

**11 June 2023**

**Malta: Opinion on the draft anti-SLAPP proposals of the Committee of Experts on Media**

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## 1. Introduction

Article 19 Europe, the Committee to Protect Journalists (CPJ), the European Centre for Press and Media Freedom (ECPMF), the European Federation of Journalists (EFJ) and Reporters without Borders (RSF) have commented on the updated proposals relating to Strategic Litigation Against Public Participation (SLAPPs) made by the Committee of Experts on Media (the Committee) established by the Government of Malta as part of the recommendations of the Public Inquiry on the assassination of journalist Daphne Caruana Galizia. The updated proposals as provided to us for comment consist of an amendment to article 10 by way of introducing a new subarticle thereto, and the introduction of a new article 24A in the Media and Defamation Act (see annex).

At the outset we note our ongoing concerns relating to the lack of transparency and public consultation of both the Government of Malta and the Committee at every stage of the process relating to the implementation of the recommendations of the Public Inquiry on the assassination of journalist Daphne Caruana Galizia.

While we welcome the progress in the development of the Committee's proposals relating to the enforcement of third country judgments, we note that they lack a proper framework to prevent SLAPPs. In particular, we are concerned that by limiting the proposed amendments to the law of defamation and libel the proposals do not sufficiently protect the right to public participation which should be the key feature of anti-SLAPP protections. It is not the legal grounds of the claim, in this case defamation and libel, that should determine whether a claim is a SLAPP, but it being an abuse of procedure against public participation. In this regard we are concerned by the limitation of SLAPP protections to defamation law and journalists, the vague definition of SLAPP defamation suits as "manifestly unfounded" in a manner that excludes SLAPPs which are not manifestly unfounded but which bear other hallmarks of SLAPPs, and the lack of protection from intra-EU SLAPP suits. We encourage the Committee to urge the Government to take further steps to meet its international human rights obligations and fully protect and promote a safe media environment in Malta by offering a range of recommendations for how the proposals can fully ensure comprehensive protection from SLAPPs.

Considering that Malta is the EU country with [the highest number of SLAPPs](#) per capita, where the use of suits based on the defendant's engagement in public participation are instituted by persons holding public office and other politically exposed persons, and businesses involved in public contracts, and that evidence indicates that at least in one case the proposer of a SLAPP suit against journalists in Malta was in communication with persons holding public office when deciding how to initiate claims against journalists, it becomes incumbent on the Committee and on the Government to ensure that anti SLAPP legislation meets the highest international standards rather than the minimum criteria that may be established in EU law or treaty.

### **In particular, we urge the Committee to recommend that the Government:**

- Introduce a standalone comprehensive anti-SLAPP law with a broad personal scope which recognises that SLAPPs are aimed at restricting transparent debate on issues of public importance and can impact anybody who wants to hold power to account. The standalone legislation needs to incorporate domestic, intra EU and third country SLAPP suits. The

legislation needs to be consistent in the protection it offers against SLAPP irrespective of where the action is instituted;

- Revise the proposed definition of “manifestly unfounded” to avoid relying on a subjective enquiry into the mind of the claimant, including through a non-exhaustive list of indicative qualities to guide Courts in identifying SLAPPs. These include:
  - The scope of the claim, including whether there is a real risk it will deter acts of public participation beyond the issues in dispute;
  - The excessive or unreasonable nature of the claim, or part of it, including but not limited to the remedies sought by the claimant;
  - Any disproportion between the resources deployed by the claimant and the likely legitimate benefit of the proceedings to the claimant if the claim succeeds;
  - The claimant’s litigation conduct, including but not limited to the choice of jurisdiction, the use of dilatory strategies, excessive disclosure requests, or the use of aggressive pre-action legal threats;
  - Any failure to provide answers to good faith requests for pre-publication comment or clarification;
  - The seriousness of the alleged wrong, and extent of previous publication;
  - The history of litigation between the parties and previous actions filed by the claimant against this party or others against acts of public participation;
  - Any refusal without reasonable excuse to resolve the claim through alternative dispute resolution;
  - Tangential or simultaneous acts in other forums to silence or intimidate the defendant or related parties;
  - Any feature that suggests the lawsuit has been brought with the purpose of intimidating, harassing, or otherwise forcing the defendant into silence.
- Introduce in proposed Article 10 para (1a) a mechanism for dismissal *before* the continued hearing and determination of the merits of the claim that will require claims targeting public participation to meet a higher threshold in order for the proceedings to advance to consider the merits of the claim. Such a threshold must be high enough to prevent such abusive lawsuits being stretched out. Judges should also have discretion to filter out cases that exhibit abusive qualities or would otherwise have a disproportionate impact on freedom of expression.
- Introduce in proposed Article 10 para (1a) a provision that the court must stay the hearing and the determination of the merits of the claim while it is determining whether the claim is abusive. Amendment of pleadings should not be allowed once the application for early dismissal is filed by the defendant.
- Amend the proposed Article 10 para (2) to clarify that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded.
- Amend the proposed Article 10 para (3) to provide clarity as to the nature of the damages for which a claimant may be found responsible, and the extent of the penalties which may be imposed on a claimant. The court should further require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of presence of elements of SLAPPs. Provision should also be made for exemplary damages or fines for cases where the claimant has exhibited particularly egregious conduct, and where the time and psychological harm caused to the defendant

should be compensated. Those defending acts of public participation in court should be eligible for legal aid assistance regardless of personal assets and income.

