

COUNTERING THE USE OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS) – RECOMMENDATION AND EXPLANATORY MEMORANDUM



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

**COUNTERING THE USE OF STRATEGIC
LAWSUITS AGAINST PUBLIC PARTICIPATION
(SLAPPS) – RECOMMENDATION
AND EXPLANATORY MEMORANDUM**

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*Lutte contre l'utilisation des poursuites
stratégiques contre la participation publique
(poursuites-bâillons) –
Recommandation et exposé des motifs*

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Recommendation CM/Rec(2024)2

of the Committee of Ministers to member States on Countering the Use of Strategic lawsuits against Public Participation (SLAPPS) – Recommendation and Explanatory Memorandum

*(Adopted by the Committee of Ministers on 5 April 2024
at the 1494th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe (ETS No. 1),
Considering that the aim of the Council of Europe is to achieve greater unity between its members for the
purpose of safeguarding and promoting the ideals and principles which are their common heritage, *inter alia*
by promoting common policies and standards;

Recalling the commitment of member States to the right to freedom of expression and information, as guar-
anteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS
No. 5, “the Convention”) and as interpreted by the European Court of Human Rights (“the Court”) in its case
law;

Recalling also the equal importance of other rights guaranteed by the Convention, including the right to a
fair trial (Article 6), the right to respect for private and family life (Article 8), the right to freedom of assembly
and association (Article 11) and the right to an effective remedy (Article 13);

Recalling and reaffirming that member States, in addition to their negative obligation to refrain from inter-
fering with the right to freedom of expression, also have a positive obligation to ensure a safe and favour-
able environment for participation in public debate by everyone, without fear, even when their opinions run
counter to those defended by official authorities or significant parts of the public;

Reiterating that free elections and freedom of expression, particularly freedom of political debate, together
form the bedrock of any democratic system and that there is accordingly little scope for restrictions on politi-
cal expression or debate on questions of public interest;

Stressing that the public interest is to be understood broadly as it covers all issues that affect and concern
the public, including controversial issues, and that the public has the right to be informed about matters of
public interest, and journalists and the media have the task of imparting information and ideas about such
matters;

Underscoring that the inclusion of diverse voices and perspectives, including minority and other opinions
outside the mainstream, is essential for ensuring pluralistic public debate and a well-informed and active
citizenry;

Being aware that asymmetries in political, financial and other forms of power in society can give rise to
inequalities in public debate and that the misuse and abuse of power and privilege by threatening or tak-
ing legal action to harass, intimidate or silence minority or critical voices have a chilling effect on public
participation;

Being gravely concerned at the persistence throughout Council of Europe member States of a wide range of
intimidation, threats, violence, killings and other crimes against individuals or organisations acting as public
watchdogs, and at the chilling effect that those threats have on public participation, especially when they
go unpunished;

Being alarmed at the chilling effect on freedom of expression, public debate and public participation caused by legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation, which are often referred to as strategic lawsuits against public participation (“SLAPPs”);

Being aware that SLAPPs are often civil law actions, but that they appear in the administrative and criminal law context as well, and that when such proceedings provide for administrative measures and criminal sanctions they can be particularly restrictive and more easily weaponised against public watchdogs, resulting in a more severe impact on the individual and a greater chilling effect;

Noting with concern that women and persons with diverse sexual orientation, gender identity and expression and sex characteristics, face specific dangers in their capacity as journalists, human rights defenders and other public watchdogs, including when targeted by SLAPPs, and noting the need to address the differentiated impact of the risks and challenges they encounter;

Seeking to consolidate and build on the legal and political responses already taken by the Council of Europe, in line with the case law of the Court and recommendations and declarations of the Committee of Ministers, such as Recommendation CM/Rec(2014)7 on the protection of whistleblowers, Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, Recommendation CM/Rec(2022)4 on promoting a favourable environment for quality journalism in the digital age, and the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to ensure Freedom of Expression (adopted by the Committee of Ministers on 4 July 2012 at the 1147th meeting of the Ministers’ Deputies), and recognising at the same time the importance of achieving consistency and coherence among different instruments and initiatives at the European and international levels;

Recognising the urgency of devising comprehensive and effective strategies to counter SLAPPs that further strengthen existing legislative and policy frameworks and practices,

Recommends that the governments of the member States:

- i. implement, as a matter of urgency and through all branches of State authorities within their competence, the guidelines set out in the appendix to this recommendation, taking full account of the principles included therein, in particular regarding structural and procedural safeguards, remedies, transparency, support for targets and victims, education, training, awareness raising as well as capacity building;
- ii. pay specific attention to SLAPPs in the context of their reviews of relevant domestic laws, policies and practices, including in accordance with Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, to ensure full conformity with member States’ obligations under the Convention;
- iii. promote the goals of this recommendation at the national level, as well as in relevant European and international forums, and engage and co-operate with all interested parties to achieve those goals;
- iv. regularly review the status of implementation of this recommendation with a view to enhancing its impact, in particular improving support mechanisms for targets and victims, and inform the Committee of Ministers about the measures taken by member States and other stakeholders, the progress achieved and any remaining shortcomings.

APPENDIX TO RECOMMENDATION CM/REC(2024)2 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON COUNTERING THE USE OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS)

I. Scope and definitions

1. For the purposes of this recommendation, strategic lawsuits against public participation (“SLAPPs”) are understood as legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation.

2. The central aim of this recommendation, protecting public participation against SLAPPs and prevent the further use of SLAPPs in Council of Europe member States, is to be realised as part of member States' fulfilment of their broader obligations under the Convention to ensure a safe and favourable environment for participation in public debate, which is an essential feature of pluralistic democratic societies that fully respect the rule of law and human rights. The fulfilment of those obligations is guided by an awareness that a range of different kinds of threats have a chilling effect on participation in public debate and lead to self-censorship, thereby depriving societies of the pluralistic offer of information and ideas that individuals need in order to make informed decisions. While action against SLAPPs is needed, a careful balance should also be struck between the parties concerned so as not to hamper the right of access to a court.

3. SLAPPs can take many different forms and are subject to various provisions in national legislative frameworks. One of the challenges for member States in their efforts to prevent SLAPPs and counter their harmful effects is to be able to identify SLAPPs expeditiously and ensure that legislative and other safeguards are in place for all such lawsuits. This recommendation therefore clarifies key terms and provides guidance on the definitional criteria of SLAPPs in order to help member States identify SLAPPs and calibrate appropriate and effective legal safeguards, responses and other measures to counter their harmful effects. It also sets out various indicators.

Key terms

4. For the purposes of this recommendation and in line with the rights enshrined in the Convention, as interpreted by the Court in its case law, the following key terms are understood in a comprehensive and inclusive manner:

- a. "Public participation" refers to everyone's democratic right to participate in public debate and public affairs, online and offline, without fear or discrimination. This includes the right to express opinions and ideas that run counter to or are critical of those defended by the official authorities or by a significant part of public opinion, or which offend, shock or disturb the State or any sector of the population, as clarified by the Court. The notion of "everyone" encompasses all public watchdogs and contributors to public debate and all participants in public affairs, including, but not limited to: journalists, media organisations, media professionals and other media actors, such as citizen journalists; civil society organisations, for example environmental and anti-corruption associations and activists; unions; whistle-blowers; academics; bloggers; human rights defenders; legal professionals; users of social media; cultural actors and creative industry actors.

"Public participation" also refers to the right to freedom of assembly and association and the right to vote and stand in elections. Public participation can thus include a wide variety of activities such as advocacy, journalism, investigating and reporting violations of the law or ethical norms, academic research, teaching, debate, writing to government officials or corporate customers, circulating petitions, being parties in litigation designed to advance social change or protect existing rights or the environment, engaging in peaceful protests or boycotts, engaging with regional or international mechanisms, or simply speaking out against misuse or abuse of power, human rights abuses, corruption, fraud or indeed commenting on any matter of public interest. The scope of the term also covers actions preparing, supporting or assisting public participation.

- b. "Public interest" refers to all matters which affect the public and in which the public may legitimately take an interest, especially those matters concerning important social issues or affecting the well-being of individuals or the life of the community or the environment. The public has the right to receive information and ideas and thus to be informed about matters of public interest, and journalists and the media have the task of imparting such information and ideas. Public interest extends to issues which may give rise to considerable controversy, but it cannot be reduced to the public's thirst for information about the private lives of others, or to an audience's wish for sensationalism or voyeurism. Politics, current affairs, human rights, justice, social welfare, education, gender equality, sexual orientation and gender identity, sexual or gender-based harassment or violence, health matters, religion, culture, history, corruption, climate and environmental issues are thus all examples of topics of public interest, unlike individuals' private relationships or family affairs. Topics may be of public interest at the local, national or international level.

Definitional criteria of SLAPPs

5. **Targeting public participation** – The legal action seeks to misuse or abuse the legal process to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation.
6. **Covering all causes of legal action** – Legal actions may entail the misuse or abuse of all types of statutory or common law to prevent, inhibit, restrict or penalise contributions to public debate, including, but not limited to, defamation, insult, invasion of privacy, conspiracy, breach of intellectual property rights, economic interference or infliction of emotional harm. While this will generally mean a civil lawsuit, in some jurisdictions it is possible to trigger misdemeanours, administrative measures or criminal charges against their critics, including through the use of injunctions. This definition also extends to “legal intimidation tactics” – interlocutory or interim measures, aggressive subpoenas or simple threats designed to intimidate the other party into backing down.
7. **All stages of legal action** – All stages of legal action are relevant, including an initial threat of legal action, which is in itself capable of having a chilling effect on public participation, as well as enforcement proceedings.

SLAPP indicators

8. SLAPPs manifest themselves in different ways and various indicators can be used to identify them. Such indicators include, but are not limited to, the following elements:
 - a. the claimant tries to exploit an imbalance of power, such as their financial advantage or political or societal influence, to put pressure on the defendant;
 - b. the arguments put forward by the claimant are partially or fully unfounded;
 - c. the remedies requested by the claimant are disproportionate, excessive or unreasonable;
 - d. the claims amount to abuse of laws or procedures;
 - e. the claimant engages in procedural and litigation tactics designed to drive up costs for the defendant, such as delaying proceedings, selecting a forum that is unfavourable to public participation or vexatious to the defendant, provoking an onerous workload and pursuing appeals with little or no prospect of success;
 - f. the legal action deliberately targets individuals rather than the organisations responsible for the challenged action;
 - g. the legal action is accompanied by a public relations offensive designed to bully, discredit or intimidate actors participating in public debate or aimed at diverting attention from the substantial issue at stake;
 - h. the claimant or their representatives engage in legal intimidation, harassment or threats, or have a history of doing so;
 - i. the claimant or associated parties engage in multiple and co-ordinated or cross-border legal actions on the basis of the same set of facts or in relation to similar matters;
 - j. the claimant systematically refuses to engage with non-judicial mechanisms to resolve the claim.
9. While SLAPPs do not necessarily include all these indicators, the more of them that are present or the more acute the behaviour, the more likely the legal action can be considered as a SLAPP.

