

Impact case study (REF3)

Institution: University of Aberdeen		
Unit of Assessment: 18 (Law)		
Title of case study: Ending Libel Tourism: Reform of EU Defamation law		
Period when the underpinning research was undertaken: 2016-2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Justin Borg-Barthet	Senior Lecturer	2012-current
Period when the claimed impact occurred: 2017-2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact (indicative maximum 100 words)		
<p>The EU Charter of Fundamental Rights includes a clear commitment to freedom of expression. However, the assassination of Daphne Caruana Galizia, a Maltese investigative journalist, in October 2017 exposed the fragility of this commitment, highlighting the need for EU anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation. Research carried out by Dr Borg-Barthet, examining in detail different approaches to anti-SLAPP legislation, provided the essential evidence that was needed to underpin calls for change. His research formed the basis for the development of a common policy platform adopted by a cross-party grouping of Members of the European Parliament and a coalition of NGOs, who used the research to advocate for change and to articulate the content of future legislation. As a result, the research has influenced debate within the EU about anti-SLAPP regulation and underpinned an acceptance by the EU of the need for legislative reform.</p>		
2. Underpinning research (indicative maximum 500 words)		
<p>Freedom of expression and the rule of law are foundational values of the European Union, and shared values of all democratic societies. Recent developments in several EU member states have demonstrated the fragility of these values, with threats to freedom of expression becoming commonplace throughout the Union. None was more dramatic than the assassination of Daphne Caruana Galizia in October 2017. Caruana Galizia was a Maltese investigative journalist who had been investigating and exposing cross-border financial crime involving several state actors. It transpired that the assassination was part of a broader attack on press freedoms through SLAPP (Strategic Lawsuits Against Public Participation), a form of legal harassment, which some powerful actors use to intimidate journalists and activists with a view to avoiding public scrutiny. The situation in Malta served to emphasise the challenges that the EU approach to SLAPP created. However, an appropriate evidence base to enable advocacy for new anti-SLAPP regulations within the EU was lacking. Research carried out by Dr Borg-Barthet at the University of Aberdeen positioned him as the obvious choice to support this advocacy process and provided the essential evidence to make a case for change.</p> <p>In 2016, Borg-Barthet explored the structure of private international law in Malta focusing on specific regulation of the treatment of companies, including systemic deficiencies in respect of those companies. Through an analysis of the somewhat limited literature and case law on Maltese private international law, supplemented by an analysis of legal practice as evidenced in assumptions in courts and practitioners' reasoning, the research found weaknesses in Maltese private international law of companies, due to a lack of sustained legislative and judicial attention [1]. Further research by Borg-Barthet examined the extent to which claims can be brought against shareholders in transnational disputes, particularly as regards cross-border torts and fundamental rights infringements, asking whether economically powerful actors were able to insulate</p>		

themselves from liability in cross-border disputes concerning civil wrongs. By analysing literature and case law Borg-Barthet demonstrated that the law is structured in a manner which practical implications of financial and psychological asymmetries in transnational litigation and proposes international legislative reform to facilitate the enforcement of obligations [2].

This research established Borg-Barthet as an expert in private international law, with specific knowledge about Malta, where he was also qualified to act as an advocate. Because of this, in the days following the assassination of Daphne Caruana Galizia, several Maltese legal practitioners approached Borg-Barthet to seek assistance with issues concerning the private international law of defamation. Borg-Barthet noted that journalists were being threatened with frivolous but expensive transnational litigation. He was then able to identify, through spot-checking of high-profile newspaper reports, that a Maltese bank had been using the mere threat of transnational litigation to force the deletion of online reporting of Caruana Galizia's investigative reporting. This research fed into the development of a Working Paper, 'The Brussels Ia Regulation as an instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform', which showed that the threat of transnational litigation was possible because EU law enables libel tourism by allowing claimants to choose the court in which to bring a claim. In the Working Paper, Borg-Barthet also developed an alternative model for the allocation of jurisdiction which would prevent libel tourism [3].

