

No. 8/23
March 2023

Opinion on the European Commission's Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Anti-SLAPP Directive", COM(2022) 177)

A. Summary

From the point of view of the German Judges' Association, the directive does not appear to be necessary. In Germany, civil procedural law already sufficiently counteracts the risk of abuse of civil court proceedings. On the contrary, there is a risk that the instruments of the directive will be misused, and that the directive will thus not prevent abuse, but only enable it.

Deutscher Richterbund
Haus des Rechts
Kronenstraße 73
10117 Berlin

T +49 30 206 125-0
F +49 30 206 125-25

info@drb.de
www.drb.de

Verfasser der Stellungnahme:
Roland Kempfle, LL.M. (Wellington)
Richter am Landgericht
Mitglied des Präsidiums

Dr. Christopher Sachse, LL.M. (Sydney)
Richter am Landgericht
Mitglied des Präsidiums

B. Evaluation in detail

In the view of the German Judges' Association, there are concerns about the European Commission's proposed directive **on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings** ("Anti-SLAPP Directive").

1. Necessity and proportionality of the directive

Irrespective of the evaluation of the Directive in detail, the fundamental question of the necessity and proportionality of the Directive arises from the perspective of German civil courts and in consideration of German civil procedure law.

a. SLAPPs not yet known to exist in German civil courts

SLAPPs are not yet known to exist in German civil courts. Unlike in other legal systems, German civil procedural law offers a high level of protection against abusive lawsuits. On the one hand, the plaintiff or applicant bears the burden of substantiation. On the other hand, service of a civil action in Germany requires the plaintiff to pay an advance on court costs. In addition, German civil procedural law orders the unsuccessful party to pay the costs of the opposing party, including attorney's fees. Therefore, anyone who files a manifestly unfounded lawsuit has to bear the defendant's attorney's fees anyway - capped by statutory fee rates. In addition, a defendant who does not have the necessary means to hire a lawyer can obtain legal aid in Germany to defend against a civil court action.

b. Absence of an impact assessment report

The proposed directive is not based on an impact assessment report. Since the phenomenon of so-called SLAPPs is unknown in German civil courts, the question arises as to the need for a corresponding EU-wide directive. Although the need is not apparent in this country, the proposed directive proposes statutory regulations that could result in significant restrictions on legal protection in an area sensitive to fundamental rights in Germany (see point 2.). Moreover, some of the proposed regulations are so foreign to German civil law and civil procedure law that their introduction would cause practical problems for the civil courts (see point 3.). In view of this, there are

fundamental reservations about the necessity of such a directive until an impact assessment report is available.

c. Effective legal protection

In case an impact assessment report confirms the Commission's finding that so-called SLAPPs are being used in a targeted and increasing manner against journalists and human rights defenders in several EU member states, without there being a violation of legal interests on the part of the plaintiff, the DRB is certainly in favor of regulations to prevent such abuse of rights. The work of journalists and human rights defenders is of paramount importance in states governed by the rule of law; the rule of law should not be abused to intimidate or silence them with groundless lawsuits, as the Commission suggests. First, however, the causes that make such abuse of civil lawsuits possible in certain EU states should be examined, including why this is not the case in other legal systems. Then the causes could be remedied in a more targeted manner than with the proposed directive, whose implementation in the German civil procedure - which offers a high level of protection against abuse - could lead to considerable problems.

d. Scope of application

For the aforementioned reasons, we advocate limiting the scope of the Directive (Art. 1) to abusive court proceedings and not include "manifestly unfounded proceedings". In this context, it seems inconsistent that the possibility of early termination of manifestly unfounded court proceedings provided for in Chapter III requires, by definition, an examination of the merits, but that this should not apply to abusive court proceedings against public participation, for which sanction options are provided for in Chapter IV instead. According to its explanatory memorandum, the Directive is intended to provide protection against the latter in particular. However, there is a fundamental need for legal protection for court proceedings that may be manifestly unfounded without being abusive at the same time. Clarifying the merits of a claim or application is precisely the core task of state courts. Irrespective of the fact that the scope of application should therefore be restricted to abusive court proceedings in our view, so as not to disproportionately restrict the legal protection of citizens seeking justice, no separate regulations appear necessary in Germany under Chapter III. This is because in the case of obvious unfoundedness - i.e. if the action is inconclusive from the outset - the judge will usually issue an appropriate

notice to the party bringing the action at the beginning of the proceedings and order the withdrawal of the action, or otherwise set an early oral hearing.

