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Contribution to the Council of Europe's consultation on countering strategic lawsuits against public participation (SLAPPs)

Reaction to the [draft text of the Committee of Ministers Recommendation](#)

Brussels, 1 August 2023

Introduction

[News Media Europe](#) is the voice of the progressive news media industry in Europe, representing over 2,700 news brands in print, online, radio and TV, through national associations from sixteen countries. Together, we defend key principles which are vital to us: protecting the freedom of the press, championing the digital future of our industry, and ensuring that the value of content is properly protected.

We thank the Council of Europe for the opportunity to comment the draft Recommendation on countering the use of SLAPPs. News Media Europe has been proactive for the past three years on this topic, as a member of the European Commission's expert group and as a stakeholder directly involved in the EU legislative debate. We think the Council of Europe's Recommendation is timely and we wish to contribute the best we can at European level.

Generally, we think that the draft Recommendation is very thorough. News Media Europe put high hopes on the initiative of the Council of Europe for an ambitious set of guidelines. We hope the Recommendation will carry important political weight that will inspire governments in the work they conduct at national and European levels.

Feedback points

Personal scope

As a general comment, we are glad that the draft Recommendation recognises the need to protect media actors against SLAPPs (point 4). **We suggest making it even clearer and referring to “news media organisations” and “news media professionals” including press publishers and journalists.**

News Media Europe conducted an internal consultation (attached) to better understand the impact of SLAPPs on our membership. Our first observation has been that press publishers are directly impacted by SLAPPs, either as direct targets or as representatives of journalists. Whenever the jurisdiction allows, press publishers would not hesitate to take over representation on behalf of employed or freelance journalists or to provide financial and legal support to journalists targeted by abusive lawsuits. Therefore, it is important to include press

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publishers in the scope of the Recommendation to grant them adequate protection against SLAPPs.

Definitions

We welcome the broad definitions of “public participation” and “public interest” which include journalistic activities by media actors, including investigating and reporting (point 4 (i)). We agree with the Committee of Experts’ approach, making it clear that citizens have a right to access information and “*journalists and the media have the task of imparting such information and ideas*” (point 4 (ii)). In fact, informing the public accurately and truthfully is not just a commercial activity, it is the media’s moral duty in a well-functioning democracy.

Moreover, the “public interest” definition proposed by the draft seems balanced and reasonable. The definition has been subject to interpretation in the case law and the line can be difficult to draw for cases involving private individuals, especially when they hold public functions or functions of influence. **Yet we should be very careful about the normalisation of a litigation culture against the media.** The media is in our view too often brought before jurisdictions on the ground of defamation from well-known figures in positions of power. Whether the act of public participation qualifies as “public interest” reporting should be decided on a case-by-case basis by the judge, keeping in mind that this is the role of the media to empower the truth.

Remedies

When it comes to remedies, we recommend that the draft Recommendation takes onboard the European Court of Human Rights 2017 ruling ([Kapsis and Danikas v Greece](#)), limiting the award of reputational damages. The Court ruled that “*Mr Kapsis [the director of a daily newspaper] and Mr Danikas [the journalist] had been ordered to pay damages without any analysis of their financial situation, and such sanctions would inevitably discourage journalists from contributing to a public discussion on questions of interest to the wider community.*” Hence, we fully agree with the capping of immaterial damages, e.g. reputational damages, (point 40), taking into account the financial situation of the defendant. It should be specified that such claims can be draining on the defendant’s resources, especially talking about a small or local newsroom and journalists.

Amicable remedies

In our view, member states should put in place incentives to favour amicable remedies as a first resort to counter the toxic litigation culture against news media. In most cases, the defendant simply does not have the resources to face legal proceedings and cannot cover the legal fees. This is why it is possible to use SLAPPs as a weapon against press publishers.

