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(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS
AND HUMAN RIGHTS
(OSCE/ODIHR)

DRAFT JOINT OPINION

**ON THE DRAFT ACT
TO REGULATE THE FORMATION,
THE INNER STRUCTURES,
FUNCTIONING AND FINANCING OF POLITICAL PARTIES
AND THEIR PARTICIPATION IN ELECTIONS**

OF MALTA

on the basis of comments by

Mr Nikos ALIVIZATOS (Member, Greece)
Mr Oliver KASK (Member, Estonia)
**Mr Richard KATZ (OSCE/ODIHR Core Group of Experts
on Political Parties)**

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I. Introduction

1. On 12 June 2014, the Minister for Justice, Culture and Local Government of Malta sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") requesting assistance from the OSCE/ODIHR in reviewing the "Draft Act of Malta to Regulate the Formation, the Inner Structures, Functioning and Financing of Political Parties and Their Participation in Elections" (hereinafter "the draft Act", CDL-REF(2014)046)) to assess its compliance with OSCE commitments and international human rights standards.
2. On 9 July 2014, the OSCE/ODIHR Director confirmed the OSCE/ODIHR's readiness to review the draft Act, and proposed that OSCE/ODIHR draft the opinion jointly with the Venice Commission, given both organisations' previous cooperation in this field.
3. On 19 September 2014, the Maltese authorities informed the OSCE/ODIHR that the draft Law would be examined by Parliament once it had resumed work in the month of October. Upon the Venice Commission's agreement to prepare a joint opinion, OSCE/ODIHR confirmed to the Minister of Justice, Culture and Local Government that both institutions would issue a joint opinion on the draft Act.
4. *The present joint opinion was adopted by the Venice Commission at its ... Plenary Session (, ...).*

II. Scope of the opinion

5. The scope of this Joint opinion covers only the draft Act, submitted for review.
6. The Joint opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe standards, as well as good practices from other OSCE participating States and Council of Europe member states. Where appropriate, they also refer to the relevant recommendations made in previous ODIHR and Venice Commission opinions and reports (see below IV.A).
7. In view of the above, the OSCE/ODIHR and the Venice Commission would like to make mention that this Joint opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the OSCE/ODIHR and the Venice Commission may make in the future.

III. Executive summary

8. At the outset, the OSCE/ODIHR and the Venice Commission welcome the draft Act, which is generally clearly written and, if adopted, would constitute a significant step forward in ensuring the transparency of political party and campaign finance in Malta. The need for a comprehensive legislation in the field of political parties in Malta, and, particularly, rules on the financing of political parties, have been recommended by numerous institutions in the past, including OSCE/ODIHR and the Council of Europe's Group of States against Corruption (GRECO) and therefore this is a welcome effort.
9. At the same time, the draft Act could benefit from certain revisions and additions, to ensure the effectiveness of the provisions, as well as their full compliance with international standards. In particular, the draft Act does not regulate many aspects concerning the financing of political parties, including election campaign financing, foreign funding of political parties, restrictions on the use of personal resources by candidates, the use of public resources or intra-party gender equality. The important roles of the Electoral Commission and of the Minister of Justice in the control, oversight and enforcement of this draft Act may

be problematic and could be reconsidered. Finally, sanctions should be proportional and ensure compliance with the legislation.

1. Key recommendations

(a) To mandate an independent and impartial body with tasks related to oversight over political party and campaign financing. Such body should be equipped with adequate resources and a sufficient power of investigation to ensure adequate and effective oversight.

(b) To improve the provisions concerning transparency in party and campaign finance, by allowing the public and the media to scrutinise records on loans and debts; electoral contestants should be required to provide the independent body charged with oversight over political party and campaign finance with information on all loans and debts.

(c) To improve the rules on donations to political parties, by, e.g., forbidding anonymous or confidential donations, or requiring disclosure of such donations to the regulator; by banning, and effectively sanctioning, donations from legal entities which provide goods or services for the public administration.

(d) To include an express reference to the principle of proportionality, and in particular, to the seriousness of the violation, in the provisions on removal of electoral candidates from the lists for violations of provisions of the draft Act and related legislation, thereby avoiding disproportionate sanctions.

2. Additional recommendations

(e) To introduce a time limit for decisions on the registration of political parties.

(f) To adjust campaign expenditure limits for individual candidates to an appropriate level, possibly basing the legal limit on a form of indexation rather than an absolute amount in order to take account of inflation.

(g) To further clarify provisions on donations which may have appreciated in value over time.

(h) To consider including provisions on public funding in the draft Act, as well as clear provisions on expenditure reporting and sanctions for wrongdoing.

(i) To prevent candidates from doubling their maximum allowed spending by running in two districts at the same time.

(j) To improve reporting requirements.

(k) To promote the use of new technologies in making financing reports and their assessment public.

