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From:	General Secretariat of the Council
To:	Delegations
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Subject:	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”) - Comments from NL delegation on the draft Presidency compromise text on Chapters I to IV

Delegations will find in Annex comments from the NL delegation on the draft Presidency compromise text on Chapters I to IV as set out in ST 16221/22.

NL COMMENTS ANTI-SLAPP DIRECTIVE PROPOSAL
FURTHER WRITTEN COMMENTS D.D. 03-03-2023 ON CHAPTERS II AND III
OF THE PRESIDENCY DRAFT COMPROMISE TEXT D.D. 20-12-2022

CHAPTER II

Common rules on procedural safeguards

Article 5

Applications for procedural safeguards

1. Member States shall ensure that when civil court proceedings are brought against natural or legal persons on account of their engagement in public participation, those persons can apply, **in accordance with national law**, for:
 - a) security **as provided for** in ~~accordance with~~ Article 8;
 - b) **early** dismissal of ~~manifestly unfounded~~ court proceedings the claims **as provided for** in ~~accordance with~~ Chapter III;
 - c) remedies ~~against abusive court proceedings~~ **as provided for** in ~~accordance with~~ Chapter IV; on the grounds that the court proceedings are abusive.
2. Such applications shall include:
 - a) a statement of the facts substantiating that the court proceedings are abusive ~~description of the elements on which they are based;~~
 - b) [a substantiation of the remedies asked;]
 - c) 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*.

Explanatory note

The proposed changes in art. 5 are meant to clarify what is expected of the defendant when applying for procedural safeguards on the grounds that the proceedings are a SLAPP.

Par. 1 reiterates that the article only refers to civil proceedings and clarifies that the applications made under (a)-(c) all relate to the fact that the proceedings are (potentially) abusive. Following the discussions in the Council working party, the NL believes that a focus on the procedural abuse aspect of SLAPP could lead to more clarity and legal certainty. The introduction of a separate (sub)category of SLAPPs¹, i.e. “manifestly unfounded claims” in art. 9 for (early) dismissals, might be deemed unnecessary as the sought balance between the (early) moment of dismissal, the threshold for dismissal and the required time for (appropriate) examination of the case can be safeguarded in art. 9 itself (see below).

Par. 2 clarifies that the defendant has to substantiate the grounds on which he considers the proceedings to be abusive and the remedies applied for. By leaving the wording “*the description of the supporting evidence*” unchanged, it is clear that the burden on the defendant should not be too severe. However, a statement of the facts which make the court proceedings abusive is the minimum that we can ask from the defendant.

¹ The COM has explained that manifestly unfounded claims can be deemed abusive, but not all abusive claims are necessarily manifestly unfounded.

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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 withdrawal of the claim ~~including the discontinuation of proceedings~~, do not affect the possibility for the court or tribunal seized of the matter to rule on the award of costs and other remedies in as far as the defendant has applied for such remedies in those proceedings ~~consider the court proceedings abusive and to impose remedies in accordance with Chapter IV.~~

Explanatory note

The additions and changes proposed are intended to clarify 1) that the claimant can withdraw the claim but cannot necessarily thereby discontinue the proceedings; 2) that the court seized will only apply any remedies after a withdrawal of the claim by the SLAPPer insofar as the defendant has applied for such remedies in the main proceedings.

Article 7

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

Member States shall take the necessary measures in accordance with national law to ensure that a court or tribunal seized of court proceedings brought against natural or legal persons on account of their engagement in public participation may accept that 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.

Explanatory note

As discussed during the last Council working party, the addition of “in accordance with national law” in this article clarifies that MS can shape the envisaged option for support from NGO’s in the proceedings in such way that best fits their national civil procedural law.

Article 8

Security

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 ~~has the power to may~~ in accordance with national law require, **without prejudice to the right to access to justice**, that the claimant ~~to~~ provides 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.

Explanatory note

As discussed during the last Council working party, the addition of “in accordance with national law” clarifies that MS can shape the way security for the procedural costs is ordered to fit in best with their national civil procedural law. The NL does not see a need for the possibility to provide security for damages.

