

# The need for a Council of Europe Recommendation on measures to deter and remedy the use of SLAPPs

## Summary

1. The term 'Strategic Lawsuits Against Public Participation' (SLAPPs) refers to abusive lawsuits that are brought to shut down critical expression, rather than to redress an actual wrong. Typically, they are filed by powerful persons or businesses against their critics, who may for example be journalists, campaigners, academics or demonstrators.
2. A growing body of evidence has shown a trend in the use of various forms of SLAPPs in Europe, and underscored the potentially devastating impact such tactics have on public watchdogs across the continent. While anti-SLAPP laws exist in a number of jurisdictions around the world, there is no such specific legislation in Europe and existing procedural safeguards are limited and not uniform.
3. The EU has recognised the importance of assisting those impacted by SLAPPs and is exploring steps to address the problem. The Commission is currently in the process of mapping the scope of their usage and reviewing its legal competence to legislate. At present, however, no dedicated European human rights standards document exists to guide the EU in enacting anti-SLAPP measures.
4. While the European Court of Human Rights (ECtHR) does not use the term SLAPP, it has dealt with the issue in a number of cases (e.g. cases concerning vexatious litigation). The Court's case law points to the need for State Parties to the European Convention on Human Rights to deter these kinds of abuses of judicial process and to support the targets.
5. In practice, however, Council of Europe (CoE) member state legislation and judicial procedures often fail to give effect to the principles enshrined in ECtHR jurisprudence. It is crucial that these safeguards are built into the procedural framework of member state laws, so that the use of SLAPPs is deterred, defendants are given the necessary support, plaintiffs are penalised and these cases are quickly dismissed from court, without exerting a chilling effect on the exercise of human rights. A CoE recommendation is the most suitable instrument to guide these efforts.
6. The CoE has already promulgated limited standards on SLAPP protection in relation to defamation laws, investigative journalism and internet intermediaries. While showing the concern of the CoE as to the impact of SLAPPs, these brief references in existing policy documents do not provide a coherent set of guidelines on how member states can and should prevent or minimise the impact of SLAPPs, and discourage those responsible.

7. Urgent action is needed, and the role of the CoE is crucial. Given the scale and nature of the problem, it is necessary that the CoE elaborates and promulgates, at the earliest opportunity, a full set of principles on how to protect the right to freedom of expression and other acts of public participation from the threat of SLAPPs.

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## A. Introduction

8. The term Strategic Lawsuits Against Public Participation (SLAPPs) refers to the use of litigation as a tool to abuse the judicial process in order to shut down critical or political expression, journalism, and acts of public participation, such as environmental and anti-corruption advocacy or protest. They are typically brought by wealthy or influential individuals or companies against their critics in the media, civil society, the legal profession or academia.
9. SLAPPs can take many forms, such as claims of defamation, interference with contractual relations, invasion of privacy or infringement of intellectual property. The plaintiff may be seeking compensation, an injunction or another type of remedy. SLAPPs are usually brought under civil law, but can also take the form of a private prosecution, in countries where such a mechanism exists.
10. One characteristic of a SLAPP is that the plaintiff's main aim is not to win the case, but rather to drown the defendants in lengthy and costly procedures, thereby reducing to silence whatever critical message they tried to express and intimidating them with the prospect of high damage claims. SLAPPs can occur even in countries whose substantive laws protect freedom of expression and related rights. If the procedural framework enables the plaintiff to abuse the judicial process by dragging out a hopeless claim for a long time, the goal of silencing the defendant can be accomplished in that way.
11. Such is the impact of SLAPPs that they can be regarded as a form of *privatised* censorship, in the sense that they enable private parties (whether corporations or wealthy individuals, or politicians or public officials acting in their private capacity) to exercise control over expression in a way that is comparable to authoritarian governments. As with traditional forms of censorship however, the impact of such lawsuits reaches beyond the immediate targets: the intent is as much to discourage and deter others from speaking as it is to punish those who have *already* spoken out.
12. Over the last few years, civil society groups have identified a growing trend in the use of various types of SLAPPs against public watchdogs. A growing body of research has

documented the insidious effect SLAPPs, and the threat thereof, routinely have on journalism, activism, advocacy and other means of holding the powerful to account.

13. This paper provides an overview of the problem of SLAPPs, the need for a recommendation from the Council of Europe on anti-SLAPP protection, and how this would complement existing ECtHR jurisprudence and ongoing efforts at the EU. It concludes with concrete recommendations to help shape any future CoE intervention on the issue of SLAPPs.

