



May 20, 2020

To: **Ms Pia Lindholm**,
Deputy Head
Unit for Civil Justice
Directorate-General Justice and Consumers
of the European Commission
-open letter-

Dear Ms Pia Lindholm,

The undersigned NGOs welcome the Commission's commitment to address the threat of vexatious litigation against journalists, activists and others. The weaponization of the law by powerful economic actors has for too long resulted in the suppression of scrutiny and the consequent weakening of the rule of law in the European Union.

The incidence of Strategic Lawsuits Against Public Participation (SLAPP) is notable throughout the European Union. Shocking as the extent of documented suppression of public interest activity may be, we are acutely aware that we are only able to document the tip of the iceberg. Inequality of arms facilitates coercive activity which results in the removal of recorded scrutiny, and has a chilling effect on public interest activity going forward.

The present state of affairs is caused by the existence of criminal defamation law, abuse of civil lawsuits for libel or protection of one's reputation, and by deficiencies in existing EU private international law, as well as the absence of harmonising measures which would ensure that fundamental rights are upheld in the Member States. We therefore **propose a number of short to medium term measures** with a view to creating an enabling environment for a vibrant democracy in the European Union.

Specifically, in order to (i) protect the rights of citizens, journalists, activists, academics, trade unionists, media organisations and NGOs, as well as (ii) their ability and obligation to supplement and enable enforcement of the law of the European Union, we are of the view that the following matters require urgent attention:

- In the first instance, and as a matter of urgency, **the Brussels I Regulation (recast) requires** amendment with a view to grounding jurisdiction in the domicile of the defendant in matters relating to defamation. This would remove the facility for pursuers to abuse their ability to choose a court or courts which have little connection to the dispute;
- The omission of defamation from the scope of the **Rome II Regulation** requires journalists to apply the lowest standard of press freedom available in the laws which might be applied to a potential dispute. **We recommend the inclusion of a new rule** which would require the application of the law of the place to which a publication is directed;
- Furthermore, **a Directive** should be adopted to introduce procedural safeguards with a view to limiting the availability of SLAPPs against journalists, activists and citizens. The absence of such measures constitutes a significant threat to the integrity of the internal market, as well as the proper functioning of the Union's institutional order. Examples of good practice in the European Union and elsewhere

should be considered in order to establish minimum standards throughout the Union.

- Finally, **budgetary measures** to morally and financially support all SLAPPs victims should be part of the available help.

The rationale and legal basis for the adoption of these measures is explained more fully in advice which **Article 19, Committee to Protect Journalists (CPJ), European Centre for Press and Media Freedom (ECPMF), Reporters Without Borders (RSF), and PEN International** commissioned from the **Centre for Private International Law at the University of Aberdeen**. We attach this advice for ease of reference.

We look forward to your response.

Yours truly,

Article 19
Articolo 21
Association of European Journalists (AEJ)
Cartoonists Rights Network International (CRNI)
Committee to Protect Journalists (CPJ)
Danish PEN
Daphne Caruana Galizia Foundation
English PEN
European Centre for Press and Media Freedom (ECPMF)
European Federation of Journalists (EFJ)
Free Press Unlimited (FPU)
German PEN
Global Forum for Media Development (GFMD)
Greenpeace EU Unit
IFEX
Index on Censorship
International Press Institute (IPI)
Legal Human Academy
Norwegian PEN
Osservatorio Balcani e Caucaso Transeuropa (OBCT)
PEN International
Reporters Without Borders (RSF)
Scottish PEN
South East Europe Media Organisation (SEEMO)
Swedish PEN
Transparency International EU

Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union

*Dr Justin Borg-Barthet, * 19 May 2020*

Executive Summary

This paper was requested by Article 19, Committee to Protect Journalists (CPJ), European Centre for Press and Media Freedom (ECPMF) Reporters Without Borders (RSF), and PEN International. It is argued hereunder that European Union law enables the abuse of defamation law in a manner which has a chilling effect on press freedoms and activism, and which consequently weakens the rule of law in the Union. It is recommended that the following measures should be adopted with urgency:

- (i) The rules on jurisdiction in the Brussels Ia Regulation should be amended with a view to removing the claimant's unilateral right to choose a court or courts in which to pursue a claim. It is argued that jurisdiction in defamation cases should lie with the courts of the respondent's domicile.
- (ii) The absence of a common rule on choice of law in defamation cases results in a lack of legal certainty, and requires journalism on cross-border matters to apply 'the lowest common denominator of press freedoms'. The Rome II Regulation should be amended with a view to harmonising rules on choice of law in defamation in a manner which renders the applicable law predictable to the parties.
- (iii) A study of national procedural and substantive laws in defamation cases should be conducted with a view to adopting a directive which will harmonise minimum safeguards for freedom of expression, particularly with a view to dissuading vexatious litigation.
- (iv) The above measures should be complemented by rule of law monitoring mechanisms which would include evaluation of the legal environment for journalism generally, and investigative journalism in particular.

* Senior Lecturer, Centre for Private International Law, University of Aberdeen. This advice is based on a forthcoming working paper 'The Brussels I Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform (Centre for Private International Law, University of Aberdeen, WP 01/2019); it is an updated version of advice presented at the European Parliament in November 2019. I am thankful to Ashley Kehui Lu for research assistance, and to Freya Cookson for logistical support in the organisation of a Workshop on Reform of EU Defamation Law, held at the University of Aberdeen in March 2019. The usual disclaimer applies.

1. Introduction: Factual Context

In April 2018, a cross-party group of Members of the European Parliament called upon the European Commission to initiate anti-SLAPP legislation with a view to protecting journalists from vexatious litigation.¹ SLAPPs (Strategic Lawsuits Against Public Participation) are abusive litigious techniques deployed against public interest reporting or activism. They are intended to produce outcomes favourable to the pursuer as a consequence of the burden of litigation, whether the litigation has been initiated or merely threatened.

The MEPs' request was prompted by events in Malta late in 2017.² On 16 October 2017, Daphne Caruana Galizia, an investigative journalist, was killed by a bomb placed under her car seat. In the immediate aftermath, journalists stood together to declare that they would not be silenced. All the while, however, online reports of Caruana Galizia's journalistic revelations were disappearing from every news portal in Malta.

It was not a bomb that induced the redaction and deletion of news reports. Private international law had been used to suppress press freedoms; private international law became a battleground for the very foundations of freedom of expression and the rule of law in a member state of the European Union.³ Caruana Galizia's revelations were of transnational concern, but had yet to capture the attention of the global press. The subjects of her revelations intended that this would remain the case, particularly in a period in which they were using their Maltese business as a springboard into other EU markets.