- Amend the proposed Article 24A to ensure that it is not focused on the recognition and enforcement of defamation judgments already adopted in third countries according to the legislation of that third country. The proposal must provide the court of the defendant's domicile with the power to assess whether those third country proceedings would have been considered as abusive had their own law been applied.
- The proposal should not be limited to foreign proceedings the nature of which "constitutes libel or injury" according to the Media and Defamation Act. The proposal should offer protection against any type of proceedings which arise from a claim on account of the defendant's public participation as long as they are abusive.
- A foreign judgment should be identified as and declared to be a SLAPP, and consequently the claim for recognition and enforcement should be rejected, for the same reasons that a domestic or intra-EU action amounts as a SLAPP. In this regard, the burden placed on the defendant vis-a-vis third country judgments should not be more onerous than that which the defendant faces for domestic SLAPPs. What constitutes a SLAPP suit needs to be the same irrespective of whether it is instituted before the courts of the country in which the defendant is domiciled or not. Security for costs should also be capable of being claimed in the Maltese courts in respect of foreign proceedings.
- The Committee is strongly urged to remove two of the criteria imposed on the defendant and to amend the third criterion. The court should not require that "the action was substantially based on requests that are related to Malta" nor "that the action could have been instituted in Malta". It is sufficient that the defendant is domiciled in Malta and that the third country judgment has arisen from a claim on account of the defendant's public participation. The third criterion must be reshaped to exclude the reference to a "strategy" and to include an objective test for SLAPP. The recommendations made above in this respect, are applicable.
- It is recommended that not only is it possible for the defendant to claim that the request for recognition and enforcement of a third country judgment amounts to SLAPP, but that the court before which such recognition is sought be given the power to raise this of its own motion.
- It is also recommended that the burden of proving that the foreign proceedings are abusive is not placed entirely on the defendant, but that the same approach proposed above for domestic SLAPP suits is adopted here too. This means that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not abusive. Moreover, that the defendant's burden of evidence is only to the extent of prima facie.
- In so far as the liquidation of damages, the proposal would benefit from clarity to clearly indicate that damages include both actual and moral damages.
- With respect to the imposition of dissuasive penalties, the proposal would benefit from the introduction of a minimum and maximum threshold.

## 2. Context

In 2017, journalist [Daphne Caruana Galizia was assassinated in Malta](#). At the time of her murder, she was facing 48 strategic litigation against public participation (SLAPPs) lawsuits emanating from politicians including the former Prime Minister and cabinet ministers. SLAPPs are claims with the aim which is not primarily to win compensation but to harass or subdue the media and other critical voices in society and to create a chilling effect on the right to freedom of expression. In addition, Daphne [Caruana Galizia](#) faced the threat of third country SLAPP lawsuits from the UK and US. According to the [research](#) of the Coalition Against SLAPPs in Europe (CASE), [Caruana Galizia](#) remains the individual who was subjected to the highest number of SLAPP cases in Europe. As a direct result of the advocacy of Daphne's family and civil society, an anti-SLAPP movement has grown to tackle SLAPPs in Europe. In memory of the legacy of Daphne Caruana Galizia, the draft Directive proposed by the European Commission in April 2022 is commonly referred to as "Daphne's Law." Meanwhile the Council of Europe will publish a comprehensive anti-SLAPP recommendation in early 2024.

Despite the international and domestic scrutiny of SLAPPs in Malta, these abusive processes have continued to be taken against the media both domestically, see for example three cases against Matthew Caruana Galizia which were won by Matthew Caruana Galizia at first instance and also at appeal on 3 May 2023, almost 4 years after they were initiated. Several cross-border intra-European Union cases have also been initiated, including a case in Bulgaria against blogger Manuel Delia by the owner of Satabank (a bank operating from Malta), Christo Georgiev over a blogpost. This was quashed by the Bulgarian Regional Court of Varna. The blogpost had been published in October 2018, the claim filed in February 2020 and dismissed in a final judgment in December 2021. Furthermore, there have been several threats of SLAPP suits waged at different media houses including *Times of Malta*, *The Shift News* and *MaltaToday*. It is therefore of the utmost importance that the current opportunity presented by the Committee results in comprehensive safeguards against SLAPPs taken domestically, SLAPPs within the EU and SLAPPs from third countries.