## B. The Problem of SLAPPs in Europe

14. The fact that private parties can pose as much of a threat to freedom of expression and related rights as governments has been properly understood for some time. The Council of Europe and other international bodies have issued guidance on how to ensure domestic law properly balances free expression against rights of others, such as privacy or protection of reputation. In practice, legislation often fails to live up to these standards; for example, defamation laws may fail to provide sufficient defences or place a reasonable cap on the damages that can be awarded. It is now becoming clear, however, that shortcomings in substantive national laws are only part of the problem, and that bringing them in line with international standards would still not stop aggressive plaintiffs from trying to silence opponents by exploiting weaknesses in procedural laws to bring SLAPPs.
15. Journalists, activists, and other public watchdogs are increasingly facing SLAPP suits. This trend is documented, for example, by the European Centre for Press and Media Freedom's Mapping Media Freedom tool<sup>1</sup> and the CoE Platform to Promote the Protection of Journalism and Safety of Journalists,<sup>2</sup> as well as recent reports by EU-Citizen (on behalf of the European Commission),<sup>3</sup> Greenpeace EU,<sup>4</sup> Index on Censorship,<sup>5</sup> and the University of Amsterdam (on behalf of the European Parliament).<sup>6</sup> The EU-Citizen report, for example, notes that 'SLAPPs are increasingly used across

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<sup>1</sup> Available at: <https://www.ecpmf.eu/monitor/mapping-media-freedom/>

<sup>2</sup> Available at:

<https://www.coe.int/en/web/media-freedom/the-platform#:~:text=WHY%20THE%20PLATFORM%20%3F,European%20Convention%20on%20Human%20Rights.>

<sup>3</sup> EU-CITIZEN, *Ad-Hoc Request SLAPPs in the European Context*, available at:

[https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf)

<sup>4</sup> Greenpeace EU, *Sued into Silence: How the Rich and Powerful use Legal Tactics to Shut Critics Up*, July 2020, available at:

<https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>

<sup>5</sup> Index on Censorship, *A Gathering Storm: the Laws being used to Silence the Media*, available at:

<https://www.indexoncensorship.org/campaigns/the-laws-being-used-to-silence-media/>

<sup>6</sup> Tarlach McGonagle et al, study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, *Safety of Journalists and the Fighting of Corruption in the EU*, available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL\\_STU\(2020\)655187\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655187/IPOL_STU(2020)655187_EN.pdf)

member states, in an environment that is getting more and more hostile towards journalists, human rights defenders and various NGOs’.

16. Other more localised research efforts have illustrated the nature of the problem in individual CoE member states, where meritless cases are taken by powerful individuals to intimidate targets. To take a few notable examples:

- i. Maltese journalist Daphne Caruana Galizia had 47 defamation lawsuits pending against her when she was murdered, brought primarily by Maltese business and political figures exposed by her investigations, with the intent to intimidate her. The plaintiffs included Prime Minister Joseph Muscat, his Chief of Staff Keith Schembri, Minister of Energy Konrad Mizzi and opposition leader Adrian Delia.<sup>7</sup> She also faced threats of legal action in London, where litigation is notoriously expensive.<sup>8</sup> Even after her death, her family had to continue to defend 34 cases that were not automatically terminated or withdrawn.<sup>9</sup> Other journalists in Malta also regularly receive threatening legal letters over their reporting and journalistic inquiries.<sup>10</sup>
- ii. In France, more than twenty defamation lawsuits have been filed by companies affiliated with the Bolloré Group against journalists, lawyers, activists and NGOs investigating alleged human rights abuses in African palm oil plantations. The sheer number of cases from one plaintiff indicates the intent by the powerful business group to silence its critics.<sup>11</sup>
- iii. Irish billionaire Denis O’Brien has brought defamation cases against media outlets in the country on an almost annual basis for the past decade. His targets have included Irish public broadcaster RTÉ, The Irish Independent, The Irish Times, Associated Newspapers (publishers of the Irish Daily Mail) and The Phoenix (a current affairs magazine). The Business Post (also the target of an unsuccessful suit) counted a total of 22 cases filed by O’Brien against media outlets in the Irish

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<sup>7</sup> The Daphne Caruana Galizia Foundation, *Our fight against frivolous and vexatious libel suits*, available at: <https://www.daphne.foundation/en/justice/vexatious-libel-cases> .

