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NOTE

From: Presidency

To: Delegations

Subject: Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)
- Preparation for the JHA Council on 8 and 9 December 2022
- Draft paper for a policy debate

In preparation for the JHA Council meeting on 8 and 9 December 2022, delegations will find in Annex the Presidency draft paper for a policy debate on the above-mentioned Directive. The paper will be presented during the Working Party on Civil Law Matters (SLAPP) on 22 November 2022.

I. STATE OF PLAY

1. On 27 April 2022, the Commission adopted 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' (SLAPP))¹ and the complementary 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')².
2. The proposal for a Directive is one of the initiatives provided for in the European Democracy Action Plan³ aimed at strengthening media freedom and pluralism. Based on Article 81(2)(f) TFEU, it provides journalists, human rights defenders and others actively participating in public debate with appropriate legal tools to protect them against lawsuits aimed at intimidating and silencing them. The Directive is intended to provide procedural safeguards in civil proceedings with cross-border implications.
3. In the European Parliament, the committee responsible for the proposal is the Legal Affairs Committee (JURI), while the committees for opinion are Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Women's Rights and Gender Equality (FEMM). The rapporteur for the file is Tiemo Wölken.

¹ ST 8529/22 + ADD1
² C(2022) 2428 final
³ COM(2020) 790 final

4. On 26 October 2022, the European Economic and Social Committee issued its opinion⁴ on the proposal.
5. In the Council, the examination of the proposal is being carried out in the Working Party on Civil Law Matters (hereinafter the ‘SLAPP Working Party’). At the meeting of the SLAPP Working Party on 13 May 2022, the Commission presented the proposal for the Anti-SLAPP Directive, the accompanying Staff Working Document and the Anti-SLAPP Recommendation.
6. The article-by-article examination of the proposal began during the French Presidency and was continued during the Czech Presidency at the Working Party meeting on 25 July 2022. In order to facilitate the drafting of the compromise text on Chapters I and II, the Commission issued a non-paper providing further clarifications and explanations on specific points identified by the Presidency, which was presented at the Working Party meeting on 9 September 2022.
7. During the SLAPP Working Party meeting on 10 October 2022, the Presidency, in close cooperation with the Commission, presented the revised text of Chapters I and II (General provisions & Common rules on procedural safeguards). The compromise text was discussed at two subsequent Working Party meetings and was followed by two revised versions.
8. Given the strong interlinkages between provisions in the first four Chapters, the Presidency continued negotiations with Chapters III and IV (Early dismissal of manifestly unfounded court proceedings & Remedies against abusive court proceedings). The Presidency issued a non-paper to serve as a basis for Member States’ drafting suggestions for the compromise text. During the SLAPP Working Party on 22 November, the Presidency presented its first compromise proposal on Chapters III & IV.

⁴ SOC/734-EESC-2022

II. SUGGESTED POLICY APPROACHES

a) Protection against SLAPPs and effective access to justice

9. While Member States have broadly supported the aim of the Directive to facilitate civil proceedings in order to protect the right to freedom of expression and media freedom of persons who engage in public participation, they have flagged the need to ensure that the anti-SLAPP measures will not prevent legitimate claims from being pursued before the courts, which would violate the claimant's access to justice.
10. Firstly, Member States stated that the procedural safeguards provided for in the Directive should be carefully targeted and in line with the right to a fair trial, in order to eliminate the risk of abuse by the defendants whom the Directive aims to protect. Secondly, the text of the Directive should emphasise that the courts need to perform a thorough examination of a case before dismissing it as manifestly unfounded or granting one of the remedies provided for in the proposal for abusive court proceedings. Member States pointed out that those who deliberately spread disinformation solely for the purposes of damaging the reputation of a public figure should not be granted protection under the Directive.

