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NOTE

From: Presidency
To: Delegations

Subject: Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)
- Presidency draft compromise on articles in Chapters I and II and the corresponding recitals

Delegations will find in Annex the a first draft of the Presidency compromise proposal on articles in Chapters I and II and the corresponding recitals. This proposal will be presented and discussed at the Civil Law Matters (SLAPP) WP meeting on 10 October 2022.

All changes compared to the Commission proposal are indicated in **bold and underline** or ~~strikethrough~~.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2)(f) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(-1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is ensured. To establish such an area, the Union is to adopt, among others, measures relating to judicial cooperation in civil matters needed for the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States, as provided by article 81(2)(f) of the TFUE.

- (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. Article 11 of the Charter should be given the meaning and scope of the correspondent Article 10 of the European Convention on Human Rights (“ECHR”) on the right to freedom of expression as interpreted by the European Court of Human Rights (“ECtHR”).
- (4) The purpose of this Directive is to provide protection to natural and legal persons who engage in public participation on matters of public interest, in particular journalists and human rights defenders, against court proceedings, which are initiated against them to deter them from public participation (commonly referred to as *strategic lawsuits against public participation* or ‘SLAPPs’).
- (5) Journalists play an important role in facilitating public debate and in the imparting and reception of information, opinions and ideas. It is essential that they are afforded the necessary space to contribute to an open, free and fair debate and to counter disinformation, information manipulation and interference. Journalists should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.

- (5a) This Directive does not define who a journalist is, since the aim is to protect any natural and legal person on account of their engagement in public participation. However, it should be underlined that journalism is a function shared by a wide range of actors, including full-time reporters, analysts, columnists, and bloggers, as well as others who engage in forms of self-publication in print, on the internet or elsewhere.**
- (6) Investigative journalists in particular play a key role in combating organised crime, corruption and extremism. Their work carries particularly high risks and they are experiencing a growing number of attacks and harassment. A robust system of safeguards is needed to enable them to fulfil their crucial role as watchdogs on matters of legitimate public interest.
- (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 voice 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, such as environmental and climate rights, women’s rights, LGBTIQ rights, **the rights of persons with disabilities**, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.
- (7a) Other important participants in public debate, such as academics and researchers, also deserve adequate protection, since they are also targeted by SLAPPs. In a democratic society, members of the academic community should be able to engage in research, teaching, learning and communication in society without fear of reprisal.**
- (8) A healthy and thriving democracy requires that people are able to participate actively in public debate without undue interference by public authority or other powerful actors, be they domestic or foreign. 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 court proceedings against public participation. Such court proceedings are not initiated for the purpose of access to justice, but to silence public debate typically using harassment and intimidation.
- (10) SLAPPs are typically initiated by powerful entities, for example individuals, lobby groups, corporations and state organs. **Such cases in general** ~~They often~~ involve an imbalance of power between the parties, with the claimant having a more powerful financial or political position than the defendant. ~~Although not being an indispensable component of such cases, where present, a~~ **An imbalance of power significantly increases the harmful effects as well as the chilling effects of court proceedings against public participation. The aim of the safeguards provided in this Directive is to redress this imbalance.**
- (11) Court proceedings against public participation may have an adverse impact on the credibility and reputation of journalists and human rights defenders and exhaust their financial and other resources. Because of such proceedings, the publication of information on a matter of public interest may be delayed or altogether avoided. The length of procedures and the financial pressure may have a chilling effect on journalists and human rights defenders. The existence of such practices may therefore have a deterrent effect on their work by contributing to self-censorship in anticipation of possible future court proceedings, which leads to the impoverishment of public debate to the detriment of society as a whole.
- (12) Those targeted by court proceedings against public participation may face multiple cases simultaneously, sometimes initiated in several jurisdictions. 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 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. Such practices also place unnecessary and harmful burdens on national court systems.

