

The Congress of Local and Regional Authorities



Chamber of Local Authorities

20th SESSION
CPL(20)3
1 March 2011

Local democracy in Malta

Monitoring Committee
Rapporteur: Emil CALOTA, Romania (L, SOC¹)

| | |
|--------------------------------|---|
| A. Draft recommendation..... | 2 |
| B. Explanatory memorandum..... | 4 |

Summary

The report concerns the second monitoring visit to Malta since it ratified the Charter in 1993. It follows up on Recommendation 122 (2002) made after the first visit as well as the complaint sent by the President of the Local Councils Association of Malta to the Congress concerning the compatibility with the European Charter of Local Self-Government of a bill to amend the Local Councils Act.

The report expresses satisfaction with the local government reform launched in 2008 which has yielded concrete results and acknowledges the improvements made to the financial compensation of local elected representatives. It notes however that there are areas of concern, such as the limitations on local authorities' responsibilities and the decrease in local council spending.

The Congress recommends that the Maltese Government increases local governments' funds and share of public affairs as well as their responsibilities, allowing for local taxation. It draws attention to the importance of ensuring the freedom of local councils to select their main executive officers. It calls for measures to increase women's access to local political office and, finally the Congress recommends that La Valletta, the capital, be granted special status on the basis of Congress Recommendation 219 (2007).

¹L: Chamber of Local Authorities / R: Chamber of Regions
ILDG: Independent and Liberal Democrat Group of the Congress
EPP/CD: European People's Party – Christian Democrats of the Congress
SOC: Socialist Group of the Congress
NR: Members not belonging to a Political Group of the Congress



A. DRAFT RECOMMENDATION²

1. The Congress of Local and Regional Authorities of the Council of Europe refers to:

a. article 2, paragraph 1.b of Statutory Resolution (2000) 1 relating to the Congress, which provides that one of the aims of the Congress shall be “to submit proposals to the Committee of Ministers in order to promote local and regional democracy”;

b. article 2, paragraph 3 of Statutory Resolution (2000) 1 relating to the Congress, stipulating that “The Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member states and in states which have applied to join the Council of Europe, and shall ensure, in particular, that the principles of the European Charter of Local Self-Government are implemented”;

c. the decision to draw up a monitoring report on local democracy in Malta taken by the Bureau of the Congress at its meeting on 5 February 2010.

2. The Institutional Committee³ of the Chamber of Local Authorities appointed its President, Mr Emil Calota (Romania, SOC) to prepare and submit to the Congress, as rapporteur, a report on local democracy in Malta.

3. Malta became a member of the Council of Europe on 29 April 1965 and ratified the European Charter of Local Self-Government on 6 September 1993.

4. The Congress notes with satisfaction that following the official visit (21-23 June), the Government of Malta increased its commitments to the European Charter of Local Self Government on 2 August 2010 so that the only remaining reservation comprises Article 9 (3).

5. The Congress takes note of the explanatory memorandum on local democracy in Malta, drawn up by the rapporteur, Mr Emil Calota, following the official visit to Malta, 21-23 June 2010.

6. The rapporteur was assisted by a consultant, Mr Eivind Smith, Vice-Chair of the Group of Independent Experts on the European Charter of Local Self-Government, whom the Congress thanks for his valuable contribution.

7. The Congress wishes to thank the Maltese authorities at national and local levels, the Maltese Association of Local Councils and the various experts who met with the delegation for their open and constructive discussions.

8. The Congress notes with satisfaction that :

a. Malta launched a process to reform local government in May 2008 on the 15th anniversary of the establishment of local councils. This reform should be applauded as it has led to a number of concrete

² Preliminary draft recommendation approved by the Monitoring Committee on 17 February 2011.

Members of the Committee :

M. Abuladze, L. Avetyan (alternate: E. Yeritsyan), A. Babayev, M. Barcina Angulo, V. Belikov, M. Bespalova, Z. Broz, X. Cadoret, M. Capdevila Allares, D. Chichinadze, B. Collin-Langen, M. Cools, J. Costa, G. Doganoglu, M. Fabbri, M. Gaju, V. Gebel, G. Geguzinskas, M. Guegan, M. Gulevskiy, H. Halldorsson, B. Hirs, J. Hlinka, C. Hughes, S. James, A. Jaunsleinis (alternate: N. Stepanovs), J-P. Klein, I. Kulichenko, J. Landberg (alternate: M. Juhkami), F. Lec, I. Loizidou, T. Margaryan, G. Marsan, V. Mc Hugh, M. Merrild, I. Micallef, M. Monesi (alternate: MG Sassi), A. Muzio, L.O. Molin, A. Ocana Rabadan, R. Rautava (alternate: S. Ruponen), H. Richtermocova, A. Rokofillou, D. Ruseva, S. Sallaku, V. Sau, W. Schuster, G. Spartanski, M. Tamiros, A. Torres Pereira, V. Udovychenko, A. Ugues, P. Van Der Velden, L. Vennesland, H. Weninger, K. Whitmore, J. Wiene, N. Zeybekci, D. Zmegac.

N.B. : The names of members who took part in the vote are in italics.

Secretariat of the Committee : S. Poirel, S. Cankocak and L. Nikoghosyan

³ Following the Congress reform, the monitoring activities carried out by this Committee were taken over by the Monitoring Committee set up on 1st December 2010.

actions, including the amendment of the Local Councils Act in 2009 and the creation of regions in 2010;

b. the progress made on certain issues by the Maltese national authorities in accordance with Recommendation 122 (2002) such as the financial compensation of local elected representatives.

9. However, there remain some issues of concern:

a. primarily, that the local councils are still not responsible for a 'substantial share of public affairs' as required by Article 3 (1). Some more responsibilities have been granted to local councils since 2002 but they remain small and their accumulated importance limited;

b. also, taking into account the growth of the national economy of Malta, local council spending compared to the total public spending has rather decreased from the already very modest level observed 8 years ago.

