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#### NOTE

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From:	Presidency
To:	Delegations
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”) – Presidency draft compromise proposal

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Delegations will find in Annex the revised draft Presidency compromise proposal on the whole text of the above-mentioned directive. This proposal will be presented and discussed during the Working Party on Civil Law Matters (SLAPP) on 15 March 2023. Some explanations in regards to the changes made in the new proposal were included in the footnotes.

Member States are invited to send in their written comments on the revised compromise text until **Friday, 10 March 2023 COB.**

All changes compared to the latest version are indicated in **bold and underline** or ~~strikethrough~~, while the other changes compared to the Commission proposal are indicated in **bold** or ~~strikethrough~~.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (-1) The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is ensured. To establish such an area, the Union is to adopt, among others, measures relating to judicial cooperation in civil matters having cross-border implications needed for the elimination of obstacles to the proper functioning of civil proceedings. That purpose should be pursued if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.**

- (1) Article 2 of the Treaty on European Union states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
- (2) Article 10(3) of the Treaty on European Union states that every Union citizen has the right to participate in the democratic life of the Union. The Charter of Fundamental Rights of the European Union (the ‘Charter’) provides, *inter alia*, for the rights to respect for private and family life (Article 7), the protection of personal data (Article 8), freedom of expression and information, which includes respect for the freedom and pluralism of the media (Article 11), and to an effective remedy and to a fair trial (Article 47).
- (3) The right to freedom of expression and information as set forth in Article 11 of the Charter includes the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 11 of the Charter should be given the meaning and scope of the correspondent Article 10 of the European Convention on Human Rights (“ECHR”) on the right to freedom of expression as interpreted by the European Court of Human Rights (“ECtHR”).
- (4) The purpose of this Directive is **to eliminate the obstacles to the proper functioning of civil proceedings, in order** to provide protection to natural and legal persons who engage in public participation on matters of public interest, in particular journalists and human rights defenders, against court proceedings, which are initiated against them to deter them from public participation (commonly referred to as *strategic lawsuits against public participation* or ‘SLAPPs’).

- (4a) **However, it is necessary to bear in mind that public participation is not always conducted in good faith. The dissemination of disinformation should not be protected under this Directive. To this end, the rules in this Directive leave the court or tribunal seised with the matter the necessary discretion to consider whether the application of the relevant safeguards is appropriate in a particular case. For example, if allegations made by the defendant are fabricated and their purpose is to damage the claimant's reputation, the defendant should not be granted protection as provided for in Chapters II, III and IV of this Directive.**
- (5) **Journalists play an important role in facilitating public debate and in the imparting and reception of information, opinions and ideas. They should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.** It is essential that **journalists** they are afforded the necessary space to contribute to an open, free and fair debate and to counter disinformation, information manipulation and interference. ~~Journalists should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.~~ **The protection afforded to journalists under the right to freedom of expression, in recognition of their important role, is subject to the proviso that they should act in good faith, in order to provide accurate and reliable information, in accordance with the ethics of journalism.**
- (5a) **This Directive does not define who a journalist is, since the aim is to protect any natural and legal person on account of their engagement in public participation. However, it should be underlined that journalism is a function shared by a wide range of actors, including reporters, analysts, columnists, and bloggers, as well as others who engage in forms of self-publication in print, on the internet or elsewhere.**

- (6) Investigative journalists in particular play a key role in combating organised crime, corruption and extremism. Their work carries particularly high risks and they are experiencing a growing number of attacks and harassment. A robust system of safeguards is needed to enable them to fulfil their crucial role as watchdogs on matters of legitimate public interest.
- (7) ~~Human rights defenders also play an important role in European democracies, especially in upholding fundamental rights, democratic values, social inclusion, environmental protection and the rule of law. They should be able to participate actively in public life and make their voice heard on policy matters and in decision-making processes without fear of intimidation. Human rights defenders refer to individuals or organisations engaged in defending fundamental rights and a variety of other rights, such as environmental and climate rights, women’s rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.~~

**Human rights defenders are individuals, groups and organizations in civil society that promote and protect universally recognised human rights and fundamental freedoms. As such, human rights defenders are committed to promoting and safeguarding civil, political, economic, social, cultural and environmental rights and to fighting against direct or indirect discrimination as listed in Article 21 of the Charter.**