(13) The safeguards provided in this Directive should apply to any natural or legal person on account of their engagement in public participation. They should also protect natural or legal persons who, either on a professional or on a personal basis, support, assist or provide goods or services to another person for purposes directly linked to public participation on a matter of public interest. This involves for example internet providers, publishing houses or print shops, which face or are threatened with court proceedings for providing services to the person targeted with court proceedings.

(13a) The concept of manifestly unfounded is commonly used in both Union law and national law. A manifestly unfounded claim may be understood as a claim which is so obviously unfounded that there is no scope for any reasonable doubt. This needs to be assessed on a case-by-case basis in relation to a specific claim.

(14) This Directive should apply to any type of legal claim or action of a civil or commercial nature with cross-border implications ~~whatever the nature of the court or tribunal~~. This includes civil claims **or actions** ~~brought in criminal proceedings~~ **resulting from a criminal offence**. It also includes interim and precautionary measures, counteractions or other particular type of remedies available under other instruments.

(15) The Directive does not apply to claims arising out of liability of the State for actions or omissions in the exercise of State authority (*acta iure imperii*) and claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. **This Directive does not apply to criminal matters either.**

(16) Public participation should mean any statement or activity by a natural or legal person expressed or carried out in exercise of the right to freedom of expression and information on a matter of **current or future** public interest, such as the creation, exhibition, advertisement, **marketing activities** or other promotion of journalistic, political, scientific, academic, artistic, commentary or satirical communications, publications or works, and any preparatory activities directly linked thereto. **Current or future public interest refers to the fact that a matter may not yet be of public interest, but may become so once the public becomes aware of it for example through a publication.** Public participation~~#~~ can also include activities related to the exercise of the right to freedom of association and peaceful assembly, such as the organisation of or participation to lobbying activities, demonstrations and protests or activities resulting from the exercise of the right to good administration and the right to an effective remedy, such as the filing of complaints, petitions, administrative and judicial claims and participation in public hearings.

(16a) Public participation should also include preparatory, supporting or assisting activities that have a direct and inherent link to the statement or activity in question and that are targeted to stifle public participation. **Such activities should directly concern a specific act of public participation or be based on a contractual link between the actual target of SLAPP and the person providing the preparatory, supporting or assisting activity. Bringing claims not against a journalist or a human rights defender but against the internet platform on which they publish or against the company printing a book or a bookshop selling the book can be an effective way of silencing public participation, as without such services criticism cannot be published and thus cannot influence public debate.**

(16b) In addition, ~~#~~**public participation** can cover other activities meant to inform or influence public opinion or to further action by the public, including activities by any private or public entity in relation to an issue of public interest, such as the organisation of or participation to research, surveys, campaigns or any other collective actions.

~~(17) Public participation should not normally cover commercial advertisement and marketing activity, which are typically not made in the exercise of freedom of expression and information.~~

- (18) The notion of a matter of public interest should include also quality, safety or other relevant aspects of goods, products or services where such matters are relevant to public health, safety, the environment, climate or enjoyment of fundamental rights. A purely individual dispute between a consumer and a manufacturer or a service provider concerning a good, product or service should be covered only when the matter contains an element of public interest, for instance concerning a product or service which fails to comply with environmental or safety standards.
- (19) Activities of a **public figure** ~~person or entity in the public eye or of public interest~~ are also matters of public interest to which the public may legitimately take an interest in. However, there is no legitimate interest involved where the sole purpose of a statement or activity concerning such a person or entity is to satisfy the curiosity of a particular audience regarding the details of a person's private life.
- (19a) Matters under consideration by a legislative, executive or judicial body, or any other official proceedings are examples of matters of public interest. Concrete examples of such matters could be legislation concerning environmental standards or product safety, an environmental license to a polluting factory or mine or an important court case about equal treatment of men and women, discrimination in the workplace, environmental crime or money laundering.**
- (20) Abusive court proceedings typically involve litigation tactics **deployed by the claimant and used in bad faith including but not limited to the choice of jurisdiction, the use of dilatory strategies and** ~~such as delaying proceedings, causing disproportionate costs to the defendant in the proceedings or forum shopping.~~ These tactics are used by the claimant for other purposes than gaining access to justice **and aim to achieve a chilling effect on public participation in the matter at stake.** Such **litigation** tactics are often, ~~although not always,~~ combined with various forms of intimidation, harassment or threats **before or during the proceedings.**

(21a) Claims made in abusive court proceedings can be either fully or partially unfounded. The concept of full or partial unfoundedness clarifies the fact that the claim does not necessarily have to be completely unfounded for the proceedings to be considered abusive. For example, even a minor violation of personality rights that could give rise to a modest claim for compensation under the applicable law can still be abusive, if a manifestly excessive amount is claimed.