10. Therefore, the Congress recommends that the Committee of Ministers invite the Maltese authorities to take account of the following suggestions with a view to the ongoing reform:

a. increase the share of public affairs and funds that the local authorities in Malta have the right and ability to regulate and manage;

b. reconsider some of the provisions regarding the status of executive secretaries in order to ensure that ministerial discretion does not hamper the freedom of local councils to select their main executive officer;

c. reconsider the tight system of financial monitoring and control that is currently in place, in order to promote local responsibility and the freedom to determine expenditure priorities which would encourage the growth of a system of genuine local self-government;

d. given the importance of local taxation for the development of a system of responsible local self-government, the Maltese authorities are again invited to introduce such a system. To overcome the objections to local taxes and in order to train municipalities to deal with taxation issues, the Maltese authorities should consider, as a first step, the possibility of transferring some state taxes to local authorities;

e. improve the system and practices of consultation and cooperation between central and local authorities in Malta, acknowledging the importance of the role of local councils as interlocutors and citizens' representatives;

f. introduce measures, in co-ordination with local authorities, to encourage and enable women's access to local political office to ensure a more balanced representation;⁴

g. to grant the city of Valletta a special status, on the basis of Congress Recommendation 219 (2007), establishing different legal arrangements to take account of the particular situation of the capital compared with other municipalities;

h. to take care that the ongoing reforms regarding supplementary levels of territorial self government (communities (hamlets) and regions) do not dilute the already limited resources and functions of local councils.

⁴ Recommendation 68 (1999) on women's participation in political life in the regions of Europe.

B. EXPLANATORY MEMORANDUM BY EMIL CALOTA, RAPPORTEUR**Table of contents**

| | | |
|------|---|----|
| I. | Introduction | 4 |
| II. | Background information: territorial organisation | 5 |
| III. | The legal basis of local self-government in Malta..... | 5 |
| IV. | On compliance with the European Charter of Local Self-Government..... | 6 |
| V. | General conclusions on compliance with the Charter | 13 |
| VI. | Political appreciations and prospects for reform..... | 13 |

I. Introduction

1. Since 1994, the Congress of Local and Regional Authorities of the Council of Europe has been conducting a systematic programme of monitoring visits into the state of local and regional democracy in member states of the Council of Europe. The monitoring is always conducted by a delegation led by one or two rapporteurs appointed by a Congress Committee. The report of the investigation is placed before a Congress plenary session or a chamber, which adopts a recommendation to the national authorities concerned.

2. The monitoring visit is conducted and the report and recommendation are formulated in the light of the principles and standards established by the European Charter of Local Self-Government of 1985, eventually supplemented by other observations related to the status of local and regional democracy in the relevant member state. Even if a member state cannot properly be criticised on legal grounds for possible violation of Charter provisions by which it is not bound, its system of local and regional democracy may nevertheless attract critical remarks regarding its relationship with the principles and standards established by the European Charter of Local Self-Government seen as a whole.

3. The Institutional Committee of the Congress appointed Mr Emil Calota (Romania, SOC), President of the Institutional Committee of the Chamber of Local Authorities, to conduct a monitoring visit and to prepare a report on local democracy in Malta. The rapporteur was assisted by a consultant, Professor Eivind Smith (Vice-Chair of the Group of Independent Experts on the European Charter of Local Self-Government, Norway), and by Ms Nichola Howson (Congress secretariat).

4. On 21–23 June 2010, the Congress delegation conducted a monitoring visit to Malta. The programme of this visit is presented in Appendix 1. The delegation would like to thank all those it met in Malta for the open and informative dialogue as well as the Permanent Representation of Malta in Strasbourg and the Ministry of Foreign Affairs in Valletta for all their help in preparing the programme.

5. During the visit as well as by other means, legal and other documents have been provided by Maltese authorities or collected from other sources. In addition to the discussions held during the monitoring visit, the report reflects such written sources as well.

6. The 2010 monitoring took as important point of departure the documents adopted following the first ever monitoring of local democracy in Malta, carried out in 2002 (see namely explanatory memorandum CPL (9) 7 and Recommendation 122 (2002)). Unless particularly important or subject to later modifications, a number of issues addressed in these documents will not be reopened or fully developed in the following text.

7. One of the reasons why the 2010 monitoring of Malta was undertaken, was a letter of 26 May 2009 addressed to the President *ad interim* of the Congress, Dr Ian Micallef, from the Head of the Maltese delegation to the Congress and President of the Local Councils Association of Malta, Mr Michael Cohen, concerning the compatibility of a bill to amend the Local Councils Act, presented by the Government to the Parliament of Malta, with the European Charter of Local Self-Government. In the letter, certain questions regarding the recruitment and position of the executive secretaries were highlighted. Later in the report, particular attention will be paid to these issues.

8. Under the responsibility of the rapporteur, a preliminary version of the report was submitted to the Maltese authorities for possible comments.

9. Together with a preliminary draft recommendation, the draft report was submitted to the Monitoring Committee on 17 February 2011. On this basis, the Congress was invited to adopt a recommendation and address it to the Maltese authorities as well as to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

II. Background information: territorial organisation

10. After more than 150 years of British colonial rule, including a short period of elected local administration under British sovereignty, Malta achieved its independence under the Constitution of 1964. Ten years later (1974), the present Republic of Malta was established. The official languages are Maltese and English and the administration may, for all official purposes, use either of these languages (Article 5 (2) of the Constitution).

11. The Republic consists mainly of the islands of Malta and Gozo, of which the former is by far the biggest and most populated. The territory (316 square kilometres) makes Malta one of the smallest member states of the Council of Europe. The same goes for the size of the population (2009: 405,000). At the same time, Malta is the most densely populated country in Europe (some 1,211 persons per sq. kilometre). Together, these facts are important for understanding the situation of local and regional democracy in Malta.

12. According to the Constitution, Malta is a unitary state with no federal structure (we will later revert to the rather limited system of “regions” on its way to being established subsequent to a 2009 amendment to Article 73 (4) of the Local Councils Act). According to the Constitution, the only element of self-government below the level of the Republic itself is the system of local councils.

13. Until 1993, no local councils were established in Malta. Following the adoption of the Local Councils Act that year, 67 councils were established, a number later increased to the present level (68) by the creation of a new council (Mtarfa). The average population of a Maltese municipality is less than 6,000, the biggest counting some 21,000 inhabitants, the smallest some 400 inhabitants.