### **Background**

In January 2022, following recommendations of the Public Inquiry on the assassination of journalist Daphne Caruana Galizia, the Government of Malta established the [Committee of Experts on Media](#) (the Committee) tasked with analysing the state of media freedom in Malta and providing legislative recommendations to the Prime Minister to rectify the situation. The Committee was also to examine "the draft legislative amendments prepared by the Government following the consultations carried out with key stakeholders". In order to reach this goal, in January 2022, the Government released drafts proposing to amend the Constitution and other laws including the Media and Defamation Act (MDA), as well as to establish structures to strengthen democratic society. Additionally, the Opposition also published its own legislative proposals.

[The initiative](#) by the Government, as well as the Opposition, to address the shortfalls of the current legislative system and further address the situation of human rights in the country was welcomed. With regard to SLAPPs, in the [analysis of the previous proposals](#) we were concerned that the

proposals would not achieve the change needed to protect journalists as they were only directed at limiting the enforcement of defamation judgements from third countries in Malta, offering no protection against those initiated in Malta. Without protections in Malta, a SLAPP case from a third country could still be enforced in Malta according to national standards. In order to [limit the effect of SLAPPs](#), we recommended that the Government adopt comprehensive measures against SLAPPs, including early dismissal procedures for both the court and the defendant.

In April 2023, Article 19 Europe and the European Centre for Press and Media Freedom were asked to meet with the Committee of Experts in an online meeting where these organisations were invited to comment on the draft proposals relating to amending [Articles 10 of the Media and Defamation Act](#) which refers to the court’s obligation in defamation cases to consider at the preliminary hearing or at any other stage during the action whether a claim is “manifestly unfounded”, and the addition of a new article 24 which relates to the enforcement of third country judgments. In May, the draft proposals were circulated to our organisations for comment. Our response was also consulted with the wider group of international media freedom, freedom of expression and journalists organisations working on issues of SLAPPs and press freedom in Malta.

Our organisations welcome the initiatives by the Committee which demonstrate their receptiveness to strengthen the protection of freedom of expression and media freedom in Malta. In this brief, we examine how the proposals comply with international freedom of expression standards and offer key recommendations to the Committee and Government on how to improve these proposals.

### ***Lack of transparent consultation***

At the same time, our organisations remain concerned about the lack of [meaningful and transparent consultation](#) about these proposals. Unfortunately, despite [the assertions of the Committee and of Government](#) that the proposals were “widely consulted,” at every stage the work of the Committee and the Government has been shrouded in secrecy and there have been no open consultations with civil society or a broader range of stakeholders. The only open consultation consisted of a one half-day meeting predominantly addressed by the Committee members, which was held well after the Committee’s initial recommendations and the Government’s presentation of legislation in Parliament. Moreover, it appears that the anti-SLAPP proposals on which we have been invited to comment, have not been made publicly accessible for comment.

Since the assassination of Daphne Caruana Galizia, our organisations have both publicly and in our meetings with officials offered our technical assistance to the Maltese authorities. In line with our repeated calls on the Maltese authorities, it is recommended that clear, transparent and time-bound processes are put in place for wide consultation both with domestic and international civil society and intergovernmental organisations on all laws or amendments relating to freedom of expression and human rights.

### ***Proposal of the Committee relating to the Protection of Journalists from lawsuits made strategically against public participation***

The Committee's drafts propose amending [Article 10 of the Media and Defamation Act](#) which relates to the court's obligation in defamation cases to consider whether a claim is "manifestly unfounded" at the preliminary hearing or during the case, and the addition of a new article 24 which relates to the enforcement of third country judgments.

There are a number of welcome positive steps in the April 2023 amended proposals from the Committee of Experts. Our organisations find it positive that the Committee is receptive to including the possibility for an early dismissal of cases, payment of damages to defendant, imposition of dissuasive penalty, and reversal of the burden of evidence. These are referred to in its draft amendment to article 10 of the Media and Defamation Act. However, as explained below more work is needed to ensure that the proposals not only meet international standards but more importantly offer meaningful and effective protection to those engaged in public participation in Malta.

In particular, we welcome the amendments to the proposed Article 24 to include the protection against the recognition and enforcement of third country judgments together with the introduction of the Court's discretion to order the payment of damages to the defendant, to impose a dissuasive penalty, and making it obligatory for the court to dismiss the case outright. The draft positively allows for the dismissal of a request for the execution of a foreign judgment if it considers that judgment to violate the right to freedom of expression as protected in the Maltese legal system. But it does not do so clearly, nor without prejudice to the defendant's right to sue for a violation of the right to freedom of expression in terms of the Constitution or the European Convention Act. Meanwhile, this defence is available in the recognition and execution of a foreign judgment but not that of SLAPPs taken within a lawsuit which falls under the Media and Defamation Act, or any other type of lawsuit.

At the same time, our organisations are concerned by the following elements of the proposed amendments.