- (21) A cross-border dimension of SLAPPs adds to the complexity and challenges faced by defendants, as they need to deal with proceedings in other jurisdictions, sometimes in multiple jurisdictions at the same time. This, in turn, results in additional costs and burdens with even more adverse consequences.
- (22) A matter should be considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised. Even where both parties are domiciled in the same Member State as the court seised, a matter should be considered to have cross-border implications in two other types of situations. The first situation is where the specific act of public participation concerning a matter of public interest at stake is relevant to more than one Member State. That includes for instance public participation in events organised by Union institutions, such as appearances in public hearings, or statements or activities on matters that are of specific relevance to more than one Member State, such as cross-border pollution or allegations of money laundering with potential cross-border involvement. The second situation where a matter should be considered to have cross-border implications is when the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State. These two types of situations take into consideration the specific context of SLAPPs.

(23) Defendants should be able to apply for the following procedural safeguards: a request for a security to cover procedural costs, or procedural costs and damages, a request for an early dismissal of manifestly unfounded court proceedings, a request for remedies against abusive court proceedings (award of costs, compensation of damages and penalties), or **some or all** of them ~~at the same time~~. **Such procedural safeguards should be carefully targeted in line with the right to an effective remedy and to a fair trial, as guaranteed in Article 47 of the Charter, leaving the court sufficient discretion in individual cases to maintain the balance between the speedy dismissal of manifestly unfounded claims and effective access to justice. The defendant should benefit from the remedy of early dismissal only when the claim is manifestly unfounded. However, it is not often possible to conclude that a claim is manifestly unfounded, yet the court finds elements indicating an abuse of procedure. In such cases of abusive court proceedings, the defendant may benefit from a security as a precautionary measure, or other remedies which are to be granted when claims are dismissed at a later stage, such as award of costs, compensation of damages or penalties.**

(23a) Whilst the description of the nature of the statement or activity as an act of public participation and, if required by the court, a description of supporting evidence should be admissibility requirements, Member States may add further requirements, without unduly hindering the access to procedural safeguards.

(24) In some abusive court proceedings against public participation, claimants deliberately withdraw or amend claims or pleadings to avoid awarding costs to the successful party. This legal strategy may deprive the court or tribunal of the power to acknowledge the abusiveness of the court proceeding, leaving the defendant with no chance to be reimbursed of procedural costs. Such withdrawals or amendments, **if provided for by national law,** should therefore not affect the possibility for the courts seised to impose remedies against abusive court proceedings.

(25) If the ~~main~~ claim is **not** dismissed **early but** later on in the ordinary proceedings the defendant may still benefit of **at a later stage or it is withdrawn or amended [according to the principle of party disposition], the Directive provides for** other remedies available against abusive court proceedings such as award of costs ~~and~~, compensation of damages **and penalties, provided that the court establishes that the proceedings had as main purpose to prevent, restrict or penalize public participation and were related to unfounded claims.**

(25b) To provide a more effective level of protection, non-governmental organisations safeguarding or promoting public participation should be empowered to support the defendant in court proceedings brought in relation to public participation, when their activity is considered relevant for the case by the court or tribunal seized of the matter. This support may take form of providing information relevant to the case, intervening in favour of the defendant in the court proceedings or other support as provided for in the national law. The procedural requirements for such support, including time limits when appropriate, should be governed by national law.

