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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MALTA

PROPOSED LEGISLATIVE CHANGES

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Council of Europe
Strasbourg, France

Mr Markert,

Implementation of the Recommendations made by the Venice Commission in December 2018

The Maltese authorities are pleased to formally engage with the Venice Commission on the subject of the implementation of the recommendations made by the Venice Commission in its Opinion of the 17th December 2018.

This communication is intended to give a detailed explanation with regards to the adoption of the relative recommendations in a manner which “would not abandon Malta’s legal traditions, but would constitute an evolution that would provide more effective checks and balances than those in place today.”

(a) Judicial Appointments

Section A of Part III the Opinion focuses on Judicial Appointments and for ease of reference, we are reproducing the recommendations made by the Venice Commission for the improvement of judicial appointments:

- “1. Judicial vacancies should be published and candidates from inside and from outside the judiciary should apply to the JAC for a specific vacancy.
2. The JAC should have a composition of at least half of judges elected by their peers from all levels of the judiciary.
3. The JAC should rank the candidates, upon merit on pre-existing, clear and transparent criteria for appointment, taking also into account the goal of achieving a gender balance.
4. The JAC should propose a candidate or candidates directly to the President of Malta for appointment. Its proposals should be binding on the President.
5. There should be no exceptions from this procedure for the appointment of the Chief Justice.”.

In order to implement the recommendations made by the Commission as faithfully as possible, whilst respecting the particularities of the Maltese system, the Maltese authorities are of the view that a system of a rolling public call, which has consistently proven to be the most effective method for attracting the most suitable candidates to the post of judge or magistrate locally, should be retained. In line with the Commission’s recommendations, such a system ensures publication of judicial vacancies and will be open for candidates both from inside as well from outside the judiciary.

In so far as the composition of the Judicial Appointments Committee is concerned, the Maltese authorities shall likewise implement the recommendation of the Commission. The composition of the Judicial Appointments Committee will be revised so that two additional judges and a magistrate, elected by their peers, will be added to the Committee. This will effectively address the recommendation of the Commission directed at the composition of the Committee, given that as a result of this change, half of the members of the Committee will be members of the judiciary, with all levels of the judiciary being thus represented and with the two judges and the magistrate elected by their peers.

Another change in the composition will be that the public prosecutor will no longer be involved in the appointment of members of the judiciary and will be substituted by the State Advocate with the latter having no prosecutorial functions. Moreover, the Chief Justice will be given a casting vote in addition to his original vote. The Maltese authorities are of the view that the fact that the Chief Justice presides over the Committee is essential and meaningful given that the Chief Justice presides over all appellate courts, whether these are civil, constitutional or criminal courts. Thus, the Chief Justice is in practice aware of the standard, integrity and compliance with ethical rules of all legal professionals who appear before these courts and who are most likely to be potential candidates for the post of judge or magistrate. This visibility on the part of the Chief Justice will certainly be an asset to the Committee. The Maltese authorities are also of the view that having the Chief Justice presiding over the Committee is likely to inspire greater public confidence in the said Committee. It is therefore of great importance that the Chief Justice will continue to preside over the Committee in order to boost confidence in, and overall effectiveness of, the system.

Under the new system, when a judicial vacancy arises the Judicial Appointments Committee will propose the three most suitable candidates for appointment to the judiciary directly to the President of Malta. The President will make the selection from amongst those candidates. The proposal of the Judicial Appointments Committee will be accompanied with a detailed report expressing the Committee's views on the suitability of each of the proposed candidates. The final choice will rest with the President. The decision to propose this amendment was taken by the Cabinet of Ministers in its meetings dated 12th May 2020 after the Minister undersigned explained the outcome of the video-conference with the Commission on the 5th May 2020.

The Maltese authorities are of the view that ranking candidates would have an undesired and demeaning effect not only vis-à-vis the candidates between them, but also in so far as their individual professional reputation is concerned, possibly discouraging potential candidates from applying. Nonetheless, the scope behind the recommended ranking of candidates will still be attained, by means of the afore-mentioned accompanying report

in respect of each individual eligible candidate, which will be sent to the President. The said report, as the Commission recommends, would examine the eligibility of each respective candidate on the basis of pre-existing, clear and transparent criteria for appointment. The Maltese authorities submit that the Committee enjoys full and unrestricted discretion, without being subject to any external influence or direction, to establish its own procedure and draw up objective and clear eligibility requirements. This proposed system will ensure that the decision of the Committee will be respected at all times given that there is no possibility of referral of candidates back to the Committee, nor is there the possibility not to abide by the decision of the Committee. The new system will eliminate the possibility of having candidates appointed directly by the Government or of the Government vetoing a proposed candidate.