<sup>8</sup> The Guardian, *Murdered Maltese reporter faced threat of libel action in UK*, 1 June 2018, available at: <https://www.theguardian.com/world/2018/jun/01/murdered-maltese-reporter-faced-threat-of-libel-action-in-uk>.

<sup>9</sup> Pen International blog, *Andrew Caruana Galizia's UNHCR speech on Criminal Defamation*, 21 June 2018, available at: <https://pen-international.org/news/andrew-caruana-galizia-criminal-defamation>.

<sup>10</sup> European Centre for Press and Media Freedom, *Malta: five media outlets threatened by lawyers of British-Azeri business owner*, 12 July 2020, available at:

<https://www.ecpmf.eu/five-maltese-newspapers-threatened-by-lawyers-for-british-azeri-business-owner/>

<sup>11</sup> See Civicus Monitor, *SLAPP Lawsuits Threaten Critical Voices in France*, 9 March 2018, available at: <https://monitor.civicus.org/updates/2018/03/09/slapp-lawsuits-threaten-critical-voices-france/>

High Court.<sup>12</sup>

- iv. In Slovenia, since August 2020, news website Necenzurirano's journalists Primož Cirman, Vesna Vukovic and Tomaž Modic have each had 13 different private prosecutions lodged against them by Rok Snežič, a tax expert and unofficial financial advisor to Slovenian Prime Minister Janez Janša, bringing the total so far to 39.<sup>13</sup>
- v. In Poland the opposition newspaper Gazeta Wyborcza is currently facing 55 active lawsuits.<sup>14</sup> A number of these lawsuits have been filed by the ruling Law and Justice Party (PiS), which has - alongside the president, Jaroslaw Kaczynski - often turned to judicial harassment as a means of silencing critics. One of these lawsuits, brought against the law professor Wojciech Sadurski, was filed on the same day as a separate lawsuit filed against the academic by the public broadcaster, TVP.<sup>15</sup>
- vi. In Moldova, the investigative reporting newspaper Ziarul de Gardă is facing a defamation lawsuit by President Dodon over an article about the luxury holidays of his family and his entourage.<sup>16</sup> The paper is facing further defamation suits from the former Minister for Transport over claims that he paid €150,000 to become minister<sup>17</sup> and a former prosecutor who is suing the newspaper over an exposé on false information in his wealth declaration.<sup>18</sup>
- vii. In Russia, abusive lawsuits are often used by politicians as a means to silence dissent: this has included the "judicial harassment" of human rights activist Oleg Orlov by Chechen President Ramzan Kadyrov;<sup>19</sup> multiple lawsuits filed by

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<sup>12</sup> The Business Post, *The Gang of 22 - The 22 cases Denis O'Brien has filed against media outlets in the Irish High Court*, 3 March 2019, available at:

<https://www.businesspost.ie/news-focus/the-gang-of-22-97814500>.

<sup>13</sup> ECPMF, *Hands off Slovenia's 'Uncensored' magazine*, 1 October 2020, available at:

<https://www.ecpmf.eu/hands-off-slovenias-uncensored-magazine/>

<sup>14</sup> Poland: Gazeta Wyborcza threatened with 55 lawsuits:

<https://mappingmediafreedom.usahidi.io/posts/23385>

<sup>15</sup> CIVICUS Monitor update on Poland, *Ruling Party steps up harassment to silence critical journalists and media outlets*, May 27 2019:

<https://www.liberties.eu/en/news/civicus-monitor-poland-update-may-2019/17657>

<sup>16</sup> Ziarul de Gardă, *Președintele Dodon explică de ce a acționat ZdG în judecată: „Trebuie să spunem mulțumesc că vă fac publicitate”*, 15 May 2020, available at:

<https://www.zdg.md/importante/presedintele-dodon-explica-de-ce-a-actionat-zdg-in-judecata-trebuie-sa-spuneti-multumesc-ca-va-fac-publicitate/>

<sup>17</sup> Ziarul de Gardă, *150 de mii de euro pentru funcția de viceministru al Transporturilor*, 3 April 2017, available at: <https://www.zdg.md/investigatii/ancheta/150-de-mii-de-euro-pentru-un-post-de-viceministru/>

<sup>18</sup> Ziarul de Gardă, *Procurori ajutați de părinți. Varianta 2018*, 1 July 2019, available at:

<https://www.zdg.md/investigatii/ancheta/procurori-ajutati-de-parinti-varianta-2018/>