When a court hears a case with connections to more than one legal system, it must decide which laws should apply to the case. In the EU, this is usually determined through shared rules, which allow predictable outcomes. However, there is no such shared rule for defamation claims. 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'. Borg-Barthet's Working Paper demonstrated the need for amendment of the Rome II Regulation with a view to harmonising rules on choice of law in defamation to make the applicable law predictable to the parties and therefore relieving journalists and civil society activists of exposure to multiple legal systems.

Critically, Borg-Barthet's Working Paper also argued that, contrary to the view previously expressed by the European Commission, the EU did have the legal power to adopt legislation which would introduce safeguards against SLAPPs. The research identified the basis for the adoption of legislation in the law of the internal market. Borrowing particularly from anti-SLAPP statutes in the United States, it proposes that EU law should require Member States' courts to allow expeditious hearings of SLAPP cases, and to introduce cost-shifting sanctions. It also proposes further protections against litigation brought or threatened in countries outside the EU [3].

The form and content of a possible future directive was articulated more fully in a Model Directive drafted by Borg-Barthet, in collaboration with Ravo and Kramer. The Model Directive proposes that courts should be empowered to dismiss frivolous cases and to require respondents in such cases to be compensated. It is also proposed that Member States should provide adequate legal and other assistance to mitigate the financial and psychological costs of litigation [4].

3. References to the research (indicative maximum of six references)

References:

[1] **Borg Barthet, J & Mallia, A** 2016, Country Report for Malta: Final report. in C Gerner-Beuerle, E Schuster, M Siems & F Mucciarelli (eds), *Study on the Law Applicable to Companies*. European Commission. <https://op.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1/language-en>

[2] **Borg-Barthet** 2019 'Jurisdictional barriers to Enforcement', Book chapter (Elgar Financial Law Series). 13: 259-280.

[3] **Borg-Barthet**, 'The Brussels Ia 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, Working Paper 007/20.

[4] L Ravo, **J Borg-Barthet** and X E Kramer 'Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law', Liberties 2020. https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf.

Grants

[P1] **Borg-Barthet**. Advice concerning the EU's competence to legislate in matters relating to vexatious defamation in lawsuits, PEN International (07/19; GBP843.00), relates to [S1].

[P2] **Borg-Barthet**. Advice concerning the EU's competence to legislate in matters relating to vexatious defamation in lawsuits, ECPMF (28/10/2020; GBP1,500) relates to [4].

4. Details of the impact (indicative maximum 750 words)

Borg-Barthet's research has prompted the initiation of a process of legal reform related to SLAPP in the European Union to eliminate practices, which result in the suppression of investigative journalism and public interest activism. The research has influenced debate within the EU about anti-SLAPP regulation, underpinning an acceptance by the EU of the need for legislative reform. It has provided an evidence base for NGOs, enabling them to articulate the content of future legislation. Through events and online publications, it has also raised public awareness of the impact of SLAPP legislation.

Creating an evidence base to enable NGOs to advocate for anti-SLAPP legislation

Following Daphne Caruana Galizia's murder in Malta in 2017, a coalition of NGOs – PEN International, Reporters Without Borders, European Centre for Press and Media Freedom, Article 19, and Committee to Protect Journalists – came together to explore the introduction of an anti-SLAPP EU Directive. This coalition quickly sought advice from Borg-Barthet, for which he drew directly on the research unpinning the original Working Paper. Borg-Barthet captured this advice in a report, '*Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union*' [S1], creating a resource that was shared with the NGOs, as well as journalists and legislators at various events. Borg-Barthet was invited to present the report at the European Centre for Press and Media Freedom's UNCOVERED conference (200 attendees, including journalists, civil society representatives, MEPs and representatives of the EU Commission in Berlin in January 2019 (<https://www.ecpmf.eu/archive/events/uncovered-conference.html>), [S2a] and then followed this up by organising a workshop in Aberdeen in February 2019 (where participants also included representatives of EU institutions) [S2b], and at an expert talk on Anti-SLAPP solutions, held at the European Parliament in Brussels [S2c]. A further talk was attended by circa 100 representatives of EU institutions, and representatives of NGOs. Following the event, David Casa MEP remarked that the research "*provided us with concrete legal proposals that will now form the basis our work*" [S2d]. This has been confirmed by the President of the European parliament, Robert Metsola MEP "[Borg Barthet's research] *has provided a much-needed basis [...] for Members of the European parliament to articulate our wish to see a proposal for an EU-wide Anti-SLAPP Directive that could fall within the limits of EU competence*" [S2e].