(b) The Chief Justice

As regards the appointment of the Chief Justice, the Maltese Authorities insist that procedure must differ from the rest. Malta is a small nation where the Judiciary complement is of 44 members (Judges and Magistrates). Therefore, the Chief Justice enjoys wide powers.

In such a context, the proposal is that the appointment to this position will be made through the support of two-thirds of the members of Parliament. This would result in basically the support of the main political parties and would enable a high level of authority. On this point there is already agreement between Government and the Opposition, always subject to the approval by the Commission. Such alignment was the result of bi-partisan discussions including within the Constitution Convention led by the

President of the Republic of Malta H.E. Dr George Vella. This agreement on the method of appointment was further enabled through a unanimous Parliamentary Resolution passed on Wednesday, 1st April 2020 in favour of the appointment of the new Chief Justice.

Malta acknowledges the fact that this deviates from one point mentioned in the Commission's opinion in this respect, however, we must accept the socio-political national context and consequently we respectfully insist that this is the best methodology. This procedure was adopted given strict deadlines that were in place due to the fact that the previous Chief Justice reached the statutory retirement age of 65 on 8th April 2020. Thus, the requirement to appoint the new Chief Justice (Judge Mark Chetcuti).

It is pertinent to note that this bi-partisan agreement is practically unprecedented. Moreover, Civil Society has publicly praised such appointment. Besides this, the two-thirds majority system is also utilized for the appointments of the Auditor-General and Ombudsman, and we know that such positions have always conducted their work in a sterling manner also thanks to the wide moral authority which such an appointment method conveys to them.

Moreover, it is in practice very awkward to have the process for the appointment of the Chief Justice to be conducted by the Judicial Appointments Committee where now the majority of the latter Committee will be members of the same Judiciary (Judges and Magistrates) and it is widely known that such a position is sought after by sitting judges.

Finally, we wish to clarify that, with respect to judicial discipline, the same method explained hereunder will apply to the Chief Justice.

Therefore, given the above, Malta requests the Commission's approval for this methodology of appointment as explained.

(c) Judicial Discipline

Section B of Part III the Opinion focuses on Judicial Discipline, and for ease of reference we are again reproducing the recommendations made by the Venice Commission for the improvement of judicial discipline:

1. "The removal of a judge or magistrate from office should not be imposed by a political body;
2. There should be an appeal to a court against disciplinary decisions directly imposed by the Commission for the Administration of Justice".

In order to fully implement these recommendations, the Maltese authorities will remove the public prosecutor from the composition of the Commission for the Administration of Justice so that the prosecutor will not be involved in the removal of any member of the judiciary. As a result, the Attorney General will be substituted by the State Advocate.

Moreover, Judicial discipline, short of removal of a member of the judiciary, will be the prerogative of the Commission for the Administration of Justice and the decision of the

Commission of the Administration of Justice will be subject to appeal before the Constitutional Court. Thus, in this respect, the Maltese Authorities will be implementing fully the Commission's Opinion.

The Maltese Authorities acknowledges that there may be room for change in the sphere of the removal of judges or magistrates, but such change should not extend to the impeachment proceedings. The proposal of the Maltese Authorities is to the effect that were the Commission for the Administration of Justice recommends that a member of the judiciary be removed by Parliament, the said member of the judiciary will have the right of an appeal from such

recommendation to the Constitutional Court. This mechanism will respect the principle that a member of the judiciary is judged by his own peers given that the adoption of this model will give the last word by way of review to the Judicial Organ.

The Maltese Authorities also believe that any final decision on its part as to the most appropriate and best way forward to provide for the removal of a judge or magistrate is after a consultation process is conducted, in particular involving the Association of the Members of the Judiciary which holds firm views on the matter, together with other interested parties and civil society.

(d) Prosecution

Section C of Part III of the Opinion focuses on Prosecution where the following recommendations were made in paragraph 73:

- “1. An office of an independent Director of Public Prosecutions or Prosecutor General or Public Prosecutor should be established in Malta.
2. The office of the independent DPP would be responsible for all public prosecutions (institution, suspension or termination of criminal proceedings, including corruption).
3. The powers of the new DPP should be subject to judicial review, notably as concerns non-prosecution, upon request by the victims.
4. The AG would [not] remain the legal advisor to the Government.
5. The Police remain responsible for investigative work”.