Pilatus Bank, an entity established in Malta, had been embroiled in controversy concerning allegations of money laundering and failure to abide by due diligence obligations.⁴ The goings-on at Pilatus were widely reported in Malta since it was alleged that the bank had processed illicit transactions to and between several politically exposed persons ('PEPs') connected to government flagship initiatives.⁵ The bank was established in Malta, under Maltese law, and, at the relevant time, operated almost exclusively in Malta, but targeted its

¹ Casa, Gomes, Macovei, Pagazaurtundúa, Kouloglou and Javór, correspondence with Vice-President Timmermans, 11 April 2018. Accessible at: <https://www.anagomes.eu/PublicDocs/88ffcc68-5169-4486-9614-105aab81d82a.pdf>

² Ibid.

³ Balzan, "Government should have sought advice to protect journalists" – lawyers', The Shift News (10/04/2018). Accessible at: <https://theshiftnews.com/2018/04/10/government-should-have-sought-advice-to-protect-journalists-lawyers/>

⁴ Pilatus Bank has since been shut down in view of the initiation of money-laundering and sanctions evasion proceedings in the United States. See e.g. BBC News, 'Malta's Pilatus Bank shut down over fraud charges' (5/11/2018). Accessible at: <https://www.bbc.co.uk/news/business-46097564>

⁵ See e.g. Borg, 'Separation deed raises questions on Schembri-Tonna "loan"', Times of Malta (20/01/2019). Accessible at: <https://www.timesofmalta.com/articles/view/20190120/local/separation-deed-raises-questions-on-schembri-tonna-loan.699516>

business to international clients including numerous international PEPs such as Azerbaijan's presidential family.⁶ The reports were published by Maltese newspapers, and were directed towards a Maltese audience, albeit in a language and via a medium which rendered them accessible worldwide.

Despite the overwhelmingly Maltese connecting factors, Pilatus Bank engaged a London law firm to threaten to bring legal action for defamation in the United Kingdom and the United States. It appears that Maltese legal advisors were concerned by the possible actions in the United Kingdom due to the significant hurdles involved in contesting the jurisdiction of a court which might arguably have jurisdiction under the Brussels I Regulation. The Regulation affords the plaintiff in libel cases a choice of forum as between the defendant's domicile and the place in which damages are alleged to have been incurred.⁷ At face value, therefore, it would appear that a court in the United Kingdom would have jurisdiction if it could be shown that the allegedly libellous report resulted in damages there, as Pilatus Bank averred. The defendant could be drawn into costly litigation in order to contest the jurisdiction of a court, determine the law governing the dispute, and to defend a lawsuit, the loss of which would be ruinous to media entities of Maltese dimensions.⁸

The threat of legal action in the UK and US was a strategic gambit which was motivated primarily by the cost of proceedings in London and the United States, as well as the psychological effects of a lack of familiarity with foreign law and procedure.⁹ London is by no means the appropriate forum, or indeed one which would unequivocally be empowered to exercise jurisdiction under the Brussels I Regulation as interpreted by the CJEU. As regards the threatened suits in the United States, First Amendment protections suggest that a successful defamation action for punitive damages is especially unlikely given the apparent absence of actual malice.¹⁰ Nevertheless, the cost of litigation was enough to persuade the

⁶ Garside and Kirchgassner, 'Azeri ruling families linked to secret investments via Maltese bank', The Guardian Newspaper (23/04/2018). Accessible at: <https://www.theguardian.com/world/2018/apr/23/azerbaijan-ruling-families-linked-to-secret-investments-via-maltese-bank>

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (hereinafter 'Brussels I Recast'), Arts 4 and 7(2).

⁸ Delia, 'Pilatus Bank bullies the local press. We will not be silenced', Truth be Told (24/10/2017). Accessible at: <https://manueldelia.com/2017/10/pilatus-bank-bullies-local-press-will-not-silenced/>

⁹ Ibid.

¹⁰ See e.g. *New York Times v Sullivan* 376, U.S. 254 (1964); *Gertz v Robert Welch*, 418 U.S. 323 (1974). A further problem which does not fall within the scope of current EU legislation is the treatment of jurisdiction of courts of third states. Current practice among so-called privacy lawyers is to threaten litigation both within the European Union and in third countries, particularly the United States. The connection to the United States tends to turn on the location of servers of providers of core web services. While existing EU instruments do not address the manner in which national private international law deals with litigation elsewhere, it is submitted that it is in fact possible for the European Union to adopt measures – whether binding or otherwise – which would require Member

three independent Maltese newspapers, as well as at least one popular online portal, to delete or alter online content as requested by the bank. The media outlets invariably stood by the veracity of their stories, noting that the deletion and alteration was not an admission of guilt but a consequence of economic duress.¹¹ In other words, the mere fact of the potential applicability of jurisdictional rules in the Brussels I Regulation sufficed to undermine press freedoms enshrined in the EU Charter of Fundamental Rights. But for the steadfast resistance of Daphne Caruana Galizia, and the actions of online activists following her assassination, the alteration of the historical record would not have been known.¹²

It is hardly surprising that journalists would reluctantly submit to the demands of a pursuer rather than engaging in litigation which could cost hundreds of thousands of pounds merely to settle a jurisdictional argument.¹³ Indeed, the fact of limited defamation cases masks extensive out-of-court settlement of disputes in situations in which one might otherwise expect respondent journalists to hold their ground.¹⁴ Financial, psychological, and other barriers to defending a lawsuit in a foreign jurisdiction are well documented in the legal literature.¹⁵ What is more, game theory analysis of out-of-court settlement of a dispute, which incurs negligible direct costs when compared to expensive litigation, would weigh heavily in favour of the former given the limited rationally grounded incentives to incur the risk and

States to adopt legislation which would discourage the use of exorbitant grounds of jurisdiction as a means to suppress journalistic work. This could include, but is not limited to, the availability of punitive damages in respect of vexatious claims.

¹¹ See e.g. Editorial, ‘Pilatus Bank: Malta’s media freedom SLAPped in the face’, *The Malta Independent* (17/12/2017). Accessible at: <http://www.independent.com.mt/articles/2017-12-17/newspaper-leader/TMIS-Editorial-Pilatus-Bank-Malta-s-media-freedom-SLAPped-in-the-face-6736182724>

¹² Delia (n 8).

