

**CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS**

**(CCPE)**

**Questionnaire for the preparation of the CCPE Opinion No. 15 (2020):**

**The role of prosecutors in emergency situations**

**Replies by Malta**

**1. Has there been an emergency or similar situation declared in order to fight against COVID-19? (by which provisions (constitutional, other), part of the territory covered, duration)**

A situation of a public health emergency was declared on the 7<sup>th</sup> March 2020 in terms of an order issued by the Superintendent of Public Health under the Public Health Act . On this basis several extraordinary measures ordering limitations on various activities such as on gatherings, travel, closure of businesses, schools, markets and closure of the Courts except for urgent cases and cases where the Court deemed that the public interest in the hearing of the case should prevail, were implemented by other orders (subordinate legislation) issued under that Act.

The Emergency Powers Act was also amended to include health emergencies as situations which could give rise to the proclamation of a state of emergency under that Act but this power was not resorted to.

The Law Courts were closed on the 16<sup>th</sup> March 2020 subject to the limitations described above. All legal time limits were suspended.

The Court Registry was re-opened on the 4<sup>th</sup> May 2020 and the Law Courts on the 5<sup>th</sup> June 2020.

There was no recourse to a declaration of a State of Emergency under the Constitution or under Article 15 of the ECHR.

**2. Which rights have been affected as a result of this emergency situation? (i.e. freedom of assembly, freedom of movement, right to health, freedom of conscience and religion, etc.)**

The above rights, with the exception of the right to health, were all affected by the restrictions on the number of persons who could be together in public places ,and by the closure of a number of establishments including places of religious worship. The right to health was affected by the postponement of non-urgent appointments and surgical operations in the health sector due to the situation caused by the pandemic. Fear of contacting the disease also scared a number of persons away from doctors' clinics and hospitals, at times with serious consequences.

**3. In case of suspension or restriction of rights on public health grounds, which requirements have been necessary (i.e. legality, proportionality, adequacy of the measures, necessity) and which**

**principles (equality, non-discrimination) and limits must have been observed? (i.e. searches, restrictions relating to media, political parties, etc.)**

Respect of the above mentioned principles is required on a constitutional and fundamental human rights level for the imposition of restrictions of rights on health grounds but one can presume that public authorities enjoy a certain margin of appreciation in determining the necessity and the proportionality of the measures. Needless to say, if such measures are challenged it will be for the courts to decide whether the above principles were properly applied or not.

Several new de-penalised offences some of which carrying significant penalties (EUR 100, EUR 1000, EUR 3000 and EUR 10,000) were introduced in order to deter people from violating quarantine rules and other orders imposed as a result of the pandemic. The police visited homes where persons were supposed to be in quarantine in order to ascertain the presence of those persons in accordance with mandatory quarantine requirements.

There were no restrictions on reporting by the media or on statements made by political parties or any other civil society actors during the crisis.

**4.Has there been detected any kind of discrimination, also originating from private persons, against certain groups (for instance, health workers, racial and ethnic minorities), hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence?**

The closure of the ports and the airports during the emergency restricted the possibility for irregular migrants to come ashore. Steps were however taken to protect the safety of life of the migrants and several groups of migrants were also taken ashore during the crisis. Situations of migrants at sea and the fear of admitting large and disproportionate numbers of irregular migrants at such a time of health emergency did however cause fear and tensions. Reports on racist hate speech also increased and anti-immigrant demonstrations were also held by some small but vociferous groups.

**5.How the prosecution service has worked in emergency situation? (i.e. restraints imposed on prosecution services such as teleworking and limited possibilities to get to the working premises, to use the corresponding equipment, to interact with relevant professionals etc.)**

At the beginning and for a few weeks into the crisis almost all law offices, including private law offices, were closed or were teleworking or working from behind closed doors.

The prosecution service functioned on the basis of having a small skeleton staff at the Office premises on a rotation basis with the rest of the staff working from home. When court cases or bail applications were appointed for hearing however the lawyers concerned had to be in court irrespective of whether they had to be teleworking on the particular day.

Meetings were in the great majority held online.

After about two months into the crisis the situation developed into one where half the staff would be present in the office on any working day.

As from the 5<sup>th</sup> June 2020 all staff were required to attend the office regularly subject to necessary health precautions. Special teleworking arrangements were made only for vulnerable persons such as pregnant women.

