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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 AT, BE, FI, FR, DE, HU, LT, PL and PT delegations on the draft Presidency compromise text on Chapters I to IV

Delegations will find in Annex comments from the AT, BE, FI, FR, DE, HU, LT, PL and PT delegations on the draft Presidency compromise text on Chapters I to IV as set out in ST 16221/22.

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AUSTRIA

Austrian Comments on the revised Presidency draft compromise text on Chapters I to IV

(doc. 16221/22; 20 December 2022)

on the Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

1. General Comments:

Austria would like to thank the Swedish Presidency for the opportunity to comment in writing on the latest revised text proposal (doc. 16221/22; 20 December 2022).

We would also like to thank the previous Czech Presidency for all the efforts made to bring this proposal forward.

Nevertheless, we remain convinced that further efforts need to be made and thorough work still needs to be done on the present text in order to solve all the technical problems and to find solutions that are useful for civil procedures in practice.

2. Article 2 – Scope and "Non-application of the provisions in criminal proceedings":

Austria expressly supports the proposal to exclude criminal proceedings from the scope of application of the Directive. Austria thanks the Presidency for the amendments in this article, they are very much appreciated.

However, in order to have a very clear regulation, we ask again to delete the phrase ",whatever the nature of the court or tribunal". The same applies to recital 14. Overall, recitals 14 and 15 should be adapted to the amended text in Article 2.

3. Article 3 (3) - Definition of abusive court proceedings:

In addition to letter (a) also an "obviously excessive dispute value" should be mentioned as a further possible indicator for an abusive court proceeding. In addition, letter (b) should be reworded to read as follows: "the existence of obviously not justified multiple proceedings initiated by the claimant or associated parties in relation to similar matters".

4. Article 4 - Matters with cross-border implications:

Austria still is clearly in favour of Option I. This option contains an indisputable and clear definition known from existing instruments, of what is to be understood by a cross-border case.
Option II is not acceptable for Austria because it could lead to ambiguities and time-consuming and cost-intensive disputes about the scope of application in practice. Options 3 and 4 are also not acceptable from Austria's point of view.

5. Article 5:

Paragraphs 1 and 2 are closely related to the other provisions of Chapters II to IV, so it will not be possible to finalise the text of Article 5 until the work on these other provisions has been completed.
As already stated in previous comments we propose to delete paragraph 3 of Article 5 from the text of the Directive because it does not add any value. This question can be left at all to national law.

6. Article 6 – Amendments to the claim and withdrawal:

This provision strongly interferes with national concepts of civil procedure. As already stated in previous comments national laws of the Member States seem to be very differently with regard to questions of amendments to a claim but also of a withdrawal of a claim.
From an Austrian point of view, therefore, the provision should be deleted or at least more flexible ("may"). This would allow the Member States to provide for measures, but would not force them to deviate from existing concepts that are very helpful against SLAPP.
Under Austrian law, once a claim has been brought before the court, it can only be withdrawn if the claimant simultaneously waives the claim or if the defendant gives his consent. In addition to this strict rules, there are already cost implications for the claimant foreseen in Austrian law.

7. Article 7 - Support to the defendant:

We stick to our position that this provision should be deleted entirely from the text of the directive. There is no reason to create a new procedural role for a "supporter". Support in any legally permissible form, be it legal advice, assumption of costs, moral support, etc., can be provided extra-procedurally. However, a new procedural role is not needed for that.

8. Article 8 - Security:

A security deposit is only intended if there are concerns that claims granted by the court can later be enforced. If a judge orders the claimant to provide security under this provision, the judge shows that he believes that it is possible that the claim is a SLAPP claim. A result could be, that the

claimant accuses the judge being biased rather than impartial. From our view, in SLAPP-cases like the ones the Commission is facing, SLAPP-claimants should not be at risk of not being able to pay costs to the defendant later on.
We find it problematic in this context that "damages" are also mentioned in the same breath as "costs". This is a break in the system, we can not accept. Costs and damages are to be treated differently from a procedural perspective.

9. Article 9 – Early dismissal:

Austria has understood the discussions in the working group so far that decisions should be made only after a correspondingly thorough examination. However, the wording "early dismissal," which originated in the Anglo-American legal sphere, raises other expectations. Therefore, the title of Chapter III and Article 9 should be worded more neutrally.

10. Article 12 – Substantiation of claims:

Austria still takes a very critical view of this provision.
If the point is for the claimant to comment on the defendant's allegation that the claim is a SLAPP claim and take a position on it, we would suggest that it should be included in the text like this.
Again, the word “early dismissal” should be changed and a neutral term found.

11. Article 13 - Appeal:

The word "early dismissal" in Article 13 needs to be adapted to a new “more neutral” heading in Article 9.

12. Article 15 - Compensation of damages:

Austria would still prefer that no provisions of substantive law be included in this procedural instrument. Like our French colleagues, we also have doubts as to whether such a regulation would be covered by the legal basis of Art 81(2)(f) TFEU.

BELGIUM

Written comment by Belgium on the Presidency's draft compromise on articles in chapters I to IV and their corresponding recitals (Doc. 16221/22)

Belgium would like to first thank the Presidency for its further work on a draft compromise of the anti-SLAPP proposal.

We would like to submit to the presidency the following comments on the latest version of the draft compromise :

Recital 15 :

In the last sentence of the recital, the word "does" is each time replaced with the word "should", which does not align with the wording of article 2.

Belgium's opinion is that recital 15 should state the exclusion of criminal matters and arbitration from the scope of the proposed directive and the fact that it does not establish rules concerning the criminal procedure in a clear manner and that the word "does" is better suited for this purpose. This does not prevent member states from providing a similar protection to that which the proposal provides, in other legal matters during the transposition.

It is suggested to reinstate the previous version of the last sentence of recital 15.

Article 14 and recital 31 :

Belgium would like to thank the Presidency again for taking into account the previously expressed issue regarding the compatibility of article 14 and its corresponding recital with Belgian law. The deletion of the reference to the reimbursement of the "full" costs of legal representation allows to partially reduce Belgium's reluctance regarding this provision.

We are, however, of the opinion that a better consistency between article 14 and recital 31 should be ensured.

1) Regarding the deletion of the words "unreasonable and disproportionate" in article 14 while the reference to "unreasonable and disproportionate fees" remains in recital 31. As the provision on the costs does not refer to these characteristics, Belgium's position is that those should not be mentioned in the recital.

It is proposed to draft recital 31 as follows : "**Costs should include all costs of the proceedings, including the costs of legal representation incurred by the defendant.** ~~**Costs of legal representation exceeding amounts laid down in statutory fee tables should not be considered as excessive, unreasonable or disproportionate per se.**~~ **The court should render the decisions on costs in accordance with national law**."

The sentence regarding the "costs of legal representation exceeding amounts laid down in statutory fee tables" not having to be considered as unreasonable or disproportionate does not align with the deletion of the word "full". This also seems to contradict the newly added sentence, referencing decisions on costs rendered "in accordance with national law".

Regarding that last sentence, Belgium would also like to ask the Presidency for some clarifications on what exactly should be understood from it and whether it should be interpreted as allowing member states to apply their national law regarding the calculation of the costs, including the costs of legal representation, namely in legal systems in which the costs of legal representation are calculated based on a fixed rate.

2) The reference to national law should be included in article 14 itself. It is suggested to draft article 14 as follows : **"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 costs of legal representation incurred by the defendant, in accordance with national law."**

FINLAND

11 January 2023

Ministry of Justice, Finland

Written comments by the Finnish delegation – SLAPP Directive Proposal, Presidency draft compromise on articles in Chapters I to IV (20 Dec 2022, 16221/22)

Chapter I

Article 4 Matters with cross-border implications

Finland still supports the Option 1. In our view consistency should be sought when defining cross-border proceedings. The definition of matters with cross-border implication should be as unambiguous as possible.

Chapter II

Article 5 Applications for procedural safeguards

Finland does not support the proposed amendments to the recital 23a. According to the previous wording Member States could decide whether the application for procedural safeguards should be dealt within the main proceedings or separately. In our view there also was consensus on this issue. Therefore, the sentence *whether the application for procedural safeguards should be dealt within the main proceedings or separately* should be kept in the recital.

Furthermore, we would like to ask the following question: Article 8 in its proposed wording is a remedy against an abusive court proceeding. Also according to recital 23, in the cases of abusive court proceedings, the defendant could benefit from a security or other remedies. Therefore Article 8 would fit better to Chapter IV. Why is the Article 8 in Chapter II instead of Chapter IV?

Article 8 Security

Finland still has some reservations regarding Article 8 and recital 26. Securities required from a claimant for instituting proceedings in a civil matter can hinder access to justice, which makes the question of securities fundamentally important.

The proposed security does not only affect unfounded claims. The obligation to post a security may also act as a deterrent to bringing justified actions. Requiring a security may therefore hamper access to justice, which is an essential and fundamental part of fair trial. Moreover, consideration of the grounds for the security could prolong the proceedings. It would also be difficult to assess the amount of the security to cover procedural costs and/or damages before the main proceedings. Overstated security would be particularly detrimental to access to justice. The proposed security would not help the defendant with the ongoing costs either.

Article in its proposed wording would also considerable stretch the ordinary meaning of security. In Finland, for example, the court may order a security, if the applicant of the security can demonstrate that it is probable that he/she holds a debt and if there is a danger that the opposing party hides, destroys or conveys his or her property or takes other action endangering the payment of the debt of the applicant.

From this point of view, the proposal in compelling format is not acceptable. In our view, the objectives of the Directive can be reached efficiently even without such an inflexible wording. For these reasons, Finland suggests that the third word of the Article (*shall*) be changed to *may*.

Article 8 in its proposed wording is a remedy against abusive court proceedings, and it should be considered if it would fit better to Chapter IV.

Chapter III

Article 9 Early dismissal

Finland supports the proposed wording of the article ("Member States shall ensure that courts and tribunals may dismiss, *after appropriate examination*…"

Article 11 Accelerated treatment

Finland has no reservations regarding the amended wording of the heading.

Article 12 Substantiation of claims

Finland has no reservations regarding the amended wording of the heading.

Article 13 Appeal

Finland supports the proposed wording of the article 13 and recital 30a (Member States shall ensure that a decision ~~*refusing or*~~ granting early dismissal ...)

Chapter IV

Article 14 Award of costs

Finland has no reservations regarding the proposed wording of the article 14 and recitals 31 and 31 a. However, in our opinion, it is reasonable to use the wording already used in other instruments. Therefore, Finland prefers the former option proposed by the Presidency, inspired by Article 14 of Directive 2004/48/EC, as follows:

"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 **reasonable and proportionate** costs of legal representation incurred by the defendant."

Article 15 Compensation of damages

Finland supports the fact that the third word of the Article (*endeavour*) has been changed to *may*.

In addition, Finland suggests that a phrase *in accordance with national law* be added to the Article. According to the recital 31, the court should render the decision on costs in accordance with national law. It is clear, that in the event that amendments to the substantive national rules on damages were required, it would not be possible to base such amendments on this Directive, since Article 81(2)(f) TFEU empowers the legislators of the Union to ensure *the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules of civil procedure applicable in the Member States*. Also the wording of the article should be

unambiguous so that it does not require amendments to substantive national rules on damages. The wording of the Article could be as follows:

"Member States may 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 **in accordance with national law**."

