



**LEGAL ANALYSIS ON THE DRAFT LAWS OF MALTA TO IMPLEMENT VARIOUS
MEASURES FOR THE PROTECTION OF THE MEDIA AND OF JOURNALISTS**

Commissioned by the Office of the OSCE Representative on Freedom of the Media from
Dr Joan Barata Mir, independent media freedom expert

February 2022

Table of contents

Executive summary and recommendations	3
Introduction	5
Part I. International legal standards on Freedom of Expression and Freedom of Information, and Defamation	5
General standards	5
Standards with regards to criminal defamation	7
Standards regarding safety of journalists	8
Standards regarding strategic lawsuits against public participation (SLAPP)	12
Standards regarding international private law matters: jurisdiction, recognition, and enforcement of judgments, as well as national choice of law rules in defamation cases	14
Part II. Overview of the proposed legal reform	16
Content and scope of the proposed legislation	16
Analysis of the provisions of the proposal in light of applicable international standards	18

Executive summary and recommendations

This Analysis examines the draft Bill of the Act “to amend the Constitution and various other laws to strengthen the right to freedom of expression and the right to privacy and to implement various measures for the protection of the media and of journalists”, and the draft Bill of the Act “to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life”.

The proposals analysed include, firstly, a reform of several articles of the Constitution of Malta. This analysis focuses on the new provisions to be included in article 41, devoted to the rights to freedom of expression and freedom of information. Secondly, it reviews a series of reforms to the Media and Defamation Act, the Code of Organization and Civil procedure, and the Criminal Code. The third legal reform area under consideration refers to the creation of a series of administrative structures and coordination procedures. Provisions proposed in this area appear to facilitate the protection of journalists facing threats, harassment, and other risks.

The draft proposals that are object of this analysis contain a series of relevant reforms regarding the protection of the right to freedom of expression in the Constitution of Malta.

In this sense, paragraphs 1 and 2 of the Constitution’s article 41 reproduce the text of article 11 of the Charter of Fundamental Rights of the European Union.¹ Having said that, it is recommended to also include the right to seek information as a basic component of the right to freedom of expression and freedom of information. This will strengthen the constitutional protection provided to the specific right to access to information. It is also advised to include a reference to the protection of the right to freedom of expression in connection to the use of any form, medium or platform.

In addition to this, a new paragraph 3 reproduces the second part of article 10 ECHR, except for the last sentence, regarding additional restrictions “for the purpose of maintaining confidence in the public service”. This additional cause included in the proposal is extremely broad and open to interpretation and can be used to establish restrictions incompatible with international standards. Therefore, and because such a vague provision may be used to deter the dissemination of relevant information and criticism about the functioning of public bodies and institutions, and limit the watchdog role of media regarding public interest matters, it is recommended that the above-mentioned additional sentence be eliminated from the Bill.

Former paragraph 3, renumbered as paragraph 4, is modified in some respects in order to guarantee that anyone “who is resident in Malta may edit or print a newspaper, journal or any other media published daily or periodically’. The article also provides for the possibility of prohibiting or restricting the editing or printing of any newspaper or journal by persons under 21 (which is also the object of an amendment that would lower this limitation to the age of 18). According to international and regional standards, the exercise of the right to freedom of expression and freedom of information is recognised and protected for “everyone”. This implies that general prohibitions and restrictions

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

exclusively based on the residence or the age of individuals might not be acceptable.

The proposal also includes a new paragraph in article 41 of the Constitution particularly focused on the protection of the right to freedom of information. The wording of this article may suggest that the legislator has a wide margin of appreciation regarding the definition of the specific scope and limits to this right. It is recommended to strengthen the protection of the right to access to information at the constitutional level by expressly incorporating the basic international and regional principles applicable to the exercise of this right.

Lastly, the proposal also includes a new paragraph on “hate speech”. Despite the need to properly tackle the growing issue of the dissemination of harmful “hate speech” in the country, the wording used in the proposal is somewhat confusing (it refers to undefined “hate speech” which at the same time incites to hatred, for example). It is therefore recommended to adjust the language of the proposed provision to the terms and criteria used by international law and other relevant international documents in this area (such as Article 20 of the International Covenant on Civil and Political Rights).

As for reforms in the Media and Defamation Act, and regarding the liability of editors and publishers in cases of decease of the original author, a safeguard must be introduced to guarantee that proceedings can only be pursued when legal liability can properly and fairly be established and determined in the absence of the said journalist. It is also recommended that, in case of decease of both author and editor, publishers may only be held liable on a subsidiary basis and when the responsibility of the former persons has already been established in a fair trial. This shall not prevent publishers to use their own defences, i.e. those deriving from their subsidiary role.

Provisions regarding the recognition and enforcement of foreign judgements in cases of defamation are recommended to be eliminated and replaced by a comprehensive anti-SLAPP legal regime containing the provisions and safeguards already recommended by international organizations.

In cases of defamation filed in terms of the Media and Defamation Act, the court fees are not payable upon the filing of any sworn reply or simple reply. Provisions proposed in this area appear to facilitate the defence of journalists in defamation proceedings. They are welcome.

The proposal to reform article 222 of the Criminal Code aims at aggravating the punishment of bodily harm criminal offences when the victim is a journalist, and the offence was committed because of that person exercising or having exercised his/her functions. This provision may represent an improvement regarding the prevention and prosecution of physical attacks against journalists and thus is welcome. However, it is also important to note that it only refers to a very particular category of crimes.

The establishment of a body in charge of coordinating possible measures and actions to improve journalists’ safety (among other actors) is also welcome. However, dealing with particular events and providing effective protection and immediate responses requires the designation and establishment of concrete units and the definition of clear protocols. It is therefore recommended to incorporate such issues. In addition to this, it is also very important to introduce or contemplate the formulation of proper engagement and

coordination mechanisms with civil society and media organizations regarding the operation of early-warning and rapid-response mechanisms.