(l) To consider further measures to promote gender equality within internal party structures and in the wider electoral process.

10. The OSCE/ODIHR and the Venice Commission remain at the disposal of the Maltese authorities for any further assistance that the authorities would consider beneficial.

IV. Analysis and recommendations

A. International standards

11. This opinion analyses the draft Act from the viewpoint of its compatibility with international standards on political party and campaign financing and OSCE commitments. International standards relevant to the financing of political parties and election campaigns are found principally in the United Nations (UN) Convention Against Corruption¹ and in Article 22 of the International Covenant on Civil and Political Rights,² and Article 11 of the European Convention on Human Rights (ECHR),³ which both protect the freedom of association. The right to free elections guaranteed by Article 3 of the First Protocol to the ECHR is also of relevance. This opinion further takes into consideration OSCE commitments, in particular on the protection of the freedom of association (Copenhagen 1990, par 9.3) and on holding genuine and periodic elections (Copenhagen 1990, par 5, 6, 7 and 8).

12. In addition, soft-law standards in this area can be found in the recommendations of UN, Council of Europe and OSCE bodies and institutions. These include General Comment 25 of the UN Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service,⁴ Council of Europe Committee of Ministers Recommendation (2003)4 on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns,⁵ as well as the Joint Guidelines on Political Party Regulation issued by OSCE/ODIHR and Venice Commission (hereinafter “the Guidelines”).⁶ The Code of Good Practice in the field of Political Parties, adopted by the Venice Commission in 2008 and its Explanatory Report will also be used.⁷

13. Reference will also be made in this opinion to GRECO reports,⁸ previous opinions issued by the OSCE/ODIHR and the Venice Commission (individually or jointly) on similar types of legislation, as well as reports from previous OSCE/ODIHR election observation missions in Malta.⁹ The European Union’s 2014 Anti-Corruption Report, with its Annex no. 18 on Malta, will also be taken into consideration.¹⁰

¹ UN Convention Against Corruption, adopted on 31 October 2003, ratified by Malta on 11 April 2008, available at:

http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

² The International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966). This Covenant was acceded to by Malta on 13 September 1990.

³ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953. The Convention was ratified by Malta on 23 January 1967.

⁴ UN Human Rights Committee General Comment 25, *The right to participate in public affairs, voting rights and the right of equal access to public service*, UN Doc. CCPR/C/21/Rev.1/Add.7, available at: <http://www.refworld.org/docid/453883fc22.html>.

⁵ Council of Europe Committee of Ministers Recommendation 2003 (4) on *Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns*, available at: [http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20\(4\)%20pol%20parties%20EN.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20(4)%20pol%20parties%20EN.pdf).

⁶ OSCE/ODIHR and Venice Commission *Guidelines on Political Party Regulation* (2010), available at: <http://www.osce.org/odihr/77812>.

⁷ Venice Commission, *Code of Good Practice in the field of Political Parties*, adopted at its 77th Plenary Session (Venice, 12-13 December 2008) and *Explanatory Report*, adopted at its 78th Plenary Session (Venice, 13-14 March 2009), available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)021-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)021-e)

⁸ Available at: http://www.coe.int/t/dghl/monitoring/greco/default_en.asp.

⁹ All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/malta>.

¹⁰ European Commission, *Annex on Malta to the EU Anti-Corruption Report*, Brussels, 3.2.2014 COM(2014) 38 final ANNEX 18.

B. General remarks

14. It should be noted, at the outset, that international organisations, notably GRECO and OSCE/ODIHR, have in the past commented on the absence of a comprehensive legal framework for regulating political financing in Malta, and have recommended the enactment of such framework¹¹, taking into account the specific context of Malta, such as its size and the fact that two political parties have alternated in the government since independence in 1964.

15. The drafters and stakeholders involved in preparing the draft Act are thus to be commended for their attempts to remedy this situation; in particular, the draft Act clearly tries to take into consideration key international standards by establishing a legal framework for party and campaign finance, outlining contribution and expenditure limits, establishing an oversight body and a system of sanctions, and should be commended for the clear language of its provisions. Furthermore, the draft Act contains specific commitments to human rights principles in its general Part 1, which embodies freedom of association principles, and includes a ban on discriminatory actions (Article 6). At the same time, it is noted that this principle mentions only a few grounds of discrimination, while key international standards, notably Article 14 of the ECHR, also mention grounds such as a person's color, language, religion (or belief), national origin, association with a national minority, and birth. Consideration may be given to expanding the ban on discrimination in Article 6 par 2 accordingly.