<sup>19</sup> Amnesty International, *Russian human rights defender not guilty of slander charges*, 14 June 2011, available at:

Russia's Liberal Democrat Party against critics;<sup>20</sup> and multiple lawsuits against opposition activist Alexy Navalny.<sup>21</sup> Meanwhile, the independent wire service RBC was sued for the equivalent of \$50 million (higher than RBC's annual income) by the largest oil and gas corporation in Russia, Rosneft; the company's CEO, Igor Sechin, has a record of suing journalists who question his wealth.<sup>22</sup>

- viii. A similar trend of politicians suing their critics can be found in Ukraine. Pavlo Demchyna, First Deputy Head of the Security Service of Ukraine, has filed as many as 16 lawsuits against journalists and activists to protect his honour and dignity.<sup>23</sup> Environmental activists have been particularly exposed to SLAPPs in Ukraine, with a local politician suing activists in response to open letters on a proposed poultry farm<sup>24</sup> and the country's state-owned nuclear power plant operator, Energoatom, suing the National Ecological Centre of Ukraine for a press release on the safety of a nuclear power plant.<sup>25</sup>

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<https://www.amnesty.org/en/latest/news/2011/06/russian-human-rights-defender-not-guilty-slander-charges/>

<sup>20</sup> See Rapsi, *Politician Zhirinovskiy challenges dismissal of his suit against FT journalist*, 20 May 2019, available at: [http://rapsinews.com/judicial\\_news/20190520/299329238.html](http://rapsinews.com/judicial_news/20190520/299329238.html); The Moscow Times, *Russian Court dismisses LDPR's defamation case against Mikhail Khodorkovsky*, 21 November 2014, available at: <https://www.themoscowtimes.com/2014/11/21/russian-court-dismisses-ldprs-defamation-case-against-mikhail-khodorkovsky-a41603>

<sup>21</sup> See Russia Beyond, *Russian tycoon Usmanov wins defamation lawsuit against Navalny*, May 31 2017, available at: [https://www.rbth.com/news/2017/05/31/russian-tycoon-usmanov-wins-defamation-lawsuit-against-navalny\\_773992](https://www.rbth.com/news/2017/05/31/russian-tycoon-usmanov-wins-defamation-lawsuit-against-navalny_773992); Meduza, *Russian court says opposition leader must retract investigative report about corruption in National Guard*, 5 February 2019, available at: <https://meduza.io/en/news/2019/02/05/russian-court-says-opposition-leader-must-retract-investigative-report-about-corruption-in-national-guard>; Rapsi, *Defamation suit filed by RT TV channel against Navalny set for mid-September*, 11 June 2020, available at: [http://www.rapsinews.com/judicial\\_news/20200611/305917217.html](http://www.rapsinews.com/judicial_news/20200611/305917217.html)

<sup>22</sup> The Interpreter, *RBC Struggles with Rosneft Libel Suit*, 12 September 2016, available at: <https://www.interpretermag.com/russia-update-december-9-2016/>

<sup>23</sup> ANTAC News, *The court rejected Demchyna's lawsuit against Shabunin*, 13 July 2018 <https://antac.org.ua/en/news/the-court-rejected-demchyna-s-lawsuit-against-shabunin/>

<sup>24</sup> Activists Persecution, *Group of activists sued for criticising state bodies in relation to Ukrainian poultry oligarch activities*, 26 September 2017, see <https://stop-persecution.org/news/group-of-activists-sued-for-criticizing-the-state-bodies-in-relation-of-ukrainian-poultry-oligarch-activities>

<sup>25</sup> Bankwatch Network, *Energoatom lawsuit against Ukrainian activists is the latest attempt to stifle public debate over an ageing nuclear energy fleet*, 28 August 2015, available at: [https://bankwatch.org/press\\_release/energoatom-lawsuit-against-ukrainian-activists-is-the-latest-attempt-to-stifle-public-debate-over-an-ageing-nuclear-energy-fleet](https://bankwatch.org/press_release/energoatom-lawsuit-against-ukrainian-activists-is-the-latest-attempt-to-stifle-public-debate-over-an-ageing-nuclear-energy-fleet)

ix. Additional examples of public watchdogs facing SLAPPs have been reported in Germany,<sup>26</sup> Romania,<sup>27</sup> Serbia,<sup>28</sup> Turkey,<sup>29</sup> the UK<sup>30</sup> and other CoE member states.