¹³ See e.g. the following family law cases: *V v V* [2011] EWHC 1190 (Fam) [61] “The overall bill to the family, now standing at £925,000, will no doubt top £1 million if next month’s hearing about the children goes ahead. It should be recalled that this level of expense has been incurred without a basis of jurisdiction having been established”; *W Husband v W Wife* [2010] EWHC 1843 (Fam): legal costs amounted to determine jurisdiction amounted to £120,000; *JKN v KCN* [2010] EWHC 843 (Fam), [7] the combined legal cost to determine jurisdiction amounted to £900,000 at the preliminary stage. In civil and commercial matters, similar costs have been observed; e.g. in *Kolden Holdings Ltd v Rodette Commerce Ltd and another* [2008] EWCA Civ 10, the court lamented the expenditure of £400,000 on a spurious challenge to jurisdiction. For qualitative and quantitative analysis of the use (and abuse) of jurisdictional litigation as a negotiating technique, see Beaumont, Danov, Trimmings and Yüksel ‘Great Britain’ in Beaumont, Danov, Trimmings and Yüksel (eds) *Cross-Border Litigation in Europe* (Hart/Bloomsbury 2017) 84-85.

¹⁴ Wallis, ‘Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, European Parliament DT\820547EN.doc (23.06.2010) 4.

¹⁵ See e.g. Visscher ‘A Law and Economics View on Harmonisation of Procedural Law’ in Kramer and van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012) 82-84; Albert et al *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (European Commission DG 2007). Accessible at <https://e-justice.europa.eu/fileDownload.do?id=99bdd781-aa3d-49ed-b9ee-beb7eb04e3ce> (Accessed 03 March 2019); Dori and Richard ‘Litigation costs and procedural cultures – new avenues for research in procedural law’ in Hess and Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352.

opportunity cost of litigation.¹⁶ This is all the more so where the risk of reputational harm to a media entity which deletes content is limited given the fact would be unknown to anyone other than the would-be litigants.

In addition to concerns regarding horizontal cases of abuse of defamation law, it is especially noteworthy that the law has on occasion been used as an instrument for the privatisation of government-driven suppression of investigative journalism where members of government share interests with private sector actors. In evidence to the European Parliament, Henley and Partners, Malta's concessionaire for its citizenship by investment programme, admitted that it regularly consulted governments before instructing lawyers to act against the press.¹⁷ It follows, therefore, that state actors are able to use the Brussels I Regulation as a proxy for state censorship; the involvement of state actors in the bringing of defamation cases which would benefit from the free movement of judgments runs counter to the limitation of the scope of the Regulation to private civil and commercial matters, and counter to the spirit in which the legislation was agreed by the Union's lawmakers.

Notably, the Pilatus Bank affair was not an isolated incident. The editor of Malta Today, observed that it is commonplace for transnational businesses to use the threat of libel to force the deletion of factual reporting. He cites four separate incidents involving unrelated businesses in which his newspaper acquiesced in the demands of transnational business entities to delete reports, implicitly suggesting that this was not due to the strength of the claim, but the force with which it was made.¹⁸ Another Maltese news site, which was established following the assassination of Daphne Caruana Galizia, noted a further example in which it was the only news organisation to refuse to delete or alter online content following threats from the concessionaire for Malta's multimillion Citizenship by Investment programme.¹⁹

Furthermore, the incidence of domestic SLAPP suits is extremely widespread, and far better documented than transnational iterations of the practice. By way of example, the widespread

¹⁶ On the application of game theory to civil disputes generally, see Albert et al (n 15) 299-300.

¹⁷ Muscat, "The consequence for those who want to silence journalists must be public outrage", The Shift News (13/06/2018). Accessible at: <https://theshiftnews.com/2018/06/13/the-consequence-for-those-who-want-to-silence-journalists-must-be-public-outrage/>.

¹⁸ Garside, 'Murdered Maltese reporter faced threat of libel action in UK' (02/03/2018), The Guardian. Accessible at: <https://www.theguardian.com/world/2018/jun/01/murdered-maltese-reporter-faced-threat-of-libel-action-in-uk>

¹⁹ Taylor, 'Lawsuits that cripple journalists: Malta a protagonist in debate on press freedoms' (02/03/2019), The Shift News. Accessible at: <https://theshiftnews.com/2019/03/02/lawsuits-that-cripple-journalists-malta-a-protagonist-in-debate-on-press-freedom/>

abuse of defamation litigation has been reported to weaken press freedoms in Croatia,²⁰ Germany,²¹ Italy,²² Malta²³ and the United Kingdom²⁴ among others. It is especially noteworthy that cases in which defamation law has been deployed to suppress factual reporting generally relate to matters of cross-border concern, whether for reasons relating to political governance or the operation of the single market.

In June 2018, however, Vice President Timmermans, responded to the MEPs arguing that the Union lacks competence to harmonise substantive defamation law, and strikes an appropriate balance in respect of private international law rules.²⁵ This paper unpacks the various aspects of potential anti-SLAPP legislation with a view to identifying possible legal techniques for the introduction of legislation which fosters an enabling environment for journalism. It is argued that the EU does in fact have competence to adopt relevant legislation, and that legislation is both necessary and urgent. Indeed, the Union has adopted numerous legal instruments which affect litigation in defamation cases. There is, however, a need to amend existing legislation, and to introduce new instruments as follows:

- (i) The rules on jurisdiction in the Brussels Ia Regulation should be amended with a view to removing the claimant's unilateral right to choose a court or courts in which to pursue a claim. It is argued that jurisdiction in defamation cases should lie with the courts of the respondent's domicile.
- (ii) The absence of a common rule on choice of law in defamation cases results in a lack of legal certainty, and requires journalism on cross-border matters to apply 'the lowest common denominator of press freedoms'. The Rome II Regulation²⁶ should be amended with a view to harmonising rules on choice of law in defamation in a manner which renders the applicable law predictable to the parties.
- (iii) A study of national procedural and substantive laws in defamation cases should be conducted with a view to adopting a directive which will harmonise minimum safeguards for freedom of expression, particularly with a view to dissuading vexatious litigation.

²⁰ <https://www.ecpmf.eu/news/threats/croatia-one-thousand-lawsuits>

²¹ <https://www.ecpmf.eu/news/legal/slapp-the-background-of-strategic-lawsuits-against-public-participation>

²² <https://globalfreedomofexpression.columbia.edu/publications/slapps-5-ws-background-strategic-lawsuits-public-participation/>

²³ <https://www.cjr.org/analysis/slapp-daphne-caruana-galizia-malta.php>

²⁴ L Harding on 'Good Morning Scotland', BBC Scotland, 23/06/2018.

²⁵ Timmermans, correspondence with Members of the European Parliament (12/06/2018). Accessible at: <https://www.anagomes.eu/PublicDocs/974f0440-6c8c-48e3-bee4-80e6ced9735e.pdf>

²⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

- (iv) The above measures should be complemented by rule of law monitoring mechanisms which would include evaluation of the legal environment for journalism generally, and investigative journalism in particular.

