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# The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform

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“The past was erased, the erasure was forgotten, the lie became truth.”<sup>1</sup>

## 1. **Introductory remarks**

Whether domestically or on a cross-border basis, defamation law has long been weaponized by economic and political actors wishing to escape scrutiny.<sup>2</sup> It was not till October 2017, however, that the extent of the implications for press freedom and the rule of law began to crystallise in public imagination. In the days following the assassination of journalist Daphne Caruana Galizia in Malta, the present author noted and exposed the manner in which jurisdictional rules had been deployed to suppress factual reporting by media entities, removing the entire online record of suspected transnational financial crime involving governmental actors and their business associates.<sup>3</sup> Far from being an isolated incident in a single Member State, it transpired that these events were symptomatic of a broader malaise arising from

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<sup>1</sup> George Orwell, 1984: <http://gutenberg.net.au/ebooks01/0100021.txt>

<sup>2</sup> See e.g. Trevor Hartley, “Libel Tourism” and Conflict of Laws’ (2010) *International & Comparative Law Quarterly* 25; Sarah Stavely-O’Carroll, ‘Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment’ (2009) *New York University Journal of Law and Liberty*, 252; Michelle Feldman, ‘Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction under New York’s Libel Terrorism Protection Act’ (2010) *Cardozo Law Review* 2457.

<sup>3</sup> Manuel 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/>

increasingly commonplace out-of-court practice of defamation law which was hitherto largely undocumented.<sup>4</sup>

In particular, costs arising from the ability to sue journalists in jurisdictions having only a tenuous connection to a case, under laws which bear little relation to the facts, have a chilling effect on press freedom and functioning democracies.<sup>5</sup> It is argued in this paper that, in the absence of reform of private international law of defamation, the ability of the European Union to function as a *sui generis* legal order is severely circumscribed. This is especially so given that the Union's need for the supplementing of public enforcement functions by individuals bearing enforceable rights<sup>6</sup> cannot be met in the absence of informed and active civic actors.

It is submitted, therefore, that the Brussels Ia Regulation<sup>7</sup> should be amended in order to ground jurisdiction in the courts of the place the defendant's domicile in defamation cases.<sup>8</sup> This would limit the ability of pursuers to price a legal defence beyond the means of the defendant (i.e. journalists and others). Amendment of jurisdictional rules should be supplemented by the introduction of predictable choice of law formulae in the Rome II Regulation,<sup>9</sup> as well as consideration of the introduction of harmonising legislation which would dissuade vexatious litigious techniques within Member States and from outwith the Brussels/Lugano<sup>10</sup> juridical space.

The paper is structured as follows. Part 2 provides factual background, highlighting the extent and effects of abuse of process, as well the institutional responses to date.

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<sup>4</sup> See e.g. Stavelly-O'Carroll (n 2) 267-270; Sofia Verza, 'SLAPP: the background of Strategic Lawsuits Against Public Participation', European Centre for Press and Media Freedom (2019). Accessible at: <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>; Gill Philips, 'How the free press worldwide is under threat', The Guardian (28/05/2020). Accessible at: <https://www.theguardian.com/media/2020/may/28/how-the-free-press-worldwide-is-under-threat>

<sup>5</sup> Verza (n 4).

<sup>6</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

<sup>7</sup> 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 Ia').

<sup>8</sup> This paper focuses on the Brussels Ia Regulation, but much of the discussion is applicable *mutatis mutandis* to Lugano Convention 2007, which mirrors the provisions of the Brussels Ia Regulation in most relevant respects.

<sup>9</sup> 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.

<sup>10</sup> Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L-339/3.

Part 3 situates the private international law discussion in its constitutional context, noting the centrality of private enforcement to the functioning of the EU legal order, as well as pertinent fundamental rights concerns. Part 4 then analyses existing jurisdictional rules and recommends that the imbalance in favour of the pursuer be remedied. It is then argued in Part 5 that this is to be complemented by harmonisation of choice of law rules in the Rome II Regulation, while Part 6 notes the need for the introduction of anti-SLAPP directive to address matters falling outwith the scope of existing instruments.

## 2. Factual Context

On 16 October 2017, Daphne Caruana Galizia, a Maltese 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 concerning transnational financial crime were disappearing from every news portal in Malta.<sup>11</sup> It was not a bomb that induced the redaction and deletion of news reports, but the opportunities which private international law offered prospective pursuers. 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.<sup>12</sup> The events in Malta were symptomatic of far-reaching challenges to press freedoms and the rule of law in other member states of the European Union, and by extension in the Union as a whole.<sup>13</sup>

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 an illicit springboard into other EU markets.<sup>14</sup> Pilatus Bank, an entity established in Malta, had been embroiled in controversy concerning allegations of

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<sup>11</sup> See Delia (n 3).

<sup>12</sup> Jurgen 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/>

<sup>13</sup> See Philips (n 4).