14. Notwithstanding the modest size of most of these localities, some councils have been further divided into “communities” (hamlets) according to Art. 47 A of the Local Councils Act as amended in 2009. Hamlets listed in the Ninth Schedule of the Act are run by an administrative committee directly elected by the residents of the relevant community.

15. During the 2002 monitoring report on Malta, local councils had been operating for less than 10 years. At that time, the system could best be understood – and praised – as the preliminary outcome of a deliberate move towards the establishment of local councils as a permanent part of the governmental structure of Malta. It was even presented this way by the Maltese authorities themselves.

16. In 2010, the Congress delegation’s main task is to assess the development of the system since 2002. If it should still be understood in light of the size and the unitary character of the Republic of Malta (see above), the system has now been in existence for 17 years. By consequence, it seems reasonable to expect a more developed and mature system of local self-government than during the first ever monitoring mission.

III. The legal basis of local self-government in Malta

17. Subsequent to its adoption in 1993, the Local Councils Act has been amended on several occasions up to 2009. The Act is by far the most important legal document regarding the situation of local self-government in Malta and offers the single most important basis for further remarks on Malta’s compliance with the principles and standards established by the European Charter of Local Self-Government.

18. By virtue of a constitutional amendment in 2001 adding a new Chapter XA to the Constitution, the system of local councils is now entrenched in the Constitution in the following way (Article 115A):

19. "The State shall adopt a system of local government whereby the territory of Malta shall be divided into such number of localities as may by law be from time to time determined, each locality to be administered by a Local Council elected by the residents of the locality and established and operating in term of such law as may from time to time be in force."

20. Following the adoption of the Local Councils Act, the Cabinet, on 12 July 1993, decided to sign and later ratify the Charter of Local Self-Government of 1985. The signature took place on 13 July 1993 and the Charter was ratified on 6 September of the same year.

21. According to the deposed instruments, Malta declared itself to be bound by Article 2, Article 3, paragraphs 1-2, Article 4, paragraphs 1-6, Article 5, Article 6, paragraphs 1-2, Article 7, paragraphs 1 and 3, Article 8, paragraphs 1-3, Article 9, paragraphs 1, 2, 7 and 8, Article 10, paragraphs 1-3 and Article 11 of the Charter of Local Self-Government (see Article 12 of the Charter).

22. Shortly after the 2010 monitoring visit, the Government of Malta notified the Secretary General of the Council of Europe (by letter of 2 August from its Permanent Representation to the Council of Europe) of its decision to adhere to Articles 7 (2) and 9 (4-6) of the European Charter of Local Self-Government. The reasons invoked bring to the forefront "the recent reform in the local councils legislation" as well as the fact that "Malta is already compliant with the above-mentioned four paragraphs". The latter part of the statement corresponds at least partly to the similar observation highlighted already in the 2002 monitoring report.

23. In this way, the only remaining reservation to the applicability of the European Charter of Local Self-Government to Malta comprises Article 9 (3) on local taxes and charges.

24. From a strictly legal point of view, a member state could not – as already noted – be criticised for not complying with provisions by which it is not bound. At the same time, however, it is the task of the Rapporteur to study the state of local democracy in the light not only of particular provisions, but also of the more general principles and standards enshrined in the Charter. This task is not only of a legal but also of a more open, political character. By consequence, the present report will take the entirety of the provisions of the Charter into account as far as needed for carrying out the task of comprehensively monitoring local democracy in Malta.

IV. On compliance with the European Charter of Local Self-Government

25. Neither the text of the Constitution nor that of the Maltese Local Councils Act explicitly recognise "the principle of local self-government" in accordance with Article 2 of the Charter. It has been explained, however, that under the historical context of the Republic of Malta the term "self-government" is easily read as a reference to "home rule" under the British Empire. In any case, the Constitution explicitly states that each locality shall be "administered by a Local Council elected by the residents of the locality". These words may most reasonably be understood as a reference to "local self-government" through elected representatives. Moreover, the Constitution clearly provides that local councils shall operate "in terms of such laws as may from time to time be in force", a provision that is well in accordance with the principle laid down in Articles 3 (1) and 4 of the Charter. Altogether there is no ground to suggest that Article 2 of the Charter is violated by the present state of Maltese law.

26. Under Article 3 (1) of the Charter, the right of local councils to "regulate and manage a substantial share of public affairs" constitutes an important part of the very notion of "local self-government". However, the provision is intimately related to the subsidiarity principle as enshrined in Article 4 (3) of the Charter. We will address the question to what extent this right is respected by the present system of local councils in Malta in relation to the latter provision.

27. Under Article 3 (2) of the Charter, the right of local authorities shall be exercised by councils freely elected by secret ballot on the basis of direct, equal and universal suffrage. As far as known to the Congress delegation, it has not been argued that this requirement is not met by the electoral system.

28. According to Article 3 (2) of the Charter, local councils may possess executive organs responsible to them. Insofar as the Mayor may be considered an executive organ of the relevant local council under Part III of the Local Councils Act (see namely Articles 26 and 27 of the Act), the responsibility

criterion does not seem to give rise to serious concern. Even if the Mayor and Deputy Mayor, according to recent legislative reform, are no longer elected by the Council but directly by the electorate (Article 25 of the Act), both shall cease to hold office upon a vote of no confidence delivered, subject to certain conditions, by a majority of the councillors in office (Article 29 of the Act).

29. However, the Local Councils Act establishes the executive secretary as “the executive, administrative and financial head of the Council”. This is why the mandatory position of the executive secretary should be examined not only under the provisions of the European Charter addressing the administrative structures of local councils (Article 6, see below), but even under Article 3 (2). The complaint received by the Congress regarding elements of the position of the executive secretary under the 2009 amendment of the Local Councils Act actually constitutes an important part of the reasons why it was decided to submit Malta to a renewed monitoring in the course of 2010.

30. In which way could the executive secretary, in his/her capacity as “the executive, administrative and financial head of the Council”, be characterised as “responsible” to the local council in the sense retained by Article 3 (2) of the Charter?