#### *Legal and personal scope of the proposal*

1. While we are aware that the Committee has asked for our reaction to a specific draft which is limited to amending the Media and Defamation Act (MDA), we strongly recommend that a comprehensive anti-SLAPP regime must go beyond the MDA. The draft protection is limited to cases of libel or slander in terms of the Media and Defamation Act, or foreign proceedings which are similar in nature. Since the protection of participation on matters of public interest, protection from SLAPPs and freedom of expression is not being proposed as a rule of public order in terms of the general law (Code of Organisation and Civil Procedure on the enforcement of foreign judgment), it is only offering protection for libel suits, leaving defendants exposed to other types of SLAPP suits that may be instituted e.g. privacy, freedom of information. This is of particular



concern in Malta where there has been a documented rise in [SLAPP litigation against the media under the Freedom of Information Act](#).

In addition the protections afforded in the Committee's proposal are, as indicated in the margin note proposed with the amendment, limited to "journalists" rather than for anyone exercising public participation. Under Article 10 of the ECHR member states have a positive obligation to ensure a safe and favourable environment for participation in public debate by everyone, without fear, even when their opinions run counter to those defended by official authorities or significant parts of the public. The EC's anti-SLAPP draft directive states that "typical targets of SLAPPs are journalists and human rights defenders. This extends beyond individual persons to media and publishing houses and civil society organisations, such as those involved in environmental activism. Other persons engaged in public participation such as researchers and academics may also be targeted." The EC draft directive Article 1 extends protections to "natural and legal persons, in particular journalists and human rights defenders, on account of their engagement in public participation."

## Recommendations

- The Committee should propose, and subsequently the Government should adopt, comprehensive measures against SLAPPs such that it is not the legal grounds of the claim that should determine whether a claim is a SLAPP, but it being an abuse of procedure against public participation. This should also include a stand alone anti-SLAPP law with a broad personal scope which recognises that SLAPPs are aimed at restricting transparent debate on issues of public importance and can impact anybody who wants to hold power to account. An indicative list of objective criteria to measure SLAPPs should be included (see point 2 below).
- Procedural rules should include the options to initiate early dismissals proceedings at the court's own motion and upon petition of the defendant, short (six months) deadlines for initiating cases, provisions on legal aid, and awards of costs as well as the provisions on judgements from the third countries.
- Furthermore, in order to support a coherent anti-SLAPP protection, the Media and Defamation Act should be reviewed in its entirety with the purpose of granting wider protection to public participation. Elements for review include the criteria upon which a libel case may be initiated in addition to the defences that one can raise with the scope of ensuring that the law discourages frivolous claims and claims which are not necessary in a democratic society.
- Finally, the proposed draft does not prohibit the issue of garnishee orders or other precautionary warrants at the request of claimants against defendants where the claim relates to one's engagement in public participation. The Committee is urged to recommend the prohibition of garnishee orders and other precautionary warrants at the request of claimants against defendants where the claim relates to one's engagement in public participation.

## *2. Definition of manifestly unfounded*

The definition of a defamation action as “manifestly unfounded” in para (4) is “an action which has been instituted as part of a strategy intended to place an undue financial burden on the defendant or otherwise to have the effect to frighten, deter or discourage public participation in the debate on matters of public interest.”

a). “Manifestly unfounded” definition and use of the term “strategy”.

Early dismissal of proceedings is only given for actions which are found to be “manifestly unfounded.” This is in turn defined as “part of a strategy intended to place an undue financial burden on the defendant or for it to have the effect of causing fear, deter, or discourage public participation in debate on matters of public interest”. The retention of the concept of “strategy” is concerning, while the putting together of manifestly unfounded and the intention or effect of the suit would require the court to undertake a subjective inquiry into the mind of the filer. Where this subjective test has been introduced in other jurisdictions for example at the state level in the Australian Capital Territory, this has been problematic.

This is being said as it appears that what is “manifestly unfounded” is in ordinary law usually considered by the Courts to be that which is clearly unfounded in law and/or in fact. This may mean that the Maltese court would require, albeit at a prima facie level, evidence from the defendant that the proceedings are fully unfounded rather than only partially unfounded but coupled with a chilling effect.

In addition, the retention of the term “strategy” may imply the requirement for the defendant to prove the claimant’s actual intent of placing undue financial burden and actual chilling effect and could mean that the defendant would need to show a set of measures or series of action taken with intent on behalf of claimant. This is a subjective test and there is concern that courts may be reluctant to infer such a purpose where doing so would lead to dismissal. This formulation may be unworkable in practice given that it could be determined that any civil lawsuit is designed to place an undue financial burden on the defendant.

By introducing the concept of manifestly unfounded and then defining the manifestly unfoundedness in this manner, one may question the extent to which the action would place undue financial burden or discourage public participation. Mixing the concept of manifestly unfounded with the effect of the case, could lead to an interpretation whereby the undue financial burden or the chilling effect required is to be of a high extent.