2. Constitutional context

A. *Private Enforcement, and the Rule of Law*

Central to the EU legal order is the notion that both the state and the private sector exercise a role in the governance of contemporary life.²⁷ The power of both is to be curtailed with a view to limiting concentration and abuse of public and private power, both where exercised separately and where exercised in tandem. The salience of this post-war consensus around West German ordoliberalism is all the more accentuated in the context of contemporary economies in which public goods have been privatised, and public interest obligations transferred along with public assets to private actors.²⁸ In legal terms, this is accompanied by the ‘blurring [of] the traditional distinctions between public and private law.’²⁹ This is especially evident in the treatment of private undertakings in competition law, but is also central to the horizontal effects of treaty provisions whereby individuals are empowered to exercise rights emanating from EU law as against one another.³⁰ The uniting philosophy of the law is that democratic governance requires the curtailment of abuse of asymmetries of power, whether they involve the State or private actors alone.

Furthermore, the central tenet of the constitutionalisation of EU law is that citizens exercise an enforcement function, supplementing oversight by public entities. The seminal judgment in *Van Gend* turns on this very point.³¹ A functioning legal order requires not only the vigilance of public entities, but the supplementing of public enforcement functions by individuals bearing enforceable rights.³²

In the context of libel suits, therefore, it is self-evident that the ability of individuals to be informed of and to scrutinise the activities of powerful actors, whether they appear in the guise of the state or as private entities, enjoys an elevated status among the principles underpinning the EU legal order. The Treaties do not merely establish an internal market,

²⁷ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

²⁸ See Sauter and Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009) 19-20.

²⁹ *Ibid* 21.

³⁰ *Van Gend* (n 27).

³¹ *Ibid*.

³² *Ibid*.

but also address the manner in which that market is governed. This includes scrutiny of the behaviour of individual entities by the institutions of the Union, the requirement that the Member States scrutinise those entities, and – crucially – the enforcement functions of informed individuals as market and civic actors.

B. Fundamental Rights

Any legislative intervention concerning defamation must, of course, account for the potential conflict between a number of fundamental rights, including the right to freedom of expression, the right to privacy and the right to access to courts. Defamation litigation almost invariably involves consideration of the appropriate balance to be struck between the rights of one party to state facts or express opinions, and the other party's right to safeguard their privacy. Any decision as to which court or courts could exercise jurisdiction may have a detrimental effect on the ability of one party to bring a suit and of the other party to defend themselves against that suit. In other words, insofar as jurisdictional rules may result in the denial of access to courts, they could operate as a proxy for the denial of other fundamental rights of one party or the other.

On the one hand, the pursuer may claim a breach of the right to private life, while the respondent will argue that the impugned speech falls within the parameters of freedom of expression. EU law does not, on the face of it, express a clear preference as between the two rights. This is to be distinguished from the position in the United States where First Amendment rights have long been upheld as 'the indispensable condition of nearly every other form of freedom'.³³ It is beyond the scope of this paper, and perhaps impossible, to identify policy choices which would strike an unassailable balance between relevant rights in the European Union. Suffice it to note at this juncture that, notwithstanding the European Court of Human Rights' efforts to establish a sound balance in individual cases,³⁴ the manner in which legal practice operates – often outwith the courts – results in a factual state of affairs which is weighted heavily against freedom of expression.

³³ *Palko v Connecticut* 302 US 319 (1937).

³⁴ See e.g. D Voorhoof, 'Freedom of Expression *versus* Privacy and the Right to Reputation: How to Preserve Public Interest Journalism' in S Smet and E Brems (eds) *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony?* (OUP 2017) 148-170; L Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2008), Chapter 6.

3. Jurisdiction

A. *The general scheme of the Brussels I Regulation*

The Brussels I Regulation is designed to prevent forum shopping and to provide prospective litigants with predictable litigious processes and outcomes. In the absence of a choice of court agreement between the parties,³⁵ this is achieved by grounding jurisdiction in the court which is most closely connected to the facts of the case. Usually, this is the court of the domicile of the defendant.³⁶ The underlying reasoning is that a pursuer should not be empowered to use jurisdictional rules to exact an advantage over the respondent by shopping for a court which is convenient to themselves, or vexatious to the counter-party; jurisdictional rules should, in principle, produce neutral outcomes for the parties.

In some cases, however, the Regulation recognises that there exist power asymmetries between the parties, or particular connections to a specific jurisdiction, which require a lawsuit to be heard in a court other than that of the defendant's domicile, or which should afford the pursuer a choice as between the court of the defendant's domicile and another connected court. This may be because of an overwhelming State interest or connection to a case, such as in respect of entries in public registers, or because of strong factual connections to a particular jurisdiction which might render it more practically convenient to litigate there.

One such situation is tort, or delict in Scots law. The rules concerning jurisdiction in tort cases remain unchanged since the adoption of the Brussels Convention 1968, save to the extent that they have been subject to extensive elaboration and development by the Court of Justice of the European Union.³⁷ In tort cases, the pursuer usually claims to be a victim of activity which could not be predicted, and for which they could not make *ex ante* legal arrangements for the settlement of disputes. The law is mindful of the fact of the involuntary nature of the obligations purportedly owed to the pursuer, and affords a unilateral choice of forum as between the jurisdiction which is most closely connected to the respondent, or the jurisdiction which is most closely connected to the facts of the case. Article 7(2) of the Brussels I Recast Regulation establishes a special ground of jurisdiction in addition to the general jurisdictional rule based on the defendant's domicile. The pursuer may also bring an action in 'the place where the harmful event occurred'. This is understood to mean either the place from which the harm originated, or the place in which the resulting harm was incurred.³⁸ Accordingly, in a simple case of cross-border damage, the Regulation opens up

³⁵ Brussels I Recast (n 7), Art 25.

³⁶ Brussels I Recast (n 7) Art 4.

³⁷ Wilderspin, 'Cross-border Non-contractual Disputes: The Legislative Framework and Court Practice' in Beaumont et al (n 13) 640-641.

³⁸ Case 21/76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

the possibility of forum shopping as between up to three jurisdictions. As discussed in Part B below, that choice is multiplied in cases of online defamation.

