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From: Presidency
To: Permanent Representatives Committee/Council

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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”)
- Policy debate

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.

¹ 8529/22 + ADD1

² C(2022) 2428 final

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 themselves 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 committee for opinion is the Civil Liberties, Justice and Home Affairs Committee (LIBE). The rapporteur for the file is Tiemo Wölken.
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 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.

³ COM(2020) 790 final

⁴ SOC/734-EESC-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 and 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 on Chapters III and IV (Early dismissal of manifestly unfounded court proceedings and 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 meeting on 22 November, the Presidency presented its first compromise proposal on Chapters III and IV.
9. While further discussions at Working Party level are needed in order to accommodate Member States' views, during the eight dedicated meetings of the Working Party held so far considerable progress has been achieved on many substantial and technical issues.
10. Firstly, 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 has 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. 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.

11. Secondly, Member States expressed concerns regarding the impact the Directive would have on national procedural law, particularly on criminal proceedings. In the compromise text, the Presidency clarified that the Directive does not establish rules concerning the criminal procedure, in accordance with the Article 81 (2)(f) TFEU legal basis.
12. Lastly, 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 broad interpretation of this concept. The Presidency has therefore proposed four alternative drafting options regarding matters with cross-border implications. Given that no prevailing opinion of the Member States in favour of any of the proposed drafting options could be identified at technical level at this stage, the issue of cross-border implication remains a preoccupation of the Working Party.

II. SUGGESTED POLICY APPROACHES

13. 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.
14. 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 an appropriate 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 someone's reputation should not be granted protection under the Directive.

15. 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.
16. Bearing in mind the principle that *nothing is agreed until everything is agreed*, the Presidency is of the view that discussions at political level will facilitate the future work on the Directive.

Question:

In light of the progress made at technical level, ministers are invited to express their views on whether the Directive should provide for adequate safeguards against the abuse of civil proceedings brought to prevent, restrict or penalise public participation and media freedom and pluralism, while ensuring that the right to effective access to justice is maintained.
