EUROPEAN
COMMISSION

Brussels, 27.4.2022
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COMMISSION RECOMMENDATION

of 27.4.2022

on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

{SWD(2022) 117 final}

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) Article 2 of the Treaty on European Union states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

(2) Article 10(3) of the Treaty on European Union states that every Union citizen has the right to participate in the democratic life of the Union. The Charter of Fundamental Rights of the European Union (the 'Charter') provides, *inter alia*, for the rights to respect for private and family life (Article 7), the protection of personal data (Article 8), freedom of expression and information, which includes respect for the freedom and pluralism of the media (Article 11), and to an effective remedy and to a fair trial (Article 47).

(3) The right to freedom of expression and information as set forth in Article 11 of the Charter includes the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. While it is not an absolute right, any limitations thereto must be provided for by law, respect the essence of the right and be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52(1) of the Charter).

(4) In line with Article 52(3) of the Charter and with the Explanations relating to the Charter, Article 11 of the Charter should be given the meaning and scope of Article 10 on freedom of expression and information of the European Convention on Human Rights as interpreted by the European Court of Human Rights. Article 10 of the European Convention on Human Rights protects freedom of expression and information. Within the scope of application of the European Convention on Human Rights, any restriction must be prescribed by law, must be necessary in a democratic society, and be made in pursuit of the legitimate aims set out in Article 10(2) of the European Convention on Human Rights.

(5) The European Convention of Human Rights also imposes a positive obligation on contracting states to safeguard the freedom and pluralism of the media and to create a favourable environment for participation in the public debate[1]. The case law of the

[1] See for instance European Court of Human Rights' judgement of 14 September 2010, *Dink v. Turkey* (applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), paragraph 137. See also on the

European Court on Human Rights further specifies that the freedom of expression constitutes one of the essential foundations of a democratic society and is applicable not only to information or to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any group in the population[2]. It has further clarified that 'in a democratic society even small and informal campaign groups (…) must be able to carry on their activities effectively' and that 'there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest'[3].

(6) Journalists play an important role in facilitating public debate and in the imparting and the reception of information, opinions and ideas[4]. It is essential that they are afforded the necessary space to contribute to an open, free and fair debate and to counter disinformation and other manipulative interference, including from actors from third countries. Journalists should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.

(7) Human rights defenders also play an important role in European democracies, especially in upholding fundamental rights, democratic values, social inclusion, environmental protection and the rule of law. They should be able to participate actively in public life and make their voices heard on policy matters and in decision-making processes without fear of intimidation. Human rights defenders refer to individuals or organisations engaged in defending fundamental rights and a variety of other rights, including environmental and climate rights, women's rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.

(8) A healthy and thriving democracy requires that people are able to participate actively in public debate. In order to secure meaningful participation, people should be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space in which different views can be expressed freely.

(9) To foster this environment, it is important to protect journalists and human rights defenders from manifestly unfounded and abusive court proceedings against public

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positive obligations under Article 10 of the European Convention on Human rights, the Report of the Research Division of the European Court of Human Rights', https://www.echr.coe.int/documents/research_report_article_10_eng.pdfI

2 See European Court of Human Rights' judgement of 7 December 1976, *Handyside v. The United Kingdom* (application no. 5493/72), paragraph 49.

3 See European Court of Human Rights' judgement on 15 February 2005, *Steel and Morris v. The United Kingdom* (application no. 68416/01), paragraph 89.

4 Recommendation CM/Rec(2022)4 of the Committee of Ministers of the Council of Europe on promoting a favourable environment for quality journalism in the digital age provides that *"…quality journalism, which rests on the standards of professional ethics while taking different forms according to geographical, legal and societal contexts, pursues the dual goal of acting as a public watchdog in democratic societies and contributing to public awareness and enlightenment"* https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0. Resolution 2213 (2018) on the status of journalists in Europe adopted by the Parliamentary Assembly of the Council of Europe refers as regards professional journalists to *"a mission to provide the public with information on general or specialist topics of interest as responsibly and as objectively as possible."* https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0.

participation (commonly known as ‘SLAPPs’). These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalise public participation. Indications of such abuse are the disproportionate, excessive or unreasonable nature of the claim or part thereof, the existence of multiple claims asserted by the claimant in relation to similar matters, or intimidation, harassment or threats on the part of the claimant or their representatives prior to the initiation of manifestly unfounded or abusive court proceeding. These proceedings constitute an abuse of court proceedings and put unnecessary burdens on courts as their aim is not to access justice but to harass and silence defendants. Long proceedings create burdens on national court systems.

