



Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters
(Aarhus Convention)

United Nations Economic Commission for Europe
Palais des Nations, 8-14 avenue de la Paix
CH - 1211 Geneva 10, Switzerland
Email: Aarhus-EnvDefenders@un.org

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

27 November 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).

As the last round of 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”) is set to take place on 29 November 2023, I consider it important at this time to draw your attention to certain key concerns in my letter dated 12 July 2023, sent to the Ambassadors and Permanent Representatives to the European Union, in Brussels, of the European Union member States.¹

Under my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention,² I have closely followed the ongoing negotiations of the draft Directive which carries an immense potential to protect and support the significant and ever-increasing number of victims of Strategic Litigation against Public Participation (SLAPP) in the European Union. As the member States are at a critical juncture in the negotiations that will determine the value and relevance of the Directive, I would like to take this opportunity to highlight the following **five key points** that I consider should be borne in mind in the finalization of the draft Directive.

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

I reiterate my call in my letter of 12 July 2023 to expressly acknowledge the vulnerable position of environmental defenders and their status as frequent targets of SLAPPs. A significant number of the complaints received under my mandate as Special Rapporteur on environmental defenders to date relate to ongoing SLAPPs against environmental defenders. These SLAPPs impose a heavy burden, both financially and psychologically, on environmental defenders, which the Directive must expressly acknowledge. Therefore, in keeping with the originally proposed language in recitals 7 and 7b of the Parliament and the Opinion of the Committee on Civil Liberties and Home Affairs, I call on the co-legislators to ensure that:

¹ Available at: https://unece.org/sites/default/files/2023-07/SR_letter_EU_anti-SLAPP_directive_2023-07-12.pdf (“Letter on draft EU Anti-SLAPP Directive, 12 July 2023”).

² Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf.

- (a) “Environmental defenders” are expressly listed as victims of SLAPPs;
- (b) It is made clear that environmental defenders are themselves human rights defenders and thus are entitled to the same rights and protections of human rights defenders; and
- (c) Matters relating to climate and environmental rights are included, throughout the Directive, when defining matters of public interest falling within the scope of the Directive and thus amounting to relevant public participation.³

2. Ensure broad substantive scope of the Directive

In my letter of 12 July 2023, I strongly welcomed the efforts of the Parliament to broaden the scope of the proposed Directive.⁴ I would like to reiterate the following key points which I consider to be essential to achieving a meaningful final text:

- (a) I call for the deletion, in its entirety, of the Council’s proposed recital 4a concerning so-called **“bad faith” public participation**. The express inclusion of the notion of “bad faith” public participation is deeply concerning, undermines the very essence of the Aarhus Convention and will undoubtedly be misused.⁵
- (b) I urge the co-legislators to delete the **“main purpose” requirement** and the **requirement for claims to be “fully or partially” unfounded** in order to constitute abusive proceedings under article 3 (1). As I explained in my letter, abusive proceedings may involve partially founded claims and/or serve more than one purpose, yet still prevent, restrict or penalize public participation in the most serious ways. I therefore reiterate my deep concern about the inclusion of such requirements in the Directive.⁶
- (c) I strongly recommend the co-legislators to retain the **inclusion of pending SLAPPs** under article 21(1a) and the **transposition period of one year** under article 21(1), as proposed by the Parliament. Given that the number of SLAPPs in European Union member States is growing exponentially,⁷ I consider both of these measures to be essential to ensure that existing and future victims of SLAPPs have legislative protection as soon as possible.⁸

3. Include a clear, broad definition of “cross-border implications”

As set out in my letter of 12 July 2023, it is imperative to retain an explicit and broad definition of “cross-border implications” in order to ensure consistency and certainty in the Directive’s implementation.⁹ The requirement of a cross-border element, due to the legislative competence of the European Union, already severely limits the scope of the proposed Directive. A failure to define “cross-border implications”, being such a key concept in the Directive, will result in

³ E.g. in relation to article 3(1), and recitals 7, 18, 19a of the Parliament’s Report and Council’s General Approach.

⁴ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, pp. 4-5.

⁵ See my letter on the draft EU Anti-SLAPP Directive, 12 July 2023, p. 3.

