

Office of the Parliamentary Ombudsman, Malta



Own-initiative report by the Parliamentary Ombudsman

Principles that should govern relations between the national government and public authorities and entities

INTRODUCTION



Following my evaluation of a complaint from a female employee of the Central Bank of Malta that the Bank refused to extend to her the family-friendly measures that the Government of Malta allows all its public officers, I decided to extend the scope of this review by launching an own-initiative investigation that focused on the principles that should guide public authorities in their reactions to decisions by their national governments on matters that regulate the public administration but do not impinge on their policies or the exercise of their functions. In the course of my investigation I sought the views of the European Ombudsman who in turn approached the European

Central Bank and also asked other national Ombudsmen via the EUOMB-Summit extranet service for their comments on the issues raised.

On the basis of my own appraisal of this issue and also in the light of these reactions, I concluded my own-initiative investigation. My report outlines what in my view constitute the guiding principles to promote good governance through a proper appreciation by public authorities of their roles as vital components of a smooth and efficient public administration. The full report appears in the first section of this publication.

Given that this report touches upon a sensitive area of public administration, my Office accepted the suggestion by the Principal Permanent Secretary at the Office of the Prime Minister to distribute it to several public institutions and entities and invite them to send their views and comments on the recommendations that I made. Replies were received from various government authorities and public bodies; and the response of those institutions that accepted to make public their views on this issue appears in the second section of this document.

I would like to take this opportunity to thank all those European institutions and colleagues who sent their replies to my initial request for information and to the leaders of local public authorities who accepted to participate in my consultation process.

It is hoped that this report will provoke a healthy debate on the proper relations that should be fostered between the national government and autonomous public authorities and entities to ensure a comprehensive, correct and transparent public administration.

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Parliamentary Ombudsman

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1. Introduction

- **1.1** This own-initiative investigation aims at outlining the principles that should govern the relations between the national government and national authorities and entities set up by the Constitution of Malta or through *ad hoc* legislation to provide a public service.
- 1.2 This investigation was prompted by a complaint filed by a former female employee of the Central Bank of Malta (CBM) who felt aggrieved that the Bank refused to approve an extension of reduced hours until her son reached the age of four. The extension would have been approved if the family-friendly measures introduced by Government for its employees in the Budget of 2007 had also been extended to the Bank's employees who are public sector employees, even if not public officers in terms of Article 124 of the Constitution of Malta. The CBM maintained *inter alia*, that the family-friendly measures introduced by Government did not apply to it since it is not part of the public service but a public entity enjoying its own separate and distinct legal personality at law.

2. My Final Opinion on that complaint

- **2.1** I concluded my investigation of that complaint with a Final Opinion of the 4 December 2008 in which I stated:
- "18. This case has however raised important institutional issues regarding the relationship between the Central Bank and Government and the extent of the parameters of the independence and autonomy the Central Bank enjoys in determining its staff policy and their conditions of employment. An issue that has to be considered in the light of its status as a National Central Bank (NCB) [forming an integral part of the ESCB and the independence it enjoys to effectively fulfil its functions through the exercise of the specific powers conferred on it for this purpose by the EC Treaty and] with the European System of Central Banks (ESCB) and of the European Central Bank (ECB Statute).

I shall be considering these issues separately and, if required, I shall deliver a further own-initiative opinion.

However, since the decision taken by the Bank in this respect was in line with the Collective Agreement and since complainant opted to resign rather than appeal the Bank's refusal of her request for extension of the period of working reduced hours, the own-initiative opinion should not affect the outcome of this complaint."

3. Own-initiative investigation

3.1 During the investigation of that complaint, it became apparent that the issues raised in that case went beyond its merits and involved the status of the Central Bank, its relations with Government and the public service and its standing as a national and international institution. Moreover it became also apparent that those issues could be applied *mutatis mutandis* to the relations between Government and other authorities and entities set up by the Constitution or through *ad hoc* legislation which, though not part of the public service, are considered to provide a public service. They are issues that have led and could lead to areas of

misunderstanding and contrast between the public service and these authorities and entities that enjoy a measure of administrative autonomy from the public service.