(10) Manifestly unfounded and abusive court proceedings against public participation can take the form of a wide array of legal abuses, mainly in civil or criminal matters, but also in administrative law matters and may be based on various grounds.

(11) Such court proceedings are often initiated by powerful individuals or entities (for example lobby groups, corporations and state organs) in an attempt to silence public debate. They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically. Although not being an indispensable component of manifestly unfounded or abusive court proceedings, where present an imbalance of power significantly increases the harmful effects as well as the chilling effects of court proceedings against public participation.

(12) Manifestly unfounded or abusive court proceedings against public participation may have an adverse impact on the credibility and reputation of journalists and human rights defenders in particular and exhaust their financial and other resources. They may have adverse psychological consequences for their targets and their family members. Manifestly unfounded or abusive court proceedings against public participation endanger journalists and human rights defenders’ ability to conduct their activities. As a result of such proceedings, the publication of information on a matter of public interest may be delayed or altogether prevented. The existence of such proceedings may have more broadly a deterrent effect on the work of journalists and human rights defenders in particular, by contributing to self-censorship in anticipation of possible future court proceedings, leading to the impoverishment of the public debate to the detriment of society as a whole. The length of procedures, the financial pressure and the threat of criminal sanctions constitute powerful tools to intimidate and silence critical voices.

(13) Those targeted by manifestly unfounded or abusive court proceedings against public participation often face multiple court proceedings simultaneously and in several jurisdictions. Court proceedings initiated in the jurisdiction of one Member State against a person resident in another Member State are usually more complex and costly for the defendant. Claimants in manifestly unfounded or abusive court proceedings against public participation may also use procedural tools to drive up the length and cost of the litigation, and bring cases in a jurisdiction they perceive to be favourable for their case, rather than to the court best placed to hear the claim.

(14) The use of manifestly unfounded or abusive court proceedings against public participation is on the rise in the European Union. According to recent studies[5], such proceedings are increasingly used across Member States.

(15) The European Parliament, in its Resolution of 25 November 2020[6], condemned the use of SLAPPs to silence or intimidate investigative journalists and media outlets and create a climate of fear around their reporting of certain topics, calling on the Commission to present a proposal to prevent them. In its Resolution[7] of 11 November 2021 on Strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, Non-Governmental Organisations (NGOs) and civil society, the European Parliament highlighted again the prevalence of the phenomenon and the need for effective safeguards for its victims across the Union.

(16) The Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists[8] also reports an increasing number of alerts of serious threats to the safety of journalists and media freedom in Europe, including multiple cases of judicial intimidation. The 2021 annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned[9]. In its Recommendation on the protection of journalism and safety of journalists and other media actors[10] of 13 April 2016, the Council of Europe recommended its member states to 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.

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5 Academic network on European citizenship rights, Ad hoc request – SLAPP in the EU context, 29 May 2020: https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf, p.4 and Academic network on European citizenship rights, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study, 30 June 2021 https://ec.europa.eu/info/files/strategic-lawsuits-against-public-participation-slapp-european-union-comparative-study_en.

6 P9_TA(2020)0320. In this Resolution, the Parliament also reiterated the terms of its Resolution of 28 March 2019 (P8_TA(2019)0328).

7 P9_TA(2021)0451.

8 Since 2015, the Platform of the Council of Europe has facilitated the compilation and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member states. Contributing Partner organisations – invited international NGOs and associations of journalists – issue alerts on media freedom violations and publish annual reports on the situation of media freedom and safety of journalists in Europe. The Council of Europe member states are expected to act and address the issues and inform the Platform on the actions taken in response to the alerts. The low response rate of Council of Europe member states, which are also EU Member States, shows a need for further action. https://www.coe.int/en/web/media-freedom.

9 In 2021, 282 alerts were published on the Platform to promote the protection of journalism and safety of journalists (coe.int), amongst these, several concerned cases of judicial intimidation, i.e. opportunistic, arbitrary or vexatious use of legislation, including defamation, anti-terrorism, national security, hooliganism or anti-extremism laws. The 2021 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists noted an increase in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe member states concerned - 1680a2440e (coe.int).

10 Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1.

