

Case Note & Comment

A model for the transposition of the EU anti-SLAPP Directive

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In its judgment of 15 March 2022 in the case of *OOO Memo v Russia*,¹ the ECtHR warned for ‘the risks that court proceedings instituted with a view to limiting public participation bring for democracy’.² This approach referred to an earlier comment by the Commissioner for Human Rights of the Council of Europe calling for urgent action against “Strategic Lawsuits Against Public Participation” (SLAPPs).³ Especially in defamation cases the ECtHR has found violations of the right to freedom of expression and information: in numerous cases it found that civil or criminal proceedings leading to an interference with the applicants’ right to participate in public debate or report on issues of public interest had violated Article 10 ECHR.⁴ Since spring 2020 journalists, media organisations and NGOs, in particular the Coalition Against SLAPPs in Europe (CASE),⁵ the European Center for Press and Media Freedom (ECPMF)⁶ and the Daphne Caruana Galizia Foundation⁷ have been advocating for an anti-SLAPP policy at the European level. With the Directive 2024/1069 of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings, the European Union obliges the EU Member States to take action against SLAPPs.⁸ The Directive must be transposed into national legislation by 7 May 2026.

1. A MODEL LAW AS STARTING POINT IN BELGIUM

On 26 February 2025 the Belgian Federal Parliament (Chamber of Representatives, Commission of

Justice) has started the treatment of a bill in order to transpose the anti-SLAPP Directive. The law proposal is submitted by the Green Party and Ecolo and will be discussed in the Commission of Justice, before it will be referred to a plenary session in Parliament for a final voting.⁹ The bill in parliament is based on a proposal of a model law¹⁰ elaborated by a group of experts of the Belgian anti-SLAPP working group that has been monitoring developments related to SLAPPs in Europe and in Belgium since 2023.¹¹ The proposal also integrates some of the provisions of the anti-SLAPP Recommendations of the European Commission¹² and of the Committee of Ministers of the Council of Europe.¹³ The Belgian bill, including its explanatory statement, can certainly inspire other European countries in their process of transposing the EU Directive 2024/1069.

2. THE DIRECTIVE AS A MINIMUM

According to the explanatory statement, the bill aims to combating a worrying phenomenon since the purpose of the ‘slapper’ is to stifle public debate, through the abuse of the judiciary. This phenomenon must be combated, as all member states of the Council of Europe have an obligation under Article 10 ECHR ‘to ensure a safe and favourable environment for everyone to participate in the public debate without fear’.¹⁴ For claimants in SLAPP-proceedings it is not about winning the lawsuit, but mainly about deterring their critics by the prospect of high legal costs, protracted legal proceedings or by the risk of being ordered to pay hefty damages. With its model law, the Belgian anti-SLAPP working group aims first and foremost to help ensure timely transposition of the Directive, at the same time following up on the Recommendations of the Council of Europe and the European Commission, which have a broader scope of application than the Directive. Indeed, the Directive aims at a minimum harmonisation within the European Union (Directive, recital 21)

and leaves room for more favourable provisions to protect persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (Directive, Article 3(1)), including national provisions providing for more effective procedural safeguards regarding the right to freedom of expression and information, as guaranteed by Article 10 ECHR.

3. BROADER SCOPE

The Belgian law proposal opts for a broader approach than the strict transposition of the Directive into Belgian law at two levels: not only does it seek to apply to SLAPPs of a cross-border nature, but also to SLAPPs where both claimant and defendant are domiciled in Belgium, without any cross-border impact. In addition to civil proceedings, the bill also seeks to apply to SLAPPs through criminal proceedings.

Admittedly, the Directive – in line with the European Union's competence – only requires action against SLAPPs if they have cross-border implications, but limiting protection to such cases would result in a difference in treatment that would be difficult to justify. Also the European Commission urges similar safeguards to be provided for domestic proceedings as well (Recommendation, Guideline 4). Moreover, limiting the scope of the law to only cases with a cross-border character would result in the law having hardly any impact in practice: after all, over 90 per cent of SLAPP cases do not have a cross-border character, but are located within one jurisdiction.¹⁵ Only through a broad scope of application can the law contribute to effectively combating SLAPPs.