- 3.2 It became clear that the issues merited the attention of the Parliamentary Ombudsman from the wider perspective of institutional relations. While the primary function of the Ombudsman remains the investigation of complaints of allegations of maladministration, he is also entrusted with the duty to monitor and assess processes within the public administration generally and to identify administrative concepts and recommend measures that favour and promote good governance.
- **3.3** When exercising this function the Ombudsman acts as an "amicus" of the public administration in a wide sense. In so doing he often assumes the role of the conscience of the public administration, identifying and highlighting shortcomings, bad or incorrect processes and procedures recommending, where appropriate, corrective measures. As an Officer of Parliament his own-initiative reports are in this respect intended to create an awareness on issues of general interest raised in the hope that an informed debate will foster appropriate solutions. In this spirit, I shall limit my investigation to areas that fall strictly within my jurisdiction.

4. Basic principles

- **4.1** The following are the basic principles that motivate my investigation. They will guide me in my appreciation of the issues raised in the Central Bank case and others and will be further elaborated in my considerations and conclusions.
- (a) It is proper that when the Constitution of Malta, conventions or indeed any law decree that a national authority or entity should be accorded a measure of autonomy in administering its affairs, that autonomy should be respected by Government. Unless expressly provided for by law, Government should not therefore seek to unduly limit or impair that autonomy by any means through internal regulation or any other exercise of ministerial discretion.
- (b) Conversely, a national authority or entity that by law enjoys a measure of autonomy should not abuse of it. Nor should it consider itself to be completely cut off from the mainstream of the management of public affairs as regulated by the public service. It is undoubtedly an extension of that service and is also rendering a service to the public. It is set up to serve the people and ultimately responds to the people's representatives in Parliament irrespective of whether it operates through public funding or not. It is accountable for its actions.
- (c) These premises lead to the inevitable corollary that, while these public authorities and entities enjoy a degree of administrative autonomy and are not as a rule bound by law to follow directives and policy decisions that bind the public service unless they are laid down by law, they should not unreasonably ignore them or fail to consider them as guidelines for good governance which they should follow, so long as they are not contrary to law and do not invade the limits of their institutional autonomy.

5. The issues to be investigated

- **5.1** Section 13 of the Ombudsman Act, 1995 (Act No. XXI of 1995) entrusts me with the function to investigate any action taken by any authority, body or person to which it applies including therefore public authorities and entities that enjoy a measure of autonomy or independence and that are not specifically excluded by the Act being actions taken in the exercise of their administrative functions. The issues raised in the Central Bank case and others question the extent to which the autonomy and independence enjoyed by these authorities and entities entitle them to ignore general directives of policy and procedures regulating the public service when these in no way interfere in the exercise of their proper functions and are not contrary to law.
- 5.2 In a letter sent to me on 9 October 2008, Dr Godwin Grima, Principal Permanent Secretary in the Office of the Prime Minister, in reaction to the complaint made against the Central Bank, thus stated:

"Having consulted the Prime Minister on this issue, this Office is of the opinion that the Central Bank of Malta should respect the decisions of the national government on matters regulating the public administration". Clearly if this statement correctly applies to the Central Bank which enjoys the maximum limit of autonomy and independence a public sector authority can enjoy, it even more applies to all other autonomous public sector authorities and entities.

6. Method of investigation

- 6.1 In conducting my investigation I have considered it useful to elicit the principles that should regulate the conduct of national public sector autonomous authorities and entities *vis* à *vis* the public service by examining the situations that have arisen in two areas where important policy decisions are and have been taken by the national government and which are intended by it to be applicable across the board to all areas of public administration, whether public service or public sector. These cases refer to family-friendly measures in the Central Bank case that gave rise to this investigation and policies regarding the recruitment and employment of staff.
- **6.2** I shall examine each case separately and will attempt to elicit from them the guiding principles which in my view should be promoted as rules of good governance to ensure correct and smooth relations between the public service and these public sector authorities and entities. This Opinion will be divided in four sections:
 - A The Central Bank
 - B Employment issues
 - C Conclusions
 - D Recommendations

