

Namens de Nederlandse Werkgroep tegen SLAPPs<sup>1</sup>, die als onderdeel van de Coalition Against SLAPPs in Europe ('CASE') opereert, schrijven we u om onze zorgen te delen over de *common position* die de Raad van de Europese Unie op vrijdag 9 juni 2023 heeft aangenomen over de voorgestelde richtlijn van de Europese Commissie "betreffende zogenaamde SLAPP-zaken".

Ten opzichte van de oorspronkelijke tekst zijn er in het Raadsvoorstel belangrijke bepalingen aanzienlijk afgezwakt. Dit zal naar ons inzien vergaande negatieve consequenties hebben in de strijd tegen het toenemende gebruik van ongegronde en onrechtmatige gerechtelijke procedures.

Hieronder hebben wij onze drie grootste zorgen uitgewerkt, waarin wij trachten te beargumenteren hoe het huidige voorstel tekortschiet in de bescherming van doelwitten van SLAPPs.

#### 1. Removal of the European Commission's definition of "cross-border"

The removal of the wide definition of "cross-border" cases in the proposed directive means it will not be applicable to the vast majority of SLAPPs where both parties reside in the same jurisdiction. According to a [recent research](#) published by CASE, roughly 90% of SLAPP cases in Europe are brought in the same jurisdiction as where the target is domiciled and would thus fall outside of the proposed directive, even if the case has cross-border relevance. The Directive is commonly referred to as Daphne's Law, in memory of the Maltese journalist Daphne Caruana Galizia who was facing more than forty SLAPPs at the time of her assassination. A stark fact is that it would not, in its current revised form, have protected her from the SLAPPs she was facing.

During our introductory discussion you pointed to the possibility that when Member States transpose the directive, they will do so in a way that covers all SLAPP suits, not only cross-border ones. This would make the definition of "cross-border" irrelevant. We hope this will be the case, but see a risk of minimalist transposition. A cautionary tale is Directive 2003/4/EC on public access to environmental information. Rather than lifting their existing access to information laws to the standard required by the directive, a fair number of Member States simply chose to implement a separate law on access to environmental information providing a higher level of transparency than applies in other areas.

#### 2. Restrictive definition of "manifestly unfounded cases" and weakening of the early dismissal mechanism

The very restrictive definition of "manifestly unfounded cases" is an extremely high threshold, significantly weakens the text as a whole and lowers the protection to SLAPP targets, specifically the key early dismissal mechanism. Judges would be expected to dismiss a claim only if it is "so obviously unfounded that there is no scope for any reasonable doubt". This should be replaced with a requirement for the claimant to establish a "prima facie case" (*i.e.* a realistic chance of success) as to each essential element of the cause of action within the early dismissal mechanism. This does not erode the right of access to justice, since to win the case the claimant anyway needs to meet a higher burden. Furthermore, the reversal of the burden of proof would be a crucial protection mechanism for targets of abusive court proceedings. It should be up to the claimant to prove that the case is not manifestly unfounded.

It has been argued that the originally proposed mechanism for early dismissal of (manifestly) unfounded lawsuits would prove counterproductive for defendants in SLAPP suits and burden the judiciary, by adding a "pre-procedure" to the trial. The opposite is true. Defendants will only ask for early dismissal if that step is likely to shorten rather than lengthen the case. Furthermore, there are very few procedural safeguards (including in Dutch law) that protect defendants at an early stage. The early dismissal mechanism should allow for the defendant to apply to dismiss a claim summarily on the basis of it being unsound. This is in line with other Dutch legislation, such as the WAMCA. Moreover, it prevents judges from wasting time in handling these cases that lack merit and were never intended to seek justice in the first place. Ultimately, this would relieve the burden on the judiciary. Article 3 in the directive includes adequate criteria that a judge can apply to decide whether a case is a SLAPP, thereby ensuring that legitimate claims can still be pursued in the courts and that access to justice remains guaranteed.

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<sup>1</sup> <https://www.freepressunlimited.org/nl/coalitie-tegen-slapps-europa>

### 3. Deletion of the provision for the compensation for damages

The deletion of the provision for the compensation of damages for the harm suffered weakens the protection available to SLAPP targets. While there might be provisions on compensation in national law in some Member States, the directive should ensure that sufficient protection is guaranteed across the European Union, and preferably that the defendant can request compensation within the same procedure rather than having to launch a separate suit. Furthermore, we cannot forget the severe psychological impact SLAPPs have on their victims. The directive should therefore facilitate the right to *full compensation* for related damages, both material and immaterial. It should ensure that victims of SLAPPs can more easily claim and obtain full compensation for that harm without having to make a separate claim. Moreover, this could potentially scare off those instigating SLAPPs, as we have evidence that repeat “SLAPPers” continue their abuse of the legal system to shut down the dissenting voices they are faced with. This would also lower the burden on the legal system.

De onafhankelijke journalistiek in Europa staat onder grote druk. Door de toename van juridische intimidatie wordt het werk van journalisten ernstig ondermijnd, wat direct effect heeft op het recht op informatie voor het publiek. Het is daarom belangrijk dat Nederland zich inspant om in deze richtlijn betekenisvolle bescherming te bieden tegen onrechtmatige rechtszaken. Niet alleen lopen Nederlandse journalisten, mensenrechtenverdedigers en maatschappelijke organisaties het risico om ten prooi te vallen aan SLAPPs in Nederland en in andere Europese landen, maar ook in het kader van solidariteit zou Nederland zich moeten inzetten voor bescherming van het Europese maatschappelijk middenveld. Daarnaast mag het wereldwijde effect niet worden onderschat: Europese wet- en regelgeving heeft het zogeheten ‘Brussels-effect’ en zal op den duur ook zijn vruchten afwerpen in andere landen in de wereld. In een wereld waar autocratische krachten steeds meer terrein winnen is dit geen te verwaarlozen effect.

Nederland staat bekend als internationale voorvechter van persvrijheid en vrijheid van meningsuiting. In lijn met de ambities van demissionair Minister Hoekstra om zich hard te maken voor de bescherming van Europese fundamentele waarden zou Nederland zich moeten inzetten voor sterke Europese waarborgen ter bescherming tegen SLAPPs.

Wij vragen u daarom om tijdens de dialoog onderhandelingen een duidelijk standpunt in te nemen tegen het afgezwakte voorstel. Alleen een ambitieuzere tekst zal ervoor zorgen dat de toekomstige wetgeving zinvolle bescherming biedt voor de journalistiek.

Hartelijke groet,  
De Nederlandse Werkgroep SLAPPs

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