31. A first aspect of this question relates to the appointment of the executive secretary. Under the Local Councils Act as amended in 2009, it is made by the local council “following the approval of the Minister” (paragraph 2). In other words, ministerial approval is required after the local council has nominated a public official from the pool as cited in Article 49 (3) (see further below). For the Charter to be fully satisfied, the approval should amount to a mere formality once a council has made its decision and the nominee – in principle fully qualified because already admitted in the pool – has accepted the proposal. No indication of a practise contrary to this requirement was received during the Congress delegation’s visit to Malta and to the extent that this situation continues, no acute problem regarding the Charter would appear. However, Malta should consider to completely abandon the need for approval by the Minister.

32. In this respect, it is worthwhile noting that the recent establishment of a pool of potential executive secretaries amongst civil servants, to which we will now turn, is in itself likely to provide enhanced quality and job security for the relevant persons and in a way allows the local council more latitude for selecting, as well as removing, the executive secretary at its own discretion.

33. “The Executive Secretary shall be a public service official chosen from a pool of persons for this purpose” (Article 49 (3) of the Local Councils Act). From what was said in the previous paragraph, it follows that the effective freedom of the local council to choose its own executive secretary depends even on the size and composition of the pool of potential executive secretaries.

34. This question was deliberately highlighted during the delegation’s visit to Malta. Our clear understanding is:

a) that the pool is established, first, in order to secure a minimum of professional skills by proposing a training course to people wishing to be admitted in the pool, cf. the requirement under Article 6 (2) of the Charter of a system permitting the recruitment “high-quality staff on the basis of merit and competence”;

b) that the pool is aiming at increasing the possibility of achieving this first goal by securing a reasonable degree of job security and career prospects (cf. Article 6 (2) of the Charter), aims the fulfilment of which would otherwise be most limited indeed by the limited number of Local Councils in Malta and the small population of most of them;

c) that the number of potential executive secretaries admitted in the pool is comfortably higher than the number of executive secretaries posts available at each given moment (see Article 49 (5) of the Act);

d) that the pool is open for new candidates fulfilling legal requirements for professional skills and training, and

e) that merit, not considerations of a party-political kind, is meant to determine the composition of the pool, a point that is actually of prime importance in a policy in which the mentalities seem so heavily

impregnated by bi-partisan approaches and the kind of scepticism towards the other that such mentalities so easily create.

35. These impressions are largely confirmed by information provided in e-mails of 15 and 16 August, 2010 from Mr Martin Bugelli, Director General (Information, Local Government and Public Consultation) at the Office of the Prime Minister. According to him, "no Ministerial approval is required for suitable individuals to be admitted in the pool for prospective executive secretaries". When a call for expression of interest for admittance is issued, "admittance to the pool is on the basis of the successful completion of a training course for executive secretaries, from among members of the public service who are already at the requisite level of seniority. Therefore, as such no person or authority decides, but one needs to have followed the course successfully." In this way, no discretionary power likely to hamper the freedom of choice of local councils unduly is likely to occur. To the contrary, the system is intended "to make sure that they all have the required standard of ability". However, there are legitimate concerns that the size of the pool is limited by allowing only members of the civil service to enter it. It could be envisaged that members of the public (with the requisite level of education) could be allowed to follow the training and, upon successful passing of an examination, could enter the executive secretary pool, ensuring a wider choice for Local Councils. Indeed, it would be appropriate for Local Councils to be consulted on the training and standard required for effective executive secretaries.

36. We may now conclude that as a whole, the new system of recruitment of executive secretaries represents a legitimate compromise between the freedom of choice of the local councils and the different problems related to size. Under the particular conditions regarding Malta, it does not in itself seem to contradict the principles of the European Charter of Local Self-Government.

37. A second aspect of the question is to know whether the executive secretary's "responsibility" to the local council in the sense retained by Article 3 (2) of the Charter council, concerns the possibility for the council to remove its executive secretary in cases of mismanagement, disagreement or other legitimate considerations. One point of departure to be kept in mind is that the executive secretary is an employee with legitimate claims of some job security according to labour law standards, an element of weight even when it comes to the prospects for recruiting high qualified staff. Another may be derived from the responsibility criterion. In an effort of balancing the two main arguments, the Local Councils Act, as amended in 2009, disposes that an executive secretary may be removed or transferred from one Council to another by the Minister by virtue of a reasoned request of the relevant Council (a), at the request of the EC himself (b) or of the Department for Local Government upon observations (by the auditors or others) of qualified mismanagement.

38. Among the cases of removal embedded in Article 49 (6), points (b) and (c) hardly raise problems regarding the scope of the monitoring mission. As to point (a), on the other hand, it seems clear that the final power of the Minister, not of the local council itself, and the fact that the Minister is given some scope of discretion ("may") are problematic regarding the principles of the Charter.

39. The problems increase to the extent that the reasons brought forward by the majority of the council are *de facto* evaluated according to what the Minister (and/or his services) would prefer. On the other hand, motions of removal based upon grounds that appear to be *ultra vires*, may not be completely excluded, at least in principle. Insofar as the Minister's discretion is used solely in cases where the grounds appear as clearly illegitimate under the rule of law, thus being used as a safeguard for the relevant executive secretary as an employee, the responsibility criterion seems nevertheless taken care of; in cases of disagreement, the Council would even have the right to address the judiciary in order to having the refusal quashed (see underneath). If, on the other hand, the Minister's power under Article 49 (6) (a) of the Act should appear as being construed considerably wider in practise, it would easily appear as a violation of the Charter.

40. A full appraisal under Article 3 (1) of the Charter must take both above-mentioned aspects into account. According to the Congress delegation's overall assessment, the present Maltese system conforms to the quest for an executive responsible towards the Council. However, this conclusion is reached only subject to a number of conditions (on the non-use of ministerial discretion) spelled out in the previous paragraphs. The balance between sometimes conflicting considerations and interests clearly remains delicate. Should the present system be considerably altered by law or in practice, the question of its conformity with the Charter should be raised anew.

41. Under Article 4 (1) of the Charter, the basic powers and responsibilities of local authorities shall be prescribed by constitution or by statute. Whereas the Constitution of Malta does not address this issue, Article 33 of the Local Councils Act contains quite detailed provisions on the powers and responsibilities of local councils, including some openings for further delegation or agreement.