- (7a) Other **important** participants in public debate, such as academics and researchers, also deserve adequate protection, **since they are also targeted by SLAPPs. In a democratic society, members of the academic community should be able to engage in research, teaching, learning and communication in society without fear of reprisal.**

- (8) A healthy and thriving democracy requires that people are able to participate actively in public debate without undue interference by public authority or other powerful actors, be they domestic or foreign. In order to secure meaningful participation, people should be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space in which different views can be expressed freely.
- (9) To foster this environment, it is important to protect journalists and human rights defenders from court proceedings against public participation. Such court proceedings are not initiated for the purpose of access to justice, but to silence public debate typically using harassment and intimidation.
- (10) SLAPPs are typically initiated by powerful entities, for example individuals, lobby groups, corporations and state organs. They often involve an imbalance of power between the parties, with the claimant having a more powerful financial or political position than the defendant. Although not being an indispensable component of such cases, where present, an imbalance of power significantly increases the harmful effects as well as the chilling effects of court proceedings against public participation.
- (11) Court proceedings against public participation may have an adverse impact on the credibility and reputation of journalists and human rights defenders and exhaust their financial and other resources. Because of such proceedings, the publication of information on a matter of public interest may be delayed or altogether avoided. The length of procedures and the financial pressure may have a chilling effect on journalists and human rights defenders. The existence of such practices may therefore have a deterrent effect on their work by contributing to self-censorship in anticipation of possible future court proceedings, which leads to the impoverishment of public debate to the detriment of society as a whole.

- (12) Those targeted by court proceedings against public participation may face multiple cases simultaneously, sometimes initiated in several jurisdictions. Proceedings initiated in the jurisdiction of one Member State against a person resident in another Member State are usually more complex and costly for the defendant. Claimants in court proceedings against public participation may also use procedural tools to drive up the length and cost of the litigation, and bring cases in a jurisdiction they perceive to be favourable for their case, rather than to the court best placed to hear the claim. Such practices also place unnecessary and harmful burdens on national court systems.
- (13) The safeguards provided in this Directive should apply to any natural or legal person on account of their engagement in public participation. They should also protect natural or legal persons who, either on a professional or on a personal basis, support, assist or provide goods or services to another person for purposes directly linked to public participation on a matter of public interest. This involves for example internet providers, publishing houses or print shops, which face or are threatened with court proceedings for providing services to the person targeted with court proceedings.
- (13a) A manifestly unfounded claim may be understood as a claim which is so obviously unfounded that there is no scope for any reasonable doubt. This needs to be assessed on a case-by-case basis in relation to each specific claim.**
- (14) This Directive should apply to any type of legal claim or action of a civil or commercial nature with cross-border implications **entertained in civil proceedings** whatever the nature of the court or tribunal. **It also includes interim and precautionary measures, counteractions or other particular type of remedies available under other instruments.** ~~This~~ **However, it should not** includes civil claims brought in criminal proceedings **and governed fully or partially by criminal procedural law.**

- (15)<sup>1</sup> The Directive ~~does~~ **should** not apply to claims arising out of liability of the State for actions or omissions in the exercise of State authority (*acta iure imperii*) and claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. **This Directive should not apply to criminal matters or arbitration and should be without prejudice to criminal procedural law not establish rules concerning the criminal procedure.**
- (16) Public participation should mean any statement or activity by a natural or legal person expressed or carried out in exercise of the right to freedom of expression and information on a matter of **current or future** public interest, such as the creation, exhibition, advertisement, **marketing activities** or other promotion of journalistic, political, scientific, academic, artistic, commentary or satirical communications, publications or works, and any preparatory activities directly linked thereto. **Future public interest refers to the fact that a matter may not yet be of public interest, but may become so once the public becomes aware of it for example through a publication. Public participation**† can also include activities related to the exercise of the right to freedom of association and peaceful assembly, such as the organisation of or participation to lobbying activities, demonstrations and protests or activities resulting from the exercise of the right to good administration and the right to an effective remedy, such as the filing of complaints, petitions, administrative and judicial claims and participation in public hearings.