While the motivation for the formulation of the rules on jurisdiction in tort appears to be the availability of evidence in the relevant jurisdictions,³⁹ as opposed to an explicit reference to power asymmetries between the parties, in granting a unilateral choice of jurisdiction to the pursuer, there can be no question that the legislator demonstrates a degree of sympathy to the party which claims to be an involuntary creditor. Furthermore, in applying a liberal interpretation to the term ‘the place where the harmful event occurred’,⁴⁰ the CJEU departs from the general principle of narrow interpretation of exceptions to the default rule of jurisdiction based on the domicile of the defendant. This suggests that the CJEU is especially sympathetic to the position of the purported victim, despite protestations to neutrality.⁴¹

Generally, the adjustment of default rules of jurisdiction for tort cases is entirely sensible. Consider, for example, the facts in the *Bier* decision, in which the Court provided an authoritative interpretation of the term ‘place where the harmful event occurred’.⁴² In this case, the operator of a French mine had polluted the Rhine river, and this pollution caused extensive damage to a flower nursery downstream in the Netherlands. In these circumstances, the pursuer had no juridical connection to the mine in France prior to the harmful event, save for the geographical accident of shared resources. Allowing the institution of an action in the Netherlands realigns the asymmetry of power as between the involuntary creditor and the tortfeasor. Nor is there any overwhelming connection which would militate in favour of preferring France to the Netherlands as a suitable forum in which to bring evidence before a court. While evidence of negligence or malfeasance is to be found in France, the existence and extent of damage can only be determined with reference to facts situated in the Netherlands. It follows, then, that the departure from the CJEU’s tradition of interpreting special grounds of jurisdiction narrowly is both sound in principle, and appears to be in keeping with the intentions of the legislator.

In a cross-border libel suit, however, the situation is quite different. First, it must be recognised that the media is not ordinarily in the business of writing about the activities of

³⁹ In case Case C-12/15 *Universal Music International Holding BV v Michael Tétéreault Schilling, Irwin Schwartz, Josef Brož* EU:C:2016:449 at para 27, the Court recalled its view that the justification for the special rule of jurisdiction in tort is motivated ‘in particular on the grounds of proximity of the dispute and ease of taking evidence (judgments of 21 May 2015 in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 40, and of 10 September 2015 in *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 74).’

⁴⁰ *Bier* (n 38).

⁴¹ *Universal Music* (n 39).

⁴² *Bier* (n 38).

people and entities which have no voluntary connection to the jurisdiction in which the newspaper's target audience is situated. The alleged victim is usually a person who has chosen to engage in activity of public interest, often in numerous jurisdictions. Unlike the owner of a nursery in the Netherlands, who had no active interest in the activities of a French mine, the pursuer in a libel case usually knowingly engaged in activity which created a voluntary nexus between themselves and the jurisdiction from which the alleged harm originated. Accordingly, while the allegedly defamatory act is not itself a product of the will of the pursuer, it remains the case that there is, conceivably, a degree of voluntariness which distinguishes the tort of defamation from other torts. This is borne out by our analysis of recent litigation in England and Wales (see Part C below).

B. Case law of the CJEU in defamation cases

The Court of Justice has, on a number of occasions, been faced with the difficulty of reconciling general rules concerning jurisdiction in tort with the specific problem of defamation. On a positive note, the Court has been mindful of the need to restrict forum shopping, particularly in cases of online defamation.⁴³ In general, however, it appears that the EU judiciary has not been especially sensitive to two key problems in transnational litigation. First, case law lacks sustained consideration of the effects on freedom of expression and access to courts arising from the vexatious use of jurisdictional rules. Secondly, and partly as a consequence of a failure to engage in policy and human rights analysis specific to defamation, the Court appears to pursue the path established in *Bier* whereby development of jurisdictional rules is shaped by the involuntary nature of the legal relationship to which the purported victim is party. This assumption, however, is problematic when considered in the light of the extensive use of jurisdictional litigation designed to provide a negotiating advantage.⁴⁴ In less sympathetic terms, jurisdictional rules are deployed as a means to extract agreement to terms which would not otherwise be acceptable to counterparties. When considered in the context of the right to free speech, as well as the rule of law implications of suppression of investigative journalism, it is immediately apparent that the Court's analysis requires greater nuance which might enable a break with path dependency.

In *Shevill*, the Court reaffirmed that a pursuer could sue in every state in which a publication is distributed for the damages arising in that state.⁴⁵ This is in keeping with the *Bier* principle that tort jurisdiction affords a choice as between the place from which the damage issued and the place in which the resulting damage was felt; in libel cases, this means a choice

⁴³ See Case C-509/09 *eDate Advertising* EU:C:2011:685; Case C-194/16 *Svensk Handel* EU:C:2017:766.

⁴⁴ Beaumont, Danov, Trimmings and Yüksel 'Great Britain' in Beaumont et al (n 13) 84.

⁴⁵ Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* ECLI:EU:C:1995:61

between the place in which the publisher operated, or the place (or places) in which the allegedly libellous material was distributed.

While the total quantum of damages would not be multiplied by virtue of this ‘mosaic approach’ itself, the immediate problem for journalists is, of course, that this could expose the defendant to the costs of litigation in each of those states notwithstanding the fact that the pursuer could, in principle, sue for the entire claim in the state of the defendant’s jurisdiction.⁴⁶

Equally, of course, the mosaic approach renders it difficult for a claimant to recover damages for the full extent of harm caused.⁴⁷ It is this difficulty which prompted the Court to afford a further choice to the pursuer, namely to sue the defendant for the global damage caused in the state in which the pursuer has their centre of main interests.⁴⁸ This is a sensible adjustment insofar as it enables the pursuer to avoid multiplication of proceedings. However, the judicial innovation does not require the pursuer to concentrate litigation in one jurisdiction; it is facultative innovation which provides the pursuer with further choices of litigation strategy. Although the Court does demonstrate a degree of sympathy with the position of the respondent insofar as it affirms that jurisdiction in online defamation cases should not be universal in *Svensk Handel*,⁴⁹ the net result of the judgments remains that the pursuer has an extensive choice of a litigation techniques. In the hands of an unscrupulous and well-financed party, this is certainly problematic in that the pre-litigation stage places the prospective respondent at the mercy of lawful but potentially abusive tactics.⁵⁰

C. *Recent online defamation cases in England and Wales*

As noted above, the pursuer in a tort case may choose to bring a case in either (i) the place in which the defendant is domiciled, or (ii) the place in which the harmful event occurred. The place where the harmful act occurred could refer to either the place from which the act which caused damage originated, or the place where the effects of the act were felt. It follows, therefore, that the pursuer could have a choice between multiple jurisdictions, and with that choice the mischief of forum shopping is amply available.

⁴⁶ Lutzi, ‘Internet cases in EU private international law: developing a coherent approach’ (2017) *ICLQ* 697, 691-692.

⁴⁷ *Ibid.*

⁴⁸ *eDate Advertising* (n 43).

⁴⁹ *Svensk Handel* (n 43). The decision in *Svensk Handel* restricts jurisdiction in applications for the removal of defamatory content to the courts which are capable of hearing the global claim for damages.

⁵⁰ *Garside* (n 18).