⁶ See my letter on the draft EU Anti-SLAPP Directive, 12 July 2023, pp. 3-4.

⁷ EU Commission Recommendation 2022/758, 27 April 2022, para. 14.

⁸ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, pp. 4-5, 8; see also recital 34b of the Parliament’s Report.

⁹ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, p. 4; see also recital 22 of the Parliament’s Report.

satellite litigation, fragmentation and the further narrowing of the Directive's scope through an unduly restrictive interpretation by some member States at national level.

Moreover, as proposed by the Parliament,¹⁰ the definition of "cross-border implications" should make clear that, even where both parties are domiciled in the same member State as the court seized, a matter should be considered to have cross-border implications when the specific act of public participation concerns matters of relevance for more than one member State. This is particularly important for SLAPPs against environmental defenders seeking to address matters like cross-border pollution or other transboundary environmental impacts.¹¹

4. Include a stand-alone provision on victim compensation and retain wide measures for victim support and assistance

Compensation for victims must be a cornerstone of protection under the proposed Directive and serves both a restorative and deterrence function. I therefore reiterate my strong support for the language of article 15 as proposed by the Parliament that requires the claimant to provide full compensation for both material and non-material harm to the victim.¹² Deletion of this provision would severely undercut the Directive's potential to effectively support victims of SLAPPs.

As I explained in my letter of 12 July 2023, effective victim support is the backbone of the Directive.¹³ In this regard, it is critical to take a holistic approach to victim protection and to recognize the Directive's role in the prevention of future SLAPPs. Chapter Vb as proposed by the Parliament made significant strides in that respect.¹⁴ In line with the Parliament's proposals, I therefore urge the co-legislators to ensure that the final text includes provisions on training of practitioners, data collection, awareness-raising and cooperation and collection.¹⁵

5. Expressly address the role of legal professionals in enabling SLAPPs

Finally, I would like to reiterate the importance of including strong provisions on the ethical obligations of legal professionals in relation to SLAPPs. The conduct of lawyers in enabling SLAPPs adds significantly to the psychological harm suffered by SLAPP victims. Imposing clear ethical obligations on legal professionals, including disciplinary sanctions, to prohibit their enabling and pursuing of SLAPPs, will help to prevent, or at least reduce, such conduct.¹⁶

At this time, it is now urgent that European Union member States take effective legislative action to address the existing and increasing problem of SLAPPs. In this context, I remind member States that the proposed Directive will provide **minimum requirements only** and should be seen as a floor, not a ceiling. In no circumstances should the proposed Directive be used by member States to justify the reduction or removal of any existing protections against SLAPPs at the national level. Indeed, I call on member States, when transposing the proposed Directive, to go beyond its minimum

¹⁰ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, p. 4; see also recital 22 of the Parliament's Report.

¹¹ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, p. 4; see also recital 22 of the Parliament's Report.

¹² Letter on draft EU Anti-SLAPP Directive, 12 July 2023, p. 7.

¹³ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, pp. 6-7.

¹⁴ See Chapter Vb of the Parliament's Report.

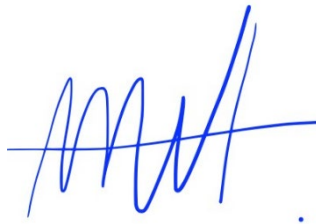
¹⁵ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, pp. 7-8.

¹⁶ Letter on draft EU Anti-SLAPP Directive, 12 July 2023, p. 7.

requirements and in doing so, to take into consideration the Council of Europe Council of Ministers Recommendation on SLAPPs.¹⁷ In this context, it will be imperative that member States ensure that their legislative and other measures to combat SLAPPs address SLAPPs without cross-border implications also.

With the final round of trilogue negotiations on the draft Directive taking place on 29 November 2023, I would be most grateful if you would bring my letter to the attention of the Minister and advisors in charge of the negotiations of the draft Directive. I also reiterate my willingness to engage further with all relevant stakeholders regarding my comments as well as in the subsequent national implementation of the Directive once adopted.

Please accept, Excellency, 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.

¹⁷ See <https://www.coe.int/en/web/freedom-expression/msi-slp>.