(17) The Commission's 2020[11] and 2021[12] Rule of Law Reports underline that in a number of Member States, journalists and others involved in protecting the public interest increasingly face threats and attacks in relation to their publications and their work, in various forms including the deployment of SLAPPs.

(18) A stark example of the use of court proceedings against public participation in the Union is that of the journalist Daphne Caruana Galizia who, at the time of her assassination, was facing over 40 civil and criminal libel and defamation court proceedings related to her investigate work.

(19) The European Democracy Action Plan[13] presented by the Commission on 3 December 2020 underlines the fundamental role of free and pluralistic media in democracies as well as the importance of civil society. It highlights among others the important role that independent and pluralistic media play in enabling citizens to make informed decisions, as well as in the fight against information manipulation and interference in the information space, including disinformation. In that context, the Commission already adopted Recommendation (EU) 2021/1534 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union[14]. That Recommendation aims to ensure safer working conditions for all media professionals, free from fear and intimidation, whether online or offline. In view of the increasing threat posed by manifestly unfounded or abusive court proceedings against public participation to media freedom and public participation, the Union should develop a coherent and effective approach to counter such proceedings. This Recommendation complements Recommendation (EU) 2021/1534 by providing specific recommendations on manifestly unfounded or abusive court proceedings against public participation. It goes beyond the protection of journalists and other media professionals and includes human rights defenders in its scope. This Recommendation should address the specific threat posed by manifestly unfounded or abusive court proceedings against public participation and by doing so, support the proper functioning of the checks and balances in a healthy democracy. It should provide guidance for Member States to take effective, appropriate and proportionate measures to address such proceedings and to ensure in this context in particular the protection of journalists and human rights defenders. The recommended measures should include raising awareness and developing expertise, in particular among legal professionals and the targets of manifestly unfounded or abusive court proceedings against public participation, to ensure that support is available for those targeted by such proceedings and to support enhanced monitoring.

(20) In order to provide for efficient protection against manifestly unfounded or abusive court proceedings against public participation and prevent the phenomenon from taking root in the Union, Member States should ensure that their respective legal

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11 COM/2020/580 final - Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and Committee of Regions 2020 Rule of law report – The rule of law situation in the European Union. - https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580.

12 COM/2021/700/final Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and Committee of Regions 2021 Rule of law report – The rule of law situation in the European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1634551652872&uri=CELEX%3A52021DC0700.

13 COM(2020) 790 final.

14 Commission Recommendation (EU) 2021/1534 of 16 September 2021 (OJ L 331, 20.9.2021, p. 8)C(2021) 6650 final.

frameworks governing civil, criminal, commercial and administrative proceedings, provide for the necessary safeguards to address such court proceedings, in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression. To provide consistent and efficient protection against manifestly unfounded court proceedings against public participation, Member States should aim to ensure that an early dismissal is available. They should also aim to provide other remedies against abusive court proceedings, namely the award of costs so that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who brought abusive court proceedings against public participation. The main objective of giving courts the possibility to impose penalties is to deter potential claimants from initiating abusive court proceedings against public participation. Such penalties should be proportionate to the elements of abuse identified. When establishing amounts for penalties, courts could take into account the potential for a harmful or chilling effect of the proceedings on public participation, including as related to the nature of the claim, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threat the defendant.

(21) Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive court proceedings against public participation for civil matters with cross-border implications. This would provide a consistent and efficient protection against such court proceedings and would contribute to prevent the phenomenon from growing roots in the Union.

(22) Member States should specifically review their legal frameworks applicable to defamation to ensure that existing concepts and definitions cannot be used by plaintiffs against journalists or human rights defenders in the context of manifestly unfounded or abusive court proceedings against public participation.

(23) In order to prevent a chilling effect on the public debate, Member States should ensure that penalties against defamation are not excessive and disproportionate. They should pay particular attention to the Council of Europe's guidelines and recommendations[15] addressing the legal framework for defamation, in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. The Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007)[16] has called on its member states, which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them

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15 See, *inter alia* PACE's Resolution 1577 Towards decriminalisation of defamation (2007) https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en, the Secretariat General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b.

16 https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en.

without delay. Member States are also encouraged to favour the use of administrative or civil law to deal with defamation cases, provided that such provisions have a less punitive effect than those of criminal law[17].

(24) Dealing with defamation cases from a criminal law angle should only be used as a last resort and responses through administrative or civil law should be favoured instead, in line with guidance from international organisations. The United Nations' Human Rights Committee[18] and the Organization for Security and Co-operation in Europe[19] have recommended the removal of defamation from criminal law statutes. Similarly, the Council of Europe has expressed reservations in this context[20].