<sup>14</sup> See Luca Rainieri, 'The Malta Connection: A Corrupting Island in a "Corrupting Sea"?' (2019) *The European Review of Organised Crime* 10, 22-25; Jelter Meers, 'UK Branch of Pilatus Bank Closed Down' (26/04/2018) *Organized Crimes and Corruption Reporting Project*. Accessible at: <https://www.occrp.org/en/daily/8019-uk-branch-of-pilatus-bank-closed-down>

money laundering and failure to abide by due diligence obligations.<sup>15</sup> 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 connected to government flagship initiatives.<sup>16</sup> The bank was established in Malta, under Maltese law, and, at the relevant time, operated almost exclusively in Malta, but targeted its business to international clients including numerous international politically exposed persons such as Azerbaijan’s presidential family.<sup>17</sup> Caruana Galizia’s reports were published by Maltese newspapers, and 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 against every Maltese news site in the United Kingdom and the United States. Maltese defendants would have been rightly 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 Ia Regulation.<sup>18</sup> 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.<sup>19</sup> 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,<sup>20</sup> 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.<sup>21</sup>

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<sup>15</sup> Pilatus Bank has since been shut down in view of serious money-laundering failings. See Case T-687/18 R *Pilatus Bank v European Central Bank* ECLI:EU:T:2019:28; Panicos Demetriades and Radosveta Vassileva, ‘Money Laundering and Central Bank Governance in the European Union’ (2020) *Journal of International Economic Law* 1, 17-18.

<sup>16</sup> See e.g. Jacob 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>

<sup>17</sup> Rainieri (n 14) 22-25; Juliette Garside and Stephanie Kirchgaessner, ‘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>

<sup>18</sup> Brussels Ia, Art 7(2).

<sup>19</sup> Brussels Ia, Arts 4 and 7(2).

<sup>20</sup> Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* ECLI:EU:C:1995:61, para 33.

<sup>21</sup> Delia (n 3)

The threat of legal action in the United Kingdom and United States was a strategic gambit which was motivated primarily by the cost of proceedings, as well as the psychological effects of a lack of familiarity with foreign law and procedure.<sup>22</sup> London was by no means the appropriate forum, or indeed one which would be unequivocally empowered to exercise jurisdiction under the Brussels Ia Regulation as interpreted by the CJEU.<sup>23</sup> Moreover, the bank's substantive claims proved to be especially weak when later exposed to the scrutiny of financial regulators.<sup>24</sup> As regards the threatened suits in the United States, First Amendment protections suggest that a successful defamation action for punitive damages would have been especially unlikely there given the apparent absence of actual malice.<sup>25</sup> Nevertheless, the cost of litigation was enough to persuade the three independent Maltese newspapers of note,<sup>26</sup> as well as at least one popular online portal, to delete or alter online content as requested by the bank.<sup>27</sup> The media outlets invariably stood by the veracity of their published accounts of the facts, noting that the deletion and alteration was not an admission of guilt but a consequence of economic duress.<sup>28</sup> In other words, the mere fact of the potential applicability of jurisdictional rules in the Brussels Ia Regulation and the absence of *ex ante* defensive mechanisms in respect of third states sufficed to undermine press freedoms enshrined in the EU Charter of Fundamental Rights.<sup>29</sup> 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, and the altered record would have been the only remaining online account.<sup>30</sup>

It is hardly surprising, of course, that journalists would submit, albeit reluctantly, to the demands of a pursuer rather than engaging in litigation which could cost

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<sup>22</sup> Ibid.

<sup>23</sup> For analysis of relevant jurisdictional rules, see Section 3 below.

<sup>24</sup> See Demetriades and Vassileva (n 15) 17-18; Rainieri (n 14) 22-25.

<sup>25</sup> See e.g. *New York Times v Sullivan* 376, U.S. 254 (1964); *Gertz v Robert Welch*, 418 U.S. 323 (1974).

<sup>26</sup> These are the Times of Malta, Malta Today, and The Malta Independent.

<sup>27</sup> See e.g. Chris Peregin, 'The Least We Can Do Six Months After Daphne Caruana Galizia Was Killed' (16/04/2018) LovinMalta. Accessible at: <https://lovinmalta.com/opinion/the-least-we-can-do-six-months-after-daphne-caruana-galizia-was-killed/>

<sup>28</sup> 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>

<sup>29</sup> Charter of Fundamental Rights of the European Union [2012] OJ C-326/391.

<sup>30</sup> Delia (n 3).

hundreds of thousands of pounds merely to settle a jurisdictional argument.<sup>31</sup> Indeed, the fact of limited incidence of transnational defamation litigation masks extensive out-of-court settlement of disputes in situations in which one might otherwise expect respondent journalists to hold their ground.<sup>32</sup> Financial, psychological, and other barriers to defending a lawsuit in a foreign jurisdiction are well documented in the private international law literature.<sup>33</sup> 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 opportunity cost of litigation.<sup>34</sup> This is all the more so where the risk of reputational harm to a media entity which deletes content is limited given the fact of the deletion would be unknown to anyone other than the would-be litigants.<sup>35</sup>

Notably, the Pilatus Bank affair was not an isolated incident. The editor of the Malta Today newspaper observed that it is commonplace for transnational businesses to use the threat of libel to force the deletion of factual reporting.<sup>36</sup> 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

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<sup>31</sup> 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.

<sup>32</sup> See Diana 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.

<sup>33</sup> See e.g. Louis Visscher ‘A Law and Economics View on Harmonisation of Procedural Law’ in Xandra E Kramer and CH van Rhee (eds) *Civil Litigation in a Globalising World* (Springer 2012) 82-84; Jean 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); Adriani Dori and Vincent Richard ‘Litigation costs and procedural cultures – new avenues for research in procedural law’ in Burkhard Hess and Xandra E Kramer (eds) *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2018) 303-352.

<sup>34</sup> On the application of game theory to civil disputes generally, see Albert et al (n 33) 299-300.

<sup>35</sup> Lawyers’ letters seen by the present author invariably include a headnote stating that the content of the letter is not for publication. It appears that media entities which acquiesce in the demand to alter content also accept the demand to refrain from publicising the fact of the alteration.

