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Review of implementation of the United Nations Convention against Corruption

Executive summary: Malta

Note by the Secretariat

The present conference room paper is made available to the Implementation Review Group in accordance with paragraph 36 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (Conference of the States Parties resolution 3/1, annex). The summary contained herein corresponds to a country review conducted in the third year of the first review cycle.

* CAC/COSP/IRG/2014/1.



II. Executive summary

Malta

1. Introduction: Overview of the legal and institutional framework of Malta in the context of implementation of the United Nations Convention against Corruption

Malta signed the Convention on 12 May 2005 (C.N.369.2005.TREATIES-12) and ratified it on 11 April 2008 (C.N.276.2008.TREATIES-9). Depositary notifications cover articles 44 (para. 6) and 46 (paras. 13 and 14) (C.N.276.2008.TREATIES-9).

Malta is a republic, whose parliamentary system and public administration is modelled on the Westminster system. Malta's legal system synthesizes the legal traditions of its colonial rule. A version of the Code Napoleon was adopted in 1852 together with, notably, the Code of Organization and Civil Procedure, the Criminal Code and the Code of Criminal Procedure (each, as amended). Although British common law was never adopted, British legal principles have impacted legislation enacted since independence in 1964, including the Maltese Constitution. Since Malta's accession to the European Union (EU) in 2004, the *acquis communautaire* and future EU regulations prevail over domestic legislation.

Multiple specialized acts are relevant for this review, including the Criminal Code (CC), Prevention of Money laundering Act (PMLA), Permanent Commission Against Corruption Act (PCACA) and Extradition Act. At the time of review, legislation was pending before Parliament (Bill No. 57) to amend the PCACA.

Malta follows a dualist system. International treaties need to be transposed into domestic law, unless there are no contradictory national provisions. Domestic legislation is interpreted in line with international treaties and European Union Framework decisions.

The Courts are divided into Superior and Inferior Courts. A bench of nineteen judges sits on the Superior Courts, in the first instance and in the appellate court. The Criminal Court presides over trials by jury. The appellate courts are the Constitutional Court, the Court of Appeal and the Criminal Court of Appeal. The Inferior Courts are presided by magistrates who have multiple competences, including as inquiring magistrates in criminal investigations, in the compilation of evidence in criminal trials, and as court of criminal judicature where sanctions do not exceed six months' imprisonment (or with the consent of the accused, ten years).

Key institutions in the fight against corruption and economic crime are the Attorney General's office, the Police (in particular the Economic Crime Unit, the International Relations Unit and the Interpol Division), the Permanent Commission Against Corruption, the Financial Intelligence Analysis Unit, the Public Service Commission, the Courts and civil society.

Malta joined the Council of Europe's Group of States against Corruption (GRECO) in 2001 and has been evaluated three times.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Active and passive bribery of public officers is criminalized (Articles 115 and 120 Criminal Code, hereinafter CC) and covers persons who discharge any public service, whether in a permanent post or temporarily, including members of Parliament, ministers and judges. The passive version of the offence addresses the request, receipt or acceptance of “any reward or promise or offer.” This includes any “reward in money or other valuable consideration or any other advantage to which he is not entitled” and is interpreted to cover benefits beyond the public officer’s legitimate remuneration as well as gifts to induce acts or omissions (CC Article 115). For active bribery, the bribe giver is prosecuted as an accomplice and is liable to the same punishment as the principal. Attempts are punishable.

While the Criminal Code does not distinguish between acts of bribery committed “directly or indirectly”, the two acts are clearly defined in the case of trading in influence (CC Article 121A).

Malta has criminalized active and passive foreign bribery (CC Articles 115 to 120 and 121 (4)). The elements described under domestic bribery are equally applicable, including the criminal sanctions.

Active and passive trading in influence is criminalized (CC Article 121A) regardless of whether the activity is (or could be) exerted, or whether it leads to the intended result.

CC Articles 121 (3) and 120(1) extend the provisions on active and passive bribery of public officials to the private sector.

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is criminalized for the most part in line with the Convention. The Prevention of Money Laundering Act (PMLA), Article 2 defines key terms under the Convention, including “criminal activity” and “money-laundering”. The required mental element includes knowing or suspecting that property is derived directly or indirectly from the proceeds of crime. PMLA Article 2 criminalizes attempts and complicity to money-laundering. The conspiracy to commit money-laundering is addressed through the application of CC Article 48A.

Any criminal offence can be a predicate offence to money-laundering (PMLA, Article 2(1), Second Schedule). A person can further be separately charged and convicted of both a money-laundering offence and its predicate crimes. As dual criminality is not a requirement for the application of the PMLA, criminal offences committed outside Malta could also qualify as predicate offences.