Unlike the Directive, which focuses solely on civil cases, the proposed regime also includes procedural guarantees against SLAPPs in criminal proceedings. Indeed, as in some other European countries, it is still possible in Belgium to initiate SLAPPs by means of a direct summons before the criminal court or a complaint with civil charges before the investigating judge. Besides the effective abuse of procedural rights through criminal proceeding, the threat of criminal prosecution, eg, for slander, insult, defamation, or stalking, also appears to have an intimidating or chilling effect on forms of public participation. Here too, the bill follows the Recommendations of the European Commission and of the Committee of

Ministers of the Council of Europe. Only imposing measures against SLAPPs in civil proceedings would lead to more SLAPPs through criminal proceedings, while according to the case law of the ECtHR criminal prosecution interfering with the right to freedom of expression in most cases amounts to a violation of Article 10 ECHR.¹⁶

4. EARLY DISMISSAL AND SECURITY

Otherwise, the bill is very close to the provisions of the Directive. It clarifies when there is 'public participation' and what the criteria or indicators are for qualifying a lawsuit as abusive court proceedings or as a manifestly unfounded claim against forms of public participation.

Through a series of additional provisions in the Judicial Code and in the Code of Criminal Procedure, the main procedural guarantees of the Directive against SLAPPs are transposed into Belgian law. These include, in particular, the possibility for the court to dismiss a SLAPP at an early stage of the proceedings. An early dismissal is possible, after an accelerated (within 30 days), adversarial procedure in case the claimant's action is assessed as manifestly unfounded. At the start of the proceedings the defendant can also request a security for the estimated costs of the proceedings as a financial guarantee in case the claimant's action is found abusive or manifestly unfounded. In line with the Directive, the model law allows associations, organisations, trade unions and other entities to act as *amicus curiae*, in support of the defendant.

5. SANCTION AND COMPENSATION

The bill opts for a specific sanction in case of a SLAPP, as the Directive requires effective, proportionate and dissuasive sanctions. For abusive court proceedings against natural or legal persons for their engagement in public participation, the court can impose a fine up to EUR 25,000. The actual general provision on vexatious and reckless litigation in the Judicial Code that limits the fine up to the maximum of €2,500 for those who use the judiciary for manifestly delaying or unlawful purposes is deemed not to meet the requirements of the Directive.

Moreover, the plaintiff can also be ordered, after request or even *ex officio*, to pay damages to the defendant. The damages can include all attributable types of procedural costs, including the full costs incurred by the defendant for legal representation, unless such costs are excessive.

6. INTERNATIONAL DIMENSION AND NATIONAL FOCAL POINT

In accordance with the Directive, the Belgian law proposal introduces, via a new section in the Code of Private International Law, the possibility to refuse recognition and enforcement of judgments given in third countries that qualify as SLAPPs. A new article in the same Code gives Belgian courts jurisdiction to hear claims for compensation for damage and costs suffered by a natural or legal person domiciled or established in Belgium as a result of a SLAPP claim brought before a court in a country outside the European Union by a claimant residing or established outside the European Union.

The Federal Institute for the protection and promotion of Human Rights (FIRM-IFDH) designated by the Federal Department of Justice as the central focal point in the fight against SLAPPs in Belgium, is assigned some of the tasks on information, support and transparency mentioned in Article 19(1) of the Directive.¹⁷ This concerns in particular providing information on available procedural guarantees and legal remedies and developing support measures, complementary to existing support mechanisms, such as legal aid and financial and psychological support offered by other organisations, eg, by associations of journalists. The FIRM will also have the task to

organize or participate in awareness-raising campaigns about SLAPPs.

Finally, the Government is charged with providing support for initiatives aimed at raising awareness and organising information campaigns on SLAPPs within one year of the entry into force of the Anti-SLAPP Act. In addition to this support, training opportunities on SLAPPs should also be organised. There will be a task here for the professional associations of journalists, the Bar and Law Societies and the Institute for Judicial Training.