**6. How criminal suspects in pre-trial detention have been dealt with? Article 5(3) of the European Convention on Human Rights requires trial within a reasonable time or release pending trial. But if the criminal courts are scarcely functioning, trials do not take place. Consequently, have criminal suspects been released from pre-trial detention? (even if they could have been dangerous). Or have the grounds for detention in custody and custody time limits been interpreted differently, according to the exceptional circumstances - in other words, has a "reasonable time" within the meaning of Art. 5(3) of the ECHR become longer**

There were no releases from prison attributable to the crisis. Bail hearings were still carried out and time limits for periods of arrest continued to be respected. The hearing of many cases on the merits was however postponed. The postponement of hearings on the merits was challenged in one case and the Court, delivering judgment at the time when the courts were still closed, decided that the situation in the particular case breached the rights of the accused under article 5(3) ECHR. The judgment is currently under appeal before the Constitutional Court.

**7. Has there been any particular intervention of the prosecution service in the emergency situation (i.e. in the case of Portugal, the Prosecutor General's Office has been in permanent session during the whole duration of the emergency situation in order to defend the principle of legality and the rights of citizens)**

The prosecution service continued to function on a continuous basis during the crisis, albeit in the situation of significantly reduced court activity described above. Prosecutors continued to be available on a 24x7 basis for urgent cases and advice.

**8. Have there been crisis response teams created within the prosecution service and at which level (central, regional, local)?**

Apart from the Police who prosecute before the Magistrates Courts, the Office of the Attorney General is the only prosecution service in Malta and is housed in one office. Responses were decided either between the highest officials or, in many cases at meetings of all prosecutors. There was consultation with the police on specific measures related to the crisis.

**9. Have there been guidelines to address the emergency situation issued for the prosecution service and at which level? What measures have been taken regarding shifts of prosecutors (for urgent matters, or during the period where courts have been mostly closed or with their activity significantly reduced) and the replacement of infected prosecutors?**

There were luckily no infected prosecutors and prosecutors suffering from certain conditions which made them more vulnerable were reasonably accommodated in the duties which they were asked to perform other than from their homes. Prosecutors were always kept available seven days a week for

urgent matters and a skeleton staff system operated throughout the crisis. The office premises were never closed. Directives or guidelines were issued on an 'ad hoc' basis as the situation unfolded by the Attorney General and the Deputy Attorney General in consultation with the other prosecutors.

**10. Has there been specific cooperation with other agencies set up (i.e. law enforcement, courts, etc.)?**

Cooperation with the judiciary, the court administration and the police was essential and ongoing. The cooperation relied on normal channels of work contact and meetings. It was not formalised by way of a special structure. The prosecution however played a role in the formal structure to meet the crisis which was set up on a national basis within the whole public sector by the Office of the Prime Minister.

**11. Has the prosecution service conducted or supervised investigations carried out by police and other investigation authorities to ensure the adequate protection of human rights in the emergency situation?**

In our system the prosecution does not investigate but it is often called to assist by giving advice and other assistance to investigators, mainly the Police. It therefore supervises or reviews investigations insofar as the situation calls for such supervision or review for example after a complaint by any investigated persons or at the request of the Police for advice. Investigations conducted by Magistrates in the course of inquests are referred to the Office of the Attorney General upon conclusion. There were no cases during the crisis period where the prosecution had to exercise such review or supervision on grounds specifically related to the crisis.

**12. Has the prosecution service decided on alternatives to prosecution to avoid overcrowding in detention facilities in the emergency situation?**

Prosecutors were encouraged to adopt a more open approach to sentence bargains when the appropriate punishment could reasonably and legally not involve an effective prison sentence. The number of sentence bargains concluded during the crisis however was not above the normal average also because defence lawyers whose clients were not likely to conclude a sentence bargain which did not involve an effective prison term were wary of seeking such bargains if their clients were on bail. The Parole Board met online and did not apply any more liberal policy on release on parole because of the crisis. The only couple of exceptions involved foreign detainees who were released a few days before their sentence expired in order to match the flight timetable to their home countries.