Malta has criminalized concealment as part of the money-laundering offence and the PMLA encompasses persons who conceal criminal proceeds without having participated in the predicate offence.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

In Malta, embezzlement by public officials (CC Article 127) consists of the breach or abuse of public trust by “misapplying” or “purloining” money or items, including immovable property a person has been entrusted with or received by title. The concept of misappropriation (CC Articles 293-294) refers to the misapplication and conversion by any person of anything which has been entrusted or delivered to them by title, including as public officials.

The abuse of public position for personal gain can lead to both disciplinary professional and criminal sanctions. Overall, offences against the due exercise of official powers are addressed in CC Article 112. While the Criminal Code does not mention the performance or failure to perform an act for the purpose of obtaining an undue advantage for the official himself or herself or for another person or entity, Article 112 (which makes no mention of benefits) requires that a person, under colour of his office, exacts that which is not allowed by law, or more than what is allowed by law, or before it is due.

Illicit enrichment is not criminalized per se, but addressed as the legal consequences of disproportionate wealth. Hence, property can be subject to forfeiture once the court is fully convinced that it has been derived from criminal activity.

CC Article 127(2) extends the embezzlement offence to the private sector.

Obstruction of justice (art. 25)

CC Articles 102 through 108 and 110 address the obstruction of justice. Furthermore, Article 111 refers to the act of hindrance and suppression of testimony. Any subornation to give false evidence committed by use of specified means (force, threats, intimidation, bribery or other inducement) is considered an aggravating circumstance. A person who instigates false testimony could also be liable as an accomplice.

CC Articles 93 through 98 address interference with law enforcement officials.

Liability of legal persons (art. 26)

The criminal liability of legal persons is addressed in CC Articles 121D and 248E, and PMLA Article 3. A legal person’s criminal liability requires the prior conviction of a natural person. Penalties against legal persons include fines (CC Article 121D) as well as administrative punishment, including suspension or cancellation of licenses and permits. Sanctions against legal persons are determined taking into consideration the profits generated, the gravity of offences and other relevant factors.

Participation and attempt (art. 27)

The participation (as an accomplice, assistant or instigator) in, and attempt to commit, an offence are criminalized under CC Articles 41, 42, 43 and 120 (2) and (3). While the preparation to commit an offence is not punishable under Maltese legislation, certain preparatory acts may comprise offences in themselves.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Corruption-related offences are generally punishable by at least one year's imprisonment. As there are no sentencing guidelines in Malta, judges enjoy relatively broad discretion in determining aggravating and mitigating circumstances at sentencing and can go below the statutory minimum in "special and exceptional" cases. Depending on the gravity of the offence, consideration is given to whether the person charged has actively cooperated with the police or filed an early guilty plea; more than one circumstance would generally need to be present for a judicial determination of aggravating or mitigating circumstances. Public officials with heightened obligations, such as the police, face potentially higher penalties due to their functions. Judges are not bound by precedent; however, decisions of the Court of Criminal Appeals are persuasive.

Certain observations were raised concerning the legal framework on immunities and/or jurisdictional privileges granted to Maltese public officials. In this context the reviewers reiterated the importance of striking an appropriate balance between such immunities or privileges and the effective investigation, prosecution and adjudication of corruption offences.

The Attorney General, whose independence is granted under the Constitution's Articles 91 (5) and 97 (2), is the Prosecutor General. The Police can prosecute cases carrying a punishment of no more than 4 years' imprisonment before the Court of Magistrates and, in cases carrying not more than 10 years' imprisonment, when both the Attorney General and accused agree. Prosecutions are conducted whenever sufficient evidence exists to warrant a conviction, a right to challenge the Police's decision not to prosecute exists.

Bail is addressed in CC Article 575 and the provision applies to all offences. No stricter conditions on bail are provided for corruption offences. The Restorative Justice Act, Articles 10 and 11, provides that parole can only be granted to prisoners serving a sentence of imprisonment of a term of one year or more.

Disciplinary proceedings are normally dealt with by the Heads of Department in line with the 1999 Disciplinary Regulations. The Public Service Commission has the duty to ensure that disciplinary action against public officers is fair, prompt and effective. While suspension (with half pay pending investigation and proceedings) of public officials is provided for in the 1999 Disciplinary Regulations (Article 14), their removal or reassignment is possible only upon conviction. Sanctions including dismissal may be decided by the Prime Minister upon recommendation by the Public Service Commission. Disciplinary proceedings and criminal proceedings are separate and distinct.