Specific forms/types of SLAPPs

10. In addition to the general characteristics of SLAPPs, member States should take due account of the distinctive characteristics of specific types of SLAPPs and their legal consequences and take appropriate and effective measures to address the specific threats posed.

i. Cross-border SLAPPs

11. Compared to domestic SLAPPs pursued within one national legal system, cross-border SLAPPs, or SLAPPs pursued in different jurisdictions, involve additional layers of complexity, costs and stress. Successfully defending cross-border SLAPPs requires expert knowledge of multiple national legal systems. This typically

involves engaging lawyers who are professionally active in or who have expertise of the relevant jurisdictions, thereby increasing the overall time and costs spent on preparing and defending the legal actions and exacerbating the chilling effect.

12. Member States should take appropriate and effective measures to limit forum shopping that is unfavourable to public participation or vexatious to the defendant, including as set out in the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression.

13. Member States should also provide effective protection against third-country judgments, bearing in mind, as relevant, emerging European and international standards in this respect.

14. Member States are encouraged to introduce rules to ensure that, where SLAPPs have been brought before judicial or other authorities of a third country against a natural or legal person domiciled in a member State, that person may seek, before judicial or other authorities of the place where they are domiciled, compensation of the damages and the costs incurred in connection with the proceedings before the judicial or other authorities of the third country, irrespective of the domicile of the claimant in the proceedings in the third country.

ii. Multiple or co-ordinated SLAPPs

15. The pressure and harassment caused by the misuse or abuse of the law and legal process are compounded and aggravated, and the legal costs increased, when a defendant or a group of defendants is subjected to multiple or co-ordinated SLAPPs.

16. The judicial or other authorities of member States should, when assessing whether a legal claim constitutes a SLAPP, or when considering a SLAPP case, take due account of and take appropriate and effective measures to eliminate or at least reduce the aggravating impact of multiple or co-ordinated SLAPPs against defendants.

17. Member States should also introduce rules to prevent the claimant from initiating additional proceedings related to the same matter, as well as rules to enable judicial or other authorities to effectively manage co-ordinated proceedings that are closely related, in order to avoid the exposure of the defendant to multiple proceedings.

iii. SLAPPs targeting anonymous public participation

18. A distinctive feature of SLAPPs targeting anonymous public participation is that the claimant seeks to force the disclosure of the identity of the defendant whose participation has been done anonymously or under a pseudonym, often due to fears for their safety if they were to speak out under their real names. Once the public participant’s identity has been revealed, they are more susceptible to threats, intimidation, abuse and attacks.

19. Member States should put in place appropriate and effective safeguards to protect the identity of anonymous public participants and confidential sources in order to limit the disclosure of their identity to the extent necessary for the proper administration of justice, in line with the Convention, including the principle of equality of arms, the Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers and other relevant standards on privacy and data protection.

II. Safeguards, remedies and transparency

20. Member States should ensure that their national legal systems and their implementation provide a comprehensive legal framework and coherent set of structural and procedural safeguards to prevent and minimise the harmful effects of SLAPPs, as well as a full set of remedies and support measures for the harms caused by SLAPPs. They should also take necessary and appropriate measures to ensure a culture of transparency around legal claims that have been found to constitute SLAPPs.

A. Legal framework

21. Member States should put in place a comprehensive legislative framework that enables everyone to participate in public debate and public affairs effectively, in safety and without fear.

22. Member States should maintain or take, as appropriate, the necessary legislative or other measures to prevent legal actions that are threatened, initiated or pursued to prevent, inhibit, restrict or penalise the free expression of any legal or natural persons on matters of public interest and the exercise of rights associated with public participation. They should also exercise vigilance to ensure that legislation and sanctions and remedies are not applied in a discriminatory or arbitrary fashion against public participation.

23. The legislative framework should be kept under regular review to assess and ensure the compliance of the framework and its application with the Convention. The reviews should cover all existing and draft legislation and secondary legislation, as well as legal practice, that concerns the rights to freedom of expression, peaceful assembly and association, and other participatory rights. Member States should, where relevant, take any legislative and other appropriate measures to safeguard those rights.

B. Procedural safeguards

Effective case management

24. Member States should empower the judicial and other competent authorities to manage actively and effectively the proceedings in order to enable effective termination of the case and to avoid any delaying tactics. To achieve effective case management, the judicial and other competent authorities should ensure that parties present their claims, defences, factual allegations and offers of evidence as early and completely as possible and as appropriate to the careful conduct of litigation in order to secure procedural expediency.

Early dismissal of claims against public participation

25. Member States should make adequate and appropriate provisions in their national legal frameworks in line with the European Convention on Human Rights and the principles of the case law of the Court to enable:

- a. courts, on their own initiative, to dismiss a claim as a SLAPP early in the proceedings; and
- b. defendants to file applications for early dismissal of claims against public participation, in order to counter the harmful effects of SLAPPs on debate of public interest matters.

Such provisions should require claimants targeting public participation to establish a reasonable cause of action at the earliest possible stage in proceedings in order to advance to trial.

26. Judicial and other competent authorities should have the legal powers to make an assessment of the indicators in paragraph 8 (above) and fully or partly discontinue the claim.

27. The conditions for the admissibility of applications for early dismissal should be determined by national law and could, for instance, include judicial consideration of the following cumulative criteria:

- a. whether the claim is unlikely to succeed at trial; and
- b. whether the proceeding amounts to abuse of process, in light of the SLAPP indicators set out in paragraph 8 (above).

28. Where time limits for the exercise of the right to file an application for early dismissal are established by law, they should be proportionate and not render it impossible or excessively difficult to exercise this right.

29. Applications for early dismissal of SLAPPs should include the right for both parties to be heard based on the adversarial principle and should be treated with due expediency by judicial and other competent authorities, taking into account the circumstances of the case, the right to an effective remedy and the right to a fair trial, and applying the SLAPP indicators set out in paragraph 8 (above).

30. Member States should equally enable administrative bodies to dismiss administrative claims against public participation early in the proceedings.

31. When the defendant files an application for dismissal of claims against public participation, bringing evidence that the claim arises from public participation on a matter of public interest and a number of the SLAPP indicators are present, and when the judicial and other competent authorities accept the application, it should be for the claimant to provide evidence against dismissal. This does not prevent member States from introducing rules of evidence that are more favourable to defendants.

32. The claimant should be given the same possibility to prove that the legal action is likely to succeed at trial or in an administrative procedure and does not aim to prevent, restrict or penalise the exercise of rights associated with public participation.

33. Member States should ensure that the decision on early dismissal is appealable.
34. Member States should ensure that an application for early dismissal or any appeal therefrom is treated in an accelerated procedure, taking into account the circumstances of the case, the right to an effective remedy and the right to a fair trial.

Stay of proceedings

35. When national law permits, member States should ensure that, if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken. Furthermore, the rules on stay of proceedings should not allow the claimant to amend the pleadings in the proceeding with the aim of avoiding a dismissal order. Any amendment of pleadings should be subject to the approval of the judicial or other competent authority. Amendment of pleadings should not be allowed once the application for early dismissal is filed by the defendant.
36. The refusal of a request for early dismissal of the proceedings should not have the effect of preventing the defendant from arguing again, before the judge deciding on the merits, that the proceedings against them constitute a SLAPP.

Security for procedural costs and damages

37. Member States should introduce rules, in line with national law and practice, to ensure that in court proceedings against public participation, judicial and other competent authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of SLAPP indicators, as set out in paragraph 8 (above).

Restitution of legal costs

38. Member States are encouraged to make appropriate provisions in their national legal systems to enable courts, upon determination that a legal claim constitutes a SLAPP, to order the claimants to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant.

Death or loss of legal capacity of the defendant

39. Member States should ensure that where, upon the death or loss of legal capacity of the defendant, in a pending case against public participation, family members and associates of the original defendant who continue the court proceedings have access to the same remedies and support as the original defendant. Member States are encouraged to provide further protection, as necessary, as these new defendants may be less equipped to deal with the original claim.

C. Remedies

Legal and other procedural costs

40. Member States should make appropriate legislative or other provisions to ensure that costs for SLAPP claims are kept to an absolute minimum.

Acknowledgement of SLAPP victim status and compensation for damages

41. Member States should make adequate provision for SLAPP victims to be acknowledged as such and to be fully compensated for damages incurred as a result of the SLAPP, covering both pecuniary and non-pecuniary damages, such as loss of income and emotional distress as well as compensation for costs and expenses, for example to cover legal and administrative costs.

Capping of damages for the claimant

42. Member States should, within the possibilities of their national legal systems, provide for the capping of damages, in order to pre-empt abusive or disproportionate financial penalties for the defendants, which would have a chilling effect on their public participation, and to avoid creating financial incentives for filing legal action.

Capping of costs

43. Member States should, within the possibilities of their national legal systems, provide for the capping of costs, to ensure defendants are able to mount an effective defence and protect against court procedures being drawn out to exhaust the financial resources of defendants, which would have a chilling effect on their public participation.

Dissuasive measures

44. Member States should put in place a system of effective, proportionate and dissuasive penalties to deter SLAPPs. This must be proportionate to the resources available to the claimant so as to provide an effective deterrent to potential future SLAPP claimants. Member States should consider providing for damages and fines for cases where the claimant has exhibited particularly egregious conduct, and where the time lost by, and psychological harm caused to, the defendant should be compensated. Member States should also consider, as further deterrence, the possibility of imposing aggravated penalties for claimants who recurrently file SLAPPs.

45. Member States should make appropriate legislative provisions to ensure that, in case of legal action deemed to be a SLAPP, judicial or other authorities may order, at the request of the defendant and at the expense of the claimant, appropriate measures for the dissemination of the information concerning the decision, including publishing it in full or in part and the names of the legal or natural persons who filed the SLAPP, in compliance with relevant European human rights and data-protection standards.

Facilitation of non-judicial remedies

46. Member States should ensure by appropriate means the conditions for effective access to non-judicial remedies, such as alternative dispute resolution, mediation and press councils, while fully respecting the independence of the same mechanisms, for the resolution of SLAPP cases.

D. Culture of transparency

47. Member States should take appropriate measures to ensure full transparency and publicity around cases which are found by national judicial and other authorities to constitute SLAPPs, including by providing the possibility for the publication of courts' findings.

48. Member States should enable the collection of data concerning SLAPP cases. To this end, they should provide for the establishment of a public register of cases that have been classified as SLAPPs. The registers should be kept up to date and made available to the public free of charge and without delay. With a view to guaranteeing full access to the data, member States should make the register accessible, ideally offline and online, in compliance with relevant European human rights and data-protection standards.

49. Member States should consider taking appropriate measures to ensure that judicial or other competent authorities provide information to bar associations about the outcome of SLAPP cases.

III. Support for targets and victims of SLAPPs

50. Member States are encouraged to organise, provide and ensure rapid access to a range of support and protective measures for targets and victims of SLAPPs. Procedures to ensure their physical protection from any potential harm should also be put in place. Member States should facilitate the provision of support by relevant actors to targets and victims of SLAPPs, such as those allocating adequate resources to provide such support. In order to be effective in practice, member States should consider organising support in consultation with victims and targets, including through their specific associations, adapt the support to their specific needs and situations and take fully into consideration their personal characteristics or status. This range of measures should also be made available for secondary or indirect victims of SLAPPs, such as family members, associates or lawyers of the targets and victims, who should be adequately protected against the harms caused by SLAPPs.