### **Recommendation**

- The Committee should propose the inclusion of an objective test for SLAPP suits, the hallmark of which is the targeting of public participation.
- Courts require and would welcome wide and robust criteria for identifying abuse. While SLAPPs do not necessarily include all of these characteristics, the more of them that are present, the more likely the lawsuit can be considered as a SLAPP. [Such indicators include:](#)
  1. The scope of the claim, including whether there is a real risk it will deter acts of public participation beyond the issues in dispute;

2. The excessive or unreasonable nature of the claim, or part of it, including but not limited to the remedies sought by the claimant;
3. Any disproportion between the resources deployed by the claimant and the likely legitimate benefit of the proceedings to the claimant if the claim succeeds;
4. The claimant’s litigation conduct, including but not limited to the choice of jurisdiction, the use of dilatory strategies, excessive disclosure requests, or the use of aggressive pre-action legal threats;
5. Any failure to provide answers to good faith requests for pre-publication comment or clarification;
6. The seriousness of the alleged wrong, and extent of previous publication;
7. The history of litigation between the parties and previous actions filed by the claimant against this party or others against acts of public participation;
8. Any refusal without reasonable excuse to resolve the claim through alternative dispute resolution;
9. Tangential or simultaneous acts in other forums to silence or intimidate the defendant or related parties;
10. Any feature that suggests the lawsuit has been brought with the purpose of intimidating, harassing, or otherwise forcing the defendant into silence.

b) Public participation and public interest are left undefined. Though speaking of concepts such as “public participation”, “matters of public interest”, “undue financial burden” and “effect to frighten, deter or discourage public participation”, the proposed draft does not contain any guidance to the court nor to the parties as to what these concepts refer to and leave it to the courts to interpret. Though it is likely that the national courts would rely on the ECtHR case law, these specific concepts may not be fully defined in such case law. This may render the proposal rather vague for defendants and claimants alike.

### **Recommendations**

- It is recommended that the terms “public participation” and “public interest” should be defined in line with the rights enshrined in the European Convention on Human Rights, as interpreted by the European Court of Human Rights in its case-law.

### *3. Early Dismissal*

The proposed para (1a) states that “The Court shall, at the preliminary hearing, or at any other stage of the hearing of that action, on a reasoned request of the defendant or on its own motion, after having heard the parties and evidence that it considers necessary, decide not to continue with the hearing of the case if it is satisfied that it has emerged that the action is manifestly unfounded.”

The new Article 10 positively seems to allow the court to have discretion to consider a request for early dismissal at any stage of the proceedings. It is recommended that for the process on the merits to continue, the court must first be in a position to determine whether the claim is abusive of the defendant’s engagement in public participation. This allows for early dismissal and reduces the prejudice that stretched-out proceedings have on public engagement.

Defendants should be able to apply for a stay of main proceedings until a final decision on early dismissal application is reached. A stay of main proceedings will contribute towards reducing procedural costs of defendants. The rules on stay of proceedings should not allow the claimant to amend the pleadings in the proceeding with the aim of avoiding a dismissal order. Any amendment of pleadings should be subject to the approval of the court.

## Recommendations:

- We reiterate the recommendation made in our previous analysis for the introduction of short (six months) deadline for initiating cases relating to defamation and libel;
- There should be a mechanism for dismissal *before* the continued hearing and determination of the merits of the claim that will require claims targeting public participation to meet a higher threshold in order to advance to trial. Such a threshold must be high enough to prevent such abusive lawsuits being stretched out to trial. Judges should also have discretion to filter out cases that exhibit abusive qualities or would otherwise have a disproportionate impact on freedom of expression.
- The court must stay the hearing and determination of the merits of the claim while it is determining whether the claim is abusive.
- Amendment of pleadings should not be allowed once the application for early dismissal is filed by the defendant.

### 4. *Burden of proof*

The proposed para (2) states, “When a claim like that mentioned in subarticle (1) is submitted by the defendant, or when the motion is raised by the Court itself, as the case may be, after the defendant submits prima facie evidence that the action is manifestly unfounded, the onus shall be on the plaintiff to prove the contrary.” Clarity to reinforce the notion that the defendant only needs to reach a prima facie level of evidence is required.

There is concern that the combination of the terms “evidence it (the Court) considers necessary” used in paragraph (1) with the terminology of paragraph (2) is not conducive to a full reversal of the burden of proof because the initial burden of proof lies with the defendant. Moreover, the proposal is vague as to what evidence a court would consider necessary.

The European Commission’s proposed Directive Article 12 relating to burden of proof states, “Member States shall ensure that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded.”

### **Recommendation**

- The Committee should recommend that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded.
- Paragraph (2) should clearly state that the defendant’s level of evidence is one of prima facie, before the paragraph passes onto to say that if this is done then there is a reversal of the burden.

### 5. *Damages and the costs of the action*

The proposed para (3) positively introduces the possibility for courts to “declare the plaintiff responsible for all the damages suffered by the defendant and to condemn the same plaintiff to pay the defendant those damages ... together with all costs of the action.” The proposal also positively introduces the court’s discretion to impose dissuasive penalties in addition to damages.

The provision is however unclear as on the one hand, it does not specify whether damages include compensation for actual loss and moral damages, and on the other hand there are no minimum and maximum thresholds for the penalties, nor any clarity on how a penalty will be calculated. With the introduction of the court’s discretion to order the claimant to order the payment of damages, there is no clarity as to whether this is only for actual damages (loss) or also for moral damages. If left undefined, it is likely that this will be considered only actual damages.

