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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MALTA

URGENT OPINION

ON THE REFORM OF FAIR TRIAL REQUIREMENTS RELATING TO SUBSTANTIAL ADMINISTRATIVE FINES

Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure

on the basis of comments by

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Mr Iain CAMERON (Member, Sweden)
Mr Nicolae EŞANU (Substitute member, Republic of Moldova)
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I. Introduction

1. By letter of 29 March 2021, the Minister for Justice, Equality and Governance of Malta, Mr Edward Zammit Lewis, requested an urgent opinion of the Venice Commission on "a constitutional reform on the subject of the fair trial requirements in proceedings which may lead to the imposition of substantial administrative penalties and on the implications of judgments of the Maltese Constitutional Court (hereinafter CCM) with regard to Malta's obligations under Article 53 of the European Convention on Human Rights". This reform is addressed:

– by Bill No. 166 of 2020 proposing amendment to Article 39 of the Constitution of Malta, (CDL-REF (2021)038); or, alternatively,

– by Bill No. 198 of 2021 proposing amendments to the Interpretation Act, Chapter 249 of the Laws of Malta (CDL-REF (2021)039).

2. Messrs Richard Barrett, Iain Cameron, Nicolae Eşanu and Ms Jasna Omejec acted as rapporteurs for this opinion.

3. Due to the health situation, it was not possible to travel to Malta. On 26, 28 and 30 April and on 3 May 2021, the rapporteurs and Ms Granata-Menghini, Secretary of the Venice Commission, held on-line meetings with the Minister of Justice, Equality and Governance, with the Attorney General, with the Commissioner of Police, with the Ombudsman, with representatives of the parliamentary majority, of the parliamentary opposition, of the Malta Financial Services Authority (MFSA), of the Financial Intelligence Analysis Unit (FIAU), of the Central Bank and of the Malta Gaming Authority (MGA). The Commission is grateful to the Ministry of Foreign Affairs for the excellent organisation of these meetings. The delegation also met with the President of the Chamber of Advocates and with representatives of the academic community.

4. This urgent opinion was prepared in reliance on the English version of the two Bills. It was drafted on the basis of comments by the rapporteurs and of the results of the on-line meetings. It was issued on 1 June 2021 pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 127th Plenary Session on 2-3 July 2021.

II. General remarks

A. The rise of the regulatory state

5. Administrative financial sanctions (also called administrative fines or penalties) are imposed by regulators or administrative bodies to deter misconduct and ensure compliance with the relevant regulatory system. They are a useful tool for responding to misconduct which, while deserving of reprimand, does not justify the application of a criminal sanction. No criminal conviction is required, the sanctions follow from a regulatory investigation and are generally subject to the civil standard of proof rather than the criminal one.

6. In the 20th century, the growth of regulators across the economies of all states has led to the increased use of administrative sanctions. Civil law states adapted their tradition of administrative justice accordingly; in common law countries, administrative sanctions were first developed in the tax area, and subsequently in new areas, or acceptance of submission to the administrative sanction regime became a contractual clause in licences.[1]

[1] For a historical overview of the vast literature on the subject see Michael Moran, "Understanding the Regulatory State", 32 British Journal of Political Science (2002) 391-413.

7. Adjudication was often sent to quasi-judicial tribunals with more specialised expertise, which often combined the investigative, adjudicative and sanctioning roles.

8. However, the separation of powers requires that criminal adjudication is in the domain of the independent judicial power, as explained by William Blackstone: "*in the distinct and separate existence of the judicial power …consists one main preservative of the public liberty, which cannot long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power*."

9. In parallel to the growth of powerful regulators, the late 20th century saw a movement in many states toward "decriminalisation" of minor or technical offences which carried less moral stigma. Instead, the misconduct was often re-categorized as an administrative offence, which allows the police and criminal justice system to concentrate on their core functions. This shift combined the perceived liberal value of removing a criminal label with the efficiency of an administrative process for lesser offences.

B. Fair trial guarantees in administrative procedures

10. The European Convention on Human Rights (ECHR or "the Convention") is not opposed to the moves towards "decriminalisation" among the Contracting States. However, offences classified as "regulatory" following decriminalisation may come under the autonomous notion of a "criminal" offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention. Under the Convention, the concept of a "criminal charge" is indeed autonomous, meaning it does not necessarily correspond with national procedural concepts. This can cause, and has caused, problems for national (and EU) proceedings classified as administrative or disciplinary in character, but which the European Court of Human Rights (ECtHR, or "the Court") considers to be "criminal". In a long line of case-law beginning with Engel v. Netherlands,[2] the Court has elaborated upon the criteria for determining whether proceedings are criminal or administrative. These criteria are the nature and severity of the penalty, the character of the act/offence and how the proceedings are classified under national law ("Engel criteria". As the Court made clear in Engel, the first of these criteria is most important.[3]

11. The Court's case-law clearly provides that companies are entitled to invoke certain rights protected by ECHR, one of which is Article 6. As a company acts through, and can only act through, its officers (directors etc.) the company itself can claim on good grounds that it is the "victim" (under Article 25) of conduct breaching the Convention. Nevertheless, there may be grounds for treating corporations differently from natural persons.

12. The more recent case-law of the ECtHR has attempted to steer a course between maintaining the safeguards of the judicial process and allowing administrative efficiency, and it has allowed differential safeguards in areas outside the "core" of the criminal law. In Jussila v. Finland, the ECtHR stated *"[I]t is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ..., prison disciplinary proceedings ..., customs law ..., competition law ..., and penalties imposed by a court with jurisdiction in financial matters .... Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency ...*".[4]

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[2] Eur. Court HR, Engel v. Netherlands, Application Nos 5100-02/71, 5354/72, 5370/72, 8 June 1976.
[3] Eur. Court HR, Case-law Guide to Article 6 ECHR, civil limb https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf and criminal limb https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.
[4] ECtHR, Jussila v. Finland [GC], No. 73053/01, 23 November 2006, § 43.

13. In A and B v. Norway, the Grand Chamber stated: "*The extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings is an important factor. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law" …. The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes pursued in sanctioning the conduct in different proceedings will be duplicated (bis) rather than complementing one another*." [5]

14. Article 6 ECHR under its criminal head has been held to apply to customs law (*Salabiaku v. France*), to penalties imposed by a court with jurisdiction in budgetary and financial matters (*Guisset v. France*), and to certain administrative authorities with powers in the spheres of economic, financial and competition law (*Lilly France S.A. v. France* (dec.); *Dubus S.A. v. France*; *A. Menarini Diagnostics S.r.l. v. Italy*; *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, §§ 45-46; by contrast *Prina v. Romania* (dec.)), including market manipulations (*Grande Stevens and Others v. Italy*, §§ 94-101).[6] In Grande Stevens et al. v. Italy, in particular, the ECtHR accepted that it was possible that an administrative authority can impose an administrative penalty which is to be seen as "criminal" in nature, but only if the basic rules of due process were observed by the authority and if its decisions were subject to a judicial review by a court or tribunal set up by law on all the merits of the case both on issues of fact and of law.[7]

C. International requirements relating to sanctioning powers of regulatory bodies

15. The opinion concentrates upon the ECHR; however, it is useful here to sketch out briefly the other international obligations which Malta has in the area, as whatever law reforms which Malta chooses to make must also take account of these. The development of administrative penalties was espoused by international bodies and, within Europe, by EU expectations. For EU member states the concept of the supremacy of EU law meant that if an administrative penalty model was required by EU law it was applicable whatever the domestic constitutional norms. Nor does the CJEU practice seem to be entirely compatible with the ECtHR standards.[8]

16. The question of whether it is an international requirement that regulatory bodies dispose of sanctioning powers in the sphere of criminal law is relevant to assess the background for the reform which is being discussed in Malta. EU law imposes the general requirement on Member States to have effective, dissuasive, and proportionate sanctions in the area of EU law. EU law directives and regulations, within the confines of the TEU and TFEU, can require the creation of criminal offences and criminal penalties. As the interlocutors pointed out, in areas the EU legislator regards as "administrative" in character, but which can involve imposing penalties which are criminal in nature according to the Engel criteria, the EU legislator does not, as such, require states to give this sanctioning power to an administrative agency.