**13. Have there been any specific modalities for action of the prosecution service in the emergency situation as regards:**

- **initiating prosecution (particularly in urgent cases, or cases relating to the emergency situation – for instance, disobedience to law enforcement agencies, health personnel, intervention in cases of domestic violence, etc.);**

In the Maltese legal system interventions of the kind described above are carried out by the Police with the prosecution service acting in an advisory role. Apart from the general measures adopted during the COVID-19 crisis there were no other special measures to deal with the above situations.

- **conducting prosecution before the courts, particularly when courts have significantly reduced their activity (have courts maintained their activity, even if somewhat reduced?);**

Court activity was drastically reduced but a number of cases, particularly involving situations where the accused was in preventive custody and bail applications were heard. Lawyers from the prosecution service always participated and were physically present at such hearings.

- **ensuring that victims and witnesses and other vulnerable participants were effectively assisted and/or protected and defendants had their rights respected through the whole procedure**

The fact that court activity was drastically reduced except for urgent and particularly important cases practically eliminated the need for such measures insofar as they are to be implemented in court since most cases were not heard. Victim protection and support is a matter taken care of in the Maltese legal setup by the Police, Social Welfare and Probation services.

- **appealing court decisions;**

Time limits for the filing of appeals were suspended during the height of the crisis but a number of urgent and human rights cases were still treated according to the normal procedure even with regard to appeals;

- **supervising the execution of court decisions and applying whenever possible non-custodial measures or reduction of prison sentences (to avoid overcrowding in detention facilities and to prevent the dissemination or spread of the disease);**

In Malta the prosecution service does not supervise the execution of sentences except for the fact that the Attorney General is ex officio a 'visitor' of the prison facility. With regard to efforts to avoid custodial sentences where this was possible through sentence bargaining the situation is explained in the reply to question 10 above.

- **implementing national crime policy (i.e. in cases where disobedience to lawful orders of law enforcement and health personnel, regarding confinement, may add spreading the disease)**

Law enforcement of the nature described above is done by the Police. Confinement imposed by the health regulations was in the form of quarantine and not imprisonment. Breach of quarantine was made subject to hefty administrative fines. Persons admitted to prison were subject to a period of quarantine in a separate detention facility.

- **carrying out functions, where applicable, outside the criminal justice system (i.e. lockdowns may result in heightened risk of people, namely children, witnessing or suffering violence and abuse, unemployment/enforcement of movement restrictions and physical distancing measures can serve as a cover for discrimination and violence against particularly groups, namely foreigners or vulnerable groups, observation of labour laws and social protection, minimising the risks of contagion of workers and employees)**

These functions are not within the remit of the prosecution service in the Maltese legal system. The involvement of the prosecution service is therefore limited to the giving of advice to law enforcement and other authorities when required.

**14. Have there been any new or extended functions of prosecution services resulting from the emergency situation as regards for example:**

- **supervising maintenance of public order and security;**
- **supervising implementation of emergency measures including confinement of population, closure of public areas and other relevant measures;**
- **supervising general protective measures for the population and maintenance of provision of relevant services, including to the most vulnerable groups during and after the pandemic (women, children, elderly, people living in institutions, deprived of their liberty or in detention or confinement, displaced, homeless, migrants, refugees, slum-dwellers, etc.);**
- **ensuring regulatory measures to prevent profiteering on foodstuffs, hygiene products and essential medicines and supplies;**
- **reducing the risk of stigmatising and harmful conduct against vulnerable groups, including those infected by COVID-19;**
- **ensuring the rights of persons held in quarantine or confinement;**
- **interacting with media and highlighting the work of prosecution services in the context of emergency situation;**
- **informing the population about the emergency measures and the corresponding penalties for their non-observation**

The answer to this question is in the negative. The activities indicated above are not within the remit of the prosecution service in the Maltese legal system. The involvement of the prosecution service in this regard is therefore limited to the giving of advice to law enforcement authorities and to dealing with particular claims and requests as required.

**15. What are, in your opinion, the main challenges faced by prosecution services in an emergency situation and in its aftermath/recovery?**

An emergency situation such as that created by COVID-19 drastically effected the momentum of work within the prosecution service both directly, due to the adoption of different working methods involving restrictions of movement and extraordinary health precautions, and indirectly by imposing severe limitations on the workings of the courts, through the extraordinary demands placed on law enforcement authorities and through the limitations on international travel which impacted international legal cooperation.

As a result of the length of the crisis the return to normality poses strong challenges both because of the backlog of work accumulated during the peak of the crisis and because the timeframe for return to a normal situation has to be worked out within the limits of maintaining a COVID safe environment.