C. Dissolution of political parties

16. Article 11.2 of the draft Act refers to the possible dissolution of a political party by a decision of the First Hall, Civil Court, when "it is ascertained that the political party persistently and as one of its many purposes propagates xenophobia, homophobia or racism", provided that such a measure is "necessary in a democratic society". It is welcome that this provision includes the democratic society test, as Article 11 of the European Convention on Human Rights should be taken into consideration. As the European Court has stated, dissolution of a political party must be the very last resort; it is "of the essence of democracy to allow diverse political programmes to be proposed and debated, (...) provided that they do not harm democracy itself".¹² The Venice Commission Guidelines on prohibition and dissolution of political parties¹³ were followed in Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe, on "Restrictions on political parties in the Council of Europe's member states", which states that, "[r]estrictions or dissolution of political parties should be regarded as exceptional measures to be applied in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country."¹⁴ "The fact alone that a party advocates a peaceful change of the constitutional order is not sufficient to justify its prohibition or dissolution."¹⁵ Consideration may thus be given to distinguishing accordingly in Article 11.2 between violent and non-violent behaviour, and to specify that the dissolution of a political party shall be a measure of last resort, and shall be applied only in extreme cases.

¹¹ GRECO, Third Evaluation Round, Second Compliance Report on Malta, *Incriminations (ETS 173 and 191, GPC 2), Transparency of Party Funding*, GRECO RC-III (2013) 22E, 25 March 2014, p 9. OSCE/ODIHR Election Assessment Mission Final Report, Republic of Malta, Parliamentary Elections, 9 March 2013.

¹² ECtHR, *Socialist Party and others v Turkey*, judgment of 25 May 1998, application no. 21237/93, par 47.

¹³ CDL-INF(2000)001, guideline 3.

¹⁴ Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe, on "Restrictions on political parties in the Council of Europe's member states", par 11

¹⁵ Guidelines, par 93.

D. Registration and removal from the registry

17. According to the Guidelines, the time-limit for “[...] deciding registration applications should be reasonably short to ensure realisation of the right of individuals to associate. Expedious decisions on registration applications are particularly important for new parties seeking to present candidates in elections. Deadlines that are overly long constitute unreasonable barriers to party registration and participation”.¹⁶ The provisions in the draft Act on registration of political parties (Articles 15 through 22) do not contain a time-limit for registration decisions. It is thus recommended to introduce such a time limit in order to avoid situations where the body responsible for registration takes too much time for such a decision, thereby leaving the party in an unclear legal situation.

18. Under Article 16.2 par c, the Electoral Commission of Malta may refuse to register a political party if it considers its purposes obscene or offensive. A similar provision appears concerning its emblem (Article 17.2.c). According to the European Court of Human Rights’ case-law, the “mere expression of a disturbing or offensive idea” is protected under the Convention,¹⁷ and therefore should not be used as a ground to dismiss an application to register a political party.

19. Under Article 21 par c, political parties may be removed from the register if they have not nominated candidates for any two consecutive general elections, local council elections or European Parliament Elections. This would appear to constitute a restriction on the right to stand for elections, which, according to Article 3 of the Protocol 1 to the ECHR shall be held: “[...] under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.¹⁸ In this light, the removal from the register for not contesting any two consecutive elections appears somewhat excessive, and should be reconsidered; another possibility would be to introduce a time period (provided it is not too short) after which the party, if it does not participate in any elections, is removed from the register.

E. Rules on the financing of political parties

20. The draft Act provides for rules on the financing of political parties. This regulation is a welcome effort; in this context, it is essential that all different aspects relating to financing of political parties are considered. Otherwise, the impact of specific regulations on limitations of donations to the political parties, their assessment and the transparency requirements would be weakened in practice.

21. There is no special chapter in the draft law on legitimate sources of party income. Provisions on legal donations and relevant restrictions are stipulated in Part IV of the draft law on “Control of donations to registered parties”, which also regulates the mechanism for reporting on donations. The draft law does not regulate other sources of financing, including the state budget or possible profitable activities undertaken by the party itself. It is recommended to include such financing instruments in the draft law as well. Such regulation should include safeguards for equal treatment of political parties in accordance with European standards. Article 35 provides for these issues to be stipulated in a separate law, but it would be preferable if they were incorporated into legislation on political parties. At the same time, consideration may be given to also ensuring a proper balance between the different financing sources, so as to safeguard the freedom of association. Limitations on loans or provisions on donations to entities connected with a political party should also be provided.

¹⁶ Guidelines, par. 69.

¹⁷ ECtHR, *United Communist Party of Turkey and Others v Turkey*, judgment of 30 January 1998, application no. 19392/92, paras 25, 43 and 46; ECtHR, *Vona v Hungary*, judgment of 9 July 2013, application no. 35943/10, para. 63.

¹⁸ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20.III.1952.