17. Documentation of concrete SLAPP cases across Europe will continue through various research projects which are underway. ARTICLE 19 and the American Bar Association are carrying out research on the abuse of defamation and other civil legislation in Serbia and Poland. As of September 2020, the European Centre for Press and Media Freedom will engage in more robust documentation of SLAPPs on its platform. Another research project by Amsterdam University, commissioned by Greenpeace International, examines 165 SLAPPs brought by individuals and companies in countries across Europe over a ten-year period. It aims to identify common characteristics of SLAPPs across the continent and the conditions that give rise to such lawsuits.

18. Overall, there is ample evidence of a growing problem of SLAPPs across the continent. As the documentation of such cases continues, legislative initiatives – soft and hard laws – are needed to protect journalists, media, human rights defenders and other public watchdogs, and to have an impact on the entire continent.

### C. EU activity in relation to SLAPPs

19. The EU is taking positive steps to address SLAPPs. The European Commission Vice President for Values and Transparency, Věra Jourová, has made EU action to address SLAPPs a priority for the European Commission, with assurances that both calls for policy and legislative measures will be included in the upcoming European Democracy Action Plan, scheduled for December 2020. In regular meetings with civil society activists, and through public statements, Vice-President Jourová has underlined how important it is to provide assistance to, and defend, individuals affected by SLAPPs, including the provision of financial and legal support.

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<sup>26</sup> See, for example, SumofUs.org, *Can you chip in to help us fight back against PayPal*, available at: <https://actions.sumofus.org/a/can-you-chip-in-to-help-defend-us-against-paypal>

<sup>27</sup> *Lawsuits Filed against the Romanian Centre for Investigative Journalism*, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_life\\_cycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&\\_sojdashboard\\_WAR\\_coesojportlet\\_alertId=65147105](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_life_cycle=0&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=65147105)

<sup>28</sup> OBC Transeuropa, *Special Dossier on SLAPPs: Strategic Lawsuits Against Public Participation*, 13th July 2020, available at: <https://www.balcanicaucaso.org/eng/ECPMF/ECPMF-news/SLAPPs-Strategic-Lawsuits-Against-Public-Participation-198695>

<sup>29</sup> *Journalist Metin Uca Sentenced to 14 Months for Tweeting Suspiciously Accurate Election Forecast by State-run News Agency*, [https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_life\\_cycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&\\_sojdashboard\\_WAR\\_coesojportlet\\_alertId=65691230](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_life_cycle=0&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=65691230)

<sup>30</sup> *Free expression groups call on Arron Banks to drop SLAPP lawsuit against journalist Carole Cadwalladr*, <https://ifex.org/free-expression-groups-call-on-arron-banks-to-drop-slapp-lawsuit-against-journalist-carole-cadwalladr/>

20. Much of the EU engagement around SLAPPs started in 2017 following the murder of Daphne Caruana Galizia. In February 2018, a small group of Members of the European Parliament made a written request to then Commission Vice-President Frans Timmermans for the establishment of an anti-SLAPP Directive.<sup>31</sup> Civil society organisations around Europe are currently continuing to make calls to the EU institutions to establish a future anti-SLAPP Directive.
21. In March 2019, Maltese academic Justin Borg-Barthet laid out the case for EU action in a paper and presentation given to freedom of expression advocates visiting the University of Aberdeen. He specified how the Brussels I Regulation (recast) enables the claimant in a defamation case to choose where to raise the claim. This enables the claimant to drive up costs for the defendant, contrary to the principles of fair trial and equality of arms enshrined in the EU's Charter of Fundamental Rights. He also clarified that the Rome II Regulation fails to specify which national law will apply to a defamation case - meaning that citizens, journalists and activists can end up subject to the laws that guarantee freedom of expression at the lowest standard.
22. The Commission has subsequently committed to opening a study into the necessary recast of Rome II in 2020, and has given clear assurances that it will also consider a similar review of Brussels I in 2021.
23. In July 2020, Vice-President Jourová pointed to the finalisation of the European Democracy Action Plan (EDAP) as the foundation for further policy and legislative measures to be taken by the Commission. The consultations for the European Democracy Action Plan were opened on 15 July and closed on 15 September 2020 - with a view to the EDAP being published in November. Civil society organisations used the consultations to contribute policy and legislative recommendations to the Commission.
24. Vice-President Jourová has told civil society activists that the Commission is currently in the process of mapping the scope of the problem, the legislative framework within Member States and the legal competence of the Commission to legislate - without committing to do so.
25. The 2019 Whistleblowers Directive set a precedent for a similar directive on SLAPPs. It demonstrates the ability of CoE Recommendations to positively influence developments at the EU, which in turn can move Member States to act effectively by setting a high standard of protection across the Union. This precedent supports the notion that a CoE Recommendation on measures to combat SLAPPs would reinforce the demand by civil society that an ambitious EU anti-SLAPP Directive be established to introduce high