Presidential pardon can be given to a person who testifies in particular cases and assists other investigations. It can also be granted if the person returns all illicit proceeds and property derived from the crime and makes compensation to injured parties or the State. The nature of the crime is taken into consideration on a case by case basis.

Protection similar to that provided to witnesses and experts (see below) is normally available to cooperating offenders only if they are formally witnesses during the trial. Mitigated punishment may be given to cooperating offenders (CC, Article 21).

Protection of witnesses and reporting persons (arts. 32 and 33)

While the protection of victims from potential harm by the accused is granted by CC Article 412C, the general protection for witnesses and experts who testify in criminal proceedings falls under Article 95 (vilification, threats or bodily harm against other public officer) and Article 101 (calumnious accusations). These provisions are limited to public officers and false accusations against persons respectively. Under the witness protection programme, protection is not available to witnesses or experts who are not victims and did not participate in the offence. Although foreseen in Article 84 of the Police Act, no agreements have been signed for the relocation of protected persons outside of Malta.

While Disciplinary Regulation 5(2) provides a right of complaint to victims of public corruption, there is no provision protecting those who report corruption. Nevertheless, the recent enactment of the Protection of Whistleblower Act in September 2013 could provide new avenues for protection, but has yet to be implemented. Anonymous reporting is possible in Malta, as Maltese Police are prohibited from divulging their sources.

Malta has established victim-friendly facilities; videoconferencing is allowed when the person testifying is a minor and audio-recording or video-recording of any evidence required from a witness is permissible.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Forfeiture of the proceeds derived from a relevant offence, or of such property the value of which corresponds to the value of the proceeds, is mandatory under CC Article 23B. Confiscation is imposed in addition to other applicable sanctions. CC Article 23 also provides for the forfeiture of instruments used or intended to be used in the commission of any crime, and of any property obtained by such crime, as a consequence of the punishment for the crime established by law. Immovable property is confiscated through judicial sale by auction or by claim and possession. Asset tracing, freezing and seizing are authorized through investigation, attachment and freezing orders under the CC and PMLA. As regards the rights of bona fide third parties, CC Article 23 (1) provides for the forfeiture of criminal proceeds “unless some person who has not participated in the crime has a claim to such property”.

An investigation order issued by a criminal court to trace assets of all kinds pertaining to a person suspected of a criminal offence overrides all bank secrecy restrictions and bank records are routinely obtained by the Maltese authorities under CC Article 257 and PMLA Article 4.

Statute of limitations; criminal record (arts. 29 and 41)

The period of prescription (CC Articles 687 through 694) starts to run only once the perpetrator of the crime becomes known to the Maltese authorities, regardless of when the offence took place. However, if the investigating or prosecuting authorities know of a crime having been committed and do not act timely to uncover the perpetrator, prescription runs nonetheless.

CC Article 49 empowers a Maltese court to take into account a final judgment delivered by a foreign court in determining punishment.

Jurisdiction (art. 42)

Territorial jurisdiction is outlined in CC Article 121C and extends to offences committed on board ships or vessels, as well as aboard Maltese planes. Furthermore, extra-territorial jurisdiction is established over offences committed against its citizens abroad. Stateless persons who are not permanent residents do not fall under the active personality principle, unless the crime is committed in Malta. The passive nationality principle is under consideration.

Concerning preparatory acts to money-laundering, or participation, committed outside of Malta, these are covered in PMLA Article 2 (1) (vi).

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Any criminal offence gives rise to both a criminal and a civil action. Article 1051A of the Civil Code provides for civil remedies in case of corruption for victims. However, no right of compensation for damages shall lie where the party claiming to have suffered the damages has wilfully been a party to the act of corruption. Malta applies the general civil law principle *fraus omnia corrumpit*, i.e., a contract which is the result of corruption may be annulled on this basis.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

Corruption offences are investigated by the Economic Crime Division of the Police. Other dedicated authorities include, inter alia, the Permanent Commission Against Corruption (PACA), the Attorney General, Magistrates and Courts of Magistrates. The various authorities cooperate closely without the need for formalised agreements.

PACA is exclusively concerned with the investigation of public corruption. While nothing prevents members of the public from reporting corruption allegations to the PACA, there are no established or prescribed procedures in place. Its recommendations are presented to the Minister of Justice who decides whether these should be presented before Parliament.

The Disciplinary Procedures of the Public Service Commission Regulations Article 5(1) and (2) provide that an officer shall report to the Head of the Department any misconduct or breach of discipline committed by any officer. While failure to report misconduct is not considered an offence, it can be the ground for disciplinary actions.

Outreach and formal partnerships with private sector entities are reported as limited in Malta, although the FIAU provided relevant training which also included participants from the private sector. Financial institutions cooperate regularly with the Police in particular.