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CHAPTER III

~~Early Accelerated~~ dismissal of manifestly unfounded court proceedings claims

Article 9

~~Early Accelerated~~ dismissal

1. In accordance with national law Member States shall ~~empower~~ ensure that courts and tribunals may to adopt an early decision to dismiss, ~~after thorough appropriate examination, in full or in part, court proceedings claims against public participation as manifestly unfounded~~ on the grounds that the proceedings are abusive at the earliest possible stage, or at any stage of the proceedings as provided for by national law ~~in accordance with national law, with effect of res judicata.~~
 2. Member States shall ensure that an application for such dismissal is treated in an accelerated manner in accordance with national law, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial.
- [~~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.~~]

Explanatory note

The proposed changes in par. 1 aim to allow for both the option that courts are enabled to dismiss a case (only) at the beginning, and the option that courts are enabled to dismiss a case at any stage (including the beginning) if the national civil procedural rules so provide. This is to accommodate those MS for which dismissal “at any stage” leads to procedural problems, but still leaves room to do so for other MS.

Furthermore, the reference to “manifestly unfounded claims” has been replaced with a reference to “abusive proceedings”. As mentioned under art. 5 above, the introduction of a separate (sub)category of SLAPPs², i.e. “manifestly unfounded claims” in art. 9, might be deemed unnecessary as the sought balance between the (early) moment of dismissal, the threshold for dismissal, and the required time for (appropriate) examination of the case is safeguarded by the other elements of art. 9. The required “appropriate examination” implies that at a (very) early stage only proceedings that are clearly abusive (i.e. based on manifestly unfounded claims) can be dismissed.³ However, dismissal at a later stage in the proceedings (for MS that would allow for this option) would also be appropriate for less obvious cases, if more thorough examination leads a judge to conclude that proceedings are abusive.

The text of article 11 has been added as (a new) par. 2 to article 9 with deletion of the word “early”, as discussed during last Council working party. The headers of Article 9 and 11 have been merged to “Accelerated dismissal” to emphasize the expedited character of the procedure while creating flexibility regarding the moment of dismissal..

The NL is of the opinion that (the old) par. 2 can be deleted since par. 1 already provides that the application has to be made in accordance with national law. In our understanding that includes the setting of time limits in as far as national law so provides.

² IBID 1. The COM has explained that manifestly unfounded claims can be deemed abusive, but not all abusive claims are necessarily manifestly unfounded.

³ In this regard, we note that manifestly unfounded claims could be included under the definition of abusive court proceedings in art. 3 par. 3 (e.g. sub (a): “the disproportionate, excessive or unreasonable nature of the claim or part thereof”).

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~~Article 11~~

~~Accelerated procedure treatment~~

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

Explanatory note

See above; the text of article 11 has been moved and added as (a new) par. 2 to article 9 with deletion of the word “early” (replaced by “such”), as discussed during last Council working party.

Article 12

~~Burden of proof~~ **Substantiation of claims**

Member States shall ensure that where a defendant has applied for **early** dismissal pursuant to Article 9 on the grounds that the proceedings are abusive, it shall be for the claimant to **substantiate describe and support with evidence the facts substantiating that the proceedings are not abusive grounds of the claim** in order to enable the court to assess whether the proceedings are abusive ~~the claim it is~~ prove that the claim is **not manifestly unfounded**.

Explanatory note

Based on the discussions in the Council working party, the proposed changes aim to clarify the relation between article 5 par. 2, article 9, article 12 and article 13. The NL believes that using the same wording of abusive proceedings in a consequent manner is helpful in this respect. The wording also clarifies what is expected of each party in the proceedings and of the court by using more precise wording.

Article 13

Appeal

Member States shall ensure that a decision ~~refusing or~~ granting **early** dismissal on the grounds that the proceedings are abusive pursuant to Article 9 is subject to an appeal in accordance with national law.

Explanatory note

The proposed changes are needed because of the changes proposed to article 9. The addition of “in accordance with national law” is meant to make sure that MS can shape the ways of appeal against an dismissal on the grounds that the proceedings were abusive.