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<sup>1</sup> *The use of “should” or “does” has been raised by MS. The question of terminology in this and the other recitals is subject to revision by the lawyer linguists. It is only a question of coherence and standard language. Normally, “shall” is used in the operative part of the Directive and “should” is used in the recitals.*



- (16a) Public participation should also include preparatory, supporting or assisting activities that have a direct and inherent link to the statement or activity in question ~~and that are targeted to stifle public participation~~. **Such activities should directly concern a specific act of public participation or be based on a contractual link between the actual target of SLAPP and the person providing the preparatory, supporting or assisting activity. Bringing claims not against a journalist or a human rights defender but against the internet platform on which they publish their work or against the company printing a text or a shop selling the text can be an effective way of silencing public participation, as without such services opinions cannot be published and thus cannot influence public debate.**
- (16b) In addition, ~~it~~ **public participation** can cover other activities meant to inform or influence public opinion or to **encourage** further action by the public, including activities by any private or public entity in relation to an issue of public interest, such as the organisation of or participation to research, surveys, campaigns or any other collective actions.
- ~~(17) Public participation should not normally cover commercial advertisement and marketing activity, which are typically not made in the exercise of freedom of expression and information.~~
- (18) The notion of a matter of public interest should include also quality, safety or other relevant aspects of goods, products or services where such matters are relevant to public health, safety, the environment, climate or enjoyment of fundamental rights. A purely individual dispute between a consumer and a manufacturer or a service provider concerning a good, product or service should be covered only when the matter contains an element of public interest, for instance concerning a product or service which fails to comply with environmental or safety standards.

- (19) Activities of a **public figure** ~~person or entity in the public eye or of public interest~~ are also matters of public interest to which the public may legitimately take an interest in. However, there is no legitimate interest involved where the sole purpose of a statement or activity concerning such a person or entity is to satisfy the curiosity of a particular audience regarding the details of a person's private life.
- (19a) Matters under consideration by a legislative, executive or judicial body, or any other official proceedings are examples of matters of public interest. Concrete examples of such matters could be legislation concerning environmental standards or product safety, an environmental license to a polluting factory or mine or an important court case about equality, discrimination in the workplace, environmental crime or money laundering.**
- (19b) Matters of public interest may also relate to alleged criminal offences, such as corruption fraud, tax evasion or sexual harassment.**
- (20) Abusive court proceedings typically involve litigation tactics **deployed by the claimant and used in bad faith including but not limited to the choice of jurisdiction, the use of delaying strategies and** ~~such as delaying proceedings,~~ causing disproportionate costs to the defendant in the proceedings ~~or forum shopping~~. These tactics are used by the claimant for ~~other purposes~~ **other than gaining access to justice and aim to achieve a chilling effect on public participation in the matter at stake.** Such **litigation** tactics are often, ~~although not always,~~ combined with various forms of intimidation, harassment or threats **before or during the proceedings.**

- (20a) Claims made in abusive court proceedings can be either fully or partially unfounded. The concept of full or partial unfoundedness clarifies the fact that the claim does not necessarily have to be completely unfounded for the proceedings to be considered abusive. For example, even a minor violation of personality rights that could give rise to a modest claim for compensation under the applicable law can still be abusive, if a manifestly excessive amount or remedy is claimed. On the other hand, if the claimant in court proceedings pursues claims that are fully founded, such proceedings should not be regarded as abusive for the purposes of this Directive.**
- (21) A cross-border dimension of SLAPPs adds to the complexity and challenges faced by defendants, as they need to deal with proceedings in other jurisdictions, sometimes in multiple jurisdictions at the same time. This, in turn, results in additional costs and burdens with even more adverse consequences.
- ~~(22) A matter should be considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seised. Even where both parties are domiciled in the same Member State as the court seised, a matter should be considered to have cross-border implications in two other types of situations. The first situation is where the specific act of public participation concerning a matter of public interest at stake is relevant to more than one Member State. That includes for instance public participation in events organised by Union institutions, such as appearances in public hearings, or statements or activities on matters that are of specific relevance to more than one Member State, such as cross-border pollution or allegations of money laundering with potential cross-border involvement. The second situation where a matter should be considered to have cross-border implications is when the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State. These two types of situations take into consideration the specific context of SLAPPs.~~