Article 16 ~~Penalties~~ **Abuse of process**

Finland still has reservations regarding Article 16. The rules on early dismissal and trial costs are possible precautions against bringing unfounded action to court. In Finland, sanctioning an unfounded civil action by imposing dissuasive penalties on the claimant is not recognized and is seen as hindering access to justice. Legal sanctions concerning SLAPP-cases should be in line with national legislation. Taking into account their legal traditions, it should be left to the discretion of the Member States to determine the sanctions to be applied. From this point of view, as pointed out earlier, the proposed Article 16 on dissuasive penalties is not acceptable. Primarily Finland supports the deletion of the article.

The second alternative could be the following:
Regarding the wording proposed by the Presidency, Finland considers it important to seek consistency when defining procedural safeguards. Therefore it is reasonable to use phrases already used in other instruments.

Article 7(2) of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure provides that *Member States shall ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures as provided for in national law, where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. Such measures may, as appropriate, include awarding damages to the respondent, imposing sanctions on the applicant or ordering the dissemination of information concerning a decision as referred to in Article 15.*

Article 16 could be worded in a similar way as the above mentioned Article 7(2) of Directive (EU) 2016/943. This could be done, for instance, as follows:

Member States shall ensure that courts or tribunals seized of abusive court proceedings against public participation may ~~impose effective, proportionate and dissuasive penalties~~ ~~restrictive financial measures~~ **apply appropriate measures as provided for in national law against** the party who brought those proceedings. **Such measures may, as appropriate, include awarding damages to the defendant and imposing sanctions on the claimant** ~~**effective, proportionate and dissuasive penalties.**~~

In addition, recital 32 would be amended accordingly as follows:

The main objective of giving courts or tribunals the possibility to ~~impose penalties~~ **apply appropriate measures** is to deter potential claimants from initiating abusive court proceedings against public participation. Such ~~penalties~~ **measures** 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 threat**~~

~~**the defendant. It should be for the Member States to decide how these penalties should be paid.**~~ **Such measures could, for example, be the obligation to reimburse the costs of legal proceedings, awarding damages to the defendant or imposing sanctions on the claimant. The liability for the costs of legal proceedings alone could be an adequate measure.**

FRANCE

NOTE DES AUTORITÉS FRANÇAISES

Objet : Commentaires des autorités françaises sur le nouveau texte de compromis sur les chapitres I à IV de la proposition de directive du Parlement européen et du Conseil sur la protection des personnes qui participent au débat public contre les procédures judiciaires manifestement infondées ou abusives (« poursuites stratégiques altérant le débat public ») – Note des autorités françaises.

Réf. : Document n°16221/22 – Proposition de directive du Parlement européen et du Conseil sur la protection des personnes qui participent au débat public contre les procédures judiciaires manifestement infondées ou abusives (« poursuites stratégiques altérant le débat public »).

Suite à l'invitation de la Présidence aux délégations de transmettre leurs commentaires écrits sur le nouveau texte de compromis portant sur les chapitres I à IV de la proposition de directive du Parlement européen et du Conseil sur la protection des personnes qui participent au débat public contre les procédures judiciaires manifestement infondées ou abusives, les autorités françaises souhaitent faire part des observations suivantes :

Dans un souci de compromis, les autorités françaises sont prêtes à accepter les Chapitres I à IV de la proposition de directive ainsi que les considérants associés, tels qu'ils ressortent du document ST 16221/22, à l'exception des trois points suivants :

Chapitre II – Règles communes concernant les garanties procédurales

Article 5 - Demandes de garanties procédurales

L'équilibre des droits des parties constitue un point d'attention majeur pour les autorités françaises. La possibilité offerte au défendeur à une procédure engagée en raison de sa participation au débat public, de solliciter les différentes garanties de la directive, le cas échéant cumulativement, ne doit pas entraver excessivement le droit au recours effectif du demandeur et le principe de l'égalité des armes.

Les autorités françaises ont compris des échanges avec la Présidence que l'objectif visé est d'exiger du défendeur qu'il étaye sa demande de garanties procédurales.

Pour autant, elles constatent que **si la proposition prévoit en effet que le défendeur apporte, dans sa demande de garanties procédurales, une description des éléments sur lesquels la demande est fondée d'une part, et une description des preuves à l'appui d'autre part, elle ne prévoit pas expressément qu'il apporte directement les éléments concernant le caractère abusif de la procédure ainsi que les éléments de preuve sur lesquels il s'appuie, y compris pour ce qui concerne sa participation au débat public.**
Les autorités françaises souhaitent que des précisions soient apportées en ce sens à l'article 5.

Proposition rédactionnelle des autorités françaises :

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, in accordance with national law, for :

(a) security as provided for Article 8 ;

(b) early dismissal of manifestly unfounded claims as provided for in with Chapter III ;

(c) remedies against abusive court proceedings as provided for in with Chapter IV.

2. Such applications shall include :

(a) a ~~description of~~ the elements on which they are based, such as **the elements showing that the request was made to prevent, restrict or penalize a specific act of public participation that the defendant carried out or supported for the applications mentioned in 1 (a) and 1(c), such as the elements showing that the request was made against a specific act of public participation that the defendant carried out or supported for the applications mentioned in 1(b);**

(b) ~~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.

Chapitre III – Rejet rapide des procédures judiciaires manifestement infondées

Article 9 - Rejet rapide

Les autorités françaises regrettent que n'ait pas été retenue la proposition des Pays-Bas tendant à permettre qu'une décision de rejet soit rendue à tout stade de la procédure et non pas seulement au stade le plus précoce.

Les autorités françaises considèrent qu'une telle proposition offre un champ d'application plus large à cette demande en ne l'insérant pas dans des délais contraints. Elle permet de distinguer le moment de la présentation de cette demande (article 9) de son traitement rapide par la juridiction (article 11). Cette modification permettrait également une plus grande marge de transposition en procédure interne.

Les autorités françaises sont donc favorables à cette modification tout comme à la suppression du second paragraphe de l'article 9.

Chapitre IV - Recours contre les procédures judiciaires abusives

Article 15 - Réparation des dommages

Les autorités françaises rappellent qu'en l'état cet article n'implique pas de modifier les règles nationales françaises en matière de responsabilité civile, qui garantissent une réparation intégrale du préjudice résultant d'un abus du droit d'agir en justice.

Pour autant, les autorités françaises expriment une réserve quant à la compétence de l'UE à légiférer sur cette matière.

L'article 81(2)(f) TFUE, qui est la base juridique de cette proposition de directive, prévoit en effet que le Parlement et le Conseil adoptent des mesures visant à assurer « *l'élimination des obstacles au bon déroulement des procédures civiles, au besoin* ***en favorisant la compatibilité des règles de procédure civile*** *applicables dans les Etats membres* ».

Or, l'article 15 n'est pas une règle de procédure civile mais une règle substantielle.

Par conséquent, les autorités françaises souhaitent que cette disposition soit supprimée.

Par ailleurs, les autorités françaises notent que l'article 4 ne sera pas discuté lors du prochain groupe de travail consacré à la proposition de directive sur les procédures-bâillons. Toutefois, en vue des futures discussions sur cette disposition, les autorités françaises souhaitent rappeler leur position sur les options proposées.

Article 4 - Matières ayant une incidence transfrontière

Les autorités françaises soutiennent l'option 3 qui prévoit la suppression de l'article 4. Cette solution est conforme à celle qui a été retenue dans la plupart des instruments européens de coopération en matière civile et commerciale. En pratique, il reviendra aux juridictions de déterminer au cas par cas si une matière a ou non une incidence transfrontière.

Si l'option 3 n'était pas l'option privilégiée par les autres Etats membres, les autorités françaises pourraient soutenir l'option 2 qui prévoit une définition moins restrictive que l'option 1 et qui, comme l'option 3, permettra aux juridictions de déterminer, au regard des éléments pertinents de la situation, si une matière a une incidence transfrontière. **Si cette option était choisie, les autorités françaises s'interrogent sur l'emploi du terme « matières ». Elles estiment qu'il conviendrait de le remplacer par le terme « litiges »,** en cohérence avec la rédaction d'autres textes tel que le règlement 861/2007.

GERMANY

Vorschlag einer Richtlinie zum Schutz von Journalisten und Menschenrechtsverteidigern, die sich öffentlich beteiligen, vor offenkundig unbegründeten oder missbräuchlichen Gerichtsverfahren („Strategische Klagen gegen öffentliche Beteiligung“- SLAPP)

Stellungnahme Deutschlands zum Kompromissentwurf der Präsidentschaft zu den Kapiteln I bis IV und den entsprechenden Erwägungsgründen vom 20. Dezember 2022 (16221/22)

Wir danken dem Vorsitz für die Vorlage des erneut überarbeiteten Kompromissentwurfs und die Gelegenheit einer ausführlichen Stellungnahme.

Dabei möchten wir unseren Ausführungen voranstellen und nochmals unterstreichen, dass wir das Ziel des Richtlinienvorschlags - den Schutz von Personen, die sich am öffentlichen Diskurs beteiligten, vor missbräuchlichen Gerichtsverfahren – unterstützen.

Allerdings sehen wir auch weiterhin einen nicht unerheblichen Diskussions- und Beratungsbedarf, um mit den vorgeschlagenen Regelungen das angestrebte Ziel auch erreichen zu können.

Daher übermittelt Deutschland, unter Verweis auf die bereits abgegebenen Stellungnahmen, folgende Anmerkungen und Formulierungsvoschläge:

I. KAPITEL I „ALLGEMEINE BESTIMMUNGEN“ UND DIE ENTSPRECHENDEN ERWÄGUNGSGRÜNDE (4 BIS 22)

- ERWÄGUNGSGRUND 4A

Wir begrüßen die jetzige Formulierung des Erwägungsgrundes 4a und regen lediglich eine redaktionelle Änderung an. Im letzten Satz des Erwägungsgrundes wird Bezug genommen auf die Verfahrensgarantien in den Kapiteln III und IV.

Die allgemeinen Regeln für die Verfahrensgarantien und solche Garantien selbst sind aber auch in Kapitel II enthalten, so dass auch dieser hier Erwähnung finden sollte.

- **Artikel 2 „Geltungsbereich”**

Wir bedanken uns für die Änderungen in Artikel 2 (1), die wir sehr begrüßen.

Anregen möchten wir aber dennoch weiterhin die Streichung des Zusatzes „whatever the nature of the court or tribunal“.

- ERWÄGUNGSGRÜNDE 14 UND 15

Die Formulierungen in den Erwägungsgründen 14 und 15 sollten an Artikel 2 angepasst werden. Wir regen daher an, auch in Erwägungsgrund 14 den Zusatz „whatever the nature of the court or tribunal“ zu streichen. Zudem sollte im letzten Satz des Erwägungsgrundes 15 die Formulierung „should“ wieder durch „does“ ersetzt werden.

- **Artikel 3 „Begriffsbestimmungen”**

DEU hat noch Zweifel daran, dass die Definitionen in Artikel 3 hinreichend klar und bestimmt sind, um eine einheitliche Anwendung der RL durch die nationalen Gerichte europaweit zu gewährleisten. Die Regelungen müssen subsumtionsfähige Tatbestandsvoraussetzungen enthalten.