This is borne out by our analysis of reported defamation cases in which the Brussels I Regulation was relied upon in the courts of England and Wales. In *Said v Groupe L'Express*⁵¹ the respondent distributed a publication principally in France, in the French language, and concerning an accredited diplomat residing in Monaco, a regular traveller in France, and who owned a property in Paris. It was alleged that the pursuer had smuggled funds through France.⁵² L'Express had only 214 subscribers in the entire United Kingdom, including Scotland and Northern Ireland, and sold a further approximately 65 copies at retail outlets. Online readership in the UK was just 252 according to L'Express. This is to be contrasted with global readership of 300,000 hard copies and 32,000 online. In sum, then, the connections to France are both extensive, and voluntary on both sides of the dispute. Connections to England and Wales on the other hand are limited.

Similarly, in *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA*, the claimant operated petrochemical production plant at a port in Poland through a company incorporated under Polish law.⁵³ It is hardly beyond the realm of imagination that the activities of the company should be of interest to the Polish public. In this case, however, the High Court was required to find that it had jurisdiction under the Brussels I Regulation given that the pursuer's centre of main interests was situated in the UK.⁵⁴

Limited as the sample of cases is, what it demonstrates is that the deployment of the jurisdictional rules in relation to defamation is somewhat gratuitous. In either case, it is clear that England and Wales is not the jurisdiction which is most closely connected to the facts of the case. In both cases, the pursuer had established voluntary connections with the jurisdiction in which the allegedly defamatory statements were made. In the Polish case, the connection was potentially particularly profitable. While it must be conceded that the respondents voluntarily disseminated content which was potentially accessible elsewhere, and which could cause harm elsewhere, surely this is the very function of speech in respect of (often powerful) individuals and entities engaging in transnational activity.

D. Public Policy Defences Against Enforcement within the EU

The civil law system for the resolution of concurrent jurisdiction requires that the court which is first seised will hear the case, and that all other courts will refrain from exercising

⁵¹ *Said v Groupe L'Express* [2018] EWHC 3593 (QB)

⁵² https://www.lexpress.fr/actualite/societe/le-diplomate-aux-mallettes-de-cash_2002864.html. Accessed 01 March 2019; the news article has since been removed.

⁵³ *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA* [2018] EWHC 1081 (QB)

⁵⁴ Jurisdiction was declined on grounds of *lis alibi pendens*. At the time of writing, the Court's decision is the subject of an appeal.

jurisdiction; this is reflected in the general scheme of the Brussels I Regulation. The question of whether the outcome of the exercise of jurisdiction was just is then left to be addressed at the enforcement stage, if at all, within the limited confines of the public policy of the jurisdiction in which enforcement is sought. Certainly, it would be possible to argue that the enforcement of ruinous judgments is contrary to public policy insofar as the quantum of damages threatens fundamental principles of the relevant state.⁵⁵ It does not appear, however, that it would be possible to argue that the costs of the litigation process itself fall within the scope of the public policy exception. The litigation process in its entirety would appear to be subject to the principle of mutual trust. Accordingly, public policy exceptions do not remove the hurdle of cost.

Moreover, reliance on exceptions to the principles of the free movement of judgments disregards the following possibilities: (i) enforcement may be sought in jurisdictions in which a public policy defence is not available; (ii) the respondent may be eager to avoid the reputational damage arising from loss of a defamation suit, even if effectively by default. In other words, the incentives to incur the opportunity cost of litigation, or to settle out of court, are far greater than incentives to litigate and then contest on potentially nebulous grounds of public policy.

E. Compatibility with Fundamental Rights Protections

The engagement of special rules of jurisdiction in defamation cases could constitute a violation of fundamental rights whether the pursuer opts for the mosaic approach or chooses to pursue a case in a single jurisdiction other than that of the respondent's domicile.

The human rights concerns regarding the mosaic approach are, arguably, most readily identifiable. In *Ali Gürbüz v Turkey* it was held that the initiation of multiple proceedings constituted a violation of Article 10 of the ECHR.⁵⁶ The case of *Gürbüz* concerns criminal proceedings, and is therefore distinguishable from civil defamation suits. Nevertheless, the reasoning of the ECtHR can be readily transposed to a situation in which a claimant brings multiple potentially ruinous proceedings in several states. While the respondent is not faced with the potential deprivation of liberty, the opportunity cost of time and money invested in defending multiple suits has the same effect. The mischief of a freezing effect on freedom of expression therefore remains, and equally constitutes an infringement of Article 10 ECHR.

⁵⁵ Lindsay, 'SLAPP lawsuits: Parliament cannot prevent foreign lawsuits but Maltese courts could limit damages', *The Malta Independent* (31/12/2017). Accessible at:

<http://www.independent.com.mt/articles/2017-12-31/local-news/SLAPP-lawsuits-Parliament-cannot-prevent-foreign-lawsuits-but-Maltese-courts-could-limit-damages-6736183102>

⁵⁶ *Ali Gürbüz v Turkey* (Ap. nos. 52497/08, 6741/12, 7110/12, 15056/12, 15057/12 and 15059/12).

As noted in the introductory comments above, it is also clear that granting the pursuer an extensive choice of fora in which to litigate enables the effective deprivation of the right to a fair trial. A defence could be beyond the means of the respondent, particularly insofar as freelance journalists and media entities with geographically constrained readership are concerned. It is clear from the Maltese examples cited above that this is not a mere theoretical concern. Private international law rules have in fact been deployed to remove reporting in an entire member state of the European Union, essentially depriving the entirety of an EU political unit of its right to access information.

F. Need for legislative intervention

Human rights defences to the operation of the jurisdictional rules in defamation cases remain an underexplored possible route for litigants. This is notwithstanding the fact that the Regulation has been deployed to undermine the right to access to courts, and by extension the right to freedom of expression, as guaranteed in the EU Charter of Fundamental Rights. Nevertheless, as is evident with reference to judgments concerning the deployment of antisuit injunctions, the European Court of Justice is reluctant to replace the *ex ante* general analysis deployed by the legislator with its, or a national court's, judgement of the merits of jurisdictional justice in individual cases. This would, in the CJEU's view, do violence to the general scheme of the Regulation which is predicated on the notion that jurisdictional outcomes should be predictable, and that courts in different member states are required to trust one another's decisions as to the exercise of jurisdiction under the Regulation.⁵⁷ It follows, then that the litigant who wishes to contest the application of jurisdictional rules would face an uphill struggle should a reference ever be made on this basis.