<sup>36</sup> Juliette 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>

that this was not due to the strength of the claim, but the force with which it was made.<sup>37</sup> 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 lucrative Citizenship by Investment programme.<sup>38</sup>

Furthermore, the Maltese examples of disadvantageous out-of-court settlement are far from unique, save to the extent that the specific instances of the practice have been exposed.<sup>39</sup> The geographic and economic scope of the problem is readily discernible with reference to similar abuse of defamation litigation and threats thereof in Croatia,<sup>40</sup> Germany,<sup>41</sup> Italy,<sup>42</sup> Malta<sup>43</sup> and the United Kingdom<sup>44</sup> among others. It is especially noteworthy that cases in which defamation law has been deployed to suppress factual reporting often relate to matters of cross-border concern, whether for reasons relating to the operation of the single market, or more broadly to the political governance of the Union.<sup>45</sup>

#### *A. Public-Private agreements to circumvent the Regulation's limited scope*

In addition to concerns regarding horizontal cases of abuse of defamation law, it is noteworthy that the law has on occasion been used as an instrument for the privatisation of government-driven suppression of investigative journalism where

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<sup>37</sup> Ibid.

<sup>38</sup> Alice 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/>

<sup>39</sup> NGOs report evidence of deletion and alteration of online reporting in several jurisdictions but have been unable to report specific instances due to confidentiality obligations.

<sup>40</sup> Giovanni Vale, 'Croatia: over a thousand ongoing trials against journalists or media' (23/01/2019) European Centre for Press and Media Freedom. Accessible at: <https://www.ecpmf.eu/archive/news/threats/croatia-one-thousand-lawsuits.html>

<sup>41</sup> Sofia Verza, 'SLAPP: the background of Strategic Lawsuits Against Public Participation'. European Centre for Press and Media Freedom. Accessible at: <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>

<sup>42</sup> Global Freedom of Expression, 'SLAPPs' 5 W's: a background of the Strategic Lawsuits Against Public Participation (12/07/2018). Accessible at: <https://globalfreedomofexpression.columbia.edu/publications/slapps-5-ws-background-strategic-lawsuits-public-participation/>

<sup>43</sup> Elaine Allaby, 'After journalist's murder, efforts to combat SLAPP in Europe' (24/04/2019) *Columbia Journalism Review*. Accessible at: <https://www.cjr.org/analysis/slapp-daphne-caruana-galizia-malta.php>

<sup>44</sup> Luke Harding on 'Good Morning Scotland', BBC Scotland, 23/06/2018.

<sup>45</sup> For an extensive overview of the geographic range and variety of SLAPPs in the EU, see Tarlach McGonagle et al, 'The Safety of Journalists and the Fighting of Corruption in the EU' (2020) Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 655.187. Accessible at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2020\)655187](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)655187); Greenpeace, 'Sued into silence: How the rich and powerful use legal tactics to shut critics up (July 2020). Accessible at: <https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>

members of government share interests with private sector actors. In May 2017, Daphne Caruana Galizia revealed that Henley and Partners, Malta's concessionaire for its Citizenship by Investment programme, had planned to bring ruinous lawsuits against all of the independent Maltese press in agreement with Malta's Prime Minister, his Chief of Staff, and the Minister for Justice and Culture.<sup>46</sup> When quizzed on the matter in the European Parliament following the assassination of Mrs Caruana Galizia, Henley and Partners confirmed that the company regularly consulted governments before instructing lawyers to act against the press.<sup>47</sup>

State actors are therefore able to use the Brussels Ia Regulation as a proxy for state censorship where a private party demonstrates willingness to front a potentially vexatious claim. This is problematic both in terms of its effects on freedom of expression, and from the perspective of the very private nature of private international law. The scope of the Brussels Ia Regulation is limited to private civil disputes, excluding state actors insofar as they act in a public capacity.<sup>48</sup> 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 civil and commercial matters, and counter to the spirit in which mutual recognition of judgments is acceptable to the Member States.<sup>49</sup> It also has the potential to enable politicians to escape the higher standard of scrutiny which the ECHR reserves to political actors.<sup>50</sup> It follows, therefore, that any analysis of the operation of rules which act as a counter-balance to freedom of expression should account also for the manner in which their practical operation may affect the very foundations of a democratic society as reflected in Article 2 TEU.<sup>51</sup>

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<sup>46</sup> Daphne Caruana Galizia, 'BREAKING/Prime Minister and chief of staff use @josephmuscat.com addresses to deal secretly with Henley & Partners chairman, who addresses them as "Keith and Joseph" (in that order)' (31/05/2017) Running Commentary: Daphne Caruana Galizia's Notebook. Accessible at: <https://daphnecaruanaGalizia.com/2017/05/prime-minister-chief-staff-use-josephmuscat-com-addresses-deal-secretly-henley-partners-chairman-addresses-keith-joseph-order/>

<sup>47</sup> Caroline 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/>.

<sup>48</sup> Brussels Ia (n 7), Art 1.

<sup>49</sup> See Brussels Ia (n 7), Recitals 10 and 26.

<sup>50</sup> See e.g. *Castells v Spain* App no 11798/85 (ECHR, 23 April 1992), para 46; *Oberschlick v. Austria (no 2)* App no 20834/92 (ECHR, 01/07/1997), para 29; *Nedim Şenir v Turkey* App no 38270/11 (8 July 2014) para 114; *Pinto Pinheiro Marques v Portugal* App no.26671/09 (ECHR, 22 January 2015), para 44. For academic analysis see Stephen JA Tierney, 'Press freedom and public interest: the developing jurisprudence of the European Court of Human Rights' (1998) *European Human Rights Law Review* 419; Ian Cram, 'Political Expression, Qualified Privilege and Investigative Journalism – An Analysis of Developments in English Defamation Law Post *Reynolds v Times Newspapers*' (2005) *Canterbury Law Review* 143, 148-150.