42. The fact that, under Article 33 (x) of the Local Councils Act, the power of the Government to delegate powers to a council through a Minister by means of orders published in the official Gazette may, in principle, be used unilaterally without the consent of the relevant council, may give rise to some concern. In practice, it seems as if orders under this provision are issued solely according to previous agreement between the Local Councils Association and the relevant authority and that the individual council has undisputed freedom not to join. It might nevertheless be worthwhile to explicitly codify the system of consultation or agreement before unilateral orders are issued (see also below on Article 4 (6) of the Charter).

43. Under Article 4 (2) of the Charter, local authorities shall have full discretion, within the limits of the law, to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority. In accordance, Article 33 (z) of the Local Councils Act explicitly states that it is within the functions of each local council to provide for all such other works, things, matters and services [than those dealt with in Article 33 (a)-(x)] which are not excluded from a Council's competence by any law for the time being in force, nor assigned to any other authority. The remaining problem thus seems to concern the most limited financial and labour resources at the disposal of local councils for undertaking supplementary tasks.

44. Article 4 (3) of the Charter lays down the principle according to which public responsibilities shall generally be exercised, in preference, by those authorities, which are closest to the citizen (the so-called subsidiarity principle). This provision must be read in connection with local authorities' right to regulate and manage a "substantial share of public affairs" (Article 3 (1) of the Charter, see above).

45. In 2002, it was observed that the local councils in Malta had been endowed with functions in a progressive but quite cautious manner. Many of the steps were rather small, and were hardly, even put together, impressive neither in number nor in importance when compared to the state of local self-government in a number of other member states. Close to ten years later (2010), the legislative list of functions for local councils has been extended at several occasions. But at the same time, the scope of functions of central government has developed as well, and the overall assessment would be the same. This is the reason why the 2002 advice that the progressive development be steadily continued and preferably speeded up towards a situation where the functions of local councils as part of the total public administration in Malta becomes more important, remains perfectly valid.

46. This appreciation is further strengthened by another way of measuring the relative importance of the part of public affairs regulated and managed by the local councils: the amount of local council spending as compared to central government spending in Malta. The exact numbers may be calculated in different ways and may not be fully representative and not fully comparable with the 2002 report. From the 2002 report, the following statement may nevertheless be quoted:

47. "Data provided by the relevant Maltese Ministry are extracted from the Local Councils Audit Report as well as from the Annual Administrative Report, both of which are open to public viewing. They show the following percentages of local council spending as compared to central government spending: 1995: 2.2, 1996: 2.2, 1997: 1.8, 1998: 1.7, 1999: 1.7, and 2000: 2.3. These figures make it evident that this part remains small in comparison with the part spent by local self-government in most of the other member states of the Charter. They also highlight the fact that no evident tendency of improvement has manifested itself during the period upon which data have been available."

48. According to statistics provided in 2010 by the Local Councils Association, the share of total spending in 2008 (the last available year) represented 1.10 % only. According to statistics provided to us on 30 July 2010 by Martin Bugelli, Director General of Local Government at the Prime Minister's Office, the 2008 share was 1,04 %, mounting to 1,27 % in 2009 and 1,28 % foreseen in 2010.

49. The differences in the numbers provided are of little or no importance in the present context. What is important is the overwhelming impression of a most limited role of local councils in the overall running of the Republic of Malta. The least that could be said is that it remains open to serious doubt whether the present system of local self-government complies with the requirement under Article 3 (1)

of the Charter that local authorities have the right to regulate and manage a “substantial share of public affairs”.

50. Under Article 4 (4) of the Charter, powers given to local authorities shall normally be full and exclusive and powers given to other authorities to limit that freedom must be provided by law, whereas Article 4 (5) requires that local authorities, insofar as possible, shall be allowed discretion in adapting the exercise of delegated powers to local conditions. As far as is known to the Congress Delegation, the legislation in force could generally be said to conform to this requirement.

51. Under Article 4 (6) local authorities shall be consulted in the planning and decision-making processes for all matters which concern them directly. Maltese law contains a number of provisions to this effect, and the overall impression is that this part of the Charter is well taken care of. On the other hand, critical observations were aired – like in 2002 – as to the reality of the consultation processes when it comes to some of the independent central agencies under Maltese law. The delegation is left with the clear impression that there is still need for improvements in the system and practices of consultation and co-operation between central and local authorities in Malta. At the core of the efforts in this sense, the importance of the role of local councils as interlocutors and citizens’ representatives in the overall running of the public sector should be stressed.

52. Under Article 5 of the Charter, changes in the boundaries of local councils shall not be made without prior consultation of the communities concerned. Maltese law still seems to cope well with this requirement.

53. Under Article 6 (1) of the Charter, local authorities shall be able to determine their own internal administrative structure in order to adapt them to local needs and ensure effective management, without prejudice to more general statutory provisions. In the context of Malta, this provision gives rise to two series of questions. One concerns the office of executive secretary, another the regulation of the size of the administrative staff of each council.

54. The obligation under Article 49 (1) of the Local Councils Act for each council to have an executive secretary is not in itself in breach of the Charter, which clearly states that more general statutory provisions may apply. As a matter of fact, comparable provisions are not uncommon in other member states, aiming to ensure some permanence in the running of the local council and to maintain some distinction between “political” functions (to be carried out by the council and the mayor) and “administrative” functions (meant primarily to be carried out by the executive secretary). The relationship between the executive secretary and the local council is further addressed in connection with Article 3 (1) of the Charter (see above).

55. Under Article 53 (1) of the Local Councils Act a council may not, in addition to the executive secretary and with some qualifications, employ more than one person per two thousand five hundred residents. However reasonable such limitations may be under financial and other perspectives, they give grounds for concern when seen in combination with the right of local councils to undertake activities not prescribed by law (Article 4 (2) of the Charter) and their right to adapt the exercise of functions to local conditions (Article 4 (5) of the Charter). This appreciation must be tempered, namely, by local councils’ right to have recourse to supplementary services by contract. It seems as if this possibility is frequently used, even when it comes to clerical services for which ministerial approval is required in each case. In this way, their global possibility of adapting the total work-force to local needs does not seem to be seriously hampered.

