



## **Comments by the Coalition Against SLAPPs in Europe (CASE) on the Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member states on countering the use of SLAPPs**

### **Introduction**

The Coalition Against SLAPPs in Europe (hereinafter, “CASE”), is a coalition of 113 non-governmental organisations from across 27 different countries in Europe that joined forces to advocate for the recognition of the threat posed by strategic lawsuits against public participation (hereinafter, “SLAPPs”) to our democracies, and to build the resilience of civil society to effectively respond against such threats by raising awareness, advancing anti-SLAPP solutions, and strengthening their legal capacity. SLAPPs are abusive legal actions taken by wealthy and powerful litigants to undermine the work of journalists, activists, whistle-blowers, human rights defenders, and other public watchdogs<sup>1</sup>. CASE members work across Europe to expose legal harassment and intimidation, protect the rights of those who speak out, and advocate for comprehensive protective measures and reform.

CASE strongly supports the approval of the Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member states on countering the use of SLAPPs (hereinafter, “the Draft Recommendation”). The proposed text of the Draft Recommendation is comprehensive and could significantly expand the legal protections and guarantees against the damage caused by SLAPPs.

CASE applauds the leadership role that the Council of Europe (hereinafter, “CoE”) plays in protecting human rights in all its member states and the vital role it gives to the participation of civil society in its work. We also reaffirm our commitment to continue supporting the CoE in its efforts to curb SLAPPs and see the Draft Recommendation approved and implemented by its member states.

Finally, CASE fully welcomes the CoE’s initiative to start a public consultation in regard to the Draft Recommendation. We acknowledge the tremendous value and timeliness that this opportunity gives to many civil society actors to participate in the development of legal protections and innovative solutions to curb the pervasive harm that the use of SLAPPs has on our democracies and legal systems.

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<sup>1</sup> Generally defined as actors who carry out the social function of keeping the public informed on matters of public interest, such as non-governmental organisations, activists, human rights defenders, the press, among others. See case *Bladet Tromsø and Stensaas v. Norway*, Application no. 21980/93 (1999.5.20) (European Court of Human Rights) (Judgment).

By taking part in this public consultation, CASE would like to share its comments with the Committee of Experts on Strategic Lawsuits against Public Participation (MSI-SLP) as a means to further strengthen the text of the Draft Recommendation. Through our comments, we also want to bring attention to sections in the text that we strongly believe should be kept and that, if removed or weakened, can greatly affect the effectiveness of the Draft Recommendation. CASE's comments come from a wide and diverse network of civil society actors. Thus, they have a general character and are not anchored to any one specific jurisdiction. Individual members of CASE or other civil society actors may present complementary submissions.

### Preamble

1. In paragraph (j), CASE believes that additional attention should be given to the manner by which SLAPPs are defined or described throughout the text of the Draft Recommendation to ensure they do not lead to restrictive interpretations of what a SLAPP is.

For example, when it is stated that SLAPPs are defined as “fully or partially unfounded claims”, it could lead to reinforcing the idea that a case that is won by a claimant cannot be considered a SLAPP. This would lead to the untenable conclusion that laws or legal systems that are amenable to abuse (e.g. broadly drafted laws that can be stretched to cover acts of public participation, or legal systems where there is little judicial independence) cannot be considered vehicles for SLAPPs where they invariably lead to claimant-friendly decisions.

2. In paragraph (k), CASE strongly welcomes the provisions recognising that SLAPPs can be based on administrative and criminal law. We believe these should be kept, as they highlight that SLAPPs are not only based on civil law (i.e. defamation) but that they greatly vary based on the local legal context in each member state.

### Operative part

3. In paragraph (vi), we believe that more explicit provisions should be included to stipulate the concrete responsibilities and actions to be taken by member states when it is stated that they should “regularly review the status of implementation”. CASE recommends the inclusion of specific actions, such as: to implement, as a matter of urgency and through all branches of State authorities, the guidelines set out in the appendix to this Draft Recommendation; to review relevant domestic laws and practice and revise them, as necessary, to ensure their conformity with the Draft Recommendation; and to promote the goals of this recommendation at the national level and engage and co-operate with all interested parties to achieve those goals.
4. While later included in paragraph (53) of the Appendix to the Draft Recommendation, CASE suggests introducing a new paragraph to mention the importance of public awareness raising in this section. We believe this is of crucial importance to deter SLAPPs. Raising more awareness about SLAPPs would help actors in justice systems in their work to better identify legitimate from vexatious

lawsuits. Likewise, awareness of the problem can support efforts to deter SLAPPs, because it becomes easier to expose those who use them as a means to intimidate public watchdogs or block public debates. Therefore, we believe it should be recommended that member states (along with journalists, the media, and any other relevant civil society actors) take further steps to inform the public and stakeholders of the Draft Recommendation.