22. Current legislation does not regulate many aspects of election campaign financing (except for the limitations on maximum expenditure for a candidate). According to common rules against corruption in the funding of political parties and electoral campaigns,¹⁹ states should consider adopting measures to prevent excessive funding of political parties, including the establishment of limits on expenditure in electoral campaigns. The current draft Act is a welcome step in this direction, but may benefit from more clarity in certain areas, as highlighted in greater detail in the sections below.

1. *Donations*

23. As noted in the Guidelines, limits have historically been placed on domestic funding of political parties in the OSCE region, in an attempt to limit the ability of particular groups to gain political influence by providing financial advantages.²⁰ Legislation in the area of political party financing may therefore set reasonable limitations on private contributions, which may include the determination of a maximum level that may be contributed by a single donor²¹. The Council of Europe Committee of Ministers' Recommendation (2003)4 also requires that "[i]n case of donations over a certain value, donors should be identified in the records".²² Specific rules on donations should be included in key legislation with a view to avoiding conflicts of interest.²³ Additionally, as also noted in Recommendation (2003)4, "[s]tates should specifically limit, prohibit or otherwise regulate donations from foreign donors"²⁴. This requires a careful and nuanced approach to foreign funding which weighs the protection of national interests against the rights of individuals, groups and associations to co-operate and share information²⁵. In the Maltese context, the existence of European Union political parties must also be considered,²⁶ as well as the European Union *acquis* in this field.

24. It is noted that currently, the draft Act does not limit, prohibit or otherwise regulate foreign funding of political parties. When dealing with this matter, appropriate consideration should be given to avoiding undue foreign influence on domestic political affairs. At the same time, any such regulation should fully respect Article 11 of the ECHR, par 10.4 of the Copenhagen Document, and European Union law; unnecessary infringement of free association in the case of political parties active at the international level should be avoided.²⁷

25. There are a number of ways in which rules on donations may be circumvented, which the draft Act has attempted to deal with. One way of circumventing bans on donations is to portray them as 'loans'. In this context, it is welcome that Article 2 (d) treats loans as donations if they are made on conditions more favorable than the commercial rate. However, loans may also be forgiven at a later date, in which case they should be considered as an in-kind contribution, subject to the limitations that apply to contributions and expenditure limits. It is recommended to clarify this in the draft Act.

26. In addition, loans may also be guaranteed by third parties. If the party originally having received the loans then fails to pay the loan back, that third party will then pay the creditor directly under the terms of the loan guarantee, effectively giving the political party a donation. Consideration should therefore be given to including a specific provision regulating loan guarantees in the draft Act, which should include reporting rules as to the receipt and repayment of such loans.

¹⁹ See Annex to the opinion on the need for a Code of Good Practice in the field of Funding of Electoral Campaigns, CDL-AD(2011)020.

²⁰ Guidelines, par. 173.

²¹ Guidelines, par. 175.

²² Council of Europe Committee of Ministers Recommendation (2003)4, Article 12 (b).

²³ Council of Europe Committee of Ministers Recommendation (2003)4, Article 3 (a).

²⁴ Council of Europe Committee of Ministers Recommendation (2003)4, Article 7.

²⁵ Guidelines, par. 172.

²⁶ *Ibid.*

²⁷ See Venice Commission, *Opinion on the prohibition of financial contributions to political parties from foreign sources*, CDL-AD(2006)014; see also in this respect Venice Commission, *Code of good practice in the field of political parties*, CDL-AD(2009)021, para. 160.

27. Another technique to circumvent donation bans is for banned entities/individuals to request intermediaries to donate on their behalf. This practice does not appear to be banned explicitly in the draft Act. In order to ensure respect of contribution limits, reporting and disclosure requirements of those entities, it is recommended to introduce a ban on knowingly donating on behalf of an individual or legal entity which is not authorised to donate to a political party, or knowingly assisting an entity or individual in donating above the legal limit set out by law.

28. At the same time, intentionally hiding donations by splitting them is punishable by fine under Article 38 par 3. Although this is certainly useful, it is noted here that the fact that the draft Act allows, in Article 35 c and d respectively, and up to a certain amount, both anonymous donations (the donor being unknown to all) and confidential donations (the donor being known only to the political party) may make it rather difficult for the regulator to find out whether anyone has in fact engaged in splitting donations, and, may, more generally, impede the enforcement of other types of limitations or prohibitions on campaign finance contributions. It is recommended to remedy this in the draft Act by either forbidding anonymous/confidential donations in the draft Act, or by requiring disclosure of such donations to the regulator.

29. As noted in the Committee of Ministers' Recommendation (2003)4, states should: "[...] take measures aimed at limiting, prohibiting or otherwise strictly regulating donations from legal entities which provide goods or services for any public administration"²⁸. No such provision appears to be contained in the draft Act. It is recommended to explicitly ban, and effectively sanction, donations from legal entities which provide goods or services for the public administration.