A. The Central Bank

- 7.1 The Central Bank merits in-depth analysis as it is a national institution that, as stated, rightfully enjoys the maximum level of autonomy and independence from the national government. The Bank is established by Article 3(1) of the Central Bank of Malta Act which also determines its status. It interprets its autonomy and independence practically in absolute terms. It states: "while the Bank is an entity fully autonomous and independent from Government and does not form part of the public service", the Bank does "form an integral part of the European system of Central Banks established under the Treaty and shall participate in carrying out the tasks and complying with the objectives conferred upon it by the Treaty and the Statute and shall assume all rights and obligations consequential to such a status."
- 7.2 In a note dated 22 May 2008 on its independence and autonomy in determining its staff policy and the conditions of employment of its staff submitted during the course of the investigation (Document A annexed to this opinion), the Central Bank stated that it is an undisputed fact that the CBM enjoys an international legal personality of its own insofar as it forms "an integral part of the European System of Central Banks as established under the Treaty." There is no doubt that in the exercise of all rights and obligations consequential to such a status and in the carrying out of tasks and complying with the objectives conferred upon it by the EC Treaty and the Statute of the European System of Central Banks, it is a fully autonomous entity independent from Government.
- **7.3** Such autonomy and independence is not, however, unlimited. It is circumscribed by the parameters set out in Article 108 of the EC Treaty that lays down this principle of independence of National Central Banks (NCBs) only "when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ECB". It is only in such cases and when exercising such functions that the NCB is required not to seek or take instructions from its government of a Member State or from any other body. It is only when exercising such powers that the government of the Member States undertook to respect this principle "and not to seek to influence the members of the decision making bodies of the ECB (European Central Bank) or of the national central banks in the performance of their tasks".

7.4 This Article is extremely clear and precise. It allows no room for interpretation. The independence of the CBM is within these limits guaranteed and the Government of Malta is bound to abide by it. It is, however, a fact that the Central Bank of Malta not only has an international dimension but has also a national one. It has functions that pertain exclusively to national fiscal and monetary policy. Every national central bank has its particular administrative set-up regulated by national legislation and Malta's CBM is no exception. Indeed, the CBM is not established as an EU agency but as a national central bank set up by national not EU law – the Central Bank of Malta Act.

Issue of jurisdiction

- **7.5** The emphasis on its international European dimension, on the strength of which the Central Bank lays its claim to a high level of autonomy, raised issues regarding the jurisdiction of the Ombudsman to investigate complaints against it as well as of interpretation of the EC Treaty and the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute). I thought it advisable therefore to seek the opinion of the European Ombudsman on two specific points:
 - taking into account national legislation as well as the applicable provisions of the EU Treaty, what is the competence of the national Ombudsmen to deal in general with complaints against the Central Banks for their respective countries and, in particular, regarding complaints concerning staff matters?; and
 - to what extent are Central Banks within the European System of Central Banks (ESCB) bound to respect the decisions of their national governments on matters regulating the public administration when these in no way interfere in the performance of the tasks conferred upon them by the Treaty? Would it be proper for a Central Bank to refuse to implement family-friendly measures, introduced by government across the board, simply on the strength of its declared full autonomy and independence from government and the claim that it does not form part of the public service?

The opinion of the European Ombudsman

7.6 The European Ombudsman, Professor Nikiforos Diamandouros, considered it proper to consult the European Central Bank on the aspect raised by me concerning the interpretation of Community Law. He requested, among others, the ECB to give an opinion. Mr Jean-Claude Trichet, President of the European Central Bank, gave his reaction by letter of 12 December 2008 and this is being annexed to this opinion (Document B). Regarding the aspect concerning the competence of other national Ombudsmen in similar circumstances, the European Ombudsman asked for information via the "EUOMB – Summit" extranet service. Eleven National Ombudsmen posted replies on the Summit for the consideration of the European Ombudsman.

Report by the European Ombudsman

7.7 The European Ombudsman gave his opinion on the 30th March 2009, reaching the following conclusion:

"Community law

After a careful examination of the provisions of the EC Treaty concerning national central banks and the ESCB, and taking into account the ECB's opinion, the Ombudsman concludes that there is nothing in Community law to prevent national ombudsmen from investigating national central banks as regards the social rights of their employees. The national ombudsmen's respective competences in such matters are therefore a matter of national law.

