST-9263-2023-INIT/en/pdf>.

⁷ Recital 4a of the General Approach of the European Council: “To this end, the rules in this Directive should leave the court or tribunal seised with the matter the discretion in order to consider whether the application of the relevant safeguards is appropriate in a particular case”.

purpose”. Abusive proceedings may serve more than just one purpose and nevertheless prevent, restrict, or penalize public participation. I am therefore deeply concerned about the inclusion of the “main purpose” requirement.

Equally, I oppose the Council’s proposed amendment to article 3 (3) to delete the reference to “fully or partially” unfounded claims. As I explain in more detail on page 6 below, limiting the definition of abusive court proceedings to those which pursue entirely unfounded claims risks excluding a significant number of SLAPPs from the Directive’s scope.

Based on the foregoing, I recommend that article 3 (3) be revised to define “abusive court proceedings against public participation” as “court proceedings that prevent, restrict, or penalize public participation and which pursue fully or partially unfounded claims. Indications of abusive proceedings can be: [etc]”.

5. Broaden the substantive scope of the Directive

I welcome various amendments proposed by the Parliament to broaden the scope of the Directive. These include in particular:

(a) Retaining, and extending, the definition of “cross-border implications”

While it is regrettable that, due to the legislative competence of the European Union, the scope of the Directive does not include SLAPPs that take place entirely within a national system, I very much welcome the Commission’s proposal to include, in article 4, a definition of “cross-border implications” and I oppose the proposed deletion of this definition in the Council’s General Approach. Deleting this definition would leave the meaning of “cross-border implications” to be determined differently by each Member State, which would run directly counter to the objective of promoting compatibility of the rules on civil procedure in the Member States. Moreover, it may lead to extended litigation on whether any particular SLAPP was within the scope of the Directive or not. I therefore strongly welcome the amendments proposed by the Parliament to article 4(2)(a) and recital 22 to broaden the definition of the cross-border requirement. In today’s digitalized and increasingly borderless world where public participation often is carried out through social media, blogs, or other web-based medium it is critical that such acts fall within the scope of the Directive’s protection. The language proposed by the Parliament reflects the need for a broad interpretation of the cross-border requirement in the light of the public interest character of the matter concerned and aligns with the drafters’ general intention to achieve a broad application of the Directive.

(b) The inclusion of pending SLAPPs

Considering the increasing number of currently pending SLAPPs, I strongly support the amendments introduced by the Parliament in article 21(1a) and recital 34b to include pending, and not just future, SLAPPs within the scope of the Directive.

At the same time, it is regrettable that neither the Council nor the Parliament extended the scope of the Directive to civil claims in criminal proceedings.⁸ Indeed, a significant number of SLAPPs take the form of civil claims in criminal proceedings or simultaneous proceedings can be a mix of civil, administrative or criminal.⁹ Excluding such claims also leaves a loophole for bad faith claimants to bring their civil claims as part of criminal proceedings and thereby evade the protection under the Directive. I therefore welcome the approach taken in article 1 of the Opinion of the Committee on Culture and Education, which specifically includes such claims within the scope of the Directive.¹⁰

6. Retain key procedural safeguards, including early dismissal procedures

The longer an abusive court proceeding goes on, the greater the financial, psychological and other toll on the defendant. I therefore strongly support the proposal by the Parliament in its recital 23, and proposed article 5(3a) of the Opinion of the Committee on Civil Liberties and Home Affairs,¹¹ to require that SLAPPs are dealt with in a swift and effective manner.

A key procedural safeguard against SLAPPs is the early dismissal procedure. While provided for across the draft texts of the Commission, Council and Parliament, there are critical differences between the various proposed texts that raise significant concerns about the practical availability of the early dismissal procedure.

First, both the Parliament and the Council follow the approach proposed by the Commission to allow for early dismissal only in relation to “unfounded” or “manifestly unfounded” claims, as opposed to abusive proceedings more generally.¹² I align with the Opinions expressed by both the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Culture and Education which recommend extending early dismissal to all abusive proceedings. As set out above, I do not see any value in the artificial distinction drawn between manifestly unfounded and abusive proceedings, with the former being a potential (but not necessary) element of the latter. For example, abusive proceedings that take the form of multiple simultaneous proceedings aimed at depleting the defendant’s financial resources or unethical litigation strategies aimed at silencing the defendant should fall within the scope of the Directive, irrespective of whether the claim is manifestly unfounded. I therefore recommend that the early dismissal provisions apply to all abusive court proceedings.