30. Under Article 35 (e), companies forming part of a single group of companies or which are directly or indirectly controlled by each other, or by the same person or group of persons, are to be considered a single source of donations. This is in principle a welcome provision, as it aims to ensure that the ceiling imposed on donations by the same provision is not unduly circumvented. Given the complexity of corporate structures, it may however be difficult for the political party to determine whether a donation is given in violation of this provision. This could easily lead to involuntary breaches of law which should perhaps not be held against the party. It is recommended to exclude this possibility through pertinent provisions in the draft Act, for example by requiring companies to make a written statement to the effect that they are making donations only on their own behalf.

31. Under Article 2, fees charged for participation in political events are deducted from "campaign expenditure". This could mean that if a political party organises a dinner in the context of a political campaign, and charges invitees EUR 500 per person for this dinner, i.e. an amount significantly above the cost price, this amount could be deducted from its total campaign expenditure. It appears excessive to deduct, under all circumstances, the fees charged for participation in political activities. The same applies to gifts *causa mortis*, which are not counted as donations. It is recommended to limit the amount which may be deducted from campaign expenditure for donations *causa mortis* and for fees charged for participation in political events, taking into account the normal price of the considered goods and services.

32. Also, Article 36 already takes into consideration that the value of a donation may at times differ from the actual cost price. It does not, however, appear to take into consideration situations where the value of a donation differs significantly from the original cost price, e.g. in cases involving donations of shares which have appreciated in value since they were purchased. At the moment of donating them, such donations may already have a much higher value than their professed original purchase price. This situation should be reflected in Article 36 accordingly.

²⁸ Council of Europe Committee of Ministers Recommendation (2003) 4, Article 5 (b).

33. It is noted that while Article 34 states that donations shall include contributions made by the members themselves, it is not clear whether this includes membership fees. Membership fees are a legitimate source of political party funding. However, charging high membership fees can be a way around donation limits. According to the Guidelines, legislation should ensure that membership fees are not used in this manner.²⁹ It is therefore recommended to consider stating explicitly in Article 34 that membership fees are also counted as donations, so as to ensure that donation limits are not circumvented.³⁰

34. Article 37 of the draft Act regulates the sponsorship of political parties. It is not clear whether the provisions on donations apply to sponsorship and whether there are thus any caps on the amounts that may be paid to political parties as part of such sponsorship. It is recommended to clarify this issue. Article 37 par 3.b should also clarify the regulation and limits established concerning third parties' contributions to a political party.

2. Reporting requirements

35. The Guidelines note that transparency in party and campaign finance is important to protect the rights of voters and to prevent corruption. Transparency is also important because the public has the right to be informed.³¹ Voters must have relevant information as to the financial support given to political parties in order to hold parties accountable.³² At the same time, regulations should not place an undue burden on parties, candidates and oversight bodies.

36. In the interest of transparency, it should be clear not only which donations a party may receive, but records should also be kept of loans and debts of political parties, and published. This helps increase scrutiny for parties in relation to the receipt of funding claimed to be loans, but which are not actually intended to be paid back. It is recommended that the public and the media should be able to scrutinise records on loans and debts, and that electoral contestants should be required to inform the independent body charged with oversight over political party and campaign finance with information on all loans and debts; the independent body should accordingly be held to publicise such statements on its website.

37. In addition, the body charged with oversight over both political party and campaign finance should be obliged to publish its analysis of political party and campaign finance reports, and accounts on its website within a reasonable period after having received them (whilst respecting personal data protection rules). Such reports should be made publicly available without unnecessary delay and should be easy to comprehend; they should also be easily accessible to the public for an extended period of time. This could be done by publishing the reports in a standardised and searchable format, and/or through newspapers with a high circulation. In this context, clear and timely deadlines for oversight bodies to publish reports should be included in relevant legislation. Also, both candidates and political parties should be required to provide regular, detailed reports on their campaign income and expenses, within an acceptable time limit, which could then also be made public (in a timely manner). The use of new technologies could be useful in this respect and should be reflected in the draft Act.

3. Independent oversight and enforcement

38. There are a number of different ways of enforcing political party and campaign finance provisions, and it is in principle for the State itself to determine which body or bodies to charge with this task. However, the Guidelines state that "[w]hichever body is tasked with

²⁹ Guidelines, par. 163.

³⁰ *Ibid.*

³¹ Cf. also Article 7.3 of the UN Convention Against Corruption.