In the same vein, it is recommended that the Bill indicates the setting up of protocols and training programmes for State authorities responsible for the protection of journalists and other media actors. It is thus also recommended that the Bill designates proper prosecution authorities and mechanisms. Investigations must be independent and impartial, in law and in practice, and they should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards.

Basic recommendations:

- Include the right to seek information as a basic component of the constitutional right to freedom of expression and freedom of information.
- Eliminate the possibility of imposing additional restrictions to the constitutional right of freedom of expression “for the purpose of maintaining confidence in the public service”.
- Eliminate constitutional restrictions to the right to edit or print periodical publications exclusively based on the residence or the age of individuals.
- Strengthen the protection of the right to access to information at the constitutional level by expressly incorporating the basic international and regional principles applicable to the exercise of this right.
- Adjust the language of the constitutional provision on hate speech to the terms and criteria used by international law and other relevant international documents in this area (such as Article 20 of the International Covenant on Civil and Political Rights).
- In cases of decease of the original author, introduce a safeguard in the Media and Defamation Act to guarantee that proceedings can only be pursued when legal liability can properly and fairly be established and determined in the absence of the said journalist. In case of decease of both author and editor, publishers may only be held liable on a subsidiary basis and when the responsibility of the former persons has already been established in a fair trial.
- Eliminate provisions regarding the recognition and enforcement of foreign judgements in cases of defamation and replaced them with a comprehensive anti-SLAPP legal regime containing the provisions and safeguards already recommended by international organizations.
- Introduce or contemplate in the Bill “to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life” the designation and establishment of concrete units and the definition of clear response protocols.
- Introduce in the above mentioned proposal the formulation of proper engagement and coordination mechanisms with civil society and media organizations regarding the operation of early-warning and rapid-response mechanisms, the need to set up training programmes for State authorities responsible for the protection of journalists and other media actors, as well as the designation of proper prosecution authorities and mechanisms.

Introduction

The present analysis was prepared by Dr. Joan Barata Mir, independent media freedom expert, at the request of the Office of the OSCE Representative on Freedom of the Media.

This Analysis examines the draft Bill of the Act “to amend the Constitution and various other laws to strengthen the right to freedom of expression and the right to privacy and to implement various measures for the protection of the media and of journalists”, and the draft Bill of the Act “to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life”.

The proposals analysed include, firstly, a reform of several articles of the Constitution of Malta. This analysis will focus on the new provisions to be included in article 41, devoted to the rights to freedom of expression and freedom of information. Secondly, they contain a series of reforms to the Media and Defamation Act, the Code of Organization and Civil procedure, and the Criminal Code. The third legal reform area under consideration refers to the creation of a series of administrative structures and coordination procedures. Provisions proposed in this area appear to facilitate the protection of journalists facing threats, harassment, and other risks.

The structure of the comment is guided by the tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These tasks include comments on the current version of the draft law by comparing provisions against international media standards and OSCE commitments; indication of provisions which are incompatible with the principles of freedom of expression and media; and recommendations on how to bring the legislation in line with the above-mentioned standards.

The Analysis first outlines the general international standards on freedom of expression and freedom of information and then presents those particularly referring to safety of journalists, libel and insult, SLAPPs, and relevant private international law provisions. These respective standards are referred to as defined in international human rights treaties and in other international instruments adopted by the United Nations, the OSCE, the European Union, and the Council of Europe. Part II includes an overview of the proposed legislation, particularly focusing on its compliance with international freedom of expression standards. The Analysis mentions the most important positive aspects of the draft law and elaborates on the drawbacks, with a view to formulating recommendations for the review.

Part I. International legal standards on Freedom of Expression and Freedom of Information, and Defamation

General standards

In Europe, freedom of expression and freedom of information are protected by article 10 of the European Convention on Human Rights (ECHR), which is the flagship treaty for the protection of human rights on the continent within the context of the Council of Europe (CoE). This article follows the wording and provisions included in article 19 of the

International Covenant on Civil and Political Rights (ICCPR), and is essentially in line with the different constitutional and legal systems in Europe.

Article 10 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. It also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy².

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions and limitations. However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, b) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a democratic society, in order to adequately protect one of those aims, according to the idea of proportionality³.

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards extant in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:

“This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

² See the elaboration of such ideas by the European Court of Human Rights (ECtHR) in landmark decisions such as *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, and *Handyside v. The United Kingdom*, Application No. 543/72, Judgment of 7 December 1976.

³ See for example *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979.

frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards”⁴.

Also, the OSCE Ministerial Council Decision 3/2018, adopted by the Ministerial Council in Milan on 7 December 2018, establishes the following:

“1. Fully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom, including by respecting, promoting and protecting the freedom to seek, receive and impart information regardless of frontiers;

2. Bring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them so that they do not limit the ability of journalists to perform their work independently and without undue interference (...)”⁵.

Standards with regards to defamation

The use of criminal law instruments to deal with attacks against the reputation of others raises important concerns in terms of proportionality and has been considered by international organizations and freedom of expression protection mechanisms as an excessive and inappropriate tool to protect such right. These organizations have also repeatedly warned about the chilling effect that the existence of such legal measures entails and advocate for the full decriminalization of speech offenses.

General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted on 29 June 2011 by the UN Human Rights Committee⁶, clearly indicates the need for States to consider the de-criminalization of defamation and reminds that:

“(I)n any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”.

Similarly, the international rapporteurs on freedom of expression, including the UN Rapporteur on Freedom of Expression and Freedom of Opinion, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression, have repeatedly underscored the need to abolish criminal defamation laws and replace them, when necessary, with appropriate civil laws⁷.

The Parliamentary Assembly of the OSCE has made similar calls to the participating

⁴ This document is available online at: <http://www.osce.org/odihr/elections/14304>.