(26) To provide the defendant with an additional safeguard, there should be a possibility to grant him or her a security to cover procedural costs and/or damages, ~~when the court considers~~. **However, it is necessary to balance such a measure with the claimant's right of access to justice. To that end, the security should be granted only after the court has examined the claim and has concluded** that even ~~if~~ **though** the claim ~~is~~ is not manifestly unfounded, there are elements indicating an abuse of procedure and the prospects for success ~~in the main proceedings~~ are low. A security does not entail a judgement on the merits but serves as a precautionary measure ensuring the effects of a final decision finding an abuse of procedure. It should be for Member States to decide whether a security should be ordered by the court on its own motion or upon request by the defendant.

(27) A stay of the proceedings, when an application for early dismissal has been filed, ensures that procedural activity is suspended, hence reducing the procedural costs of the defendant.

- (28) To avoid any impact on the access to an effective remedy, the stay should be temporary and kept until a final decision on the application is taken. A final decision means a decision that is no longer subject to judicial review.
- (29) To ensure high expediency in the accelerated procedure on an application for early dismissal, Member States may set time limits for the holding of hearings or for the court to take a decision. They may as well adopt schemes akin to procedures in relation to provisional measures. Member States should make efforts to ensure that when the defendant has applied for other procedural safeguards, the decision is also taken in an expeditious manner. For expeditious treatment, Member States could take into account, amongst others, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threaten the defendant.
- (30) If a defendant has applied for early dismissal, it should be for the claimant in the main proceedings to prove in the accelerated procedure that the claim is not manifestly unfounded. This does not represent a limitation of access to justice, taking into account that the claimant carries the burden of proof in relation to that claim in the main proceedings and only needs to meet the much lower threshold of showing that the claim is not manifestly unfounded in order to avoid an early dismissal.
- (31) Costs should include all costs of the proceedings, including the full costs of legal representation incurred by the defendant unless such costs are excessive. Costs of legal representation exceeding amounts laid down in statutory fee tables should not be considered as excessive per se. Full compensation of damages should include both material and immaterial damages, such as physical and psychological harm.
- (32) The main objective of giving courts or tribunals 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 should 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 threaten the defendant.

- (33) In the cross-border context, it is also important to recognize the threat of SLAPPs from third countries targeting journalists, human rights defenders and other persons engaged in public participation who are domiciled in the European Union. They may involve excessive damages awarded against EU journalists, human rights defenders and others. Court proceedings in third-countries are more complex and costly for the targets. To protect democracy and freedom of expression and information in the European Union and to avoid that the safeguards provided by this Directive are undermined by recourse to court proceedings in other jurisdictions, it is important to provide protection also against manifestly unfounded and abusive court proceedings in third countries.
- (34) This Directive creates a new special ground of jurisdiction in order to ensure that targets of SLAPPs domiciled in the European Union have an efficient remedy available in the Union against abusive court proceedings brought in a court or tribunal of a third country. This special ground of jurisdiction allows the targets domiciled in the European Union to seek, in the courts or tribunals of their domicile, for compensation of damages and costs incurred in connection with the proceedings before the court or tribunal of the third country. This right applies irrespective of the domicile of the claimant in the proceedings in the third country.
- (35) This Directive should be without prejudice to the protection that other instruments of Union law or **provisions of national law establishing more favourable rules**, provide to natural and legal persons that engage in public participation. In particular, **this Directive cannot be understood as being intended to reduce or restrict freedoms such as the freedom of expression and information, nor** ~~it does not to~~ detract in any way from the protection offered by Directive 2019/1937 on the protection of persons who report breaches of Union law¹, as implemented in national law. As regards situations falling within the scope of this Directive and of Directive 2019/1937, the protection offered by both acts should therefore apply.

¹ OJ L 305, 26.11.2019, p. 17-56.