³² Guidelines, par. 194.

regulation should be nonpartisan in nature and meet requirements of independence and impartiality”.³³

39. The draft Act places the Electoral Commission at the heart of the enforcement of its provisions. The Electoral Commission is appointed under Article 60 of the Constitution of Malta by the President of the Republic, “acting in accordance with the advice of the Prime Minister, given after he has consulted the Leader of the Opposition”. Members of the Electoral Commission may be removed from office by the President acting in accordance with the advice of the Prime Minister³⁴ not only for inability to discharge their function but also for ‘misbehaviour’.³⁵ This manner of appointment and dismissal, in combination with the fact that members of the Electoral Commission are political appointees,³⁶ essentially, in spite of the high level of confidence that the Electoral Commission enjoys, calls into question the Electoral Commission’s objective independence from the executive. Consideration could thus be given to mandating another body with tasks related to political party and campaign financing, or to the creation of a new independent and impartial body charged with this task.

40. The same consideration should be made with regard to the Minister of Justice, who is part of the executive, and a political appointee, and has a role in a number of provisions of the Act, such as providing what information should be contained in the general outline plan for compliance with financial reporting requirements (Article 15 par 2); the format of donation reports that will be made accessible to the public (Article 44) and even the non-applicability of any provisions of the draft Act “with regard to administrative fines and sanctions for failure to submit proper statement of accounts” (see Articles 33 par 9 d and Article 45 par 1.c).

41. It may also be challenging for any oversight body to detect illegal sources of political party or campaign finance without sufficient powers of investigation. The body enforcing the relevant legislation should therefore have sufficient powers to do so. According to the Guidelines, “legislation should grant regulatory agencies the ability to investigate and pursue potential violations. Without such investigative powers, agencies are unlikely to have the ability to effectively implement their mandate”³⁷. Similarly, the Committee of Ministers Recommendation 2003(4) requires that: “independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.”³⁸ The process of auditing alone may be rendered ineffective if the oversight body may do so solely on the basis of information submitted to it, and is not able to examine whether that information is realistic or accurate, and whether it presents an actual and complete picture of a contestant’s income and expenditures. To strengthen the auditing process, several countries have provided their oversight bodies with the power to assess the accuracy of campaign finance reports and their compliance with the rules.

42. It is thus recommended to consider giving the oversight body a number of additional powers in this area, such as, for example, the power to call witnesses and the power to ask other governmental institutions (tax authorities, anti-corruption authorities, etc.) for assistance in carrying out its work, including through the provision of information or expertise and the power to call witnesses under oath. The infringement of rules on political party and campaign finance should be subject to an effective remedy, including effective, proportionate and dissuasive sanctions. In addition, the body enforcing legislation should be able to issue orders leading to the partial or total loss of funds obtained in contravention to the draft Act. Any sanctions imposed “[...] must bear a relationship to the violation and respect the

³³ Guidelines, par. 219 ; Human Rights Committee General Comment 25, par 20.

³⁴ Constitution of Malta, Article 60 par. 6.

³⁵ Constitution of Malta, Article 60 par. 7.

³⁶ OSCE/ODIHR Election Assessment Mission, p. 6.

³⁷ Guidelines, par. 220.

³⁸ Council of Europe Committee of Ministers Recommendation (2003)4, Article 14 (b).

principle of proportionality³⁹, and it should be possible for the affected political party to appeal such decisions to a court.

43. Sanctions for failure to report before the end of the relevant period, or failure to adhere to rules on form and content of reports, are set at a maximum of EUR 10.000 (Article 31). This relatively low amount may lead to a situation where parties which have received contributions in contravention of the law may decide not to report at all and to pay the fine instead. The same is true for other provisions of the draft Act, which does not calculate the fine in accordance with the sums involved in violation of the draft Act. At the same time, potentially new political parties should not be discouraged by the threat of fines from participating in the political process. It is recommended to consider introducing proportionate punishment, i.e. punishment that takes into account the gravity of the offence, whether it is a repeated violation, what amount of money is involved, and the long-term implications of the relevant punishment. This could be done by calculating punishment as a percentage of the income of a party, or by reference to the amount involved in the violation for non-compliance with reporting requirements or failure to report.

44. Regarding the proportionality of punishment, it is laudable that the draft Act contains, in most places, the possibility to adjust the level of punishment to the seriousness of the violation⁴⁰. It is recommended to ensure that all provisions are worded to include the concept of proportional punishment; in particular, it is recommended to add it to Article 41 par 4 (sanctioning cases where inaccurate declarations are made knowingly or out of negligence).

45. It is further noted that only Article 25 par 3 refers to the Criminal Code. Insofar as other acts banned by the draft Act would qualify as criminal acts as well, it is recommended to include references to other provisions of the Criminal Code in the relevant articles.

46. Legislation should specify the process and procedures determining how and which party reports are selected for auditing⁴¹. According to the Guidelines, “[r]eports should clearly distinguish between income and expenditures. Further, reporting formats should include the itemization of donations into standardized categories as defined by relevant regulations. The nature and value of all donations received by a political party should be identified in financial reports”.⁴² There is a lack of guarantees concerning auditors to be appointed to carry out annual audits (Article 28) and a lack of clarity on accounting rules in the draft Act, which contains only a reference to “generally accepted accounting standards” (Article 24 par 1). Provisions on accounting for political parties should be similar to those provided for NGOs and companies in general. It is recommended to clarify provisions in the draft Act on auditing, and to provide for more specific guarantees on the independence of auditors.