Borg-Barthet's work was also used to inform a common position adopted by a broader grouping of 26 NGOs in their advocacy work in the European Union, and was presented as the rationale behind a proposal presented to Pia Lindholm, Deputy Head for the Unit for Civil Justice within the Directorate-General Justice and Consumers of the European Commission. In early 2020, Borg-Barthet also presented his research to circa 100 representatives of EU institutions, scholars and civil society activists at the European SLAPP Symposium, organised by Greenpeace International [S2f].

Borg-Barthet's advice has enabled not only the development of a better understanding of the technical aspects of reform which would assist in the attainment of the aims advocated by the

NGOs but has also provided public servants and NGOs with an opportunity to engage with one another to better understand potential routes for acceptable reform. Testimony from Article 19's Head of Europe and Central Asia demonstrates the vital role that Borg-Barthet's research has played. Not only has it '*contributed to the rapid development of understanding of legal shortcomings which enable the suppression of freedom of expression in the EU*', it has also

enabled a coalition of NGOs to identify the legal issues which enabled Strategic Lawsuits Against Public Participation (SLAPP)... On the basis of his work, NGOs developed their policy positions on anti- SLAPP legislation, and were better placed to understand the broader policy and legal context in which our advocacy work was to be conducted. The articulation of clear solutions and well-researched justifications for legislative intervention has been a crucial element of NGO advocacy in this regard. The research which Dr Borg-Barthet conducted empowered a coalition of NGOs better to articulate the legal basis for the adoption of EU legislation, as well as the content of future legislation [S2g].

Influencing EU political debate and legislative reform

In April 2018, a cross-party group of Members of the European Parliament wrote to the European Commission to request reform of EU defamation law. The Commission's response at this stage suggested that the Union lacked a specific competence to adopt new legislation, and that existing legislation struck a sound balance between relevant rights. By drawing directly on Borg-Barthet's research, this cross-party group, supported by the coalition of NGOs, have since been able to convince the EU to alter its stance [S3c], so much so that, by October 2019, Vice-President Designate Jourová had been persuaded of the necessity to introduce reforms, as evidenced in her confirmation hearings before the European Parliament [S3a-b]. As the Article 19 testimony confirms, '*Indeed, as a consequence of the work which we have conducted with Dr Borg-Barthet's assistance, the European Commission has now included the adoption of anti- SLAPP measures in its European Democracy Action Plan*' [S2g].

This European Democracy Action Plan (https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en), published in December 2020, draws directly on Borg-Barthet's research [S4]. To continue the work, Borg-Barthet has been engaged as a legal expert on behalf of the NGO coalition [P1; 4] charged with drafting model legislation and providing legal advice at meetings with Vice-President Jourová and Commissioner Reynders. Jourová has also indicated that the Commission will consider the most robust legislative and non-legislative measures available, once the expert advisory group has completed its work. Borg-Barthet's role in this shift in EU priorities is captured by EU Representative for the Committee to Protect Journalists:

His academic research provided the Commission with the legal basis to revise existing EU law... Together, we have been able to secure commitments from the European Commission to act with regards to a recast of the cornerstones of EU law, the Brussels Ia Regulation and the Rome II Regulation. This is no small feat and quite simply we could not have achieved this without Justin's leadership, knowledge and assessment of EU and private international law [S5].