51. *Legal support* – Where necessary and according to national legislation, member States should consider providing adequate access to free legal assistance, including in the light of the indicators in paragraph 8 (above). Existing national mechanisms and instruments organising and providing legal support should also be made available. Member States should encourage and empower independent organisations specialising in legal support, associations of legal professionals, media and press councils, human rights defenders'

organisations, journalists' unions and associations, academic institutions providing legal services and other non-governmental organisations to provide SLAPP targets with legal services. Member States should, in co-operation with relevant stakeholders, strive to ensure that natural and legal persons who are targets of SLAPPs are able to obtain access to insurance for legal support under fair conditions.

52. *Financial support* – Member States should consider providing financial support to SLAPP victims, in collaboration with national associations of journalists, trade unions and relevant civil society organisations, including by establishing national funds, grants and/or other targeted assistance, or supporting existing funds or projects aimed at financially assisting victims and targets of SLAPPs.

53. *Psychological support* – SLAPP targets and victims may have access to various types of confidential and professional psychological support such as direct advice, referral to relevant health authorities or financial help to independently and directly secure support. Member States should encourage public health authorities to give due consideration to, and dedicate resources for services to, SLAPP targets and victims.

54. *Practical support* – In cases where their physical safety is threatened, SLAPP targets and victims should have access to early warning mechanisms such as hotlines operated by civil society organisations or independent State agencies. In exceptional situations, member States should have in place effective and gender-specific mechanisms for voluntary evacuation to a safe place and police protection. Where feasible, existing national mechanisms and instruments that are available for other types of targets and victims should be made accessible to SLAPP targets as well.

55. *Private-sector support* – Member States should ensure that relevant private-sector actors comply with all applicable laws aimed at the protection of SLAPP targets and victims, and provide support as necessary. Such support should extend both to employees and to associates engaged in a freelance capacity.

56. *Informational support* – Member States should be encouraged to collect actively and on an ongoing basis, and disseminate free and easily accessible information about local and international organisations that provide various types of support to SLAPP targets and victims.

IV. Education, training and awareness raising

57. Member States should encourage relevant bodies to give prominence to this recommendation – and to educational materials dealing with the issues it addresses, including gender-specific issues – in educational and training programmes. Such programmes should include tailor-made training for the judiciary, legal professionals and relevant public authorities, taking into account the established case law of the Court, the existing procedural tools, the substantive standards and the core values and deontological rules of the profession.

58. Member States should encourage, while respecting the editorial freedom of journalists and the media, awareness-raising activities for the benefit of journalists, other media actors and other public watchdogs about the issues addressed in this recommendation. Such activities should stress the importance of acting in accordance with journalistic, legal or other professional ethics as the first shield against SLAPPs. Such activities should also facilitate access to resources and mechanisms, international, regional, national and local, for the protection of all actors when they are targeted by SLAPPs.

59. Member States should develop, or facilitate the development of, wider awareness-raising strategies and measures, such as campaigns aimed at the general public that focus on the democratic and societal value of public participation and the dangers of SLAPPs and their harmful effects.

V. National co-ordination and international co-operation

60. Member States should promote the goals of this recommendation at the national level, including in the national, regional and minority languages of the country, and engage and co-operate with all interested parties to achieve the widest possible dissemination of its content in a variety of publicity materials.

61. Member States should co-ordinate their implementation activities, including through existing or purpose-created national focal points, in a constructive and inclusive manner with competent national authorities and a wide range of actors, including targets and victims of SLAPPs.

62. To achieve the aims of this recommendation, and with a view to continue contributing to the development of relevant complementary standards and mechanisms against SLAPPs, member States should enhance the co-operation and exchange of information, expertise and best practices with other States and in relevant European and international forums.

Explanatory memorandum

FOREWORD – RECOMMENDATION AND EXPLANATORY MEMORANDUM

1. The purpose of the Recommendation of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation ('the Recommendation') is to cover a wide range of practices in administrative action, civil and criminal litigation and pre-trial conduct that are used to prevent, inhibit, restrict or penalise public participation on matters of public interest. The Recommendation will assist member States to identify these legal actions, whether threatened, initiated or pursued, understand their effect, and provide a roadmap for methods to prevent, dismiss, dissuade or circumvent these practices. It also provides guidelines on selected methods to mitigate the negative effects on those that are being targeted or threatened by this form of litigation, including through support, protection or compensation.
2. The purpose of the Explanatory Memorandum is to act as an interpretative support tool designed to explain the context, reasoning and nuances behind the Recommendation. It cites sources that underpin the Recommendation's development and provides practical examples of its intended application. A substantial body of literature and research providing valuable insights, information, and analysis related to the topics addressed in the draft Recommendation is available. While recognising that these can serve as a valuable resource to gain insights, make informed decisions, or contribute to further research and development in that area, the Explanatory Memorandum does not have aim to provide a comprehensive overview of the ever-evolving landscape of sources and initiatives available.
3. The Recommendation addresses strategic lawsuits against public participation as 'SLAPPs'. SLAPPs take the form of a specific abuse of national legal systems or rules of private international law. These lawsuits share some common denominators in respect of their objective and abusive nature. As the Council of Europe's Secretary General notes in her report, 'State of Democracy, Human Rights and the Rule of Law' (2023), legal guarantees create the regulatory framework for the exercise of the right to freedom of expression. States are under a duty to create an enabling environment for the exercise of this right, which implies the introduction of legislative frameworks to safeguard freedom of expression, including the right of access to information. The Recommendation is crafted in this spirit, since new legislative frameworks are necessary to meet novel challenges posed to freedom of expression.
4. The misuse or abuse of law and procedure in this Recommendation is understood as referring to expressly artificial constructions, including claims, partially or fully devoid of reality, not based on facts or created with the aim of obtaining unfair advantage or exploiting the law for other purposes than intended, namely, to cause harm, intimidate or pursue another purpose *contra bona mores* or as being used in bad faith for ulterior purposes than those manifested in the claims. In this context, the Recommendation does not equate the abuse of law to basic breaches of procedural law.
5. As SLAPPs aim to exploit specific features of national procedural and substantive law, including national regulations, the Recommendation focuses on underlying principles. Member States are encouraged to transpose these into their national legislation and policies in accordance with applicable regulations.
6. SLAPPs that aim to intimidate, punish or prevent public participation are not limited only to civil proceedings, but can also take the form of abuse of criminal or administrative law. The Recommendation's underlying principles apply equally to these three legislative areas. States are therefore encouraged to use the Recommendation when tackling SLAPPs on a larger scale. Criminal sanctions can have a particularly aggravating effect on SLAPP targets given the lasting repercussions on individuals.

7. The Recommendation has been developed by the Committee of Expert on SLAPPs (MSI-SLP) which was established as a subordinate body to the Steering Committee on Media Information Society (CDMSI). In line with its terms of reference, the Recommendation builds on the case law of the European Court of Human Rights ('the Court'), which has, under Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention'), final jurisdiction to interpret and apply the Convention and its Protocols through its case law. Its judgments not only serve to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing, in line with Article 19, to the observance by the member States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, Application no. 5310/71, 18 January 1978, §154).

8. The Recommendation is to be interpreted with reference to the jurisprudence of the Court and in relation to other obligations under international human rights law. In keeping with the dynamic nature of the Convention, the Recommendation itself is drafted in a way that should enable its reading, understanding and application as a 'living document', to be interpreted by reference to future developments in the area of SLAPPs and potential future jurisprudence of the European Court of Human Rights.

BACKGROUND AND CONTEXT

9. SLAPPs have far-reaching consequences: they impede individual rights to expression whilst undermining the free exchange of ideas and information essential in a pluralistic society. SLAPPs can lead to self-censorship and a 'chilling effect' on free speech, as journalists or other affected parties withdraw investigations and publications fearing legal and financial consequences they cannot afford to bear. Media outlets and other actors may move away from lines of investigation expected to attract legal risk through intimidatory actions that are core to SLAPPs, such that the public loses access to information.

10. Apart from direct harm caused to affected parties, SLAPPs can have important consequences in terms of shutting down debate on matters of public interest. The Council of Europe Commissioner for Human Rights was one of the first, at the institutional level, to raise the alarm about this issue in her comment, 'Time to Take Action against SLAPPs', (2020), followed shortly after by the Secretary General's Information Document, 'Current Trends in Threats to Freedom of Expression: interference with the coverage of public events, broadcasting bans and strategic lawsuits' SG/Inf(2021)36 (2021). Numerous alerts have since highlighted the ongoing challenges posed by SLAPPs, particularly in the context of the Final Declaration and the Resolution for the safety of journalists (2021), including Council of Europe member States' specialised Ministers responsible for Media and Information Society, adopted at the Ministerial Conference 'Artificial Intelligence – Intelligent Politics: Challenges and opportunities for media and democracy' (2021).

11. Where SLAPPs are not challenged and jurisdictions are perceived to be lenient towards this type of threat, this leads to a 'chilling effect' where media and public interest actors refrain from critiques or investigations, thus impoverishing public discourse. Scrutiny, transparency and accountability necessary for robust debate are jeopardised by the silencing of voices that challenge powerful actors that employ SLAPP tactics.

12. The term 'SLAPP' was first popularised in the United States in the 1980s, but its origins can be traced back to earlier legal discussions and cases. The concept behind SLAPP lawsuits had been recognised by legal scholars and activists for some time before the term was coined. In the United States, SLAPP suits date back to cases when citizens were sued for speaking out against government corruption. With the rise of political activism in the 1960s and 1970s, suits to suppress speech became a popular tool to stifle those perceived to be obstacles or a threat.

13. It was only in 1988 when the term SLAPP itself was first developed in academic writing by Professors George W. Pring and Penelope Canan, in their article '*Strategic Lawsuits Against Public Participation*' which identified the use of 'civil tort action to stifle political expression' (P. Canan and G.W. Pring, '*Strategic Lawsuits Against Public Participation*', (1988), *Social Problems* 35(5), 506-519; P. Canan and G.W. Pring '*Studying strategic lawsuits against public participation: mixing quantitative and qualitative approaches*' (1988) 22(2) *Law & Society Review* 385).

14. One of the earliest examples of anti-SLAPP legislation that names SLAPP was enacted in the state of California in 1992. California's anti-SLAPP statute, known as the California Anti-SLAPP Law (California Code of Civil Procedure, § 425.16) served as a model for similar legislation in other states in the USA. At the time of drafting of this document the majority of states in the USA had enacted some form of anti-SLAPP legislation.

15. In Europe the term SLAPP is used in legal documents mainly by the institutions of the European Union (EU). Some forms of anti-SLAPP legal provisions that aim to tackle the challenge posed by SLAPP exist in

various European jurisdictions. However, in Europe protection against SLAPP relies predominantly on existing legal frameworks and protections for freedom of speech and expression, with no dedicated anti-SLAPP legislation akin to that found in the United States or Canadian provinces. These legal mechanisms include procedures for dismissing abusive or frivolous lawsuits that may be used in cases with characteristics similar to SLAPP suits.

16. As SLAPP is an English language acronym, its use in national legal systems across member States is not expected. However, broad acceptance of this acronym in academic writing and working documents of international organisations means it has evolved as a legal *terminus technicus* that encompasses more than the sum of its parts. This term is used throughout the Recommendation and Explanatory Memorandum for the sake of clarity, consistency and understanding.