56. As to Article 6 (2) of the Charter according to which the conditions of service of local government employees shall meet with certain standards including the need of recruiting high quality staff and adequate career opportunities, suffice it here to refer back to what has previously been said about the recruitment of executive secretaries.

57. According to Article 7 of the Charter, the conditions of office of local elected representatives shall provide for free exercise of their functions. This requires, among others, a reasonable financial compensation. Since 2002, the legislation on this point has been substantially improved and only few complaints were heard during the visit of the Congress Delegation. In this respect, the provisions of Article 32 (1) of the Local Councils Act must be understood in light of the fact that in Malta, even members of parliament are paid only on a part-time basis.

58. Under Article 8 of the Charter, administrative supervision of local authorities may only be exercised according to provisions in the Constitution or in statutory law, shall normally aim only at ensuring the compliance with the law and be exercised in a way in which the intervention of the controlling authority is kept in proportion to the interests protected. The general impression is that this requirement is taken care of under Maltese law. Moreover, local councils have access to the judiciary in case of disagreement over the limits of the freedom to act under the law (see further below).

59. Under Maltese law, accounting control is mainly carried out under the responsibility of the Auditor General, an officer of the House of Representatives acting independently from the executive branch of government under Article 108 of the Constitution. Under Article 65 of the Local Councils Act, the Auditor General appoints a local government auditor to audit the accounts of each local council. The report on each financial year is submitted to the Auditor General, who forwards copies to the relevant Minister, the Minister of Finance and the respective council. As a matter of principle, the auditing process is limited to the compliance of Local Councils with the financial regulations existing from time to time. Neither by law nor in practice, the system seems to give rise to concern when it comes to compliance with Article 8 of the Charter. Even the Parliament's Public Accounts Committee receives copies through the relevant Minister. The Auditor General's main report is discussed in this Committee, which is free to hear representatives of local councils and to adopt recommendations as to future measures to be taken.

60. Even if the general impression is that the principle of control based on legality, less than on more global value for money or expediency issues, is well observed under Maltese law, the Congress Delegation left Malta with a strong impression of a system of administrative monitoring (including accounting) of local councils which is relatively tight. It may be said that the present system insists much more on preventive or even day-to-day control (by the executive secretaries and others) than on verifying in the aftermath whether wrongdoings have been committed. Presumably, this situation may be explained, at least in part, by the relatively young age of the system of local councils in Malta. But it seems legitimate to suggest that it may even enclose an element of distrust in the operation of local councils as its offspring, while in turn contributing to keeping the latter in a kind of client position towards central government. Even if no clear violation of the Charter may be found at this particular point, Malta should therefore reconsider the totality of its system of monitoring and control in a way more likely to enhance local responsibility and, by the same token, the growth of a system of genuine local self-government.

61. Under Article 9 (1) of the Charter, local authorities shall be entitled to adequate financial resources of their own, which they may dispose of freely within the framework of their powers. According to the explanatory report, the provision seeks to ensure that local authorities are not deprived of their freedom to determine expenditure priorities. Basic allocations to local councils are given as lump sums according to the Eighth Schedule to the Local Councils Act, containing rather detailed provisions regarding the distribution of available resources effectively ring-fencing them. To this should be added, however, a number of single purpose schemes, etc. under which separate grants are paid out. Seen in conjunction with the rather detailed list of mandatory tasks devoted to local councils under Article 33 (a)-(u), it seems open to some doubt whether the system really copes with the requirement that local councils have financial resources which they may dispose of freely.

62. Under Article 9 (2) of the Charter, the financial resources of local councils shall be equal to their responsibilities. In Malta, by far the most important part of the resources of Local Councils come from central government allocations under Article 55 of the Local Councils Act and the more detailed provisions laid down in the Eighth Schedule to which it refers. The Congress delegation has no possibility of objectively verifying whether the affirmed aim of the funding system, i.e. ensuring that councils are fully funded and in a position to effectively discharge all the responsibilities transferred to them from central government while leaving reasonable space for the freedom of local councils to provide for non-mandatory works, matters and services, is effectively achieved. It is nevertheless interesting to note that during its visit to Malta, problems at this point were not among those highlighted by representatives of local councils. Altogether, the Delegation sees no solid grounds for concern at this point as the system actually operates.

63. Article 9 (3) of the Charter requires that at least part of the financial resources of local authorities derives from local taxes or charges of which they have some power to determine the rate. Since August 2010, this is the only provision of the Charter by which Malta is not bound. The choice is quite

deliberate, no power of taxation is enjoyed by local councils and a strikingly broad consensus that there should be no such thing as “local taxation” seems to exist. Consequently, it seems clear that this part of Article 9 (3) of the Charter is not observed by the present state of Maltese law.

64. The most limited income earned by local councils through such as the power to propose and to benefit from fines under Article 36 of the Local Councils Act and by virtue of delegated powers to collect penalties by agreement under Article 33 (w) of the Act, seem unlikely to considerably change the appreciation in the previous paragraph.

65. In principle, Article 9 (5) of the Charter regarding equalisation and redistribution may be supposed to be satisfied by the system of central government allocations under Article 55 and the tenth Schedule of the Local Councils Act (see above), a system under which the distribution formula are frequently adjusted following reports, propositions and discussions between central government and (representatives of) local councils.

66. Whereas the general allocations scheme under Article 55 and the Eighth Schedule of the Local Councils Act seem to meet the requirements under Article 9 (7) of the Charter that grants to local authorities shall not be earmarked for the financing of specific projects, the rising importance of “schemes” for the realisation of specific purposes may – at least in the long run – entail the withdrawal of the rather unconditional acceptance at this point ventured in the 2002 Congress documents.

67. Under Article 9 (8) of the Charter, local authorities shall have access to borrowing for capital investments within the limits of the law. However, the Local Councils Act outlaws any works with a cost which exceeds the annual provision allotted for each financial year unless explicitly authorised by the relevant Minister acting in concurrence with the Minister of Finance. When exceptions are allowed, they are supposed to be met by the allocation of supplementary funds by central government, not by money borrowed in the capital market. If this limitation does not seem to give rise to acute disputes in practice, the limitation at this point nevertheless gives rise to concern when it comes to Malta’s observance of the Charter.

