

# COUNTERING THE USE OF SLAPPS

Division for Cooperation on Freedom of Expression

## MODULE 7 Procedural safeguards

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

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# COUNTERING THE USE OF SLAPPS

## Module objective

The objective of this module is to ensure that course participants have a thorough understanding of the anti-SLAPP procedural safeguards required under European standards, including as regards codes of ethics for lawyers, and that they have explored ways of implementing these safeguards under national laws and regulations.

## Session techniques and methods

- ▶ Brainstorming exercise
- ▶ Presentation and Q&A
- ▶ Large group discussion
- ▶ Small group discussion

## Duration

- ▶ 1.5 – 2 hours

## PROCEDURAL SAFEGUARDS

### → Brainstorming Exercise

Allocated time: 30 minutes

#### Guidance for trainers

A group brainstorm, facilitated by the trainer, discussing what kind of procedural safeguards participants think are required to prevent and minimise the harmful effects of SLAPPS

The trainer should ask participants to adopt a 'blue sky' thinking mentality, and look at potential solutions. They should not solely look at current national practice and be constrained by current rules and practices which may prevent solutions; rather they should be solution-oriented in their thinking and come up with ways of preventing and minimising the harmful effects of SLAPPS.

Participants are encouraged to share their ideas, which can be written on a flip chart, on post-it notes on the wall, or on an interactive whiteboard. At this stage there should be no discussion or critiquing of contributions or other discussion; the trainer's role is limited to listing ideas and preventing premature debate. If necessary, the trainer could gently guide the discussion by asking questions such as:

- ▶ should courts look at how they can improve the management of cases?
- ▶ are there ways that a case might be dismissed at an early stage?
- ▶ should the regulatory body for lawyers (a national lawyers' society, or lawyers' council) draw up rules to prevent the use of excessively aggressive tactics?
- ▶ can claimants be asked to lodge a security in advance of bringing a claim, tied to the size of the damages they request?
- ▶ can SLAPP cases be dismissed at an earlier stage?

It is true that these are all guiding questions, which generally should be avoided. However, asking one or two such 'guiding' questions may be helpful in getting a group brainstorm started. The trainer should be careful not to provide all the answers.

Once all responses are noted, the trainer facilitates feedback. This will include discussion, analysis, and categorisation of the ideas that have been contributed. The trainer can wrap up the session by thanking participants for their contributions. If possible, the paper on which contributions have been noted should be left on the wall as a reminder of the various identifying characteristics that the group has come up with.

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## EUROPEAN STANDARDS ON PROCEDURAL SAFEGUARDS

### → Presentation

Allocated time: 25 minutes plus Q&A

Following the brainstorming session, the trainer presents a PowerPoint presentation covering in detail the procedural safeguards set out in the two main European legal instruments:

- ▶ Council of Europe Recommendation [CM/Rec\(2024\)2 on countering the use of strategic lawsuits against public participation \(SLAPPs\)](#)
- ▶ European Union [Directive \(EU\) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings \('Strategic lawsuits against public participation'\)](#)

This presentation, and the Q&A that follows it, is a core element of the training and may not be skipped. The time indicated for discussion is a suggested minimum; more time may be taken. The trainer may also start a discussion on the extent to which current domestic law and practice is in line with, or diverges from, the requirements set out in the Directive and Recommendation.

After the presentation, the PowerPoint slides are handed out. The hand-out lists the safeguards as set out in both the Recommendation and in the EU Directive and is a key resource for training participants.

The trainer should prepare two or three large sheets of flip-chart paper listing the defining characteristics of a SLAPP under the Council of Europe Recommendation and the EU Directive and hang these on the wall in the training room. They will form important reference points throughout the rest of the training.

### Safeguards under Recommendation CM/Rec(2024)2 and EU Directive 2024/1069

The EU Directive requires two procedural safeguards:

1. Security for costs (Article 10)
2. 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.

The Recommendation provides more detail and specifies five sets of procedural safeguards:

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

## COUNTERING THE USE OF SLAPPS

In summary, as outlined in Module 4:

	<b>Council of Europe Recommendation (CM/Rec(2024)2)</b>	<b>EU Directive (2024/1069)</b>
<b>EARLY DISMISSAL</b>	<p>a. courts, on their own initiative, to dismiss a claim as a SLAPP early in the proceedings; and,</p> <p>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.</p>	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.
<b>STAY OF PROCEEDINGS</b>	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.	Not covered
<b>SECURITY FOR PROCEDURAL COSTS</b>	Member States should introduce rules, in line with national law and practice, to ensure that in court proceedings against public participation, judicial and other competent authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of the presence of SLAPP indicators, as set out in paragraph 8 (above).	Member States shall ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation, the court or tribunal seized 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.
<b>RESTITUTION OF LEGAL COSTS</b>	Member States are encouraged to make appropriate provisions in their national legal systems to enable courts, upon determination that a legal claim constitutes a SLAPP, to order the claimants to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant.	Member States shall ensure that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all types of costs of the proceedings that can be awarded under national law, including the full costs of legal representation incurred by the defendant unless such costs are excessive. Where national law does not guarantee the award in full of the costs of legal representation beyond what is set out in statutory fee tables, Member States shall ensure that such costs are fully covered, unless they are excessive, by other means available under national law.
<b>DEATH OR LOSS OF LEGAL CAPACITY OF THE DEFENDANT</b>	Member States should ensure that, 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.	Not covered

## COUNTERING THE USE OF SLAPPS

### *Effective case management*

Effective case management is an important safeguard. The Recommendation states in paragraph 24 that “[t]o 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.” This builds on Rule 49 of the [ELI-UNIDROIT Model European Rules of Civil Procedure](#), which have been developed by academics in comparative procedural law and are a model for all European countries. The underlying idea is that judges should be involved at the earliest stage of proceedings, and where necessary accelerate procedures. The Consultative Council for European Judges has similarly noted that “member States should provide for an accelerated or urgent enforcement procedure where delay might cause an irreversible wrong” ([Opinion No.13 on the role of judges in the enforcement of judicial decisions](#) (CCJE(2010)2-Final), par. 17).