Raising awareness in civil society about the impact of Strategic Lawsuits Against Public Participation Legislation

In the phase immediately following the assassination of Daphne Caruana Galizia, Borg-Barthet used a personal Facebook page to publicise the hitherto undisclosed fact that accurate reporting of transnational interest was being deleted or redacted by every major media entity in Malta following threats of vexatious litigation. The revelations were shared widely through social media and resulted in four leading independent media entities informing their readers that they had been forced to alter online content due to the potential cost of defending a lawsuit outside of their own jurisdiction. As testimony from the Daphne Caruana Galizia Foundation affirms,

Dr Borg Barthet's research and publication on the subject of SLAPPs exposed the use of such covert action and its chilling effect on news media in Malta, enabling the affected media to

publicly admit to having received threats of litigation, particularly from Ali Sadr and Pilatus Bank [S6].

The EU Representative for the Committee to Protect Journalists has stated that Borg-Barthet's work, initially used by the NGOs, has also raised awareness amongst civil society about SLAPP and its implications:

[Borg-Barthet's] work in turn expanded to create a larger pan-European civil society movement on SLAPPs, that has now mobilized not only press freedom groups, but environmental INGOs, trade unions, and lawyer networks to work together to expose and campaign against the problem. Through regular exchanges, it has been Justin who has been pivotal in providing INGOs with the arguments that expose the legal shortcomings that enable SLAPPs. His academic research ... gave civil society the fuel to approach the Commission, and in turn again expose these flaws using substantive academic research as the basis for our arguments [S5].

The research has also been shared through the mainstream press, including explicit citations of Dr Borg-Barthet's work in the Guardian newspaper (e.g. <https://bit.ly/3tng1IR>) in the United Kingdom and multiple newspapers in Malta (e.g. <https://bit.ly/3qHCAQd>), as well as several reference to the resultant proposals on news sites such as EU Observer, Deutsche Welle, and EurActiv [S7].

5. Sources to corroborate the impact (indicative maximum of 10 references)

- [S1] Report requested from Justin Borg-Barthet by Article 19, Committee to Protect Journalists (CPJ), European Centre for Press and Media Freedom (ECPMF) Reporters Without Borders (RSF), and PEN International: Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union. https://pure.abdn.ac.uk/ws/files/163491558/2020.05.19_Anti_SLAPP_advice.pdf
- [S2] Collation of information relation to events where advice was presented. Examples include:
- <https://www.ecpmf.eu/archive/events/uncovered-conference.html>
 - <https://www.abdn.ac.uk/law/research/workshop-reform-of-eu-law-on-defamation--742.php>
 - <https://www.ecpmf.eu/archive/events/expert-talk-on-anti-slapp-solutions-brussels.html>
 - Corroboration of statement from David Casa, MEP: <https://bit.ly/3qQHtaC>
 - Testimonial from the Vice President of the European Parliament
 - Corroboration of proposal presented to Pia Lindholm <https://bit.ly/3pOFMJU>
 - Testimony from Article 19
- [S3] Evidence of change in EU position:
- Initial letter: <https://www.eppgroup.eu/how-we-make-it-happen/with-eu-countries/malta/news/meps-continue-to-pile-on-pressure-for-anti-slapp-legislation> plus potentially European People's Party Group, 'SLAPP – An EU solution is urgently needed': <http://www2.eppgroup.eu/press-release/SLAPP---An-EU-solution-urgently-needed.-David-Casa-MEP>
 - EU initial position: <https://www.anagomes.eu/PublicDocs/974f0440-6c8c-48e3-bee4-80e6ced9735e.pdf>
 - EU position changed position: <https://www.europarl.europa.eu/resources/library/media/20191008RES63701/20191008RES63701.pdf>
- [S4] European Democracy Action Plan: https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en
- [S5] Testimony from Committee to Protect Journalists
- [S6] Testimony from Daphne Caruana Galizia Foundation
- [S7] Media articles citing the research bringing it into the mainstream press