2.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:

- The aggravated punishment structure for passive bribery as an example of accounting for the gravity of offences (arts. 15, 21);

- There is no requirement for the offence of foreign bribery to be linked to “the conduct of international business” (art. 16);
- The ease with which law enforcement institutions appear to cooperate, in particular the police and Attorney General’s office.

2.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Monitor the application of the bribery provisions to ensure that cases of indirect bribery are equally covered in future cases, in light of the absence of a specific provision addressing indirect bribery.
- Consider the possibility of establishing the criminal liability of legal persons regardless of whether a natural person has been convicted.
- Consider whether existing provisions strike an appropriate balance between immunities and privileges and the effective investigation, prosecution and adjudication of corruption offences.
- Consider whether existing provisions on the protection of victims who are not witnesses are adequate to ensure full protection of such persons in line with UNCAC. Also, consider whether the fact that the witness protection programme is not available to witnesses or experts who are not victims and did not participate in the offence poses restrictions to the effectiveness of such programme.
- Clarify the role of PACA and its competency to receive public complaints and undertake necessary awareness raising of its existence. Ensure that sufficient financial and human resources are provided in particular to PACA.
- Conduct an assessment of Malta’s current bodies involved in the fight against corruption in view of clarifying roles and responsibilities and harmonizing functions, in particular to ensure the existence of one or more bodies equipped with sufficient independence, resources and staff (including investigative skills) to effectively combat corruption. Attention should also be paid to preventive aspects, such as anti-corruption education and awareness raising among public officials and the general public.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition (art. 44)

Extradition is governed by the Extradition Act (EA) and is conditional on the existence of treaties or extradition arrangements (Article 43(1) Constitution). Malta is party to the European Convention on Extradition and four bilateral treaties (the United States of America, Egypt, Libya and Tunisia). Although Malta does not take the Convention as the legal basis for extradition, it would honour a request on its basis due to powers granted to the Minister of Justice to enter into extradition relations on a case by case basis with States that are not Commonwealth or designated countries (Articles 30A and 32 EA).

Extradition is subject to dual criminality (Article 8 EA) and a minimum penalty requirement of imprisonment for at least one year, which covers corruption-related offences under Maltese law. In the absence of dual criminality extradition is possible under the European Arrest Warrant and Surrender Procedures, and for Iceland and Norway. In other cases, extradition is limited to the extent that not all offences established under the Convention have been criminalized. Simplified extradition procedures are in place for ten designated Commonwealth countries and under the London Scheme for Extradition within the Commonwealth.

No requests for extradition have been refused by Malta to date, except in one case where the request did not satisfy Malta's legal requirements.

Political offences are exempted from extradition (Article 10(1)(a) EA). Although the Constitution provides for the extradition of Maltese citizens (Article 43(3)) and there have been relevant cases, nationality is an optional ground for refusal under Malta's extradition treaties. The *aut dedere aut judicare* obligation is not addressed in Malta's domestic legislation and all treaties.

The issues of fair treatment or the discriminatory purpose have not been invoked to date in corruption-related cases.

Extradition may not be refused on the ground that the offence involves fiscal matters; around 90 per cent of incoming requests relate to financial crimes, and these requests are invariably executed.

Malta consults with requesting States as a matter of practice.

Transfer of sentenced persons; transfer of criminal proceedings (arts. 45, 47)

Malta is party to the Council of Europe Convention on the Transfer of Sentenced Persons and two bilateral treaties with Libya and Egypt. Malta has participated in prisoner transfer arrangements as a requested and requesting State.

The transfer of criminal proceedings is possible once the Courts are vested with jurisdiction, and examples of implementation were provided.

Mutual legal assistance (art. 46)

Article 649 CC is normally invoked to grant mutual legal assistance (MLA) requests emanating from foreign judicial, investigative, prosecuting or administrative authorities. Malta is party to international treaties on MLA and has signed two bilateral treaties (USA, China). Malta also follows the Harare Scheme Relating to MLA within the Commonwealth.

Dual criminality is a general requirement for MLA (see, e.g., Malta's reservation to the European Convention on MLA in Criminal Matters). However, no obstacles exist under Maltese law to granting assistance in the absence of dual criminality for non-coercive measures. Malta has executed requests involving acts that constituted administrative violations rather than criminal offences under Maltese law.

Malta is able to provide a wide range of assistance, from the serving of summons and documents to the enforcement of confiscation orders, from the hearing of witnesses to search and seizure, from the production of documents to video conference. Assistance is provided unless contrary to domestic law or public policy (Article 649(1) and (5) CC).