68. According to Article 10 (1) of the Charter, local authorities shall be entitled to co-operate and to form consortia with other local authorities in order to carry out tasks of common interest. Under Article 37 (1) of the Local Councils Act, two or more local councils may discharge any of their functions jointly and they may also arrange for the discharge of these functions by a joint committee of theirs or by an officer of one of them, and such possibilities have been used quite extensively by a number of local councils.

69. Under Article 10 (2) of the Charter, local authorities shall have the right to belong to an association for the protection and promotion of their common interests, as well as to international associations. Both requirements are met by the provisions enshrined in Article 37 (3) of the Local Councils Act (at national level, membership is even mandatory), and the Local Councils Association is quite active notwithstanding limited clerical and other resources.

70. According to Article 10 (3) of the Charter, local authorities shall have the right to co-operate with their counterparts in other states. According to Article 79 of the Local Councils Act, local councils have the right to make twinning arrangements with any city, town, village or other locality in any country, subject, however, to the approval by the Minister on the basis of an opinion of the Local Councils Association. A considerable number of twinning agreements have been entered into.

71. In Malta, local councils are explicitly granted “the right to challenge in court any decision which in any way interferes with the free exercise of their powers granted by this Act” (Article 38 of the Local Councils Act). Insofar as the relevant provisions are concentrated in this Act or taken by virtue of it, and even more to the extent that the principles of the Charter are introduced in Maltese law by it, however, this limitation gives no particular grounds for concern in respect of Article 11 of the Charter. It would be interesting to know more about why the practical use of the access to justice seems to be close to non-existent.

V. General conclusions on compliance with the Charter

72. The overall impression following the point-to-point scrutiny carried out in part IV of the report, remains the same as in 2002, i.e. that Malta complies well with a number of provisions in the Charter, albeit sometimes with room for further improvement or under certain conditions (as to the use of discretionary power, etc.). The most positive fact that Malta has considerably extended the scope of its obligations under the Charter has in no way undermined this general impression.

73. On a limited number of points, however, a more critical appreciation seems justified, not the least because the Maltese local councils system has nearly doubled its age since 2002 and could legitimately be expected to be equally more mature. We will limit ourselves to two remarks of considerable general bearing.

74. First, it is hard to see that Malta complies with its obligations under Article 3 (1), requiring that a "substantial share of public affairs" be devoted to Local Councils, read in conjunction with Article 4 (3) on the subsidiarity principle. In 2002, the Congress delegation noted that local councils in Malta had been endowed with functions in a quite cautious manner, and that even put together, the steps were hardly impressive neither in number nor importance when compared to the state of local self-government in a number of other member states of the Charter. Since then, more steps have been taken but most of them remain limited, whereas the national economy of Malta has been growing. In this way, local councils' spending compared to the total public spending has rather decreased from the very modest level observed around 2000. In any case, no evident tendency of improvement can be seen and it remains open to serious doubt whether the requirements under Articles 3 (1) and 4 (3) of the Charter are met.

75. The second more fundamental observation of a negative kind concerns the only Charter provision by which Malta is still not bound: Article 9 (3) requires that part at least of the financial resources of local authorities derives from local taxes or charges of which they have some power to determine the rate. Whereas some charges are actually levied, no power of taxation is enjoyed by local councils in Malta. By consequence, it seems clear that Article 9 (3) is not observed by the present state of Maltese law.

76. Historical arguments as well as considerations regarding the size of Malta has been presented in defence of the present situation, that corresponds to a consensus that seems strikingly broad that no such thing as "local taxation" should be introduced in Malta. Nevertheless, the importance of local taxation for the development of responsible local self-government strongly recommends that Maltese authorities further consider the possibility of introducing a system of local taxes through a step-by-step approach similar to the one so far used for introducing the present system of local self-government itself. For instance, this could be achieved by transferring a portion of state taxes to a scheme of local taxes without increasing the overall fiscal burden, thus accustoming the public to what might later become a full-fledged system of local taxation in conformity with Article 9 (3) of the Charter of Local Self-Government.

VI. Political appreciations and prospects for reform

77. When it comes to the political appreciations on the present situation and on prospects for development and reform, the 'tour de force' needed to establish local authorities almost from scratch in 1993 should be recalled and valued.

78. Since the visit, the withdrawal (2 August 2010) of most of Malta's reservations to the Charter in the immediate aftermath of the Congress Delegation's visit deserves praise.

79. As to the development in the Maltese system since 2002, namely through the reform of the Local Councils Act in 2009, a number of improvements may be noted, including the new latitude in the system of financial compensation to local elected officers. After a closer look, even the new system of training and selection of executive secretaries appears to carry a number of positive elements in the scope of the Charter.

80. On the other hand, it is at least doubtful to what extent the "deliberate move towards the establishment of local councils as a permanent part of the governmental structure of Malta" highlighted

in the 2002 Congress documents, has really been continued to the extent that could reasonably be envisaged less than ten years after the establishment of the system. The general impression is that the steps accomplished remain small and their accumulated importance limited. In any case, local councils are still far from enjoying the right to regulate a substantial share of public affairs required by the Charter.

81. The prospect for development is further hampered by the absence of local taxes which would enhance the responsibility of the local communities and the councillors themselves. To the contrary, the largely predominant dependence on central government money, including single-purpose schemes, etc. may be supposed to maintain local councils in a kind of client relationship to the financing and monitoring authorities at national level.

82. During the delegation's meeting with the Mayor of Valletta, Dr Alexiei Dingli, the specificities and responsibilities of the capital city was discussed in comparison to other municipalities. Valletta has the unusual situation where during the night it has a population of approximately 7,000 but during the day the population is tripled. It is advised that the city of Valletta receive a special legal status recognising the capital's importance in the country and its particular responsibilities.⁵

83. During the visit the Congress delegation met with many mayors and was struck by the fact that there is a distinct lack of women's participation in local government at this level. Out of 68 local councils only 7 are headed by women mayors. There can be no doubt that this situation should and could be greatly improved and positive measures need to be introduced in Malta to facilitate women's access to public and political office.⁶

84. In the scope of the Charter, the development of communities (hamlets) within the geographical limits of some of the Councils can hardly be criticised in itself. But their legal claim of a proportionate part of the resources of the relevant Local Council itself (Article 47 (9) of the Local Councils Act) may easily contribute to diluting the already limited financial resources at the disposal of the Council. In this way, the system is most different from one in which the councils enjoy some freedom to organise their local activities according to their own wishes and the needs not only of the residents of the hamlet, but according to those of the municipality as a whole. The need for further reflection at this point is further underscored by the relatively small size of Maltese local councils, even those which have communities (hamlets) within their geographical boundaries.