(25) The right to the protection of personal data is further concretised in Regulation (EU) 2016/679 of the European Parliament and of the Council[21]. The right to the protection of personal data is not an absolute right. Article 85 of the GDPR provides that Member States shall by law reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

(26) Member States should encourage self-regulatory bodies and associations of legal professionals to align, where necessary, their deontological standards, including codes of conduct, with this Recommendation. Member States should also ensure, as relevant, that the deontological standards which seek to discourage or prohibit legal professionals from engaging in conduct which might constitute an abuse of process or an abuse of their other professional responsibilities towards the integrity of the legal process, and their corresponding disciplinary sanctions, cover manifestly unfounded or abusive court proceedings against public participation. This should be accompanied by appropriate awareness raising and training activities in order to increase knowledge and efficacy of existing deontological standards that are relevant to manifestly unfounded or abusive court proceedings against public participation.

(27) Legal professionals are key actors in manifestly unfounded or abusive court proceedings against public participation, either by representing litigants, prosecuting individuals or adjudicating disputes. Therefore, it is crucial that they have the necessary knowledge and skills to do so. Member States should support and offer training opportunities to these legal professionals. Training could substantively contribute to building their knowledge and capacity in how to detect manifestly unfounded or abusive court proceedings against public participation, including those

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17 See also United Nations' Human Rights Committee's General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf and the Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf

18 United Nations' Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

19 Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media, Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf.

20 Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, see paragraph 6.

21 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

with a third-country element, and react appropriately. Such training should address the judiciary and the judicial staff at all court levels including judges, prosecutors, court and prosecutors' office staff, as well as any other justice professionals associated with the judiciary or otherwise participating in the administration of justice, irrespective of the definition in national law, legal status or internal organisation, at the regional and local levels, where manifestly unfounded or abusive court proceedings against public participation may appear in the first instance. Such training should also address other legal professionals such as qualified lawyers. Developing local training capacity can contribute to the long-term sustainability of the training.

(28) Extending such training to journalists, press council members, media professionals and human rights defenders would help them to recognise when they are confronted with such court proceedings and provide them with critical legal skills to reduce their risks of being exposed to manifestly unfounded or abusive court proceedings against public participation or equip them with better knowledge to better address it. It could also enable them to engage in robust reporting on SLAPPs. Training for journalists should also refer to the ethical standards and guidelines set out by national press or media councils. To contribute to overall capacity building and strengthen the institutional response to manifestly unfounded or abusive court proceedings against public participation, such training could also involve data protection authorities, National Human Rights Institutions, ombudsman institutions and media state regulatory bodies.

(29) Providers of legal training and associations of legal professionals are very well positioned to impart training on manifestly unfounded or abusive court proceedings against public participation, as well as to determine the objectives of such training and to assess the most suitable training methodology. Training delivered by legal professionals to other legal professionals allows all to learn as a group, to better share experiences and to foster mutual trust. Exchanges of relevant practices at the European level should be encouraged, including with the support of the Commission, with the involvement of the European Judicial Training Network (EJTN). Involvement of legal practitioner's and their professional associations, from preparing needs analyses to the evaluation of results, is of paramount importance to ensuring the effectiveness and sustainability of training activities.

(30) Training should address freedom of expression and information and other fundamental rights, under the EU Charter of Fundamental rights of the European Union and the European Convention on Human rights and national law and include practical guidance on how to apply relevant case-law, restrictions to and articulation between fundamental rights, including freedom of expression, procedural safeguards as well as other relevant provisions under national law. Due account should be taken of Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR[22].

(31) Training should, among other things, address the protection of personal data which may be used to initiate manifestly unfounded or abusive court proceedings against public participation. It should also address information manipulation and interference, including disinformation.

(32) Training should consider the national legal framework and context. Combining these with the guidance developed by the Council of Europe, testimonials from targets of

[22] Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR (2017), https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.

manifestly unfounded or abusive court proceedings against public participation and best practices from other Member States in a structured and coherent manner could contribute to the successful learning objectives associated with training on manifestly unfounded or abusive court proceedings. Training may also be used to foster exchange of best practices between Member States.