<sup>51</sup> Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

### *B. Institutional responses: an urgent need for reform*

In April 2018, a cross-party group of Members of the European Parliament called upon the European Commission to initiate the process for the adoption of anti-SLAPP legislation with a view to protecting journalists from vexatious litigation.<sup>52</sup> 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.<sup>53</sup> Sustained research and advocacy efforts from MEPs and NGOs resulted in a somewhat different approach once Vice President Jourová took over the Values and Transparency portfolio in 2019.<sup>54</sup> Jourová has since indicated that private international law of defamation merited targeted reform, and that the Rome II Regulation will be prioritised.<sup>55</sup> It is argued hereunder that openness to reform is to be welcomed, but that it is paramount that legislative intervention addresses a broad spectrum of concerns regarding the operation of the private international law of defamation, particularly in respect of jurisdiction, as well as relevant domestic laws which abut on the private international law of defamation.

### 3. Constitutional context

To date, the development of EU private international law of defamation has lacked sustained engagement with the principled and legal constraints on the formulation and application of the law. The Jenard Report concerning the Brussels Convention 1968 notes that the articulation of EU rules on jurisdiction in tort was simply a reflection of the position as it persisted in the six founding Member States.<sup>56</sup> There was little consideration for the manner in which tort should be addressed generally,

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<sup>52</sup> David Casa, Ana Gomes, Monica Macovei, Maite Pagazaurtundúa, Selios Kouloglou and Benedek Javór, correspondence with Vice-President Timmermans, 11 April 2018. Accessible at: <https://www.anagomes.eu/PublicDocs/88ffcc68-5169-4486-9614-105aab81d82a.pdf>

<sup>53</sup> Frans Timmermans, correspondence with Members of the European Parliament (12/06/2018). Accessible at: <https://www.anagomes.eu/PublicDocs/974f0440-6c8c-48e3-bee4-80e6ced9735e.pdf>

<sup>54</sup> Vice-President-designate for Values and Transparency, 'Answers to the European Parliament: Questionnaire to the Commissioner-Designate Věra Jourová', 17-18 (Accessible at: [https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner\\_ep\\_hearings/answers-ep-questionnaire-jourova.pdf](https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_ep_hearings/answers-ep-questionnaire-jourova.pdf))

<sup>55</sup> Parliamentary questions (22/06/2020), Answer given by Vice-President Jourová on behalf of the European Commission, Question reference E-002166/2020 [https://www.europarl.europa.eu/doceo/document/E-9-2020-002166-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-002166-ASW_EN.html)

<sup>56</sup> Jenard Report OJ 1979 C 59/1, 25-26.

still less how the practice of defamation law might be altered by the free movement of judgments in an internet age which had yet to dawn. Notably, Jenard states that the inclusion of special rules in respect of tort was necessary ‘especially in view of the high number of road accidents.’<sup>57</sup> Clearly, the considerations which bore on the minds of the drafters of the 1968 Convention addressed mundane horizontal relationships – important to the parties, but of little systemic consequence for a legal order governed by the rule of law; a far cry from the constitutional problems arising in contemporary defamation cases.<sup>58</sup>

The lack of engagement with principle in respect of jurisdiction is exacerbated by unsuccessful engagement in respect of choice of law problems. The Rome II Regulation excludes defamation altogether for lack of agreement among the Member States, thereby requiring litigants to discover and rely upon domestic choice of law rules.<sup>59</sup> A decision to ground jurisdiction in a particular court or courts, therefore, also enables the pursuer to choose which substantive and procedural rules will apply to a dispute.<sup>60</sup> The net effect is that, with little consideration for underlying principles, EU law has developed a strong pro-pursuer regime in the private international law of defamation. This section sets out to sketch the principles of which lawmakers should take cognisance with a view to remedying the law’s present shortcomings.

#### *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.<sup>61</sup> The power of both is to be curtailed with a view to limiting concentration and abuse of public and private power, both whether exercised separately or in tandem.<sup>62</sup> The salience of this post-war movement towards West German ordoliberalism is all the more accentuated in the

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<sup>57</sup> Ibid 26

<sup>58</sup> On the complexity and distinctiveness of the private international law of the tort of defamation, see PB Carter, ‘Defamation’ in Campbell McLachlan and Peter Nygh (eds) *Transnational Tort Litigation: Jurisdictional Principles* (OUP 1996), 107-108.

<sup>59</sup> See e.g. Alex Mills, ‘The law applicable to cross-border defamation on social media: whose law governs free speech in ‘Facebookistan?’ (2015) *Journal of Media Law*, 1.

<sup>60</sup> Ibid, 4.

<sup>61</sup> *Van Gend* (n 6).

