Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

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

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Executive summary

This Analysis examines the draft Bill of the Act "to implement various measures for the protection of the media and of journalists".

The proposed amendments include several different areas.

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 order the discontinuance of the proceedings. In 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.

In cases of so-called "libel tourism", 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, without prejudice to the application of European Union law and of any treaty to which Malta is a party.

Benefits of legal aid are granted to defendants in actions on defamation under the Media and Defamation Act without the necessity to fulfil (and confirm under oath) a series of requirements. 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.

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."

It is recommended, regarding the liability of editors and 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. 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 any case, the best option would be to circumscribe the liability of editors and publishers to cases where the decease of the journalist took place after the judgement was already adopted.

Provisions regarding the recognition and enforcement of foreign judgements in cases of defamation shall be 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 well as best international comparative practices. These provisions may also be complemented with the introduction, regarding the enforcement and recognition of foreign judgements, of a series of clear and certain rules simply precluding the

implementation of decisions that would violate the right to freedom of expression as protected in the Maltese legal system, based also on clearly defined burdens of proof and cost allocations.

Provisions proposed in this area appear to facilitate the defence of journalists in defamation proceedings. They must be welcome.

Provisions aggravating the punishment of bodily harm criminal offences when the victim is a journalist 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 they only cover a very specific 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.

Summary of recommendations

a) 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 be properly and fairly established and determined in the absence of the said journalist.

b) In any case, the best option would be to circumscribe the liability to editors and publishers to cases where the decease of the journalist took place after the judgement was already adopted.

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

d) Such provisions may also be complemented with the introduction of clear and certain rules precluding the implementation of foreign defamation judgements that violate the right to freedom of expression as protected in the Maltese legal system, based also on clearly defined burdens of proof and cost allocations.

e) 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 this complex issue, including the prevention, protection, and prosecution aspects.

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 refers to the draft Bill of the Act "to implement various measures for the protection of the media and of journalists" of the Republic of Malta, which still needs to be discussed and approved in the Parliament.

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 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 of 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 democracy[1].

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 proportionality[2].

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 frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards"[3].

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 (…)"[4].

Standards with regards to criminal defamation

[1] 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.

[2] See for example The Sunday Times v. UK, Application No. 6538/7426 Judgment of April 1979.

[3] This document is available online at: http://www.osce.org/odihr/elections/14304.

[4] Available online at: https://www.osce.org/chairmanship/406538?download=true

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 Committee[5], 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 laws[6].

The Parliamentary Assembly of the OSCE has made similar calls to the participating States in repeated occasions[7].

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 delay[8]. 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 violence[9]. 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 interest[10].

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[5] Available online at: http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

[6] 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.

[7] 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.

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

[9] See Bladet Tromso and Stensaas v. Norway, Application No. 21980/93, Judgement of 20 May 1999.

[10] See inter alia Cumpănă and Mazăre v. Romania, Application No. 33348/96, Judgement of 17 December 2004, and and Mahmudov, Agazade v. Azerbaijan, Application No. 35877/94, Judgement of 18 December

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 they are also 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 2018[11], 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 Expression[12], 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"[13]. The statement warns against the increasing use of specious lawsuits to censor, harass and ultimately suppress the investigative work of journalists, activists, and advocacy groups[14]. 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 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,

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2008, and Independent Newspapers (Ireland) Limited v. Ireland, Application No. 28199/15, Judgement of 15 June 2017.

[11] Available online at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

[12] 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/

[13] Available online at: https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps

[14] 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/

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.

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 interest[15].

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 platforms[16]. 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 two last very

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[15] 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

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

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 also enable member States to adopt higher standards of public participation and allows 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)[17], 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

[17] (OJ L 351, 20.12.2012, p. 1)

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 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 2007[18] (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 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)[19] 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, the following main conclusions must be formulated:

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 draft legal text 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 (article 913 and Tariff A of Schedule A), as well as the

[18] (OJ L 339, 21.12.2007, p. 3)
[19] (OJ L 199. 31.07.2007, p. 40)

Criminal Code (article 222).

The proposed amendments can be summarised as follows.

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.

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".

Benefits of legal aid are granted to defendants in actions on defamation under the Media and Defamation Act without the necessity to fulfil (and confirm under oath) a series of requirements, including "that he believes that he has reasonable grounds for taking or defending, continuing or being a party to proceedings", as well as that he/she is not in possession of certain wealth, income or properties.

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.

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."

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

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 of 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.

This being said, it is necessary to recommend, regarding the liability of editors and 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 any case, the best option would be to circumscribe the liability of editors and publishers only to cases where the decease of the journalist took place after the judgement was already adopted.

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 the following considerations:

a) 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".

b) 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.

c) 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).

d) 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 on the basis of their own national legislation although, on the other hand, the former will still be able to "adapt" original damage compensations to the amount resulting to the application of Maltese legal criteria to the case. The provision does not clarify whether this will represent re-opening the case and giving the defendant the opportunity to defend his/her case before the Maltese courts based on Maltese legislation, or the court will just decide *inaudita parte* with regards to the amount of the compensation without further analysis or consideration. In the case of the latter, how will the Maltese court establish such determination without a proper and fair analysis of the case and particularly without considering the arguments of the claimants and defences of the defendants in light of Maltese law?

This proposal is 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. This very complicated process may also violate the basic principle of *res iudicata*, since the relevant and substantial aspects of one single case will be the object of legal proceedings and decided by two different courts in two different countries.

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 well as best international comparative practices. It is also recommended to consider the reports and recommendations already under consideration by the EU institutions in this field. In any case, it is important to underscore the fact that the adoption of such provisions does not require to wait for the adoption of a directive in question.

These provisions may also be complemented with the introduction, regarding the enforcement and recognition of foreign judgements, of a series of clear and certain rules simply precluding the implementation of decisions that violate the right to freedom of expression as protected in the Maltese legal system, based also on clearly defined burdens of proof and cost allocations. The model of the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Law[20] in the United States may provide guidance (at least when it comes to certain aspects) in this field.

Benefits of legal aid and court fees

Provisions proposed in this area appear to facilitate the defence of journalists in

[20] https://www.govinfo.gov/app/details/PLAW-111publ223/summary

defamation proceedings. They must be welcome.

Establishment of aggravating circumstance for criminal cases of bodily harm where the victim is a journalist

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 very specific 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 actions also need to go beyond legal reform and include very relevant aspects such as establishing early warning systems and rapid response mechanisms, creating and maintaining an enabling environment for journalists, training key stakeholders (including judges, law enforcement, military, journalists, and civil society), regularly monitoring and reporting on attacks against journalists, and ensuring victims of crimes against journalists and their families have access to appropriate remedies, among many other aspects[21].

[21] See the UN Human Rights Council Resolution 33/2 of 26 September 2016 on the Safety of Journalists. Available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/226/24/PDF/G1622624.pdf?OpenElement