(33) To reach a wider audience and to foster support, training on manifestly unfounded or abusive court proceedings against public participation should also make best use of new technologies, including online training. Access to e-resources, up-to-date material, and stand-alone learning tools on relevant legislation and guidance would complement the benefits of such training activities.

(34) In order to foster synergies with similar initiatives on the training of legal professionals, training modules on manifestly unfounded or abusive court proceedings on public participation could be included in training on related topics, such as freedom of expression and legal ethics. The use of existing materials and training practices such as those promoted on the European e-Justice Portal, the UNESCO Global Toolkit for Judicial Actors[23] and the Council of Europe's HELP (Human Rights Education for Legal Professionals)[24] online courses should be encouraged.

(35) Including manifestly unfounded or abusive court proceedings against public participation in the law and journalism curricula would help equip legal professionals and journalists with better knowledge to recognise such proceedings and equip them with specific knowledge to respond accordingly, and support the development of expertise and professional competencies among lecturers. Such knowledge could be provided by higher education institutions in complementary courses or seminars during the final years of a degree programme, for instance to law students of law and journalism.

(36) Member States should support awareness raising campaigns on manifestly unfounded or abusive court proceedings against public participation organised among others by national entities, including National Human Rights Institutions and civil society organisations.

(37) Communication activities on manifestly unfounded or abusive court proceedings against public participation could take the form of publications, messages, public meetings, conferences, workshops and webinars.

(38) The targets of manifestly unfounded or abusive court proceedings against public participation often have difficulties finding information on available support resources. To facilitate the identification of entities or bodies able to provide assistance on manifestly unfounded or abusive court proceedings and to ensure the effectiveness of support against such proceedings, information should be collected and made available at a single point, be free of charge and easily accessible. To that end, each Member State should establish one national focal point that gathers and shares information on available resources.

(39) An underlying goal of awareness raising activities on manifestly unfounded or abusive court proceedings against public participation should be to promote awareness of the

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[23] Global toolkit for judicial actors: international legal standards on freedom of expression, access to information and safety of journalists (2021) https://unesdoc.unesco.org/ark:/48223/pf0000378755.

[24] https://www.coe.int/en/web/help/home.

importance of a public space that enables democratic participation and allows citizens to have access to a plurality of views and reliable information, free from bias.

(40) Awareness raising campaigns should be coordinated with national focal points and other competent authorities to ensure their effectiveness. They should also seek synergies with awareness raising campaigns on compatible topics such as those focusing on fostering of open, free and fair debate and the protection of the right to freedom of expression and should be integrated with awareness raising activities that promote active civic participation, pluralism of views and access to reliable information. They should also seek synergies, as relevant, with resilience building on media, information literacy, journalistic standards and fact-checking in the context of measures addressing disinformation, information manipulation, and interference including from abroad. The target audience could include *inter alia* specific groups, such as media professionals, legal professionals and members of civil society organisations, communication professionals, academics, think tanks, politicians, civil servants, public authorities and private corporations.

(41) Member States should aim to ensure, by any means they consider appropriate, the availability of information on the procedural safeguards and other safeguards under their national legal frameworks, including information on the entities or bodies which can be contacted to provide assistance against manifestly unfounded or abusive court proceedings against public participation.

(42) Such support resources may include law firms that defend *pro bono* the targets of manifestly unfounded or abusive court proceedings against public participation, the legal clinics of universities which provide such support, organisations that register and report on SLAPPs, and organisations that provide financial and other assistance to the targets of manifestly unfounded or abusive court proceedings.

(43) The targets of manifestly unfounded or abusive court proceedings against public participation need to be adequately equipped to face such proceedings. It is therefore necessary to develop capacities in Member States in order to provide support to those targeted by such proceedings. Member States should offer funding and promote funding available at Union level to organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings.

(44) A more systematic monitoring of manifestly unfounded or abusive court proceedings against public participation is necessary to better tackle the phenomenon. Data collected should include sufficient information for authorities and other relevant stakeholders to quantify and better understand it including in view of providing the necessary support to targets. Member States should entrust, taking into account their institutional arrangements on judicial statistics[25], one or more authorities with collecting and aggregating data on manifestly unfounded or abusive court proceedings against public participation initiated in national courts. These authorities may collect the data from several stakeholders. To ease the collection of data, the authorities entrusted to collect data may establish contact points so that judicial authorities, professional organisations, non-governmental organisations, human rights defenders, journalists and other stakeholders can share data on manifestly unfounded or abusive court proceedings. Member States should entrust one of these authorities with

[25] See the Guidelines on judicial statistics of the European Commission for the efficiency of justice (CEPEJ) at its 12th plenary meeting (Strasbourg, 10 – 11 December 2008) - CEPEJ-GT-EVAL (coe.int).

coordinating the information and reporting the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023. Member States should ensure the accountability of the data collected. For this purpose, they should ensure that the data collection process follows professional standards and that the authorities entrusted with data collection and statistics enjoy sufficient autonomy. Data protection requirements should be complied with.