<sup>62</sup> For in-depth analysis of the influence of ordoliberalism in the development of a European economic constitution, see e.g. Laurent Warzoulet, ‘The EEC/EU as an Evolving Compromise between French Dirgism and German Ordoliberalism (1957-1995)’ (2019) *Journal of Common Market Studies* 77-93.

context of contemporary economies in which public goods have been privatised, and public interest obligations transferred along with public assets to private actors.<sup>63</sup> In legal terms, this is accompanied by the ‘blurring [of] the traditional distinctions between public and private law.’<sup>64</sup> The recognition of quasi-equivalence between elements of the exercise of public and private power is especially evident in the treatment of private undertakings in competition law,<sup>65</sup> but is also central to the horizontal effects of treaty provisions whereby individuals are empowered to exercise rights emanating from EU law, particularly its core constitutional principles, as against one another.<sup>66</sup> The normative framework of the law requires democratic governance to curtail abuse of asymmetries of power, whether they involve the State or private actors alone.<sup>67</sup>

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.<sup>68</sup> A functioning legal order requires not only the vigilance of public entities, but the supplementing of public enforcement functions by individuals bearing enforceable rights.<sup>69</sup> EU law distinguishes itself from general international law on the basis of its amenability to private enforcement with a view to ensuring effectiveness, and the tools which the CJEU has fashioned (and which the Member States have embraced) to that end.<sup>70</sup> Equally, the Court has developed remedies such as state liability with a view to ensuring the effectiveness of private enforcement where horizontal rights are rendered unenforceable by Member State failings.<sup>71</sup> Private enforcement, by the Court’s own account, is central to the distinction between EU law as a *sui generis* legal order from general international law in which private parties are, generally, passive subjects.<sup>72</sup>

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<sup>63</sup> See Wolf Sauter and Harm 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.

<sup>64</sup> *Ibid* 21.

<sup>65</sup> See e.g. Case 43/75 *Defrenne v Sabena* [1976] ECR 455, paras 31-34.

<sup>66</sup> See *Ibid*, paras 38-39.

<sup>67</sup> Sauter and Schepel (n 63) 15.

<sup>68</sup> *Van Gend* (n 6).

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*; Case 6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

<sup>71</sup> See e.g. Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, para 33; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECR [1996] I-01029, para 20.

<sup>72</sup> *Van Gend* (n 6)

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, but also address the manner in which economic and political governance of that market are exercised. This includes the legal facilitation of 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. In the absence of a system which safeguards public scrutiny, the very foundations of EU law as a distinct legal order are rendered unsound.

### *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 or reputation.<sup>73</sup> 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.

EU law and the ECHR do not, on the face of it, express a clear and systematic preference as between the prospective parties' rights.<sup>74</sup> 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'.<sup>75</sup> 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,<sup>76</sup> the

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<sup>73</sup> See Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2008), Chapter 6.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Palko v Connecticut* 302 US 319 (1937).

<sup>76</sup> For extensive analysis of ECHR case law, see Dirk Voorhoof, 'Freedom of Expression *versus* Privacy and the Right to Reputation: How to Preserve Public Interest Journalism' in Stijn Smet and Eva Brems (eds) *When Human*

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. As noted in Part 2.A above, this is achieved through the exercise of coercive economic power which denies the respondent the right to access to courts.<sup>77</sup> The reform of jurisdictional rules proposed hereunder is therefore intended to address existing imbalance without doing violence to the right of the claimant to have a case heard, while operating within the permissible margin of appreciation afforded to legislators in the present state of European fundamental rights law.

#### 4. Jurisdiction

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

The Brussels Ia Regulation is designed to prevent forum shopping and to provide prospective litigants with predictable litigious processes and outcomes.<sup>78</sup> In the absence of a choice of court agreement between the parties,<sup>79</sup> 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.<sup>80</sup> 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

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*Rights Clash at the European Court of Human Rights. Conflict or Harmony?* (OUP 2017) 148-170 and the references therein; Zucca (n 73), Chapter 6.

<sup>77</sup> See by analogy *Ali Gürbüz v Turkey* (Ap. nos. 52497/08, 6741/12, 7110/12, 15056/12, 15057/12 and 15059/12).

<sup>78</sup> For the broader European Economic Area and Switzerland, identical rules are to be found in the Lugano Convention 2007.

<sup>79</sup> Brussels Ia (n 7), Art 25.

<sup>80</sup> Brussels Ia (n 7) Art 4.

public registers,<sup>81</sup> or because of strong factual connections to a particular jurisdiction which might render it more practically convenient to litigate there.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> The law is framed with reference to 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 Ia Regulation therefore 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.<sup>85</sup> Accordingly, in a simple case of cross-border damage, the Regulation opens up the possibility of forum shopping as between up to three jurisdictions. As discussed in Part 4.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,<sup>86</sup> 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

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<sup>81</sup> Brussels Ia (n 7), Art 24(3).

<sup>82</sup> *Ibid*, Recital 16.

<sup>83</sup> Michael Wilderspin, 'Cross-border Non-contractual Disputes: The Legislative Framework and Court Practice' in Paul Beaumont et al (n 31) 640-641.

<sup>84</sup> See generally Susan E Woodward, 'Limited Liability in the Theory of the Firm' in Donald A Wittman (ed) *Economic Analysis of the Law. Selected Readings* (Blackwell, Oxford 2003) 153.

<sup>85</sup> Case 21/76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

<sup>86</sup> 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).'

where the harmful event occurred',<sup>87</sup> 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 Court is especially sympathetic to the position of the purported victim, despite protestations to neutrality.<sup>88</sup> Indeed, in *Shevill* the Court analyses the efficacy of jurisdictional rules entirely from the perspective of the plaintiff.<sup>89</sup>

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 'the place where the harmful event occurred'.<sup>90</sup> 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 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

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<sup>87</sup> *Bier* (n 85).

<sup>88</sup> *Ibid*, para 11; *Universal Music* (n 86), paras 26-27.

<sup>89</sup> *Shevill* (n 20), paras 31-33.

<sup>90</sup> *Bier* (n 85).

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.