17. Under the Directive (EU) 2015/849 - Anti-Money Laundering Directive (AMLD), for instance, the European Commission has a legal obligation to identify high-risk third countries having strategic deficiencies in their regime on anti-money laundering and countering terrorist financing. In so doing, strategic deficiencies are taken into account in particular in the area of "the powers and procedures of the third country's competent authorities for the purposes of combating money laundering and

[5] ECtHR, A. and B. v. Norway, Nos. 24130/11 and 29758/11, 15 November 2016, § 133.
[6] https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.
[7] ECtHR, Grande Stevens et al. v. Italy, No. 18640/10, 4 March 2004.
[8] Sofia Mirandola and Giulia Lasagni, The European ne bis in idem at the Crossroads of Administrative and Criminal Law, EuCrim 2019/2, p. 126, Andrea Perrone, EU Market Abuse Regulation: The Puzzle of Enforcement, 21 European Business Organization Law Review (2020) 379–392.

terrorist financing including appropriately effective, proportionate and dissuasive sanctions, as well as the third country's practice in cooperation and exchange of information with Member States' competent authorities". An interaction takes place between the EU and the Financial Action Task Force (FATF).

18. The Financial Action Task Force (FATF), the global money laundering and terrorist financing watchdog,[9] reviews money laundering and terrorist financing and monitors countries to ensure that they implement the FATF Recommendations or FATF Standards fully and effectively, and holds countries to account that do not comply. According to the FATF Recommendations, "Supervisors should have adequate powers to supervise or monitor, and ensure compliance by, financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. They should be authorised to compel production of any information from financial institutions that is relevant to monitoring such compliance, and to impose sanctions, in line with Recommendation 35, for failure to comply with such requirements. Supervisors should have powers to impose a range of disciplinary and financial sanctions, including the power to withdraw, restrict or suspend the financial institution's license, where applicable." Pursuant to Recommendation 35 on "Sanctions", "Countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons covered by Recommendations 6, and 8 to 23, that fail to comply with Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) requirements. Sanctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management."

19. The Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism – MONEYVAL – carries out evaluations of member states of the Council of Europe which are not members of the FATF (28 states in total).[10] Moneyval is an FATF-style regional body, and its system of peer review is entirely based on the FATF model and methodology. Moneyval reports are routinely reviewed for quality and consistency by FATF.

III. Background

A. The Maltese constitutional provisions and case-law concerning fair trial requirements in criminal and administrative cases

20. Article 39 of the Constitution is titled "Provisions to secure protection of law" and provides procedural safeguards for the protection of the right to a fair hearing. Article 39 (1) and (2) of the Constitution reads as follows:

> "39. (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

21. Article 39 (1) and (2) of the Constitution must be read together with Articles 37, 95 and 99 of the Constitution. In Art. 37(1), which prescribes protection from deprivation of property without compensation, the Constitution refers to the "right of access to an independent and impartial court or tribunal established by law", as well as "a right of appeal from its determination to the

[9] http://www.fatf-gafi.org/
[10] https://www.coe.int/en/web/moneyval/

Court of Appeal in Malta". Art. 95 of the Constitution prescribes the establishment of "Superior Courts" composed of "judges" and the Constitutional Court composed of "such three judges as could … compose the Court of Appeal". Art. 99 of the Constitution prescribes the establishment of "Inferior Courts" composed of "magistrates". Section 47(1) of the Constitution on the interpretation of Chapter IV (Fundamental Rights and Freedoms of the Individual), which includes Section 39 (right to a public and fair trial), provides as follows: "court" means any court of law in Malta other than a court constituted by or under a disciplinary law and in sections 33 and 35 of this Constitution includes, in relation to an offence against a disciplinary law, a court so constituted". The term "court" is thus exclusively reserved to those adjudicating bodies composed only of judges and magistrates by the Constitution itself - see Articles 95 - 101, particularly Articles 95 and 99, 100.

22. In short, the Superior Courts, presided over by judges, are the Constitutional Court, the Court of Appeal, the Court of Criminal Appeal, the Criminal Court and the Civil Court. The Inferior Courts, presided over by "magistrates", are the Court of Magistrates (Malta) for the Island of Malta and the Court of Magistrates (Gozo) for the Islands of Gozo and Comino.[11] The Court of criminal jurisdictions are those described in the Criminal Code, Second Book, Part I, under the title "Of the authorities to which the Administration of Justice is entrusted": the Court of Judicial Police as Court of Criminal Judicature, the Court of Judicial Police as Court of Criminal Inquiry, the Criminal Court and the Court of Criminal Appeal.

23. The members of the judiciary in Malta are only those serving "judges" and "magistrates" appointed to sit in the Superior and Inferior Courts within the meaning of the provisions of Chapter VIII of the Constitution. Other offices – for example, retired judges and retired magistrates who may be appointed to preside over certain tribunals, as well as Commissioners for Justice, Adjudicators (who sit in the Small Claims Tribunals), arbitrators, assistants (who sit with a Magistrate in the Juvenile Court) – are not members of the judiciary for the purposes of the Constitution, nor are members Maltese citizens appointed to sit on international courts or international tribunals unless before that appointment he or she was a judge or a magistrate within the meaning of Articles 96 or 100 of the Constitution.[12]

24. As interpreted by the Maltese interlocutors with whom the Venice Commission delegation met, the provisions of the Constitution of Malta differ from Article 6 of the ECHR (and consequently Article 47 of the EU Charter), in the sense that, if proceedings lead to the imposition of an administrative penalty that is classified as being criminal rather than civil in nature, the only place where such proceedings can take place is before a "court" as prescribed in Art. 39 (1) of the Constitution.

25. This interpretation of Art. 39 of the Constitution has been confirmed by the Constitutional Court of Malta in the following judgments:

- Judgment in the case of *Police v. Emmanuel Vella* of 28 June 1983,[13]
- Judgment in the case of Federation of Estate Agents v. Director General Competition, Hon. Prime Minister and the Attorney General of 3 May 2016,[14]
- the Thake Rosetta Noe Judgment of 8 October 2018.[15]

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[11] Association for Judges and Magistrates of Malta, at https://judiciary.mt/en/Pages/The-Courts.aspx (Last visited on 20 April 2021).
[12] Ibid., at https://judiciary.mt/en/Pages/The-Judiciary.aspx (Last visited on 20 April 2021).
[13] Kollezzjoni ta' Decizjonijiet Tal-Qrati Superjuri ta' Malta Vol. LXVII Part 1, p. 2., in: Borg, Tonio, Leading Cases in Maltese Constitutional Court, Print It, Malta, 2019.
[14] No. 87/2013/1, in the case of Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni), l-Onorevoli Prim Ministru u l-Avukat Ġenerali // Federation of Estate Agents v. Director General Competition, Hon. Prime Minister and the Attorney General
[15] Ibid. See also Dr Richard Camilleri and Dr Annalies Azzopardi, Constitutional Appeal on the Protection of Human Rights in Competition Proceedings, MAMO TCV Advocates, 05 May 2016, at https://www.mamotcv.com/resources/news/constitutional-appeal-on-the-protection-of-human-rights-in-competition-proceedings; Dr Paul Edgar Micallef, 'An effective regulatory enforcement and sanctions regime post the Federation of Estate Agents Case: the issues' [2018] XVIII Id-Dritt 92-116, p. 4, at

26. Three main standpoints of the CCM are especially relevant for the issues under consideration.

– First, in the *Police v. Emmanuel Vella Judgment*, the CCM stated:
"[A]ccording to the Constitution, the term's' court' and 'tribunal' or 'other adjudicating authority' do not have the same meaning and cannot be used interchangeably. When it wanted to mean 'tribunal' or 'other adjudicating authority', the Constitution expressly states so, therefore when it only uses the term 'court', one cannot extend the meaning of this word to cover also that which is not included therein; something which the Constitution does when it wanted to."[16]

– Second, in the *Federation of Estate Agents Judgment*, the CCM stated:
"*Once as has been seen, the proceedings under the competition law …, relate to the nature of a criminal charge, such proceedings are affected by article 39(1) and therefore have to be conducted before a Court. The question remains as to whether such shortcoming can be rectified by a right of appeal to the Court of Appeal granted by article 13A (5) of Chapter 379. The Federation argues that the entire procedure relating to a criminal charge must take place before a Court and at no stage can a judgment be delivered or else a hearing held relating to a criminal charge by an organ which is not a Court. This is correct."*[17] According to Borg, the FEA Judgment "meant that all administrative penalties in Maltese legislation scattered in different pieces of legislation had to be changed in order to abide by this judgment."[18]

– Third, in the *Thake Rosetta Noe Judgment*, the CCM stated:
"[w]hen the court of first instance correctly reached the conclusion that the administrative penalty was of a criminal nature and therefore ran counter to article 39(1) of the Constitution, there was no longer need to examine whether there was any breach of Article 6 of the Convention."[19]

27. To conclude, numerous tribunals have been established in Malta today, which, under the Maltese law, are not part of the "judiciary" for the purposes of the Constitution. All these tribunals are considered as "other independent and impartial adjudicating authorities prescribed by law" within the meaning of Article 39 (2) of the Constitution. However, they do not have the capacity of the "court" which has the jurisdiction to decide on the charge of a criminal offence within the meaning of Article 39 (1) of the Constitution. In the *Police v. Emmanuel Vella* Judgment, the CCM stated: *"[T]he tribunal de quo is not a court in the sense and for the purposes of article 39 (1) of the Constitution of the Republic of Malta, and therefore according to the said Constitution and in particular article 39 (1), cannot have any jurisdiction to hear and decide cases relating to criminal offences."*[20] No authority, whatever name called, which is not one of the Courts described in the Criminal Code, Second Book, Part I, can take cognizance of a criminal offence.[21]

B. The amendment of the Constitution

28. Article 66.1 of the Constitution provides that "[…] Parliament may alter any of the provisions of this Constitution […]. (2) In so far as it alters […] articles 32 to 48 (inclusive) […] a bill for an Act of Parliament under this article shall not be passed in the House of Representatives unless at the final voting thereon in that House it is supported by the votes of not less than two-thirds of all the members of the House".