⁵ Available online at: <https://www.osce.org/chairmanship/406538?download=true>

⁶ Available online at: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

⁷ See the Joint Declaration of 2002, available online at: <http://www.osce.org/fom/39838?download=true>, and the Joint Declaration of 2010 on “Ten Key Challenges to Freedom of Expression in the Next Decade”, available online at: <http://www.osce.org/fom/41439?download=true>.

States in repeated occasions⁸.

In the CoE, the Parliamentary Assembly adopted the Resolution 1577 (2007), which urged those member States that still provide prison sentences for defamation, albeit they are not actually imposed, to abolish them without delay⁹. With regards to the ECtHR, although it has never clearly called for a full decriminalization of defamation, it has always underscored that criminal sanctions, particularly imprisonment, deserve a very strict scrutiny with regards to its compatibility with article 10, and they are only acceptable in exceptional cases, notably hate speech or incitement to violence¹⁰. In more general terms, the Court has always warned that the imposition of disproportionate remedies in cases of defamation, either at the criminal or even at the civil level, will dissuade the press from taking part in the discussion of matters of legitimate public interest¹¹.

Standards regarding safety of journalists

General Comment No. 34 states the following (para 23):

“States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 [of Article 19] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with Article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.”

The RFoM observes media developments as part of an early warning function and helps participating States abide by their commitments to freedom of expression and free media. The RFoM focuses the work on several main areas, including media self-regulation and safety of journalists, with a specific accent on safety of female journalists online. In the “Safety of Journalists Guidebook”¹² the RFOM has called for “coordinated and consistent

⁸ See for example the Resolution on Freedom of the Media included in the Declaration of the Annual Meeting of the Parliamentary Assembly in Paris in 2001, available online at: <http://www.oscepa.org/documents/all-documents/annual-sessions/2001-paris/declaration-14/214-2001-paris-declaration-eng/file>.

⁹ Available online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17588&lang=en>.

¹⁰ See *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93, Judgement of 20 May 1999.

¹¹ See inter alia *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, Judgement of 17 December 2004, and *Mahmudov, Agazade v. Azerbaijan*, Application No. 35877/94, Judgement of 18 December 2008, and *Independent Newspapers (Ireland) Limited v. Ireland*, Application No. 28199/15, Judgement of 15 June 2017.

¹² Available online at: <https://www.osce.org/files/f/documents/d/7/85777.pdf>

State policies and practices” and goes on to say that “it is necessary to ensure that national laws, administrative and judicial systems protect and promote freedom of expression and safeguard the lives and professional rights of journalists”.

In November 2021 the RFOM also issued a report on legal harassment and abuse of the judicial system against the media, which elaborates on instances where the law is being misused to prevent journalists and other media workers from doing their work, or as a means of retaliation for their unwanted investigations or reporting and contains 11 recommendations to provide general guidance to OSCE participating States regarding their related commitments¹³.

Protecting media and journalists from attacks or intimidations of all nature, preventing such threats, and the issue of impunity constitute fundamental elements at the core of the effective and full enjoyment of the right to freedom of expression and freedom of information. Safety of journalists (including physical, psychological and legal angles) has been placed at the top of the priorities in the human rights agenda of most relevant international and regional organizations including the United Nations, UNESCO, the Council of Europe.

It is important to mention here, in particular, the UN Human Rights Council Resolution 33/2 of 29 September 2016, on the safety on journalists¹⁴, the UN Plan of Action on the Safety of Journalists and the Issue of Impunity¹⁵ and the UNESCO Journalists’ Safety Indicators¹⁶. Regarding the Council of Europe, it is important to refer to the Recommendation CM/Rec(2016)4[1] of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors¹⁷.

The already mentioned OSCE Ministerial Council Decision 3/2018 also calls on participating States to:

“Condemn publicly and unequivocally all attacks and violence against journalists such as killing, torture, enforced disappearance, arbitrary arrest, arbitrary detention and arbitrary expulsion, intimidation, harassment, and threats of all forms, such as physical, legal, political, technological or economic, used to suppress their work and/or unduly force closure of their offices, including in conflict situations”.

Journalists, activists, media workers and all persons exercising their right to freedom of expression are entitled to expect the State to adopt measures to protect them against the possible risks they might face as a result. This obligation also stems from their right to life and to personal integrity and security among others, both for themselves and their families. However, together with these fundamental rights, the State obligation to adopt special protection measures also arises from the need to guarantee the independence of said persons when carrying out its duties.

¹³ Available online at: <https://www.osce.org/representative-on-freedom-of-media/505174>

¹⁴ Available online at: <https://undocs.org/A/HRC/RES/33/2>.

¹⁵ Available online at: <https://en.unesco.org/un-plan-action-safety-journalists>

¹⁶ Available online at: <https://en.unesco.org/themes/safety-of-journalists/journalists-safety-indicators>

¹⁷ Available online at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1

In consequence, killing of journalists and other media workers, as the ultimate form of censorship, requires an equally strong answer from the State in terms of protecting the individuals facing such a risk.

According to UNESCO, key indicators of the fulfilment of State's role and responsibilities regarding the protection of safety of journalists include laws which can effectively provide such protection; appropriate normative statements, policies, and institutional frameworks that safeguard the importance of journalists' safety; criminal and civil justice systems that deal effectively with threats and acts of violence against journalists; and other relevant actions such as publication of data about attacks on journalists and impunity, additional protections for persons who represent sources of information for journalists and human rights defenders, and measures to support and compensate families of murdered journalists, among others.

The Declaration on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers of the Council of Europe on 30 April 2014, notes the growing trend to harass, intimidate, deprive of their liberty, physically attack and even kill journalists because of their work, and the even more worrying fact that States quite often fail to properly investigate such attacks, which is leading to what is described as a "culture of impunity."