## Appendix to Recommendation CM/Rec(20XX)XX

### *Scope and definitional approach*

5. We believe that in this section, more attention should be given to describing the different strategic aims pursued through SLAPPs: preventing (before public participation), hindering (during public participation), and sanctioning (during and after public participation). Along these lines, CASE wants to highlight that SLAPPs have also been employed to threaten the protection of journalistic sources as a way to prevent information from reaching the public. For example, CASE members are facing SLAPP cases where legal proceedings have been used to grant access to documentation and sources that fed into journalistic investigations or as a means of forcing disclosure of sources (i.e. as a means of building an effective truth defence).

### *Definitional Criteria*

6. CASE supports the list of SLAPP indicators put forward in paragraph 8. The chapeau states that “the more of them that are present, the more likely the legal action can be considered as a SLAPP”. We agree with this statement, but it is important to convey that the force with which indicators are present is also relevant, such that a case may sometimes be considered a SLAPP even if only one or a small number of indicators is present. For example, an astronomical damage claim might in some instances be sufficient to conclude that the claim’s underlying purpose is to harass or intimidate.

### *Procedural Safeguards*

7. CASE recommends that the Draft Recommendations include the introduction of caps or maximum amounts that can be requested as compensation for damages or judicial costs. We believe that this is key to ensure that, even in cases when SLAPPs are found to be meritorious by courts, SLAPP targets are not forced to pay unreasonably high amounts in damages or legal defence costs.
8. We strongly welcome the inclusion of paragraph (21). We believe that effective case management and ensuring procedural expediency are vital guarantees to support those targeted by SLAPPs, who often have to wait unreasonable amounts of time for a trial to come to a conclusion. This is of particular relevance for cross-border litigation, which is already cumbersome for most defendants.

9. CASE strongly welcomes the inclusion of a recommended early dismissal mechanism in paragraphs (22) to (30). This is a fundamental element of any robust and effective anti-SLAPP legislation as it allows courts to dispose of SLAPP cases before SLAPP targets are subjected to the full costs of judicial proceedings (i.e. the time and financial resources needed for litigation).
10. We do, however, recommend the removal of the cumulative nature of the criteria for admissibility in paragraph (24), as the likelihood to succeed on trial and the abusive nature of a SLAPP should be considered independently. If a claim is abusive, it has no legitimate right to proceed to trial and should be filtered out of the court process. In any event, however, the democratic importance of public interest speech merits an additional layer of protection, and the European Court of Human Rights (ECtHR) has repeatedly held that the ability of journalists, NGOs, and other public watchdogs must be safeguarded in a democratic society. As such, it is quite appropriate that cases targeting acts of public participation be subject to a higher pretrial threshold, regardless of whether they exhibit features of abuse.
11. We also suggest that while the dismissal mechanism should be available “early”, it should continue to be available in later stages of the judicial proceedings. Some cases will gradually reveal themselves as a SLAPP as they progress, for example through tactics designed to delay the proceedings and drive up costs.

### *Remedies*

12. CASE welcomes the introduction of caps or maximum amounts that can be requested as compensation for damages or judicial costs, as mentioned in paragraph (40) of the Draft Recommendation. However, we believe that the language employed in this provision appears to solely cover immaterial damages and does not limit what can be requested for judicial costs. We believe that this is key to ensure that, even in cases when SLAPPs are found to be meritorious by courts, SLAPP targets are not forced to pay unreasonably high amounts in damages or legal defence costs.

### *Support for targets and victims of SLAPPs*

13. CASE strongly welcomes the recommendation to provide legal aid to those affected by SLAPPs listed in paragraph (47). However, we recommend strengthening its wording by including that member states “should ensure” (as opposed to “should consider”) that those defending themselves for acts of public participation in court are eligible for legal aid. Additionally, we also want to point out that there is a slight contradiction with the language employed in paragraph (38), where the phrase “should be considered” is used. CASE believes that the phrasing “should ensure” should be used in both instances.
14. We welcome the recommendation that member states should provide psychological support for those targeted or affected by SLAPPs, as it is now included in paragraph (49) of the Draft Recommendation. This serves to bring more attention to the huge

distress and moral damage that SLAPPs inflict on their targets and the public relations campaigns established to discredit them. This is of particular relevance for those who serve as public watchdogs in the representation of groups that are already disadvantaged in society, such as women and those who belong to diverse marginalised groups (i.e. indigenous peoples, ethnic minorities, the LGBTIQ+ community, among others).

15. As a new element to be included in this section, CASE recommends highlighting the role that alternative dispute resolution mechanisms can play in avoiding SLAPPs. Mediation, the mechanisms offered by ombudsman institutions, or even those provided by media and press councils (in cases of journalistic malpractice or breaches of journalistic ethical codes) offer faster and less cost-intensive remedies before starting legal actions. CASE believes that a failure to use available and suitable alternative dispute resolution mechanisms should be considered as an additional indicator of SLAPP intent (as listed in paragraph (8) of the Appendix to Recommendation CM/Rec(20XX)X, on “SLAPP indicators”).