Fighting Corruption in Malta and at European Union Levels

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Undoubtedly, the fight against corruption is no easy job, mainly because of the very secretive nature of such an offence that, at times, makes it next to impossible to detect, especially when hardly anyone files a report with the law enforcement authorities. Hence, new methods need to be identified and devised to fight corruption at a national level and in the European Union whilst at the same time safeguarding human rights, especially the right to a fair and public trial as well as the right to privacy. This is indeed an arduous task for all the public authorities involved in the process. It is hoped, however, with developments taking place in technology and forensic science and with the assistance of new legal provisions being revised on an ongoing basis, that novel and sophisticated laws, policies, strategies, procedures, and other measures may be conceived at national and at EU levels to make it easier for public authorities to catch, prosecute, and condemn fraud perpetrators. Nevertheless, there has to be a harmonious concordance at both these levels in order for law enforcement agencies to succeed in their unenviable task.

Typology of the Fight against Corruption: From a legal perspective, corruption can be fought at different levels. Naturally, the first level that comes to mind involves criminal law and criminal procedure. After all, in law corruption is categorised as principally a criminal offence. But it does have a spill-over effect into other branches of the law such as administrative law and civil law.

I. The Maltese Scenario

Insofar as Malta is concerned, there are provisions in the Criminal Code that penalise fraud. There is a special commission – the Permanent Commission against Corruption[1] – which is specifically tasked with investigating corruption. Furthermore, there are other laws, which, though not necessarily related directly to corruption, play a vital role in exposing it. A number of administrative measures can reasonably easily be introduced to cut down on corruption.

1. Administrative Law as a Tool to Fight Corruption

Effective mechanisms aimed at combating corruption go beyond the criminal law and criminal procedure and spill over into such areas as constitutional law and administrative law. I will cite here some administrative law measures, which, if well implemented, can assist in the fight against corruption:

Asset Reporting Duties of MPs: In terms of the Code of Ethics for Members of Parliament,[2] MPs have a duty to report publicly on their assets. However, there have been a few MPs who, for a number of years, did not file their asset return. There was a situation in which a Minister "forgot" to declare in his annual asset return a bank account in Switzerland for eight years. There was also a case in which an MP failed to file his asset return for four consecutive years. To my knowledge no action has been taken in all these cases. It cannot be said, in the case of annual asset reporting to the House of Representatives, that there is no machinery in place to act as a deterrent against abuse. On the contrary, the machinery is there, but it is a dead letter.

Freedom of Information: Another measure that can cut down on corruption is to make the records of the public administration more readily accessible to the media for scrutiny. However, the Maltese Freedom of Information Act[3] enacted in 2008 (which only came into force in September 2012) is not optimal as far as empowering persons to have access to government-held information is concerned. This is because the records of certain authorities are totally exempt from public scrutiny whereas, in those cases where the public enjoys such a right, it is marred by other hurdles and pitfalls intended specifically to deny access. The struggle for openness and transparency in the government is still one against state secrecy.

Political Parties' Finances: In Malta, there is no law regulating political parties and, more importantly, their sources of financing. It is up to the political parties themselves to decide whether, when, and to what extent to divulge their sources of financial support.

Ineffective Auditor-General Controls: In other instances, where the Auditor General successfully audits the public administration's financial records, financial maladministration is not always rectified and whoever was responsible for the irregularity is not always punished. A strong internal audit system at the ministerial level should complement the detection of corruption within the departments, agencies, and other entities falling within a ministry's portfolio.

Exclusion from Public Procurement Procedures: Persons and companies investigated for and convicted of fraud should be excluded from the award of tenders in the public procurement process. Before a tender is awarded, the Department of Contracts should, in conjunction with the police and the Malta Financial Services Authority, ensure that the companies tendering are investigated in order to ascertain the identity of their directors, shareholders, and beneficiaries. Furthermore, if any one or more of these persons have been convicted of fraud by a court of criminal jurisdiction, their tender should be declared inadmissible.

Conflicts of Interest: There is the need to define by law what constitutes a conflict of interest that ought to debar a public officer or a holder of political office from acting in certain situations.

Duty to Disclose: All holders of political office and all public officers should be obliged by law to disclose all donations received, regardless of the amount involved. This should include accepting goods or services free of cost or at lower prices or by taking commissions. Should a person be found guilty of accepting gifts or services as aforesaid, criminal and disciplinary action should be taken against him, which might, depending on the gravity of the case, lead to dismissal from office and/or imprisonment.

