

# COUNTERING THE USE OF SLAPPS – MODULE 7

## MODULE 7 Procedural safeguards

*(Training material to be shared with trainers only)*

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# COUNTERING THE USE OF SLAPPs – MODULE 7

## PRESENTATION OUTLINE

Reminder: the two main international instruments

Procedural safeguards under the CoE Recommendation and the EU  
Directive

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## REMINDER: THE TWO MAIN INTERNATIONAL INSTRUMENTS

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# MAIN INTERNATIONAL LEGAL INSTRUMENTS

As discussed in Module 4:

- ▶ Council of Europe Recommendation  
CM/Rec(2024)2 – applies to administrative,  
civil and criminal matters
- ▶ European Union Directive 2024/1069  
– applies only to civil matters with cross-border  
implications

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**PROCEDURAL SAFEGUARDS  
UNDER THE COE  
RECOMMENDATION  
AND THE EU DIRECTIVE**

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# RECOMMENDATION CM/REC(2024)2

Part B of Chapter II of the Recommendation covers procedural safeguards:

- ▶ Effective case management (paragraph 24)
- ▶ Early dismissal of claims against public participation (paragraphs 25-34)
- ▶ Stay of proceedings (paragraphs 35, 36)
- ▶ Security for procedural costs and damages (paragraph 37)
- ▶ Safeguards in case of death or loss of legal capacity of the defendant (paragraph 39)

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# EU DIRECTIVE 2024/1069

The EU Directive requires two procedural safeguards:

- ▶ Security for costs (Article 10)
- ▶ Early dismissal of manifestly unfounded claims (Articles 11-13)

The Directive specifies that applications for procedural safeguards must be treated in an accelerated manner, which in itself provides an additional safeguard.

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# EFFECTIVE CASE MANAGEMENT/ SPEEDY RESOLUTION

Paragraph 24 of the **Recommendation**:

“To achieve effective case management, the judicial and other competent authorities should ensure that parties present their claims, defences, factual allegations and offers of evidence as early and completely as possible and as appropriate to the careful conduct of litigation in order to secure procedural expediency.”

Paragraph 34: “application for early dismissal or any appeal therefrom is treated in an accelerated procedure”

Article 7 of the **Directive**:

“Member States shall ensure that applications [for security or early dismissal] are treated in an accelerated manner in accordance with national law, taking into account the circumstances of the case, the right to an effective remedy and the right to a fair trial.”

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# SECURITY FOR COSTS

Article 10 of the **EU Directive** requires that States ensure that a “court or tribunal... may require, without prejudice to the right of access to justice, that the claimant provide security for the estimated costs of the proceedings, which may include the costs of legal representation incurred by the defendant, and, if provided for in national law, damages”.

Note the somewhat ambiguous language “may” (twice); “without prejudice to the right of access to justice”; “if provided for in national law”.

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# SECURITY FOR COSTS (CONTINUED)

Paragraph 37 of the **Recommendation** provides that States should:

“ensure that in court proceedings against public participation, judicial and other competent authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of SLAPP indicators”

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# EARLY DISMISSAL

Early dismissal of cases is a key safeguard and at the heart of the regimes of both the Directive and the Recommendation. The Directive provides (Article 11):

“Member States shall ensure that courts and tribunals may dismiss, after appropriate examination, claims against public participation as manifestly unfounded, at the earliest possible stage in the proceedings, in accordance with national law.”

It should be noted that there is no early dismissal required of abusive claims (the Directive imposes sanctions for such claims, but no early dismissal). Member states

\*may\* however provide for early dismissal of abusive claims under national law; the Directive provides only a minimum level of protection.

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# EARLY DISMISSAL (CONTINUED)

Article 12 of the Directive provides that the claimant must prove that a claim is well-founded:

- “1. The burden of proving that the claim is well founded rests on the claimant who brings the action.
2. Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to substantiate the claim in order to enable the court to assess whether it is not manifestly unfounded.”

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# EARLY DISMISSAL (CONTINUED)

Paragraphs 25-34 of the **Recommendation** concern early dismissal. Paragraph 25:

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

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

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

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# EARLY DISMISSAL (CONTINUED)

National authorities are left discretion how to implement this:

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

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

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# EARLY DISMISSAL (CONTINUED)

Paragraphs 28-34 state:

- ▶ time limits time for the exercise of the right to file an application for early dismissal should be proportionate
- ▶ both parties should be heard
- ▶ administrative bodies should have a similar power to dismiss SLAPP actions early
- ▶ it should be for the claimant to provide evidence against dismissal
- ▶ the claimant should have the possibility to establish the application is not a SLAPP
- ▶ appeals to early dismissal decisions should be available
- ▶ applications should be heard in an accelerated procedure

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# STAY OF PROCEEDINGS PENDING EARLY DISMISSAL APPLICATION

Paragraphs 35-36 of the Recommendation provide that pending an application for dismissal, proceedings should be stayed:

“35. When national law permits, member States should ensure that, if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken. Furthermore, the rules on stay of proceedings should not allow the claimant to amend the pleadings in the proceeding with the aim of avoiding a dismissal order. Any amendment of pleadings should be subject to the approval of the judicial or other competent authority. Amendment of pleadings should not be allowed once the application for early dismissal is filed by the defendant.

36. The refusal of a request for early dismissal of the proceedings should not have the effect of preventing the defendant from arguing again, before the judge deciding on the merits, that the proceedings against them constitute a SLAPP.”

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# STAY OF PROCEEDINGS PENDING EARLY DISMISSAL APPLICATION

There is no equivalent requirement in the Directive, although states may go beyond its minimum requirements and provide for a stay of proceedings in national law.

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# SAFEGUARDS FOR FAMILY MEMBERS

Paragraph 38 of the **Recommendation** provides:

“Member States should ensure that where, upon the death or loss of legal capacity of the defendant, in a pending case against public participation, family members and associates of the original defendant who continue the court proceedings have access to the same remedies and support as the original defendant.

Member States are encouraged to provide further protection, as necessary, as these new defendants may be less equipped to deal with the original claim.”

The **Directive** has no equivalent requirement although states may decide to introduce this under national law, going over and beyond the minimum level of protection that the Directive requires.

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