Of course, defences concerning human rights restrictions arising from the application of the Regulation differ significantly from the rationale in *Turner v Grovit* insofar as mutual trust between courts is not at issue. The pleading would not be that a court which is properly seised under the Regulation is unsuited to determine whether it should exercise jurisdiction, but that the exercise of jurisdiction by that court as required by the Regulation would breach the fundamental right to access to courts. Crucially, however, the catch in this scenario is that the litigant who is able to litigate the jurisdictional point and seek a reference to the Court of Justice cannot be a respondent who lacks the financial means to litigate. If the respondent has the means to argue the human rights case in the court which would be appointed to hear a case under the Regulation, any pleadings as to the human rights question would be hypothetical and therefore incapable of being referred to the CJEU.

⁵⁷ See in particular Case 159/02 *Turner v Grovit* EU:C:2004:228, paras 24-26.

An alternative route might be for the defendant to challenge the lawfulness of the Regulation in the courts of their domicile. This approach has more promise insofar as affordability is concerned, but the procedural route to seize a court of a live human rights concern, as opposed to a merely hypothetical threat, is also shut off by virtue of the principle in *Turner v Grovit* and the overarching *lis alibi pendens* rule in the Regulation.

It follows, then, that while there is a theoretical argument that the CJEU could soften the harder edges of the application of the Regulation, the opportunity is highly unlikely to present itself. Furthermore, if the opportunity did in fact arise, it is unlikely that the Court would be willing to break with the path it has established in earlier case law. Accordingly, it must be for the legislator to loosen the bonds created by the Regulation, or to reorder the rules with a view to grounding jurisdiction in a court which is in fact closely connected to the dispute. Furthermore, it is submitted that a clear rule is required which would eliminate the opportunity for pursuers vexatiously to seize a court of litigation intended only to create a jurisdictional dispute. This would be best achieved by grounding jurisdiction in the court of the defendant's domicile in defamation cases, unless the parties agree otherwise.

4. Choice of Law

The susceptibility of defamation cases to forum shopping is exacerbated by a lack of harmonisation of choice of law rules, and the significant variance in the substance of national laws. In view of the exclusion of defamation from the scope of the Rome II Regulation,⁵⁸ a choice of court carries with it a choice of the standards of free speech to be applied to a particular case. As noted in Section 2 above, the pursuer is afforded extensive jurisdictional choice. This carries with it a unilateral right to determine not only the private law rights and duties of the parties, but also the fundamental rights standards and public policy applicable to a dispute. The practical effect is that journalists who engage in reporting of matters of cross-border interest must foresee and apply the lowest common denominator of free speech if they are to satisfy the standards of each legal system to which they may be subject.⁵⁹ Alternatively, of course, journalists might simply refrain from investigating and reporting cross-border matters for fear of legal reprisal. This chilling effect is especially problematic in the context of a European Union which seeks to develop the connectedness of a European

⁵⁸ Rome II Regulation (n 7), Art 1(g).

⁵⁹ Mills, 'The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?' (2015) *Journal of Media Law*, 1, 19.

polity in an EU democracy.⁶⁰ It is therefore argued in this section that legislative intervention in choice of law is required to supplement reform of jurisdictional rules.

Defamation was excluded from Rome II as a consequence of disagreement between the member states, and between the EU's legislative institutions. Proposals ranged from the Commission's choice of the law of the habitual residence of the person harmed, to Parliament's proposal which would have favoured the publisher's establishment.⁶¹ In the Council of Minister's deliberations, it is reported that some thirteen different options were put forward for consideration.⁶² In the event, the differences could not be bridged and a decision was taken to proceed with the adoption of a choice of law regulation which excluded defamation from its scope, provided that a review would take place by 2012. That decision in 2006 was perpetuated following further failure to agree to changes in 2012 and thereafter. The danger now is that the temporary exclusion of defamation becomes permanent.

The judgment in *eDate Advertising* affirms that the courts of the place of the defendant's domicile and of the place where the harmful event occurred are entitled to hear the entire claim in an alleged multi-jurisdictional libel.⁶³ It does not follow, however, that that court will apply the law of a single legal system, still less its own law, to the entire claim. Thus, while the rule in *eDate Advertising* enable litigants to eliminate the costs of multi-jurisdictional litigation, it does not necessarily also eliminate the costs of engagement with multiple legal systems. By way of example, a court in France might be entitled to hear the entire claim concerning an alleged libel of a multinational entity having its centre of interests in France. However, the court might find that the part of the claim which concerns damages arising in France would be subject to French law, whereas damages arising elsewhere are to be determined in accordance with the relevant foreign laws. The court would then be required to hear experts from each of the relevant legal systems.

The difficulties are multiplied by the complexity and multiplicity of systems for the determination of the governing law of tort. In the legal systems of the United Kingdom, for example, the double actionability rule operates as substantive protection for the respondent in defamation cases.⁶⁴ However, it requires the court to engage in an inquiry of both the

⁶⁰ See e.g. Weiler, 'The European Union belongs to its citizens: three immodest proposals' (1997) *European Law Review*, 150-156.

⁶¹ Wallis (n 14) 2-3.

⁶² Dickinson, 'Privacy and Personality Rights in the Rome II Regime – Not Again?', conflictoflaws.net (19/07/2010). Accessible at: <http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/>

⁶³ *eDate Advertising* (n 37).

⁶⁴ Mills (n 59) 7-10.

actionability of the claim in the forum, and in the place in which the harmful event occurred. In a multi-jurisdictional claim, this means that litigators must incur the cost of engagement with each relevant legal system.⁶⁵

The European Parliament's proposal for the introduction of a choice of law rule for defamation in a recast of the Rome II Regulation is, therefore, certainly to be commended.⁶⁶ Indeed, Mills argues persuasively that the formulation proposed by the Parliament is a sound place to start discussions for future reform.⁶⁷ The Parliamentary proposal begins with a presumption that the applicable law will be the law of the place in which the most significant elements of the loss are situated (para 1). This is subject to the exception, however, that the law of the defendant's habitual residence will apply if it was not reasonably foreseeable that damages would occur elsewhere (para 2). There are then safeguards for printed matter and broadcasts whereby it is presumed that the place in which the damage occurred is the place of editorial control or the place to which a publication is directed (para 3).

While the European Parliament's proposal has the merit of addressing conflicting concerns in defamation law,⁶⁸ it is submitted that a rule which is more readily applied by courts and foreseeable to the parties would be preferable. To this end, a presumption that the law of the place to which a publication is directed would be applied certainly has merit. In the event that future developments in media consumption result in an increase in publications with multinational audiences, it would be arguable, of course, that there is no such place and that a supplementary rule is therefore required. In these circumstances, the default rule as proposed in paragraph 1 of the Parliamentary proposal, namely that the law of the place in which the damage occurred could apply.