### *Expedient processing of SLAPP applications*

Any application that a case is dismissed as a SLAPP should be dealt with in an expedient manner. The Recommendation states that “[a]pplication for early dismissal or any appeal therefrom is treated in an accelerated procedure” (Paragraph 34); the Directive requires that Member States “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” (Article 7).

### *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.”

The Recommendation provides that states should “[e]nsure 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” (paragraph 37).

### *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: “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” (Article 11). It should be noted that there is no early dismissal required of abusive claims; Articles 14 and 15 of the Directive require cost awards and 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.

Article 12 of the Directive provides that the claimant must prove that a claim is well-founded: “[t]he burden of proving that the claim is well-founded rests on the claimant who brings the action. 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.”

The Recommendation covers early dismissal in paragraphs 25-34. Paragraph 25 states:

“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.

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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.”

National authorities are left discretion on how to implement this. Paragraph 27 suggests two criteria:

1. Whether the claim is unlikely to succeed at trial; and
2. Whether the proceeding amounts to abuse of process in light of the SLAPP indicators.

Paragraphs 28-34 state that time limits for the exercise of the right to file an application for early dismissal should be proportionate; both parties should be heard; 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; applications should be heard in an accelerated procedure. Appeals should be available; and administrative bodies should have a similar power to dismiss SLAPP actions early. Pending an application for dismissal, proceedings should be stayed:

### ***Safeguards for family members***

Paragraph 38 of the Recommendation states that “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.

# COUNTERING THE USE OF SLAPPS

## DISCUSSION ON PROCEDURAL SAFEGUARDS

### → Small group discussion

Allocated time: 45 minutes

#### Guidance for trainers

The participants divide into small groups, ideally of no more than four people. Each of the groups discusses the following topics:

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. How can the judicial and other competent authorities better manage proceedings in order to enable effective termination of the case and to avoid any delaying tactics?

Courts should be able, on their own motion or upon a motion by the defendant, to dismiss SLAPP cases at an early stage in the proceedings. What is needed in order to make this requirement a reality?

How best can the EU Directive requirements regarding early dismissal be implemented in your country, considering they provide only the minimum level of protection and countries can go beyond this (particularly in relation to abuse applications)?

Courts should 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. If this practice already exists in the country, how can it be improved? If the practice does not already exist, how can it be introduced?

Each group is asked to discuss the characteristics they have been assigned and think of examples, either hypothetical or from their actual work, of cases that have these characteristics. For each such example, the groups should discuss whether cases with such characteristics are currently considered as SLAPPS in the legal system of the country, and if not, what needs to be changed for this to be the case.

After 20 minutes, the small groups report back to the larger group to report their findings; there may be follow-up discussion in the larger group.

# EXERCICES – MODULE 7

## Procedural Safeguards

*(Training material to be shared with participants)*

### 1. PROCEDURAL SAFEGUARDS

Task for the group: discuss what kind of procedural safeguards participants think are required to prevent and minimise the harmful effects of SLAPPs. The group is asked to adopt a 'blue sky' thinking mentality and look at potential solutions. Do not be constrained by current rules and practices which may prevent solutions; instead, be solution-oriented and come up with ways of preventing and minimising the harmful effects of SLAPPs.

Questions to guide the discussion:

- ▶ should courts look at how they can improve the management of cases?
- ▶ are there ways that a case might be dismissed at an early stage?
- ▶ should the regulatory body for lawyers (a national lawyers' society, or lawyers' council) draw up rules to prevent the use of excessively aggressive tactics?
- ▶ can claimants be asked to lodge a security in advance of bringing a claim, tied to the size of the damages they request?
- ▶ can SLAPP cases be dismissed at an earlier stage?

### 3. DISCUSSION ON PROCEDURAL SAFEGUARDS

Task for the groups: discuss the following topics and report back to the group as a whole. Under each topic, think of examples, either hypothetical or from actual work, of cases that have these characteristics. For each such example, discuss whether cases with such characteristics are currently considered as SLAPPs in the legal system of the country, and if not, what needs to be changed for this to be the case.

- a. 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. How can the judicial and other competent authorities better manage proceedings in order to enable effective termination of the case and to avoid any delaying tactics?
- b. Courts should be able, on their own motion or upon a motion by the defendant, to dismiss SLAPP cases at an early stage in the proceedings. What is needed in order to make this requirement a reality?
- c. How best can the EU Directive requirements regarding early dismissal be implemented in your country, considering they provide only the minimum level of protection and countries can go beyond this (particularly in relation to abuse applications)?
- d. Courts should 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. If this practice already exists in the country, how can it be improved? If the practice does not already exist, how can it be introduced?

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## 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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