It follows that the wholesale application of rules concerning ordinary torts to defamation is intrinsically problematic. As demonstrated in the next sub-section, the Court's elaboration of special rules for online defamation serves only to exacerbate these difficulties, further underscoring the need for legislative reform.

### *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.<sup>91</sup> On a positive note, the Court has been mindful of the need to restrict forum shopping, particularly in cases of online defamation.<sup>92</sup> 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 is problematic when considered in the light of the extensive use of jurisdictional litigation designed to provide a negotiating advantage.<sup>93</sup> 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. This has not been forthcoming.

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<sup>91</sup> For a critical overview of the development of the case law, see Lorna Gillies, 'Jurisdiction for Cross-Border Breach of Personality and Defamation: *Edate Advertising* and *Martinez*' (2012) *International and Comparative Law Quarterly* 1007-1016; Tobias Lutzi, 'Intenret Cases in EU Private International Law – Developing a Coherent Approach' (2017) *International and Comparative Law Quarterly* 687.

<sup>92</sup> See Case C-509/09 *eDate Advertising* EU:C:2011:685; Case C-194/16 *Svensk Handel* EU:C:2017:766.

<sup>93</sup> See Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yüksel 'Great Britain' in Beaumont et al (n 31) 84.

The potential for mischief is borne out by the present author's analysis of reported defamation cases in which the Brussels Ia Regulation was relied upon in the courts of England and Wales in 2018-19. It is clear from this analysis that the limited number of cases which are carried through to litigation corroborate the concerns regarding out-of-court settlement above.<sup>94</sup> In *Said v Groupe L'Express*<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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 Ia Regulation given that the pursuer's centre of main interests was situated in the UK.<sup>98</sup>

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 of public interest with the jurisdiction in which the allegedly defamatory statements were made, thereby negating possible economic arguments

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<sup>94</sup> See Part 2.A.

<sup>95</sup> *Said v Groupe L'Express* [2018] EWHC 3593 (QB).

<sup>96</sup> L'express, 'le diplomate aux mallettes de cash' (02/05/2018). Accessed 01 March 2019; the news article has since been removed pending legal proceedings: [https://www.lexpress.fr/actualite/societe/le-diplomate-aux-mallettes-de-cash\\_2002864.html](https://www.lexpress.fr/actualite/societe/le-diplomate-aux-mallettes-de-cash_2002864.html).

<sup>97</sup> *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA* [2018] EWHC 1081 (QB)

<sup>98</sup> Jurisdiction was declined on grounds of *lis alibi pendens*. At the time of writing, the Court's decision is the subject of an appeal.

in support of adjustments for the party claiming to be an involuntary creditor.<sup>99</sup> In the Polish case, the voluntary connection to Poland 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, it must equally be accepted that contemporary journalism and its consumption require online presence.

Not only has the CJEU been unable to provide a nuanced body of case law which is mindful of freedom of expression concerns, but where online defamation-specific innovations have been forthcoming, these have often added to the potential respondent's vulnerability to abuse of process. 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.<sup>100</sup> 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 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.<sup>101</sup> The scale of potential exposure to litigation is especially accentuated in the context of the ubiquitous accessibility of online reportage.<sup>102</sup>

Equally, of course, the mosaic approach renders it difficult for a claimant to recover damages for the full extent of harm caused.<sup>103</sup> 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.<sup>104</sup> This is a sensible adjustment insofar as it enables the pursuer to avoid

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<sup>99</sup> See Woodward (n 84) 153.

<sup>100</sup> *Shevill* (n 20).

<sup>101</sup> Lutz (n 91) 691-692.

<sup>102</sup> *Ibid* 690.

<sup>103</sup> *Ibid* 691-692.

<sup>104</sup> *eDate Advertising* (n 92).

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 unilateral 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*,<sup>105</sup> 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.<sup>106</sup>

The availability of the mosaic approach could equally constitute a breach of the right to freedom of expression. In *Ali Gürbüz v Turkey* it was held that the initiation of multiple proceedings constituted a violation of Article 10 of the ECHR.<sup>107</sup> The case of *Gürbüz* concerns criminal proceedings, and is therefore distinguishable from civil defamation suits which would fall within the scope of the Brussels Ia regime. Nevertheless, the reasoning of the ECtHR can be transposed readily to a situation in which a claimant brings multiple potentially ruinous proceedings in several states. While the respondent is not faced with potential deprivation of liberty, the opportunity cost of time and money invested in defending multiple suits has the same effect on the attractiveness of the exercise of free speech.<sup>108</sup> The mischief of a freezing effect on freedom of expression therefore remains, and, it is submitted, equally constitutes an infringement of Article 10 ECHR.

### *C. 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

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<sup>105</sup> *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.

<sup>106</sup> Garside (n 36).

<sup>107</sup> *Ali Gürbüz v Turkey* (Ap. nos. 52497/08, 6741/12, 7110/12, 15056/12, 15057/12 and 15059/12).

<sup>108</sup> *Ibid.*

Charter of Fundamental Rights.<sup>109</sup> Nevertheless, conclusions concerning the viability of a human rights claim can be gleaned with reference to the CJEU's broader inclination to reinforce the predictability, and therefore the rigidity, of the Brussels/Lugano system. As is evident with reference to judgments concerning the deployment of antisuit injunctions, the Court 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.<sup>110</sup> This would, in the CJEU's view, do violence to the general scheme of the Brussels Ia 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.<sup>111</sup> 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 Brussels Ia 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 argue 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 litigate the human rights case in the court which would be appointed to hear a case under the Regulation, the hypothetical nature of a human rights claim might render a request for a preliminary rule unnecessary or inadmissible.<sup>112</sup>

An alternative route might be for the defendant to challenge the lawfulness of the Brussels Ia Regulation in the courts of their domicile. This approach has more promise insofar as affordability is concerned, but the procedural route to seise a

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<sup>109</sup> Charter of Fundamental Rights (n 29), Arts 11 and 47.

