



CASE Analysis of EU Anti-SLAPP Directive's Provisions with regard to remedies (security to be provided by claimant and costs, damages and fines)

CHAPTER II Common rules on procedural safeguards

(..)

Article 8, Security

Member States shall ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation, the court or tribunal seised may require, without prejudice to the right of access to justice, that the claimant provides security for the estimated costs of the proceedings, which may include the costs of legal representation incurred by the defendant, and, if provided for in national law, damages.

CHAPTER IV Remedies against abusive court proceedings

Article 14, Award of costs

Member States shall ensure that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all types of costs of the proceedings, available under national law including the full costs of legal representation incurred by the defendant, unless such costs are excessive.

1a. Where national law does not guarantee the award in full of the costs of legal representation beyond statutory fee tables, Member States shall ensure that such costs are fully covered, unless they are excessive, by other means available under national law.

~~Article 15 - Compensation of damages~~

~~Member States shall take the necessary measures to ensure that a natural or legal person who has suffered harm as a result of an abusive court proceedings against public participation is able to claim and to obtain full compensation for that harm.~~

Article 16, Penalties or other equally effective appropriate measures

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

What is in the final compromise text of the Anti-SLAPP Directive?

Articles 8 and 14 create guarantees that defendants in SLAPP cases will be financially compensated for **all types of costs of the proceedings**. This includes a **full award of the costs of legal representation**, meaning that Member States will need to ensure that those costs can be fully recovered even if there are statutory fee tables in place.

Article 16 provides for **measures to penalise and deter claimants** that start abusive court proceedings. Claimants can be ordered to pay a fine, they can be obliged to publish the court decision, and they can be ordered to compensate for damages, next to eventually other effective appropriate measures.

Article 8 of the Directive provides the defendant with an additional safeguard by imposing on the Member States the obligation to create the possibility to grant SLAPP defendants a



security to cover the estimated costs of the proceedings, and if provided for in national law, also the estimated damages.

In the final compromise text, Article 15 on compensation of damages has been fully removed. While Article 16 provides for an option for compensation of damages incurred by the defendants as an effective and appropriate measure, this is only if such a possibility is provided for in national law.

What is CASE's analysis of the final compromise text on compensatory damages?

It is positive and crucial that the Directive provides for measures and guarantees to respond to the financial repercussions of SLAPPs for defendants. This includes the guarantees of granting a security, the compensation of all types of costs, including full costs of legal representation, and the imposition of a fine or other measures. However, the applicable provisions are not all formulated in a sufficiently compelling way to effectively impose Member States to introduce such measures and guarantees in an effective and enforceable way. Without any specific and clear provision about compensation for damages at the expense of the claimant, the main risk is that in most of the Member States the transposition - and its consequent enforcement - will refer to already existing compensatory rules that are insufficient to fully compensate SLAPP targets and deter future SLAPPs.

Article 8 that provides for a **security** is weakly formulated as it follows from this provision that the courts (or tribunals) “**may require, without prejudice to the right of access to justice,** that the claimant provides security for the estimated costs of the proceedings, which **may include** the costs of legal representation incurred by the defendant, and, **if provided for in national law,** damages”. Hence a very open provision that leaves a broad margin to the Member State if and how they formulate such a guarantee. What the Member States “shall ensure” according to this Article 8 is **not guaranteeing an effective enforceable right to security**. It only opens up the possibility for this.

The guarantee for **compensation of all types of costs**, as provided for in Article 14 is the most compelling provision for the Member states. Member States indeed “shall ensure” that a SLAPP claimant can be ordered to bear **all types of costs** of the proceedings, available under national law including the full costs of legal representation incurred by the defendant, *unless such costs are excessive*. A very important note that is included in the Directive is that Member States have to ensure that the award in full of the costs of legal representation is possible, even if this is beyond statutory fee tables. This is an important provision that will help to compensate for the financial repercussions on SLAPP defendants.

CASE is mostly concerned about the lack of a proper provision on the **compensation of damages**. First of all, there is no specific provision on this matter (Article 15 that provided for such a right is deleted). Secondly, the mechanism for compensation of damages is only included as a subsidiary option formulated in Article 16. Hence **no obligation or guarantee that such compensation of damages is imposed**. Only an option, a possibility, and only “where provided for in national law”. Furthermore the option for compensation of damages is part of a provision aiming at dissuasive penalties in order to deter potential claimants from initiating abusive lawsuits, while most EU countries do not adhere to the concept of punitive



damages. Therefore the weakly formulated option for damages in Article 16 risks to remain an empty box.

What does CASE recommend for the transposition of the Directive to national legislation?

SLAPPs are not ordinary lawsuits: in that case, there would be no need for a specific regulation. SLAPP lawsuits drain time and resources from the defendant and have a deep impact on the defendant's work and personal life, with serious effects on their mental wellbeing. Furthermore SLAPPs intimidate or silence voices that need to be heard in a democracy, while SLAPP-claimants abuse the administration of justice and the judiciary. CASE therefore recommends that Member States not only impose substantial fines, but include specific safeguards on damage compensation that covers the full extent of harm, including physical, psychosocial, and reputational harm, suffered by targets of SLAPPs. Clear criteria for compensation should be set, taking into account the nature of the legal claim, the "strength" of the claimant, the length of the proceedings and all the non-pecuniary damages caused to the defendant by the SLAPP. The amount of non-pecuniary damages in these cases can be very high, so no ordinary mechanism could actually provide a fair compensation for the defendant, without considering the impact of the SLAPP itself.

With the deletion of Article 15 from the final text and the consequent lack of specific regulation about compensatory damages, the transposition into national legislation should be considered not only a formal necessary act of the legislative process, but a crucial moment to ensure the defendants in SLAPPs and, more generally, freedom of expression have the best protection possible in all EU Member States. Furthermore, we advise Member States to ensure that a request for compensation of damages should not necessarily imply the filing of a separate formal claim on the side of the SLAPP target.