With a view of implementing the above recommendations, on the 18th December 2019 the Office of the State Advocate was established in terms of article 91A of the Constitution as the principal advisor to Government in matters of law and legal opinion. The State Advocate is tasked to act in the public interest and to safeguard the legality of State action and also performs such other duties and functions as may be conferred by the Constitution or by any law. The State Advocate enjoys constitutional independence and is not subject to the direction or control of any other person or authority in the performance of the functions conferred. Following the establishment of the office of the State Advocate, the functions of the public prosecutor remained vested with the Attorney General whose office already enjoys constitutional independence in terms of Article 91 of the Constitution. The offices of the State Advocate and of the Attorney General are separate offices which operate from different premises.

Amendments have been introduced in the Attorney General Ordinance (Chapter 90 of the Laws of Malta), which amendments have not yet come into force, in order to provide for the taking over by the office of the Attorney General of prosecutions of those offences that carry a punishment of more than two years (therefore including corruption related offences) whilst the police will remain responsible for investigative work. A public call was issued by the Office of the Attorney General in order to recruit legal officers to act as prosecutors before the inferior and superior courts. It is envisaged that not later than the the end of 2020 the office of the Attorney General will be responsible for the public prosecutions of the most serious offences. With the coming into force of the amendments to the Attorney General Ordinance, recommendations 2 and 5 of the Commission will be fully implemented whilst recommendations 1 and 4 have already been implemented by the Maltese authorities.

In so far as recommendation 3 is concerned, Maltese authorities propose the introduction of legal amendments that allow for the possibility of (a) judicial review of decisions not to prosecute and other decisions taken by the Attorney General on the grounds of illegality or unreasonableness; and (b) judicial review of decisions to prosecute before a particular court. In practice, the proposed amendments would provide for the possibility of review of the decision not to prosecute, whereby the injured party would have the right to request the Attorney General to reconsider the

decision taken. This request must be made by the injured party within a period of one month from when the injured party knew or could have known of the decision, whichever is the earlier. In the event that the Attorney General informs the injured party that the request was not acceded to or if no reply is issued by the Attorney General within one month, then the injured party may institute an action for judicial review before the civil courts. Such an action shall be filed by the injured party within two months from the date when the injured party becomes aware or could have become aware of the decision, whichever is the earlier. The civil courts would have the authority and jurisdiction to annul the decision of the Attorney General not to prosecute.

(e) The Permanent Commission Against Corruption (PCAC)

In addition, the Commission identifies, in paragraph 72 of its Opinion, two structural shortcomings in the set up and operation of the Permanent Commission Against Corruption (PCAC) being:

1. the appointment of the members by the Prime Minister and
2. the reports with the findings of the PCAC are sent to the Minister responsible for justice. In order to address these shortcomings, legal amendments are being proposed which provide for the chairperson of the PCAC to be appointed by the President acting in accordance with a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the members of the House; whilst the two remaining members of the PCAC will be appointed by the President acting in accordance with the advice of the Cabinet given after consulting the Leader of the Opposition.

An amendment is also being proposed for those reports which contain a finding of corrupt conduct in the opinion of the PCAC, to be transmitted directly to the public prosecutor.

(f) The Ombudsman

Section B of Part IV of the Opinion deals with the office of the Ombudsman wherein at paragraph 101 the Commission recommends the raising of the rules on appointment and dismissal of the Ombudsman as well as the powers of the Ombudsman to the constitutional level, and that Parliament should be obliged to debate reports addressed to it by the Ombudsman.

In order to implement these recommendations, legal amendments are being proposed whereby the provisions dealing with the appointment, removal and suspension of the Ombudsman will be included in the Constitution. The proposed amendments also provide for the mandatory obligation for Parliament to debate the annual report prepared by the Ombudsman.

(g) The Prime Minister

Section B of Part V of the Opinion focuses on the powers vested in the Prime Minister where the Commission recommends that the power of the Prime Minister to appoint members to independent commissions should be shifted from the Prime Minister to the Cabinet of Ministers.

In order to implement this recommendation, legal amendments are being proposed in order to ensure that the appointment of other high-ranking officials; including (i) the members of the Employment Commission; (ii) the Governor, Deputy Governor and the directors of the Central Bank of Malta; (iii) the Chairman of the Malta Financial Services Authority; and (iv) the members of the Board of the Arbitration Centre; is effected by the Cabinet of Ministers and not the Prime Minister.

An amendment is also being proposed to provide for the appointment of the Information and Data Protection Commissioner by the Cabinet of Ministers after consulting the Leader of the Opposition.

