The Bar Council's preliminary response to the EU Commission consultation on Strategic Lawsuits Against Public Participation (SLAPP) in the EU

1. This is a preliminary response by the General Council of the Bar of England and Wales (the Bar Council) to the European Commission's consultation[1] seeking ways to limit **Strategic Lawsuits Against Public Participation (SLAPPs)** in the EU. The Bar Council also takes note of the European Parliament's most recent resolution on the subject[2] calling for the European Commission to table a package of measures, both legislative and non-legislative, and in both the criminal and civil law domains.

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad. The Bar Council is also the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB). A strong and independent Bar exists to serve the public and is crucial to the administration of justice.

Executive Summary

3. The Bar Council considers that a strong independent media is a fundamental cornerstone of democracy, which should be protected from, amongst other things, vexatious harassment through SLAPPs. The Bar Council also strongly believes in the need to protect the integrity of the legal process, allowing those who believe their rights are infringed their day in court to seek redress where appropriate. Recognising the need to balance these interests, the Bar Council agrees in principle with the need for proportionate EU action against SLAPPs. In particular, we endorse the Commission's statements of principle that[3]

> "SLAPPs constitute an abuse of court proceedings …, threatening democratic values and the exercise of fundamental rights, in particular the freedom of expression and information, and the freedom of the media. They represent a threat to pluralistic public debate, as they may lead to the targets censoring themselves. Moreover, they may have a deterrent effect

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13192-EU-action-against-abusive-litigation-SLAPP-targeting-journalists-and-rights-defenders_en

[2] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0451_EN.html

[3] Commission Roadmap - Ares(2021)6011536

on other potential targets, who may decide not to assert their right to investigate and report on issues of public interest[.]" and

"[T]he initiative would need to preserve all parties' fundamental rights, e.g. data protection and privacy rights, and access to an effective remedy and a fair trial."

4. Another key factor in achieving this crucial balance is recognising litigation which constitutes an abuse of the process. Even when cases can be seen *with hindsight* to have been pursued for a purpose other than the obvious legal remedy, it is often very difficult to recognise that purpose *in prospect*. The problem remains one of definition: how to define "SLAPP" with sufficient precision and without over-reach, so that improper use of the legal process to prevent legitimate inquiry in the public interest is stopped at the earliest possible stage, while at the same time the legitimate defence of private interests against unjustified press and third party intrusion is not hampered.

5. Whilst we see the potential for SLAPPs to be brought in domestic litigation, we note the point made by the Commission that the sort of litigants that are likely to launch SLAPPs would seek to take advantage of the added complexity inherent in conducting litigation cross-border. We further note that since much journalism (particularly investigative journalism targeted at organised crime and corruption, which may be thought to require heightened protection) is transnational, the private international law principle that actions may be brought in the State where the damage occurs often leads to cumbersome, complex and expensive litigation in such cases, a feature which may be taken advantage of by would-be SLAPP claimants. We consider that the EU's stated objectives in this field are more likely to be realised if developed in cooperation with neighbouring third countries where such litigation may originate, including the UK. For all these reasons we would be happy to assist the EU's work going forward if that is considered useful. We take this opportunity to set out a few initial points of principle and look forward to further opportunities to develop ideas and solutions as the EU's work advances.

The role of the legal profession in the administration of justice

6. The Bar Council recognises that this form of abusive litigation and the unquestionable need to protect the administration of justice when tackling it, may well (depending upon the measures adopted) have material consequences for the legal profession, both in the EU and in affected third countries. Many of our members are actively engaged in defending the rights of those targeted by the instigators of such lawsuits, whether in England and Wales or beyond our shores. Our members have also been involved in some of the cases reported to the COE Platform, which raise potential SLAPP issues. We therefore have an interest in the formulation of any measures thought necessary to tackle this problem, and we are able to offer our experience and expertise accordingly.

7. We support the consultation response and preliminary position paper submitted by the Council of the Bars and Law Societies of Europe[4] to the present consultation[5] ("the CCBE paper"). Notably, insofar as (i) it reflects this balance and calls for a careful examination and debate of all the relevant issues and (ii) seeks protection not only for journalists, but also others, including lawyers, engaged in the defence of democracy and the rule of law (see, in particular, paragraphs 8, 9, 11, 18, 28, 30 - 34). As is the case for our own position, we expect the CCBE's to be further developed, and will support it in the effort, as this important work proceeds. The rest of this paper thus seeks, on a preliminary basis, to add one or two points to those already developed in the CCBE paper.