(45) When entrusting authorities with data collection and reporting, Member States could consider establishing synergies with relevant instruments in the area of the rule of law and the protection of fundamental rights. National Human Rights Institutions, where established, may play an important role as well as other entities such as ombudspersons' offices, equality bodies, or competent authorities such as those designated under the Directive (EU) 2019/1937 of the European Parliament and of the Council[26] may also be relevant. National focal points providing an overview of support resources and the entities or authorities entrusted to collect and report data could be situated in the same organisation, taking into account the requirements and criteria described in this Recommendation.

(46) The authorities entrusted to collect data should publish information on manifestly unfounded or abusive court proceedings against public participation, in accessible formats on their websites, and, as relevant via other appropriate tools. When doing so, they should ensure that fundamental rights including the right to privacy and to the protection of personal data of those individuals involved in manifestly unfounded or abusive court proceedings against public participation are fully respected.

(47) To delineate the duration of proceedings concerning manifestly unfounded or abusive court proceedings, precise information on the events, acts or actions that started and closed such proceedings and the dates on which they occurred should be collected whenever possible. The collected data should also include, as relevant, information about the background of a case, for example, where there have been repetitive preceding court proceedings against the same defendant or by the same plaintiff.

(48) As necessary, the EU expert group against SLAPP established by the Commission[27] could support the development across Member States of comparable criteria that can be easily applied by the authorities entrusted to collect and report data on manifestly unfounded or abusive court proceedings against public participation.

(49) The EU expert group against SLAPP supports the exchange and dissemination of practice and knowledge among practitioners on SLAPP related issues. It could provide among others technical assistance to authorities in setting up focal points, developing training material and organising legal assistance.

(50) The Citizens, Equality, Rights and Values (CERV) Programme, established by Regulation (EU) 2021/692 of the European Parliament and of the Council[28], aims to protect and promote the rights and values enshrined in the Treaties and the Charter. In order to sustain and further develop democratic societies based on the rule of law, the

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[26] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

[27] Register of Commission expert groups and other similar entities (europa.eu)

[28] Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 (OJ L 156, 5.5.2021, p. 1).

CERV programme provides *inter alia* for the possibility to fund activities linked to capacity building and awareness on the Charter including on freedom of expression. The Justice Programme, established by Regulation (EU) 2021/692[29] provides *inter alia* for the possibility to fund activities linked to judicial training, with a view to fostering a common legal and judicial culture based on the rule of law, and to support and promote the consistent and effective implementation of Union legal instruments that are relevant in the context of the Programme.

HAS ADOPTED THIS RECOMMENDATION:

SUBJECT MATTER

1. This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to address manifestly unfounded or abusive court proceedings against public participation and protect in particular journalists and human rights defenders against such proceedings, in full respect of democratic values and fundamental rights.

APPLICABLE FRAMEWORKS

2. As a general rule, Member States should ensure that their applicable legal frameworks provide for the necessary safeguards to address manifestly unfounded or abusive court proceedings against public participation in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression.

3. Member States should aim to ensure that procedural safeguards to grant an early dismissal of manifestly unfounded court proceedings against public participation are available. They should also aim to provide other remedies against abusive court proceedings against public participation, namely the award of costs meaning that a claimant who has initiated abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who initiated abusive court proceedings against public participation.

4. Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive cases against public participation for civil matters with cross-border implications.

5. Member States should ensure that their rules applicable to defamation do not have an unjustified impact on the freedom of expression, on the existence of an open, free and plural media environment, and on public participation.

6. Member States should ensure that their rules applicable to defamation are sufficiently clear, including their concepts, to reduce the risk that they are misused or abused.

[29] Regulation (EU) 2021/692 of the European Parliament and of the Council, aims to contribute to develop a European area of justice and to strengthen democracy, the rule of law and the protection of fundamental rights.