17. Whilst SLAPPs have long existed in academic literature, they can be difficult to identify in practice given their abusive nature which keeps information outside the public domain, silences and potentially isolates their targets. Compiling data and evidence about SLAPPs is notoriously difficult, as successful threats may mean cases are never heard, such that reporting on their incidence is near impossible. The absence of definitional clarity has meant that civil society observers have publicly disagreed with judges or legal practitioners over whether decided cases constitute a SLAPP. As a result, the number and growth of these cases is disputed.

18. According to the above-mentioned Secretary General's report, 'State of Democracy, Human Rights and the Rule of Law' (2023), the Council of Europe's Platform for the Protection of Journalism and Safety of Journalists has recorded alerts in 16 countries, with some media outlets forced to defend cases in multiple jurisdictions simultaneously. The cost of defending these cases can cripple individuals and organisations - both psychologically and financially - and in many instances threatens their professional or organisational survival. The human cost to journalists that seek to hold the powerful to account is clearly reflected in the Council of Europe's report, 'A Mission to Inform – Journalists at risk speak out' (2020).

19. On 10 October 2023, the Committee on Culture, Science, Education and Media of the Parliamentary Assembly to the Council of Europe (PACE), unanimously adopted the Report 'Countering SLAPPs: an imperative for a democratic society', by Rapporteur Mr Stefan Schennach. *Inter alia*, it notes that "In recent years, there has been a steady increase" in the number of SLAPPs and that, although "Journalists and publishers have always been targets of legal action and SLAPPs are part of a broader trend that usually begins with verbal intimidation, which is the most prevalent aspect, before moving on to threats of a legal nature and possibly even to physical attacks, [...] today all social watchdogs are under threat".

20. Many journalists and affected parties subject to these actions initially reported on the difficulties faced in finding adequate legal representation or sources of support. In other cases, individuals did not know they had been subject to a SLAPP or did not understand the term, making finding appropriate support harder. In addition, SLAPP targets have felt isolated when experiencing these attacks, unaware of the surge of these cases that may have affected their peers, such that solidarity or mutual support is harder to establish. There are now initiatives from non-governmental organisations (NGOs) in particular which aim to raise public awareness of SLAPP activity so that those affected can seek legal recourse or practical support (see, for example, the work conducted by the Coalition Against SLAPPs in Europe). In some countries, funds or grants are being developed to financially support those subjected to SLAPPs, such as the USA's Reporters Shield programme.

21. Apart from legal actions, SLAPPs can often be accompanied by aggressive reputation management practices which seek to discredit the defendant or remould the claimant's reputation to undermine the defendant's argument. These attacks may take the form of 'astroturfing': this involves sponsors obscuring their role in orchestrating marketing or public relations campaigns to generate credibility for their message from grassroots backers or members of the public. Unlike legal practitioners, reputation management firms are hardly regulated, making it much harder to challenge or counter their activities via official channels. Those affected by SLAPPs may find that the accompanying attacks on their character or professional integrity undermine their ability to pursue further investigations in future. In some cases, SLAPPs are accompanied by physical threats or actual violence as in the tragic murder of journalist Daphne Caruana Galizia, who at the time of her death faced over forty of these actions against her (see also the Council of Europe's report, 'A mission to inform - Daphne Caruana Galizia speaks out' (2020). The Recommendation encourages member States to remain alert to the potential overlap between legal and physical risks as these can go hand in hand.

22. SLAPPs challenge the integrity of legal systems given their pursuit of causes of action for improper purposes: this can cause systems, the judiciary or legal practitioners to lose credibility owing to their inability to address SLAPPs abuses due to inadequate legal protection. Where ordinary cases seek to vindicate legal

rights, SLAPP actors instead use the legal system to intimidate and silence critical voices. Whilst it is vital to preserve access to justice for both parties in suspected SLAPP cases, including the right to defend one's reputation, the challenge is ensuring that the typical imbalance of resources present in these cases does not result in defendants pre-emptively withdrawing their work or settling cases to avoid the disproportionate costs and damages threatened in these cases.

23. International studies report that women journalists targeted by SLAPPs have been disproportionately impacted, particularly as women are often subject to a greater number of attacks in onlinespheres which can lead to later legal action. Online threats often spread into the offline domain, meaning the impact and harm felt can exponentially increase (see 'A mission to inform - Daphne Caruana Galizia speaks out' (2020), mentioned above; see also the reports by Reporters Without Borders, 'Sexism's Toll on Journalism' (2021) and 'Online Harassment of Journalists: Attack of the Trolls' (2018).

24. The introduction further stresses the need to address the specific impact, risks and dangers encountered by public watchdogs with diverse sexual orientation, gender identity and expression and sex characteristics, including when targeted by SLAPPs (see UNESCO's discussion paper, 'The Chilling: global trends in online violence against women journalists' (2021)).

25. The Court referenced a SLAPP in *OOO MEMO v. Russia*, Application No. 2840/10, 15 June 2022, §46 - 48), holding that a defamation lawsuit brought by a legal entity that exercised public power, i.e. by the highest body of executive power in the region, against a journalist, in the specific circumstances of the case, pursued no legitimate aim. On this occasion, the Court also took note of 'the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy' (§43).

26. Jurisdictions around the world are reckoning with the impact of SLAPP cases. To date, several jurisdictions have enacted legislation designed to deter these actions albeit not at the national level, with variable degrees of success. For instance, judicial innovation has introduced new protection via developed jurisprudence relating to public interest defences in defamation law (see, for example, the South African case *Mineral Sands Resources (Pty) Ltd v Reddell* (CCT 66/21) [2022] ZACC 37). The challenge that SLAPPs pose in legal terms is their flexibility in adapting substantive law provisions to meet their improper aims: these actions may be framed in defamation or privacy law – to name two common examples – whilst inherently they aim to attack a defendant's ability to speak freely on a matter of public interest.

27. There is considerable concern about the proliferation of these tactics at both domestic and international levels. Greater attention is being paid to these practices, their effect on society and interplay with other fundamental rights and freedoms. Having this in mind, this Recommendation introduces definitional criteria in order to guide member States and create principles to tackle the growth of these actions.

PREAMBLE

28. The preamble underlines the legal basis for the Recommendation derived from the Council of Europe member States' commitments tied to the Convention as well as the case law of the Court and other relevant standard-setting instruments. On one hand it highlights positive and negative obligations of the State and individual rights that might come into jeopardy due to the expanding use of SLAPPs, and on the other those rights that member States should take into special consideration when adopting measures against SLAPPs (member States' positive obligations are further elucidated in *Dink v. Turkey*, Applications nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, § 137; *Khadija Ismayilova v. Azerbaijan*, Applications nos. 65286/13 and 57270/14, 10 January 2019, § 158).

29. Legal actions always contain a strategic aim, this element is not problematic per se. However, SLAPPs are distinguished by their use of litigation for improper purposes.

30. Diverse stakeholders must be involved to tackle SLAPPs effectively. They include: public entities including elected bodies and authorities at the state or federal, regional and local levels and their representatives and staff, in particular in the fields of media regulation, policing, public media and the judiciary, national human rights institutions and equality bodies plus other stakeholders including political parties, public figures, internet intermediaries, privately owned media including commercial, local and minority media organisations, professional associations, civil society organisations, human rights defenders, representatives of minority and other groups, social partners, academia and research institutes. Legislators and policymakers are encouraged to work in partnership with advocates in this field to inform their reforms and build on learnings and best practice.

31. SLAPPs have a direct impact on the right to freedom of expression, as enshrined in Article 10 of the Convention and interpreted by the Court, particularly affecting journalists and other media actors performing an essential role of ‘public watchdogs’, instrumental for the healthy operation of democracy.

32. As repeatedly stated by the Court, their task of imparting information and ideas on matters of public interest is an integral element of freedom of expression and is strictly connected to the corresponding right of the public to receive such information and ideas. Freedom of expression as set forth in Article 10 is not an absolute right. Interferences with the right to freedom of expression must, however, be strictly construed, and any restriction must be prescribed by law, necessary in a democratic society, in pursuit of the legitimate aims set out in Article 10(2) of the Convention and proportionate to the legitimate aims pursued. In accordance with the principle of subsidiarity, member states have the primary responsibility in ensuring that these conditions are met. For a detailed guide to Article 10 case law, see Guide on Article 10 of the European Convention on Human Rights - Freedom of expression and the ‘Thematic Factsheet on Freedom of Expression’ (2021) by the Department for the Execution of Judgments of the European Court of Human Rights.

33. The right to freedom of peaceful assembly and association is a fundamental right that, like freedom of speech, is one of the cornerstones of public participation on matters of public interest and as such can, and often is, the subject of SLAPP (see Guide on Article 11 of the European Convention on Human Rights – Freedom of Assembly).

34. SLAPPs do not solely challenge the right to freedom of expression but can also affect the enjoyment of a number of other essential rights protected by the Convention, including the right of access to a court (Article 6, right to a fair trial); the right to reputation (Article 8, right to respect for private and family life); and the right to an effective remedy (Article 13). Assessing whether a violation of these rights has occurred requires a careful balancing exercise between the competing interests at stake.

35. The impact of SLAPPs can be particularly felt in relation to the Court’s detailed articulation of various Convention Articles. Article 6 provides that everyone has the right to a fair trial and that they must be able to present their case effectively before a court, in keeping with the principles of procedural fairness and equality of arms. The right of access to a court for the purposes of Article 6 is an inherent aspect of the safeguards enshrined in Article 6. However, the ‘right to a court’ and the right of access are not absolute. They may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought.

36. As noted in the Guide on Article 10 of the Convention, §123, “the protection of reputation or rights of others is, by far, the legitimate aim most frequently relied on in Article 10 cases” brought before the Court. Article 8 specifies that everyone has the right to private and family life, including reputation, but that it must, as appropriate, be weighed against the right to freedom of expression, as enshrined in Article 10 of the Convention.

37. The Court has held that the public right to be informed is an essential right in a democratic society that, in certain special circumstances, may even extend to aspects of the private life of public figures, particularly where politicians are concerned (*Von Hannover v. Germany (no. 2)* [GC], Applications nos. 40660/08 and 60641/08, 7 February 2012, § 64; *Karhuvaara and Iltalehti v. Finland*, Application no. 53678/00, 16 November 2004, § 45). Although the publication of news about the private life of public figures is generally for the purposes of entertainment rather than education, it contributes to the variety of information available to the public and undoubtedly benefits from the protection of Article 10 of the Convention. However, such protection may cede to the requirements of Article 8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination (*Mosley v. the United Kingdom*, Application no. 48009/08, 10 May 2011, § 131; *Von Hannover v. Germany (no. 2)* [GC], Applications nos. 40660/08 and 60641/08, 7 February 2012, § 110).

38. Article 11 details the right to freedom of assembly and association, providing essential protection for the right to participate in public debate and affairs, in community with others.

39. Finally, under Article 13 of the Convention, everyone has the right to an effective remedy before a national authority when their rights have been violated. This right cannot be stretched to include misuse or abuse of legislation or legislative process to strategically thwart public participation.

40. SLAPPs are commonly discussed in a civil law context, but in practice they can – and often do – appear in a criminal law context as well, especially in countries where defamation laws still envisage criminal sanctions.

