

**NOTE ON THE ACTIONS TAKEN BY THE NATIONAL AUTHORITIES  
REGARDING THE DRAFT LAW OF THE REPUBLIC OF MALTA “TO  
PROVIDE FOR THE UPDATING OF THE REGULATION OF MEDIA AND  
DEFAMATION MATTERS AND FOR MATTERS CONSEQUENTIAL OR  
ANCILLIARY THERETO”**

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### **Introduction**

In November 2017, an Analysis on the draft Bill of the Act “to provide for the updating of the regulation of media and defamation matters and for matters consequential or ancillary thereto” of the Republic of Malta was sent to the national authorities. The 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 was the second Analysis on the draft Bill made by this expert for the Office. The first one was commissioned and submitted in February 2017.

In January 2018, Maltese authorities sent a note to the Office of the OSCE Representative on Freedom of the Media regarding the proposals made by the Analyses mentioned above, highlighting those taken on board, as well as those that will not be incorporated after being considered.

### **Analysis**

First, regarding the recommendations taken on board, they should be particularly welcomed, as they refer to relevant aspects of the draft in terms of providing a better and stronger protection of freedom of expression, as already explained in the legal analyses. Such areas include a proper definition of the notions of “editor” and “publisher”, the introduction of a general notion of media referring to all forms of dissemination of ideas, the replacement of the notion of “printed matter” with “written media”, the introduction of the defence of truth in cases where even though a person is not a public figure he or she gets involved in matters of public interest, as well as the introduction of the condition of harm to a living person’s reputation in the article about defamation of deceased persons.

Regarding the recommendations that will not finally be incorporated, it should be noted the following:

a) Regarding the proposal to grant the court the power to reverse the burden of proof in cases where the defendant has made statements the content of which is difficult to prove it has to be noted that, indeed, in other European legal systems this is not contemplated either and the case law of the European Court of Human Rights has shown some flexibility and given a certain margin of appreciation to States in this area. The proposals made in the Analysis are still valid in the sense that from a freedom of expression perspective they are

the most protective ones, although the final decision on this matter belongs to the Maltese parliament.

b) Regarding the proposal to include further parameters framing the power of the Minister to issue regulations with regard to actions to be taken by the operator of a website following a notice of complaint, it has to be noted that the recommendations of the Analysis basically aimed at guaranteeing, in any case, a proper balance between the possible defamatory nature of the statement and the public interest in its publication, as well as the limited time frame and scope of such measures. Maltese authorities oppose that the introduction of such parameters would cause “the power to make regulations appear rather uncertain” and that the prior approval of the regulation by the House of Representatives already represents a sufficient safeguard. It has to be stressed once again that the introduction of such additional parameters would only further help preventing arbitrary restrictions to freedom of expression. This being said, it must also be noted that despite not being mentioned in this specific provision of the draft, the parameters in question have clearly inspired and guided the legal proposal in general, and therefore they must be respected by the regulations under consideration. Moreover, it has to be interpreted that they will also be taken into account by the House of Representatives when giving the approval to such regulations.

c) Regarding the refusal of the proposals made vis-à-vis the requirement to have legal capacity in order to be an editor of a newspaper, the reasons provided appear to be solidly founded on Maltese national law.

d) Regarding the proposal to have a more defined procedure for the appointment of the Media Registrar, Maltese authorities insist on the fact that this is a simple administrative custodian of the Media Register whom “does not take substantive decisions effecting the operation of the media” (apart from the obvious fact that the decisions will in any case be subject to judicial review under general administrative law). Considering these allegations and the fact that the second draft already incorporated some additional safeguards regarding the mentioned appointment, the current version of the draft can so far be seen as adequate.

e) Finally, the proposal regarding the simplification of registration requirements is not taken on board on the basis that the current registration requirements are not considered to be unduly burdensome. It has to be noted that the principle of proportionality requires to reduce to the maximum all limits, regulations and requirements linked to the exercise of the right to freedom of expression. Despite the recommendations made regarding the provisions of this area, the assessment made by national authorities must be accepted and respected.

Vienna, January 2018