The mentioned Recommendation CM/Rec (2016) 4 insists in paragraph 3, that a "chilling effect" may result from insufficient efforts by States authorities in the proper investigation and prosecution of crimes against journalists. Particularly, this paragraph warns against the negative effects that this may have "on the public watchdog role of journalists and other media actors and on open and vigorous public debate, all of which are essential in a democratic society" and the risk to "undermine public trust in the rule of law". It also stresses the core issue of the responsibility of States in creating a favourable environment for freedom of expression through a range of positive obligations "to be fulfilled by the executive, legislative and judicial branches of governments, as well as all other State authorities, including agencies concerned with maintaining public order and national security, and at all levels."

Under the mentioned international and regional standards, it can be concluded that States have, in the field of safety of journalists, an obligation to prevent, protect and prosecute.

Regarding prevention, the Recommendation CM/Rec (2016) 4 establishes the following:

"2. Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. (...). The legislative framework, including criminal law provisions dealing with the protection of the physical and moral integrity of the person, should be implemented in an effective manner, including through administrative mechanisms and by recognising the particular roles of journalists and other media actors in a democratic society."

As for protection, the Recommendation refers to the following:

"9. State authorities have a duty to prevent or suppress offences against

individuals when they know, or should have known, of the existence of a real and immediate risk to the life or physical integrity of these individuals from the criminal acts of a third party and to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk. To achieve this, member States should take appropriate preventive operational measures, such as providing police protection, especially when it is requested by journalists or other media actors, or voluntary evacuation to a safe place. (...)

10. Member States should encourage the establishment of, and support the operation of, early-warning and rapid-response mechanisms, such as hotlines, online platforms or 24-hour emergency contact points, by media organisations or civil society, to ensure that journalists and other media actors have immediate access to protective measures when they are threatened. If established and run by the State, such mechanisms should be subject to meaningful civil society oversight and guarantee protection for whistle-blowers and sources who wish to remain anonymous. Member States are urged to wholeheartedly support and co-operate with the Council of Europe's platform to promote the protection of journalism and the safety of journalists and thereby help to strengthen the capacity of Council of Europe bodies to warn of and respond effectively to threats and violence against journalists and other media actors. (...)

12. Member States are urged to develop protocols and training programmes for all State authorities who are responsible for fulfilling State obligations concerning the protection of journalists and other media actors. Those protocols should be adapted to the nature and mandate of the State agency personnel in question, for example, judges, prosecutors, police officers, military personnel, prison wardens, immigration officials and other State authorities, as appropriate. The protocols and training programmes should be used to ensure that the personnel of all State agencies are fully aware of the relevant State obligations under international human rights law and humanitarian law and the actual implications of those obligations for each agency.”

Last but not least, when it comes to prosecution the Recommendation mentions, among other issues, the following:

“20. For an investigation to be effective, the persons responsible for, and who are carrying out, the investigation must be independent and impartial, in law and in practice. Any person or institution implicated in any way with a case must be excluded from any role in investigating it. Moreover, investigations should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards. Investigations must be effective in order to maintain public confidence in the authorities' maintenance of the rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Investigations should also be subject to public oversight, and in all cases the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. (...)”

Standards regarding strategic lawsuits against public participation (SLAPP)

According to what has already been presented, States have a positive obligation to secure the enjoyment of the rights enshrined in Article 10 of the Convention. Not only must they refrain from any interference with the individual's freedom of expression, but also they are under a positive obligation to protect their right to freedom of expression from any infringement, including by private individuals.

The Recommendation CM/Rec (2018) 2 on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers of the Council of Europe in March 2018¹⁸, states that:

“State authorities should consider the adoption of appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression.”

The 2012 Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, to ensure Freedom of Expression¹⁹, refers to “libel tourism” as a form of “forum shopping when a complainant files a complaint with the court thought most likely to provide a favourable judgment and where it is easy to sue, and the mere cost of the procedure could have a dissuasive effect on the defendant. The Declaration stresses the fact that:

“The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.”

The Commissioner for Human Rights of the Council of Europe issued on 27 October 2020 the statement “Time to take action against SLAPPs”²⁰. The statement warns against the increasing use of specious lawsuits to censor, harass and ultimately suppress the investigative work of journalists, activists, and advocacy groups²¹. According to the Commissioner, SLAPPs have several common features. Firstly, they are purely vexatious in nature. The aim is not to win the case but to divert time and energy, as a tactic to stifle legitimate criticism. Litigants are usually more interested in the litigation process itself than in the outcome of the case. Secondly, there is a power imbalance between the plaintiff and the defendant. Private companies or powerful people usually target individuals, alongside the organisations they belong to or work for, as an attempt to intimidate and silence critical voices, based purely on the financial strength of the complainant.

¹⁸ Available online at:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

¹⁹ Available online at: <https://icjr.or.id/declaration-of-the-committee-of-ministers-on-the-desirability-of-international-standards-dealing-with-forum-shopping-in-respect-of-defamation-“libel-tourism”-to-ensure-freedom-of-ex/>

²⁰ Available online at: <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>

²¹ See The Foreign Policy Centre, Justice for Journalists, *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world*, November 2020, available online at: <https://fpc.org.uk/publications/unsafe-for-scrutiny/> and Greenpeace, *Sued into silence. How the rich and powerful use legal tactics to shut critics up*, July 2020, available online at: <https://www.greenpeace.org/eu-unit/issues/democracy-europe/4059/how-the-rich-and-powerful-use-legal-tactics-to-shut-critics-up/>

Therefore, to counter SLAPPs effectively, the Commissioner recommends a comprehensive response, based on a threefold approach:

- “- preventing the filing of SLAPPs by allowing the early dismissal of such suits. This should go hand in hand with an awareness raising exercise among judges and prosecutors, and proper implementation of the case-law of the European Court of Human Rights on defamation.
- introducing measures to punish abuse, particularly by reversing the costs of proceedings.
- minimising the consequences of SLAPPs by giving practical support to those who are sued.”

At the level of the European Union, so far, no member State has adopted any form of anti-SLAPP legislation (as opposed to relevant non-EU cases such as the United States, Canada and Australia). However, it is important to note that EU institutions are in the process of considering the elaboration of an anti-SLAPP Model directive, i.e., the framework for a robust legislative intervention with a view to stemming the flow of litigation aimed at suppressing public participation in matters of public interest²².