DEU schließt sich insoweit der Stellungnahme Frankreichs vom 8. Dezember 2022 (WK 17168/2022 INIT) an, als auch wir der Auffassung sind, dass sich die Merkmale einer SLAPP-Klage im Einzelfall erst nach einer umfänglichen Prüfung des gesamten Prozessstoffes sicher feststellen lassen.

Uns stellt sich daher die Frage, wie den Gerichten überhaupt handhabbare und ausgewogene Schutzmechanismen für SLAPP-Betroffene im laufenden Verfahren an die Hand gegeben werden können, wenn die dafür notwendigen Feststellungen erst am Ende des Prozesses getroffen werden können?

Die Definitionen in Artikel 3 bedürfen daher einer weiteren Prüfung.

- ARTIKEL 3 (1)

  Wir halten es für notwendig, die Definition des Begriffs „*öffentliche Beteiligung*“ in Artikel 3 (1) erneut zu überarbeiten.

  Die aktuelle Fassung der Definition von „*öffentlicher Beteiligung*“ setzt voraus, dass eine natürliche oder juristische Person in Ausübung ihres Rechts auf Meinungs- und Informationsfreiheit handelt.

  Die Feststellung, ob eine Veröffentlichung von der Meinungsfreiheit gedeckt ist, dürfte in den meisten SLAPP-Verfahren aber gerade Gegenstand des Verfahrens sein und daher erst am Ende des Verfahrens, nach einer gründlichen Prüfung, durch das Gericht feststellbar sein.

Dies bedeutet, dass das Gericht in der Regel nicht in der Lage sein dürfte in dem Zeitpunkt, in dem der Beklagte geltend macht, dass es sich um einen SLAPP-Fall handelt und Anträge auf Schutzmaßnahmen stellt, über diese Frage bereits abschließend zu urteilen. Der Schutz würde also ins Leere laufen.

Darüber hinaus meinen wir, dass die in Erwägungsgrund 16 enthaltenen weiteren Merkmale einer „*öffentlichen Beteiligung*" in die Definition im Regelungstext aufgenommen werden müssen.

Wir regen daher an, Artikel 3 (1) wie folgt zu fassen:

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:
1.'public participation' means any public statement or activity by a natural or legal person 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, publication or works and any preparatory activities directly linked therto.

Eine Artikel 3 (1) entsprechende Anpassung müsste dann auch im Erwägungsgrund 16 erfolgen.

- ARTIKEL 3 (3)

  Auch die Definition von „*missbräuchlichen Gerichtsverfahren gegen öffentliche Beteiligung*" bedarf einer weiteren Überarbeitung.

  Der aktuelle Wortlaut ist unglücklich, soweit formuliert wird „*court proceedings that have as their main purpose to prevent…*", denn es ist nicht das Gerichtsverfahren als solches, das den Beklagten beeinträchtigt, sondern die missbräuchliche Geltendmachung von Ansprüchen, die nicht oder nur teilweise begründet sind und/ oder eine überzogene Forderung beinhalten.

  Darüber hinaus stellen wir uns weiterhin die Frage, wie Artikel 3 (3) mit den Ausführungen in Erwägungsgrund 20a zusammenpasst.

  Während in Erwägungsgrund 20a richtiger Weise ausgeführt wird, dass auch teilweise unbegründete Klagen oder solche, die dem Grunde nach begründet sind aber einen überhöhten/ überzogenen Anspruch verfolgen, geeignet sein können, den Beklagten einzuschüchtern und von einer öffentlichen Beteiligung abzuhalten, spiegelt dies der Regelungstext nicht wieder.
  Im Regelungstext selbst wird vielmehr nur auf „unbegründete Klagen" Bezug genommen.

- **Artikel 4 „Angelegenheiten mit grenzüberschreitendem Bezug"**

Zu Artikel 4 verweisen wir auf unsere bisherigen Stellungahmen. Wir sind der Auffassung, dass zunächst auch die Artikel 17 bis 19 diskutiert werden müssen, bevor eine abschließende Befassung mit Artikel 4 erfolgen kann.

- ERWÄGUNGSGRÜNDE 21 UND 22

  Da die Diskussion zur Fassung des Artikels 4 noch nicht abgeschlossen ist, muss auch die Formulierung der Erwägungsgründe 21 und 22 weiter unter Vorbehalt stehen.

II. KAPITEL II „GEMEINSAME BESTIMMUNGEN ÜBER VERFAHRENSGARANTIEN" UND ENTSPRECHENDE ERWÄGUNGSGRÜNDE (23 BIS 26)

- **Artikel 5 "Anträge auf Verfahrensgarantien"**

Unsere Stellungnahme zu Artikel 5 steht auch weiterhin unter dem Vorbehalt der weiteren Verhandlungen zu den Kapiteln II, III und IV.

Wir möchten jedoch anmerken, dass wir uns fragen, ob Kapitel II im Lichte der in Artikel 3 formulierten Definitionen überhaupt sinnvoll aufgebaut und korrekt überschrieben ist.

Wie bereits wiederholt, unter anderem von Finnland, angesprochen, ist die in Artikel 8 vorgesehene „*Sicherheit*" ein Schutzinstrument, das nur dann zur Anwendung kommt, wenn Anhaltspunkte für ein missbräuchliches Verfahren vorliegen. Gleiches gilt nach dem Wortlaut auch für die Regelungen des Artikel 6 zu Befugnissen des Gerichts, auch nach einer Klageänderung noch über Maßnahmen nach Kapitel IV entscheiden zu können.

Beide Vorschriften beziehen sich damit ausdrücklich nur auf „*missbräuchliche Verfahren*", die nach der Definition des Artikel 3 (3) voraussetzen, dass die Klage unbegründet ist.

Damit unterscheiden im Ergebnis alle in der Richtlinie vorgesehenen Schutzinstrumente danach, ob es sich um ein „*missbräuchliches Verfahren*" handelt oder eine Klage „*offenkundig unbegründet*" (Artikel 9 - 13) ist.

Allein Artikel 7 „*Unterstützung des Beklagten im Gerichtsverfahren*" findet auf beide Konstellationen Anwendung.

Es ist daher, aus unserer Sicht, zu prüfen, ob nicht Artikel 6 und 8 in Kapitel IV zu verschieben und ggf. Artikel 5 und 7 als allgemeine Regelungen in Kapitel I zu integrieren wären.

Wobei dann auch zu prüfen wäre, ob Artikel 5 überhaupt in seiner aktuellen Ausgestaltung notwendig bleibt.

Für den Fall, dass Artikel 5 unverändert bleibt, schlagen wir vor, Absatz 3 zu streichen, da er neben Absatz 1 keinen Mehrwert hat. Sollte eine Streichung nicht erfolgen, so wäre zumindest der Wortlaut entsprechend Absatz 1 anzupassen und „*in accordance with*" durch „*as provided for in*" zu ersetzen.

- ERWÄGUNGSGRUND 23

  Unter dem Vorbehalt der weiteren Verhandlungen zu Artikel 5 möchten wir zum jetzigen Zeitpunkt folgende Anmerkungen zu Erwägungsgrund 23 machen:

  Wir bedanken uns zunächst für die Aufnahme unserer Anregungen in Satz 2 des Erwägungsgrunds 23.

  Allerdings sollte auch die Formulierung des Satzes 1 nochmals überprüft werden, da der Satz durch die bereits erfolgten Änderungen nicht mehr gut verständlich ist.

  Darüber hinaus sollte der Text nach Satz 2 gestrichen werden, da es einer solchen Erläuterung hier nicht bedarf und diese nicht zur Klarheit beiträgt.

  Wir schlagen daher für Erwägungsgrund 23 folgende Formulierung vor:

  (23) Defendants should be able to apply for – some or all – of the following procedural safeguards: a security to cover procedural costs and or damages where applicable, an early dismissal of manifestly unfounded claims, remedies against abusive court proceedings (award of costs, compensation of damages, penalties). Such procedural safeguards should be carefully applied in line with the right to an effective remedy and to a fair trial, as set out in Article 47 of the Charter, leaving the court sufficient discretion in individual cases to thoroughly review the matter at hand thereby allowing speedy dismissal of manifestly unfounded claims without restriction of the effective access to justice.

- **Artikel 6 „Nachträgliche Änderung von Klagen oder Schriftsätzen"**

Zu Artikel 6 müssen wir unsere grundsätzlichen Bedenken aufrechterhalten.

Nach unserem Verständnis ist der Zivilprozess im Grundsatz ein Prozess zwischen zwei Parteien, die um die Durchsetzung ihres privaten Rechts miteinander streiten. Das Verfügungsrecht über den Prozess im Ganzen steht daher auch den Parteien zu. Sie können durch Antrag den Beginn des Verfahrens und seinen Umfang oder seine Beendigung bestimmen. Die Parteiherrschaft ist eine der wichtigsten Grundregeln im Zivilprozess und auch Ausdruck des Grundrechts auf informationelle Selbstbestimmung.

Die Befugnis des Gerichts auch nach der Rücknahme von Anträgen noch in der Sache zu entscheiden, verstößt gegen diese Grundsätze und würde dem Gericht die Rolle einer allgemeinen Gerechtigkeitskontrolle aufdrängen. Dies ist mit dem deutschen Verständnis des Zivilprozesses nicht vereinbar.

Darüber hinaus ist die Regelung des Artikel 6 auch nicht notwendig, um den von einer SLAPP-Klage Betroffenen zu schützen. Nach deutschem Zivilprozessrecht ist eine (teilweise) Klagerücknahme nach Beginn der mündlichen Verhandlung nur noch mit Einwilligung des Beklagten möglich (§ 269 Absatz 1 ZPO). Der Beklagte kann also durch die Verweigerung seiner Einwilligung in die Rücknahme eine Fortsetzung des Verfahrens und eine Entscheidung des Gerichts erzwingen. Gegebenenfalls kann er dann - nach den gesetzlichen Regelungen im weiteren Verfahren - auch Gegenansprüche geltend machen.

Zudem ist ein SLAPP-Betroffener durch die bestehenden nationalen Regelungen auch vor einer Belastung mit Kosten geschützt. Denn das deutsche Kostenrecht für den Zivilprozess sieht vor, dass der Kläger im Falle einer (Teil-) Rücknahme die Kosten des Rechtsstreits zu tragen hat (§ 269 Absatz 3 Satz 2 ZPO). Diese Kostentragungspflicht umfasst sowohl die Gerichts- als auch die Anwaltskosten des Beklagten.

Darüber hinaus ist es dem Beklagten auch unbenommen, in einem weiteren Verfahren, den Kläger gegebenenfalls auf Schadensersatz in Anspruch zu nehmen.

Wir halten daher eine Streichung des Artikels 6 für angebracht.

Sollte eine Streichung nicht erfolgen, so muss zumindest eine flexiblere Regelung gefunden werden, so dass die Formulierung „*the Member States may*“ angeregt wird.

