

Position Paper: Working Group SLAPPs in the Netherlands

SLAPPS (Strategic Lawsuits Against Public Participation) are a growing threat to freedom of speech, a free press and civic space all over the world. The Netherlands is no exception. Recent data shows that 1 out of 10 journalists has faced legal action in connection with a publication. Half of the 858 surveyed journalists reported that they have received a letter threatening legal action at least once.

Typically used by the super-rich and politically corrupt, SLAPPs are abusive lawsuits that are not intended to respond to a real wrong, but are used to harass, bankrupt, and intimidate journalists, activists, and human rights defenders into silence. For a SLAPP to be effective it doesn't ever have to reach a courtroom. Legal intimidation through threatening letters with sky-high costs and legal redress is often enough to reach the intended goal of silencing speech or retracting (elements of) a story. In addition, SLAPPs have a chilling effect on press freedom, with journalists intimidated into preventively abstaining from reporting on certain topics or themes. On top of this all, SLAPPs take a severe toll on their victims, ranging from severe anxiety, fear of financial ruin and self-censorship.

The most famous example of SLAPPs is the case of Daphne Caruana Galizia, who at the time of her death had 47 defamation cases pending against her. To this day, her family is still fighting off some of these lawsuits. But legal harassment of journalists is also taking place closer to home. Okke Ornstein was an exemplary case in the Netherlands in 2016, but recent examples of Nardy Cramm, the Dutch blogger who is facing multiple lawsuits from powerful casino players in Curaçao, show that SLAPPs are a very real threat to press freedom.

That is why the European Commission published a legislative package to address SLAPPs in Europe, including an anti-SLAPPs Directive and an accompanying Recommendation. The Netherlands' initial response, however, has been relatively hesitant towards these measures. As the Working Group for the Netherlands operating under the umbrella of the Coalition Against SLAPPs in Europe (CASE), we urge the Dutch cabinet to support the strongest possible set of measures proposed by the Commission, to vote in favour of the Directive in the Council vote in 2023, and to implement the Commission's Recommendation swiftly.

Scope of SLAPPs in Netherlands

The Dutch cabinet concludes that there are few to no SLAPPs in the Netherlands. However, neither SLAPPs nor legal intimidation with threatening letters have been specifically monitored in the Netherlands. That is why, in cooperation with the NVJ, we sent out a questionnaire to Dutch journalists to gather data on journalists' perception of legal safety in the Netherlands, including *threats* of lawsuits. Although the Directive wouldn't directly prevent such threats, journalists and activists would be able to ignore unfounded letters more confidently after its adoption and transposition into national law.

The data gives us valuable insights into the legal safety of journalists in the Netherlands. 83% of journalists are aware of the legal risks related to being a journalist. As a result, 25% of journalists say they are therefore more cautious with publishing their work, while 10% either adjust their publication or refrain from publishing completely. 1 out of 10 journalists have faced actual legal action as a result of a publication. Lastly, although there is a high level of awareness among journalists regarding the legal risks related to being a journalist, 85% of journalists have never heard of the term SLAPPs. This underlines the need for awareness raising on the topic among journalists.

Also, the Directive has a broader scope than solely national SLAPPs. It would also protect Netherlands-based persons and organisations that are being SLAPPED abroad. There are past and current examples of Dutch civil society organisations facing SLAPPs outside of the Netherlands. The Directive would protect such organisations against any attempt to enforce foreign judgments in SLAPP cases in the Netherlands and would enable them to seek compensation.

Prevention

Regardless of the exact scope of SLAPPs in the Netherlands, adopting legislative measures against SLAPPs is important in terms of prevention. SLAPPs are rising all over Europe. The assumption that the Netherlands will stay an exception is too short-sighted. What is not a problem today, could easily become a problem tomorrow. The Netherlands shouldn't wait until SLAPPs are a widespread problem in the Netherlands – as it is in many other European countries – before supporting preventive legislation such as the Anti-SLAPP Directive and implementing its recommendation, for example through coordinated monitoring and awareness raising on the issue.

Legal arguments

In its BNC-fiche the Dutch cabinet expresses some substantive hesitations regarding the Directive.

Definition of SLAPPs

Firstly, the cabinet argues that the Directive uses wide definitions which make it challenging for a judge to decide whether a case is a SLAPP. In our view, Article 3 of the proposal contains adequate criteria a judge can apply in practice. A similar criteria test has recently been adopted in the UK. It reads as follows: First, it will assess if the case is against activity in the public interest – for example investigating financial misconduct by a company or individual. Then, it will examine if there's evidence of abuse of process, such as whether the claimant has sent a barrage of highly aggressive letters on a trivial matter. Finally, it will review whether the case has sufficient merit – specifically if it has a realistic prospect of success.

Prolonging judicial cases

The cabinet argues that the 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. Moreover, nipping SLAPPs in the bud *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.

In conversations with us, current and former judges confirmed that such a “pre-procedure” would be a useful complement to the existing safeguards in Dutch civil law. They also pointed out that the time spent examining a claim during such a “pre-procedure” would not be wasted if the request for early dismissal is rejected; the judge will then need less time to deal with the case in the main procedure.

We therefore argue that the Anti-SLAPPs Directive introduces necessary and vital provisions that are currently missing to protect against SLAPPs in the Netherlands.

Leadership role

Finally, the Netherlands has a longstanding reputation as a frontrunner and champion of freedom of expression. With mechanisms such as PersVeilig it is a country that is often looked to for best practices in ensuring the safety of journalists. Accordingly, the Netherlands became co-chair of the Media Freedom Coalition last year, a position that comes with a responsibility in holding those that harm journalists and civil society to account.

At the same time, freedom of expression is under significant pressure within its own borders. Journalists increasingly find themselves in (life-)threatening situations, leading to the NOS removing its logo from its vehicles, which among others resulted in the Netherlands dropping 22 spots on the Reporters Without Borders World Press Freedom Index. And as our recent research shows, legal intimidation is a very real threat in the Netherlands. We urge the Netherlands to vote in favour of the Anti-SLAPPs Directive in the upcoming Council vote and implement the accompanying Recommendations to prevent further decline and showing that it takes the growing legal threats to journalists seriously.

Undersigned:

Free Press Unlimited

Greenpeace

Article 19

Nederlandse Vereniging van Journalisten

Tarlach McGonagle, academic (independent)

Otto Volgenant, lawyer (independent)