On 25 November 2020, the European Parliament adopted a Resolution on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation, and the role of platforms²³. By this means, the European Parliament condemns the use of SLAPP to silence or intimidate investigative journalists and outlets and create a climate of fear around their reporting of certain topics, and strongly reiterates its call on the Commission to come forward with a comprehensive proposal for a legislative act aiming to establish minimum standards against SLAPP practices across the EU and to propose an anti-SLAPP (strategic lawsuit against public participation) directive.

The legal reform will particularly be oriented at empowering national courts to expeditiously dismiss cases without harming potential claimants’ legitimate rights to access courts. Legislation must therefore afford the claimant the opportunity to present legitimate claims to the court, and therefore satisfy the requirements of article 6 ECHR in terms of the right to a fair trial. Anti-SLAPP legislation would only dissuade the misuse of civil procedure in a manner which prevents respondents from articulating a defence in accordance with EU law and international human rights instruments.

In addition to the above, legislation would also need to cover issues related to jurisdiction, recognition, and enforcement of judgments within the Union, as well as the harmonisation of national choice of law rules in defamation cases. These last two very important issues will be considered in the next section.

When it comes to the directive as such, it would allow member States to transpose legislation in a manner which best suits the civil procedure of each legal system. It should

²² See the study requested by the JURI Committee of the European Parliament on “The Use of SLAPPs to Silence Journalists, NGOs and Civil Society” (June 2021), available online at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf)

²³ Available online at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0320_EN.html

also enable member States to adopt higher standards of public participation and allow a degree of flexibility through practice and periodic revision. Considering international standards and best comparative practices, the norm is expected to cover the following areas:

- Early dismissal: courts should be empowered to ensure that SLAPPs are dismissed at the earliest possible phase of legal proceedings, provided that the respondent persuades the court that the matter falls within the scope of the relevant legislation.
- Deterrent measures: effective, proportionate, and dissuasive measures of penalty are imposed on the claimant, which may also bring an advantage to the party whom the claimant had wished to vex through litigation.
- Restriction of forum shopping: specific rules to deter litigation in third countries, as well as the extension of remedies available to deter domestic SLAPPs.
- Non-legislative measures: adequate training for judges and legal practitioners or the creation of a specific EU fund to provide support for the victims of SLAPPs.

Standards regarding international private law matters: jurisdiction, recognition, and enforcement of judgments, as well as national choice of law rules in defamation cases

In order to provide a complete legal analysis of the draft legislation under consideration, it is also important to consider a series of international applicable legal principles and standards regarding jurisdiction, recognition, and enforcement of judgments, as well as national choice of law rules in defamation cases.

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 (Brussels 1a)²⁴, states in Recital 16 that:

“In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.”

In line with this, article 4.1 of the Regulation establishes the following:

“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

Exceptions to this general principle are enshrined in article 7. According to it, a person domiciled in a member State may be sued in another member State “in matters relating

²⁴ (OJ L 351, 20.12.2012, p. 1)

to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur” (paragraph 2).

Regarding recognition of judgements, article 36.1 of the Regulation states the following:

“A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”

Regarding enforcement of judgements, articles 39 and 40 of the Regulation establish that:

“A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.”

“An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.”

Last but not least, article 45.1 regulates the possible refusal of recognition and enforcement, based on the following provisions:

“1. On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;

(...)”

Identical provisions are contained in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007²⁵ (Lugano Convention). The Lugano Convention is an international treaty negotiated by the EU on behalf of its member States (and by Denmark separately because it has an opt-out) with Iceland, Norway, and Switzerland, with the same object

²⁵ (OJ L 339, 21.12.2007, p. 3)

as the Regulation cited above. It is important to note that, after leaving the European Union, the United Kingdom has applied to accede to the Convention as an independent member. This would require the agreement of all signatories. However, EU institutions have recommended member States not to accept this accession.

Regulation (EU) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)²⁶ was adopted to be applied in situations involving a conflict of laws regarding non-contractual obligations in civil and commercial matters. However, letter g) of paragraph 2 in article 1 particularly excludes from the scope of this norm “non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.”

Based on the above, there must be formulated the following main conclusions:

a) Within the scope of the Regulation Brussels 1a and the Lugano Convention, the domicile of the defendant is not necessarily the only criterion in terms of jurisdiction in cases of defamation.

b) In the cases mentioned above, the legal criterion of “the place where the harmful event occurred or may occur” may open the door for a claimant in a defamation case to sue before the courts of the country where the latter is established, instead of the courts of the country where the defendant is domiciled. In particular, the way information is nowadays distributed and accessed online gives particularly flexibility in the interpretation of the notion of the “place of the actual causation of the damage”. This can also open the door to fragmentation or the so-called “mosaic litigation” (the purported victim may sue in every State in which it is claimed that damage arose in respect of the damage arising in that State).

c) Possibilities for national courts to object the recognition or enforcement of a judgement from another EU member State or party to the Lugano Convention are extremely limited due to the exceptional nature of refusal causes according to the applicable provisions.

d) The EU does not count yet on a common legislation regarding non-contractual obligations arising out of violations of rights relating to personality, including defamation.

Part II. Overview of the proposed legal reform

Content and scope of the proposed legislation

The proposals analysed include, firstly, a reform of several articles of the Constitution of Malta. This analysis will focus on the new provisions to be included in article 41, devoted to the rights to freedom of expression and freedom of information.