- (36) This Directive is complementary to the Commission recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”). This recommendation is addressed to Member States and it provides a comprehensive toolbox of measures including training, awareness-raising, support to targets of abusive court proceedings and data collection, reporting and monitoring of court proceedings against public participation.
- (37) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (38) [In accordance with Articles 1, 2 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application] OR
- (39) [In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified [, by letter of ...] its wish to take part in the adoption and application of this Directive.]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

Subject matter

This Directive provides safeguards against manifestly unfounded or abusive court proceedings¹, in civil matters with cross-border implications brought against natural and legal persons, in particular journalists and human rights defenders, on account of their engagement in public participation.

Article 2

Scope

1. This Directive shall apply to matters of a civil or commercial nature with cross-border implications, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

1a. This Directive lays down minimum rules, thus enabling the Member States to adopt or maintain more favourable provisions.

¹ The notion of "manifestly unfounded court proceedings" in article 1 is still under the Presidency's scrutiny. While recital 23 clarifies the notion of manifestly unfounded claims and the relationship between manifestly unfounded claims and abusive court proceedings, these clarifications are for the moment not reflected in the articles. Considering any change to article 1 would need to be reflected throughout the proposal, the Presidency decided to make the appropriate changes to the text only after discussions on Chapters III & IV, particularly on article 9.

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. **‘public participation’** means any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto. [This includes complaints, petitions, administrative or judicial claims and participation in public hearings];
2. **‘matter of public interest’** means any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as:
 - (a) **fundamental rights**, public health, safety, the environment, **or** climate ~~or enjoyment of fundamental rights~~;
 - (b) activities of a ~~person or entity in the public eye or of public interest~~ **figure**;
 - (c) matters under ~~public consideration or review~~ by a legislative, executive, or judicial body, or any other ~~public~~ official proceedings;
 - (d) allegations of corruption, fraud or **other criminal offences**;
 - (e) activities aimed to fight disinformation;
3. **‘abusive court proceedings against public participation’** mean court proceedings ~~brought in relation to public participation that~~ **have as their main purpose to prevent, restrict or penalize public participation and** are **related to unfounded claims** ~~that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalize public participation~~. Indications of such a purpose can be:
 - (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof;

- (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
- (c) intimidation, harassment or threats on the part of the claimant or his or her representatives.

Article 4

Matters with cross-border implications

Option 1

1. For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised.
- ~~2. Where both parties to the proceedings are domiciled in the same Member State as the court seised the matter shall also be considered to have cross-border implications if:~~
 - ~~(a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or~~
 - ~~(b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.~~
- 2. Domicile shall be determined in accordance with Regulation of the European parliament and Council (EU) No 1215/2012/EU.**
- 3. The relevant moment for determining whether a matter has cross-border implications is the date on which the claim is received by the court or tribunal.**

Rationale:

Paragraph 1

This definition of matters with cross-border implications does not extend the conventional concept of matters with cross-border implications. Certainly, if one of the parties or both parties are not domiciled in the Member State as the court seised, it is always a matter with cross-border implications.

However, the problem with this wording is that it does not cover all matters that have relevant cross-border implications. There might be matters having relevant cross-border implications, which may not be regarded as being in scope of the definition in paragraph 1. For instance, the situation when the claimant sues the defendant (they both have their domicile in the same Member State as the court seised) for overall damages, which have occurred in several Member States arising from a delict (e.g. defamatory article). Thus, the cross-border implications are given due to the place of damage, however, under the definition in paragraph 1 which associates the cross-border implications only with domicile of the parties, they are not given. However, it shall be emphasized that under the Brussels I bis Regulation (Art. 7/2) the place where the harmful event occurred (including both place of harmful conduct and place of damage) is a relevant connecting factor that could establish international jurisdiction in this Member State.

The fact that there may be cross-border implications where both parties to a dispute are domiciled in the same Member State as the court seised has been recognised by the CJEU on several occasions (e.g. CJEU judgment C-281/02 Owusu).

Omission of original Paragraph 2

A significant number of Member States consider the definition of matters with cross-border implications to be too broad. Art. 4 paragraph 2 might go beyond the traditional concept of matters with cross-border implications and some Member States are concerned that purely national cases would be considered as matters with cross-border implications due to the current wording of the second paragraph. Concerns about the application of this provision in practice were also expressed.