Darüber hinaus regen wir für diesen Fall eine Anpassung des Wortlautes entsprechend der in den Artikeln 7 und 8 gewählten Formulierung an, so dass klargestellt ist, dass sich das Instrument nur auf solche Verfahren bezieht, die sich „*gegen natürliche oder juristische Personen wegen ihrer Beteiligung am öffentlichen Diskurs*“ richten und sich auf die Sicherheiten aus Kapitel IV bezieht.

Wir schlagen daher gegebenenfalls folgende Formulierung vor:

Article 6

Subsequent amendment to claim or pleadings

Member States may ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation any subsequent amendments to the claims or the pleadings made in accordance with national law by the claimant, inculding the discontinuation of proceedings, do not affect the possibility for the court or tribunal seised of the matter to consider the court proceedings abusive and to impose remedies as provided for in Chapter IV.

- ERWÄGUNGSGRÜNDE 24 UND 25

Wie oben ausgeführt und auch bereits von anderen Mitgliedsstaaten mitgeteilt, schützt die (teilweise) Rücknahme eines Klageantrags den Kläger nicht in allen nationalen Verfahrensordnungen davor, die Kosten des Verfahrens tragen zu müssen. Wir meinen, dass diesem Umstand in den Erwägungsgründen Rechnung getragen werden muss.

Wir schlagen daher folgende Formulierung für Erwägungsgrund 24 vor:

(24) Where applicable, claimants may 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.
In jurisdicitions that allow for such a strategy, such a withdrawal or amendment should therefore not affect the possibility for the courts seised to impose remedies against abusive court proceedings.

Erwägungsgrund 25 sollte gestrichen werden, da er keinen Mehrwert hat.

- **Artikel 7 „Beteiligung Dritter"**

Wir schließen uns der Auffassung Österreichs an, dass die Regelung in Artikel 7 gestrichen werden sollte. Die Regelung ist nicht verhältnismäßig.
Das damit angestrebte Ziel, Betroffenen in SLAPP-Fällen Unterstützung zur Verfügung zu stellen, kann mit einer Beratung und Unterstützung außerhalb des Prozesses erreicht werden.
Neben der anwaltlichen Beratung, die wir in SLAPP-Fällen für die wichtigste Hilfestellung für die Betroffenen halten, steht es Betroffenen immer frei, sich von weiteren Personen oder Organisationen unterstützen zu lassen. Sollten diese Organisationen Informationen haben, die für den Betroffenen in

einem Gerichtsverfahren von Nutzen sein könnten, so können diese problemlos über den Betroffenen selbst und dessen Rechtsbeistand zum Prozessstoff gemacht werden.

Es bedarf dazu keiner Beteiligung von Dritten am Zivilprozess. Die Schaffung einer solchen Interventionsmöglichkeit für einen Dritten, der kein eigenes rechtliches Interesse an dem Verfahren hat, würde die Verfahren unnötig verzögern und ggf. auch verteuern und hätte somit keinen Mehrwert. Es ist mithin nicht ersichtlich, dass ein solcher Eingriff in die nationalen Prozessordnungen hier erforderlich ist. Dies insbesondere nicht vor dem Hintergrund, dass mangels einer Folgenabschätzung die Zahl der SLAPP-Verfahren nicht bekannt ist.

Sollte eine Streichung von Artikel 7 und Erwägungsgrund 25a nicht erfolgen, so muss den Mitgliedsstaaten zumindest die größtmögliche Flexibilität eingeräumt werden.

Wir schlagen daher für diesen Fall folgende Formulierungen vor:

Article 7

Support to the defendant

Member States may take the necessary measures to ensure that a court or tribunal seised of court proceedings brought against natural or legal persons on account of their engagement in public participation may accept that non-governmental organisations may support the defendant in those proceedings.

(25a) *To provide a more effective level of protection, Member States may enable non-governmental organisations to support a person who is a defendant in court proceedings brought against natural or legal persons on account of their engagement in public participation. This support could take form of providing information relevant to the case, intervening in favour of the defendant in the court proceedings or other form as provided for in the national law. The conditions under which non-governmental organisations could support the defendant and the procedural requirements for such support, such as time limits where appropriate, are governed by national law.*

- **Artikel 8 „Sicherheit"**

Zu Art. 8 möchten wir nochmals auf unsere bereits vorgetragenen Bedenken verweisen.

Wir haben Zweifel daran, dass die vorgeschlagene Regelung tatsächlich den gewünschten Nutzen für den Beklagten hat und befürchten, dass dem erhebliche Nachteile und Risiken gegenüberstehen.

Zum einen ist bereits fraglich, ob eine Sicherheitsleistung, die den Beklagten ja nicht unmittelbar von ihn ggf. belastenden finanziellen Bürden befreit, einen finanzkräftigen Kläger tatsächlich beeindruckt. Denn nach den von der KOM regelmäßig angeführten Fallbeispielen sind SLAPP-Kläger in der Regel wirtschaftlich potent und werden daher eine Sicherheitsleistung schlicht in ihr Vorhaben einkalkulieren.

Zum anderen stellt die Regelung das mit der Sache befasste Gericht vor große Herausforderungen. Denn das Gericht muss für seine Entscheidung über eine Sicherheitsleistung dem Grunde und der Höhe nach, ggf. zu einem sehr frühen Zeitpunkt im Verfahren, eine Prüfung etwaiger Missbrauchselemente durchführen und dazu auch Stellung beziehen. Diese Prüfung verzögert das Verfahren und birgt zudem die Gefahr, dass das Gericht sich befangen macht oder der Kläger dies zumindest behauptet.

Wir sehen hierin ein erhebliches Potential für Verfahrensverzögerungen und den Missbrauch dieses Instrumentariums.

Darüber hinaus sehen wir es als sehr problematisch an, dass eine Vorschrift zur Aufbürdung von Sicherheitsleistungen (die nicht an ganz enge Kriterien geknüpft ist) ein schwer kalkulierbares Kostenrisiko für alle Kläger bedeutet und damit den Zugang zu den Gerichten erschwert. Allein die jetzt gewählte Formulierung in Art. 8 ändert daran nichts. Denn in den Fällen, in denen sich bspw. eine natürliche Person gegen Veröffentlichungen eines großen Medienhauses zur Wehr setzen will, kann das Verlangen nach einer Sicherheit (insbesondere, wenn man mögliche Schadensersatzforderungen hier mit einbeziehen würde) den Kläger unverhältnismäßig belasten.

Wir regen daher an, Artikel 8 entweder zu streichen oder den Mitgliedsstaaten eine größtmögliche Flexibilität einzuräumen, indem die Formulierung „*shall*“ durch ein „*may*“ ersetzt wird.

Darüber hinaus müsste die Formulierung „*or for procedural costs and damages*“ gestrichen werden.

Wir verweisen zu der Problematik, die mit einer materiell-rechtlichen Regelung zum Schadensersatz verbunden ist, auf unsere Ausführungen zu Artikel 15 des RL-Vorschlags und möchten zugleich auf weitere Schwierigkeiten hinweisen.

Zum einen kennt das nationale Recht eine Haftung aufgrund prozessualen Fehlverhaltens nur bei einer vorsätzlichen Schädigung des Prozessgegners oder dort, wo als Folge des Prozesses, außerhalb des prozessualen Streitgegenstandes, ein Schaden entsteht.

Zum anderen sind es im nationalen Zivilprozessrecht die Parteien, die den Prozessstoff bestimmen. Das Gericht kann sich daher überhaupt nur dann mit einer Schadensersatzforderung und mithin auch einer darauf gerichteten Sicherheitsleistung befassen, wenn die Partei diesen bereits – in prozessual zulässiger Weise – geltend gemacht hat.

Da es sich dabei um besondere prozessuale Konstellationen handelt, halten wir eine Einbeziehung von Sicherheitsleistungen für Schadensersatzansprüche in Artikel 8 für nicht sinnvoll.

- ERWÄGUNGSGRUND 26

  Für den Fall, dass Artikel 8 und Erwägungsgrund 26 nicht gestrichen werden, regen wir an, den Wortlaut des Erwägungsgrundes entsprechend der für Artikel 8 vorgeschlagenen Änderungen anzupassen.

III. KAPITEL III „VORZEITIGE EINSTELLUNG VON OFFENKUNDIG UNBEGRÜNDETEN GERICHTSVERFAHREN" UND ENTSPRECHENDE ERWÄGUNGSGRÜNDE (26A BIS 30A)

- **Überschrift des Kapitels III**

Wir begrüßen die Änderung der Überschrift des Kapitels III und möchten zugleich anregen, diese vollständig zu überarbeiten. Kapitel III befasst sich mit unterschiedlichen Verfahrensregelunge, die bei „*manifestly unfounded claims*" eingreifen, so dass die Überschrift, in Anlehnung an die Überschrift zu Kapitel IV, weiter gefasst werden sollte und bspw. „*Remedies against manifestly unfounded claims*" lauten könnte.

- **Artikel 9 „Vorzeitige Einstellung"**

Wir möchten anregen, auch die Überschrift des Artikel 9 zu ändern. Die Bezeichungn „*early dismissal*" suggeriert, dass die Entscheidung des Gerichts ohne gründliche Prüfung, also „*frühzeitig*" erfolgen soll. Nach der sehr zu begrüßenden Änderung des Wortlautes der Vorschrift ist aber jetzt klargestellt, dass es sich um eine Entscheidung des Gerichts handelt, die aufgrund einer gründlichen Prüfung - so früh als möglich im Prozess - getroffen werden soll. Daher schlagen wir vor, die Überschrift zu ändern und die Regelung bspw. nur mit „*dismissal*" zu überschreiben oder die Formulierung „*dismissal at the earliest possible stage*" zu wählen.

Im Übrigen begrüßen wir die neue Formulierung des Artikel 9 und können diese mittragen.

Absatz 2 des Artikel 9 erscheint uns nach der Änderung des Absatzes 1 nicht mehr sinnvoll. Wir regen eine Streichung an.

- ERWÄGUNGSGRUND 26A

  Wir regen an, Erwägungsgrund 26a auf einen notwendigen Inhalt zu beschränken und Ausführungen zur Wirkung der Abweisung einer Klage als offenkundig unbegründet zu streichen. Nach dem Wortlaut des Artikels 9 obliegt es den nationalen Gesetzgebern („*in accordance with national law*"), die Regelungen zum Verfahren auszugestalten. Soweit

einheitliche Verfahrensgarantien etabliert werden sollen, sind diese in den weiteren Artikeln des Kaptitels III geregelt.

Darüber hinaus meinen wir, dass die Formulierungen an die jetzt in anderen Erwägungsgründen gewählten Formulierungen und Begriffe angepasst werden sollten, um eine Einheiltlichkeit zu erreichen, die die Umsetzung erleichtern wird.

Wir schlagen daher für Erwägungsgrund 26a folgenden Wortlaut vor:

(26a) *Member States shall adopt new rules or apply existing rules under national law so that a court or tribunal seised of court proceedings brought against natural or legal persons on account of their engagement in public participation can decide to dismiss manifestly unfounded claims as soon as it has received the necessary information in order to justify such a decision. This provision does not preclude the application of existing national rules which enable national courts to assess admissibility of an action even before the proceedings are initiated.*

- **Artikel 10 „Aussetzung des Hauptverfahrens"**

DEU begrüßt die Streichung des Artikels 10 und der Erwägungsgründe 27 und 28.