Asset Declaration by Judiciary and Public Officers: All members of the judiciary and all public officers and other key office holders in the public sector – like MPs – should file a yearly declaration of assets with the Auditor General. The database containing such information should be accessible to Inquiring Magistrates. In the case of public officers, the declaration should be filed by officers in salary scales 1 to 10 and, in the case of the public sector, by employees holding grades comparable to salary scales 1 to 10 in the public service.

Duty to report criminal offences and misbehaviour: Maltese law does not impose on any person the duty to report crimes except in very exceptional cases concerning national security or public health. A duty should be established by law to require any person who comes to know of corruption to report it and, in the case of public officers and public sector employees, they should also be required to report breaches of their code of ethics to their respective Permanent Secretaries.

Corruption Prevention and Response Plan: The ministry responsible for justice should spearhead a corruption prevention and response plan to be introduced in all government departments and agencies and bodies corporate established by law.

2. Criminal Law and Criminal Procedure

Criminal law and criminal procedure remain a pivotal tool in the fight against corruption. From a Maltese perspective, several measures can be taken to reinforce the role of criminal law and criminal procedure to make it better equipped to guarantee the detection and successful prosecution of corruption-related crimes.

Permanent Commission against Corruption: Although the Permanent Commission against Corruption has existed since 1988, it has not necessarily been a success story. In the cases prosecuted by the Police for corruption, it appears that the Commission was involved in none of the cases in which investigations led to

prosecution and conviction. On the contrary, the impression is given that this Commission was used more as a sort of a shield to protect Ministers and public officers upon their request, with the ensuing result that their behaviour was investigated with the Commission issuing a clean conduct certificate declaring no wrongdoing on their part. The Commission has not served its purpose well and should be rethought. Perhaps its task should be taken over by a new and revamped system of Inquiring Magistrates.

The Role of the Inquiring Magistrate: As the law stands today, the Inquiring Magistrate does everything except inquire. Essentially, the Inquiring Magistrate collects and preserves all the evidence adduced before him by the police and submits his findings together with all the documentation received to the Attorney General. He does not take an active role in the inquiry but is at the receiving end, collecting evidence provided to him by third parties. Inquiring Magistrates do not take the initiative to conduct the inquiry. Unlike the police, neither the Inquiring Magistrate nor the Attorney General is equipped to investigate. For the law to function well, Inquiring Magistrates should be empowered to investigate directly. There should be a pool of magistrates specifically and solely tasked with carrying out magisterial inquiries headed by a Chief Inquiring Magistrate. These magistrates should not be assigned any other judicial duties but should concentrate only on one task: leading and conducting criminal investigations. Once they decide that a person should be prosecuted in court, it should be the pool of Inquiring Magistrates – not the police or the Attorney General – who should prosecute. The police should assist and take instructions from these Inquiring Magistrates. Inquiring Magistrates should be in a position to order the police to carry out extended surveillance, infiltration, interception of communications, arrests, and searches. Inquiring Magistrates should also authorise the seizure of assets.

Judicial Database: Inquiring Magistrates do not have a judicial database. Such a database is maintained by the police. The Inquiring Magistrates should have an archive of digital information instead of the current mode of paper documentation. Interestingly enough, the reports of Inquiring Magistrates are retained by the Attorney General and not by the Inquiring Magistrates. Moreover, Inquiring Magistrates act individually and do not work in a team, nor do they share intelligence among themselves. There is no central repository where a copy of their reports is kept in the courts building. This database is a must in order to have access to the latest up-to-date information to assist in magisterial inquiries. Moreover, Inquiring Magistrates should have their own office, which should not be located in the Courts of Justice building but in a separate building and allowing them to have registries for their files, rooms for interrogation purposes (equipped with audiovisual recording facilities), digital archives, crime conference rooms, facilities for conducting overseas crime conferences, etc.

Collaborators of Justice: In the case of criminals who would have reneged on their past behaviour and chosen to collaborate with law enforcement officers, the law should ensure that these collaborators (the *pentiti* as they are called in Italy) should be offered a considerable reduction or complete amnesty in regard to any punishment to be dispensed in their regard. They should also be offered protection through a witness protection scheme. Their families and relatives should also be protected from any vengeance that might be perpetrated against them by criminal organisations.

Whistle Blowers: The Whistle Blowing Bill[4] was presented to the House of Representatives as a bill in 2010. However, it was never enacted into law. Whistle blowers should be given full protection when they blow the whistle in corruption matters, and this includes job provision if the circumstances of the case so warrant.