The Ombudsman also notes that the ECB's opinion appears to indicate that there is nothing in Community law to prevent national legislation from imposing parental leave requirements on a national central bank.

National law

The Maltese Ombudsman enclosed a memo with his observations containing his analysis of the subject matter (the CBM's refusal to follow the Government's decision to give male public officials 20 days parental leave). The memo concluded by stating that the Maltese Ombudsman's Final Opinion will be given in light of the European Ombudsman's decision on the query.

It appears that the Maltese Ombudsman may have understood the query procedure, which constitutes a means for national ombudsmen to obtain answers to queries about EU law and its interpretation, to also include an opinion by the European Ombudsman on the specific case pending before the Maltese Ombudsman. However, the mandate of the European Ombudsman is to uncover maladministration in the activities of the Community institutions and bodies¹. It is therefore not possible for the European Ombudsman to give an opinion on the case pending before the Maltese Ombudsman and concerning the activities of a national institution.

Nevertheless, on the basis of the Maltese Ombudsman's observations, the European Ombudsman concludes that the Maltese Ombudsman is satisfied with the information provided to him by the ECB and certain colleagues in the European Network of Ombudsmen. The European Ombudsman further notes from the Maltese Ombudsman's memo that he now appears to have a clear opinion on how the matter brought before him should be dealt with.

In the light of the above, the European Ombudsman considers that the issues raised in the query have been adequately clarified. He therefore closes the query."

Ombudsman's jurisdiction

- **7.8** By letter of 26 May 2009 I showed my appreciation to the European Ombudsman for his opinion that, in my view, correctly analyses the points raised. I informed him that his conclusions given within the parameters of his jurisdiction were in line with my reading of the legal position. I underlined that he was of course right to state that it is not within his remit to give an opinion on merits that fell within the competence of national Ombudsmen so long as these do not involve issues of EU law and its interpretation.
- 7.9 The European Ombudsman rightly referred the matter of the national ombudsman's jurisdiction to investigate complaints against the national Central Bank to national legislation. In Malta's case, Act No XXI of 1995 gives the Parliamentary Ombudsman jurisdiction over the Government, including any government department or any authority of the Government and over any statutory body and any partnership or other body in which the Government has a controlling interest or over which it has effective control. The exceptions to this provision (section 12[1]) are listed in Part A of the First Schedule of the Act and the CBM is not one of the exempted persons or bodies.
- 7.10 The Parliamentary Ombudsman, therefore, has jurisdiction to investigate complaints against the Central Bank albeit with the very important limitation that requires him not to interfere in any way in the exercise of the functions proper to it within the terms of Article 108 EC Treaty and analogous provisions in the Central Bank of Malta Act. For fairness' sake, it has to be said that the Central Bank did not plead outright lack of jurisdiction. It is not pleading that complaints relating to employer/employee relations within the Central Bank do not fall within the Ombudsman's jurisdiction. Indeed such cases have been investigated by my Office while fully respecting the autonomous, independent status of the Central Bank. It is pleading that it should not be expected to implement those family-friendly measures adopted by Government for the public service with regard to public officers, over and above benefits that Central Bank employees enjoy through Collective Agreements.
- **7.11** It is also correct to say that the Central Bank accepts that the extent of its independence and autonomy is not such as to claim immunity from the jurisdiction of the Courts. In its submissions during the

Article 2(1) of the Statute of the European Ombudsman.

course of the investigation that prompted this own-initiative investigation, the CBM states: "The institutions and bodies of the Republic of Malta with the exception of the Courts and Tribunals do not have the power to approve, suspend, annul or differ decisions of the Bank." It is not clear whether the Central Bank claims that its independence and autonomy are such as to grant it immunity from any legislative enactment by Malta's Parliament even when these manifestly do not seek to influence its decision-making in the performance of its duties. It appears to be the unanimous opinion of all those national ombudsman who responded to the queries of the European Ombudsman that their national Central Bank would be bound to observe any legislative family-friendly measure that was generally binding in the country including public authorities and entities.