Concerning para 2, subparagraph (a), the mere fact that proceedings are brought against an act of public participation concerning a matter of public interest relevant to more than one Member State says nothing about the cross-border implications of the case. Moreover, it could be difficult for the court seised to assess whether a matter of public interest is relevant for more than one Member State. Any legal dispute between the claimant and the defendant on the relevance of the matter of the public interest would be in direct contradiction with the intended objective of the Directive (to ensure that SLAPPs are dismissed as quickly as possible and with minimum cost and other damage to the defendant). Moreover, the question is how the link between a particular act of public participation and a SLAPP is to be demonstrated. A journalist may write several articles about a claimant concerning several matters of public interest, so the question of how to prove that a SLAPP was initiated against a particular act of public participation concerning a matter of public interest that is being litigated involves more than one Member state.

Concerning para 2, subparagraph b), CZ PRES fully agrees with the COM that the multiplicity of proceedings initiated in different Member States may indicate that a SLAPP is involved. However, the same problem arises as in the case of paragraph 2(a). The mere fact that several proceedings have been initiated in different MS does not mean that the individual proceedings have cross-border implications.

New Paragraph 2

Some Member States expressed concerns regarding the concept of domicile and whether it is applicable also for legal persons. The CZ Presidency considers it pertinent to determine the domicile by a reference to Brussel I bis Regulation, where the domicile of natural and legal persons is set out comprehensively. This approach also works for other EU legislation, such as Art. 3(2) of Regulation (EC) No 861/2007 (Small Claims)

New Paragraph 3

As regards the proposed wording of paragraph 3, the provision sets out the point in time at which cross-border implications are assessed. The Presidency is of the opinion that this moment should be the date on which the court or tribunal receives the claim (the lawsuit or extension of the lawsuit). The intention of the provision is to provide the court a clarification of the moment at which the cross-border implications shall be assessed and to limit the possibility for the claimant to evade the Directive by changing the residence or by extending or partially withdrawing the action. The extension or partial withdrawal of an action may consist in changes concerning number of defendants or subject-matter of the action. The latter is more relevant for Option 2 below. This approach also works for other EU legislation, such as in Art. 3(3) of Regulation (EC) No 861/2007 (Small Claims).

Option 2

1. For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised **and all other elements relevant to the situation are located in that Member State.**
- ~~2. Where both parties to the proceedings are domiciled in the same Member State as the court seised the matter shall also be considered to have cross-border implications if:
 - ~~(a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or~~
 - ~~(b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.~~~~
- 2. Domicile shall be determined in accordance with Regulation of the European parliament and Council (EU) No 1215/2012/EU.**
- 3. The relevant moment for determining whether a matter has cross-border implications is the date on which the claim is received by the court or tribunal.**

Rationale:

Paragraph 1

The revised text of paragraph 1 addresses the problem indicated in Option 1 which gives only the narrow interpretation of cross-border implications. The definition in Option 2 uses the term “all other elements relevant to the situation” which has been already used in Art. 3 paragraph 3 and 4 of the Rome I Regulation. The purpose of using this expression in the Rome I Regulation was to put certain restrictions on the choice of law in contractual matters in cases where the choice of law would be the only cross-border element in otherwise strictly national matters (Art. 3(3) Rome I Regulation) or the choice of law of a third state would be the only extra-Community element in otherwise strictly intra-Community matters (Art. 3(4) Rome I Regulation). Art. 14 paragraphs 2 and 3 of the Rome II Regulation serve the same purpose for the choice of law in non-contractual matters by using the same wording and structure. Both regulations intentionally do not contain the definition of what shall be regarded as “all other elements relevant to the situation”. It is for obvious reasons: the meaning of the notion changes depending on the substance of each particular case and its assessment is up to the judge. However, the relevance is always evaluated with respect to international jurisdiction and applicable law. For example, the nationality of one of the parties is not considered a relevant cross-border implication in the field of contractual or noncontractual liability in the EU; however, when it comes to the choice of law in matters of succession the nationality of the deceased person is a relevant cross-border implication.

