



CASE Analysis of EU Anti-SLAPP Directive's Cross-border definition

Recitals

- (21) ... It is for the court to determine the elements relevant to the situation depending on the particular circumstances of each case, also taking into account, as appropriate, the specific act of public participation or the specific elements indicating a possible abuse, in particular where multiple proceedings are initiated in more than one jurisdiction. This determination by the court should be carried out irrespective of the means of communication used.

Article 4

Matters with cross-border implications

1. For the purposes of this Directive, a matter is considered to have cross-border implications unless both parties are domiciled in the same Member State as the court seized ***and all other elements relevant to the situation are located only in that Member State.***
2. ~~Where both parties to the proceedings are domiciled in the same Member State as the court seized, the matter shall also be considered to have cross-border implications if:~~
 - ~~(a) the act of public participation concerning a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or~~
 - ~~(b) the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State.~~

What is in the final compromise text of the Anti-SLAPP Directive?

The scope of the legislation is mentioned in Article 4, which establishes it covers all cases except where “both parties are domiciled in the same Member State as the court seized ***and all other elements relevant to the situation are located only in that Member State.***”

This is a vague notion which offers a margin of appreciation to the court. Recital 21 empowers the court to determine the cross-border elements “irrespective of the means of communication used”. This addition allows the judge to take into account the cross-border dimension of the act itself as well as the interest of the public in the act of public



participation, thus broadening somehow the notion of a matter with cross-border implications.

What implication does this have in practice??

According to [CASE research on SLAPPs in Europe](#), **only less than 10% of the cases identified and vetted are classical cross-border cases - where the two parties are domiciled in different member States**. Therefore, the broad definition of cross-border allows for more cases to be considered by this new law. For example, with regard to the Directive, SLAPPs being brought against Wikimedia aimed at suppressing or modifying well-sourced public information will fall within the scope. The [ongoing case](#) brought by the global business leader César do Paço is against the Portuguese and English language versions of his biography, which will inevitably have consequences on other linguistic versions of Wikipedia.

What does CASE recommend for the transposition of the Directive to national legislation?

CASE advocated for a broad definition **to ensure that the safeguards the Directive will put forward can actually find concrete application**.

Article 4 includes the novel definition that a matter is considered cross-border “**unless** both parties are domiciled in the same Member State as the court seized **and** all other elements relevant to the situation are located only in that Member State.” It is yet to be seen what “all other elements” will consist of, but in our view, the courts should interpret this as broadly as possible.

A broad notion of cross-border is also more consistent with the objectives of the directive: providing safeguards against abusive claims aimed at chilling free expression on public interest issues. This cannot be confined within a single Member State’s domestic borders and so it is important to read Article 4 and Recital 21 together with the Recommendation of this same legislative package, which encourages Member States to include similar safeguards for domestic cases:

4. Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive cases against public participation for civil matters with cross-border implications.