SLAPPs often materialise in charges brought under defamation, insult, blasphemy, data protection or 'fake news' laws that are particularly restrictive and could be in some circumstances disproportionate from the point of view of the severity of sanctions for alleged criminal press offences (see *Fatullayev v. Azerbaijan*, Application no. 40984/07, 22 April 2010, § 103). Among the journalists interviewed for the Council of Europe's study, 'Journalists Under Pressure - Unwarranted interference, fear and self-censorship in Europe' (2017) who had experienced judicial intimidation, the most common intimidation was reported under defamation laws.

41. Legal claims might include suits alleging defamation, reputational damages, libel, insult, invasion of privacy, breach of protection of personal data, conspiracy, cybercrime, stalking or harassment, breach of intellectual property rights, such as protection of trademarks or copyright, breach of trade secrets, professional secrecy or confidentiality, economic interference or infliction of emotional harm. Journalists have also been harassed with legal claims in order to reveal their sources (see also paragraph 38 of the PACE Culture Report mentioned above).

42. While SLAPPs will generally mean a civil lawsuit, in some jurisdictions it is possible for claimants to trigger or pursue criminal charges against their critics such as criminal defamation laws or breach of public order or national security, or administrative lawsuits.

43. The Parliamentary Assembly of the Council of Europe (PACE) has taken a firm position, notably since its Resolution 1577(2007), 'Towards decriminalisation of defamation' and called for the complete decriminalisation of these offences. The Court, in its case law, also recommended limited use of criminal law in general for freedom of expression issues. However, in relation to sanctions, the Court took a more nuanced position reiterating that the imposition of prison sentences related to press offences is only compatible with Article 10 of the Convention in exceptional circumstances, notably where other fundamental rights have been seriously impaired, for instance by hate speech or incitement to violence (see, e.g., *Cumpănă and Mazăre v. Romania [GC]*, Application no. 33348/96, 17 December 2004, § 111 et seq.). Indeed, the Court held that, although the contracting states are permitted, or even obliged, to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power.

44. Administrative measures, including sanctions, that encompass tax and data protection affairs should also be considered when developing a response to SLAPPs.

45. More broadly, regarding general measures, the Committee of Ministers emphasised its serious concerns relating to the use of diverse criminal laws (such as accusations of illegal activities, abuse of authority, treason, hooliganism or other crimes which can have close links to the legitimate exercise of the freedom of expression) against journalists, bloggers, lawyers and members of NGOs). The Committee of Ministers expressed grave concern in face of the legislative amendments to the Criminal Code introducing new defamation offences subject to imprisonment irrespective of whether incitement to violence or hatred is involved and called for legislative amendments aimed at reducing the possibility of imposing prison sentences in defamation cases (see Interim Resolution CM/ResDH(2014)183 and Interim Resolution CM/ResDH(2016)145 in *Mahmudov and Agazade Group v. Azerbaijan*, Application No. 35877/04, 18 December 2008.). The Committee of Ministers welcomed decriminalisation of insult and defamation (*Dalban Group v. Romania*, Application No. 28114/95, 28 September 1999) in the final resolution CM/ResDH(2011)73). In some cases, even when legislation allowing prison sentences for defamation had not yet been abolished, the Committee of Ministers took into consideration the fact that this sanction was no longer applied in practice (see *Björk Eiðsdóttir Group v. Iceland*, Application No. 46443/09, 10 July 2012, final resolution CM/ResDH(2016)26 adopted by the Committee of Ministers on 8 March 2016).

46. The chilling effect of legal action or threats against public interest reporting is addressed in Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors. In its Appendix, §36 reads: 'Actual misuse, abuse or threatened use of different types of legislation to prevent contributions to public debate, including defamation, anti-terrorism, national security, public order, hate speech, blasphemy and memory laws can prove effective as means of intimidating and silencing journalists and other media actors reporting on matters of public interest. The frivolous, vexatious or malicious use of the law and legal process, with the high legal costs required to fight such lawsuits, can become a means of pressure and harassment, especially in the context of multiple lawsuits.'

47. The escalation of SLAPPs has been documented extensively by intergovernmental and non-governmental organisations at the European and national levels, including in successive annual reports by the contributing Partner organisations to the Council of Europe Platform to Promote the Protection of Journalism

and Safety of Journalists, not least the Annual Report, 'War in Europe and the Fight for the Right to Report' (2023). In the latter, it noted that 'abusive legal threats and strategic lawsuits against public participation have not subsided, contributing to an atmosphere of intimidation and legal bullying' and that 'The use of legal actions aimed at intimidating and silencing journalists and media – by dragging them into courts and wasting their time and money – is a favourite tool for certain politicians, businessmen and other powerful figures.' It highlighted that SLAPPs 'are used across the European continent.'

48. It is important to build on existing Council of Europe instruments of direct relevance to SLAPPs that place central emphasis on the organisation's key values of human rights, democracy and rule of law, as safeguarded by the rights enshrined in the Convention, as interpreted by the Court. In particular:

- ▶ Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression (4 July 2012).
- ▶ Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers;
- ▶ Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors;
- ▶ Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership;
- ▶ Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries;
- ▶ Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe;
- ▶ Recommendation CM/Rec(2022)4 on promoting a favourable environment for quality journalism in the digital age.

49. In parallel with the drafting of the Council of Europe Recommendation, the European Commission announced an anti-SLAPP package which included a Proposal for a Directive (COM/2022/177) on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings, taking on civil cross-border cases, and a Recommendation ((EU) 2022/758 of 27 April 2022) on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings. Whilst the Council of Europe has a different mandate and territorial coverage, co-operation and dialogue is encouraged and as such a position of situational awareness has been adopted in relation to EU developments, noting that some States may adopt both.

OPERATIVE PART

50. Governments of the member States are recommended to implement the Recommendation into effective anti-SLAPP protection measures, in particular with regard to structural and procedural safeguards, remedies, transparency and support for targets and victims, education, training and awareness raising, in order to secure the protection and promotion of the rights and freedoms concerned, and to ensure the exercise of the vital function of "public watchdog" as interpreted by the Court (e.g. *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*. Application no. 33014/05, 5 May 2011, §§ 64, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11), 8 November 2016, § 168).

51. Member States are recommended to address SLAPPs when reviewing relevant domestic laws - including procedural laws – policies and practices, and revise them, as necessary, to ensure their conformity with States' obligations under the Convention. Addressing the necessity to conduct such review, the Operative part makes specific reference to Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, providing guidance under the „Prevention“ pillar on the review process (see also the Extended Implementation Guide DGI(2023)05 to selected topics under Prevention and Promotion Pillars of the Guidelines to CM/Rec(2016)4).

52. The operative part indicates that the Recommendation should also be promoted through the translation and dissemination of the text as widely as possible, including the Explanatory Memorandum, among all competent authorities and officials and among professionals, including non-governmental actors, as appropriate.

53. Member States are encouraged to promote research, exchange best practice and co-operate through engagement with interested parties. To this end, making use of existing platforms aimed at enhancing

co-operation is recommended, for instance in the framework of the Council of Europe Campaign for the Safety of Journalists which aims for effective implementation of agreed standards, including by gathering together a wide range of relevant stakeholders to discuss challenges and identify solutions.

54. A periodic, comprehensive review of the status of the implementation of measures is further recommended to member States to allow policymakers and stakeholders to assess whether the measures adopted are effective. States should ensure that they remain relevant and adaptable to evolving circumstances, promoting transparency and accountability (see also the Appendix to Recommendation CM/Rec(2016)4, Section I §3-5).

APPENDIX TO THE RECOMMENDATION

I. Scope and definitions

55. This Recommendation sets out measures aimed at countering the proliferation of SLAPPs, aiming to uphold and preserve a healthy environment for democratic dialogue and investigative freedom which enriches public debate. It encourages member States to develop a culture of intolerance towards SLAPPs and meaningful legal protection for those enduring them. The Recommendation provides guidance in defining and identifying SLAPPs, recommended legal and structural changes that will support member States in their efforts to resist these actions in their jurisdictions and practical measures that can support affected parties.

56. The scope outlines the purpose of the Recommendation in more detail and gives a general overview of the features of SLAPPs that set them apart from good faith judicial recourse. While litigation in good faith aims to uphold legitimate rights of the claimant, SLAPPs aim to prevent, hinder, restrict or penalise public participation. The claimant is not primarily concerned with the outcome of proceedings, but rather the effect they will have on the defendant and the matter of public interest. This can be to create pressure, distract, intimidate, deter, prevent, stop or punish public participation on matters of public interest. The Recommendation stresses that SLAPPs can take various legal forms – from claims of defamation, nuisance, or other that allege harm to complaints under privacy and personal data protection laws and requests pursuant administrative and criminal laws. The common denominator of these actions is their abusive nature.

57. Many actions that can be identified as SLAPPs contain elements of claims that can be made out and proceed to trial. Member States should recognise that some actions that can be classified as SLAPPs may be arguable in law, though SLAPPs can be distinguished as they unduly hamper freedom of expression and restrict public participation.

58. This abusive behaviour can take different forms and the member States are recommended, in line with guiding principles in the Recommendation, to adopt legislative and other safeguards in their national legislation and policies.

59. As noted again by the Council of Europe Commissioner for Human Rights, Dunja Mijatović, at the launch of the Journalists Matter campaign “[t]hese coercive tactics, which abuse the legal system, are used by powerful individuals, corporations, or entities to silence critics who speak out on matters of public concern. SLAPPs are not necessarily aimed at winning in court, but at bankrupting, intimidating, and silencing critical voices”.

Key terms

60. The Recommendation provides extensive illustration of how the terms ‘public participation’ and ‘public interest’ should be interpreted in order to correctly apply the recommended measures. The list provided in the Recommendation is not exhaustive; member States are encouraged to interpret ‘public interest’ in line with the Court’s case law. Preparing, supporting and assisting acts of public participation are covered by the Recommendation as SLAPP targets and victims should not be narrowly defined. For example, whilst a specific journalist may be identified as a defendant to an action, the impact and harm caused may also affect their family members and they too should be subject to the protections addressed below.

61. Public participation can take different forms. The right to public participation in democratic societies is guaranteed by a cluster of rights, including the obligation to respect human rights and ensure their enforcement (Article 1); the right to freedom of expression (Article 10 of the Convention); the right to freedom of assembly and association (Article 11 of the Convention); the right to an effective remedy (Article 13); the right to vote and stand for election (Article 3, Protocol 1 to the Convention), and the general prohibition of discrimination (Article 1, Protocol 12 to the Convention). The global perspective provided by the protection of

freedom of expression in Article 19 of the International Covenant on Civil and Political Rights' is acknowledged, where it is specified that everyone has the right to hold opinions without interference and to seek, receive and impart information and ideas.

62. Diverse actors are subject to SLAPPs. The Recommendation favours a broad approach to affected parties to ensure that it accommodates targets as SLAPPs evolve. Though traditionally journalists and media professionals are prime targets given their investigative aims and recognised role of 'public watchdogs', today NGOs, academics, environmental activists, whistleblowers, human rights defenders, legal professionals, victims rights' organisations, fraud and crime caseworkers, labour organisations and others who participate in public debate and public affairs (online and offline), including by highlighting wrongdoing and promoting public accountability, are counted amongst the targets of SLAPPs (see also *Halet v. Luxembourg [GC]*, Application No 21884/18, 14 February 2023).