The effects of the crisis on the economy , the possible deterioration of social and employment situations, both within national and immigrant communities, which may be conducive to an increase in crime are also major challenges for the law enforcement and prosecution services.

**16. For example, have specific plans been made with regard to the returning to “normal life”? In member States where court proceedings have been suspended for months, there will be a huge back load of cases now to be dealt with. Is it the task of prosecutor to decide how these cases should be prioritised? Will special initiatives be taken, i.e. court proceedings during weekends, extra payment of prosecutors for extra work? Is there a risk that less serious cases will be closed or prosecution waived?**

The courts have re-opened as from the 5<sup>th</sup> June 2020 but there are still restrictions on the use of the court building in order to provide for social distancing and limit the number of persons present in the same place. These measures tend to impact the efficiency of the workings of the Courts. It is the courts which decide on any prioritisation of cases but all cases are now being heard or are appointed for hearing. The Courts will reduce their normal summer recess in order to try and compensate for the time lost during the crisis. There are no plans to drop cases because of this situation and the pre-crisis court schedule was retained. It is very unlikely that the legal profession will be able to take on a 7 day work week for the hearing of cases other than urgent cases and such a move is not considered as a viable option.

**17. Are challenges faced by prosecution services in an emergency situation and in its aftermath/recovery related to:**

- **independence and accountability of prosecutors in the context of emergency situations;**

The independence and accountability of prosecutors was not seen as having been in any way impacted by the emergency COVID-19 situation. It is however understood that the stress placed on prosecutors to take decisions in emergency situations has the potential of impacting their image as regards accountability and possibly independence;

- **ethics and professional conduct of prosecutors during emergency situations and thereafter;**

Same as with the above question of accountability and independence. The crisis produced no evidence of a challenge to prosecutor’s ethics and professional conduct but it is recognised that it has the potential to pose such a challenge.

- **training of prosecutors on working modalities at the time of emergency situations (for instance, for teleworking) and protecting themselves from COVID-19;**

The crisis struck quite quickly and unexpectedly and any training and adaptation to new working methods was done on the job as the prosecution service coped with the situation. Protective measures with regards to health were widely advertised both by the health authorities and within the public service.

- **creation of multidisciplinary teams, if need be (with health personnel, for instance);**

The prosecution service participated in an overall multi-disciplinary structure set up by the public service to respond on a national level to issues raised by the crisis;

- **support to vulnerable groups, which are to be the most impacted by the economic consequences of the pandemic (unemployment, worsening working conditions, impact on economic, social and cultural rights in general, etc.)**

As stated above, the economic and social effects of the crisis, both short and long term, pose a serious challenge to prosecution services by potentially creating a social environment which is more conducive to certain crime. The financial assistance provided by Governments and the assistance given by Non-Governmental Organisations to various sectors to soften the effects of the crisis also represents a significant contribution towards containing the challenge to prosecution services

- **international assistance and cooperation, taking into account the consequences of the pandemic and the need for a reinforced cooperation among prosecution services (sharing best practices)**

This practically unprecedented event has had a severe impact on international cooperation in criminal matters mainly because of the very severe restrictions which it imposed on international travel. It has however also pointed to the need to seek ways and means in which prosecution services can still cooperate effectively in times of such crises.

#### **18. What are, in your opinion, ways and methods to overcome these challenges?**

Although every legal system has its own unique characteristics the general principles of law which emerge from the European Convention on Human Rights and the other many legal instruments of the Council of Europe and key international organisations provide guidance about the limits of permissible actions and restrictions in particular situations including situations of emergency and health crisis.

Efforts to provide guidance through the sharing of common experiences are an important tool in developing the necessary strategies to overcome the challenges of such a crisis and to ensure compatibility and complementarity of approaches. .

The COVID-19 crisis has in fact been characterised by a large number of very welcome efforts to provide training and fora for discussion for the international community of prosecutors and to enable prosecutors to identify the particular threats and demands of the times.

The decision of the CCPE to change the topic of Opinion No 15 to one dealing with emergency situations as soon as the pandemic emerged and despite the work already done on the previous topic provides a clear example of the importance of international cooperation and of the solidarity between prosecution services in their efforts to overcome the emerging challenges of the crisis situation.