- (23) Defendants should be able to apply for the following procedural safeguards: a request for a security to cover procedural costs, or procedural costs and, **where applicable**, damages, a request for an early dismissal of manifestly unfounded ~~court proceedings~~**claims**, a request for remedies against abusive court proceedings (award of costs, ~~compensation of damages~~ and penalties), or **some or all of them at the same time**. **Such procedural safeguards should be carefully 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. The defendant should benefit from the remedy-procedural safeguard of early dismissal only when the claim is manifestly unfounded. However, even in the cases, where it is not possible to conclude that a claim is manifestly unfounded, the court could find elements indicating an abuse of procedure. In such cases of abusive court proceedings, the defendant could benefit from a security as a precautionary measure, or other remedies which are to be granted when claims are dismissed at a later stage, such as award of costs or compensation of damages/penalties. ~~In addition the court could also impose penalties.~~**
- (23a) **Member States should lay down or maintain the rules on how the court or tribunal seised on the matter should deal with applications for procedural safeguards. For instance, Member States could decide whether the applications for procedural safeguards are should be dealt with in the main proceedings or separately or whether to add further conditions in order for such applications to be admissible. Nevertheless, Such national rules should not make the exercise of these procedural safeguards unduly difficult.**

- (24) In some abusive court proceedings against public participation, claimants deliberately withdraw or amend claims or pleadings to avoid awarding costs to the successful party. This legal strategy may deprive the court or tribunal of the power to acknowledge the abusiveness of the court proceeding, leaving the defendant with no chance to be reimbursed of procedural costs. Such withdrawals or amendments, **if provided for by national law, and with respect for the parties' power to dispose over the proceedings,** should therefore not affect the possibility for the ~~courts seised~~**defendant** to ~~impose~~**apply for** remedies against abusive court proceedings. **This is without prejudice to the possibility for Member States to provide that procedural safeguards can be taken *ex officio*.**
- (25) If ~~the main~~ claim is **not** dismissed **early but later on in the ordinary proceedings** the ~~defendant may still benefit of~~ **at a later stage or if it is withdrawn or amended, this Directive provides for** other remedies available against abusive court proceedings such as award of costs ~~and, compensation of damages and penalties,~~ **provided that the court establishes that the proceedings had as main purpose to prevent, restrict or penalize public participation and pursue unfounded claims.**
- (25a) **To provide a more effective level of protection, non-governmental organisations should be able to support the defendant in court proceedings brought in relation to 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.**

(26) To provide the defendant with an additional safeguard, there should be a possibility to grant him or her a security to cover procedural costs and/or damages, ~~when the court considers~~ **However, it is necessary to strike a balance between that measure and the claimant's right of access to justice. ~~To that end, such security should be granted only after the court has examined the claim and has concluded~~ that even if ~~though~~ the claim is not manifestly unfounded, there are elements indicating an abuse of procedure and the prospects for success in the main proceedings are low. The court or tribunal seized may consider it appropriate for the claimant to provide a security if there are elements indicating that the proceedings are abusive or with regard to the risk of the defendant not being reimbursed or to the economic situation of the parties or other such criteria laid down in national law.** A security does not entail a judgement on the merits but serves as a precautionary measure ensuring the effects of a final decision finding an abuse of procedure **and covering the costs and potential damage caused to the defendant, particularly where any delay would cause irreparable harm.** It should be for Member States to decide whether a security should be ordered by the court on its own motion or upon request by the defendant.

(26a) ~~Without prejudice to the right to appeal, {~~The decision that grants early dismissal should have the effect of *res iudicata*~~be a decision on the merits, after appropriate examination. 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. Member States should adopt new rules or apply existing rules under national law so that the court can decide to dismiss manifestly unfounded cases as soon as it has received the necessary information in order to justify the decision. Such a dismissal should take place at the earliest possible stage in the proceedings but that moment could occur at any time during the proceedings depending on when the court has received such information. Where the defendant has applied for the dismissal of the claim as manifestly unfounded, the competent court should deal with that application in an accelerated manner in accordance with national law in order to expedite the assessment of whether the claim is manifestly unfounded, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial. 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. }

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

- ~~(28) To avoid any impact on the access to an effective remedy, the stay should be temporary and kept until a final decision on the application is taken. A final decision means a decision that is no longer subject to judicial review.~~
- (29) To ensure ~~high expediency in the accelerated procedure on an~~ **that an** application for early dismissal **is treated with high expediency**, Member States may set time limits for the holding of hearings or for the court to take a decision. They may as well adopt schemes akin to procedures in relation to provisional measures. Member States should make efforts to ensure that when the defendant has applied for other procedural safeguards, the decision is also taken in an expeditious manner. For expeditious treatment, Member States could take into account, amongst others, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threaten the defendant.
- ~~(30) [If a defendant has applied for early dismissal, it should be for the claimant in the main proceedings to prove in the accelerated procedure **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.]~~
- (30a) A decision granting early dismissal should be subject to appeal. ~~In order to prevent abusive court proceedings from continuing when manifestly unfounded claims are pursued,~~ **A decision refusing early dismissal could also be subject to appeal in accordance with national law.**