In matters of non-contractual liability, apart from the domicile of the parties, a relevant element would be the place of the harmful event, which includes both the place of harmful conduct and the place of damage as these elements are used as connecting factors for international jurisdiction (Art.7(2) Brussels I bis Regulation) and applicable law (Art. 4 and following Rome II Regulation). In the matters of contractual liability, it can be again the domicile of the parties or e.g. the place of the conclusion of a contract (Art. 11 Rome I Regulation), the place of performance of a contract (Art. 7(1)(a) Brussels I bis Regulation) or the place where the goods shall be supplied (art. 7(1)(b) Brussels I bis Regulation). In the matters of individual employment contracts, it is the country from which the employee habitually carries out his work (Art. 21 Brussels I bis Regulation, Art. 8 Rome I Regulation).

Featuring these examples of elements relevant to the situations shows how variable they are, yet easily identifiable for each particular claim. They are used as connecting factors in regulations adopted in the field of private international law in the EU and interpreted via the case law of the CJEU.

When it comes to the practical application of the definition in Option 2, it stands that:

- cases when at least one of the parties is not domiciled in the same Member State as the court seised would always be regarded as having cross-border implications;*
- cases when both parties are domiciled in the same Member State as the court seised would be considered to have cross-border implication only if another element relevant to the situation is not located in that Member State.*

This definition in fact only reflects the current practice in private international law matters in the EU. It does not bring new interpretation in the sense of narrowing or extending the concept of cross-border implications.

Paragraphs 2 and 3

See the rationale to the Option 1.

Option 3

- ~~1.— For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised.~~
- ~~2.— Where both parties to the proceedings are domiciled in the same Member State as the court seised the matter shall also be considered to have cross-border implications if:
 - ~~(a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or~~
 - ~~(b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.~~~~

Rationale:

The deletion of Art. 4 would mean that the existence of cross-border implications will be assessed as it has always been in civil proceedings in the EU, namely on a case-by-case basis. It shall be mentioned that cross border implications are on purpose not defined in rules of private international law in the EU. The exceptions, including Art. 3 of Regulation No. 1896/2006 (Payment Order), Art. 3 of Regulation No. 861/2007 (Small Claims) and Art. 2 of Directive 2003/8/EC (Legal Aid) have a different function than changing the general perception of cross-border implications in the EU private international law:

Art. 3 of Regulation No. 1896/2006 and Art. 3 of Regulation No. 861/2007 are intended to simplify court proceedings in cases where one of the parties to the dispute is domiciled in a Member State other than the Member State of the court seised by introducing specific procedural rules. As regards Art. 2 of Directive 2003/8/EC, its aim is to ensure the effective access to justice for a party who is domiciled in a Member State other than the Member State of the court seised and who cannot bear the costs of the proceedings. The condition of domicile in different Member States also intends to make a clear distinction between strictly national specific procedural rules and the harmonized EU rules.

In case of deletion of Art. 4 a simple guidance for courts on how to assess matters with cross-border implications given in the recitals could be sufficient.

Option 4

1. For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised.
2. Where both parties to the proceedings are domiciled in the same Member State as the court seised the matter shall also be considered to have cross-border implications if:
 - (a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is ~~[relevant]~~ **deemed by the competent court or tribunal to have** **or [has] a specific and direct link** to more than one Member State, or
 - (b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.

Rationale

This is a modified version of Commission's original proposal and the rationale remains the same as in the original proposal. However, this version addresses the key point of Article 4(2)(b) in relation to which many Member States asked for clarifications. This would require corresponding change to recital 22.

CHAPTER II

Common rules on procedural safeguards

Article 5

Applications for procedural safeguards

1. Member States shall ensure that when court proceedings are brought against natural or legal persons on account of their engagement in public participation, those persons can apply for:
 - (a) security in accordance with Article 8;
 - (b) early dismissal of manifestly unfounded court proceedings in accordance with Chapter III;
 - (c) remedies against abusive court proceedings in accordance with Chapter IV.
2. Such applications shall include:
 - (a) a description of the elements on which they are based;
 - (b) **if required by the court**, a description of the supporting evidence.
3. Member States may provide that measures on procedural safeguards in accordance with Chapters III and IV can be taken by the court or tribunal seised of the matter *ex officio*.