The draft legal text also includes a series of amendments to the existing Media and Defamation Act, (article 3, and addition of a new article 24A of the principal Act), the Code of Organization and Civil Procedure (Tariff A of Schedule A), as well as the Criminal Code

²⁶ (O) L 199. 31.07.2007, p. 40)

(article 222). The proposed amendments can be summarised as follows:

- a) In cases where the author or the editor of an allegedly defamatory piece of content dies at a time when civil proceedings on the issue are pending or to be commenced, the competent court shall not award any damages against the heirs of the deceased author or editor and may also, upon a request of the heirs of the deceased, summarily order the discontinuance of the proceedings with regard to the merits of the case and to the payment of costs as the court may consider appropriate. However, the provisions mentioned above will not be applied to cases where the media outlet “has a publisher other than the deceased author or editor”, in which case the proceedings may be continued upon the request of the plaintiff against the said publisher instead of against the heirs.
- b) Recognition and enforcement of judgements from other countries in cases of libel or slander will only be enforceable to the amount in damages that a Maltese court would have decided, had the action been filed in Malta and decided against the author, editor, or publisher. These provisions are applicable to cases where the court determines that legal action giving rise to the judgment was substantially based on claims related to Malta, the lawsuit could have been filed in Malta and was probably not so filed as part of a strategy intended to place an unwarranted financial burden on the defendant, as well as to limit the execution of such judgment. It is important to note that this legal provision is applicable without prejudice to “the application of European Union law and of any treaty to which Malta is a party”.
- c) In causes for defamation filed in terms of the Media and Defamation Act the court fees are not payable upon the filing of any sworn reply or simple reply. They will be collected in accordance with the judgment of the court upon the termination of the cause.
- d) In cases of wilful criminal offences against a person (including bodily harm, and bodily harm from which death ensues), a new aggravating circumstance is added for cases where the victim “was a journalist and the offence was committed because of that person exercising or having exercised his functions.”

Lastly, this analysis will also cover the proposal of an “Act to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life”. This proposal creates of a series of administrative structures and coordination procedures. Provisions proposed in this area appear to facilitate the protection of journalists facing threats, harassment, and other risks.

Analysis of the provisions of the proposal in light of applicable international standards

Proposed constitutional reforms

The draft proposals object of this analysis contains a series of very relevant reforms regarding the protection of the right to freedom of expression in the Constitution of Malta. In this sense, paragraph 1 and 2 of article 41 (focused on this right) are to be replaced by the following:

“1) Freedom of expression shall be guaranteed as provided in this article. This right shall include freedom of any person to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2) The freedom and pluralism of the media and the importance of the role journalists shall be respected.”

These two paragraphs reproduce the text of article 11 of the Charter of Fundamental Rights of the European Union, and therefore this is to be welcome. Having said that, this is an important opportunity to align the Constitution to the broader provisions and safeguards included in international and regional instruments such as the ICCPR (article 19) and the ECHR (article 10), and therefore it is recommended to also include the following:

- a) Besides the right to receive and impart information, it would also be important to include the right to seek information as a basic component of the right to freedom of expression and freedom of information. This will strengthen the constitutional protection provided to the specific right to access to information (also mentioned in another paragraph), in line with international standards.
- b) It is also advised to include a reference to the protection of the right to freedom of expression in connection to the use of any the form, medium or platform.

In addition to this, a new paragraph 3 is included with the following wording:

“3) The exercise of the freedoms guaranteed by this article , since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and independence of the judiciary. Proportionate restrictions on the freedom of expression of public officers may be imposed by law within the limits provided for in this sub-article for the purpose of maintaining confidence in the public service.”

This paragraph reproduces the second part of article 10 ECHR, except for the last sentence, regarding additional restrictions “for the purpose of maintaining confidence in the public service”. Although there might be cases where some specific restrictions may apply vis-a-vis public employees’ speech, these are already covered under the provisions contained in article 10. The additional cause included in the proposal is extremely broad and open to interpretation and can be used to establish restrictions incompatible with international standards. It is important to stress the fact that speech with negative effects regarding “confidence in the public service” (including speech by public officials) may

also fall under the particularly protected category of political speech, as well as entail reporting activities based on information provided by whistleblowers. Public employees can thus make significant contributions to the kind of political debates that are necessary in a functional democracy. This represents an overriding public interest vis-a-vis a general need to protect the confidence of citizens in the public service. Therefore, and because such a vague provision may be used to deter the dissemination of relevant information and criticism about the functioning of public bodies and institutions, and limit the watchdog role of media regarding public interest matters, it is recommended that the mentioned additional sentence is eliminated from the Bill.

Paragraph 3 (re-numbered as paragraph 4) is modified in some aspects in order to guarantee that anyone “who is resident in Malta may edit or print a newspaper, journal or any other media published daily or periodically’. The article also provides for the possibility of prohibiting or restricting the editing or printing of any newspaper or journal by persons under 21 (which is also the object of an amendment that would lower this limitation to the age of 18), as well as requiring any person who is the editor or printer of any such publications “to inform the prescribed authority to that effect and of his age and to keep the prescribed authority informed of his place of residence”. According to international and regional standards, the exercise of the right to freedom of expression and freedom of information is recognised and protected for “everyone”. This implies that general prohibitions and restrictions exclusively based on the residence or the age of individuals might not be acceptable. Persons under the age of 18 may already be affected by currently existing basic limitations in the Maltese legal system regarding the exercise of professional and economic activities, as well as the creation of legal incorporations. Including such a broad restriction, particularly at the constitutional level, thus represents an unnecessary (as there is no clear public interest in a democratic society that would justify this measure) and disproportionate restriction to the right to freedom of expression, because it will deprive a certain sector of the population (young students and activists, for example) from an effective tool to disseminate and propagate their own (and also protected) ideas and opinions. Therefore, it is recommended to eliminate the whole paragraph 3 of article 41 (renumbered as paragraph 4 as the result of the draft proposal).

The proposal also includes a new paragraph particularly focused on the protection of the right to freedom of information:

“5) Public authorities shall be obliged to provide access to information held by them and information on their activities under such conditions as may be provided by law.”