For instance, the Recommendation could encourage recourse to non-judicial remedies (e.g. mediation, press councils, ombudsmen) to exclude frivolous claims and solve conflicts with

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the media in an amiable manner. These alternative dispute resolution systems provided by independent bodies are often faster, cheaper, and equally effective solutions to restore one's reputation (e.g. rectification, public apology).

Settlements and censorship

We would also like to draw the attention of the Committee of Experts on the use of settlements, as a means to censor the media. The Danish cases against Ekstra Bladet (2007) and Politiken (2010) (see our repository of cases) illustrate this problem.

Although settlements can offer reasonable out-of-court solutions and contribute to diffusing tensions between parties, they can also feed into an imbalanced system where a strong party puts pressure on a weaker one for obtaining concessions under the threat of litigation. Therefore, even when SLAPPs are not reported, it is worth looking at the role of settlements on media freedom and the limits some of these agreements can put to freedom of expression. **During the data collection exercise, member states should pay attention to such agreements. This could be a point for improvement in the "SLAPPs indicators" section (point 8) and in the "culture of transparency" (point 17) section of the draft Recommendation.**

Protection of sources

In the section on "specific forms or types of SLAPPs", we recommend adding as a distinctive feature the targeting of journalistic sources, alongside the targeting of anonymous public participation. Under the Council of Europe's [Recommendation No. R \(2007\) 7 on the right of journalists not to disclose their sources of information](#), Principle 5 states that: "*Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.*" Hence we suggest that forcing news media professionals to disclose their sources be added to the list of SLAPPs indicators (point 14).

Early dismissal of abusive claims

We fully support the early dismissal procedure, a key element of anti-SLAPP measures. The burden should be on the claimant to prove that the claim is not abusive. **However, we warn the Council of Europe against an excessively high threshold ("manifestly unfounded")** that would make it very difficult for the defendant to apply for early dismissal or, would make it easy for the claimant to prove that the claim is admissible (point 24).

Costs

We fully agree that upon determination of a SLAPP case in court, the claimant should bear all the costs of the legal proceedings including the lawyers' fees incurred by the defendant. Aware that member states cannot instruct courts on costs management, we think nonetheless that this principle is very important and language should be strengthened (point 36).

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Promoting the public interest value of journalism

With the rise of violence against news media professionals across Europe, media freedom cannot be taken for granted. Aside of legislative action, soft measures such as promoting the public interest value of journalism could contribute to restoring trust and respect for news media professionals. **The Recommendation could more explicitly encourage member states to launch awareness campaigns or support educational activities explaining the importance of journalism for a free and democratic society** (point 19).

Application and data collection

Last but not least, the application of the Recommendation and its monitoring – despite its non-binding nature – are key. We agree that member states should enable the collection of data regarding SLAPP cases (point 44). This can be done in cooperation with courts, civil society organisations, media associations and press councils. News Media Europe has worked towards making data available and informing decision-makers about ongoing cases targeting press publishers (see report attached) and will continue to do so at European level in the context of the application of anti-SLAPP instruments. **In this regard, we suggest setting up a directory of support and expert organisations to help victims. In addition, the public registries should be easily accessible at home and from other countries.**

More generally, we think it is important that member states expressly prioritise media freedom, freedom of expression and the safety of journalists in their political agenda. This is the foundation of democratic systems. **Concretely, putting in place focal points within a dedicated administration** with the mission to monitor progress on the application of the Recommendation, collect data about cases with the help of relevant stakeholders, and report back to the Council, would be constructive implementation measures.

Competence

In our view, one point which is missing in the draft Recommendation is that of jurisdictional competence and applicable law. The text rightly points to the problem of forum shopping in defamation cases (point 11) but fails to propose any way forward. **In our view, anti-SLAPP measures require private international law reforms to make cross-border defamation suits more difficult.** The applicable jurisdiction should be that of the residence of the defendant, while the applicable law should be that of the publication. Reviewing international treaties seem instrumental in the fight against cross-border SLAPPs. We further develop on this point in the section “reforming private international law” of our report.

We thank you for considering our feedback on this very important file.

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