In addition to costs being made available on a full indemnity basis, provision should be made for damages or fines for cases where the claimant has exhibited particularly egregious conduct, and where the time and psychological harm caused to the defendant should be compensated.

## **Recommendation**

- To meet international standards, the provision requires clarity as to the nature of the damages for which a claimant may be found responsible, and the extent of the penalties which may be imposed on a claimant.
- The court should require the claimant to provide security for procedural costs, or for procedural costs and damages, if it considers such security appropriate in view of presence of elements of SLAPPs.
- Provision should be made for exemplary damages or fines for cases where the claimant has exhibited particularly egregious conduct, and where the time and psychological harm caused to the defendant should be compensated.
- Those defending acts of public participation in court should be eligible for legal aid assistance.

### *6. Enforcement of judgments of a foreign court*

The recommendation under consideration by the Committee in Article 24 extends over three subparagraphs an article of law that was previously all put into one paragraph, but positively removes the Court's discretion to partially enforce a foreign judgment, obliges the court to hear the defendant first, and provides the Court with the discretion to order plaintiff to pay damages to defendant and also to impose a dissuasive penalty.

When considering the Government's original draft, the [OSCE May 2022 legal analysis](#) had raised the following concerns:

1. That recognition and enforcement of judgments from courts in EU MS and signatories of the Lugano Convention are not covered by this provision and so these rules will continue to apply fully;
2. "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";
3. Judgments from third countries could still be recognised and enforced to such amount as the Court in Malta would consider appropriate;
4. Maltese courts would accept the assessment of facts and liabilities made by foreign courts based on their own national legislation, while the Maltese courts could vary the original damage compensations to the amount resulting from the application of the Maltese legal criteria to the case;
5. The Bill is "based on confusing and vague criteria, thus leaving to courts the possibility to embrace different and contradictory interpretations";

6. The draft leads to an additional burden for defendants to defend their case in the foreign court and also intervene before the Maltese courts;
7. Recommend the introduction of 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 being considered by the Committee addresses the concerns included in point 3 and partially in point 4, in point 6 and in point 7. The draft also now grants the Maltese Court the discretion to impose a dissuasive penalty and to order the claimant to pay damages. This is welcomed.

The draft however does not provide an actual and comprehensive anti-SLAPP regime as it remains focused on the recognition and enforcement of a foreign judgment adopted in line with foreign law. Consequently, assessment of facts and liabilities made by a foreign court based on foreign law would be accepted by a Maltese court, unless the latter is convinced that certain criteria are fulfilled.

The draft only offers protection from foreign judgments “ordering the payment of damages and, or costs to the equivalent of what constitutes libel or injury” according to the Media and Defamation Act. This means that the protection proposed is limited to actions of libel or slander, even though SLAPPs take the form of proceedings which are of different types, and of which libel and slander are only examples.

Meanwhile, the criteria that are to be fulfilled in this proposal remain largely unchanged in wording, even if the OSCE legal analysis considered these to be “confusing and vague criteria”.

The proposal sets an overly high threshold for the defendant to be able to validly claim that the foreign suit amounts to SLAPP. The defendant would have to convince the court of a number of criteria which are cumulative. These are:

- i. The action was substantially based on requests that are related to Malta; and
- ii. The action could have been instituted in Malta; and
- iii. The action was probably instituted as part of a strategy intended to put an undue financial burden on the defendant, or otherwise have the effect to frighten, deter or discourage public participation in the debate on matters of public interest.

The threshold placed on the defendant is consequently much higher in the case of the enforcement of third country judgment than in national proceedings. This places the defendant at an overly burdensome position, where he/she would not only need to convince the court that the foreign suit was part of a strategy, but also that the action was both based on requests related to Malta as well as could have been instituted in Malta. Furthermore, there is nothing in the proposed article 24A that brings about a reversal of the burden of evidence. The draft positively allows for the dismissal of a request for the execution of a foreign judgment if it considers that judgment to violate the right to freedom of expression as protected in the Maltese legal system. But it does not do so without prejudice to the defendant’s right to sue for a violation of the right to freedom of expression in terms of the Constitution or the European Convention Act. This could lead to a situation whereby if a foreign judgment is recognised by a Maltese Court,

the defendant cannot raise this claim before a constitutional court or refer it to the ECtHR. This could be either because the defendant had failed to claim this defence and so not exhausted an ordinary remedy, or because the court did consider the issue and found against the defendant even though it is not a court of constitutional jurisdiction. Meanwhile, this defence is available in the recognition and execution of a foreign judgment but not that of national SLAPPs.

The proposal also positively introduces a rule that does not bar the defendant from raising the defence that the foreign suit was a SLAPP suit if he/she had remained in default in the defamation action instituted abroad.

The proposal provides the courts with the discretion of declaring the claimant responsible for the payment of damages, and may also impose a “dissuasive penalty”. Again, the nature of the damages that the court may consider is unclear, as is the amount and the determination of what is a “dissuasive penalty”.