- 7.12 Considering the conclusion of the European Ombudsman that the ECB's opinion appears to indicate that there is nothing in Community law to prevent national legislation from imposing parental leave requirements on a national Central Bank, it is fair to conclude that such legislation would not be considered to be in violation of the protective umbrella of Article 108 of the EC Treaty and that, consequently, the Central Bank would not be in a position to claim immunity and plead lack of jurisdiction in such a case. Similar legislative enactments would not, therefore, be considered to be in violation of the right of the Central Bank to determine the terms and conditions that regulate the employment of its employees. This is indirectly borne out by the statement made by the President of the European Central Bank in his submissions to the European Ombudsman when he states that "Unless established by legislation applicable to all male employees residing in Malta, the CBM is not bound to grant the parental leave in question to its male employees" (vide Document B annexed).
- **7.13** While it is conceded that the Bank enjoys the right to make staff regulations or rules without government approval and to autonomously define its staff's conditions of employment, such autonomy and independence do not exclude it from the jurisdiction of Malta's Parliament and legislation it enacts for the common good. It can therefore claim no blanket immunity. It can, however, contest the legislative provisions if in its opinion they are in contrast with its independence as guaranteed by Article 108 of the Treaty and Article 36 of the ESCB Statute.

The essential merits of the case

- **7.14** Having disposed of doubts raised regarding matters of jurisdiction, the crux of the case remains a simple one.
- **7.14.1** It is agreed that there is no law binding the Central Bank to implement these family-friendly measures.
- 7.14.2 It is agreed that these family-friendly measures were introduced by the national Government through internal regulations applicable to all public officers. These family-friendly measures implement Government's official policy to push for similar measures across the board, bettering, if need be, improving conditions beyond what is provided in its Collective Agreements, when and where required. This was Government's declared policy in the 2008 Budget Speech.
- 7.14.3 Is it not proper for the Central Bank, as part of the public administration in a wide sense, to respect the decisions of the national Government and implement measures favouring the conditions of its employees once it is established that these in no way impair or interfere with the proper exercise of its functions?

The Central Bank's position

7.15 The Government, acting as a model employer, agreed to grant public officers more favourable family-friendly measures that those stipulated in the law or indeed in Collective Agreements. It declared its intention to extend these favourable working conditions to all employees in the public sector. The public sector is not made up of a homogenous group of institutions. Various public authorities and entities that

have a measure of independence and autonomy from the national Government are comprised within this group and include all those that fall within the jurisdiction of the Parliamentary Ombudsman.

- 7.16 I cannot but agree with the conclusion of the President of the European Central Bank that "... the CBM is an independent body with its own distinct legal personality, separate from the Maltese Government, and with its own decision-making bodies, recruitment policies and conditions of employment of staff. Similarly to Maltese Government employees, CBM employees are public officials, however they are not civil servants". Similarly, even if to a lesser degree, other authorities and entities like the Broadcasting Authority, the Malta Transport Authority, the Malta Environment and Planning Authority, the Data Protection Commissioner and others can claim a similar status.
- **7.17** The statement by Mr Trichet with which I am in complete agreement, that Central Bank employees are not public officers but are public sector employees, cannot but lead to the conclusion that the Central Bank, like other autonomous public authorities and entities, is an administrative instrument that forms an integral part of the national public administration entrusted with the government of the country in its various aspects.

International status of CBM

- **7.18** It would, therefore, not be correct to consider that the CBM, on assuming its rightful place as a full member within the European System of Central Banks (ESCB) and having by this fact assumed an international legal personality of its own, ceased to form a vital part of national public administration of the Republic of Malta. It is my view that this is not the case.
- **7.19** I concur with the statement made by the President of the ECB that "Unless established by legislation applicable to all male employees residing in Malta, the CBM is <u>not bound</u> to grant the parental leave in question to its male employees" (my highlights) once they are not civil servants. This statement is correct if viewed in the light of strict legality since there is no express law that binds the CBM to do so and the Government has used instruments applicable only to the public officers it employs. The crux of the issue remains, however, whether such an approach satisfies the test and rules of good administrative practice that have to look beyond the limits of strict legality.