8. Whilst acknowledging the burden for the defendants who are targeted by this form of litigation, we stress the need in this context to find solutions from the perspective of the legal profession that are compatible with the administration of justice. Tackling the myriad complex challenges posed by SLAPPs will require sensitive law and policy making, balancing many, potentially conflicting, fundamental rights such as freedom of the press and the right to freedom of speech with the right to an effective remedy, to privacy and the protection of personal data. Any policy solutions, whether based on hard or soft law, will also need to respect the checks and balances that are built into our legal systems and form the foundation of our democratic societies, including the independence of the judiciary and of the legal profession as guarantors of the administration of justice.

An insight into the challenge for legal professionals & regulators

9. Legal professionals are bound by professional codes of conduct and ethical rules governing, inter alia, their management of potentially conflicting duties to the client, to the court and to the public interest as applicable (see, paragraph 35 of the CCBE paper).

10. In England and Wales, one aspect of this is the so-called "Cab-Rank Rule" which requires a barrister (who is available and competent to act in the given case) to accept instructions for litigation from a professional client (a solicitor or in-house counsel), irrespective of

- the identity of the client;
- the nature of the case to which the instructions relate;
- whether the client is paying privately or is publicly funded; and
- (importantly here) any belief or opinion which [the barrister] may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

In practice, Members of the Bar of England & Wales may thus find themselves *professionally bound* to act on *either* side of a SLAPP.

11. Thus the Cab-Rank Rule prevents barristers from refusing to act on the basis of their perception of the nature of the client or his/ her case: thereby ensuring that all potential litigants,

[4] Of which the Bar Council is a member.

[5] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Position_papers/EN_AtJ_20211210_CCBE-Position-on-abusive-litigations-targeting-journalists-and-right-defenders.pdf

regardless of e.g. reputation, background or the apparent circumstances of the case, have access to justice. This is a cornerstone of our legal system, ensuring equality of arms before the law. Accordingly, if any determination is to be made that a particular litigation is a SLAPP, it should be made on the basis of either a judicial decision or other appropriate independent ruling having a public character and subject to appeal or review. Where such a determination is made in the course of litigation, it should have prospective consequences only and should not entail penalties for those who have acted in the litigation thus far.

12. It can be seen that the challenge for the professional regulator is always to draw the line appropriately between ensuring, on the one hand, that a party who claims to have suffered a legal wrong has access to representation to obtain a remedy to vindicate his or her rights, and, on the other, that legal professionals are not drawn into attempts to abuse the system of legal remedies for illegitimate ends. By way of example, our members have advised in the approach taken by the Solicitors' Regulatory Authority (SRA) to set this boundary in the context of non-disclosure and confidentiality agreements (NDAs), especially (but not only) as they may be used in the settlement of employment disputes. The SRA frowns upon solicitors' use of, and attempts to enforce, overbroad confidentiality agreements which purport to impede a person from "whistleblowing" (e.g. about a sexual harassment case) to the appropriate authorities, and has issued and recently updated a Warning Notice to that effect.

13. One can readily see how a legal professional who knowingly aids an unjustified attempt to suppress allegations of serious misconduct – which is the concern in relation to NDAs – comes into conflict with the public interest that such disclosures be made and those guilty of misconduct be made accountable. A similar principle might be in play where a legal professional is asked to advance a claim based on an alleged cause of action, where the client's primary intention (and/or the obvious primary consequence) would not be the vindication of his rights, but to punish or deter journalists, or other actors who may be targets of SLAPPs, from undertaking legitimate activities which democratic societies regard as being in the public interest. The question where legislation or professional rules should draw the line, and thus how the private rights and public interests involved should be balanced, is a complex and sensitive matter. The Bar has considerable experience of addressing this type of balancing exercise in its public interest work on numerous topics relating to the administration of justice, and we hope that the EU institutions will feel free to call on our expertise to aid their work going forward.

14. We note this to underline the constraints applicable here, and in support of the point made at paragraph 35 of the CCBE position paper, that:

> "…Any measures proposed should not in any way interfere with the independence, quality and efficiency of national justice systems which are crucial for the achievement of effective justice." "In this regard it should be noted that the independence of the judiciary must not be compromised, therefore putting judges in a structural "monitoring" role should not be supported."

A similar point applies to all officers of the court, including members of the legal profession.