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http://lawjournal.ghsl.org/viewer/211/download.pdf; Deo Debattista, A stronger competition law, Times of Malta, 9 June 2019, at https://timesofmalta.com/articles/view/a-stronger-competition-law-deo-debattista.712332 (Last visited on 21 April 2021).
[16] Borg, footnote 7, p. 356.
[17] Ibid, p. 370.
[18] Ibid, p. 376.
[19] Ibid., p. 378.
[20] Ibid, p. 360.
[21] Ibid. p. 360.

C. The Interpretation of the Constitution

29. The Maltese Constitution of 1964 has significantly been influenced by the British constitutional tradition. However, unlike in the UK system, Parliament in Malta is not supreme but is subject to the Constitution as suprema lex. Art. 6 of the Constitution (the supremacy clause) expressly declares that the Constitution is the supreme law of the land by stating that: "6. Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

30. Article 47(1) of the Constitution provides the rules on the interpretation of Chapter IV (Fundamental Rights and Freedoms of the Individual); Article 124 provides for numerous rules on the interpretation of the Constitution. Paragraph 14 of Article 124 provides: "Where Parliament has by law provided for the interpretation of Acts of Parliament, the provisions of any such law, even if expressed to apply to laws passed after the commencement thereof, shall apply for the purposes of interpreting this Constitution, and otherwise in relation thereto, as they apply for the purpose of interpreting and otherwise in relation to Acts of Parliament as if this Constitution were an Act of Parliament passed after the commencement of any such law as aforesaid: Provided that, until such time as Parliament has made provision as aforesaid, the law applicable for the interpretation of this Constitution and otherwise in relation thereto shall be the law which was applicable for that purpose on the appointed day."

31. Article 95 (2) of the Constitution provides that the Constitutional Court "shall have jurisdiction to hear and determine […] (d) appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution other than those which may fall under article 46 of this Constitution; […]". The Constitutional Court is the highest court in the hierarchical system in Malta. However, its decisions declaring a legislative act or regulation as unconstitutional do not automatically suspend the same legislative act or regulation. They merely declare these as "unconstitutional" and this fact is noted in the relative official text of the same legislative act or regulation.[22]

32. The 1975 Interpretation Act[23] (Chapter 249 of the Laws of Malta) is designed "to make provision in respect of the construction and application of Acts of Parliament and other instruments having the force of law and in respect of the language used therein." It is an ordinary law to assist with the interpretation of other ordinary laws.

[22] See Article 242 of the Code of Organization and Civil Procedure (Chapter 12 of the laws of Malta).
[23] https://legislation.mt/eli/cap/é'ç/eng/pdf

D. Administrative and regulatory authorities in Malta

33. Since the period closely preceding Malta's accession to the European Union in 2004, many regulatory and other public authorities have been established by different laws in various important fields such as competition affairs and consumer protection (the MCCAA), financial regulation (the MFSA), regulation of communications (the MCA), money laundering and terrorist financing (the FIAU), use of resources (the MRA), use of energy and water services (the REWS), data protection (IDP Commissioner), digital innovations (the MDIA), gambling activities (the MGA), equestrian activities (the EquestriMalta), etc.

34. By the Act of Parliament establishing particular regulatory or other public authority, each authority might impose administrative penalties. In this light, the Minister for Justice, Equality and Governance of Malta emphasised in his letter to the Venice Commission the importance of the following:

- The Constitution of Malta does not provide for administrative penalties. This follows from the fact that in 1964, the year the Constitution was drawn up and enacted, administrative penalties were largely limited to the fiscal sector and mainly took the form of an 'additional tax' imposed upon taxpayers who failed to abide by fiscal laws.
- In 1981, a process of depenalisation of minor offences was initiated, and a number of minor criminal offences were depenalised and made subject to a "penalty" rather than to the punishments provided by criminal law, namely fines or imprisonment. Since then, hearings have been transferred to 'Commissioners for Justice' who could also be part-time lay judges, providing for an appeal to the Court of Magistrates. This type of depenalisation is today a well-established practice in the Maltese legal system.

35. As explained by the Minister of Justice, under Maltese administrative law, regulatory authorities are bound to observe the principles of legality and of "natural justice" in coming to their decisions. This is included in written law in Article 464A of the Code of Organisation and Civil Procedure on judicial review of administrative acts, apart from being a principle affirmed by the Courts for a long time.

36. Malta has no separate Administrative Law regime and Administrative Law cases are treated as civil cases with the courts of civil jurisdiction, having the right to review the legality of administrative acts in accordance with Article 464A of the Code of Organisation and Civil Procedure.

37. Further, each law establishing particular regulatory or other public authority grants a right of appeal from decisions of that authority to the specialised tribunal established by the same law or by the Administrative Justice Act (AJA),[24] decisions of which are subject to appeal to the Court of Appeal in terms of the AJA or the Court of Appeal (Inferior Jurisdiction) in terms of the Code of Organisation and Civil Procedure.

[24] Chapter 490 of the Laws of Malta - ACT V of 2007, as amended by Legal Notices 246, 334 of 2009, 337 of 2010; Act VI of 2011; Legal Notices 326 of 2011, 402 of 2012, 163, 443 of 2013; Act IV of 2016 and Legal Notices 5 of 2018 and 9 of 2019.

38. Below are some of the appeal mechanisms prescribed in the relevant Acts.

Act	Appeal against administrative fines	First Instance	Appeal	Second Instance
DPA Data Protection Act	Appeal from a decision of the IDP Commissioner. As a rule, the effects of a decision which is appealed against shall not, except where the Tribunal or the Court of Appeal so orders, be suspended by virtue of the appeal.	Information and Data Protection Appeals Tribunal established by Art. 24 of the DPA. The Tribunal shall have "the same powers as are competent to the First Hall, Civil Court according to law."	Appeal against the decision of the Tribunal.	Court of Appeal as constituted in accordance with Art. 41(9) of the COCP.
MGAA Malta Gaming Authority Act	Appeal (with a suspensive effect) from a decision of the MGA, provided that no appeal shall lie from any decision of the MGA imposing a fine not exceeding two thousand euro (€2,000).	The Administrative Review Tribunal established by Art. 5 of the AJA. Hearing of the appeal (in person or by agent)	Appeal against the decision of the Tribunal on a point of law only.	Court of Appeal (Inferior Jurisdiction) Hearing of the appeal
MCAA Malta Communications Authority Act	Appeal (with a suspensive effect) from a decision of the MCA. An administrative fine imposed shall not exceed three hundred and fifty thousand euro (€350,000) for each infringement or failure to comply and, or twelve thousand euro (€12,000) for each day of infringement or non-compliance.	The Administrative Review Tribunal established by Art. 5 of the AJA. Hearing of the appeal	Appeal against the decision of the Tribunal.	Court of Appeal in terms of the AJA.
	The decision of the Authority pending an appeal whether before the Tribunal or the Court of Appeal, shall stand and shall be adhered to by all the parties to whom the decision applies. The Tribunal or the Court of Appeal may, on the application of a party to the appeal, suspend in whole or in part the decision which is the subject of the appeal pending the final determination of the appeal.			
MFSAA Malta Financial Services Authority Act	Appeal against a decision of the MFSA, provided that no appeal shall lie from any decision of the MFSA imposing a penalty not exceeding two hundred and thirty-two euro and ninety-four cents (€232.94).	The Financial Services Tribunal established by Art. 21 of the MFSAA. The Tribunal shall hold its sittings in public unless having regard to the nature of the matter before it.	Appeal against the decision of the Tribunal on a question of law only.	Court of Appeal (Inferior Jurisdiction) constituted in terms of Art. 41(9) of the COCP.
MRAA Malta Resources Authority Act	Appeal (with suspensive effect) from a decision of the MRAA. An administrative fine imposed shall not exceed	The Administrative Review Tribunal established by Art. 5 of the AJA.	Appeal against the decision of the Tribunal on a question of law.	Court of Appeal in terms of the AJA.

