



CASE Analysis of EU Anti-SLAPP Directive's Early Dismissal Mechanism

Chapter III

Early dismissal of manifestly unfounded *claims*

Article 11

Early dismissal

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.*

What did CASE about the Early Dismissal Mechanism (EDM) in the draft Directive?

You can read our full briefing on the proposed early dismissal mechanism (EDM) [here](#). In short, we noted the following shortcomings in the draft EDM contained in the European Council's general approach:

- The draft established a dichotomy between “manifestly unfounded” court proceedings and “abusive” court proceedings, with the EDM applying only to the former - meaning that even cases recognised as being abusive would not necessarily be subject to early dismissal.
- By including a definition of “manifestly unfounded” in Paragraph 13(a) of the recital, the Council's proposal narrowed the application of the EDM to only the most extreme cases.

What is in the final compromise text of the Anti-SLAPP Directive?

The key components of the directive in relation to the EDM are as follows:

- An obligation under Article 11 to ensure courts and tribunals can dismiss claims as “manifestly unfounded” (see below) at the earliest possible stage in proceedings, with the burden of proving that the claim is well founded resting (under Article 12) on the claimant
- An obligation under Article 7 to ensure that any such application to dismiss is treated in an accelerated manner
- While remedies against abusive court proceedings are provided for in Chapter IV of the directive, the EDM continues to apply only to manifestly unfounded proceedings (regardless of whether they are otherwise identified as being abusive).



What is CASE's position on the final EDM?

Crucially, the final text of the EDM has removed the restrictive definition that had previously been included in Paragraph 13(a) of the recital. Given the ambiguity inherent in the words “manifestly unfounded”, such a definition would have otherwise narrowed the application of the EDM to the point of unworkability.

Along with the inclusion of the word “may” in the first line of Article 11, this increases the discretion that is left to member states. This has both positive and negative implications. On the one hand, it gives space to member states to develop a robust early dismissal mechanism that *does* conform to the high standards CASE has previously articulated (see below). On the other hand, it means that the EDM introduced on a national level may theoretically allow a case to proceed to trial *even if* that case is found to be manifestly unfounded. This would be problematic since it would create uncertainty in the application of the EDM, which may make SLAPP defendants less willing to fight an abusive lawsuit (given the risk that it will be allowed to proceed to trial).

One further shortcoming that could undermine the operation of national EDMs is the removal of the stay of proceedings (previously found in Article 10 of the draft directive). Where procedural rules currently allow for onerous pretrial motions and procedures - in particular, the often resource and cost-intensive disclosure procedure - an EDM will serve little purpose if proceedings are not suspended pending resolution of the anti-SLAPP motion. This is because such procedures can be used to drive up costs or otherwise give effect to the SLAPP (e.g. by harassing and intimidating the defendant) while the motion to dismiss is being considered. Where such costly procedures exist, it will therefore be crucial that a stay of proceedings is imposed on a national level.

All of which means, in short, that a lot will come down to transposition. The directive's EDM provides a promising *framework* for member states to adopt to filter out SLAPPs. Whether or not it will actually work to achieve its purpose will depend on how the details of the model are fleshed out. How will courts define “manifestly unfounded”? How much discretion will they allow courts to decide whether to dismiss “manifestly unfounded” cases? Will they ensure, where needed, that proceedings are stayed pending resolution of the anti-SLAPP motion? How effective the EDM will be will depend on how these questions are answered.

However these questions are answered, provisions under Article 7 (ensuring EDM applications are treated in an accelerated manner) and Article 12 (ensuring that the burden of proof falls on the claimant) will prove crucial to ensuring that the EDM minimises the harm any “manifestly unfounded” lawsuit causes to the defendant. Together these provisions will reduce the opportunity for the SLAPP litigant to stretch out proceedings and drive up costs - and ensure that claims against public participation are required to meet a higher threshold before proceeding to trial.

As Article 3 (as well as Articles 21 and 55 of the Recital) makes clear, the provisions in the directive represent *minimum requirements* for effective anti-SLAPP action. The provisions



governing early dismissal should emphatically not therefore be regarded as being sufficient in themselves to filter out SLAPPs.

What does CASE recommend for the transposition of the Directive to national legislation? Given the above, CASE recommends the following in order to ensure that EDMs introduced on a national level are sufficiently robust to filter out SLAPPs:

1. “Manifestly unfounded” should be defined broadly to mean that the claimant has failed to establish a prima facie case as to each essential element of the cause of action.
2. Dismissal should be treated as automatic upon a case being found to be “manifestly unfounded”.
3. Proceedings should be automatically suspended pending resolution, thereby ensuring that the litigation process cannot be weaponised while the motion is being decided
4. The early dismissal mechanism should be extended to cases where the proceedings are found to be abusive, as per Article 4(3).
5. Member States should include provisions in their procedural code to guarantee that early dismissal claims are treated in an accelerated manner.