Good administrative practice

- **7.20** Good administration can be defined in a general way as the observance of those norms that comprise the basic elements of the correct conduct of public affairs for the common good and which, in the main, reflect the underlying tenets of fairness and justice that an organised society expects. The point to consider is whether the Central Bank, notwithstanding its international status, or any other public authority or entity would be acting correctly if it capriciously decides not to implement measures introduced by the national government for the public service that would benefit its employees. The question to be asked is whether this would be fair and just.
- **7.21** Family-friendly measures introduced by Government are intended to affect all employees in the public sector. They cannot, therefore, be considered to be measures that would impact negatively on the ability of the CBM to employ and retain the qualified staff necessary for the performance of the tasks conferred upon it by the Treaty (ESCB Statute) and national legislation in an independent manner. They would in no way impinge on the independence and autonomy of the CBM and, in my opinion, would not, therefore, fall foul of the terms of Article 108 of the EC Treaty.
- **7.22** On a national level there should be no doubt that the CBM is a public authority and its employees and staff are public sector employees, even if, in terms of the Constitution of Malta, they are not public officers. These public sector employees form part of the public administration understood in a wider sense, that is, the public service and the public sector taken together as a whole. Mr Jean-Claude Trichet, contrary to what the CBM submits, rightly points this out. However, I agree with the CBM that its employees are not subject at law and *a priori* to employment regulations applicable to the public service.

7.23 On the other hand I see no reason why employees of the Central Bank and other autonomous authorities and entities should not enjoy benefits that are granted by Government to public officers and that are ultimately intended to improve the public administration or as a social measure. The bettering of conditions of work and the avoidance of improper discrimination are specific areas to be taken into account in this context.

(I) Bettering of conditions of work

- **7.24** The fact that employees of the authority or entity enjoy adequate benefits within the framework of their particular Collective Agreements is not, in my opinion, a valid reason not to implement Government's inspired measures bettering the conditions of work of public officers. Most public officers also enjoy conditions of work that are sanctioned by Collective Agreements with Government.
- 7.25 The betterment of working conditions with measures similar to the one under review often go beyond what is provided in Collective Agreements. These measures, intended to apply to all employees in the public sector, are meant to improve minimum working conditions. In a general way Government expects its lead to be followed by all employers including those in the private sector. This should be especially so in those cases where these directives and regulations in no way interfere in the exercise of the functions proper to the public authority or entity and even more when their purpose is to promote better administration or improve the working conditions of employees.
- **7.26** In the latter case, which was essentially the merits of the complaint that provoked this own-initiative investigation, one would expect national autonomous authorities, as ideal employers, to adopt those measures that are adopted by Government to improve the working conditions of public officers. One would expect them to take note of the nature and extent of these measures and to follow Government's lead by implementing them unless there are <u>cogent reasons</u> that militate against such a decision. This insofar as that they could have a negative impact on the administration of the institution in the exercise of its functions.

(II) Improperly discriminatory

- 7.27 These authorities and entities are jealous of their right to recruit their staff and negotiate their conditions of employment insofar as this is necessary to ensure their full autonomy and independence in the proper exercise of their functions. This does not, however, mean that they should consider themselves not to form part of the national public administration bound by the rules of good governance and accountable for their actions to the people through their elected representative in Parliament. The CBM can, therefore, be considered today to be an organ of public administration within the national territory, managed and served by public sector employees who form part of the public administration. It is my view that in the management of its affairs there is no reason why the CBM and indeed any other constituted authority or entity enjoying a degree of independence and autonomy should not be expected to adopt administrative measures inspired by the Government in favour of public officers when these are not in contrast and do not in any way interfere with the exercise of their declared functions within their exclusive jurisdiction unless there are cogent reasons that militate against such a decision.
- **7.28** It would be improperly discriminatory if a public authority or entity were, without good reason or capriciously, to deprive its employees of benefits like family-friendly measures that public officers and other public sector employees generally enjoy over and above those given by law or Collective Agreements. While the CBM would not be violating any express binding law if it failed to do so, it would in my opinion be breaching the rules of good governance unless it provides cogent reasons to justify its actions on the basis that if it had to comply and implement objectively salutary measures, this would materially impinge on the "exercise of its powers and carrying out the tasks conferred upon it".
- **7.29** It would be incorrect to equate NCBs with a commercial company having a distinct legal personality that can only be regulated by Government through legislative instruments. I concur that Central Banks are constituted public authorities, separate from their governments in the strict sense of this term. However, the

fact that they have their own decision-making bodies, recruitment policies and conditions of employment for staff in no way means that Central Banks are not an integral, pivotal and essential part of the public administration in the wide sense of the term "government". They should, therefore, be guided so far as is reasonable by the same rules of good governance by which the public service is regulated.