47. More generally, although the requirement to audit annual statements of accounts contained in Article 27 par 1 is to be welcomed, it is recommended, in the interest of transparency,⁴³ and in particular so as to be able to cross-check campaign finance reports and political party finance reports, to also require audits of campaign expenditure, and to require the publication of auditors’ reports.

4. Bans and restrictions

48. Articles 47 and 53 amend the Constitution of Malta and the Electoral Polling Ordinance to allow for the removal of an elected candidate for giving false information on election expenses or for incurring election expenses above the ceiling set out in the law. This constitutes a significant sanction, and, considering the fact that it is a limitation of the right to

³⁹ Guidelines, par. 225. A similar requirement is also set by the Council of Europe Committee of Ministers Recommendation 2003 (4), Article 16 which requires infringements to “[...] be subject to effective, proportionate and dissuasive sanctions”.

⁴⁰ Guidelines, par. 225, the Council of Europe Committee of Ministers Recommendation 2003 (4), Article 16.

⁴¹ Guidelines, par. 214.

⁴² Guidelines, par. 203.

⁴³ Code of Good Practice in Electoral Matters, I.2.3.d.

be elected as protected by Article 3 of Protocol 1 of the ECHR,⁴⁴ any such annulment should only be determined by a court of law, in compliance with due process of law and only if the legal violation is likely to have impacted the electoral result”.⁴⁵ It is recommended to include express reference to the principle of proportionality, and in particular to the gravity of the violation, in the provisions on removal of candidates for violations of provisions of the draft Act and related legislation.

49. It is noted that the draft Act does not contain prohibitions of a number of other acts, possibly because they have not been problems in Malta in the recent past. It would, however, be useful to clearly ban the abuse of state resources, a practice which, as the Guidelines note, has been “[...] universally condemned by international norms”.⁴⁶ It is also recommended to specifically ban the requirement of payment to political parties by public employees (civil servants) as stipulated by the Guidelines.⁴⁷ A ban on the manipulation or intimidation of public employees should also be included in the draft Act.⁴⁸

5. Spending limits & use of resources

50. According to common rules against corruption in the funding of political parties and electoral campaigns, states may consider adopting reasonable measures to prevent excessive funding of political parties, such as establishing limits on expenditure on electoral campaigns⁴⁹. Under current Maltese law, the total campaign expenditure per candidate must not exceed EUR 1,400; this limit has been criticized as unreasonably low and insufficient to conduct an effective campaign encompassing all campaign-related expenditures.⁵⁰ Consideration could be given to adjusting campaign expenditure limits for individual candidates to a more realistic and appropriate level; such a legal limit could further be based on a form of indexation rather than an absolute amount in order to take account of inflation.

51. At the same time, there is, under current Maltese legislation, no ceiling on overall party expenditures in the campaign context.⁵¹ It has been argued in the past that this has led to a distorted electoral campaign that disproportionately favored the two well-resourced parliamentary parties.⁵² It is recommended to introduce a reasonable ceiling on campaign expenditures by political parties.

52. Moreover, there do not appear to be any restrictions on the use of personal resources by candidates. As noted by the Guidelines, “[a]lthough a candidate’s own contributions are often perceived to be free from concerns over possible corruption or undue influence, legislation may limit such contributions as part of the total spending limit during the campaign period and require the disclosure of such contributions. It is also appropriate to require that candidates file a public disclosure of assets and liabilities.”⁵³ It is recommended to consider introducing limits on the use of personal resources in election campaigns and to require the disclosure of such contributions, as well as a public statement by candidates of their assets and liabilities.

53. The current legislation does not regulate the use of public resources during elections, such as, e.g. television and radio stations, newspapers and news portals. To ensure that all parties may campaign on a level playing field, it would be recommended to include equitable provisions on the use by the political parties of these resources in the draft Act (in addition to the principle of equal treatment of political parties in Article 5), or in other relevant legislation.

⁴⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20.III.1952.

⁴⁵ Guidelines, par. 225.

⁴⁶ Guidelines, par. 207 ; see also par 5.4 of the 1990 OSCE Copenhagen Document.

⁴⁷ Guidelines, par. 210.

⁴⁸ Ibid.

⁴⁹ Council of Europe Committee of Ministers Recommendation (2003)4, , Article 9; cf. Guidelines, par 196, and Human Rights Committee General Comment 25, par 19.

⁵⁰ OSCE/ODIHR Election Assessment Mission, p. 11.

⁵¹ Guidelines, paras 172-175.