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<sup>31</sup> EPP Group, *MEPs continue to pile on pressure for anti-SLAPP legislation*, 22 February 2018, available at: <https://www.eppgroup.eu/how-we-make-it-happen/with-eu-countries/malta/news/meps-continue-to-pile-on-pressure-for-anti-slapp-legislation>

minimum standards on the support and protection for victims, as well as a recast of problematic provisions within Brussels I and Rome II.

#### D. ECtHR Jurisprudence

26. Although the term 'SLAPP' has not been used yet by the ECtHR, there have been many cases before the Court addressing the problems associated with and presented by SLAPPs. These included, in particular, defamation cases or cases related to access to justice and due process as well as procedural protection in civil litigation. Typically, the applicant is an individual or organisation involved in journalism, advocacy or academia who complains about a failure by domestic courts to adequately protect his or her right to freedom of expression under Article 10 of the Convention.
27. Probably the most vivid example is *Steel and Morris v. United Kingdom*,<sup>32</sup> also known as the 'McLibel case', in which McDonald's had used its financial muscle to try to crush a small campaign group after it distributed a leaflet entitled "What's wrong with McDonald's?", accusing the fast food giant of a range of ills, such as driving economic inequality, deforestation, poor nutrition and the exploitation of workers.
28. After hiring seven private investigators to infiltrate the group and find out who was responsible, and threatening them with a huge damage claim, McDonald's launched libel proceedings against two members who refused to apologise. The resulting trial lasted 313 court days, the longest in English legal history, and featured 40,000 pages of evidence and 130 witnesses. McDonald's was estimated to have spent in excess of GBP 10 million on legal expenses.
29. The Court's rulings in this and other cases show that State Parties to the Convention are required, under Articles 6 and 10 of the Convention, to put procedural protections in place to ensure that the judicial process is not abused against critical and political voices.
  - i. First, **a higher threshold should apply when public figures seek to protect their reputation or private life.** In *Lingens v. Austria*,<sup>33</sup> the Court held that the "limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual", because a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed ... and he must consequently display a greater degree of tolerance." This has since become a bedrock principle of Article 10 jurisprudence, and has been extended to all manner of public figures – not just politicians but also, among others, Heads of

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<sup>32</sup> ECtHR 15 February 2005.

<sup>33</sup> ECtHR 8 July 1986.

State,<sup>34</sup> business magnates,<sup>35</sup> major corporations<sup>36</sup> and associations that are active in the public domain.<sup>37</sup> Anti-SLAPP legislation can play an important role in giving this higher threshold effect in national law, by enabling courts to dismiss suits at an early stage, if they relate to criticism of a public figure that falls clearly within the (wider) acceptable limits.

- ii. Second, in defamation cases, national law should offer “**adequate and effective safeguards against a disproportionately large award**”.<sup>38</sup> This is because “unpredictably high damages in libel cases are considered capable of having a chilling effect.”<sup>39</sup> In practice, plaintiffs in SLAPP cases continue to be able to intimidate their critics with high claims, precisely because the levels of damages remain unpredictable in many CoE member states.
- iii. Third, **defendants must have access to legal aid if they would otherwise be deprived of the opportunity to present their case effectively.** In the aforementioned ‘McLibel’ case, the Court accepted that the failure to provide legal aid to the two defendants – a part-time bar worker and a single parent on income support – constituted a violation of the right to a fair trial under Article 6 § 1 of the Convention, given the gross inequality of arms between them and McDonald’s. The Court held that, while “it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms”, it must nevertheless ensure that in civil cases, “each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage.” In addition, the lack of procedural fairness and equality gave rise to a violation of the right to freedom of expression under Article 10 of the Convention.
- iv. Fourth, the freedom of expression of **public watchdogs should be protected at a high level.** The Court has long emphasised the essential role played by the press in a democratic society and the special position of journalists in this context. When drawing attention to matters of public interest, the media are entitled to heightened protection, provided they are acting in good faith in order to provide accurate and reliable information.<sup>40</sup> In recent years it has recognised that this public watchdog function is not limited to the press but may also be exercised by, among others, non-governmental organisations, academic researchers, authors of

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<sup>34</sup> See, for example, ECtHR 25 June 2002, *Colombani and Others v. France*.