- (31) **Where the court has found the proceedings to be abusive, c**Costs should include all **types of** costs of the proceedings, including the ~~full~~ costs of legal representation incurred by the defendant ~~unless such costs are excessive. Costs of legal representation exceeding amounts laid down in statutory fee tables should not be considered as excessive, **unreasonable or disproportionate** per se.~~ **The court should render the decisions on costs in accordance with national law.** Full compensation of damages should include both material and immaterial damages, such as physical and psychological harm.
- ~~(31a) Compensation of damages should be ancillary to the main objective of this Directive, which is to ensure the elimination of abusive court proceedings that are an obstacle for the proper functioning of civil proceedings [or which is to ensure the elimination of obstacles to the proper functioning of civil proceedings by preventing their abuse]. Full compensation of damages could include both material and immaterial damages, such as physical and psychological harm.~~
- (32) The main objective of giving courts or tribunals the possibility to impose penalties **or other appropriate measures** is to deter potential claimants from initiating abusive court proceedings against public participation. **Where the court has found the proceedings to be abusive, s**Such penalties **or measures** should be proportionate to the elements of abuse identified. When establishing **their** amounts ~~for penalties~~, courts should take into account the potential for a harmful or chilling effect of the proceedings on public participation, including as related to the nature of the claim, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threaten the defendant. **It would be for the Member States to decide how these penalties should be paid.**

- (33) In the cross-border context, it is also important to recognize the threat of SLAPPs from third countries targeting journalists, human rights defenders and other persons engaged in public participation who are domiciled in the European Union. They may involve excessive damages awarded against EU journalists, human rights defenders and others. Court proceedings in third-countries are more complex and costly for the targets. To protect democracy and freedom of expression and information in the European Union and to avoid that the safeguards provided by this Directive are undermined by recourse to court proceedings in other jurisdictions, it is important to provide protection also against manifestly unfounded and abusive court proceedings in third countries.
- (34) This Directive creates a new special ground of jurisdiction in order to ensure that targets of SLAPPs domiciled in the European Union have an efficient remedy available in the Union against abusive court proceedings brought in a court or tribunal of a third country, **irrespective of a decision being rendered or being final, as target of SLAPPs can suffer damages and incur costs since the start of the court proceedings and possibly without any decision being rendered (e.g. in the case of a withdrawal)**. This special ground of jurisdiction allows the targets domiciled in the European Union to seek, in the courts or tribunals of their domicile, for compensation of damages and costs incurred in connection with the proceedings before the court or tribunal of the third country. This right applies irrespective of the domicile of the claimant in the proceedings in the third country. **It is aimed to act as a deterrent against abusive court proceedings brought in third countries against persons domiciled in the European Union and can be enforced, for example, where a third-country claimant has assets in the European Union. This provision does not deal with applicable law nor with substantive law on damages as such.**

- (35) This Directive should be without prejudice to the protection that other instruments of Union law or **provisions of national law establishing more favourable rules**, provide to natural and legal persons that engage in public participation. In particular, **this Directive does not intend to reduce or restrict freedoms such as the freedom of expression and information, nor it does not to** detract in any way from the protection offered by Directive 2019/1937 on the protection of persons who report breaches of Union law<sup>1</sup>, as implemented in national law. As regards situations falling within the scope of this Directive and of Directive 2019/1937, the protection offered by both acts should therefore apply. **More favourable provisions may include national provisions establishing more effective procedural safeguards, such as a liability regime relating to freedom of expression and information.**
- (36) ~~This Directive is complementary to~~ The Commission recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)- ~~This recommendation~~ is addressed to Member States and it provides a comprehensive toolbox of measures including training, awareness-raising, support to targets of abusive court proceedings and data collection, reporting and monitoring of court proceedings against public participation.

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<sup>1</sup> OJ L 305, 26.11.2019, p. 17-56.