Witnesses Protection Schemes: A witness protection scheme should not simply be used to protect witnesses from any attempts on their lives but also to film their evidence before it reaches court. Such evidence should be taken down by an Inquiring Magistrate and filmed. Should the witness not be in a position to attend court, the Inquiring Magistrate could use the evidence – which is to be considered, for all intents and purposes of law, as legally admissible evidence – in court. Sometimes, in order to protect a witness, s/he should not ap-

pear physically in court, especially where the threats on his or her life have been assessed by the Inquiring Magistrate as too high a risk to take. Should the defence wish to cross-examine the witness, this can be done either by shielding the witness in court so that he cannot be seen (provided that the presiding judge is in a position to ascertain the witness's identity), or else the witness may provide testimony from an off-site location by recourse to remote technology. In certain cases, a court should be allowed not to reveal the identity of the witness to the accused.

National Coordinating Agency: It would benefit Malta to have a committee responsible for ensuring coordination at the national level of all anti-corruption efforts involving judicial and law enforcement authorities, prosecution services, Inquiring Magistrates, customs, police, and the military when they perform police functions such as coast guard functions, etc. The Malta Financial Services Authority can also participate in this committee and should have anti-bribery and corruption systems and controls in place.

Lifting the Corporate Veil: In order to ensure that criminals do not hide behind companies or other moral entities, howsoever designated, the criminal law should lift the corporate veil, meaning that, where it is clear that the accused person is hiding behind a corporate body, the criminal law should not – for the purposes of evidence, conviction, and punishment – distinguish between the person of the accused and the juridical *persona* of a body corporate once a direct nexus is established between both *personae*.

II. Arrangements at the EU Level

Transnational Arrangements for the Detection of Criminals: At the EU level, the EU should make laws to authorise law enforcement infiltrators in criminal organisations. They should be authorised to proceed to another European Union Member State in order to identify the criminals involved in that state without the other state taking any criminal action against such infiltrators. EUROPOL should be tasked with coordinating such measure.

Letters of Request: Measures should be taken both at the EU and international levels to expedite letters of request in order to ensure that evidence collected abroad by judicial authorities is dispatched in a timely manner to the judicial authorities in Malta and vice versa. The EU has admirably solved the delays associated with extradition between EU countries through the European Arrest Warrant. The next step is to fast-track letters of request, if this is not already the case. In one case,[5] such letters of request had taken more than four years to be returned to Malta, and the Constitutional Court found in favour of the accused for the delay caused by the slow process of returning the letters of request which was brought about in the compilation of evidence. Judicial cooperation requires that letters of request are given priority, and they should not take more than three to six months to be remitted back to the requesting court. On a national level, there should be only one body involved in dealing with letters of request. This should be the courts. In the case of Malta, the Prime Minister and the Attorney General are also involved in this process, which ensures further delays in the external and internal forwarding and receipt of letters of request.

Access to Information Held by Banks and Other Entities: Inquiring Magistrates should have access to all banking documents and other information held by other bodies, including government departments, e.g., tax authorities, whether such information is held in Malta or abroad in an EU Member State. If, for instance, a Maltese citizen or a company conducting business in Malta, wherever registered, is suspected of having moved proceeds derived from illegal activities in Malta to any European Union country, or vice-versa, the EU should have legislation in place allowing the sharing and divulging of the required information by banks etc. via their respective law enforcement agencies – on penalty of banking licence revocation and the imposition of other criminal sanctions, including imprisonment, for those bankers and other persons who do not collab-

orate in the administration of justice. At a later stage, the EU should make the necessary effort to establish this arrangement on an international level.

III. Conclusion

Maltese criminal laws regulating corruption tend to be antiquated, and it is therefore welcome news to learn of the work being carried out by OLAF and GRECO in nipping in the bud all forms of corruption. This type of offence does indeed have an EU dimension and hence it requires cooperation between all EU Member States for it to be prosecuted successfully. The situation is thus far from ideal.

1. The Permanent Commission against Corruption is established by the Permanent Commission Against Corruption Act, Chapter 326 of the Laws of Malta.↩
2. The text of the Code of Ethics for Members of Parliament is available at: http://www.parlament.mt/codeofethics-mp?l=1. Last accessed on 1 July 2013.↩
3. Chapter 496 of the Laws of Malta.↩
4. Bill 58 of 2010. The text of this Bill is available at: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=21495&l=1. Last accessed on 1 July 2013.↩
5. The Police versus Carmelo sive Charles Ellul Sullivan et, Constitutional Court, 24 January 1991 (the text of this judgment is published only in Maltese).↩