5. Harmonisation of substantive and procedural laws

The problems of jurisdiction and choice of law are exacerbated by a lack of harmonisation of defamation laws. It is uncontroversial that divergence in national laws operates as both a financial and psychological barrier to transnational litigation. The party that is unfamiliar with the legal system which will determine the outcome of the case – usually the defendant –

⁶⁵ Ibid.

⁶⁶ European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170/INI) 2013/C 261 E/03.

⁶⁷ Mills (n 59) 14-15.

⁶⁸ Ibid.

will, in their consideration of the potential outcomes, incur the further cost of risk arising from uncertainty of the law.⁶⁹

Furthermore, substantive laws, as well as procedural laws which lack tools to dissuade vexatious defamation suits, and which impose the evidentiary burden on the defendant in libel proceedings regardless of public interest, are said to have a chilling effect on investigative journalism whether there exists a cross-border element or otherwise.⁷⁰ By way of example, consider the rule in some jurisdictions that the defendant bears the burden of proof in the context of investigative journalism which relies on whistleblowers.⁷¹ The defendant is unable to use whistleblower testimony since this would endanger the source, and breach the trust (and, potentially, a contract) upon which the relationship with that source relies.

The European Union lacks specific competence to adopt substantive and procedural legislation concerning defamation, save to the extent that procedure includes rules of private international law. To date, the view has been taken that the Union therefore may not adopt legislation to harmonise national defamation laws.⁷² The understanding of the manner in which competences are conferred on the Union has evolved, however. Reference need only be made to the recently adopted Whistleblower Protection Directive which, while restricted to illegalities falling within the scope of EU law, provides extensive analogous argumentation for the Union's competence in respect of defamation. The Commission identified no fewer than seventeen legal bases for the introduction of the directive in its original proposal.⁷³ Taken globally, however, there is a clear thread running through the arguments which relies on the internal market effects of whistleblower protection. It is simply untenable to argue that whistleblowers should be able to turn to journalists as a matter of EU law, while the activities of journalists themselves do not fall within the scope of EU law save to the extent that the courts which may hear a case are determined by the Brussels I Regulation.

⁶⁹ See generally Albert et al *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (European Commission DG 2007). Available at <https://e-justice.europa.eu/fileDownload.do?id=99bdd781-aa3d-49ed-b9ee-beb7eb04e3ce> (Accessed 15 October 2019); Dori and Richard 'Litigation costs and procedural cultures – new avenues for research in procedural law' in Hess and Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352. Maltese journalists and lawyers attested to the present author that the deletion of materials relating to Pilatus Bank's activities was, partly, motivated by their impression that foreign courts might take all manner of unexpected decisions. Of course, on closer inspection, the reality is that the laws of relevant states are, in fact, more protective of press freedoms than the laws of Malta.

⁷⁰ Index on Censorship, 'British MP condemns chilling libel cases faced by Daphne Caruana Galizia's family' (19/04/2018). Accessible at: <https://www.indexoncensorship.org/2018/04/british-mp-condemns-chilling-libel-cases-faced-by-daphne-caruana-galizias-family/>

⁷¹ See e.g. Chapter 248, Part II, Laws of Malta.

⁷² Timmermans (n 25); Wallis (n 14) 4-5.

⁷³ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0218&from=EN>

Furthermore, if it can be argued that whistleblower protection has a direct effect on the functioning of the internal market, as the Commission does in its reliance on Article 114 TFEU, it must follow that this is also so for defamation. Indeed, as noted in section 2 above, the effectiveness of EU law is reliant on the vigilance of individuals. Those individuals include the journalists who inform citizens, and the citizens who are reliant on journalistic revelations. In this context, it is pertinent, perhaps, to recall breaches of EU law which have recently been exposed by investigative journalists, and which consequently enabled the Union to take action to rectify breaches of the law.⁷⁴

In the event that the view is taken – incorrectly, in our view – that competence cannot be found under Article 114 TFEU, or indeed under various other legal bases which have been deployed elsewhere, there can be little doubt that Article 352 TFEU would be available to the Commission should it choose to exercise its legislative initiative. This, however, would complicate matters insofar as the legislative procedure would require the unanimous approval of the member states. Given the increased incidence of rule of law backsliding, and the evidence of misuse of libel laws by members of numerous governments, it is arguable that the Commission might be reluctant to embark on a path which could meet with insuperable resistance. In these circumstances, however, the failure to legislate would serve to emphasise the need for intervention to support journalistic freedoms. It is submitted that proactive rule of law monitoring could, as a fall-back position, provide a potential avenue to instigate the adoption of national legislation as necessary in the context of a system of reflexive governance.

6. Concluding remarks

In view of the central role of the press in safeguarding the rule of law – indeed, in view of freedom of expression’s foundational value as a prerequisite for the existence of the rule of law – it is submitted that the balance between rights of pursuer and defendant in defamation cases should be realtered. Jurisdiction should be grounded in the forum of the defendant’s domicile unless the parties agree otherwise. This would enable the press to reasonably foresee where they will be expected to defend their stories, and would be in keeping with the core values of the Brussels I Regulation, namely predictability and the limitation of forum shopping. Notwithstanding the recent recast of the Brussels I Regulation, the rules concerning defamation are unchanged since 1968. It is submitted, therefore, that the facts presented above constitute sufficient testing for the operation of the regulation in this specific respect. Amendments which would remove the claimant’s unilateral right to choose a court or courts in which to pursue a claim, replacing this with jurisdiction in the respondent’s

⁷⁴ See generally IJ4EU website. Accessible at: <https://www.investigativejournalismforeu.net/projects/>

domicile, are certainly necessary, and could be adopted without doing any violence whatsoever to other aspects of the Regulation.

Furthermore, greater predictability as to the outcomes of choice of law processes is certainly merited. Indeed, in the absence of harmonisation of jurisdictional rules, it is of fundamental importance that the press should be able to predict which laws *any* court within the European judicial area would apply and, therefore, what is the extent of their potential exposure. Harmonisation of choice of law rules, however, is not necessarily sufficient to ensure that press freedoms can be safeguarded appropriately. Several jurisdictions within the EU retain problematic rules of evidence and lack tools which would dissuade vexatious litigation and threats thereof. This is especially problematic in the context of sophisticated financial crime and other activities where the suppression of evidence of wrongdoing is a central feature of relevant activity. It is therefore submitted that the European Union should either (i) introduce legislation to harmonise rules of evidence in defamation cases, for which it has competence as a consequence of the importance of journalistic revelations to the integrity of an internal market governed by the rule of law; or (ii) if this proves politically impossible, to adopt coordinating measures which in respect of the preservation of press freedoms and the rule of law, and to follow these up with well-publicised monitoring.