11. The Presidency addressed these concerns in the compromise proposal on Chapters I & II. The compromise text strives to ensure that the purpose of the Directive – to facilitate civil proceedings in situations with cross-border implications in order to protect journalists, human rights defenders and others against SLAPPs – is better reflected in the provisions of the proposal and does not lead to abuse where a claimant seeks a legitimate claim. To this end, the compromise text further clarifies the concepts of manifestly unfounded claims and abusive court proceedings and the fact that the procedural safeguards from which the defendant may benefit should be applied in line with the right to an effective remedy and to a fair trial, as set out in Article 47 of the Charter. It also better defines the personal scope of the Directive by offering further explanations and examples in the recitals regarding the concepts of journalists, human rights defenders and others and the public participation activities in which they may engage. Lastly, the compromise text points out that adequate protection against abuse of the measures under the Directive is to be achieved by giving sufficient discretion to national courts when they decide on the application of such measures in particular cases.
12. Member States have generally welcomed the improvements brought by the Presidency to the text of the proposal and the more balanced approach when it comes to the protection of the fundamental rights at stake. Nevertheless, some of the Member States further stressed the importance of the right to an effective remedy and reiterated that the measures as proposed by the Directive should not be abused to the detriment of claimants pursuing legitimate claims.

Question:

Ministers are invited to express their views on whether they agree with the core elements of the proposed Directive aimed at facilitating civil proceedings in order to protect against SLAPPs in the EU while, at the same time, ensuring that a balance with effective access to justice is maintained.

b) *Cross-border implications*

13. Article 81 TFEU, on which the proposal is based, provides *inter alia* that the Union develops judicial cooperation in civil matters having cross-border implications.
14. In its proposal, the Commission defines matters with cross-border implications for the purposes of the Directive in Article 4. According to the Commission's proposal, cross-border implications exist when at least one of the parties is not domiciled in the Member State of the court seised (Article 4(1)). Pursuant to Article 4(2)(a), cross-border implications also exist where the specific act of public participation concerning a matter of public interest is relevant to more than one Member State. Additionally, Article 4(2)(b) provides that the scenario where the claimant has initiated any concurrent or previous court proceedings against the defendant in another Member State should be considered as having cross-border implications.
15. Some Member States expressed concerns regarding the fact that the definition of matters with cross-border implications laid down in the second paragraph of the Commission's proposal could lead to a wide interpretation of matters with cross-border implications, which could result in strictly national cases being included.
16. As emerged from discussions, some Member States would prefer to restrict matters with cross-border implications only to cases where at least one party is not domiciled in the Member State of the court seised. Other Member States and the Commission have expressed the view that the Directive should also apply to cases where both parties are domiciled in the same Member State as the court seised if there are other cross-border implications relevant to the situation. There are also Member States that hold the opinion that no definition is needed or that are at least flexible as regards this concept.

17. In order to accommodate the different views, the Presidency has proposed three alternative drafting options regarding matters with cross-border implications. **The first option** limits the application of the Directive to matters where at least one of the parties is not domiciled in the Member State of the court seised. The cross-border implications are, in this scenario, determined exclusively by the domicile of the parties. **The second option** contains a definition that seeks to cover all matters where relevant cross-border implications are indicated. In this option, the cross-border implications are not limited to the different domiciles of the parties, but rather other elements relevant to the situation should also be taken into consideration. In SLAPP cases, this will most likely mean the place where the harmful event occurred. **The third option** proposes the deletion of Article 4 in its entirety, which in practice would lead to the same result as the second option due to current practice in private international law matters in the EU.
18. Although certain Union legal acts contain a definition of cross-border implications⁵, in general, there is no comprehensive definition of matters with cross-border implications in the Union *acquis* related to civil matters⁶.
19. Given that no prevailing opinion of the Member States in favour of any of the proposed policy options could be identified at technical level, the Presidency is of the view that further guidance on the issue of matters with cross-border implications is needed.

⁵ Art. 3 of Regulation No 1896/2006 creating a European order for payment, Art. 3 of Regulation No 861/2007 establishing a European Small Claims Procedure, Art. 2 of Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

⁶ E.g. Regulation No 1205/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation), Regulation No 593/2008 on the law applicable to the contractual obligations (Rome I), Regulation No 864/2007 on the law applicable to the non-contractual obligations (Rome II). These Regulations will be applicable in SLAPP cases in identifying the international jurisdiction and the applicable law.

Question:

Ministers are invited to express their views on whether it is appropriate to define matters with cross-border implications for the purposes of the Directive. If Ministers consider that matters with cross-border implications should be defined for the purpose of the Directive, they are invited to express their views on whether this definition should also cover cases where both parties are domiciled in the same Member State as the court seised but there are other cross-border implications relevant to the situation.