**(36a)<sup>1</sup> This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and the fundamental rights constituting general principles of Union law. Accordingly, this Directive should be interpreted and implemented in accordance with those fundamental rights, including the freedom of expression and of information, as well as the rights to an effective remedy, to a fair trial and to access to justice. When implementing this Directive, all public authorities involved should achieve, in situations where the relevant fundamental rights conflict, a fair balance between the rights concerned, in accordance with the principle of proportionality.**

(37) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

~~(38) [In accordance with Articles 1, 2 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application] OR~~

(39) {In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified [, by letter of ...] its wish to take part in the adoption and application of this Directive.}

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<sup>1</sup> *This new recital concerns the relation to fundamental rights and that a fair balance between the rights concerned should be achieved.*

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

# General provisions

### *Article 1*

#### Subject matter

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

### *Article 2<sup>1</sup>*

#### Scope

1. This Directive shall apply to matters of a civil or commercial nature with cross-border implications **entertained in civil proceedings**, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). **This Directive ~~does~~ shall not apply to criminal matters or arbitration and shall be without prejudice to criminal procedural law ~~does not establish rules concerning the criminal procedure.~~**

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<sup>1</sup> *The last sentence in Article 2.1 has been amended in line with the discussions at the WP meeting on 31 January. The change to “shall” is for reasons of coherence only. In the first sentence, “whatever the nature of the court or tribunal” is kept in the text. In order to clarify that the Directive is not applicable in cases where civil claims are brought in criminal proceedings, and where there could be a risk of an overlap with criminal procedural law, a new sentence with this meaning is added in recital 14.*

- 1a. **This Directive lays down minimum rules, thus enabling the Member States to adopt or maintain provisions more favourable to persons engaged in the public participation, including national provisions establishing more effective procedural safeguards relating to freedom of expression and information.**

### *Article 3*

#### **Definitions**

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

1. **‘public participation’** means any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto. ~~This includes complaints, petitions, administrative or judicial claims and participation in public hearings;~~
2. **‘matter of public interest’** means any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas such as:
  - (a) **fundamental rights**, public health, safety, the environment, ~~or climate or enjoyment of fundamental rights;~~
  - (b) activities of a ~~person or entity in the public eye or of public interest~~**figure;**

- (c) matters under ~~public consideration or review~~ by a legislative, executive, or judicial body, or any other ~~public~~ official proceedings;
  - (d) allegations of corruption, fraud or **other criminal offences**;
  - (e) activities aimed to fight disinformation;
3. **‘abusive court proceedings against public participation’** mean court proceedings ~~brought in relation to public participation~~ that **have as their main purpose to prevent, restrict or penalize public participation and are 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, **including the excessive dispute value**;
  - (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
  - (c) intimidation, harassment or threats on the part of the claimant or his or her representatives.

*Article 4<sup>1</sup>*

**Matters with cross-border implications**

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.~~

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<sup>1</sup> *Removing the Article, as in option 3, is the option that seems most acceptable for all involved.*



## CHAPTER II

# Common rules on procedural safeguards

### Article 5<sup>1</sup>

#### 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** 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 **as provided for in** ~~in~~ ~~accordance with~~ Chapters III and IV can be taken by the court or tribunal seised of the matter *ex officio*.

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<sup>1</sup> *Different options regarding Article 5.2 were discussed at the WP meeting on 31 January. By deleting 5.2 – the question regarding what the defendant might perform and prove will be left to national law and the circumstances in each given case. As a consequence, there should not be any overlap with this provision and Article 12.*

Article 6<sup>1</sup>

**Subsequent amendment to claim or pleadings**

Member States shall 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 ~~in the main proceedings~~, including the **withdrawal** ~~discontinuation~~ of proceedings, do not affect the possibility for the court or tribunal seised of the matter to consider the court proceedings abusive and **for the defendant to apply for** ~~to impose remedies in accordance with Chapter IV,~~ **without prejudice to Article 5(3).**

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<sup>1</sup> *In line with the discussions at the WP meeting on 31 January, “discontinuation” has been replaced by “withdrawal”. The addition at the beginning of the Article is for reasons of coherence only.*  
*In order to clarify that the Article does not infringe on the principle of party disposition, the text has been adjusted so that any remedy in Chapter IV requires an application from the defendant. A new sentence regarding party disposition has also been added in recital 24. This should not hinder the courts to take these decisions ex officio in those MS where this is possible, hence the reference to Article 5.3 at the end of the provision.*