- **7.30** This principle is widely recognised by other independent authorities, including my Office set up by the Constitution of Malta and by *ad hoc* legislation, and rightly so. There is absolutely no reason why the CBM should not be required to act similarly albeit within the parameters specially traced to ensure its proper functioning both nationally and internationally. Parameters that, it should be accepted, are established not in the interest of the institution itself but also of the country it has the duty to serve and indeed the whole EU.
- 7.31 The submission of the CBM that it need not implement these family-friendly measures because its employees have their conditions of work established by a Collective Agreement is not, in my view, justified. Malta has for years had progressive labour laws and judicial structures that regulate industrial relations and establish minimum standards and conditions of work that are binding on all. Collective Agreements are a recognised instrument to regulate and improve employer/employee relations. The family-friendly measures introduced by Government give benefits to public officers that are over and above those enjoyed by them as of right by statute or agreement. As an ideal employer, Government takes a lead and expects others to follow its example. It stands to reason that public sector entities such as the CBM that participate in the governance of the country have the duty, also as good employers, to follow that lead when this in no way impinges on the exercise of functions proper to them.

Special relationship with Government

- **7.32** The fact that the Central Bank (or indeed other autonomous public authorities and entities) has international characteristics and affiliations places it in a special relationship *vis-à-vis* the Government. This does not, however, mean that its particular status raises it to a state of splendid isolation, outside the jurisdiction of the country's judicial, legislative and administrative organs. After all, the Central Bank is not an EU agency as it has been established by Maltese law.
- 7.33 It is my view that one has to distinguish clearly between the independence enjoyed by the Central Bank as a national bank within the European System of Central Banks as set out in the EC Treaty and other relevant EC Statutes, and the autonomy that the institution enjoys under the Central Bank of Malta Act. The two concepts are not coextensive. Indeed the absolute independence enjoyed by the Central Bank under the ESCB Statute is specifically limited and circumscribed to acts "when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB."
- **7.34** While it is recognized that the Central Bank undoubtedly has an international legal personality of its own that enables it to perform its international functions and obligations, I would opine that this personality is not "alternative to, and distinct from, the legal person `Republic of Malta`". It is rather a hybrid personality that allows it to perform tasks that comply with objectives conferred upon it both by its international status as required by the EC Treaty and ESCB Statute and by its national status as required by the Central Bank of Malta Act. It still retains its function as a vital instrument in promoting and overseeing the country's economic and financial well-being while providing an essential service to the public administration that is bound to act in these areas within the parameters of the EC Treaty applying guidelines and directives of the ESCB of which the CBM forms an integral part.
- 7.35 It is noted that the governing council of the ECB, on the basis of the law, case law and doctrine, recognises that the independence of NCBs from interference from third parties is circumscribed "to decisions that are incompatible with the Treaty and the Statute as far as ESCB related tasks are concerned." While reserving judgement on whether such a limitation has to be nationally interpreted restrictively or extensively, it is clear that the ECB does not expect the national Central Bank to be absolutely autonomous, independent and immune from decisions of governing bodies who would otherwise have the right at law to give it instructions on matters beyond the stated limits.