85. The recent (2009) creation of a regional level in Malta should be welcomed. Yet when the small size of the Republic – by way of territory as well as of population – is taken into account, it may nevertheless be worthwhile asking why so many as four regions on the island of Malta (plus one for the island of Gozo) has been found to be needed? Could it not be said that fewer and therefore bigger regions would provide increased abilities at regional level to take over parts of the tasks actually exercised by central government? Even if the reform is still (summer 2010) in the course of realisation, the overall impression of the Congress Delegation is that at present, the regions should not be endowed with functions hitherto exercised by local councils, which would dilute the resources of the latter without really increasing the overall role of sub-national authorities in Malta.

86. When leaving Malta, the Congress delegation was left with a striking impression that nobody really speaks about nor desires further devolution. Of course this impression – which actually corresponds with the common legal as well as current denomination of the local authorities in Malta – should be understood in the light of what has already been said about size. But mentally, it may be linked even to the way the local councils are seen, regulated, financed and controlled by national institutions of different kinds.

87. One example is provided by the system of *ex ante* controls. While generally not constructed in a way contradicting the Charter's requirements about legality, etc., it seems strikingly tight, from the outside (in the hands of central government, auditing, etc.) as well as from the inside of the council apparatus (through the executive secretaries). In the next run, the system may well be contributing to a state of mind seemingly characterised by limited faith in local councils, which in turn tend to limit

⁵ Recommendation 219 (2007) status of capital cities.

⁶ Recommendation 68 (1999) on women's participation in political life in the regions of Europe.

themselves to the execution of tasks devolved from central government while craving for more central government money.

88. If we turn to the Government's strategy for the reform of local councils (2009), in itself quite ambitious indeed, we are easily left with the impression that the councils' main task is to deliver high quality services. According to the document on "Reform of the Local Councils as a result of a consultation process", issued by the Prime Minister, Mr Lawrence Gonzi (2009), for instance, "The main objective of the reform" is "the best service for the residents of each locality".

89. It goes without saying that high quality services are important in themselves as well as for the legitimacy of the local authorities, and the Government's view at this point seems widely shared within the Maltese community. But services of different kinds may be produced and provided by a number of different instances, of which local councils are just one. It is hard to see that a strategy making this the "main objective" is the best one for enhancing and making understood the inherent values of genuine local self-government.

90. During the visit the delegation nevertheless noted with great pleasure the commitment and enthusiasm of all the interlocutors to further developing local self-government in Malta. Indeed, the initiative of reform of local self government which was launched in 2008, on the 15th anniversary of the creation of local councils, must be applauded. The three pillars (solidarity, subsidiarity and sustainability) on which the 'Local Councils 2015' vision is based, is indeed sound. With this in mind, it can only be expected that during the five years to come, local self-government in Malta will continue to develop in line with the European Charter of Local Self-Government.

Appendix

Programme of the monitoring visit of the Congress of Local and Regional Authorities in Malta

| | |
|-----------------|---|
| Mr Emil CALOTA | Rapporteur on local democracy, member of the Institutional Committee of the Congress, Romania |
| Mr Eivind SMITH | Vice-President of the Group of Independent Experts on the European Charter of Local Self-Government of the Congress, Norway |

Monday, 21 June 2010

Meeting with:

- Local Council's Association:

Mr Michael Cohen – President of LCA and Mayor of Kalkara
Ms Claudette Abela Baldacchino - Vice-President (President South-East Region)
Dr Ian Micallef - Vice-President (International) – Councillor of Gzira
Dr Malcolm Mifsud – Mayor of Pieta
Mr Paul Farrugia – Mayor of Tarxien (President Southern Region)
Mr Anthony Mifsud – Mayor of Mtarfa (President of Northern Region)
Mr Jimmy Magro – Secretary of the Maltese delegation to the Congress

- Mayors on mainland:

Mr Michael Fenech Adami - Mayor of Birkirkara (Central region)
Mr Jesmond Aquilina - Mayor of Qormi (South-East Region)
Nigel Holland - Mayor of Floriana (Southern Region)
Mr Sandro Craus - Mayor of Rabat (Northern Region)
Ms Graziella Galea - Mayor of San Pawl il-Ba
Mr Joe Farrugia – Mayor of Birzebugga

- Mr Henri Darmanin, author of a thesis on “Malta and the European Charter of Local Self-Government

- Chief Justice Vincent Degaetano, Constitutional Court

- Mr Alexiei Dingli, Mayor of Valletta

- Shadow Minister for Local Government, Hon Stefan Buontempo and Mr Paul Pace, Executive Secretary of Dingli Local Council

Tuesday, 22 June 2010

Meeting with:

- Local Councils' Executive Secretaries Association:

Mr Adrian Mifsud - President
Mr Paul Gatt - Vice President and Treasurer
Mr Kenneth Brincat - Secretary

- Dr Silvio Camilleri, Attorney General

- Mr Anthony C. Mifsud, Auditor General

Travel to Gozo

Meeting in Victoria Local Council with:

Dr Samuel Azzopardi - Mayor of Rabat (President Gozo Region)
Mr Joe Cordina - Mayor of Xaghra (Gozo)
Ms Monica Vella - Mayor of Xewkija (Gozo Region)
Ms Mary Portelli - Mayor of Nadur (Gozo Region)

Wednesday, 23 June 2010

Meeting with:

- Prof. Henry Frendo, Vice-President of the Group of Independent Experts on the Charter of Local Self-Government, Professor of History, University of Malta
- Mr Martin Bugelli, Director General for Information, Local Government and Public Consultation
- Hon Dr Chris Said, Parliamentary Secretary for Consumers, Fair Competition, Local Councils and Public Dialogue