7. Member States should also ensure that penalties against defamation are not excessive and disproportionate. Member States should take utmost account of the Council of Europe's guidelines and recommendations[30] addressing the legal framework for defamation, and in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. Member States are encouraged to favour the use of administrative or civil law to deal with defamation cases[31], provided that such provisions have a less punitive effect than those of criminal law.

8. Member States should strive for an adequate articulation in their legislation between the right to the protection of personal data and the right to freedom of expression and information to reconcile those two rights, as required by Article 85(2) of the Regulation (EU) 2016/679.

9. Member States should take appropriate measures to ensure that the deontological rules that govern the conduct of legal professionals and the disciplinary sanctions for violation of those rules consider and include appropriate measures to discourage manifestly unfounded or abusive court proceedings against public participation. Member States should encourage self-regulatory bodies and associations of legal professionals to align their deontological standards, including their codes of conduct, with this recommendation. Appropriate awareness raising and training is also recommended.

TRAINING

10. Member States should support training opportunities on manifestly unfounded or abusive court proceedings against public participation for legal professionals such as judiciary and judicial staff at all court levels, qualified lawyers as well as for potential targets of such court proceedings. The focus of trainings should lie on building expertise to detect such proceedings and react appropriately.

11. Member States should encourage associations of legal professionals and legal training providers to offer training on how to deal with manifestly unfounded or abusive court proceedings against public participation. The Commission will encourage European level training providers like the European Judicial Training Network to provide such training. Legal practitioners and their professional

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30 See, *inter alia* PACE's Resolution 1577 Towards decriminalisation of defamation (2007) https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en, the Secretariat General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b.

31 Beyond the Council of Europe (see previous footnote), there is a growing international demand to decriminalise defamation. See United Nations' Human Rights Committee's General comment No. 34 Article 19: Freedoms of opinion and expression of 12 September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf and the Organization for Security and Co-operation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf

associations should be involved in the development, organisation, conduct and evaluation of the training.

12. Training should cover the relevant aspects of the EU Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. It should include practical guidance on how to apply Union law, national case law, the case law of the Court of Justice of the European Union and the case law of the European Court of Human Right, on ascertaining that restrictions to the exercise of the freedom of expression meet the requirements provided for, respectively, by Article 52 of the Charter and by Article 10(2) of the European Convention on Human Rights as well as on the articulation of freedom of expression and information, and with other fundamental rights.

13. Training should also cover the procedural safeguards against manifestly unfounded or abusive court proceedings against public participation, where available, as well as jurisdiction and relevant applicable law in fundamental rights, criminal, administrative, civil and commercial matters.

14. Training activities should also address the obligation for Member States, under Regulation (EU) 2016/679, to reconcile, by law, the protection of personal data with the right to freedom of expression and information. They should cover rules adopted by Member States to this end and the specific exemptions or derogations to Regulation (EU) 2016/679 applicable to data processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression[32]. Due account should be taken of the elements mentioned in the Annex to this Recommendation.

15. Member States should consider embedding such training in training on freedom of expression and legal ethics.

16. Training for journalists, other media professionals and human rights defenders should strengthen their capacity to deal with manifestly unfounded or abusive court proceedings against public participation. It should focus on recognising manifestly unfounded or abusive court proceedings against public participation, how to manage being targeted by such court proceedings and inform them of their rights and obligations in order for them to be able to take the necessary steps to protect themselves against such proceedings. Training for journalists should also include the ethical standards and guidelines set out by national press or media councils.

17. Member States could encourage higher education institutions to include knowledge on how to identify manifestly unfounded or abusive court proceedings against public participation in their curricula, especially for law and journalism degrees.

18. Training could include testimonials from the targets of manifestly unfounded or abusive court proceedings against public participation. Training could also, making best use of the knowledge developed within the framework of the EU expert group against SLAPP, foster the exchange of experience among Member States.

AWARENESS RAISING

19. Member States are encouraged to support initiatives, including those of National Human Rights Institutions and civil society organisations, aimed at raising awareness and organising information campaigns on manifestly unfounded or abusive court

[32] For more information on the transposition of Article 85 GDPR into national law, see the SWD, p. 26.

proceedings against public participation. Particular emphasis should be placed on addressing potential targets of such proceedings.

20. Awareness raising activities should aim to explain the issue of manifestly unfounded or abusive court proceedings against public participation in a simple and accessible way so that such proceedings are easily recognised.