(h) Permanent Secretaries

Section 1 of Part C of the Opinion deals with Permanent Secretaries and the recommendation provides that Permanent Secretaries should be selected upon merit by an independent Civil Service Commission and not by the Prime Minister. In order to implement this recommendation, legal amendments are being proposed in order to ensure that the Public Service Commission, which is an independent constitutional body, will make recommendations to the President of the Republic for the appointment of Permanent Secretaries on the basis of clear and pre-established requirements and after giving due consideration to any recommendation that the Principal Permanent Secretary may make.

The proposed amendments will provide that the appointment of the Principal Permanent Secretary shall be made by the President acting on the advice of the Cabinet of Ministers after having consulted with the Public Service Commission.

(i) Persons of Trust

Section 2 of Part C of the Opinion deals with Positions and Persons of Trust. The thrust of the recommendation is to introduce a real and clear legal basis which strictly limits the appointments of persons of trust. In order to address this recommendation, amendments will be introduced in the Public Administration Act (Chapter 595 of the Laws of Malta) establishing a clear legal basis for the appointment of persons of trust.

These provisions will limit these engagements to consultants to Ministers or Parliamentary Secretaries, staff in the Secretariats of Ministers or Parliamentary

Secretaries and appointments of a temporary nature whenever a post remains vacant after repeated public calls are issued.

The amendment will also establish the maximum number of persons that may be engaged as persons of trust in the Secretariats of Ministers and Parliamentary

Secretaries as well as the conditions and duration of such engagements. A consequential amendment will also be introduced in the Standards in Public Life Act (Chapter 570 of the Laws of Malta) to reflect the changes made in the Public Administration Act in so far as the definition of persons of trust is concerned.

(j) The President of Malta

The Commission stresses on the importance of a qualified majority in the House of Representatives for the appointment and removal of the President and the granting of more powers to the President in order to serve as a player for more checks and balances on the power of the Executive.

First of all, it must be noted that for recent appointments, although the nomination was always put forward by the Prime Minister, there was agreement with the Leader of the Opposition. Therefore, given this, to a certain extent there was already a degree of agreement between both sides of Parliament in place.

Secondly, there is already alignment for such proposals from the Commission's side to be discussed within the parameters of the Constitutional Convention, where such discussion will be open to ensure public participation by the President of Malta and, solely after this process, will the required decisions be taken.

(k) 'Erga Omnes' Obligations

The Government has taken note of the Venice Commission opinion on the effects of judgments of the Constitutional Court and in particular of paragraphs 78 and 79 of the Commission's opinion of December 2018.

The Government however considers that enshrining the principle of 'erga omnes' application of judgments of the Constitutional Court in the Constitution of Malta would go against established principles of the Maltese legal system and would itself give rise to undue complications which have hitherto been avoided.

It is relevant in this regard to note that the principles of 'binding judicial precedent' and 'stare decisis' are not part of the Maltese judicial system which allows the Courts to treat every case on its own merits. In this context it is considered that the introduction of a system whereby a judgment of the Constitutional Court, given on particular facts, claims and defences, would be applicable 'erga omnes' insofar as it finds a law to be incompatible with the Constitution would itself give rise to further legal contestation and to possible legal uncertainty as to the precise meaning of such 'erga omnes' application.

Every endeavor is being made to conform our legislation with the decisions and teachings of our Constitutional Courts, where these have consistently ruled on the constitutional inconsistency of particular legislation and this is proving effective. For instance, in the field of rent and housing laws, owners of residential properties subject to protected leases are seeking recourse to the newly introduced remedies before the Rent Regulation Boards

which are now available under the newly amended rent laws [Vide Act XXVII of 2018 – An Act to Amend The Housing (Decontrol) Ordinance]. Thus, the aggrieved party sustaining the undesired effects of previous legislation is himself or herself recognising and benefitting from the effectiveness of the newly introduced ordinary domestic remedies.

(l) Conclusion

The Maltese authorities remain at the disposal of the Commission to provide any further clarifications and updates that may be required in connection with the implementation of the recommendations made by the Commission. Should the proposed legislative amendments be deemed satisfactory by the Commission, the Maltese authorities will immediately draft and send the same for the scrutiny of the Commission.

A copy of this communication will also be made available to the European Commission.

Yours sincerely,

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Minister for Justice, Equality and Governance

Copy: Dr Robert Abela, Prime Minister
Evarist Bartolo, Minister for Foreign and European Affairs