The particular risk of forum shopping in SLAPP cases

15. As noted above, the Bar Council is aware of instances of this type of litigation being pursued in the domestic courts in England & Wales, in cases where claimants and/or defendants have questionable connections to the jurisdiction. As noted in paragraph 42 of the CCBE's position paper, and above, the exponential growth in online journalism greatly increases the risk that e.g. reputational damage can be said to have been suffered, and thus a defamation case mounted, against a journalist in a jurisdiction other than that of his or her domicile. A challenge for the EU is that the problem of SLAPPs is one that will not respect its own borders, whether internal or external. As also noted above, the complexity of transnational litigation is itself potentially attractive to well-resourced SLAPP claimants seeking a juridical advantage over a small foreign news outlet.

16. Recent reforms to the libel laws of England and Wales (embodied in the Defamation Act 2013) include a provision (section 9) intended to tackle cases with only a tenuous connection to the jurisdiction. By section 9, a claimant wishing to sue a defendant domiciled outside the EU had to show that England and Wales was, of all the places where the statement or a closely synonymous statement had been published, clearly the most appropriate place in which to bring the action. Since Brexit, section 9 applies to claims in defamation against defendants resident in any jurisdiction outside the United Kingdom. Any measures aimed at curbing SLAPPs which would include those originating in the English courts should have regard to this development, and the experience of our members in litigating transnational cases since its introduction is likely to be of assistance in any such analysis.

17. We understand that in formulating any measures aimed at combatting transnational SLAPPs, account will also need to be taken of developments in the law at European level in relation to jurisdiction in personality rights cases (privacy and defamation) and the territorial application of the GDPR, as demonstrated in a series of recent decisions of the ECJ[6]. These show an incremental liberalisation of the approach to jurisdiction in personality rights and data protection cases arising from publication on the internet. In relation to data protection cases, the UK maintains a particular interest post-Brexit because the UK has now incorporated the GDPR into its domestic law[7], and is likely – so long as that domestic legislation is in place – to seek to give effect to such rights with regard to their application in the EU. Conversely, any relaxation of data protection rights in the UK may give rise to the use of data protection SLAPP claims targeted at UK publishers from claimants within (or purportedly within) the EU.

[6] Cases on jurisdiction in personality rights cases: *eDate Advertising GmbH v X* [2012] QB 654; *Bolagsupplyningen OU v Svensk Handel AB* [2018] QB 963. Cases on the territorial provisions of the GDPR: *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) (Case C-131/12) [2014] QB 1022; *Weltimmo sro v Nemzeti Adatvedelmi es Informacioszabadsag Hatosag* (Case C-230/14) [2016] 1 Wlr 863; and *Verein fur Konsumerenteninformation v Amazon EU Sarl* (Case 191/15) [2017] QB 252

[7] This is the effect of the Data Protection Act 2018 and SI 2019/419: see *R (Open Rights Group) v Secretary of State* [2021] EWCA Civ 800, [2021] 1 WLR 3611 [5], [12-13]

18. Further, the Bar Council has noted from the Commission's supporting documentation (e.g. https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf), that much mention is made of specific features of common law jurisdictions lending themselves to SLAPP claims, especially, but not only in the USA. If the jurisdiction of England and Wales is seen as potentially in a similar situation, the Bar Council would be happy to assist the EU in looking for workable solutions, based on the experiences of its members in a common law jurisdiction.

19. We agree with the points being made that this type of litigation is generally brought not to "win" the case, but rather to wear out / deter the defendant, and others in like position, through the sheer weight, volume, length and / or cost of litigation. The absence of EU-UK arrangements for mutual recognition and enforcement of judgments is not therefore likely to be a deterrent to potential litigants seeking to use SLAPPs either in the UK or in an EU jurisdiction against a party in the other. However the absence of any agreement on the rules on *jurisdiction* as between the EU and UK could make the launching of a SLAPP in the UK courts against a party in the EU, and vice versa, more attractive.. The present Brussels I regime (Regulation 1215/2012), and the Lugano regime based on its immediate predecessor, contain special rules for tortious claims including defamation. By prescribing enforceable reciprocal rules for allocating jurisdiction, they play an important role in preventing abusive forum-shopping claims in the courts of Contracting States by restraining multiple sets of proceedings and ensuring that a claim is brought in the territory to which it has a real and substantial connection. The application of the Lugano rules between the EEA and UK would therefore have obvious advantages in helping achieve the aims underlying the Commission's current consultation exercise and the latest EP resolution.

20. We note the suggestion, including in the EP resolution of mid-November 2021 (link above) and paragraph 48 of the CCBE paper that EU measures in the field of judicial cooperation in civil matters, including Regulation 1215/2012, be revised to deal with these cases. We urge the EU to consider a similar or comparable solution as between the EU and the UK.

The Bar Council
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