Second, it is important to clarify the burden of proof in early dismissal proceedings. Pursuant to proposed article 12 of the Council’s General Approach, where a defendant has sought early

⁸ Article 2(1) as proposed by the Commission and accepted by the Council specifically requires the claim to be “entertained in civil proceedings”.

⁹ As acknowledged in recital 12 of the Parliament’s Report.

¹⁰ See pdf-page 110 of the Parliament’s Report, available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0223_EN.pdf

¹¹ See pdf-page 83 of Parliament’s Report, available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0223_EN.html.

¹² See article 9 and recital 26a of the General Approach of the European Council.

dismissal, it is for the claimant “to substantiate the claim in order to enable the court to assess whether it is not manifestly unfounded”. I believe this provision suffers from significant uncertainty. It is unclear what level of proof is required to “substantiate” a claim of manifest lack of foundation. National courts may impose an unduly light burden on the claimant to establish that its claims are not manifestly unfounded and thereby strip the early dismissal safeguard of much of its power. One possibility to avoid such uncertainty would be to turn the burden of proof into a requirement for the claimant to show a prima facie case. This would not interfere with a claimant’s right to a fair trial while at the same time increase the opportunity for courts to stop abusive proceedings at an early stage.

Third, in its General Approach to article 9 (1), the Council proposes the deletion of the early dismissal of a claim “in part”. It thereby removes the possibility for those parts of a claim that are unfounded to be dismissed at an early stage. This is a significant reduction in protection, since it enables claimants to add multiple unfounded claims in the knowledge that if even one head of claim is not manifestly unfounded, the defendant be required to defend the full set of claims to the end.

Fourth, in its General Approach, the Council proposed to delete article 10 providing for the stay of the main proceedings during an early dismissal application.¹³ I oppose such deletion and instead align with the position taken both by the Commission and the Parliament on this issue. A failure to stay the proceedings while an early dismissal application is pending can significantly increase the burden on the defendant, having to argue both for early dismissal and proceed with the defense on the merits of the claims at the same time.

7. Provide extensive support to victims

Victim support should be a cornerstone of the Directive. I therefore welcome the various additions made by the Parliament, including new article 5b which imposes an obligation on Member States to assist persons engaging in public participation, and article 7, which specifically provides for a right to intervene and/or support for NGOs and other entities safeguarding or promoting the rights of persons engaging in public participation. I particularly welcome the language in the Parliament’s proposed article 7, which makes clear that such a right is in addition to any right of intervention already existing in national law. NGOs and other civil society actors have an important role to play both in supporting defendants and in providing additional information or opinions to the court. This should be reflected in the Directive.

In this context, I support the language proposed by the Parliament in recital 31 and article 14 to make clear that all costs, including the “full costs of legal representation” “is” ordered (as opposed to “can be ordered” in the Council’s General Approach). A clear statement that the defendant is entitled to all his or her costs, including the full costs of legal representation, is key to discourage SLAPPs.

¹³ See also recitals 27-28 of the General Approach of the European Council.

In this regard, I am very concerned that the Council has proposed to delete article 15 which specifically provides the defendant with a right to compensation for both material and non-material harm suffered as a result of an abusive proceeding. Beyond the financial burden for a defendant to fight SLAPPs, abusive proceedings combined with other forms of intimidation also carry significant psychological stress and potential long-lasting reputational damage. It is critical to acknowledge and provide redress for the multi-dimensional impact of SLAPPs. I therefore strongly support the approach taken in article 15 of the Parliament's Report, which specifically requires the claimant to provide full compensation for both material and non-material damage to the defendant.¹⁴

Article 15 as amended by the Parliament also specifically provides that a defendant should be able to obtain full compensation "without the need to initiate separate court proceedings to that end". I strongly support this amendment. Requiring a defendant to initiate new proceedings to get redress for the harm suffered as a result of abusive proceedings not only creates an additional burden for the defendant but also significantly increases the time until a defendant is made whole again.

8. Take a holistic approach to protection against SLAPPs

I very much welcome the amendments proposed in the Parliament's Report recognizing the importance of a holistic approach to protection against SLAPPs.