Act	Appeal against administrative fines	First Instance	Appeal	Second Instance
	one hundred thousand euro (€100,000) for each contravention and/or six hundred euro (€600) for each day of non-compliance, from the date of the decision given by the Authority.[25]	The Tribunal shall have the same powers as are competent to the First Hall, Civil Court according to law.		
	The effect of a decision to which an appeal relates shall not, except where the Tribunal or the Court so orders, be suspended in consequence of the bringing of the appeal.			
PMLA Prevention of Money Laundering Act	Appeal (with suspensive effect) against a decision of the FIAU, provided that administrative penalty exceeds five thousand euro (€5,000).	Court of Appeal (Inferior Jurisdiction) constituted in terms of Article 41(9) of the COCP. Hearing of the appeal *in camera*		
REWSA Regulator for Energy and Water Services Act	Appeal (with suspensive effect) against a decision of the REWS, provided that administrative penalty does not exceed one hundred thousand euro (€100,000) for each contravention and/or six hundred euro (€600) for each day of non-compliance.	The Administrative Review Tribunal established by Art. 5 of the AJA. The Tribunal shall have the same powers "as are competent to the First Hall, Civil Court according to law."	Appeal against the decision of the Tribunal on a question of law.	Court of Appeal in terms of the AJA.
	The effect of the decision to which an appeal relates shall not, except where the Administrative Review Tribunal or the Court of Appeal so orders, be suspended in consequence of the bringing of the appeal.			

IV. Analysis

39. The Venice Commission has been requested to express its opinion "as to whether its preferred option of adopting Bill 166 to amend the Constitution of Malta or, alternatively, Bill 198 to amend the Interpretation Act, in their present form or in any other form which may be recommended by the Commission, is the correct approach to further clarify the interpretation of Article 39 of the Constitution of Malta with the right to a fair trial as guaranteed under the ECHR, together with the Charter of Fundamental Rights of the EU".

[25] Article 31A (10) of the MRAA reads: "In all cases where the Authority imposes an administrative penalty in respect of anything done or omitted to be done by any person and such act or omission also constitutes a criminal offence, no proceedings may be taken or continued against the said person in respect of such criminal offence. An administrative penalty imposed by the Authority upon any person shall be considered a civil debt."

40. The request involves two distinct issues:

- A material one: how to best achieve the government's aim to clarify the position of the Maltese framework in respect of the position of the ECtHR on the fair trial guarantees under Article 6 ECHR (and Article 47 of the Charter of Fundamental Rights of the European Union);
- A formal one: can this aim be best achieved through a constitutional reform – as is attempted through Bill No. 166 – or through a legislative amendment – as is attempted through Bill 198.

41. The Commission wishes to stress at the outset that its role is not to assess whether such reform is necessary or appropriate. This choice falls within the sovereignty of the Maltese authorities and people. Further, the question of whether the proposed amendment of the Interpretation Act is compatible with the Constitution of Malta as interpreted by the constitutional case-law is for the Constitutional Court of Malta to decide, eventually. The Commission therefore will only provide its analysis of the two pending options in the light of the European standards and of the European experience. It hopes, in so doing, to contribute constructively to the public discussion in view of the final decision which will be taken by parliament.

A. Amendment of the Constitution vs. amendment of the Interpretation Act

42. Bill No. 166 aims at amending Article 39 of the Constitution to enable regulatory authorities to impose sanctions which may qualify as "criminal", subject to judicial review.

43. Bill No. 198 instead aims at amending the Interpretation Act. It seeks to provide a "new" classification of penalties, fines, sanctions or measures, distinguishing ones "of a criminal nature" from others which "shall not be interpreted as substantively constituting a criminal offence". In other words, the Bill seeks to bring punitive administrative fines and other administrative pecuniary or non-pecuniary sanctions or administrative measures under the civil limb of Article 39 of the Constitution (i.e., Article 39 (2)) rather than the criminal one (i.e., Article 39 (1)), provided that there is a provision for a full appeal to a court. Although this amendment is proposed for the Interpretation Act which is an ordinary law to assist with the interpretation of other ordinary laws (see para. 33 above), it appears to be directed to the constitution only. It therefore basically amounts to an attempt to change Article 39 (1) of the Constitution of Malta as it is interpreted by the CCM. This Bill has indeed generated heated debates in Maltese society as an important part of the society is of the opinion that in fact the Draft bill does not propose an interpretation of the Constitution but is a disguised amendment to the Constitution, an attempt to "introduce amendments to the Constitution without amending the Constitution", and an "underhanded measure".

44. The Commission notes that the Maltese Constitution provides for a – not overly rigid - amendment procedure which for Article 39 requires a two-thirds majority. The Constitutional Court has both the power of interpretation of the Constitution, and a power to determine the validity of ordinary laws. These powers can co-exist with the power of the parliament to adopt interpretations of ordinary laws and the Constitution itself.

45. It is true that Article 124(14) of the Constitution does allow for general provisions on statutory interpretation to extend to the constitution; however, it is unclear if it allows the Interpretation Act to be used for specifically constitutional contexts. The position of the Chamber of Advocates is that this Article, used within its proper parameters, does not give discretion to the Parliament to change the substantive meaning of the Constitution:

> "It is merely a power that allows Parliament to provide clarification to the meaning of terms used in laws. If the effect of that change is to have a substantive impact on the rights guaranteed and protected by the Constitution, then such a provision of law would require a

change to the Constitution itself, and would therefore require the qualified majority of the House of Representatives."[26]

46. The line between "constitutional interpretation" and "constitutional review" of a constitution can admittedly be fluid, depending upon the judicial culture of the state.[27] However, there is such a line. There is also a line between interpretation and amendment. Where the Constitutional Court has "determined" the interpretation of a constitutional provision, a subsequent Act of Parliament which advances an "interpretation" which is opposed to, or incompatible with, such a determination is difficult to reconcile with the powers of the Constitutional Court under Article 95 of the Constitution.

47. Further, the Venice Commission has previously stated that provisions outlining the power to amend the Constitution are not a legal technicality, but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole.[28] Qualified majorities strengthen the position of the parliamentary minority, by giving them the negative power to block decisions: "Parliamentary rules on qualified majority […] constitute an instrument that may effectively and legitimately protect opposition and minority interests, both when it comes to procedural participation, powers of supervision and certain particularly important decisions. At the same time, this is an instrument that restricts the power of the democratically elected majority, and which should therefore be used with care, and tailored specifically to the national constitutional and political context."

48. The Maltese Constitution requires a qualified majority to amend Article 39, which means that a broad consensus between the parliamentary majority and opposition needs to be found on the opportunity and the terms of the proposed amendment. The Constitution thus grants the opposition a power of participation, supervision and even blockage of the decision on the amendment. Achieving the same result as the amendment intends to achieve in a procedure which does not require a qualified majority would appear to defeat the purpose of Article 66.1.

49. In addition, the Commission has also stressed in its previous opinions that important political processes such as the amendment of the Constitution require the broadest political support: genuine all-inclusive and open debate, in which the media and civil society can also participate, should take place irrespective of whether the governing majority has the necessary number of votes to pass the amendments.[29] Constitutional amendment procedures should be the object of extensive public debate, more so than legislative amendment procedures.

50. In the Commission's view, the balance between the two institutions (Constitutional Court and Parliament) should be seen as giving the Parliament the right to indicate its preferred interpretation of a constitutional provision, the meaning of which has not yet been conclusively determined, while giving the Constitutional Court the power to determine the matter. Such an approach (that the Constitutional Court has the power to determine the matter) appears also supported by a systemic interpretation of the Constitution read as a whole.

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[26] A Position paper of the Chamber of Advocates, Bill 198 – the supremacy of the Constitution and due process, 9 March 2021, at https://www.avukati.org/2021/03/10/bill-198-the-supremacy-of-the-constitution-and-due-process/ (Last access: 2 May 2021).

[27] The US Supreme Court, for example, described a constitutionally conform restrictive interpretation by an Alabama court of a Alabama state ordinance setting out wide grounds for limiting the freedom of demonstration as " a remarkable job of plastic surgery upon the face of the ordinance" Shuttlesworth v Birmingham, 394 U.S. 147 (1969), at pp. 149, 153.

[28] CDL-AD(2015)014, Joint Opinion on the Draft Law "On Introduction of changes and Amendments to the Constitution" of the Kyrgyz Republic, § 23

[29] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, para. 67.