<sup>110</sup> See Trevor Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) *International and Comparative Law Quarterly* 813, 813-815.

<sup>111</sup> See in particular Case 159/02 *Turner v Grovit* EU:C:2004:228, paras 24-26.

<sup>112</sup> See Case C-621/18 *Wightman et al v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999, para 28 and the references therein.

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.<sup>113</sup>

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 its earlier case law.<sup>114</sup> 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 restricting jurisdiction in defamation cases to the Brussels/Lugano regimes' default rules, namely the grounding of jurisdiction in the court of the defendant's domicile in defamation cases, unless the parties agree otherwise. In view of the fact that the default rule of jurisdiction grounds jurisdiction in the courts of the place of the respondent's domicile, there does not appear to be any obvious argument that granting that court jurisdiction in defamation cases would infringe the claimant's right to access to courts. Nor is there any obvious systemic reason to expect the availability of evidence to be limited as a consequence of constraint of pursuer choice. In contrast, the threat to freedom of expression posed by the permanence of existing rules is amply evident with reference to contemporary legal practice.

## 5. 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

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<sup>113</sup> See Thalia Kruger, 'The anti-suit injunction in the European judicial space' (2004) *International and Comparative Law Quarterly* 1030, 1030-1040.

<sup>114</sup> Hartley (n 110) 813-815.

II Regulation,<sup>115</sup> 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 Part 4 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.<sup>116</sup> 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 polity in an EU democracy.<sup>117</sup> 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.<sup>118</sup> In the Council of Minister's deliberations, it is reported that some thirteen different options were put forward for consideration.<sup>119</sup> 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.

A lack of harmonisation of choice of law rules is especially problematic given the room for forum shopping available to the plaintiff. This is particularly true where the mosaic approach is chosen, but also in the event of a single jurisdiction being seised

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<sup>115</sup> Rome II Regulation (n 9), Art 1(g).

<sup>116</sup> Mills (n 59) 19.

<sup>117</sup> See e.g. Joseph Weiler, 'The European Union belongs to its citizens: three immodest proposals' (1997) *European Law Review*, 150-156.

<sup>118</sup> Wallis (n 32) 2-3.

<sup>119</sup> Andrew 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/>

of the entire claim. 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.<sup>120</sup> 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.<sup>121</sup> The court would then be required to hear experts from each of the relevant legal systems, thereby further multiplying litigation costs.<sup>122</sup>

The difficulties are exacerbated 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.<sup>123</sup> However, it requires the court to engage in an inquiry of both the actionability of the claim in the forum, and in the place in which the harmful event occurred.<sup>124</sup> In a multi-jurisdictional claim, this means that litigators must incur the cost of engagement with each relevant legal system.<sup>125</sup>

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.<sup>126</sup> Indeed, Mills argues persuasively that the formulation proposed by the Parliament is a sound place to start discussions for future reform.<sup>127</sup> The Parliamentary proposal begins with a presumption that the applicable law will be the

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<sup>120</sup> *eDate Advertising* (n 92).

<sup>121</sup> Mills (n 59) 22.

<sup>122</sup> See Visscher (n 33) 82-84.

<sup>123</sup> Mills (n 59) 7-10.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> 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).

<sup>127</sup> Mills (n 59) 14-15.

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).<sup>128</sup>

While the European Parliament's proposal has the merit of addressing conflicting concerns in defamation law,<sup>129</sup> it is submitted that, for reasons of cost cited above, 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 there is no such place, a supplementary rule would be required. In these circumstances a case could be made for the application of the default rule as proposed in paragraph 1 of the Parliamentary proposal, namely that the law of the place in which the damage occurred would apply.<sup>130</sup> In any event, the key concern is to ensure a degree of predictability which would eliminate substantive advantages of forum shopping which would accrue to pursuers.

## 6. Harmonisation of substantive and procedural laws

The problems of jurisdiction and choice of law are exacerbated by a lack of harmonisation of defamation laws, and lack of pan-EU defensive mechanisms against the threat of litigation in third countries. It is uncontroversial that divergence in national laws operates as both a financial and psychological barrier to transnational litigation, particularly when viewed from the perspective of the respondent.<sup>131</sup> The party that is unfamiliar with the legal system which will determine the outcome of the case – usually the defendant – will, in their consideration of the potential outcomes, incur the further cost of risk arising from uncertainty of the law.<sup>132</sup>

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<sup>128</sup> European Parliament (n 126), draft Article 5a.

<sup>129</sup> Mills (n 59) 14-15.

<sup>130</sup> European Parliament (n 126), draft Article 5a(1).

<sup>131</sup> Visscher (n 33) 82-84

<sup>132</sup> See generally Albert et al (n 33); 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.