## **Recommendation**

- We reiterate our recommendation that a meaningful anti-SLAPP regime needs to be enacted through a standalone legislation which needs to incorporate domestic, intra EU and foreign SLAPP suits. Furthermore, the legislation needs to be consistent in the protection it offers against SLAPP irrespective of where the action is instituted.
- The Committee’s proposed article 24A would require a number of amendments for it to start engaging with international standards, and for it to offer at least minimally effective protection. These include:
  - The proposal must ensure that it is not solely focused on the recognition and enforcement of defamation judgements already adopted in third countries according to the legislation of that third country.
  - The proposed Article 24A should be amended to ensure that it is not focused on the recognition and enforcement of defamation judgements already adopted in third countries according to the legislation of that third country. The proposal must provide the court of the defendant’s domicile with the power to assess whether those third country proceedings would have been considered as abusive had their own law been applied.
  - The proposal should not be limited to foreign proceedings the nature of which “constitutes libel or injury” according to the Media and Defamation Act. The proposal should offer protection against any type of proceedings which arise from a claim on account of the defendant’s public participation as long as they are abusive.
  - A foreign judgment should be identified as and declared to be recognised as a SLAPP, and consequently the claim for recognition and enforcement should be rejected not be recognised or enforced, for the same reasons that a domestic or intra-EU action amounts as a SLAPP. In this regard, the burden placed on the defendant vis-a-vis third country judgments should not be more onerous than that which the defendant faces for domestic SLAPPs. What constitutes a SLAPP suit needs to be

the same irrespective of whether it is instituted before the courts of the country in which the defendant is domiciled or not.

- The Committee is strongly urged to remove two of the criteria imposed on the defendant and to amend the third criterion. The court should not require that “the action was substantially based on requests that are related to Malta” nor “that the action could have been instituted in Malta”. It is sufficient that the defendant is domiciled in Malta and that the third country judgment has arisen from a claim on account of the defendant’s public participation. The third criterion must be reshaped to exclude the reference to a “strategy” and to include an objective test for SLAPP. The recommendations made above in this respect, are applicable.
- It is recommended that not only is it possible for the defendant to claim that the request for recognition and enforcement of a third country judgment amounts to SLAPP, but that the court before which such recognition is sought be given the power to raise this of its own motion.
- It is also recommended that the burden of proving that the foreign proceedings are abusive is not placed entirely on the defendant, but that the same approach proposed above for domestic SLAPP suits is adopted here too. This means that where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not abusive. Moreover, that the defendant’s burden of evidence is only to the extent of prima facie.
- In so far as the liquidation of damages, the proposal would benefit from clarity had it to clearly indicate that damages include both actual and moral damages.
- With respect to the imposition of dissuasive penalties, the proposal would benefit from the introduction of a minimum and maximum threshold.

#### *7. No recommendations on intra-EU SLAPP suits*

Both the suspended bill, and the original recommendations from the Committee focus on addressing national SLAPP suits, and the execution of third country judgments. The proposals are silent on the issue of intra-EU SLAPP suits, creating a potential loophole from SLAPPs protection.

The recommendations now being considered by the Committee focus on national SLAPP suits and the execution of third country judgments. The recommendations now being considered by the Committee retain the words, “Without prejudice to the application of the law of the European Union and of any treaty to which Malta is a party, and notwithstanding any other provision in the Code of Organisation and Civil Procedure or in any other law ...”.

The OSCE analysis had indicated that this means that the Brussels Regulation and the Lugano Convention will continue to apply for intra-EU SLAPP suits. The report concluded that this means:

- i. the domicile of the defendant is not necessarily the only criterion in terms of jurisdiction in cases of defamation;
- ii. 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;



- iii. possibilities for national courts to object the recognition and enforcement of a judgment from another EU MS or party to the Lugano Convention are extremely limited due to the exceptional nature of refusal causes;
- iv. 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.

The EC's draft anti-SLAPP directive states "SLAPPs often have a cross-border nature and where cross-border implications exist, they add an extra layer of complexity and costs, with even more adverse consequences for defendants. The fact that online media content is accessible across jurisdictions may open the way for forum shopping and hamper effective access to justice and judicial cooperation. Defendants may face multiple court proceedings at the same time and in different jurisdictions. The phenomenon of forum shopping (or libel tourism) is a factor amplifying the problem and some jurisdictions are perceived as more claimant-friendly." The failure of the proposals to address intra-EU SLAPPs would have the effect that these will remain exclusively regulated by the Lugano Convention and the Brussels Regulation and when the anti-SLAPP Directive (Daphne's Law) enters into force. Until then, those at risk of facing SLAPPs from other EU jurisdictions may remain exposed without protection in Malta.

The reform of the Brussels Ia and the Rome II Regulations has long been advocated as another, complementary measure to counter SLAPP suits in the EU. Such reform should be aimed at grounding jurisdiction in the courts of the place the defendant's domicile and to introduce predictable choice of law formulae for defamation cases.