51. The Commission has already addressed this issue, which arises in different ways in all constitutional democracies: "who has the final say? the Constitutional Court or Parliament?" The answer depends in part on the temporal scope of the conflict: in relation to a specific case being litigated, the final say is for the Constitutional Court. The Constitutional Court's decisions are final and binding. Its decisions are not infallible, but they are final nonetheless, even when they might be considered wrong. This principle is clearly stated in many constitutions, including the Constitution of Malta. Constitutional Courts judgments with erga omnes effects oblige Parliament to repeal/ amend the provisions found unconstitutional. On the other hand, Parliament can enact legislation that replaces annulled provisions as long as they do not repeat the same provisions that have been invalidated and take into account the Constitutional Court's arguments. But only the constituent power, often Parliament with a qualified majority or other reinforced procedure, can establish a new framework that will be binding also on the Constitutional Court, through the constitutionally established procedures for enacting constitutional amendments.[30]

52. To read the interpretative power of Parliament so widely as to enable it to be used as an alternative to having to use the amendment procedures would open the way for the government of the day easily to circumvent individual rights and other protections set out in the Constitution. Of course, the "final word" still remains with the Parliament. The ultimate control of the Maltese Parliament over the content of the Constitution continues to exist as, acting in accordance with the constitutional amendment procedures, it can decide to amend the constitution to provide in the future for a different interpretation from that previously determined by the Constitutional Court in a concrete case.

53. It follows that in the opinion of the Venice Commission, the reform of the system of fair trial guarantees for administrative sanctions in Malta should be achieved through the amendment of Article 39 of the Constitution.

B. How to achieve the government's aim: the content of the reform

1. The standards on sanctioning powers of administrative authorities

54. The reform in question seeks to achieve legal certainty. The Minister of Justice has argued that "the Maltese administration has found itself in a situation of uncertainty whereby the effectiveness of its regulatory authorities and its capacity to meet European Union and International obligations, as well as obligations arising out of recommendations made in the course of international evaluations in some sectors have been impacted". Several cases have been brought before the Constitutional Court to challenge the power of regulatory authorities to impose substantial fines, arguing that the fines are criminal in nature and therefore may only be imposed by a Court.

55. One of the critical components of any regulatory regime is that the regulatory authority should have adequate enforcement and sanctioning powers. As has been pointed out, generally speaking, two main options may be considered when providing regulatory authorities with such powers: enabling the regulatory authority to impose punitive administrative fines itself, with a right of review before an independent and impartial court/adjudicative body established by law from any decision taken by the regulatory authority to impose such sanctions; or requiring the regulatory authority to file an application with an independent and impartial court established by law, moving the court to impose appropriate punitive administrative fines against the non-compliant person (the so-called "dual administrative/judicial enforcement system").[31]

56. It is true that many European countries have introduced systems where public authorities (especially Quasi-Autonomous National Government Organisations (QUANGOs) with devolved

[30] CDL-AD(2020)039-e, Urgent opinion on the Reform of the Constitutional Court of Ukraine, §§ 33-34.
[31] Paul Edgar Micallef, An effective regulatory enforcement and sanctions regime post the Federation of Estate Agents Case: the issues, [2018] XVIII Id-Dritt 92-116, pp. 2-3.

governmental powers) are allowed to act as an investigator, prosecutor and judge in their own causes and to impose very substantial administrative fines/penalties on entities regulated by those same authorities.[32] This combination of functions, however, has not been required as such by the international monitoring bodies, as long as the authorities have powers to impose a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative.[33] As the Council of Europe's Group of States against Corruption (GRECO) has stressed in relation to anti-corruption institutions, when these regulatory authorities are set up, they must be independent and accountable,[34] especially if they are to have sanctioning powers in addition to advisory and investigative ones.

57. It needs to be stressed therefore that the option of giving the power to impose heavy sanctions which could qualify as criminal to a regulatory authority is conditioned on the latter's guarantees of independence and impartiality.

58. Further, the pertinent case-law of the ECtHR indicates that Article 6 ECHR requires that an administrative authority can impose an administrative "criminal" penalty only if it observes the basic rules of fair trial and if there is judicial review (on both issues of facts and law) by a court or tribunal set up by law.[35]

59. Whether judicial review (or the actual sanctioning power) is with a criminal court or with a civil court will affect the standard of proof required. In the case of the former, the prosecuting authority must prove its case beyond a reasonable doubt, whereas in the case of the latter, the standard of proof in civil litigation based on the balance of probabilities applies.[36] National law might also distinguish between natural and legal persons in different ways, for example allowing for different types of responsibility for corporate bodies or more severe monetary penalties.

2. Purely judicial system vs. "dual track system"

60. There is a range of possible directions for a state addressing the dilemma of administrative penalties and judicial power. The most conservative approach is to restrain the development of

[32] See for example the Austrian Financial Market Authority established by the Financial Market Authority Act of 2002. The FMA has the power to impose administrative penalties (in the case of natural persons of up to 5 million euro, in the case of legal persons of up to 10 million euro or up to 15% of the total net turnover (if such amount is greater than 10 million euro. A complaint may be filed against the decision of the FMA with the Federal Administrative Court, with possible suspensive effect.

[33] In its 2019 report MONEYVAL has concluded that Malta has a range of proportionate and dissuasive sanctions (Moneyval Mutual Evaluation Report Executive Summary Malta ...http://www.fatf-gafi.org › fatf › reports › mer-fsrb, paras 498 – 504 of the 2019 Report Annex on p. 211 – 212). The sanctions available are quite high – up to 5mln EUR and/or 10% of annual turnover for financial institutions, for example. This report provides a summary of the anti-money laundering and combating financing of terrorism (AML/CFT) measures in place in Malta as at the date of the on-site visit from 5 to 16 November 2018. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of Malta's AML/CFT system, and provides recommendations on how the system could be strengthened. The findings of this assessment have been reviewed and endorsed by the FATF. Under the Fourth (corruption prevention among members of parliament, judges and prosecutors) and Fifth Evaluation Rounds (corruption prevention in central governments and law enforcement agencies), GRECO recommended to provide the anti-corruption supervisory authorities (in particular, the relatively recent institution of the Parliamentary Commissioner for Standards of Public Life) with a set of effective, proportionate and dissuasive sanctions (see paragraph 27 of the Second Compliance Report on Malta under the Fourth Evaluation Round and paragraphs 98, 119 of the Fifth Evaluation Round Report). This aspect of GRECO recommendations has not yet been implemented by Malta.

[34] In the context of the compliance procedure regarding the Fifth Evaluation Round, GRECO has recommended that "clear consequences and effective, proportionate and dissuasive sanctions are applicable to guarantee the accuracy and correctness of information declared as well as the actual filing of a declaration, including the possibility to refer a matter to criminal investigation" (paragraph 98) and that the (relatively recent) Parliamentary Commissioner for Standards in Public Life be "equipped with the appropriate means and possibilities to conduct inquiries and to *propose* effective, proportionate and dissuasive sanctions": https://eucrim.eu/news/greco-fifth-round-evaluation-report-malta/ , para. 119.

[35] See paras. 10-15 above.

[36] P.E. Micallef, op. cit.

administrative penalties and keep all serious enforcement powers in the judicial sphere. For member states of the EU, the supremacy of EU law would continue to allow administrative penalty regimes which are required by EU law to be introduced despite the domestic constitutional obstacle. This approach often requires more judges on administrative bodies or judges on specialised courts (perhaps sitting with experts). Another approach is to develop a system of administrative justice, with administrative courts and an administrative code. This may involve a change to the constitutional framework. However, it is also likely to require wide jurisdiction for appeals into the court system. It will also be evident that all these approaches require significant judicial resources. This is likely to be a difficulty for a small jurisdiction such as Malta.