Article 6

Subsequent amendment to claim or pleadings

Member States shall ensure that any subsequent amendments to the claims or the pleadings made **in accordance with national law** by the claimant in the main proceedings, including the discontinuation of proceedings, do not affect the possibility for the court or tribunal seized of the matter to consider the court proceedings abusive and to impose remedies in accordance with Chapter IV.

Article 7

~~Third party intervention~~ **Support to the defendant in court proceedings**

Member States shall take the necessary measures to ensure that a court or tribunal seized of court proceedings against public participation may accept that **relevant** non-governmental organisations safeguarding or promoting ~~the rights of persons engaging in public participation may take part~~ **support** in those proceedings, either in support of the defendant **in those proceedings** or to provide information.

Article 8

Security

Member states shall ensure that in court proceedings against public participation, the court or tribunal seized ~~has the power to~~ **may** require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of presence of elements indicating abusive court proceedings.

CHAPTER III

Early dismissal of manifestly unfounded court proceedings

Article 9

Early dismissal

1. Member States shall empower courts and tribunals to adopt an early decision to dismiss, in full or in part, court proceedings against public participation as manifestly unfounded.
2. Member States may establish time limits for the exercise of the right to file an application for early dismissal. The time limits shall be proportionate and not render such exercise impossible or excessively difficult.

Article 10

Stay of the main proceedings

Member States shall ensure that if the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken.

Article 11

Accelerated procedure

Member States shall ensure that an application for early dismissal is treated in an accelerated procedure, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial.

Article 12

Burden of proof

Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded.

Article 13

Appeal

Member States shall ensure that a decision refusing or granting early dismissal pursuant to Article 9 is subject to an appeal.

CHAPTER IV

Remedies against abusive court proceedings

Article 14

Award of costs

Member States shall take the necessary measures to ensure that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant, unless such costs are excessive.

Article 15

Compensation of damages

Member States shall take the necessary measures to ensure that a natural or legal person who has suffered harm as a result of an abusive court proceedings against public participation is able to claim and to obtain full compensation for that harm.

Article 16

Penalties

Member States shall provide that courts or tribunals seised of abusive court proceedings against public participation have the possibility to impose effective, proportionate and dissuasive penalties on the party who brought those proceedings.

CHAPTER V

Protection against third-country judgments

Article 17

Grounds for refusal of recognition and enforcement of a third-country judgment

Member States shall ensure that the recognition and enforcement of a third-country judgment in court proceedings on account of public participation by natural or legal person domiciled in a Member State is refused as manifestly contrary to public policy (ordre public) if those proceedings would have been considered manifestly unfounded or abusive if they had been brought before the courts or tribunals of the Member State where recognition or enforcement is sought and those courts or tribunals would have applied their own law.

Article 18

Jurisdiction for actions against third-country judgments

Member States shall ensure that, where abusive court proceedings on account of engagement in public participation have been brought in a court or tribunal of a third country against a natural or legal person domiciled in a Member State, that person may seek, in the courts or tribunals of the place where he is domiciled, compensation of the damages and the costs incurred in connection with the proceedings before the court or tribunal of the third country, irrespective of the domicile of the claimant in the proceedings in the third country.

CHAPTER VI

Final provisions

Article 19

Relations with the 2007 Lugano Convention

This Directive shall not affect the application of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007.

Article 20

Review

Member States shall provide the Commission with all relevant information regarding the application of this Directive by [5 years from the date of transposition]. On the basis of the information provided, the Commission shall by [6 years from the date of transposition] at the latest, submit to the European Parliament and the Council a report on the application of this Directive. The report shall provide an assessment of the evolution of abusive court proceedings against public participation and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to amend this Directive.

Article 21

Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 years from the date of entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 23

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