Furthermore, substantive and procedural laws which lack tools to dissuade vexatious defamation suits are said to have a chilling effect on investigative journalism, whether there exists a cross-border element or otherwise.<sup>133</sup> This is true whether the threatened lawsuit is framed in substance with reference to defamation law or other potential claims such as intellectual property law or privacy.<sup>134</sup> The availability of procedural mechanisms to dissuade the bringing of vexatious lawsuits in matters of public interest merits further attention,<sup>135</sup> as do procedural safeguards and court expertise which affect findings as to the existence of a legal breach.<sup>136</sup> By way of example, anti-SLAPP statutes in the United States typically include the following procedural safeguards:

(1) granting defendants specific avenues for filing motions to dismiss or strike early in the litigation process; (2) requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard; (3) requiring the plaintiff to produce evidence that shows the case has merit; and (4) imposing cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry his burden.<sup>137</sup>

Furthermore, the absence of specialised courts and use of juries in defamation proceedings in some jurisdictions limits the practical availability of sophisticated defences such as good faith and honest comment defences.<sup>138</sup> Equally, rules in some jurisdictions concerning the burden of proof in the context of investigative journalism which relies on whistleblowers pose insurmountable barriers to a legal defence.<sup>139</sup> Investigative journalism is also hampered by a lack of harmonised defensive

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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.

<sup>133</sup> 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/>; see also Robert T Sherwin, 'Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation' (2017) *Columbia Journal of Law and the Arts* 431, 432-433.

<sup>134</sup> See Philips (n 4).

<sup>135</sup> See George W Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989) *Pace Environmental Law Review* 1, 15-21.

<sup>136</sup> Ibid, 15-19.

<sup>137</sup> Sherwin (n 133) 437.

<sup>138</sup> For a range of views on the suitability of jury trials in defamation cases, see e.g. Andrew Scott, 'Reform of defamation law in Northern Ireland' (Department of Finance, Belfast 2016) 2.116-2.122. Accessible at: <http://eprints.lse.ac.uk/67385/>; Dermot McClean, 'Removal of juries from defamation cases would ease the 'chilling effect'' (02/12/2019). Accessible at: <https://www.lavellepartners.ie/news/2019/12/02/removal-of-juries-from-defamation-cases-would-ease-the-chilling-effect/>

<sup>139</sup> See e.g. Chapter 248, Part II, Laws of Malta.

mechanisms in respect of the enforcement of judgments of the courts of third countries.<sup>140</sup> As in the State of New York's Libel Terrorism Protection Act, consideration could also be given to the granting of relief to counter proceedings instituted outwith the European Union in respect of defendants amenable to the jurisdiction of courts of the Member States.<sup>141</sup> It is beyond the scope of this paper to articulate the precise content of a possible anti-SLAPP directive. Suffice it to note here that a range of measures is required to ensure a level playing field for investigative journalism.

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. While Article 81(2) TFEU provides a legal basis for the adoption of rules on civil procedure to eliminate 'obstacles to the proper functioning of civil proceedings', this is to be understood primarily with reference to the free movement of judgments.<sup>142</sup> To date, the view has been taken that the Union therefore may not adopt legislation to harmonise national defamation laws or the finer detail of procedural law.<sup>143</sup> The understanding of the manner in which competences are conferred on the Union has evolved, however. In particular, the Whistleblower Protection Directive,<sup>144</sup> while restricted to illegalities falling within the scope of EU law, provides a robust precedent for the view that, read together, several articles of the TFEU confer competence in respect of defamation and procedure affecting public participation. The Commission identified no fewer than seventeen legal bases for the introduction of the directive in its original proposal.<sup>145</sup> 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 Ia Regulation.

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<sup>140</sup> See Delia (n 3).

<sup>141</sup> See Michelle Feldman, 'Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction Under New York's Libel Terrorism Protection Act' (2010) *Cardozo Law Review* 2457, 2458-2460.

<sup>142</sup> Article 81 TFEU.

<sup>143</sup> Timmermans (n 53); Wallis (n 32) 4-5.

<sup>144</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law [2019] OJ L-305/17.

<sup>145</sup> Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law COM(2018) 218 final 2018/0106(COD), Recital 1.

Furthermore, if it can be argued that whistleblower protection has a direct effect on the functioning of the internal market,<sup>146</sup> it must follow that this is also the case for defamation. Indeed, as noted in Part 2 above, the effectiveness of EU law is reliant on the vigilance of individuals minded of their rights and apprised of relevant facts.<sup>147</sup> 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.<sup>148</sup>

## 7. Concluding remarks

In view of the foregoing, it is submitted that EU law requires extensive reform to ensure that vexatious litigious techniques no longer have the effect of undermining freedom of expression in the Member States. This is an especially pressing concern in the context of a Union which is currently facing unprecedented challenges to the rule of law and democracy. Reforms which recognise the central role of the press in safeguarding the rule of law would constitute a meaningful contribution to the advancement of democratic values where so much else has failed.

It is submitted, therefore, that the relationship between the rights of pursuers and defendants in defamation cases should be revisited to remedy existing imbalance. Jurisdiction should be grounded in the forum of the defendant's domicile unless the parties agree otherwise. This would enable the press to foresee where they will be expected to defend their stories, and would be in keeping with the core values of the Brussels Ia Regulation, namely predictability and the limitation of forum shopping. Furthermore, greater predictability as to the outcomes of choice of law processes and the content of national law are also needed in order to dissuade meritless litigation intended to suppress speech.

Each of the above reforms is necessary if repetition of the events which preceded, and perhaps enabled, the assassination of Daphne Caruana Galizia is to be avoided.

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<sup>146</sup> Directive (EU) 2019/37, Recital 1.

<sup>147</sup> *Van Gend* (n 6).

<sup>148</sup> See generally IJ4EU website. Accessible at: <https://www.investigativejournalismforeu.net/projects/>

The net effect would be to provide journalists with a robust system of protection from the sort of litigious techniques which chill freedom of expression, and which isolate and endanger the few who resist overwhelming odds posed by the unscrupulous abuse of tools which remain readily available to prospective litigants.