61. By way of comparison, in Ireland, which has constitutional provisions for the role of the judicial power[37] similar to those which exist in Malta, the use of administrative penalties usually requires confirmation by a court. The Irish Central Bank is given the power by statute to regulate the financial services sector and the Bank can conduct inquiries into contraventions which can result in recommendations to impose substantial fines against companies and individuals. However, the fines must be confirmed by a court. When the constitutionality of this procedure was challenged as the administration of justice by a non-judicial body the challenge was rejected by the High Court, as, inter alia, the provision for judicial confirmation meant the inquiry was not the administration of justice.[38] In April 2021 the Irish Supreme Court addressed the constitutional position with the adjudication of legal disputes by specialised tribunals which are not courts under the constitution. By a majority the court decided that this was the administration of justice which could be dealt with by a non-judicial body in a limited area of application, provided it acted in a judicial manner and in public.[39]

62. The Swedish legislature, in implementing the Market abuse regulation[40], which provides a good example of the "typical" supervisory powers and sanctioning powers to be given to an administrative agency", concluded that the heavy financial penalties were, without doubt, to be seen as "criminal" in character on the basis of the Engel criteria. A similar position was taken as regards the most severe administrative monetary penalties applicable to breaches of competition law. Nonetheless, the Swedish legislature opted for allowing the supervisory authority not only to investigate alleged violations, but also to "prosecute" these and determine the penalty. It reached the conclusion that a system of dual (administrative/criminal) sanctions would involve considerable problems, as the underlying rationales between the two types of sanctions partially diverge, and partially coincide. This would make it difficult, if there are two separate sanctioning bodies, to coordinate a suitable "holistic" response to a corporate breach of the rules. Dual sanctioning systems also raise the problem of ne bis in idem. Crucial to the decision of the Swedish legislature was that Swedish administrative agencies have a constitutional duty of objectivity (Instrument of Government, Chapter 1, section 9), that institutional structures were created to maintain this duty, that there were fair procedures (transparent, duty to hold a hearing on request etc.) and that the penalty was subject to a full appeal, on law and facts, before the (administrative) courts.

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[37] "Irish law therefore showed some of the same strands as were discernible in other jurisdictions: the development of administrative agencies; the increased role of the State; a move towards individual dispute resolution in the industrial relations sector; and a significant expansion of the role of the judicial review. Nevertheless, there were differences of both detail and emphasis. More importantly, Ireland — in common with jurisdictions such as Canada and Australia — had adopted a constitution which required the administration of justice to be carried out in courts. The question, therefore, of how the proliferation of administrative agencies which required bodies to resolve disputes was to be reconciled with the fact that the administration of justice was to be carried out in courts and, at least by implication, nowhere else was something that had to be resolved as a matter of law rather than abstract theory." Irish Supreme Court (per O Donnell J) in Zalewski v. Workplace Relations Commission [2021]IESC 24.

[38] Purcell v Central Bank of Ireland, High Court (2016 unreported).

[39] See Zalewski case as at fn 34.

[40] Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse of 16 April 2014 OJ L 173/1, 12.6.2014.

63. In Malta, following the judgments of the Constitutional Court in the cases Federation of Estate Agents and Thake Rosetta Noe, the legislation on competition was amended in 2019 to introduce a "double track system", that is a mixed administrative and judicial model whereby the regulator (the Office for Competition) has the power to set standards and investigate compliance but the adjudication and imposition of the penalty requires an application to a court. (the Civil Court, commercial section). During the virtual exchanges it was suggested that such a dual track system should be adopted for all the areas in which regulatory authorities operate. It would preserve the full guarantees of fair trial afforded by independent and impartial courts, with the application of the criminal law standard of proof for more serious penalties and would meet the constitutional requirements. In this respect, the Commission's attention was drawn to the fact that the Maltese regulatory authorities are for the most part appointed by the government and are not always independent. In several cases, appeals against the decisions of these authorities are on points of law only.

64. During the virtual exchanges, however, some authorities and other interlocutors raised several issues in regard to the double track system. Court proceedings in Malta are slow. Putting the sanctioning power in a court has the effect of making the court the regulator in the relevant sector, a role for which it may not have the technical expertise. The police (who have been bringing prosecutions) are not expert either. All these cases would clog the courts and the effectiveness of the action of the regulatory authorities would be impaired, should the imposition of sanctions come a long time after the expert investigations. It was also argued that the proceedings before the regulatory authorities do afford basic fair trial guarantees, in terms of being informed, of being given the possibility of submitting defensive arguments, of being heard if requested, and of lodging an appeal with suspensive effects.

65. It is not for the Venice Commission to say which system is preferable. Several remarks may be made in respect of both systems.

66. The lack of expertise of the courts could be solved, or at least ameliorated, by requiring the investigating/prosecuting body to explain its reasoning as to why something is a breach, and its quantification of the seriousness of the breaches (explaining the basis for the size of the penalty it proposes), and allowing the defence to submit expert evidence disputing this. An alternative is to have a court appointed expert – which however may be difficult to make workable in practice in a small country like Malta, with limited availability of expertise. Splitting off one category of sanctions from the sanctions toolbox should involve duties on the sanctioning bodies (the courts and the supervisory agencies) to coordinate their responses, meaning that the former should take into account whatever other penalties the latter have already imposed. The main focus of the supervisory agency is on remedying deficient systems and procedures and making these work in the future. The main focus of the courts would be, as in all criminal law, on determining whether an "offence" has been committed and if so, on what is a suitable punishment. It should be stressed in this regard that the expert regulator will continue to exercise all the supervision functions up to the actual imposition of penalties. There is a risk that the sanctioning power thus remains de facto in the hands of the expert regulator, which raises again the question of the latter's independence.

67. The delays in the proceedings could be reduced by increasing the number of criminal judges, even though there is no guarantee that it will do so, unless some mechanisms are introduced to improve judicial efficiency, plea bargaining, plus legislative changes to require faster procedures. The opposition and the political majority appear to disagree even about the factual issue of whether or not resources have been sufficiently increased.

68. Nor does establishing a specialist court seem automatically to be a solution. First, in line with the case-law of the Constitutional Court it must be a specialist "criminal" court and only judges or magistrates may sit on it (not eg financial experts). The option of expanding the jurisdiction of the Administrative Appeals Tribunal, where non-judges sit, would not be available. Second, the experience with the existing specialist courts is not always positive. Third, the Venice Commission

has previously expressed reservations about the "surprisingly high number" of specialist tribunals in Malta, on account specifically of the special appointment procedures involving the executive power.[41] The Maltese criminal justice system seems to need more fundamental reform, which will be costly. Moreover, all the other penalties, ie short of the "criminal" financial penalties, will remain in the hands of the supervisory agencies. While this has advantages in the form of efficiency etc., some interlocutors argued that these agencies, or some of them, suffered from political clientelism. Thus, even if a satisfactory solution to the judicial proceedings issue is found, more general reform of these agencies' appointment procedures, institutional structure etc. might also be necessary.

69. In conclusion, in the Venice Commission's opinion the choice which the Maltese authorities are facing is indeed a complex one; affording full fair trial guarantees is certainly a legitimate aim, but so is ensuring effective regulatory and supervision action, especially in the areas of the fight against corruption and money laundering. One can go further and argue that the main problem for Malta's present supervisory systems is that they are under-resourced bearing in mind the size of the industries they are supervising, and/or that penalties, even the less serious penalties, are not being imposed enough. At any rate, the judgments of the Constitutional Court do not create a ready-made solution – ie simply hand the determination of the "criminal" penalties to the ordinary criminal courts. If this approach is to be taken, much more resources must be made available, judicial efficiency must be improved, the problem of a lack of judicial expertise must be dealt with, as must the coordination problems which follow from having a "dual track" system or systems.

3. Whether there can be a discrepancy between the level of protection afforded by the Maltese Constitution and by the ECHR

70. The Minister of Justice has indicated that a specific ground of criticism against Bill 198 was that Article 53 ECHR "prohibits the State from changing the law in a manner which would reduce the protection granted by Article 39.1 of the Constitution, read in conjunction with the case-law of the Constitutional Court of Malta, which essentially provided that proceedings which may lead to the imposition of heavy administrative penalties can only take place (from beginning to end) before a court."

71. As concerns in particular the question whether Article 53 ECHR allows or not to limit or to suppress a fundamental right, the Venice Commission notes that even if it is entitled "Safeguard for existing human rights", Article 53 is not intended to establish a prohibition for limiting or suppressing a fundamental right granted at the national level. As it appears from the text of the norm, the goal of Article 53 is to ensure that the Convention itself will not be interpreted in the sense that it requires to limit or to derogate from any of the human rights and fundamental freedoms which may be ensured under the national legislation or under any other agreement to which a Contracting Party is a party.

72. Article 53 ECHR explains that the ECHR provides the *minimum* level of fundamental rights protection which States party to the ECHR need to ensure within their jurisdiction. As the ECtHR has clarified (in respect of former Article 60, now Article 53 ECHR), the Preamble to the Convention refers to the "common heritage of political traditions, ideals, freedom and the rule of law" […], of which national constitutions are in fact often the first embodiment. Through its system of collective enforcement of the rights it establishes (see the Loizidou v. Turkey judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, p. 26, § 70), the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, *but never limits it* (emphasis added)."[42] The Court has also clarified in the context of Article 6 ECHR that "the concept of a "civil right" under Article 6 § 1 cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention."[43]

[41] CDL-AD(2020)006, §§ 97, 98; CDL-AD(2018)014, § 29.
[42] ECtHR, United Communist Party of Turkey and others v. Turkey, Application 19392/92, 30/01/1998, § 28.
[43] ECtHR, Okyay and Others v. Turkey Application no. 36220/97), 12 July 2005, 68.