- **Artikel 11 „Beschleunigtes Verfahren"**

Wir begrüßen die neue Überschrift des Artikel 11 und können diesen so mittragen.

- ERWÄGUNGSGRUND 29

Wir sind jedoch nicht sicher, ob der Bezug auf „*missbräuchliche Verfahren*" in Erwägungsgrund 29 richtig verortet ist.

Satz 1 des Erwägungsgrundes gilt ausdrücklich für Artikel 9, also die Abweisung „*offenkundig unbegründeter Klagen*".

Soweit in Satz 3 und 4 dann Ausführungen zu Anträgen auf „*andere Verfahrensgarantien*" gemacht werden, können diese sich sinnhafter Weise nur auf die Garantien aus Artikel 7 „*Unterstützung des Beklagten in Gerichtsverfahren*" und Artikel 8 „*Sicherheit*" beziehen. Denn das angerufene Gericht kann über die sonstigen Verfahrensgarantien (Artikel 6, 14, 15 und 16) erst mit seiner Endentscheidung in der Sache befinden.

Hier käme dem Betroffenen also nur eine insgesamt zügige Verfahrensführung zu Gute. Dies sollte – so es denn gewollt ist – dann aber in Kapitel I oder II (siehe hierzu aber unsere Anmerkungen zu Artikel 5) geregelt werden.

- **Artikel 12 „Beweislast"**

Wir begrüßen die Umbenennung des Artikels 12 und die neue Formulierung.

- ERWÄGUNGSGRUND 30

  Wir meinen, dass der zweite Satz des Erwägungsgrundes 30 nicht zur Klarstellung beiträgt und daher entfallen könnte. Es wäre daher zu überlegen, den gesamten Erwägungsgrund entfallen zu lassen. Die Regelung in Artikel 12 ist aus sichheraus verständlich.

- **Artikel 13 „Beschwerde"**

Wir begrüßen die Änderungen in Artikel 13 und können diesen so mittragen.

- ERWÄGUNGSGRUND 30A

  Erwägungsgrund 30a sollte gestrichen werden, da die Regelung aus sichheraus verständlich ist.

  Zudem ist der Satz 2 unzutreffend. Die Regelung des Artikel 9 bezieht sich auf „*offenkundig unbegründete Klagen*". Diese soll das Gericht zum frühstmöglichen Zeitpunkt abweisen können. Satz 2 des Erwägungsgrundes spricht hingegen davon, dass der Fortgang „*missbräuchlicher Verfahr*" verhindert werden soll. Dies ist jedoch nicht Regelungsinhalt des Artikel 13.

IV. KAPITEL IV „RECHTSBEHELFE GEGEN MISSBRÄUCHLICHE GERICHTSVERFAHREN" UND ENTSPRECHENDE ERWÄGUNGSGRÜNDE (31 BIS 32)

- **Artikel 14 „Erstattung der Kosten"**

Den Formulierungsvorschlag für Artikel 14 können wir mit der Maßgabe mittragen, dass Erwägungsgrund 31 entsprechend angepasst wird.

- ERWÄGUNGSGRUND 31

  Im Hinblick darauf, dass in Artikel 14 der Passus "unless such costs are excessive, unreasonable or disproportionate" gestrichen wurde, sollte auch der Satz 2 in Erwägungsgrund 31 gestrichen werden.

Der Erwägungsgrund hätte dann folgenden Wortlaut:

(31) Costs should include all costs of the proceedings, including the costs of legal representation incurred by the defendant. The court should render the decisions on costs in accordance with national law.

- **Artikel 15 „Schadensersatz"**

Wir weisen erneut darauf hin und schließen uns den Anmerkungen Frankreichs dazu an, dass diesseits davon ausgegangen wird, dass die materiell-rechtliche Regelung des Artikels 15 nicht von der Rechtsgrundlage des Artikels 81 Absatz 2 Buchstabe f AEUV gedeckt ist.

Wir schlagen daher die Streichung dieses Artikels vor.

Sollte eine Streichung nicht in Betracht kommen, so halten wir allerdings die jetzt erfolgte Änderung, die den Mitgliedsstaaten Flexibilität einräumt, für zwingend erforderlich.

Darüber hinaus müsste aber auch weiter geprüft werden, wie die bestehenden Zweifelsfragen zur internationalen Zuständigkeit des Gerichts und zum anwendbaren Recht zu beantworten sind, da hier ja grenzüberschreitende Fälle geregelt werden und sich diese Fragen nur unter Anwendung des IPR beantworten lassen.

- ERWÄGUNGSGRUND 31A

  Darüber hinaus unterstützen wir die Position Österreichs und Estlands und bitte ebenfalls um eine Streichung des Satzes 2 in Erwägungsgrund 31a.

- **Artikel 16 „Sanktionen"**

Unter Bezugnahme auf unsere Stellungnahmen unterstützen wir den bereits von der CZE-Präsidentschaft und Finnland unterbreiteten Vorschlag, Artikel 16 ähnlich der Regelung des Artikels 7 (2) der Richtlinie (EU) 2016/943 zu fassen.

Es erscheint sachgerecht, den Mitgliedsstaaten hier größere Spielräume als bislang zuzubilligen, indem auf „geeignete Maßnahmen, wie sie im nationalen Recht vorgesehen sind" abgestellt wird.

Wir schlagen daher eine neue Überschrift für Artikel 16 und folgende Fromulierung vor:

Article 16

Measures against abusive court proceedings

Member States shall ensure that courts or tribunals seised of abusive court proceedings against public participation may apply appropriate measures as provided for in national law against the party who brouhgt those proceedings. Such measures may, as appropriate, include awarding damages to the defendant and imposing sanctions on the claimant.

- ERWÄGUNGSGRUND 32

Entsprechend der vorgeschlagenen Änderungen in Artikel 16 wäre auch Erwägungsgrund 32 neu zu fassen. Wir können uns insoweit dem Vorschlag Finnlands für die folgende Formulierung anschließen:

(32) The main objective of giving courts or tribunals the possibility to apply appropriate measures is to deter potential claimants from initiating abusive court proceedings against public participation. Such measures should be proportionate to the elements of abuse identified. Such measures could, for example, be the obligation to reimburse the costs of legal proceedings, awarding damages to the defendant or imposing sanctions on the claimant. The liability for the costs of legal proceedings alone could be an adequate measure.

COURTESY TRANSLATION

Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings
("Strategic lawsuits against public participation" – SLAPP)

German position statement on the Presidency draft compromise on Chapters I to IV and the corresponding recitals of 20 December 2022 (16221/22)

We thank the Presidency for presenting the further revised draft compromise and for the opportunity to submit a detailed position statement.

We would like to preface our comments by reiterating our support for the goal of the proposed Directive of protecting individuals who engage in public discourse from abusive court proceedings.

However, we still see a considerable need for discussion and consultation in order to be able to achieve the desired objective through the regulations proposed.

With reference to its previous statements, Germany therefore submits the following comments and drafting proposals:

I. CHAPTER I "GENERAL PROVISIONS" AND THE CORRESPONDING RECITALS (4 TO 22)

- RECITAL 4A

We welcome the current wording of recital 4a and propose only an editorial change. The last sentence of the recital refers to the procedural safeguards as provided for in Chapters III and IV.

However, the common rules on procedural safeguards as well as such safeguards themselves are also set out in Chapter II, which should therefore also be mentioned here.

- **Article 2 "Scope"**

We thank the Presidency for the amendments to Article 2(1), which we very much welcome. However, we would still like to encourage the deletion of the clause "*whatever the nature of the court or tribunal*".

- RECITALS 14 AND 15

The wording in recitals 14 and 15 should be aligned with Article 2. We therefore suggest also deleting the clause "*whatever the nature of the court or tribunal*" in recital 14. In addition, in the last sentence of recital 15, the wording "*should*" should be changed back to "*does*".

- **Article 3 "Definitions"**

Germany still has doubts as to whether the definitions in Article 3 are clear and precise enough to ensure uniform application of the Directive by national courts throughout Europe. The provisions must contain subsumable constituent elements.

In this regard, Germany agrees with France's statement of 8 December 2022 (WK 17168/2022 INIT) in so far as we also take the view that the elements of each individual SLAPP claim can only be determined after a full examination of the entire subject-matter of the proceedings.

We therefore see uncertainty as to how the courts can be given workable and balanced protection mechanisms for the targets of SLAPP claims in ongoing proceedings if the findings needed for these can only be made at the end of the proceedings.

The definitions in Article 3 therefore require further consideration.

- ARTICLE 3(1)

  We consider it necessary to revise the definition of the term "*public participation*" in Article 3(1) once again.

  The current version of the definition of "*public participation*" presupposes that a natural or legal person is acting in the exercise of the right to freedom of expression and information.

  However, in most SLAPP proceedings, the question of whether a publication is covered by the freedom of expression is likely itself to be the very subject of the proceedings, and will therefore only be decided on by the court at the end of the proceedings after a thorough examination.

  This means that, in general, the court will not be in a position to give a final ruling on this issue at the point in time when the defendant claims that the case is a SLAPP case and makes requests for protective measures. Protection mechanisms would therefore be ineffective.

We also believe that the other elements of "*public participation*" contained in recital 16 need to be included in the definition in the regulatory text itself.

We therefore propose that Article 3(1) be worded as follows:

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:
1.'public participation' means any public statement or activity by a natural or legal person 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, publication or works and any preparatory activities directly linked thereto.

An adjustment in line with Article 3(1) would then also have to be made in recital 16.

- ARTICLE 3(3)

  The definition of "abusive court proceedings against public participation" also needs further revision.

  The current wording is unfortunate in so far as it reads "court proceedings that have as their main purpose to prevent …"; here, it is not the judicial proceedings themselves that adversely affect the defendant, but the abusive claims that are fully or partially unfounded and/or contain excessive demands.

  Furthermore, it remains unclear to us how Article 3(3) corresponds with the remarks made in recital 20a.

  Recital 20a rightly states that partially unfounded claims or claims that are essentially well founded but pursue an excessive amount or remedy may also be capable of intimidating the defendant and discouraging public participation. However, this is not reflected in the regulatory text.
  Rather, the text itself refers only to "unfounded claims".

- **Article 4 "Matters with cross-border implications"**

With regard to Article 4, we refer to our statements submitted previously. We believe that Articles 17 to 19 need to be discussed before a final assessment of Article 4 can take place.

- RECITALS 21 AND 22

Since discussions on the wording of Article 4 have not yet been concluded, the wording of recitals 21 and 22 must also remain subject to reservation.

II. CHAPTER II "COMMON RULES ON PROCEDURAL SAFEGUARDS" AND THE CORRESPONDING RECITALS (23 TO 26)

- **Article 5 "Applications for procedural safeguards"**

Our position on Article 5 remains subject to the ongoing negotiations on Chapters II, III and IV.

However, we would like to point out at this stage that we wonder whether, in the light of the definitions set out in Article 3, Chapter II is at all properly structured and titled.

As has been pointed out on several occasions, including by Finland, the "*security*" provided for in Article 8 is a protective instrument that only comes into effect where there are indications of abusive proceedings. The same applies, according to the wording, to the provisions of Article 6 concerning the court's powers to decide on measures under Chapter IV even after an amendment to the claim.