First, strategic litigation against public participation consists not only of the trial itself, but also of pre-trial strategies, including threats and other form of intimidation, that in themselves frequently serve to silence the victim. The Directive should acknowledge that it is not just the SLAPP trial itself that is harmful to public participation, but also pre-trial and other litigation strategies outside trial. I therefore welcome the specific inclusion of "threats" in article 1 and recital 4 as amended by the Parliament and commend, in particular, the Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the inclusion of a new recital 13a, which specifically addresses pre-trial procedures. Equally, I welcome the Parliament's amendments to recital 31 which specifically include "pre-trial costs" as part of recoverable costs for a defendant in SLAPPs.

I also welcome the fact that the Parliament has acknowledged the significant role of the lawyer in this context.¹⁵ An important, yet often overlooked, aspect of abusive proceedings is the role played by the lawyer, whose aggressive conduct often adds to the emotional distress and pressure on the defendant. Imposing ethical rules on the legal profession in European Union member States that would prevent abusive conduct by lawyers in court proceedings against environmental defenders is long overdue.

Second, it is important to acknowledge that the victims of SLAPPs frequently span beyond the named defendant to include the defendant's family members and lawyers acting on his or her

¹⁴ See also recital 31a of the Parliament's Report.

¹⁵ See articles 18(h) and (j) and recital 34d of the Parliament's Report.

behalf. As such, I welcome the additions made in the Parliament's Report to recital 13 to specifically list such direct or indirect victims in the relevant group of protected individuals.

Third, a key strategic goal of the Directive should be prevention. I accordingly welcome the amendments to article 18 proposed in the Parliament's Report, including provisions on awareness raising (article 18(f)), cooperation and coordination (article 18(i)) and data collection (article 18(k)).

9. Require early transposition of the Directive

I note that the Council has proposed to amend article 18 of the Directive to extend the deadline for transposition of the Directive into national law to three years (compared to the two-year transposition period included in the original draft). In contrast, the Parliament has proposed to limit the transposition period to one year. I strongly support the Parliament's proposed one year transposition period. To effectively address the issue of SLAPPs, early transposition is essential.

Before closing, I would like to highlight two issues that are regrettably missing from the current draft Directive but are addressed in the draft recommendation of the Committee of Ministers of the Council of Europe to member states on countering SLAPPs.¹⁶

First, many natural and legal persons engaging in public participation, including environmental defenders, face reprisals for doing so, and may for reasons of personal safety therefore wish to protect their identity. There have been an increasing number of SLAPPs in which claimants seek to force disclosure of the identity of the defendant whose public participation was conducted anonymously. However, the possibility for anonymous public participation is not currently addressed in the draft Directive. Disclosure of personal information opens the defendant up to threats or other forms of intimidation aimed at silencing the defendant. I therefore recommend that, in line with the draft recommendations of the Committee of Ministers,¹⁷ appropriate language is added to the Directive to protect the identity of persons participating anonymously.

Second, it is important that upon the death of a defendant the burden of defending a SLAPP is not involuntarily shifted to the family of victims, thereby prolonging the significant harm caused by abusive proceedings. While this issue is not presently addressed in the draft Directive, the draft Recommendations of the Council of Europe Committee of Ministers provides for the discontinuance of cases upon the death of the defendant.¹⁸ I recommend that similar language be inserted in the Directive.

In conclusion, I would like to thank you for the opportunity to provide my comments on the current draft Directive. In the light of the commencement today of the trilogue negotiations on the draft Directive, I would be most grateful if you would bring my letter to the attention of the Minister and advisors in charge of the negotiations on the draft Directive. I express my willingness to engage further

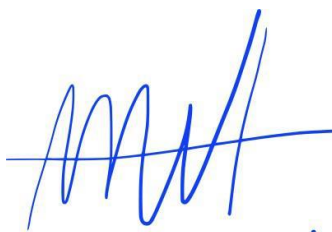
¹⁶ Available at: [Public consultation on draft CM Recommendation on Countering Strategic Lawsuits against Public Participation \(SLAPPs\) - Freedom of Expression \(coe.int\)](#).

¹⁷ See paragraphs 13-14 of CM Recommendations on SLAPPs.

¹⁸ See paragraph 37 of CM Recommendations on SLAPPs.

with all relevant stakeholders regarding my comments if that may be helpful. I also stand ready to provide input during the further stages of the legislative process.

Please accept the assurances of my highest consideration.



Michel Forst

UN Special Rapporteur on Environmental Defenders under the Aarhus Convention

To: Ambassadors and Permanent Representatives to the European Union, in Brussels, of the European Union member States.

Cc: Permanent missions to the UN Office and other international organizations in Geneva of the European Union member States.