21. Awareness raising activities should provide information on existing support structures, including reference to national focal points that gather and share information on available resources. Awareness raising efforts should also provide a clear overview of legal lines of defence available under national frameworks in case of manifestly unfounded or abusive court proceeding against public participation and how they could be used effectively.

22. Awareness raising campaigns combating negative attitudes, stereotypes and prejudices could also address manifestly unfounded or abusive court proceedings against public participation.

23. Promoting better understanding of the nature and extent of the impact of manifestly unfounded or abusive court proceedings against public participation should be included in awareness raising activities on the right to freedom of expression addressed to specific groups, such as media professionals, legal professionals, members of civil society organisations, academics, think thanks, communication professionals, civil servants, politicians, public authorities and private corporations.

SUPPORT MECHANISMS

24. Member States should ensure that targets of manifestly unfounded or abusive court proceedings against public participation have access to individual and independent support. To that end, Member States should identify and buttress organisations that provide guidance and support for such targets. Such organisations may include associations of legal professionals, media and press councils, umbrella associations for human rights defenders, associations at Union and national level, law firms defending targets of manifestly unfounded or abusive court proceedings against public participation *pro bono*, legal clinics of universities and other non-governmental organisations.

25. Each Member State should establish a focal point that gathers and shares information on all organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.

26. Member States are encouraged to make use of national and Union funding to provide financial support and promote funding available at Union level towards organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation in particular to make sure that they have sufficient resources to react quickly against such proceedings.

27. Member States should ensure that legal assistance is available to defendants of manifestly unfounded or abusive court proceedings against public participation in an affordable and easily accessible manner.

28. Member States should facilitate the exchange of information and best practices between organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.

DATA COLLECTION, REPORTING AND MONITORING

29. Member States should, taking into account their institutional arrangements on judicial statistics, entrust one or more authorities to be responsible to collect and aggregate, in full respect of data protection requirements, data on manifestly unfounded or abusive court proceedings against public participation initiated in their jurisdiction. Member States should ensure that one authority is responsible to coordinate the information and report the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023, in full respect of data protection requirements. The Commission will publish a yearly summary of the received contributions.

30. Where necessary, the EU expert group against SLAPP could support the development and best use of standards and templates on data collection.

31. Data referred to in point 29 should include:

(a) the number of manifestly unfounded or abusive court proceedings against public participation cases, initiated in the relevant year;

(b) the number of manifestly unfounded or abusive court proceedings against public participation cases dismissed early in the relevant year starting from 2022, both dismissed on merits and for procedural reasons;

(c) the number of court proceedings, classified by type of defendant (e.g. journalist, human rights defender, press outlet);

(d) the number of court proceedings, classified by type of plaintiff (e.g. politician, private person, company, whether the plaintiff is a foreign entity);

(e) figures about acts of public participation on the account of which court proceedings were launched;

(f) figures on the estimated amount of initial damages requested by plaintiffs;

(g) description of the different legal bases employed by plaintiffs and related figures;

(h) figures on the length of the proceedings, including all instances;

(i) figures on cross-border elements; and

(j) as available, other data including on judicial costs of proceedings and, as relevant and appropriate, relevant figures on historical backgrounds of cases.

32. The authority ensuring coordination, referred to in point 29, should publish the data, in accessible formats on its website, and as relevant via other appropriate tools, while taking the necessary arrangements to ensure the protection of the rights of those involved in manifestly unfounded or abusive court proceedings against public participation.

FINAL PROVISIONS

33. Member States should make full use of the funding support available at Union level to implement the specific provisions of this Recommendation, and promote the funding opportunities available for public and private entities, including civil society organisations, in particular under the CERV Programme and the Justice Programme.

34. Member States should transmit by the end of 2023 and subsequently on request, in compliance with data protection rules, a report to the Commission on the implementation of this Recommendation containing aggregated data consolidated at Member States' level. The Commission will hold, as necessary, discussions with Member States and stakeholders, in relevant forums, on the measures and actions taken to apply the Recommendation.

35. No later than 5 years after the date of adoption, the Commission will assess the impact of this Recommendation on the evolution of manifestly unfounded or abusive court proceedings against public participation in the European Union. On this basis, the Commission will determine whether additional steps are required to ensure the adequate protection of targets of such proceedings, taking into account the findings of the Commission's Rule of Law Reports and other relevant information, including external data.

Done at Brussels, 27.4.2022

For the Commission
Didier REYNDERS
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
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