Both provisions expressly refer only to "*abusive proceedings*", which, according to the definition in Article 3(3), require that the claim is unfounded.

Consequently, all the protective instruments provided for in the Directive differentiate between whether the proceedings are "*abusive proceedings*" or whether a claim is "*manifestly unfounded*" (Articles 9 to 13).

Only Article 7 "*Support to the defendant in court proceedings*" applies to both constellations.

It is therefore necessary, in our view, to examine whether Articles 6 and 8 should be moved to Chapter IV and whether Articles 5 and 7 should be integrated as general provisions in Chapter I.

In this case, it would then also have to be examined whether Article 5 is still necessary at all in its current form.

In the event that Article 5 remains unchanged, we propose deleting paragraph 3, as it has no added value beyond paragraph 1. If it is not to be deleted, the wording should at least be adapted in line with paragraph 1, with "*in accordance with*" being replaced by "*as provided for in*".

- RECITAL 23

Subject to the ongoing negotiations on Article 5, we would like to make the following comments on recital 23 at this stage:

First of all, we are grateful for the inclusion of our suggestions in sentence 2 of recital 23.

However, the wording of sentence 1 should also be reviewed once again, as the sentence is no longer easy to understand due to the changes made.

Furthermore, the text after sentence 2 should be deleted, as there is no need for such an explanation here and it does not contribute to clarity.

We therefore propose the following wording for recital 23:

(23) Defendants should be able to apply for – some or all – of the following procedural safeguards: a security to cover procedural costs and or damages where applicable, an early dismissal of manifestly unfounded claims, remedies against abusive court proceedings (award of costs, compensation of damages, penalties). Such procedural safeguards should be carefully applied in line with the right to an effective remedy and to a fair trial, as set out in Article 47 of the Charter, leaving the court sufficient discretion in individual cases to thoroughly review the matter at hand thereby allowing speedy dismissal of manifestly unfounded claims without restriction of the effective access to justice.

- **Article 6 "Subsequent amendment to claim or pleadings"**

We maintain our fundamental concerns regarding Article 6.

In our understanding, civil proceedings are in principle proceedings between two parties who are in dispute with each other over the enforcement of their private rights. The parties therefore also have the right to dispose of the proceedings as a whole. They can, by filing an application, determine the beginning of the proceedings, as well as their scope or discontinuation. The power of the parties to determine the course of the proceedings is one of the most important basic rules in civil procedure and also an expression of the fundamental right to self-determination in respect of information.

The power of the court to decide on the merits even after the withdrawal of applications violates these principles and would impose on the court the task of controlling justice in general. This is not compatible with the German understanding of civil procedure.

Moreover, the provision of Article 6 is not even necessary to protect a target of a SLAPP claim. According to German civil procedure law, a (partial) withdrawal of legal action after the beginning of the oral hearing is only possible with the consent of the defendant (section 269 (1) of the Code of Civil Procedure [*Zivilprozessordnung*, ZPO]). The defendant can thus force a continuation of the proceedings and a decision by the court by refusing to consent to the withdrawal. According to statutory rules, the defendant may then also assert counterclaims in the further proceedings.

In addition, a person targeted by a SLAPP claim is also protected by existing national regulations from being burdened with costs. Specifically, the German law on costs for civil proceedings provides that in the case of a (partial) withdrawal, the claimant is under obligation to bear the costs of the legal dispute (section 269 (3) sentence 2 ZPO). This obligation to bear the costs includes both the court costs and the defendant's lawyer's fees.

Furthermore, the defendant is also at liberty to claim damages, if applicable, from the claimant in further proceedings.

Consequently, we take the view that Article 6 should be deleted.

If Article 6 is not to be deleted, then a regulation must be found that at least offers greater flexibility. To this end, we advocate the wording "*the Member States may*".

In this case we would also suggest an adjustment of the wording in line with the wording chosen in Articles 7 and 8 in order to make clear that this instrument concerns only proceedings that are brought "*against natural or legal persons on account of their engagement in public participation*" and refers to the remedies in Chapter IV.

We therefore propose the following wording:

Article 6

Subsequent amendment to claim or pleadings

Member States may ensure that in court proceedings brought against natural or legal persons on account of their engagement in public participation any subsequent amendments to the claims or the pleadings made in accordance with national law by the claimant, including the discontinuation of proceedings, do not affect the possibility for the court or tribunal seised of the matter to consider the court proceedings abusive and to impose remedies as provided for in Chapter IV.

- RECITALS 24 AND 25

  As stated above and already communicated by other Member States, the (partial) withdrawal of a claim does not protect the claimant in all national procedural codes from having to bear the costs of the proceedings. We believe that this must be taken into account in the recitals.

We therefore propose the following wording for recital 24:

(24) Where applicable, claimants may 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 proceedings, leaving the defendant with no chance to be reimbursed of procedural costs.
In jurisdictions that allow for such a strategy, such a withdrawal or amendment should therefore not affect the possibility for the courts seised to impose remedies against abusive court proceedings.

Recital 25 should be deleted as it has no added value.

- **Article 7 "Support to the defendant in court proceedings"**

We agree with the view taken by Austria that the provision in Article 7 should be deleted.
The provision is not proportionate.
The objective pursued here of making support available to the targets in SLAPP cases can be achieved through advice and support options outside of court proceedings.
In addition to legal advice, which we consider to be the most important support for the targets in SLAPP cases, affected persons are always free to seek support from other persons or organisations. If these organisations have information that could be of use to targets in court proceedings, this information can easily be contributed to the case material via the affected persons themselves and their legal counsel.

This does not require any participation of third parties in the civil proceedings. The creation of such a possibility of intervention for third parties who have no legal interest of their own in the proceedings would unnecessarily delay the proceedings and possibly also make them more expensive, and would thus have no added value. It is therefore not apparent why such an encroachment on national procedural rules would be necessary here. This is all the more true given that, in the absence of an impact assessment, the number of SLAPP proceedings is not known.

If Article 7 and recital 25a are not to be deleted, the Member States must at least be afforded the greatest possible flexibility.

In this case, we propose the following wording:

Article 7

Support to the defendant

Member States may take the necessary measures to ensure that a court or tribunal seised of court proceedings brought against natural or legal persons on account of their engagement in public participation may accept that non-governmental organisations may support the defendant in those proceedings.

(25a) *To provide a more effective level of protection, Member States may enable non-governmental organisations to support a person who is a defendant in court proceedings brought against natural or legal persons on account of their engagement in public participation. This support could take form of providing information relevant to the case, intervening in favour of the defendant in the court proceedings or other form as provided for in the national law. The conditions under which non-governmental organisations could support the defendant and the procedural requirements for such support, such as time limits where appropriate, are-governed by national law.*

- **Article 8 "Security"**

As regards Article 8, we would like to refer once again to our previously submitted concerns.

We have doubts as to whether the proposed provisions actually offer the intended benefits for the defendant and fear that there are at the same time considerable disadvantages and risks.

On the one hand, it appears questionable whether the deposit of a security, which itself does not immediately relieve the defendant of any financial burden placed on him/her, would at all dissuade a claimant in a strong financial position. After all, as seen in the cases regularly cited by the Commission as examples, SLAPP claimants are usually in a position of financial strength and will therefore simply include the provision of security in their calculations.

On the other hand, the provision poses great challenges for the court seised with the matter. In order to decide on the grounds for and the amount of a security deposit, the court would have to examine and address any elements of abuse at a very early stage of the proceedings. This examination would stall the proceedings and also entail the risk of the court becoming biased or, at least, of the claimant alleging that the court is biased.

We see considerable potential here for delays in the proceedings and the risk that this instrument could be abused.

Furthermore, we consider it highly problematic that a provision stipulating the deposit of a security (that is not subject to very narrow criteria) would constitute a cost risk for all claimants that is very hard to calculate and may impede access to the courts. The current wording chosen in Article 8 does not alter this. This is because in cases where, for example, a natural person wishes to defend themselves against publications by a large media company, the requirement of a security could place a

disproportionate burden on the claimant (especially if possible claims for damages were to be included in the amount).

We therefore suggest either deleting Article 8 or affording the Member States the greatest possible flexibility by replacing the wording "*shall*" with "*may*".

Furthermore, the wording "*or for procedural costs and damages*" should be deleted.

With regard to the problems associated with a substantive provision on damages, we refer to our comments on Article 15 of the proposed Directive, and at the same time would like to point out further difficulties we see.

Firstly, our national law only recognises liability on the basis of procedural misconduct in cases of intentional damage to the opposing party, or in cases where damage arises as a consequence of the proceedings, outside of the procedural subject matter of the dispute.

Secondly, under German civil procedural law, it is the parties who determine the subject matter of the proceedings. The court can therefore only ever deal with a claim for damages, or with a security deposit in connection with that claim, if the party has already asserted it in a procedurally admissible manner.

Since these are specific procedural constellations, we do not consider it appropriate to include security deposits for claims for damages in Article 8.

- RECITAL 26

  In the event that Article 8 and Recital 26 are not to be deleted, we suggest that the wording of the recital be adapted in line with the amendments proposed for Article 8.

III. CHAPTER III "EARLY DISMISSAL OF MANIFESTLY UNFOUNDED CLAIMS" AND THE CORRESPONDING RECITALS (26A TO 30A)

- **Title of Chapter III**

We welcome the amendment to the title of Chapter III and would at the same time suggest that it be completely revised. Chapter III deals with different procedural rules that are applicable in the case of "*manifestly unfounded claims*". The title should therefore be worded more broadly and, in line with the title of Chapter IV, could for example read "*Remedies against manifestly unfounded claims*".

- **Article 9 “Early dismissal”**

We would like to suggest that the title of Article 9 should also be changed. The term "*early dismissal*" suggests that the decision of the court should be made without a thorough examination, i.e. prematurely. However, following the very welcome change in the wording of the provision, it is now clear that this is a decision of the court that is to be taken on the basis of a thorough examination – as *early as possible* in the trial. Therefore, we suggest changing the title of the provision to simply "*dismissal*", for example, or choosing the wording "*dismissal at the earliest possible stage*".

Apart from this, we welcome the new wording of Article 9 and can support it.

We find that paragraph 2 of Article 9 no longer makes sense after the amendment of paragraph 1. We suggest deleting it.

- RECITAL 26A

We propose to limit recital 26a to necessary content only and to delete remarks on the effect of the dismissal of an action as manifestly unfounded. According to the wording of Article 9, it is the task of the national legislators ("*in accordance with national law*") to develop the procedural rules. Insofar as uniform procedural safeguards are to be established, these are regulated in the other articles of Chapter III.

In addition, we believe that the wording should be adapted to the wording and terms now chosen in other recitals in order to achieve uniformity that will facilitate transposition.

We therefore propose the following wording for recital 26a:

(26a) *Member States shall adopt new rules or apply existing rules under national law so that a court or tribunal seised of court proceedings brought against natural or legal persons on account of their engagement in public participation can decide to dismiss manifestly unfounded claims as soon as it has received the necessary information in order to justify such a decision. This provision does not preclude the application of existing national rules which enable national courts to assess admissibility of an action even before the proceedings are initiated.*

- **Article 10 “Stay of the main proceedings”**

Germany welcomes the deletion of Article 10 and of recitals 27 and 28.