<sup>35</sup> See, for example, ECtHR 21 September 1990, *Fayed v. the United Kingdom*.

<sup>36</sup> See, for example, ECtHR 15 February 2005, *Steel and Morris v. United Kingdom* and ECtHR 8 September 2020, *OOO Regnum v. Russia*.

<sup>37</sup> See, for example, ECtHR 27 February 2001, *Jerusalem v. Austria*.

<sup>38</sup> ECtHR 13 July 1995, *Tolstoy Miloslavsky v. United Kingdom*.

<sup>39</sup> ECtHR 15 June 2017, *Independent Newspapers (Ireland) Limited v. Ireland*.

<sup>40</sup> See, for example, ECtHR 24 February 1997, *De Haes and Gijssels v. Belgium*.

literature on matters of public concern and even bloggers and popular users of social media.<sup>41</sup>

30. In practice, CoE member state legislation often fails to give effect to the four principles mentioned above, as can be seen from a study prepared by the CoE's media division.<sup>42</sup> This does not mean that they are just ignored; on the contrary, in many cases the principles concerning public figures and public watchdogs are faithfully applied by national courts when issuing their rulings. But in SLAPP cases, the damage has typically already been done by the time the ruling is issued. The plaintiff does not file the case with the expectation of winning, but with the aim of intimidating and exhausting the defendant through a drawn-out lawsuit.
31. It is therefore important that these safeguards are built into the procedural framework of member state laws, so that SLAPP lawsuits are as far as possible deterred, or else can be dismissed at an early stage, rather than after a full trial. This is all the more true of safeguards against disproportionately large damage claims and provisions for legal aid; these are difficult or impossible for a judge to create, and must be provided for in legislation. A CoE recommendation is the most suitable instrument to guide national authorities in these tasks.

## **E. Existing Council of Europe standards**

32. The Council of Europe has a solid tradition and proactive policy and practice of formulating recommendations, resolutions, and declarations on the right to freedom of expression and information. These highly authoritative CoE documents are often inspired by the relevant jurisprudence of the European Court of Human Rights dealing with the rights of media, journalists and other media actors, internet platforms and 'public watchdogs' such as NGOs and human rights defenders.
33. By promulgating this kind of 'soft law', the Committee of Ministers or the Parliamentary Assembly of the Council of Europe recommend that member states "implement in their domestic law and practice" the principles formulated or appended in the recommendations or declarations at issue,<sup>43</sup> or "to implement the guidelines ..., take all necessary measures to ensure ...," and to "engage in a regular, inclusive and transparent dialogue with all relevant stakeholders ... including civil society."<sup>44</sup>

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<sup>41</sup> ECtHR 8 November 2016, *Magyar Helsinki Bizottság v. Hungary* [GC].

<sup>42</sup> Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, CDMSI(2012)Misc11Rev2.

<sup>43</sup> CM/Rec(2000)7 on the protection of journalists' sources.

<sup>44</sup> CM/Rec. 2018/2 on the roles and responsibilities of internet intermediaries. See also CM/Rec(2016)1 on the protection of journalism and the safety of journalists and other media actors, CM/Rec(2014)7 on the protection of whistleblowers and CM/Rec(2011)7 on a new notion of media.

34. In relation specifically to SLAPPs, **CM/Rec(2016)1** recommends that “Member states must exercise vigilance to ensure that legislation and sanctions are not applied in a discriminatory or arbitrary fashion against journalists and other media actors. They should also take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors” (Appendix, nr. 13). In the 2007 Declaration by the Committee of Ministers on the protection and promotion of investigative journalism, it was mentioned that member states must ensure that prosecutions or sanctions are “not misused to intimidate media professionals and in particular investigative journalists.”
35. In 2012, a declaration by the Committee of Ministers touched upon a specific cross-border issue of SLAPPs, by alerting member states “that libel tourism constitutes a serious threat to the freedom of expression and information,” and by acknowledging “the necessity to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury.” According to the 2012 Declaration, “the prevention of libel tourism should be part of the reform of the legislation on libel/defamation in the member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights,” and the national law provisions on libel and defamation are to be aligned with the case law of the European Court of Human Rights. The Committee of Ministers also undertook “to pursue further standard-setting work with a view to providing guidance to member States’ on the issue of libel tourism.”<sup>45</sup>
36. Most recently the **CM/Rec 2018/2**, on the roles and responsibilities of internet intermediaries, contains an explicit reference to the need for action to be taken against SLAPPs in the digital environment. As part of the guidelines formulated by the Committee of Ministers with regard to safeguards for freedom of expression on the internet, it is expected that “State authorities should consider the adoption of appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression.”