63. As clarified in the above-mentioned Guide on Article 10 of the Convention, the Court has increasingly recognised the importance of the societal role played by NGOs and activists in safeguarding rights. The press was the first entity described as a 'public watchdog', however the Court also recognises that NGOs play the same role (*Animal Defenders International v. the United Kingdom [GC]* Application No.48876/08, 22 April 2013, § 103; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC]* Application No. 17224/11, 27 June 2017, § 86; *Cangi v. Turkey*, Application No. 24973/15, 14 November 2023, § 35). In particular, the Court considers that the public watchdog role played by NGOs is 'of similar importance to that of the press' (*Animal Defenders International v. the United Kingdom [GC]*, Application No. 48876/08, 22 April 2023, § 103; *Steel and Morris v. the United Kingdom*, Application No. 68416/01, 15 May 2005, § 89; *Magyar Helsinki Bizottság v. Hungary [GC]*, Application No. 18030/11, 8 November 2016, § 166. In the Court's view, similarly to the press, an NGO performing a public watchdog role is likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally (*Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC]*, Application No. 17224/11, 13 October 2015, § 87).

64. The Court has further noted that, given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of social media may also be compared to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned (*Magyar Helsinki Bizottság v. Hungary [GC]*, Application No. 18030/11, May 15 2005, § 168). Equally, academic researchers and authors of literature on matters of public concern also enjoy a high level of protection.

65. Alongside 'public watchdogs' and contributors to public debate and all participants in public affairs, the Recommendation makes specific reference to environmental associations and activists. Indeed, as stressed by the Special Rapporteur on Environmental Defenders in his statement (2022) under the Aarhus Convention, individuals and groups engaged in environmental activism and climate change advocacy have been subjected to SLAPP lawsuits in diverse situations and legal jurisdictions "due to the powerful economic interest that they tend to oppose in their efforts to speak up on issues of public interest."

66. In addition, the Recommendation encompasses preparatory, supporting or assisting actions directly linked to the activities of a person fulfilling the role of a "public watchdog", as the SLAPPs can be brought against such actors as legal professionals representing press.

67. Whistleblowers can fall victim to SLAPPs and they are referred to in the Recommendation as possible victims. Recommendation CM/Rec(2014)7 on the protection of whistleblowers defines them as individuals who expose wrongdoing, corruption or illegal activities, usually within an organisation. The Court has already underlined that information concerning unlawful acts or practices exposed by whistleblowers is of particularly strong public interest and that States are under a positive obligation to take measures to protect their private life against invasion of privacy and freedom of expression.

68. Whistleblower protection laws are designed to shield individuals who expose wrongdoing from retaliation, allowing them to report misconduct without fear of losing their jobs or facing legal actions. Similarly, some advocate for laws that protect SLAPP victims from frivolous lawsuits that seeks to silence free speech. Therefore, whistleblowers should receive adequate and effective protection to ensure their ability to speak freely, without fear of reprisal when the information in question serves the public interest. The ultimate goal is to both protect individuals targeted by SLAPPs, including whistleblowers, and, more generally, to prevent any chilling effect SLAPPs will have on freedom of expression.

69. As noted in the Council of Europe's Annual Report by the Partner organisations to the Platform to Promote the Protection of Journalism and Safety of Journalists 'War in Europe and the Fight for the Right to Report' (2023), "[f]ighting fake news is increasingly being used as a pretext to initiate legal proceedings against journalists" and that politicians, including those serving in government, are instigating "an increasing number of legal threats" against journalists. In some jurisdictions, victims of sexual harassment and tenants challenging landlords are amongst those on the receiving end of SLAPP tactics. Member States should remain alert to evolving trends as there is no single target group affected: any person engaged in public participation is a potential victim.

70. Per the Guide on Article 10 of the Convention, in the Court's view, 'public interest' ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them. This includes that which attract its attention, or which concern it to a significant degree, especially where it affects the wellbeing of citizens or the life of the community. This is also the case regarding matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC]*, Application No. 931/13, 27 June 2017, § 171). The Court has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest.

71. The Court has however reiterated that the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism (*Couderc and Hachette Filipacchi Associés v. France [GC]*, Application no. 40454/07, 10 November 2015, §101).

72. It is worth noticing that the Recommendation takes the view that topics of "public interest" may be of public interest at local, national or international levels.

Definitional Criteria of SLAPPs

73. It is not only SLAPP targets and victims that struggle to identify or act against SLAPPs as discussed above. For example, the United Kingdom's Solicitors Regulation Authority found that in many cases, legal practitioners were unaware of their reporting duties when considering potential SLAPP activity (see the UK's Solicitors Regulation Authority article, 'Review shows law firms need to do more on SLAPPs' (2023)). This presents problems for legal regulators that are bound to investigate legal wrongdoing: where there is an absence of clarity, practitioners do not know where their ethical duties lie, hence the need for clear definitional criteria.

74. Civil and common law jurisdictions have different approaches in initiating legal proceedings, including pre-trial administrative actions and communication between the parties that precede these processes and proceedings. In many instances, competent authorities are responsible for initiating proceedings, whilst in others, parties are themselves responsible. Both approaches are covered in the Recommendation as it is the action itself that should trigger these protections rather than the instigator.

75. Interim measures should be included as in many jurisdictions, SLAPPs will not proceed to a full trial if the claimants are successful in securing their aims via interim measures.

SLAPPs indicators

76. In addition to underlying principles, the Recommendation provides a list of indicative characteristics that need to be taken into consideration when determining the nature of the legal action in question. This section clarifies that while not all indicators need to be present in all cases, the acute and egregious nature of one of the characteristics and/or the presence of more of them is likely to evidence a SLAPP. All SLAPPs have common denominators in their objective and are abusive in the way they approach the law or its purpose. Indicators should guide the judicial and other competent authorities in identifying these common denominators. When determining the presence of indicators, the judicial and other competent authorities should adopt a broad approach and examine all proceedings, including pre-trial administrative actions and communication between the parties that preceded these proceedings.

77. The Recommendation refers to "judicial and other competent authorities" to include in this formulation authorities with decision-making powers, such as administrative bodies, arbitrators and mediators, data protection agencies, media councils and regulatory bodies.

78. The following features will almost always be present: the defendant is involved in public participation in matters of public interest or clearly intends to be a clear link, direct or indirect, between the claimant, the matter of public interest and activities of the defendant exists; and a direct, indirect or potential negative

effect on public participation. Negative effects in these kinds of actions impact the defendant's activities relating to public interest.

79. Other indicators may include abusing an imbalance of power, such as financial advantage or political or societal influence; engagement in procedural and litigation tactics, such as delaying proceedings; or the claimant or associated parties engaging in multiple and co-ordinated or cross-border legal actions, with clearly disproportionate remedies requested in the legal action.

80. The indicators given in this Recommendation and explanatory memorandum are not exhaustive. Member States are encouraged to examine the possibility of adding other indicators that are in line with their constitutional traditions and objective of this Recommendation and that would aid the court in determining a SLAPP. Whilst the presence of these indicators makes it more likely that a legal action is a SLAPP, absence of some does not automatically mean that the case is not a SLAPP case. It is rare that all indicators would be present. The court should not only count but also weigh the indicators when determining if the case is a SLAPP. Strong presence of one key indicator may sometimes be sufficient to determine that the case is a SLAPP.

81. Judicial and other competent authorities may consider pre-trial conduct as an example of SLAPP indicators, particularly in jurisdictions where pre-action protocols specify standard procedures before bringing actions. For example, the unreasonable refusal to engage in good faith right to reply to communication or alternative dispute resolution could indicate bad faith on the part of the claimant. However, care should be taken to ensure both parties' conduct is considered as if there is, for example, mutual refusal by both parties to engage in alternative dispute resolution then the claimant's part in this should not be penalised by judicial and other competent authorities.

Specific forms/types of SLAPPs

82. Beyond standard abusive litigation practice, the Recommendation highlights three other forms that SLAPPs can take, and that member States should take into consideration when adopting measures in accordance with this Recommendation. These are:

I. Cross-border SLAPPs

83. The Recommendation invites member States to acknowledge the emotional and financial toll that comes with defending legal actions that span multiple jurisdictions. Cross-border litigation can be especially emotionally challenging because individuals or entities involved most likely are not familiar with the laws and procedures of foreign countries. Additionally, language barriers can compound this effect, making the situation even more disorienting.

84. Many SLAPPs-related claims do not involve a cross-border dimension. However, when this occurs, specific measures are needed to curb its implications. In this context, some SLAPPs can coincide with the so-called practice of 'forum shopping', which consists of deliberately selecting a forum in which the law or other aspects of the litigation, such as the high legal fees, disproportionately favour the claimant. While the choice of a particular forum is not automatically indicative of a SLAPP, the abuse of this right to put SLAPP targets in a disadvantageous position would be.

85. The Council of Europe study, 'Liability and jurisdictional issues in online defamation cases' DGI(2019)04 provided several useful observations in this field. Noting that the growing inter-connectedness of modern societies has allowed published content to be instantly accessible across the globe, making it possible to claim that an allegedly defamatory statement has produced damage in several different states, the study noted how this situation may ultimately result in complex international legal disputes. It therefore identified 15 existing or emerging good practices that either mitigate the risk of 'forum shopping' in defamation cases or help address the phenomenon in ways that limit negative impacts on freedom of expression. Amongst these good practices (and related Recommendations), some concern the amount of damages granted by courts in defamation proceedings, which should be strictly proportionate to the harm suffered by the claimant; others refer to punitive damages which, where available under the member States' legal framework, are only allowed if strict and clearly defined legal conditions are met; another invites national courts to consistently rely on the prohibition of abuse of rights to address the cases of manifest forum shopping. The study concluded that, in the absence of a legal instrument specifically addressing the phenomenon of forum shopping, the issue may eventually be addressed through the enactment of specific anti-SLAPP measures at national or international level.

86. The phenomenon known as 'libel tourism' - a form of 'forum shopping' that occurs when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue - has also been addressed by the Committee of Ministers in its Declaration on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression (2012). In this document, it was noted that, in some cases, libel tourism may be seen as the attempt to intimidate and silence critical or investigative media purely on the basis of the financial strength of the complainant. In other cases, the very existence of small media providers has been affected by the deliberate use of disproportionate damages by claimants through libel tourism. Against this background, the Committee of Ministers' Declaration alerts member States to the fact that libel tourism constitutes a serious threat to freedom of expression and information, acknowledges the need to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury, and to align national law provisions with the case law of the Court. It also undertakes to pursue further standard-setting work with a view to providing guidance to member States.

87. This section of the Recommendation addressing cross-border SLAPPs also draws from relevant paragraphs of the European Commission's proposal for a Directive. In particular, the Recommendation includes a provision similar to that in the proposed EU Anti-SLAPP Directive, which allows persons domiciled in member States to pursue damages through their domestic court for SLAPPs initiated in the courts of another State.

88. In the context of robust safeguards against judgments from third countries, the fundamental principle stipulates that each state possesses the discretion to decline recognition of the enforcement of a court decision from a third country, or the effects thereof, when such recognition or enforcement is manifestly at odds with the public policy of the state. This particularly pertains to the fundamental constitutional rights and freedoms of individuals. The inclusion of a public policy exception to the recognition of foreign judgments by countries is considered as sufficient, as it is designed to safeguard against potential attempts to circumvent national protection through the abuse and misuse of the legal system of another state, as outlined in this Recommendation.