⁵² OSCE/ODIHR Election Assessment Mission, p. 11.

⁵³ Guidelines, par. 169.

This would ensure compliance with the 1990 OSCE Copenhagen Document, which requires participating States to provide “political parties or other organisations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities”.⁵⁴

54. There does not appear to be a provision regulating profitable activities of political parties, which may also be a source of income. It is recommended to regulate this issue as well.

55. It is also noted that Article 46 of the draft Law, which foresees an amendment to the Electoral Polling Ordinance to the effect that candidates running in two separate electoral districts may apportion their expenditure between these electoral districts as they see fit, may be open to abuse. Candidates may raise their total expenditure limits by running in one district only *pro forma* and spending no (or very few) funds there, while spending their maximum allowed amount in another district, effectively doubling the maximum amount. It is recommended to deal with this problem accordingly in the draft Act, for example by banning certain apportionments, or by ensuring maximum transparency in such matters.

6. Public funding

56. It is noted that the draft Act does not regulate or provide for direct public funding. Current Maltese legislation foresees only some forms of indirect public funding, for example through the Income Tax Act, which provides for a tax exemption on political party income, including income from party-affiliated clubs.⁵⁵ In addition, the supply of services by “non-profit organisations of a public nature” to their members is exempt from the Value Added Tax.⁵⁶ Similarly, a deduction of expenses incurred by an elected candidate to support his or her campaign is given, as long as these do not exceed the ceiling stipulated in the General Elections Act.⁵⁷

57. Instead, the draft Act chooses to leave regulation of direct public funding to future, separate legislation (Article 35). While this is of course up to each state, it is noted that public funding could be a useful tool by which to further level the playing field between political parties, so that also smaller parties, with less funds at their disposal, will have a chance to be part of the political landscape of a state. This could help enhance political pluralism in Malta, given that over the last fifty years, only two political parties have alternated in the government. Moreover, a good balance of public and private funding will ensure that political parties do not become too dependent on their donors, and will on the other hand reduce outside influence on political parties (provided such funding is distributed equally, in a neutral and legally foreseeable manner).

58. Public funding can also be a valuable tool to further gender equality, for example where allocation of public funds is made contingent on compliance with requirements for women’s participation.⁵⁸ At the same time, as noted in the Guidelines, “[i]rregularities in financial reporting, non-compliance with financial-reporting regulations or improper use of public funds should result in the loss of all or part of such funds for the party.”⁵⁹ Bearing in mind the above statements, consideration may be given to including provisions on public funding in this draft Act as well, which should then also include clear provisions on expenditure reporting, and sanctions for wrongdoing.

⁵⁴ 1990 OSCE Copenhagen Document, par. 7.6. See also the *Code of Good Practice in Electoral Matters*, I.2.3.a.

⁵⁵ OSCE/ODIHR Election Assessment Mission, p. 11.

⁵⁶ OSCE/ODIHR Election Assessment Mission, p. 11.

⁵⁷ *Ibid.*

⁵⁸ Guidelines, par. 191.

⁵⁹ Guidelines, par. 215.

F. Gender issues

59. The draft Act does not contain provisions on the promotion of gender equality within internal party structures or in the wider electoral process. According to the Guidelines, in respecting universal and regional instruments designed to ensure equality for women, as well as general principles for non-discrimination, legislation should endeavour to ensure that women are able to participate fully in political parties as a fundamental means for the full enjoyment of their political rights.⁶⁰ There are a number of ways of achieving this goal, some of which are related to internal party regulations, whilst others may be contained in legislation. Gender equality may be promoted through the creation of a “women’s section” or “gender division” within political parties;⁶¹ by introducing electoral gender quotas that could increase women’s parliamentary representation,⁶² by providing training and capacity-building programmes developed for female members and potential candidates prior to their selection,⁶³ by adopting, implementing or evaluating gender-equality strategies, plans and programmes at different levels, including specific action plans to achieve balanced participation and representation of women and men in internal political party offices,⁶⁴ or by recognizing and considering the family responsibilities of party members.⁶⁵ It is recommended to consider including specific provisions to promote gender equality in the draft Act, and in particular, to ensure greater gender balance in electoral lists.

60. It is also noted that the draft Act is not drafted in a gender-neutral manner, as it refers at times to individuals using the masculine personal pronoun (see e.g. Article 28 (b)). This is not in line with general international practice, which normally requires legislation to be drafted in a gender-neutral manner, thereby applying to both genders equally. It is recommended to phrase all provisions of the draft Act in a gender-neutral manner.

⁶⁰ Guidelines, par. 101.

⁶¹ Guidelines, par. 100.

⁶² Guidelines, par. 102.

⁶³ Guidelines, par. 103.

⁶⁴ Guidelines, par. 104.

⁶⁵ Guidelines, par. 105.