73. In the Commission's view, therefore, to the extent that the protection afforded under the Maltese system is higher than that afforded by Article 6 ECHR as interpreted by the ECtHR, Article 53 ECHR does not require that the Maltese and the ECHR be aligned. Article 53 does not prevent such alignment either, but the Commission wishes to stress that any decision to limit, and even more remove or abrogate a fundamental right or freedom should only be taken after long and very careful consideration and debate.

74. Whatever option is chosen for the reform, the expectations of a fair trial in ECHR terms will continue to apply with the criminal law additions where the sanctions are punitive. However, the consequence of either the constitutional change or the statutory approach is to recognise that the protections for persons subject to heavy administrative sanctions will be reduced from that of a court under the Maltese constitutional standard to a quasi-judicial tribunal with a lower standard of proof. The availability of judicial review and an appeal into the ordinary courts, no matter how extensive, do not detract from the fact that in some cases this is a re-calibration downwards to an Art 6 standard.

4. Bill No. 166

75. Bill No. 166 intends to amend the Constitution of Malta[44] by adding a new paragraph (sub-article) 3A to Art. 39 of the Constitution, as follows:

> *"(3A) Nothing in this article or in any other law shall prevent any independent administrative or regulatory authority or any other body established by law from imposing administrative penalties or taking any other measures which may have the characteristics of a charge or punishment of a criminal nature where such administrative or regulatory authority or other body is empowered to do so by law:*
> *Provided that in such cases the decisions of the said administrative or regulatory authorities or other bodies to impose any such administrative penalties or other measures shall be subject to a right of appeal before an independent and impartial Court or tribunal established by law".*

76. In essence, the amendment seeks to extend the framework of paragraph 1 of Article 39 of the Constitution in two directions, with the effect of its indirect derogation:

- first, by enabling all bodies established by law to impose administrative penalties and other measures, which are criminal in nature, provided that they are empowered to do so by law (i.e. Act of Parliament),
- second, by extending, in these cases, the "type" of bodies authorised to decide on the appeal: the appellate body would no longer be just a "court" but also a "tribunal".

77. This is a direct amendment to Art 39 to ensure that independent regulators can impose administrative sanctions which might be characterised as criminal, provided there is a right to appeal to a court or independent tribunal. This approach aligned the Maltese structure for administrative penalties with the ECHR expectations.

78. The proposed amendment, if interpreted as an amendment, does not raise any issue as concerning the conformity with the decisions of the Constitutional Court, as it does provide expressly, as the Constitutional Court did, that in cases of imposition of substantial administrative penalties the charge or punishment can be (or is) of a criminal nature. The part which provides the power of the administrative or regulatory authority to impose such penalties also cannot be considered contrary to the Constitutional Court's judgment, as the Constitutional Court did not

[44] As the Venice Commission understands it, the political opposition has signalled that it will not accept Bill No. 166 as it is at present formulated.

assess whether or not it is permissible as such to entrench in the Constitution the sanctioning power of administrative or regulatory authorities, but only the question of whether the impugned decisions were or not in conformity with the text of the Constitution, *in force at the moment of the examination of the case*. From this point of view, Bill No. 166 is not problematic.

79. When constitutional change is proposed to facilitate administrative justice, it may be presented as the replacement of an inconvenient problem by a more convenient and efficient solution, without perhaps preserving the value which was inherent in the problem, or ensuring that full constitutional protections will extend to the solution. The language of 'Nothing in this article…' or 'Nothing in this Constitution…' may look like a blanket immunity rather than the integration of administrative justice into the constitutional framework. Nevertheless, the search for a textual amendment to the constitution to address the dilemma is the valid approach as only constitutional change could bring clarity and certainty.

80. The amendment in Bill 166 would have the effect of an enabling provision as all the relevant Acts would have to set out the right of appeal. It is uncertain whether the required right of appeal is a full appeal or could be satisfied by an appeal on limited grounds or on severity or points of law only. The introductory formula of 'Nothing in this article or in any other law…' might at face value be taken to mean that the constitutional or legal protections constraining the exercise of power by the regulator will not apply. This approach which would not be in line with the case-law of the ECtHR could be reconsidered to make it clear that all other protections would continue to apply to regulators exercising the new competence.

81. It should be noted however that this Bill does not amend Article 39.1 of the Constitution, but rather introduces a new paragraph in Article 39 which sets out a rule for the interpretation of the first paragraph. This interpretation goes against the interpretation of current Article 39.1 as given by the Constitutional Court, but, as stated above, this is acceptable if it is done through a proper constitutional amendment. However, it is debatable whether this rule on interpretation of Article 39.1 may *de facto* amount to a derogation of the latter: the text of paragraph (1) requires imperatively a fair hearing, by an independent and impartial court established by law, of every case of criminal charges. The proposed new paragraph suggests interpreting it so as to derogate from these requirements.

82. In conclusion, in the opinion of the Venice Commission, Bill No. 166 could be improved by making it clear that the constitutional or legal protections constraining the exercise of power by the regulatory authorities will continue to apply when they exercise the new sanctioning competence. It could also be envisaged to amend the text of Article 39.1 instead of creating a specific rule for its interpretation.

5. Bill No. 198

83. Bill No. 198 provides:

> *13A. (1) Where any Act, whether passed before or after this Act, confers a power upon a public authority which exercises regulatory, supervisory, compliance, investigatory or enforcement functions to impose a civil penalty, an administrative fine or other civil or administrative pecuniary or non-pecuniary sanction or administrative measure, such a penalty, fine, sanction or measure may be interpreted as constituting a punishment of a criminal nature and the infringement in respect of which the said penalty, fine, sanction or measure may be imposed may be interpreted as substantively constituting a criminal offence subject to the following provisions of this article.*
> *(2) A classification of a penalty, fine, sanction or measure as provided in sub-article (1) as being of a criminal nature may only be made upon the following considerations:*
> *(a) the nature of the infringement in respect of which the penalty, fine, sanction or measure is or may be imposed;*
> *(b) the nature and severity of the penalty, fine, sanction or measure.*
> *(3) A penalty, fine, sanction or measure as provided in sub-article (1) shall not be interpreted as constituting a punishment of a criminal nature and the infringement in respect of which the said penalty, fine, sanction or measure may be imposed shall not be interpreted as substantively constituting a criminal offence where the following conditions are satisfied in respect thereof:*
> *(a) it is imposed after the person upon whom the penalty, fine, sanction or measure is imposed has been granted an opportunity to bring forward his defence within a reasonable time;*
> *(b) it does not involve imprisonment, detention or other form of deprivation of personal liberty;*
> *(c) it does not result in a criminal record;*
> *(d) it is subject to appeal to a court both on points of law and on points of fact; and*
> *(e) when an appeal to a court is filed therefrom it is not enforceable without the authorisation of the court to which it is appealed.*
> *(4) The provisions of this article shall not apply to the interpretation of article 6 of the European Convention on Human Rights as incorporated in the European Convention Act.".*

84. Bill No. 198 seeks to provide a "new" classification of penalties, fines, sanctions or measures, distinguishing ones "of a criminal nature" from others which "shall not be interpreted as substantively constituting a criminal offence". As stated in the Bill, "[t]he objects and reasons of this Bill are to amend the Interpretation Act for the purpose of regulating the interpretation of the classification of laws or punishments as criminal in nature with particular reference to the situation where an Act confers a power upon a public authority which exercises regulatory, supervisory, compliance, investigatory or enforcement functions to impose a civil penalty, an administrative fine or other civil or administrative pecuniary or non-pecuniary sanction or administrative measure."

85. The proposed new "interpretation" of Article 39 that punitive administrative fines and other administrative pecuniary or non-pecuniary sanctions or administrative measures fall under the civil limb of Article 39 (i.e., Article 39 (2)) rather than the criminal one means that the previous distinction between "civil" and "criminal" cases in the article is blurred. Bill 198 proposes to provide that a penalty, sanction or fine is not "criminal" in nature if the person on whom it is imposed has had the opportunity of defending him/herself within a reasonable time; if it does not involve detention or deprivation of personal liberty; if it does not result in a criminal record, if it is subject to appeal both on points of law and on points of fact, and if the appeal has suspensive effect. These criteria do not fully coincide with those developed by the ECtHR. Indeed they seem to reverse the logic of the Strasbourg case-law: instead of saying that if the charge is criminal, the accused must be afforded full fair trial guarantees, it says that if due process has been provided, the charge was not criminal.