II. Multiple or co-ordinated SLAPPs

89. The burden and intimidation resulting from SLAPPs are intensified and made worse when numerous legal actions are threatened, initiated or pursued against a defendant.

90. According to the Recommendation, if this occurs, judicial and other competent authorities of member States should give it careful consideration and implement suitable and effective actions to diminish or, at the very least, mitigate the impact numerous or orchestrated SLAPPs have on the defendants. Such rules should also prevent the claimant from initiating other proceedings related to the same matter or in a case closely related while the SLAPP proceedings are pending. *Mutatis mutandis* the principle of *litis pendentia* and attempts to circumvent it should be closely scrutinised in these cases.

iii. SLAPPs targeting anonymous public participation

91. This category includes so-called 'cyber-SLAPPs' which have been identified in particular in the US. Whilst SLAPPs often target printed publications in newspapers or books, online publications may also be challenged. There are instances where individuals or organisations may participate in public debate in an online anonymous capacity for good reason, including via qualifying as a journalistic source or via social media, notably where there are recognisable threats against them. In some cases, revealing their identity may be an indicator of SLAPP activity as it threatens their ability to meaningfully participate in a public domain as identity disclosure may put them in an exposed or dangerous position. The act of revealing identifying information about an online person, such as their name or address, is often referred to as 'doxing'.

92. The Coalition Against SLAPPs in Europe highlighted that SLAPPs have also been employed to threaten the protection of journalistic sources to prevent information from reaching the public. In these cases, lawsuits have been employed as a strategy to compel the revelation of sources. As an example of such a SLAPP is a dispute in which a preliminary injunction procedure was initiated against a media house in Estonia. The proceedings sought the identity of a person who sent information about an event in an Estonian school to a media tip email address. According to the informer, the headmaster of the school was allegedly aware of the consumption of alcohol by a minor. Media house objected to the release of the data. The lower courts obliged the disclosure of identification information of the source. The Supreme Court agreed with the media house, stating that journalists have the right to refuse to give evidence and to refuse to disclose documents, in order to protect their source (Estonian Supreme Court, Civil Chamber, 12.12.2022, 2-21-17817).

93. In this context it is also worth recalling the Committee of Ministers Recommendation No. R (2000)7 on the right of journalists not to disclose their sources of information. Principle 5 states: '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'. As noted by the PACE in Recommendation 1950 (2011), 'protecting sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern, as expressed by the Court in its case law under Article 10 of the Convention.'

II. Safeguards, remedies and transparency

A. Legal framework

94. The legal framework emphasises the need for specific legislative changes that would address the issues of SLAPPs in a targeted and effective manner. For this reason, it is essential that these measures are periodically reviewed and re-evaluated.

95. The measures put forward in the Recommendation seek to further strengthen existing legislative and policy frameworks and practices, taking into account that those frameworks and practices may already include particular safeguards and forms of protection against SLAPPs that are aligned with the measures in the Recommendation or fulfil the same purpose.

96. As appropriate, the setting up and implementation of dedicated anti-SLAPPs national laws is recommended. This draws from outstanding ongoing efforts and existing examples of member States that have elaborated their proposals for specific anti-SLAPPs laws, such as Ireland's proposed amendments to the Defamation Act 2009 which features an early dismissal procedure, security for costs and damages against the plaintiff, or the United Kingdom's legislative measures in the Economic Crime and Corporate Transparency Act 2023 which will rein in SLAPPs activity relating to economic crime by introducing a statutory definition to aid legal certainty, an early dismissal mechanism and costs capping via secondary legislation.

B. Procedural safeguards

97. While member States should take action to dissuade and prevent SLAPPs, an important way of combating these is preventing them from having a negative effect on public participation once the litigation starts. Procedural safeguards elaborated in the Recommendation provide guidelines in this regard for adopting national measures needed to combat SLAPPs effectively.

98. Listed safeguards should work in concert and complement each other. Member States should strive to implement these measures, having regard to specific characteristics of national legal orders. The principal safeguards are:

99. The first of the procedural safeguards is "effective case management". It is presented as a general formulation, which builds on Rule 49 of the ELI-UNIDROIT Model European Rules of Civil Procedure (2020). These are a model for all European countries, elaborated under the auspices of UNIDROIT and the European Law Institute by academics in comparative procedural law (around 60 from different jurisdictions). They reflect an overwhelming trend also coming from commercial arbitration, to give the judiciary more power not only to conduct but to manage the proceedings. The underlying idea is to involve judges from the earliest stage of proceedings. The court must take responsibility where a SLAPP is brought using the necessary means to accelerate procedure because this mitigates the harmful effects on freedom of speech and public participation. This implies a shared responsibility for parties and the judge to co-operate. The Consultative Council for European Judges further noted that "member States should provide for an accelerated or urgent enforcement procedure where delay might cause an irreversible wrong" in Opinion no.13 on the role of judges in the enforcement of judicial decisions (CCJE(2010)2-Final) §17.

100. According to the Recommendation, early dismissal may be managed through newly introduced procedures requiring early judicial determination of whether SLAPPs characteristics are met, building on strike-out or summary judgment applications in some jurisdictions. The right to access to justice and evidential considerations for both parties should be kept in mind and a fair balance should be struck.

101. Regarding the stay of proceedings, it is recommended that if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on an early dismissal application is reached. A stay of main proceedings will contribute towards reducing defendants' procedural costs. Alternatively, the judicial or other competent authority can also decide against a stay of proceedings, but to proceed with the case in an accelerated procedure on the merits of the claim.

102. Claims may be fast-tracked via accelerated procedure where a SLAPP claim is raised, either alongside or in place of an early dismissal mechanism to ensure speedy resolution. This is designed to again reduce the financial, professional and psychological impact on defendants which occurs where proceedings are drawn out. Appellate courts should also strive for quick resolution under early dismissal procedures, given that appeals can themselves add expense and burden to underlying claims.

103. Restitution of legal costs protects defendants by introducing clarity around the financial risk they will be exposed to in litigation.

104. Whilst it is important for decisions to be taken expeditiously, judges should also be alerted to appeals which can in effect further delay proceedings. This is why listed safeguards should be used together wherever possible to ensure a holistic approach. National legal systems will need to determine whether interim or final determinations decisions under these safeguards may be subject to appeal. Procedural safeguards could be substantially undermined where rights to appeal serve to undo their function, so caution should be adopted. Whilst final decisions on merits may be appealed according to national laws, member States have a positive obligation to ensure it is done in an expeditious way. In criminal actions, the Court recognises the right of appeal. In the United States, where a motion to dismiss is denied, SLAPP laws provide an accelerated interim right to appeal, though this is not typically a feature of civil law systems. Member States will need to define evidential standards.

105. Member States will need to define evidential standards under these recommended procedural changes, particularly where burdens of proof are reversed. This is important as early dismissal procedures will by definition occur before a full trial begins such that the usual disclosure and evidence rules will not apply; judges should be provided with guidance on what material evidence is to be expected.

106. Third parties that have established legitimate interest or expertise in SLAPP cases should be allowed to intervene in proceedings, either represented or as *amicus curiae* as a further form of legal safeguard (see also the UNESCO 'Guide for Amicus Curiae Interventions in Freedom of Expression Cases(2021)).

C. Remedies

107. In addition to the remedies required under Article 13 of the Convention (see Guide on Article 13 of the European Convention on Human Rights – Right to an effective remedy), which sets forth judicial and non-judicial remedies, the Recommendation addresses some specific remedies, redress and relief which member States should adopt. The purpose of these is to mitigate the negative effects on the defendant and ensure the effectiveness of remedies, redress and relief to dissuade further abusive lawsuits. The main remedies, redress and relief that the member States could adopt include: restitution, reparation, compensation; acknowledgement of SLAPP victim status; compensation for damages; capping of damages for the claimant; capping of costs; dissuasive measures and the facilitation of non-judicial remedies. Even where no harm has yet occurred, SLAPP targets should be able to seek suitable redress and relief from the court in order to protect legal rights.

108. Paragraph 41 recommends that compensation of damages for the SLAPP victim should not require the filing of a separate claim on the part of the defendant, to minimise the strain on defendants in the context of SLAPP claims, for example the defendant should be allowed to submit a counterclaim within the same proceedings.

109. Paragraph 42 may in practice involve limiting damages that can be sentenced by the court in cases of defamation and privacy law actions as the most common examples of SLAPP actions.

110. Regarding the capping of costs and damages, by introducing this measure there is greater incentive for defendants to challenge abusive actions as there is a maximum amount they will have to pay. Where costs caps are introduced, actors subject to pre-action threats who may otherwise be encouraged to self-censor and withdraw their investigations may instead participate in public debate, safe in the knowledge that, if they face litigation, they will not risk excessive costs exposure thanks to their maximum costs being capped. Costs caps may be subject to a sliding scale according to the financial resources of a defendant.

D. Culture of transparency

111. As part of an effective approach in dealing with SLAPPs, open access to data concerning SLAPP cases should be made available in a user-friendly way so that the public and relevant regulatory authorities can access and analyse trends and outcomes in SLAPP cases in the form of a public register. Transparency regarding litigation and litigants, including case law once determined, should serve not only as a deterrent, but also as a valuable source to evaluate the state of vexatious litigation and provide expertise to those providing

support to targets and victims of SLAPPs. Following implementation of anti- SLAPP measures outlined in this Recommendation, data monitoring and analysis should occur to track where measures have proved effective or otherwise, enabling States to adapt measures as necessary to produce the desired effect.

112. In light of the United Nations 'Basic Principles on the Role of Lawyers' (1990), lawyers should generally not be identified with their clients or causes in published data unless malicious intent of the lawyer has been proven. Where legal malpractice is suspected, lawyers' associations or regulators' codes of ethics should be consulted, and appropriate sanctions pursued (see also Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

113. When collecting and sharing personal data, States should adhere to basic principles of data protection standards, notably "Purpose Limitation" where data collected and shared should be for specific, legitimate purposes and "Data Minimisation" where States should collect and share only the data that is necessary for the intended purpose. This is not to endanger and reveal personal information of SLAPP targets and victims on one hand and not to unnecessarily stigmatise legal professionals for exercising their profession on the other.

114. General information about statistics and transcripts of judgments, including the reasoning, should be made publicly accessible with respect to personal data protection where appropriate and necessary. Wherever possible, this information should be machine readable to facilitate efficient data analysis.

115. The Recommendation provides guidance to member States to consider making appropriate provision to ensure that judicial or other competent authorities provide information to bar associations about the outcome of SLAPP cases. In addition, member States could consider, when data collected shows that certain legal professionals are repeatedly involved in SLAPPs litigation, encouraging the court or relevant bodies to bring this to the attention of a relevant bar association or other professional body that has authority to examine compliance of this actions with set ethical or professional standards.