- **Article 11 “Accelerated treatment”**

We welcome the new title of Article 11 and are happy to support this formulation.

- RECITAL 29

However, we are not sure whether the reference to "*abusive court proceedings*" in recital 29 is in the correct place.

Sentence 1 of the recital explicitly applies to Article 9, i.e. the dismissal of "*manifestly unfounded*" claims.

As far as the third and fourth sentences then refer to applications for "*other procedural safeguards*", these can only logically concern the safeguards in Article 7 "Support to the defendant in court proceedings" and Article 8 "Security". This is because the court seised with the matter can only decide on the other procedural safeguards (Articles 6, 14, 15 and 16) in its final decision on the merits.

In this case, the person concerned would only be helped by a speedy conduct of the proceedings as a whole. However, this should, if so intended, be regulated in Chapter I or II (please see our comments on Article 5).

- **Article 12 "Substantiation of claims"**

We welcome the renaming of Article 12 and the new wording.

- RECITAL 30

We believe that the second sentence of recital 30 does not add clarity and could therefore be deleted. It would thus be worth considering deleting the recital entirely. The provision in Article 12 is comprehensible on its own.

- **Article 13 "Appeal"**

We welcome the amendment in Article 13 and are happy to support this formulation.

- RECITAL 30A

Recital 30a should be deleted as the provision is comprehensible on its own.

Furthermore, the second sentence is incorrect. The provision of Article 9 refers to "*manifestly unfounded*" claims. The court is, according to this regulation, to be able to dismiss such claims at the earliest possible stage. Sentence 2 of the recital, on the other hand, refers to preventing the continuation of "*abusive court proceedings*". This, however, is not the regulatory substance of Article 13.

IV. CHAPTER IV "Remedies against abusive court proceedings" and the corresponding recitals (31 to 32)

- **Article 14 "Award of costs"**

We are able to support the drafting proposal for Article 14 with the proviso that recital 31 be amended in line with this wording.

- RECITAL 31

  In view of the fact that in Article 14 the phrase "*unless such costs are excessive, unreasonable or disproportionate*" has been deleted, the second sentence of recital 31 should also be deleted.

  The recital would then read as follows:

  (31) Costs should include all costs of the proceedings, including the costs of legal representation incurred by the defendant. The court should render the decisions on costs in accordance with national law.

- **Article 15 "Compensation of damages"**

We would like to endorse France's comments on this provision and reiterate our assessment that the substantive rule of Article 15 is not covered by the legal basis of Article 81(2)(f) TFEU.

We therefore propose the deletion of this Article.

Should a deletion, however, not be viable, we consider the current amendment, which affords flexibility to the Member States, to be indispensable.

In addition, further examination would be necessary as to how the existing doubts regarding the international jurisdiction of the court and the applicable law should be settled, since cross-border cases are to be regulated here and such matters can only be resolved by applying private international law.

- RECITAL 31A

  Furthermore, we support the position of Austria and Estonia and also ask for the deletion of sentence 2 in recital 31a.

- **Article 16 "Sanctions"**

With reference to our previous submissions, we support the proposal made by the Czech Presidency and Finland to draft Article 16 in line with the provision of Article 7(2) of Directive (EU) 2016/943.

It appears expedient to afford the Member States greater flexibility by referring to "*suitable measures as provided for in national law*".

We therefore propose a new title for Article 16 and the following wording:

Article 16

Measures against abusive court proceedings

Member States shall ensure that courts or tribunals seised of abusive court proceedings against public participation may apply appropriate measures as provided for in national law against the party who brought those proceedings. Such measures may, as appropriate, include awarding damages to the defendant and imposing sanctions on the claimant.

- RECITAL 32

In line with the proposed amendments to Article 16, recital 32 would also have to be reworded. In this respect, we are able to support Finland's proposal for the following wording:

(32) The main objective of giving courts or tribunals the possibility to apply appropriate measures is to deter potential claimants from initiating abusive court proceedings against public participation. Such measures should be proportionate to the elements of abuse identified. Such measures could, for example, be the obligation to reimburse the costs of legal proceedings, awarding damages to the defendant or imposing sanctions on the claimant. The liability for the costs of legal proceedings alone could be an adequate measure.

HUNGARY

CHAPTER I

General provisions

[…]

Article 3

Definitions

[…]

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~~ which pursue 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.

Commented [HU1]: Maintaining our previous views we reccommend deleting Article 3 (3) point (b) as the mere fact that the claimant is initiating multiple proceedings in relation to similar matters does not imply that the procedure in question is a SLAPP. Therefore, it should not open the way to the overly-broad application of SLAPP instruments. We are concerned that point b) might prevent the claimant from pursuing their legitimate claim.

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.

Commented [HU2]: In relation to Article 4, we support Option 1 proposed by the Presidency. We are of the opinion, that the provison in Option 1 is sufficiently precise: domicile and place of residence of a person can be easily determined. It is a matter of judicial discretion to determine what other circumstances, apart from domicile and place of residence, may give a cross-border character to a given case. Therefore, the interpretation of what additional circumstances may qualify a case as cross-border may lead to the development of divergent jurisprudence in different Member States. In the light of this, we do not support Option 2. Option 3 foresees the complete deletion of Article 4, Option 1, providing a clear basis for the identification of cross-border cases, is certainly preferable to Option 3. As in our previous proposal, we do not support Option 4.

~~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 only 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 caries 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**, in accordance with national law,** for at least two of the followings:

   (a) security **as provided for** in ~~accordance with~~ Article 8;

   (b) early dismissal of manifestly unfounded ~~court proceedings~~**claims as provided for** in ~~accordance with~~ Chapter III;

   (c) remedies against abusive court proceedings **as provided for** in ~~accordance with~~ Chapter IV.

2. Such applications shall include:

   (a) a description of the elements on which they are based;

   (b) 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*.

Commented [HU3]: In relation to Article 5(1) we draw attention to the following. We are of the opinion that in order to ensure that the legal instruments provided by the proposal are consistent with national procedural law and increase the effectiveness of the fight against SLAPP phenomenon, it would be more appropriate to define complementary and optional instruments rather than introducing EU-level legislation prescribing mandatory application of specific SLAPP instruments. In view of this, we believe it may be appropriate to adjust the wording of the proposal in such a way as to give Member States the option of choosing which two of the three instruments they prefer to apply.

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 seised 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 seised 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~~ in accordance with national law.

Article 8

Security

Member ~~s~~**S**tates shall ensure that in court proceedings **brought** against **natural or legal persons on account of their engagement in** public participation, the court or tribunal seised ~~has the power to~~**may** require**, without prejudice to the right to access to justice, that** the claimant ~~to~~ provide**s** security for procedural costs, or for procedural costs and ~~damages~~ sanctions, if it considers such security appropriate in view of presence of elements indicating abusive court proceedings.

Commented [HU4]: In order to ensure that the legal instruments provided by the proposal are consistent with national procedural law and increase the effectiveness of the fight against SLAPP phenonmenon, we recommend deleting the reference to the Chapter IV – thus giving Member States more discretion in determining the applicable legal remedies.

Commented [HU5]: We consider the proposed amendment acceptable if such support is considered appropriate in the form of out-of-court assistance. Under current Hungarian procedural law in force, it is necessary to have a legal interest in the outcome of a lawsuit between other persons in order to intervene in a lawsuit. However, NGOs do not have such an interest. In our view, social organisations can assist the defendants more effectively by means of out-of-court assistance, such as providing information or legal counseling.

Commented [HU6]: We recommend referring to the sanctions set out in Article 16.
In order to award damages, provision of evidence might be required which necessitates a separate evidentiary procedure. It is not worth burdening the ongoing procedure and delaying decision-making, since the claim for damages may be the subject of a separate procedure. In order to shorten the proceedings, it is more practical to deposit the amount that may be imposed in the given procedure without the need for an evidentiary procedure (e.g. financial nature sanction).

CHAPTER III

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

Article 9

Early dismissal

1. 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 **at the earliest possible stage, in accordance with national law~~,~~ with effect of *res judicata***.

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.~~

[…]

Commented [HU7]: We are of the opinion that in order to ensure that the legal instruments provided by the proposal are consistent with national procedural law and increase the effectiveness of the fight against SLAPP phenomenon, it would be more appropriate to define complementary and optional instruments rather than introducing EU-level legislation prescribing mandatory application of specific SLAPP instruments. In view of this, we believe it may be appropriate to adjust the wording of the proposal in such a way as to give Member States the option of deciding whether they prefer the mandatory introduction of the legal instrument mentioned in the Article.

Nevertheless, we consider the current wording of the compromise text less precise. We suggest including the reference to *res iudicata* in order to make the wording as precise as possible. We refer to the fact that the absence of a decision with *res iudicata* effect may be unfavourable for the defendant. If there is no substantive effect attached to the decision on early dismissal, the plaintiff might submit their claim again and again. Therefore, it is crucial to indicate that the decision on early dismissal has substantive effect.

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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 necessarily incurred in ~~of~~ the proceedings, including the ~~full~~ costs of legal representation incurred by the defendant~~, unless such costs are excessive, unreasonable or disproportionate~~.

Commented [HU8]: In principle, we are in support of the provision set out in the Article, provided that not all cost but only the costs necessarily incurred is borne by the claimant who has brought abusive court proceedings against public participation. We consider it necessary to clarify the wording in this respect. The obligation to bear all costs, including costs unnecessarily incurred, is contrary to the principle of full reimbursement.

Article 15

Compensation of damages

Member States ~~shall endeavour~~**may** ~~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 in accordance with national law.

Commented [HU9]: In order to provide more flexibility for Member States, we consider it appropriate to include the proposed reference to the national law. Also, we would like to point out that the general rules of substantive law on damages provide for the possibility to claim full compensation for the harm resulting from an abusive court proceedings against public participation.

Article 16

Penalties

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

[…]

LITHUANIA

Written comments by the Lithuanian delegation on the 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") (Document 16221/22, Chapters I-IV)

Article 9(1) and Recital 26a

We appreciate that our previous comments on Article 9(1) were taken into account, and we welcome the latest amendments to the text of this Article. However, the text of Recital 26a is still not fully aligned with the wording of Article 9(1), because it stresses that the decision that grants early dismissal should have the effect of *res judicata*. As we have mentioned in our previous written comments on Article 9(1) and Recital 26a, emphasis on *res judicata* effect is disproportionate and goes too far.

