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From:	General Secretariat of the Council
To:	Delegations
N° prev. doc.:	ST 16221/22
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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 EE delegation on the draft Presidency compromise text on Chapters I to IV

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

1. Recital 24

We support the deletion of the final part of the Recital 24.

2. Article 4 – Matters with cross-border implications

Our first preference is Option 1, as the application of this option is the most foreseeable for the court.

To the extent that we have come to a common understanding with the Commission, previous and current Presidencies that the court does not need to assess whether the case falls within the scope of the Directive and does not have to apply the Directive upon receiving the claim at the admissibility phase before the proceedings are initiated (Recital 26a), we can now be more open and explore other options as well.

However, as regards Option 2, even though the wording of Rome I and Rome II is used, we have doubts about how to define and determine “all other elements relevant to the situation”. As this wording would be part of the operative text of the Directive, we would need to determine for transposition what these “all elements relevant to the situation” are. The provision would be ambiguous, if we leave these elements undetermined. Thus, we cannot support Option II, because the transposition and application of Option II as it stands now would not be clear enough.

At this point, our second preference would be Option 3. However, when transposing the directive, difficulties may arise if there are no rules on how to determine cross-border implications and thus to which cases the provisions to be transposed should apply.

As regards Option 4, in our view, the amendments in paragraph 2 (a) are going in the right direction. However, we would still need to analyse it further.

3. Article 7, Recital 25a – Support to the defendant in court proceedings

We would like to thank the Presidencies for the changes made in the first sentence of the Recital 25a. The proposed text is now in line with the wording of Article 7.

We have explained our national law in written comments in document WK 14781/2022 INIT. We would like to emphasize that it is important for us that the wording could be interpreted in such a way that the organization does not have to have independent procedural rights and legal standing in the proceedings, it does not have to be a party to the proceedings and its costs do not have to be reimbursed. A defendant may be supported in the proceedings by a person with active civil procedural legal capacity (natural person on behalf of the organization), if the defendant does not object. If the defendant objects, the court will not take into account the adviser's submission.

4. Article 9, Recital 26a – Early dismissal

We have understood from the discussions that the measures of the Directive should be applied only to those cases where the court proceedings are pending and the Directive should not affect national rules regarding admissibility and rejecting a statement of claim. The possibility of applying domestic admissibility rules is extremely important for us. Therefore, we would like to thank the Presidencies for the wording suggestion for the last sentence in the Recital 26a. We strongly support having this sentence in the text (currently in square brackets). If possible, we would like to ask you to consider moving it to the text of Article 9.

However, we propose to delete the word "*existing*" from the sentence. Under the proposed wording, the application of our national horizontal admissibility rules would be prevented if the rules were changed as they would not be anymore the "*existing national rules*" after such a change. This should be avoided.

5. Article 11 – Accelerated treatment

We would like to thank the Presidencies for changing the title of Article 11 as it is now more in line with the text of the Article.

6. Article 14, Recital 31 – Award of costs

Regarding Article 14, we would like to thank the Presidencies for deleting the word "*disproportionate*" from the text.

We have indicated in our previous written comments that we are hesitant about the wording "*all the costs of the proceedings*". What is considered as procedural costs in a particular Member State is regulated in national law. As we do not harmonize what should be considered as procedural costs at the EU level, the word "*all*" may lead to unintended consequences. Thus, the word "*all*" should be deleted.

We would also prefer a reference to national law to be included in the text of Article 14.

7. Article 15, 31a – Compensation of damages

We would prefer if no provisions of substantive law were included in the instrument. However, if Article 15 is kept in the text, we prefer using the word "*may*" and are thankful that this change has been made to the wording of Article 15.

For us it is also important that it is clear that the type and extent of damages is left for the Member States' national law to regulate. Therefore, we would propose adding reference to national law in the text of Article 15 and deleting the second sentence of Recital 31a.

8. Article 16 - Penalties

Regarding Article 16, we would like to refer to our previous comments in WK 15374/2022 INIT. We propose to delete the provision. Penalizing the plaintiff for filing a lawsuit is not the task of administering justice by a civil court and it is not compatible with our civil procedural law and legal system.

If the provision remains in place, Member States should be offered options appropriate to their legal system. More flexibility would be provided for Member States, if the wording would refer e.g. to suitable measures as provided for in national law.

In this case, the title of the Article should also be changed accordingly so that it would not refer to penalties.