## Article 7<sup>1</sup>

### ~~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 **in accordance with national law** ~~safeguarding or promoting the rights of persons engaging in public participation may take~~ **part** ~~support~~ in those proceedings, either in support of the defendant **in those proceedings** or to ~~provide information.~~

## Article 8<sup>2</sup>

### **Security**

Member sStates 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~~ provides security for procedural costs, or for procedural costs and damages, if it considers such security appropriate ~~in view of presence of elements indicating abusive court proceedings.~~

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<sup>1</sup> *In line with the discussions at the WP meeting on 31 January, “in accordance with national law” has been added in the Article regarding the kind of support that shall be ensured. The change at the beginning of the Article is for reasons of coherence only.*

<sup>2</sup> *In order to address the issues raised by MS regarding this Article, it is suggested to delete “in view of presence of elements indicating abusive court proceedings”. This would give MS/courts more flexibility in implementing/applying the provision. It would also mean that a security could be granted in more situations and earlier in the procedure, which would give the SLAPP victims a stronger protection. Recital 26 has been amended accordingly and a list of examples have been added regarding when the granting of a security could be appropriate.*

## Early dismissal of manifestly unfounded court proceedings claims

### Article 9<sup>1</sup>

#### Early dismissal

1. Member States shall ~~empower~~ **ensure that** courts and tribunals ~~may to adopt an early decision to dismiss, after appropriate examination, in full or in part, court proceedings claims~~ against public participation as manifestly unfounded **at the earliest possible stage, without prejudice to the possibility for the court to dismiss them at a later stage, in accordance with national law.**
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.~~

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

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<sup>1</sup> *In line with the discussion at the WP meeting on 31 January, a clarification has been added in order to ensure that the court is not impeded from taking a decision on early dismissal at a later stage in the proceedings.  
In recital 26a, this has been further clarified. Additionally, the sentence that describes the decision has been changed in order not to use the notion of res judicata.  
Article 9.2 has been replaced with the wording that was previously in Article 11.*

*Article 10*

**Stay of the main proceedings**

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

*Article 11*

**Accelerated procedure treatment**

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

*Article 12*

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

Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to **substantiate the claim in order to enable the court to assess whether it is** ~~prove that the claim is~~ not manifestly unfounded.

*Article 13*

**Appeal**

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

## CHAPTER IV

# Remedies against abusive court proceedings

### *Article 14<sup>1</sup>*

#### **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 types of costs of the proceedings available under national law, including the full costs of legal representation incurred by the defendant, ~~unless such costs are excessive.~~

### *Article 15*

#### **Compensation of damages**

Member States shall ~~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.

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<sup>1</sup> *In line with the discussions at the WP meeting on 17 February, all “type” of costs and a reference to national law has been added, in order not to harmonise what type of costs should be included in the costs of the proceedings.  
The deletion at the beginning of the Article is of coherence reasons only.  
Recital 31 has been amended accordingly and the sentence concerning statutory fee tables has been removed.*

## Article 16<sup>1</sup>

### **Penalties and other appropriate measures**

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 **or other appropriate measures** on the party who brought those proceedings.

## CHAPTER V

### **Protection against third-country judgments**

## Article 17<sup>2</sup>

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

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

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- <sup>1</sup> *In light of the discussions at the WP meeting on 17 February, the proposed addition is meant to give a larger degree of flexibility when implementing the Article. Recital 32 has been amended accordingly. Other recitals also may need to be amended if this wording in Article 16 remains.*
- <sup>2</sup> *In line with the discussions at the WP meeting on 17 February, the reference to public policy has been removed.*

## Article 18<sup>1</sup>

### Jurisdiction for actions against third-country judgments

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

## CHAPTER VI

### Final provisions

## Article 19

### Relations with bilateral and multilateral ~~the 2007 Lugano~~ Conventions and agreements

This Directive shall not affect the application of ~~the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters~~ bilateral and multilateral conventions and agreements between a third State and the Union or a Member State concluded before the date of the entry into force of this Directive, signed in Lugano on 30 October 2007.

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<sup>1</sup> *No change is suggested in this draft. Instead, recital 34 has been amended to further clarify the intentions behind the Article. The Article in its current wording only gives obligations regarding jurisdiction.*



## Article 20

### Review

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

## Article 21

### Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [~~2~~**3** years from the date of entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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

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

*Article 22*

**Entry into force**

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

*Article 23*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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