According to Article 11 such decision is taken in an accelerated manner. Therefore, it is likely that the scope of the court's investigation in such cases will be narrower than in ordinary cases. Taking this into account, we still are of the opinion that such interpretation in Recital 26a may violate the right of the claimant to effective access to justice. It should be considered that the claimant, having eliminated the shortcomings of the claim, could apply to the court again in the future with a similar claim. Moreover, we doubt whether direct indication of the effect of *res judicata* of the decision to dismiss the claim does not limit the principle of procedural autonomy of Member States. So, we suggest leaving a question of the effect of the decision to the national law. Therefore, we suggest amending Recital 26a accordingly:

"**(26a)** ~~**Without prejudice to the right to appeal, tThe decision that grants early dismissal should have the effect of *res ijudicata*. This implies that if the plaintiff initiates a proceeding involving the same cause of action and between the same parties, the court should be able to dismiss the application as inadmissible.**~~ **[in accordance with the *res judicata* principle].** **Member States should adopt new rules or apply existing rules under national law so that the court can decide** ~~**in the same or in a separate proceeding**~~ **to dismiss manifestly unfounded cases as soon as it has received the necessary information in order to justify the decision. The decision that rejects early dismissal should be a procedural one, ruling on the continuation of the court proceeding. [The possibility to grant an early dismissal does not preclude the application of existing national rules which enable national courts to assess admissibility of an action even before the proceedings are initiated.]**"

POLAND

Comments by Poland regarding the chapters I to IV of the proposal for Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation")

Related document: 16221/22

Thank you very much to the Presidency for another compromise text on Chapters I to IV.
In general, we support the amendments that have been made.
On specific issues:

Chapters I and II

▪ **Article 6 and recital 24** - we support the deletion of the last three sentences in recital 24. In combination with the current wording of Article 6, which refers to national law, and the current wording of Article 15, this provision seems to provide greater flexibility in respect of national legal systems.

We also support the rewording of Article 6 proposed by AT and FR.

Chapters III and IV

▪ **Article 9 and recital 26a** - we prefer this version than the previous one, i.e. the replacement of the word *thorough examination* by *appropriate examination*. We also support the deletion of the effect of res iudicata from the provision, considering the indication in recital 26a sufficient.

▪ **Article 11** - taking into account the change of the title of Article 11, which is heading in the right direction, and the clarification of the PRES CZ and the EC at the last meeting on 22.11.2022 that in principle this provision is not about the procedure, but only about issuing a quick decision, reassured that this provision does not obligatorily require a separate (accelerated) procedure, we can agree to the proposed wording of the provision.

With regard to the alternative idea, which arose at the above-mentioned meeting, that - Article 11 should be deleted and the wording in Article 9 *at the earliest possible stage* should be considered sufficient, or alternatively that an additional paragraph should be added to Article 9 to address this issue of accelerated action - we believe that this is also a good solution.

▪ **Article 12 and recital 30**:

1. We can accept the current wording of the provision in Article 12 - following the change in the title of the provision and the clarification by PRES CZ at the previous Working Group meeting, that the provision is not about the burden of proof. However, in this case, we would like to add in recital 30 that it does not follow from Article 12 that in every case the court must oblige the claimant to respond to the application for early dismissal.

We therefore propose to add the following sentence to recital 30:

Neither should this be interpreted as an obligation for the court to require from the claimant, in each and every case, to respond to the application for early dismissal, in order to substantiate the grounds for the claim in greater detail.

The whole recital then would be:

(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~~* ***substantiate*** *that the claim is not manifestly unfounded. This ~~does not represent~~* ***should not be interpreted as*** *a limitation of access to justice, taking into account that the claimant* ***normally*** *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.~~* ***Neither should this be interpreted as an obligation for the court to require from the claimant, in each and every case, to respond to the application for early dismissal, in order to substantiate the grounds for the claim in greater detail.***

The rationale for this proposal is that in Polish civil procedure, the court in the case of an manifestly unfounded claim may immediately dismiss it, without serving it to the defendant and even if it wasn't properly filed. Consequently, we believe that whether a claim is manifestly unfounded should, as a rule, be evident from the complaint itself and in typical cases the court can decide on it without further input from the claimant.

2. Alternatively, we would like to propose a wording of Article 12, that would, in our opinion, captures the essence of the original wording of the EC proposal, while resolving the issues mentioned above:

Member States shall ensure that a court seized of an application for early dismissal is required to consider all circumstances of the case in determining whether the claim is manifestly unfounded, even if they have not been brought up by the defendant.

We would also welcome removing this provision entirely.

In addition, in our opinion, a rightful reference to Article 5(2) when considering Article 12 was made by FR in its written comments, also proposing an editorial change to it, stressing the importance of balancing the rights of the parties. Indeed, while Article 5 implies that the defendant must set out in its application for early dismissal - on the one hand, a description of the elements on which the application is based and, on the other hand, a description of the evidence in support of the application, it does not explicitly provide that it must directly set out the elements relating to the abusiveness of the proceedings as well as the evidence on which it relies, including with regard to its participation in the public debate.

▪ **Article 14 and Recital 31** - the current wording of the provision in Article 14, in conjunction with Recital 31 is sufficient for us, we are satisfied with the previous addition in recital 31 *that the court should render the decisions on costs in accordance with national law*. However, we would prefer this statement to be moved to Article 14.

▪ **Article 15 and recital 31a** - we prefer the current wording *may* instead of the previous *shall endeavour*. Currently, Article 15 in conjunction with recital 31a is acceptable to us. However, we would like to note, as also pointed out by other Member States, that if it turns out that all MS already have rules on liability law in their national systems, we propose to delete Article 15, because there is then no need to regulate this.

PORTUGAL

DRAFT PRESIDENCY COMPROMISE PROPOSAL ON ARTICLES IN CHAPTERS I TO IV (16221/222)

The Portuguese delegation would like to thank the Presidency for the opportunity to present written comments on the new compromise text regarding Chapters I to IV. We believe that this constitutes a good working method that facilitates the debate and contributes to reach an agreement.

Having analysed the new draft, we particularly welcome:

- The addition of "**eliminate the obstacles to the proper functioning of civil proceedings**" in **recital (4)** as it is more consistent with the legal basis of the proposal (article 81(2) (f) of the Treaty on the Functioning of the European Union);
- The elimination of "**The aim of the safeguards provided for in this Directive is to redress this imbalance**" in **recital (10)** as the true aim of the Directive is the one mentioned in recital (4);
- The elimination of "**main proceedings**", "**main court proceedings**" and "**in the same or in separate proceeding**" (**recitals (23a), 24** and **26a**) as they called into question the unicity of proceedings;
- The deletion of "~~**Consequently, provided the court concludes that main court proceedings were abusive, it may still award costs to the defendant and/or impose penalties and the defendant may still claim and obtain compensation of damages. Despite a subsequent amendment made by the claimant, the court should retain the possibility to decide on the counterclaim for compensation of damages made by the defendant and if appropriate, award compensation for harm. This is without prejudice to a possibility to award compensation of damages *ex officio*, if national law allows it.**~~" in **recital (24)**. In our view, retaining «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.» allows to respect court discretion and the national legal framework on this matter. In a nutshell, as it stands, the wording of recital (24) is sufficient to achieve the objective;
- The elimination "**when their activity is considered relevant to the case by the court or tribunal seised for the matter**" in **recital (25a)** as this could represent a disproportionate interference;

- The deletion of «**[, in the absence of specific evidence as to the amount of the potential damage,] additional guidance is needed for national courts [for determining the amount of the security] and whether**» in **recital (26)** meets our expectations regarding this matter: national law should be sovereign on this issue. Though we have expressed some doubts on «**particularly where any delay would cause irreparable harm.**», we are flexible as the text on this recital seems to be more balanced;
- **Recital (30)** is more reassuring by emphasising that, when the defendant requested the early dismissal, it is up for the claimant to further substantiate the claim in order for the court to assess whether it is not manifestly unfounded. This should be acceptable and not interpreted as a limitation of access to justice. In connection with this recital, we also consider the amendments introduced in **article 12** to be more legally accurate ("**substantiate the claim in order to enable the court to assess whether it is not manifestly unfounded**") and consistent with the spirit of the recital, as focused on the substantiation of the claim;
- The amendments introduced in **recital (31)** and **article 14** tackle effectively the questions that our delegation has raised on costs (under our national law there is a specific situation where the payment of costs of legal representation by the losing party has a maximum ceiling). National legal features on this matter are now respected and the role of national law is emphasized;
- The exclusion of the scope of the Directive of criminal matters and criminal procedure through the addition of the final sentence in **Article 2 (1)**;
- The inclusion of "proceedings **brought** against **natural or legal persons on account of their engagement in** public participation…" in **Articles 7** and **8** as it is more legally accurate and consistent with the wording of Article 1;
- The suppression of "**with effect *res judicata***" in **Article 9** is very welcomed. Indeed, we were of the opinion that this provision should focus on the procedural safeguard of an early dismissal and not on its effects. The replacement of «thorough» for «appropriate» is acceptable;

However, other aspects do not merit the same positive stance. Namely the following still need further discussion:

- **Recital (26a)** continues to be problematic, in particular when confronted with Article 9 where reference to *res judicata* effects of early dismissal was erased. As we have

mentioned, references to *res judicata* should be avoided; the focus of the recital should be on the type of procedural safeguards and their role in the context of the Directive. Moreover, we do not see the need to retain the first sentence when a bit further **"in accordance with the *res judicata* principle"** was eliminated. Therefore, we would like to resubmit our previous suggestion:

"(26a) An early dismissal of the claim is a key procedural safeguard to counter the harmful effects of SLAPP and contributes to redress the imbalance between parties. Where there are reasons to believe that claims against public participation are manifestly unfounded, courts and tribunals may, and after appropriate examination, dismiss them, at the earliest possible stage of the procedure, in accordance with national law.

A decision taken by the court or tribunal granting dismissal should impede orextinguish the legal effects of such claims invoked by the claimant against the defendant, without prejudice of the right of appeal in accordance with national law"

- The logic of **recital (30a)** remains reversed and tangled. Indeed, an appeal of a decision refusing early dismissal should not rely only on "the prevention of continuation of abusive court proceedings when manifestly unfounded claims are pursued"[1], but rather on the right to an effective remedy. It seems to exist some confusion between the purpose of early dismissal and the effects on the procedure of an appeal of a decision granting or refusingan early dismissal. The *raison d'être* of early dismissal is to prevent abusive court proceedings from continuing when manifestly unfounded claims are pursued. This should not be confused with the right to request the review of a decision which is at the core of the right to seek effective judicial protection. Therefore, the right to an appeal should be recognised to both parties. However, the modalities of an appeal and its effects might differ depending on the decision at stake. We agree that it is necessary to safeguard cases where the defendant may misuse the early dismissal procedural safeguard and "paralyse" proceedings in such a preliminary stage (a defendant requests early dismissal alleging that is SLAPP, the court refuses early dismissal, and the defendant appeals the refusal decision). But we should not impede the right of appeal. What can be addressed, for instance, is when such appeal shouldbe considered by the court or its effects on the proceeding. Therefore, the written

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[1] As the text "In order to prevent abusive court proceedings from continuing when manifestly unfounded claims are pursued, a decision refusing early dismissal should could also be subject to appeal" seems to indicate

suggestions made either by Austria or by France (Doc. WK 17168/2022, 07.12, respectively, on pages 5 or 24) could be a good way to solve the issue. Recital 30a should then be amended accordingly. The main point is that nothing in the Directive should impinge on the right to lodge an appeal, in the sense that the decision on the early dismissal, either refusing or granting it, should be able to be appealed against.

- The inclusion of **"by preventing their abusive"** in the sentence **[which is to ensure the elimination of obstacles to the proper functioning of civil proceedings by preventing their abusive]** in **recital (31a)** is not consistent with the purpose of the Directive mentioned in recital (4) and goes beyond the legal basis of the proposal and the wordingof recital (-1).