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Position on proposed EU Directive anti Strategic Lawsuits Against Public Participation (SLAPPs)

News Media Europe applauds the procedural safeguards proposed by the European Commission. Co-legislators should absolutely maintain a broad definition of SLAPPs (Chapter I), the early dismissal of intimidation lawsuits (Chapter III), the dissuasive financial measures against abusive claimants (Chapter IV) and the refusal to enforce SLAPPs from third countries (Chapter V). We believe these principles will have a deterring effect on the authors of SLAPPs, provided they are considered as minimum standards. Any amendment should aim for a higher level of protection.

However, we strongly encourage co-legislators to better protect press publishers who are repeated victims of SLAPPs, either as direct targets or as journalists' representatives in legal proceedings. Our recommendations are practical and fully consider the right to a fair trial on the one hand (Article 47 of the Charter) and freedom of expression and information on the other (Article 11 of the Charter). Find our case studies here.

RECOMMENDATIONS

1. **Greater protection for newsrooms and press publishers (Article 1, Recital 4):** Press publishers are either direct targets of SLAPPs or undertake legal costs and representation on behalf of employed and freelance journalists, as demonstrated in our report. They should expressly benefit from the protection of the Directive.

2. **Making news reporting an act of "public participation" (Article 3.1):** Given the role of the press, especially investigative journalism, in reporting public interest stories (e.g., elections, acts of corruption, tax evasion) and holding public figures accountable, press publications regardless of the medium (print, online, tv, radio) or the format (e.g. articles, videos, documentaries, podcasts, caricatures) must fall in the definition of "public participation" activities.

3. **Recognising press freedom as a "public interest" activity (Article 3.2):** the Proposal remains shy when it comes to the protection of press freedom. The "public interest" definition should expressly include "media freedom and pluralism" derived from Article 11(2) of the Charter. As such, Member States will have to consider the social and democratic functions of the media in transposition laws.

4. **Considering the imbalance of powers in the definition of SLAPPs (Article 3.3):** Parties' unequal bargaining powers are characteristic of cases opposing a strong claimant (e.g. political figure, businessman, company) against a weaker defendant (e.g. journalist, editor-in-chief, publishing house) even when parties conclude so-called amiable agreements under the threat of costly court proceedings. Also, we should not give "abusive court proceedings" a too narrow definition to allow the judge to require security for procedural costs, which is one of the most effective tools against SLAPPs.

5. **Third-party intervention of press publishers and journalists' representatives (Article 7):** Third-party intervention should be extended to trade associations and trade unions to support press publishers and journalists who are dragged in intimidation procedures.

6. **Mandatory full fee recovery (Article 14):** The Proposal suggests that the abusive claimant "*can* be ordered to bear all the costs of the proceedings" and could escape its obligation if "such costs are excessive". The award of costs must be mandatory and non-negotiable. If the victim gets the claim dismissed, it shall recover lawyer fees in full. This would carry a chilling effect on abusive claims, especially given the non-reciprocity (the successful claimant would not recover the full fees from the defendant).

7. **Stricter budget rules should the claim be admissible (new Article 16a):** The Proposal fails to provide budget solutions in case the claim is admissible. A principle of proportionate costs should apply in proceedings against news publication: stricter budget rules and greater case management (e.g. estimation for each step of the court

process) should allow press publishers to better foresee legal costs and mitigate fee reimbursement. Finally, the defendant that wins the case should recover the legal fees in full.

8. **Grounds for refusal of third-country judgments (Article 17):** National interpretations of "*ordre public*" and the specificities of national legal systems should be taken into account. For illustration, Swedish law provides that only the publishing company or its editor in chief can be sued for the publications, not the journalist in his/her personal capacity. This means that a third country ruling against a Swedish journalist would be considered "manifestly contrary" to Swedish public policy and therefore dismissed.

9. **Swift transposition and retroactive effect (Article 21):** The Directive can only achieve its full potential if it is completely and correctly transposed. Yet we are extremely worried about the transposition deficit across Europe, with very serious impacts on the news media sector[1] (Copyright, AVMS, Whistle-blower Directives). Given the fundamental rights urgency, Member States should transpose within one year, instead of two. In addition, we suggest giving the rules retroactive effect to allow victims to request dismissal of existing charges.

10. **Reviewing the rules for defamation and violations of privacy**: To achieve complete protection, the EU should review Brussels I (recast) and Rome II Regulations to limit forum shopping:

- **Reviewing Brussels I (recast) Regulation (EU) 1215/2012 (competent jurisdiction)**: As the law stands, news media companies are exposed to lawsuits coming from a country connected to the damage (Article 7.2), such connection being broadly interpreted. In our view, the applicable jurisdiction should be that of the residence of the journalist or press publishers' headquarters, to avoid risks of unpredictable and cross-border lawsuits. We look forward to the results of the study on the revision of Brussels I.
- **Reviewing Rome II Regulation (EU) 864/2007 (applicable law)**: As the law stands, targets of SLAPPs are exposed to the law of a country other than the one where they are domiciled, creating great legal uncertainty for the victims. As a principle, press publishers and journalists should be held to the standards of the country-of-origin where they are based and where they publish from. The study on the revision of Rome II Regulation supports this solution[2].

Finally, we recall that the vast majority of SLAPPs are domestic cases which cannot be addressed under the Directive. To fill in this gap, we call on the Member States to enforce without delay the EU Recommendation which is complementary to the Directive to protect news media professionals.

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[1] Report from the Commission, "Monitoring the application of European Union Law" (2021)

[2] Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (2021) finds that "*a unified EU approach to the conflict-of-laws in SLAPPs based on defamation could mitigate most of the difficulties faced by victims of SLAPPs in a cross-border context. More specifically, defamation, including outside the context of SLAPPs, should be covered by the Rome II Regulation and a preference should be given to a rule designating the law of the victim's habitual residence, without prejudice to Art. 14 [freedom of choice]".*