Malta has not refused any request for assistance to date.

Where the Attorney General, as central competent authority, communicates to a magistrate a request made by a foreign authority for any investigation, search, seizure or examination of witnesses, the magistrate conducts or orders such investigation or examination. Orders for search and seizure are executed by the police. For requests relating to offences punishable by over one year's imprisonment, including money-laundering, where dual criminality is satisfied, the Attorney General applies to the Criminal Court for an investigation order or an attachment order, or for both (Article 435B CC; Article 9 PMLA, Article 24B, Dangerous Drugs Ordinance). If granted, the Order will prevail over any obligation of confidentiality or professional secrecy, and the provisions applicable to a domestic investigation order or attachment order apply.

Requests which are executed by the police, namely the collection of evidence and the taking of interviews, are completed within an average timeframe of three weeks. Requests executed by the Attorney General through the issue of investigation, attachment or freezing orders are generally executed within two weeks. Requests involving the hearing of witnesses are fully executed within 3-6 months, depending on the workload of the Courts. The direct transmission of MLA requests between judicial authorities is covered by Article 649 CC.

There are no obstacles to providing MLA in relation to matters governed by bank secrecy (e.g., Article 6B, Professional Secrecy Act) or involving legal persons, and such requests are routinely granted. Confidentiality requirements are observed on the basis of administrative practice in accordance with article 649(5B) of the Criminal Code.

Malta relies on its cooperation through CARIN, INTERPOL, EUROPOL and police-to-police cooperation (see below) to share pre-MLA information.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49, 50)

Maltese police participate in the Camden Asset Recovery Inter-Agency (CARIN) network, and engage in police-to-police exchange of information and cooperation on the basis of e.g., INTERPOL, EUROPOL and *commission rogatoire* from foreign judicial and police authorities. The Attorney General's Office, as the central judicial authority, also ensures cooperation with other States through Eurojust and the European Judicial Network (EJN). Statistics related to criminal requests (not limited to corruption matters) through INTERPOL, EUROPOL and Malta's Schengen "SIRENE" bureau (Supplementary Information Request at the National Entry) were provided. Malta also uses the SIENA (Secure Information Exchange Network Application) network as a platform for information exchange.

The FIAU, though not a law enforcement agency, has concluded information sharing arrangements, including through the Egmont Group and the EU (9 MOUs at the end of 2012). Detailed statistics on the FIAU's international requests for assistance (incoming/outgoing) were provided.

The Malta police force has liaison officers posted at Europol, through agreements with other States on a case by case basis, and at foreign embassies.

Malta has entered into a number of crime and police cooperation agreements. Malta considers this Convention as the basis for direct law enforcement cooperation, but there has been no experience in its application.

Joint investigations are possible under Malta's treaties (e.g., EU Convention on MLA and some bilateral treaties). Maltese authorities directly participated or assisted in joint investigative teams in a few cases, including one corruption-related investigation.

Special investigative techniques that are 'non-intrusive' can be conducted upon consent by the Attorney General (Article 435 E (3) CC). Evidence collected under a warrant or investigation order is admissible if the technique was lawfully conducted, though no law addresses the matter.

3.2. Successes and good practices

- The integration of a liaison officer to execute requests requiring police intervention (e.g. search and seizure, service of summons, arrest for purposes of interrogation, court hearings etc.) within the designated unit in the Attorney General's office dealing with international cooperation requests.
- Maltese CC provides for hearings of suspects by video conference and by telephone in certain cases.
- Malta has commendable international law enforcement cooperation, with technical investigative training provided to other countries, in particular through the Malta police force and the FIAU; and there has been a recent increase in dedicated resources to the international relations unit in the police.

3.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- More clearly specify the *aut dedere aut judicare* obligation in domestic legislation.
- Consider, in the interest of greater legal certainty and consistency in future cases, adopting guidelines or other formalized procedures to address the duty to consult before refusing extradition.
- Adopt relevant provisions to address the notification requirement relating to matters of confidentiality (art. 46(20)).
- Consider adopting relevant guidelines or formal procedures in respect of:
 - confidentiality undertakings and the disclosure of exculpatory information governing the spontaneous sharing of information (art. 46(5));
 - the limitation on use (art. 46(19));
 - matters covered in arts. 46(24) and (25);
 - the duty to consult before refusing or postponing MLA (art. 46(26) and to provide reasons for refusing assistance (art. 46(23));
 - the safe conduct of persons (art. 46(27)).

- Consider more clearly specifying matters incidental to the temporary transfer of detained persons (art. 46(11) (b) and (c)) and the issue of costs (art. 46(28)).
-