The specific protection of the right to access to information at the constitutional level must be welcome. This being said, the wording of this article may suggest that the legislator has a wide margin of appreciation regarding the definition of the specific scope and limits to this right. It is important to underscore that according to international standards, the right to access to information (a key component of the fundamental right to freedom of information) must be subjected to the same safeguards and conditions regarding the establishment of possible formalities, conditions or restrictions. It is also important to note that the recent Report of the Commissioner for Human Rights of the

Council of Europe following her visit to Malta from 11 to 16 October 2021²⁷ particularly points at the deficiencies of the existing Freedom of Information Act (echoing also the conclusions of the latest report by the Council of Europe Group of States Against Corruption (GRECO) in this field), as well as at the increasingly restrictive attitude towards access to information in general. For all these reasons, it is recommended to strengthen the protection of the right to access to information at the constitutional level by expressly incorporating the basic international and regional principles applicable to the exercise of this right.

Lastly, the proposal also includes a new paragraph on hate speech:

“6) This article shall not be interpreted as protecting hate speech which incites violence or hatred such as racial, religious, ethnic, or gender hatred.”

The category generally known as “hate speech” may constitute a legitimate clause for the prohibition of certain forms of expression at the national level according to article 20.2 ICCPR. Despite the need to properly tackle the growing issue of the dissemination of harmful hate speech in the country, the wording used in the proposal is a bit confusing (it refers to undefined “hate speech” which at the same time incites to hatred, for example). Being true that article 20.2 ICCPR contains a broad definition of hate speech, it is the responsibility of the national legislator, as well as that of national judicial operators, to make a proper assessment of each piece of content on the basis of principles, rules and conditions established in international law. In particular, it is important to note the threshold test on hate speech extracted from the Rabat Plan of Action, which permits to assess if a particular statement reaches the level of actual incitement to discrimination, hostility or violence. The Rabat framework test lays out six parameters to check if a statement may amount to a criminal offence. On a case-by-case basis, the test looks into the context, speaker, intent, content, extent of the speech, and likelihood of harm²⁸. It is therefore recommended to adjust the language of the proposed provision to the terms and criteria used by international law and other relevant international documents in this area.

Civil proceedings against deceased authors (journalists) and editors

The proposed legislation aims at introducing, as it has already been shown, important restrictions regarding the commencing or the pursuing of legal proceedings in alleged cases of defamation when authors (journalists) and editors are already deceased. The provisions also give courts the power to continue the proceedings against publishers.

The fact that civil defamation legal proceedings cannot be commenced or pursued when the original author of the content in question and the editor are already deceased needs to be welcome. Human rights, including the right to freedom of expression and freedom of information, are directly connected to the personality of their holders and thus they should be considered extinct upon their death. This shall also apply to responsibilities connected to the exercise of such rights, including civil liability.

Having said that, it is necessary to recommend, related to the liability of editors and

²⁷ Available online at: <https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d>

²⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/Hate-speech-threshold-test.aspx>

publishers in cases of decease of the original author, the introduction of a safeguard in the sense that proceedings can only be pursued when legal liability can be properly and fairly established and determined in the absence of the said journalist.

Liability in defamation cases is decided by courts based on the assessment of the content itself, but also after pondering the defences that the defendants may use in their favour (truth, honest opinion, public interest, etc.). Therefore, the law must indicate the dismissal of cases where only the (deceased) original author and/or editor (in case of decease of the latter as well) would have been able to provide the court with all the necessary elements for the adoption of their judgement, or, in other words, when the absence of some defendants makes it impossible for the remaining ones to exercise their right to a defence fully and fairly.

In light of the response provided by the Maltese authorities to the legal analysis on these same provisions and commissioned by the OSCE in October 2021, it is necessary to underscore a particular recommendation regarding the specific liability of publishers.

Under article 3 of the existing Defamation Act, civil proceedings for defamation may be instituted against the author, the editor, and the publisher (in this last case, only when the prior persons cannot be easily identified). It is obvious that regarding content creation and publication, only the author and the editor can be considered as holding an editorial control capacity, which is thus directly connected to their primary liability. In most legal systems (including the Maltese one), publishers are put in a subsidiary position in terms of liability. Only when, for some reason, civil defamation actions and/or claims against the author or the editor are not viable, publishers may be sentenced and compelled to take on economic compensations. Considering all these elements, it is recommended that, in case of decease of both author and editor, publishers may only be held liable on a subsidiary basis and when the responsibility of the former persons has already been established in a fair trial. This shall not prevent publishers to use their own defences, i.e. those deriving from their subsidiary role.

Recognition and enforcement of defamation judgements from third countries

A relevant provision included in the proposed amendments establishes a series of parameters regarding the recognition and enforcement in Malta of judgements from third countries in cases of defamation. This provision is particularly problematic based on a series of considerations.

Firstly, recognition and enforcement of judgements from courts in EU member States and signatories of the Lugano Convention are not covered by this provision. In such cases, the already mentioned rules and principles established by these instruments will fully apply. This is, in any case, the meaning of the initial paragraph “(w)ithout prejudice to the application of European Union law and of any treaty to which Malta is a party”.

Secondly, despite the reference to the fact that “the action giving rise to the judgment was substantially based on claims related to Malta, that the action could have been filed in Malta and was probably not so filed as part of a strategy intended to place an unwarranted financial burden on the defendant, limit the execution of such judgment” (sic), it is important to underscore that the analysed provisions do not establish an actual and comprehensive anti-SLAPP regime, as they are exclusively focused on the recognition

and enforcement of defamation judgements already adopted in third countries, according to their own and respective legislation.

Thirdly, the presence of the circumstances mentioned in the paragraph above does not per se preclude the recognition or enforcement of judgements from third countries. Such judgements will be enforceable “to such amount which the Court considers would be due in damages and, or costs under this Act had the action been filed in Malta and decided against the author, editor or publisher” (sic).