## **Recommendation**

- The Committee is urged to recommend the government ensure meaningful protection for intra-EU SLAPP suits and recognise that the enforcement of SLAPPs from other EU countries runs contrary to public policy. At a minimum, the proposed measures in the EU Anti-SLAPP Directive should be reflected in the Committee's proposal and intra-EU SLAPPs should be regulated in a manner which is equal to the protection to defendants facing SLAPPs in Malta and from third countries.
  - The Committee should recommend that the Government of Malta support efforts to reform Brussels 1a and Rome II regulations aimed at grounding jurisdiction in the courts of the place the defendant's domicile and to introduce predictable choice of law formulae for defamation cases.
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## **Annex - The proposed amendments**

Article 10 currently reads:

“(1) In an action for defamation the Court shall appoint the case for a preliminary hearing within a period of twenty days from the time allowed for the filing of the sworn reply.

(2) The Court shall, at the preliminary hearing, after hearing the parties, decide whether the action may be determined by mediation or agreement between the parties or through an apology, in all cases with or without the payment of costs and or an amount of damages not exceeding one thousand euro (€1,000). When the court decides that there is a likelihood that the action is capable of being resolved by agreement or mediation between the parties it shall refer the parties to mediation to be concluded within a specified period after which the action shall proceed if no agreement is reached between the parties.

(3) Where the Court decides that the action may not be determined as provided in sub-article (2) it shall proceed with the hearing of the cause.”

The Committee proposes to add the following subarticle 1A to Article 10:

Margin Note reads: “Protection of journalists from lawsuits made strategically against public participation.”

New Subarticle reads:

“(1A)(1) The Court shall, at the preliminary hearing, or at any other stage of the hearing of that action, on a reasoned request of the defendant or on its own motion, after having heard the parties and evidence that it considers necessary, decide not to continue with the hearing of the case if it is satisfied that it has emerged that the action is manifestly unfounded;

(2) When a claim like that mentioned in subarticle (1) is submitted by the defendant, or when the motion is raised by the Court itself, as the case may be, after the defendant submits prima facie evidence that the action is manifestly unfounded, the onus shall be on the plaintiff to prove the contrary.

(3) In a case where the Court had to consider the defamation action as manifestly unfounded, the Court will be able to proceed to declare the plaintiff responsible for all the damages suffered by the defendant and to condemn the same plaintiff to pay the defendant those damages that may be liquidated by the same Court, together with all the costs of the action. In any case, the Court will also have the power, at its discretion and according to all the circumstances of the case, to impose a dissuasive penalty on the plaintiff, which penalty will be payable to the defendant.

(4) For the purposes of this article, a defamation action is considered to be manifestly unfounded if the Court considers that it has been instituted as part of a strategy intended to place an undue financial burden on the defendant or otherwise to have the effect to frighten, deter or discourage public participation in the debate on matters of public interest”; and

(b) in subarticle (2), the words “The Court shall, in the preliminary hearing,” shall be replaced by the words “Without prejudice to the provisions of subarticle (1A), the Court shall in a preliminary hearing,”.

The new Article 24A being proposed by the Committee reads:

No margin note is being proposed for paragraphs (1) and (2).

New Article reads:

“24A.(1) Without prejudice to the application of the law of the European Union and of any treaty to which Malta is a party, and notwithstanding any other provision in the Code of Organisation and Civil Procedure or in any other law, upon the request of the execution in Malta against an author, editor, person responsible for publication or person responsible for a broadcasting medium, domiciled in Malta, of a judgment of a foreign court ordering the payment of damages and, or costs to the equivalent of what libel or injury according to this Act, the Court must first proceed to hear the defendant.

(2) If then, after having heard the defendant, the Court considers that the action that gave rise to the action was substantially based on requests that are related to Malta, that the action could have been instituted in Malta and that it was probably not so instituted as part of a strategy intended to put an undue financial burden on the defendant, or otherwise to have the effect to frighten, deter or discourage public participation in the debate on matters of public interest, the Court must, as a principle of public order, completely reject any request for the execution of that judgment.

Margin Note next to subparagraph (3) reads: “Protection against judgments obtained abusively from foreign courts. Cap. 12.”.

(3) The Court may also reject the execution in Malta of a judgment as mentioned in this article if it considers that the execution of that judgment violates the right to freedom of expression as protected in the Maltese legal system.

(4) In its considerations on whether the judgment delivered by the foreign court should be executed in Malta, the Court shall not derive any negative inference in relation to the defendant from the fact that he might have been in default in the defamation action instituted against him before the foreign court.

(5) In the event that the Court had to reject the request for the execution in Malta of a judgment as mentioned in this article, the Court shall be able to declare the plaintiff liable for all damages suffered by the defendant and to condemn the same plaintiff to pay the defendant those damages that may be liquidated by the same Court, together with all the costs of the enforcement procedures. In any case, the Court will also have the power, at its discretion and according to all the circumstances of the case, to impose a dissuasive penalty on the plaintiff, which penalty will be payable to the defendant.”