2. **Restrictions on civil legal protection in Germany**

The European Commission's proposal for a directive would result in considerable restrictions on legal protection in Germany in an area that is particularly sensitive to fundamental rights.

a. Classification of "normal" procedures as abusive, Art. 3 (3)

According to Art. 3 (3) of the Proposed Directive, almost any press or expression dispute requesting an injunction against reporting and claiming a violation of the General Right of Personality would be classified as "abusive judicial proceedings against public participation." This is because the primary purpose of a motion or action to prohibit certain press coverage for violations of the General Personality Law is precisely to "prevent, limit, or sanction public participation," as the proposal states. Since in such cases the courts must evaluate each expression in dispute by carefully weighing the legal interests of both parties to the proceedings, i.e., in particular, they must legally balance any violations of the general right of personality on the one hand with the freedom of expression and the freedom of the press on the other, in a large number of cases the action or application is only partially justified. According to the general definition in Art. 3 (3) p. 1 of the Directive, this would always be classified as abusive, although the examples in p. 2 suggest that such cases are not likely to be meant by this. In order to clarify that such cases are not covered, the definition in Art. 3 (3) p. 1 should be revised, which could be achieved, for example, by inserting the word "abusively" between "main purpose to" and "prevent".

b. Obstruction of urgent legal protection by Art. 10

The suspension of the main proceedings provided for in Art. 10 can be abused to delay decisions in interim proceedings.

In order to assert violations of the general right of personality caused by public statements in court and to prevent further violations of rights in a timely manner, it is possible in Germany to apply for the issuance of an interim injunction, according to which the party opposing the application - usually a publishing house or other media company, in some cases also individuals -

must refrain from making the corresponding statements. This urgent legal protection, which in civil court practice in Germany is granted particularly swiftly and effectively in view of possible violations of rights protected by fundamental rights, could in fact be nullified by the suspension of the main proceedings provided for in Art. 10. This is because Article 10 provides that already when an application under Article 9 for early termination is filed, the main proceedings are to be suspended until a final decision is made on this. Even if the decision on this would have to be dealt with expeditiously under Art. 11, the final decision may take some time because of the possibility of appeal under Art. 13 and the necessity of granting a hearing in both instances. During this entire period, the main proceedings would have to be suspended according to Art. 10, which, according to the current wording of the regulations, would also include fast-track proceedings. Thus, even if an application under Article 9 were manifestly unfounded, it could be filed solely with the aim of obtaining a stay of the main proceedings under Article 10 and thus continuing a coverage that might violate the applicant party's fundamental rights until the final decision on the application under Article 9.

This would mean that effective urgent legal protection in standard cases involving press law and the law of expression would no longer be guaranteed in Germany. It must also be taken into account that the scope of the directive would inevitably also affect proceedings in which, for example, a private individual defends himself against a report by a press organ that could potentially wipe out his existence. The suspension of the main proceedings provided for in Art. 10 thus harbors the risk that this instrument of the directive will also be used in an abusive manner against parties seeking legal protection against possibly serious violations of personality rights.

It therefore seems imperative to exclude proceedings in interim relief from Chapter III from the outset. Particularly in the area of interim relief, there is also no need for a separate application for early discontinuation, since the purpose of these provisions is precisely to bring about a rapid decision on court proceedings that are manifestly unfounded. This is the case in interim relief anyway, which is why there is no need to extend the regulations in Chapter III to interim relief.

3. **Additional problems for judicial practice**

Further problems for civil court practice in Germany are pointed out below.

a. Definition of Matters with cross-border implications, Art. 4

Insofar as the cross-border dimension in Art. 4 (2) is extended beyond (1), the definition in Art. 4 (2) a) appears to be considerably too broad. This is because purely domestic proceedings in which both parties are domiciled in the same Member State are in danger of being included as cross-border proceedings within the meaning of the Directive if the public interest extends beyond this Member State. Irrespective of the difficulty of establishing this in individual cases, it is also the case that a cross-border need for legal protection and regulation is not evident in such a domestic case.

b. Third party intervention, Art. 7

The involvement of third parties provided for in Art. 7 is likely to increase the processing workload for the civil courts considerably and thus lead to an increase in the duration of proceedings. This is because the court would have to grant the parties the right to be heard for every procedural act of a third party involved and would also have to state its position in its decision on the dispute.

c. Penalties, Art. 16

The imposition of penalties for abusive court proceedings, contrary to the stated intention of the Directive to relieve the civil courts of abusive proceedings, gives rise to the expectation of an additional burden on the courts, since in this case they would have to make a further decision against which appeals could in turn be lodged. An unsuccessful lawsuit is already sufficiently sanctioned by the fact that the plaintiff must pay both the court costs and the attorney's fees of the other side. Admittedly, an abuse fee would seem to make sense for proceedings that can be pursued free of charge, as is the case, in particular, with the Federal Constitutional Court for an abusive filing of constitutional complaints. However, the implementation of this proposal in German law appears to be difficult. This is because, while civil courts must decide a legal dispute solely on the basis of the facts presented by the parties in accordance with the principle of submission of evidence applicable in Germany, the same court would have to obtain the basis for its own decision - also with regard to determining the proportionate

amount of a sanction - in order to impose sanctions under Article 16. The DRB is therefore not in favor of imposing sanctions on parties to civil proceedings.

With more than 17,000 members in 25 state and professional associations (with a total of more than 25,000 judges and public prosecutors nationwide), the German Judges' Association is by far the largest professional association of judges and public prosecutors in Germany.