86. The criterion of "the nature of the infringement in respect of which the penalty, fine, sanction or measure is or may be imposed" is very vague. On the other hand, the Venice Commission has not ascertained whether at present the criteria for categorising a sanction as "criminal" are sufficiently clear; in order to improve legal certainty, it would seem necessary for the regulatory authorities and for the parties in the procedures to know in advance, or sufficiently early, whether the case requires to be tried in court. The formula in Article 13A §2 a) does not increase legal certainty and risks to complicate the situation rather than to contribute to the identification of a solution.

87. Article 198 adds: "The provisions of this article shall not apply to the interpretation of Article 6 ECHR as incorporated in the European Convention Act." The effects of this formula are unclear.

88. The new classification in Bill No. 198 does not address the issue of the independence and impartiality of the regulator imposing the sanctions. Yet, in order to be in line with the standards, the regulatory authorities imposing criminal sanctions would need to offer guarantees of independence and impartiality. Like Bill No. 166, Bill 198 would require that all the relevant Acts on regulatory Authorities set out the right of appeal on both points of fact and of law.

89. The question of the standard of proof remains open: if the cases involving the imposition of heavy administrative sanctions are to be considered as criminal, even if the trying court is not criminal but civil, should be the required standard of proof "beyond a reasonable doubt"?

C. The procedure of preparation and examination of Bills No. 166 and No. 198

90. During the virtual exchanges it became apparent that the procedure of discussion of Bills 166 and 198 did not make space for an open and meaningful public discussion, even though the Bills were posted on the Parliament's website, a deadline of two weeks for submitting comments was given to the public and the debates in parliament were in principle open to the public and streamed live. Further, it appears that the opposition was not consulted prior to the submission of Bill 198. The Ombudsman was not consulted either.

91. As a matter of fact, Bill 198 was noticed and largely commented upon in the press by several distinguished representatives of the legal community of Malta, so that a meaningful debate did in fact take place. Nonetheless, the Venice Commission finds that the procedure of adoption of legislative and a fortiori constitutional amendments should make provision for sufficient time and facilities for making sure that public debates take place and that all the stakeholders and relevant interlocutors have the possibility to submit their view and arguments. Such open, transparent and meaningful debates are important elements of democratic law-making.[45] The Venice Commission therefore encourages the authorities to engage in such consultations in the following phases of this reform.

V. Conclusion

92. The Venice Commission has been requested by the Minister of Justice, Equality and Governance of Malta to express its opinion on the pending reform, either of Article 39 of the Constitution (Bill No. 166) or alternatively of the Interpretation Act (Bill No. 198), as concerns the fair trial guarantees attached to substantial administrative sanctions. The aim of the reform is to ensure legal certainty in the matter of whether the very numerous regulatory authorities of Malta may impose heavy administrative sanctions, against the backdrop of Article 39 of the Constitution,

[45] Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine.§ 28; CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, §§ 26 ff; CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §§ 135-137; CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 15.

requiring, as per the interpretation of the Constitutional Court, that the proceedings which lead to the imposition of a sanction which qualifies as "criminal" in nature, may only take place before a court composed exclusively of judges or magistrates. In this respect, Article 39 of the Maltese Constitution provides stronger fair trial guarantees than Article 6 ECHR as interpreted by the European Court of Human Rights, which provides that an administrative authority can impose a "criminal" administrative penalty provided that the basic rules of due process were observed and there is judicial review of both the facts and the merits of the case.

93. The request involves two distinct issues:

- A material one: how to best achieve the government's aim to clarify the position of the Maltese framework in respect of the position of the ECtHR on the fair trial guarantees under Article 6 ECHR;
- A formal one: can this aim be best achieved through a constitutional reform – as is attempted through Bill No. 166 – or through a legislative amendment – as is attempted through Bill 198.

94. The Venice Commission's role is not to assess whether the reform in question is necessary or appropriate. This decision falls within the sovereignty of the Maltese authorities and people. Further, the question of whether the proposed amendment of the Interpretation Act is compatible with the Constitution of Malta as interpreted by the constitutional case-law is for the Constitutional Court of Malta to decide, eventually. The Commission therefore will only provide its analysis of the two pending options in the light of the European standards and of the European experience. It hopes, in so doing, to contribute constructively to the public discussion in view of the final decision which will be taken by Parliament.

95. As regards the question of whether the planned reform should be achieved through a constitutional amendment or through a change in the interpreting rules contained in the Interpretation Act, the Venice Commission recalls that the "final say" in the interpretation of the Constitution in a given case belongs to the Constitutional Court. The Constitutional Court's decisions are final and binding and oblige Parliament to repeal/amend the provisions found unconstitutional and to follow the interpretation given by the Constitutional Court. Parliament has nonetheless the power to amend the Constitution to provide for a different interpretation from that provided by the Constitutional Court, provided that the procedure for constitutional amendment is duly followed. The qualified majority required in Article 66.1 of the Constitution for constitutional amendment entails that a broad consensus needs to be found between the parliamentary majority and the opposition, giving the latter the power to participate, supervise and even block the decision on the amendment. Achieving the result of a constitutional amendment in a procedure which requires a simple majority would defeat the purpose of the supermajority requirement in Article 66. To read the interpretative power of Parliament so widely as to enable it to be used as an alternative to having to use the amendment procedures would open the way for the government of the day easily to circumvent individual rights and other protections set out in the Constitution.

96. It follows that in the opinion of the Venice Commission the reform should be achieved through the amendment of Article 39 of the Constitution.

97. The Commission also notes that the EU and the other international monitoring bodies such as FATF, Moneyval and Greco do not require as such that regulatory authorities should have the power to impose *criminal* sanctions, but they require that they have powers to impose a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative. Regulators which have sanctioning powers in addition to advisory and investigative ones should offer guarantees of independence and impartiality. Article 6 ECHR requires that the administrative authority observe the basic rules of fair trial and that there should be judicial review (on both issues of facts and law) of the decision by a court or tribunal set up by law.

98. In Malta, after the judgments of the Constitutional Court clarifying the proceedings involving sanctions which are criminal in nature should take place entirely before a court, a "dual track system" was introduced in the competition law sector, whereby the regulatory has the power to set standards and investigate compliance while the adjudication and imposition of the penalty requires an application to a court. Several interlocutors in Malta consider that such dual track system should be introduced in all the areas in which regulatory authorities operate. The authorities and other interlocutors instead pointed to the delays in court proceedings and to the lack of expertise of courts and of the police.

99. In the Venice Commission's opinion, the choice which the Maltese authorities are facing is a complex one: affording full fair trial guarantees is certainly a legitimate aim, but so is ensuring effective regulatory action, especially in the area of the fight against corruption and money laundering. There is also the problem that Malta's present supervisory systems may be under-dimensioned bearing in mind the size of the industries they are supervising, and/or that penalties, even the less serious penalties, might not be being imposed enough. At any rate, the judgments of the Constitutional Court do not create a ready-made solution – ie simply hand the determination of the "criminal" penalties to the ordinary criminal courts. If this approach is to be taken, much more resources must be made available, judicial efficiency must be improved, the problem of a lack of judicial expertise must be dealt with, as must the coordination problems which follow from having a "dual track" system or systems.

100. In the Commission's view, to the extent that the protection afforded under the Maltese system is higher than that afforded by Article 6 ECHR as interpreted by the ECtHR, Article 53 ECHR does not require that the Maltese Constitution be aligned to the ECHR. Article 53 ECHR does not prevent such alignment either, but the Commission wishes to stress that any limitation, and even more so a suppression, of a fundamental right or freedom should be considered with the utmost prudence, taking into account in particular the need for balancing such right or freedom against other fundamental ones.

101. As concerns in particular Bill No. 166 providing that independent regulators can impose "criminal" administrative sanctions provided that there is a right of appeal to a court or independent tribunal, in the opinion of the Venice Commission it could be improved by making it clear that the constitutional or legal protections constraining the exercise of power by the regulatory authorities will continue to apply when they exercise the new sanctioning competence. It could also be envisaged to amend the text of Article 39.1 instead of creating a specific rule for its interpretation.

102. As concerns specifically Bill No. 198 providing a new interpretation of Article 39 of the Constitution that punitive administrative fines fall under its civil limb instead of under its criminal limb if certain due process and other conditions are met, the Venice Commission finds that the provision is very vague and would not improve legal certainty. Its relations with Article 6 ECHR should be clarified. Further, if regulatory authorities are to impose criminal sanctions, their independence and impartiality should be ensured, and a right to appeal on both points of fact and of law should be introduced for all of them.

103. Finally, the Venice Commission recalls that open, transparent and meaningful public debates are an important element of democratic law-making and encourages the Maltese authorities to engage in such consultations in the following phases of this reform.

104. The Venice Commission remains at the disposal of the Maltese authorities for further assistance in this matter.