#### **F. Why is a CoE anti-SLAPP recommendation needed?**

37. These brief references to provisions and recommendations in existing policy documents of the Council of Europe show a concern as to how SLAPPs impede the right to freedom of expression and information. But due to their fragmented, and abstract character, they do not provide a coherent set of guidelines on how to prevent SLAPPs by way of legislative action or other remedies, in line with the positive obligations of the member states under Article 10 of the Convention “to create a favourable environment for

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<sup>45</sup> CM/Declaration of 4 July 2010 on the desirability of international standards dealing with forum shopping in respect of defamation, “libel tourism”, to ensure freedom of expression.

participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear" (ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan*).

38. So far, the importance of anti-SLAPP measures to guarantee the right to freedom of expression and participation in public debate is not sufficiently reflected in the policy documents of the Council of Europe. From this perspective it is illustrative that the draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member states on promoting a favourable environment for quality journalism in the digital age<sup>46</sup> makes no reference to the issue of SLAPPs, providing no guidance as to how to tackle the abusive or vexatious litigation that so often toxifies the environment for journalism.
39. The need for urgent action on SLAPPs has recently been highlighted in the annual report of the Council of Europe's Platform to promote the protection of journalism and the safety of journalists.<sup>47</sup> The Platform recorded 142 serious threats to media freedom and mentioned "a growing pattern of intimidation to silence journalists that requires urgent actions by member states to uphold the essential role of a free press in democratic societies." The Platform's 2020 report refers specifically to Strategic Lawsuits Against Public Participation as "(typically civil) lawsuits brought by powerful individuals or companies that have no legal merit and are designed to intimidate and harass the target – especially through the prospect of burdensome legal costs – and not to be won in court. In some cases, the threat of bringing such a suit, including through letters sent by powerful law firms, is enough to bring about the desired effect".<sup>48</sup>
40. The CoE Commissioner for Human Rights, Dunja Mijatović, also recently published a blog post entitled ""Time to take action against SLAPPs", stating that it "high time to tackle a practice which puts pressure both on journalists and on civil society as a whole and dissuades them from critical reporting", adding that "I believe that the Council of Europe and its member states are well placed to play a role in this context."<sup>49</sup>
41. A CoE Recommendation would be of great assistance to campaigners urging the EU to put in place ambitious anti-SLAPP measures, as illustrated by the positive influence exerted by CoE standards on the EU's Whistleblower Directive. It would of course also be capable of positively influencing developments in CoE member States that are not part of the EU.

## G. Recommendations

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<sup>46</sup> 7th draft as of 26 September 2019, MSI-JOQ(2018)08rev6, available at:

<https://rm.coe.int/msi-jog-2018-rev7-e-draft-recommendation-on-quality-journalism-finalis/168098ab76>.

<sup>47</sup> Available at: <https://rm.coe.int/annual-report-en-final-23-april-2020/16809e39dd>.

<sup>48</sup> See p. 23.

<sup>49</sup> Commissioner for Human Rights Dunja Mijatović, *Time to take action against SLAPPs*, 27 October 2020, available at: <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

The civil society organisations in support of this memo now call on the Council of Europe to take urgent action on this important issue by:

- Ensuring, as a first step, that a minimal set of legal and practical guidelines be incorporated in the CoE draft recommendation on quality journalism in the digital age.
- Elaborating and promulgating, as soon as possible, a self-standing Recommendation on how to protect the right to freedom of expression and other acts of public participation from the threat of SLAPPs. Such a recommendation should provide clear guidance to member states on:
  - Measures to be taken in domestic law to ensure that SLAPPs are discouraged.
  - Ensuring national procedural law provides a mechanism enabling SLAPP-type suits that are filed to be dismissed at an early stage, before they become a major drain on the defendant's resources.
  - Making available full financial and legal support to defendants.
  - Preventing the use of forum shopping in conjunction with SLAPPs.
  - Putting in place a system of sanctions for those who bring SLAPPs.