It is now up to the legislature and then the legal profession and the judiciary to redress the imbalance between the right of access to justice and the right to fair trial in combination with the right to privacy and reputation on the one hand (Art. 6 and 8 ECHR) and the right to freedom of expression and information on the other hand (Article 10 ECHR). After all, SLAPPs have no place in a democratic society under the rule of law: in the words of the ECtHR such court proceedings instituted with a view to limiting public participation bring a risk for democracy. More than ever there is an urgent need for adequate domestic safeguards against SLAPPs by way of a broad and timely transposition of the EU anti-SLAPP Directive.

The model law of the Belgian anti-SLAPP WG and the bill in parliament to combat SLAPPs are published on the website of the Belgian anti-SLAPP working group: <https://www.slapp.be/en/proposals> and <https://www.slapp.be/nl/voorstellen> and on the website of the Parliament: <https://www.dekamer.be/FLWB/PDF/56/0728/56K0728001.pdf>.

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Notes

¹ <https://hudoc.echr.coe.int/eng?i=001-216179>.

² <https://strasbourgobservers.com/2022/04/01/ooo-memo-v-russia-echr-prevents-defamation-claims-by-executive-bodies/>.

³ <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

⁴ <https://verbo.obs.coe.int/> and https://www.echr.coe.int/documents/d/echr/FS_Reputation_ENG.

⁵ <https://www.the-case.eu/>.

⁶ <https://www.ecpmf.eu/>.

⁷ <https://www.daphne.foundation/en/>.

⁸ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401069.

⁹ Proposition de loi portant des mesures visant à protéger des personnes qui participent au débat public contre les demandes en justice manifestement infondées ou les procédures judiciaires abusives (“poursuites stratégiques altérant le débat public” ou “SLAPP/poursuites-bâillons”), 18 février 2025, DOC 56 0728/001 / Wetsvoorstel houdende maatregelen ter bescherming van bij publieke participatie betrokken personen tegen kennelijk ongegronde vorderingen of misbruik van procesrecht (“strategische

rechtszaken tegen publieke participatie" of "SLAPP's", 18 februari 2025, DOC 56 0728/001 <https://www.dekamer.be/FLWB/PDF/56/0728/56K0728001.pdf> and <https://www.dekamer.be/kvvcf/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?legislist=legisnr&dossierID=0728>. It is expected that also the Minister of Justice will take an initiative to introduce a bill as a law project of the Government. In that scenario both the law proposal introduced by the Green Party and Ecolo, and the bill introduced by the Government will be on the agenda of the Commission of Justice. The Commission of Justice has started its proceedings by requesting for advisory opinions from several organisations and bodies (including the professional organization of journalists and the Federal Institute for the protection and promotion of Human Rights (FIRM)) about the Green Party-Ecolo law proposal.

¹⁰ <https://www.slapp.be/en/proposals>.

¹¹ <https://www.slapp.be/en>.

¹² <https://eur-lex.europa.eu/eli/reco/2022/758/oj/eng>.

¹³ <https://www.coe.int/en/web/freedom-expression/-/council-of-europe-adopts-recommendation-on-counteracting-the-use-of-slapps>.

¹⁴ ECtHR 29 January 2015, Uzeyir Jafarov v. Azerbaijan, par. 68, <https://hudoc.echr.coe.int/eng?i=001-150649>.

¹⁵ <https://www.the-case.eu/resources/a-2024-report-on-slapps-in-europe-mapping-trends-and-cases/>.

¹⁶ Voorhoof, D. (2023). The chilling effect of prosecution of defamation on the right to freedom of expression : an urgent call to decriminalize defamation. In M. Luchtman (Ed.), *Of swords and shields : due process and crime control in times of globalization : liber amicorum prof. dr. J.A.E. Vervaele* (pp. 159–167). The Hague: Eleven, <https://biblio.ugent.be/publication/01H2K5E5CBW61EMY35332A8JJS>.

¹⁷ <https://www.federalinstitutehumanrights.be/en/what-does-firm-ifdh-do-against-slapp>.