Lastly, the provision mentioned in the previous paragraph implies, on the one hand, that Maltese courts would apparently accept the assessment of facts and liabilities made by foreign courts based on their own national legislation although, on the other hand, the former will still be able to “adapt” original damage compensations to the amount resulting from the application of Maltese legal criteria to the case. According to the response provided by the Government of Malta, a court faced with an article 24A defence regarding a judgement which is otherwise enforceable in Malta “would necessarily have to hear the submissions and evidence of the person demanding the enforcement and of the person opposing it and it will have to determine that the elements of the article 24A defence are present before deciding to only enforce the foreign judgment up to a certain extent”. It is also pointed out that “a similar process also takes place when a party opposes the enforcement of a foreign judgment on grounds other than those provided in the draft article 24A”.

This Bill is however based on confusing and vague criteria, thus leaving to courts the possibility to embrace different and contradictory interpretations. In addition to this, the provisions included in the proposal may represent an additional burden for the defendants, since besides the need to defend their case before the courts of a foreign country, they may also (and must) intervene before Maltese courts with regards to the imposition of the damage compensation. Being true that opposing, on any grounds, the execution of certain foreign court decisions at the national level may always entail following additional procedures at the national level, the specific nature and human rights impact of defamation lawsuits require the adoption of a very protective and restrictive approach when it comes to the stages and instances necessary to finally determine the liability of a journalist or any media actor. In other words, the implementation of the defence included in the proposal will only increase the chilling effect intrinsic to a defamation lawsuit in a foreign country as it will force the defendant to face responsibilities and all the burdens associated to any lawsuit in not only one, but two different jurisdictions.

Based on all the previous considerations, it is recommended that this provision is eliminated and replaced by a comprehensive anti-SLAPP legal regime containing the provisions and safeguards already recommended by international organizations (particularly the Commissioner for Human Rights of the Council of Europe), as described in detail above.

Lastly, in the legal analysis elaborated in October 2021 it was recommended to introduce, regarding the enforcement and recognition of foreign judgements, a series of clear and certain rules precluding the implementation of decisions that violate the right to freedom of expression as protected in the Maltese legal system. The draft under consideration contains a provision in this sense, which needs to be welcome:

“Provided that the court may also refuse the execution in Malta of a judgment as referred to in this article if it considers that the execution of that judgment would violate the right to freedom of expression as protected in the legal system of Malta”

Benefits of legal aid and court fees

In cases for defamation filed in terms of the Media and Defamation Act the court fees are not payable upon the filing of any sworn reply or simple reply. Provisions proposed in this area appear to facilitate the defence of journalists in defamation proceedings. They must be welcome.

Reform of the Criminal Code

This specific proposal aims at aggravating the punishment of bodily harm criminal offences when the victim is a journalist, and the offence was committed because of that person exercising or having exercised his functions.

This provision may represent an improvement regarding the prevention and prosecution of physical attacks against journalists and must thus be welcome. However, it is also important to note that it only refers to a particular category of crimes.

Protection of safety of journalists does not only require the proper prosecution and punishment of a variety of possible crimes, but also a more comprehensive approach to the problem, including the prevention, protection, and prosecution aspects. These matters will be further developed in the next section.

Proposal of an “Act to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life”

The third legal reform area under consideration refers to the proposal mentioned above. Provisions proposed in this area appear to facilitate the protection of journalists facing threats, harassment and other risks. They must be welcome.

This proposal includes the following elements:

- a) The power of the Minister “responsible for matters of security” to “establish executive, administrative or consultative structures in the form of councils, committees, or boards within the Ministry responsible for matters of security to perform functions related to the protection of democratic society and of the democratic way of life”.
- b) The establishment of a Committee for the Recommendation of Measures for the Protection of Journalists, Other Media Actors and Persons in Public Life to be appointed by the mentioned Minister. This Committee will be formed by the Commissioner of Police or his representative, the Head of the Malta Security Service or his representative, and the Commander of the Armed Forces of Malta or his representative.
- c) The definition of the attributions of the mentioned Committee, including:

- a. responding to any real and immediate risks of acts of violence against journalists, other media actors and persons in public life,
- b. deciding upon measures beyond interim solutions in order to manage any risk encountered by journalists, other media actors and persons in public life,
- c. devising a security plan which shall be based, amongst other matters, on threat assessments which give due consideration to the levels of threat, risk and vulnerability, early warning systems and systems of rapid response,
- d. providing the necessary protection for journalists and other media actors, and
- e. providing the necessary protection for persons in public life.

The establishment of a body in charge of coordinating possible measures and actions to improve journalists' safety (among other actors) is to be welcome. Following up on the conclusions of the public inquiry report on the assassination of the journalist Daphne Caruana Galizia, the Commissioner for Human Rights of the Council of Europe also recommends in her mentioned report the adoption of a "co-ordinated response to threats and harassment against journalists, including online, in order to provide adequate protection measures".

As it has already been mentioned, under applicable international and regional standards States have, in the field of safety of journalists, an obligation to prevent, protect and prosecute. The provisions included in the proposal basically refer to the second component of this three-pronged approach (protection). It is clear that the coordinated action of the Committee may improve the public response to certain threats and risks affecting journalists. However, this is a high level committee that may essentially play a general coordination role. Dealing with particular events and providing effective protection and immediate responses requires the designation and establishment of concrete units and the definition of clear protocols. None of such elements are properly contemplated (even in terms of assigning such tasks) in the proposal. It is therefore recommended to incorporate such issues. In addition to this, it is also very important to introduce or contemplate the formulation of proper engagement and coordination mechanisms with civil society and media organizations regarding the operation of early-warning and rapid-response mechanisms (hotlines, online platforms or 24-hour emergency contact points) to ensure that journalists and other media actors have immediate access to and are aware of protective measures when they are threatened. In the same vein, it is recommended that the proposal indicates the setting up of protocols and training programmes for State authorities responsible for the protection of journalists and other media actors.

Another matter that is not contemplated at all in the proposal is prosecution. It is thus also recommended that the bill designates proper prosecution authorities and mechanisms, taking particularly into account the fact that investigations must be independent and impartial, in law and in practice, and that they should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards.