III. Support for targets and victims of SLAPPs

116. For the purpose of the Recommendation, the terms 'victim' and 'target' in relation to SLAPPs are used regardless of whether the SLAPP is based in abuse of criminal, administrative or civil law. The terms do not define legal status but is used as a cover term for all subjects that are objects of SLAPP and seek protection in line with this Recommendation. A 'victim' is a direct or indirect recipient of harm resulting from violation of their rights. A 'target' generally refers to an individual or entity that the perpetrator intends to cause harm to through their actions and who has not yet suffered harm. While all victims of SLAPP are also targets of SLAPP, not all targets are victims, because targets have yet to suffer harm.

117. The harm suffered by the victim may be an economic loss, physical harm, mental or emotional harm. They may be exposed to financial burdens, face stress, fear, anxiety, depression, and other psychological harms. Both target and victim in the case of the SLAPP are determined as a factual state based on the objective circumstances with reference to SLAPP indicators. No formal recognition of the victim or target status is necessary to provide access to legal support or other tools and remedies described in the Recommendation. The assessment is made on a case-by-case basis as to provide expedient access to aid and not hinder access to legal tools.

118. In some cases, journalists have had to be relocated owing to the impact of a SLAPP lawsuit. They may face stress, fear, anxiety, depression, and other psychological harms. Whilst the terms of reference for this Recommendation do not extend *prima facie* to physical safety, the Recommendation highlights that SLAPPs can take place on a *continuum* and thus physical danger also warrants attention as physical harm can also occur. Member States are encouraged not to limit themselves only to legal aid but expand these mechanisms to other forms of legal support, such as sign-posting or advice from a non-legal source, at any stage of the legal process and proceedings, including pre-trial administrative actions and communication between the parties that precede these processes and proceedings.

119. Member States are encouraged to consider legal aid provision for SLAPP defendants, particularly considering the disparity in resource frequently present in these cases. The provision of legal aid in the form of financial support for legal representation, but also advice, other support mechanisms and free access to resources on SLAPPs, can support access to justice and fair trial rights for SLAPP victims. It should be made clear at which point victims become eligible for this support where provision is introduced.

120. Paragraph 52 addresses the financial support which could be ensured to the victims of SLAPPs building on the guidelines in §1.3.4 of Recommendation CM/Rec(2022)4 on promoting a favourable environment for quality journalism in the digital age.

121. Employers should provide support where their employees are victims or targets of SLAPPs in their regular course of employment. This may include special leave, paid time off, additional insurance or financial assistance. The term “employer” should be interpreted in an extensive manner, so as to include also, for example, media that freelancers co-operate with or human rights organizations that volunteers co-operate with, but that are not *sensu stricto* employers.

122. Member States should provide supporting measures including psychological or financial aid and consider collaboration with civil society organisations with expertise in this field. As an example of government and civil society working in partnership, the United States Agency for International Development announced in June 2022 that they would provide in \$9 million in seed funding for Reporters Shield — a defence fund that journalists and activists around the world can use to protect themselves against SLAPPs and other abusive lawsuits. The fund is intended to become self-sustaining through financial contributions from media organisations.

123. Broadening already existing national schemes and mechanisms for targets of SLAPPs should be considered, such as general schemes set up to protect journalists, safe houses or legal aid centres. Practical support measures should be put in place in consultation with SLAPP targets and take into consideration their specific needs and concerns.

124. Member States are also recommended to take into consideration the situation of vulnerable groups or individuals targeted by SLAPPs who are exposed to a higher risk of negative effects and should be given special attention. These include persons at risk of discrimination by reason of their sexual orientation, gender identity and expression, and sex characteristics, racial, ethnic or national minorities, persons from low socio-economic background, persons with disability or vulnerable due to age.

125. Victims and targets may be supported by NGOs or civil society groups, including, for example, showing presence outside courtrooms or in interviews with media outlets. Member States are encouraged to recognise this as an additional safeguard in the form of moral support for targets and victims facing proceedings or threats. Pro bono legal support is also a valuable source of assistance in many cases including in legal practice clinics, though this should always take place under the supervision of qualified legal professionals.

IV. Education, training and awareness raising

126. Educational, training and public awareness campaigns should be an integral part of national strategies to combat SLAPPs. These should aim at sensitising a wide range of relevant actors to the detrimental effects of SLAPPs both on the those targeted and the public at large, illustrating the impact on public discourse in a democratic society.

127. It is recommended to set up custom-made training of legal professionals to help them identifying SLAPPs and support them, respectively, in avoiding acting against the legitimate exercise of freedom of expression (prosecutors), adopting defence strategies (lawyers) or judicial decision (judges) that fully take into account the existing procedural tools and the substantive standards offering protection to those that are affected by them. The assumption is that a trend towards the effective implementation by the judiciary of freedom of expression standards in line with the Court’s case law would itself provide a discouraging factor against SLAPPs.

128. Lawyers’ associations or regulators’ ethical codes and disciplinary procedures should be revised and updated where necessary to reflect best practice in combatting SLAPPs. Any change in disciplinary codes or sanctions should be communicated to members of lawyers’ associations. Public awareness of referral mechanisms to regulators or legal ombudsmen should be widely disseminated so that concerns around legal malpractice can be dealt with promptly.

129. Awareness raising activities for the benefit of journalists and other media actors (and their organisations, including Press Councils), as well as other “public watchdogs” possibly targeted by SLAPPs (e.g., human rights defenders, environmental activists, and their organisation) may prove crucial in at least two respects. First, as far as journalists are concerned, they would support the importance of striving for responsible journalism, in line with journalistic ethics, as the first shield against SLAPPs. Secondly, it would assist journalists and other relevant actors in accessing resources and mechanisms, international and local, for their protection when they are targeted by legal proceedings aimed at intimidating or silencing them.

130. Experience can be drawn by Council of Europe co-operation activities and the setting up of platforms of interprofessional exchange of points of views and experiences that have proved a particularly important and effective tool to raise awareness on the protection of the freedom of journalists and other media actors. This consists in bringing together, through structured and long-term processes, representatives of all

stakeholders (e.g., journalists, lawyers, judges, politicians, and business community) to build a common and practical understanding of the acceptable limitation to freedom of expression and the importance of protecting journalists from intimidation in any form, including SLAPPs.

131. In the above-mentioned activities, a special focus needs to be placed on mainstreaming a gender equality perspective as female journalists and other public watchdogs are disproportionately the targets of threats and intimidation.

132. Education and training programmes should aim to ensure their long-term sustainability, including by working in partnership with national training institutions (judicial academies, bar associations, and universities) to embed training on freedom of expression and the issue of SLAPPs into the relevant curricula and certifying local trainers, who may subsequently deliver training to their peers, enabling a cascade effect of training tailored to each beneficiary's needs.

133. Member States should also consider the formation of programmes on media law at faculties with journalism studies and law faculties.

134. Awareness campaigns should aim to inform and educate the public about the specific issues raised by SLAPPs, including their forms and negative effect on society. They should aim to promote understanding and encourage action or behaviour change that leads to a decrease of SLAPP activity. These awareness campaigns should make use of various communication channels, including social media, advertising, events, and educational materials, to reach a broad audience and convey their messages effectively. The goal of awareness campaigns should be to mobilise individuals or communities to support a cause or take action to address the challenges posed by SLAPPs.

135. Beyond this, fostering co-ordination through national focal points could prove useful in co-ordinating training. Trainings should be provided to relevant stakeholders, such as media workers, representatives of civil society organisations, lawyers and judges. Where States do not organise or co-ordinate such trainings, they should promote and support relevant initiatives that do so. These campaigns should be accessible to national minorities in their own language wherever necessary.

V. National co-ordination and international co-operation

136. To achieve the scope of the Recommendation, member States should work towards advancing the objectives outlined in the Recommendation within and outside their own borders. At the national level, this should include using the country's official languages, as well as regional and minority languages, to spread the message.

137. As SLAPPs can affect various groups, co-ordination at a national level is essential when adopting comprehensive measures. Member States should therefore also actively collaborate with all relevant

138. stakeholders to ensure that the Recommendation's content reaches as many relevant stakeholders as possible through a diverse range of promotional materials.

139. With a view to make their efforts more harmonised and effective, member States are also encouraged to act in a concerted fashion, either through already established or specifically designated national hubs such as focal points. This collaboration should be conducted in a positive and inclusive manner, involving competent national authorities and a broad spectrum of participants. For example, the United Kingdom has set up a new taskforce to co-ordinate a non-legislative response to SLAPPs which target journalists as part of its National Action Plan on the Safety of Journalists (2023), bringing together government, journalists and legal services to co-ordinate action to tackle SLAPPs.

140. These kinds of taskforces could be used as means to ensure effective implementation of the Recommendation. For example, at the Council of Europe level, to ensure the effective implementation of the European-wide Campaign for the Safety of Journalists, member States were invited to appoint National Focal Points act as the interface between the domestic stakeholders entrusted with the 'national chapter' of the Campaign and the Council of Europe Secretariat of the Campaign. At the European Union, States were invited to establish focal points for the purpose of fighting against SLAPPs.

141. The transnational features of some SLAPPs make it essential that effective measures and action plans are co-ordinated on both regional and international levels in order to strengthen judicial co-operation, establish procedural rules to avoid 'forum shopping' that is unfavourable to public participation or vexatious to the defendant and multiple or co-ordinated SLAPPs.

Besides cases of cross-border SLAPPs, international co-operation is necessary also to guarantee legal clarity and efficiency to the protection of free expression. The United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity and the Issue of Impunity aims to create a free and safe environment for journalists and media workers, both in conflict and non-conflict situations, with a view to strengthening peace, democracy and development worldwide and highlights the importance of training legal professionals in this respect. These benefits collectively contribute to a fairer an

The Council of Europe [Recommendation CM/Rec\(2024\)2 on countering the use of strategic lawsuits against public participation \(SLAPPs\)](#) was adopted by the Committee of Ministers on 5 April 2024. It provides a definition of SLAPPs, understood “as legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalise free expression on matters of public interest and the exercise of rights associated with public participation.” For the purpose of application of the Recommendation, public participation and public interest are intended broadly, extending to everyone’s democratic right to participate in public debate and public affairs, online and offline, without fear or discrimination. According to CM/Rec(2024)2, the notion of “everyone” encompasses all public watchdogs and contributors to public debate and all participants in public affairs. Therefore, it is not limited to journalists and other media actors, but to all critical voices, such as civil society organisations, environmental associations and activists, academics and human rights defenders.

Its guidelines are intended to apply to civil lawsuits, as well as to administrative and criminal law contexts, including legal intimidation tactics. Moreover, the Recommendation covers both domestic and other types of SLAPPs, such as cross-border, multiple or coordinated, and SLAPPs targeting anonymous public participation. To facilitate the identification of SLAPPs, the Recommendation provides a non-exhaustive list of 10 indicators. These include reference to outstanding features of SLAPPs, such as the exploitation of an imbalance of power; the partial or full unfoundedness of the arguments put forward by the claimant; the request of disproportionate, excessive or unreasonable remedies; and the engagement in delaying tactics.

The governments of the member States are recommended to further strengthen existing legislative and policy frameworks to counter SLAPPs, in particular regarding structural and procedural safeguards, remedies, transparency, support for targets and victims, and development of education, training, awareness raising programmes.

The Recommendation is accompanied by an Explanatory Memorandum designed to further explain the context, reasoning and practical examples useful for the understanding and implementation of the Recommendation.

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The Council of Europe is the continent’s leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.