B. Employment issues

- 8.1 Another sensitive area in respect of which complaints have been investigated by my Office, refers to the method of recruitment of employees and the granting of appointments and promotions in public authorities and entities that enjoy a measure of autonomy. It is recognised that, as a rule, these authorities and entities have the right to recruit their employees and to organize and administer their staff complement. It is not being suggested that the Government should directly or indirectly interfere with these areas that are proper to the day-to-day management of these bodies in the discharge of their functions. These authorities and entities are jealous of their right to regulate employment within their institutions to enable them to properly perform their functions. In most cases they have a provision in their founding statutes similar to Article 14 of the Central Bank Act that lays down that "The appointment of officials and other employees of the Bank shall be made by the Board and on such terms and conditions as may be established by the Board."
- **8.2** The Broadcasting Authority, the Office of the Ombudsman, the University of Malta, the Malta Maritime Authority and other entities rightly maintain that they are not subject to the employment regulations applicable to the public service and that their employees are not public officers. The question is, however, whether these authorities and entities are bound to have in place procedures that ensure the required standards of fair and just practices in the recruitment and management of staff analogous to those required in the public service according to the norms of good governance.
- **8.3** This Office has on occasions investigated complaints against a number of authorities and entities alleging that recruitment of employees had not taken place in a transparent manner and that was carried out without a call for applications and without a proper selection process. There have been complaints that vacancies, filled both by internal and external procedures, were not properly regulated by a system whereby assessments could be verified and that selection boards were not bound to follow predetermined criteria to ensure a transparent selection process.
- **8.4** A number of these complaints against these authorities and entities that fall under the jurisdiction of this Office have been sustained. The justification for the inadequate standards of procedure in recruitment and promotion exercises is very often that if procedures similar to those followed in the public service were to be adopted, their efficiency and/or competitiveness would be hampered. It is true that the setting up of these authorities and entities can only be justified if they are an effective means to ensure that the public service they provide is effectively delivered. They are not, however, a means unto themselves. Neither are they a special reserve, conveniently set apart and cut out of the mainstream of the public administration, to allow a free hand to management beyond the strict standards to which a public body should rightly be subjected to and to which it should adhere.
- **8.5** The freedom that these authorities and entities should rightly be allowed in the administration of their affairs has to be proportionate and commensurate to the requirements of their functions. Their procedures have still to conform to the rigid standards of transparency and good governance that the public service is bound to abide by.

The Public Administration Act

8.6 Understandably, therefore, these authorities and entities must enjoy freedom in matters of recruitment and management of staff to enable them to properly fulfil their functions. As stated this freedom is often spelled out in their founding statutes, which also define its limits within the boundaries of the exercise of their proper functions. The fundamental distinction made by the President of the European Central Bank that "similarly to Maltese Government employees, CBM employees are public officials, however they are not civil servants" can be extended to all the employees in these public authorities and entities. It is a distinction similar to that made in the Public Administration Act (Chapter 497) – approved by Parliament and one understands will soon be brought into force - between "public employee" and "public officer".

- 8.7 The interpretation provision of this Act Article 2 defines "public employees" as including public officers and employees of government agencies and entities. On the other hand "a public officer" is defined as having the same meaning assigned to it by Article 124 of the Constitution, namely, a holder of any public office or a person appointed to act in any such office, being an office of emolument in the public service. One has still to conduct a proper analysis of the impact that the Public Administration Act will have on the relations between the national government and these authorities and entities that according to the same Act are considered to form part of the "public administration". This is defined in Article 2 of the Act to mean "the Government of Malta including its Ministries and departments and the agencies, government entities, commissions and boards referred to in the Act". "A government entity" means an organisation not being a government department, a government agency or a commercial partnership in which Government has a controlling interest whether or not such organisation is established by law. The term "organisation" is all embracing and can include any body or group of persons.
- **8.8** Essentially therefore all those organisations that fall under the jurisdiction of this Office would be considered to form part of the public administration. Indeed Article 12(b) of the Ombudsman Act (Act XXI of 1995) lays down that the Act is applicable to (inter alia) "... any statutory body ... or other body in which the Government has a controlling interest or over which it has effective control ..."

The Merit Protection Commission

- 8.9 It is clear to my mind that the Public Administration Act is in effect attempting to apply in practice the principle that these authorities and entities are to be considered part of the public administration in a wide sense and that, when administering their affairs, they should be guided by the basic principles of good governance. With special reference to employment issues, Article 32 of the Act sets up the Merit Protection Commission with a function, *inter alia* to audit the appointment of employees in government agencies and government entities to verify that these are made in accordance with Article 21 of the Act. Article 21 lays down that "Except as otherwise provided for in this or any other Act, appointments to public offices shall be made by competitive selection on merit". This Article, in sub-article (2), further elaborates that "..... competitive selection on merit means the selection of the candidate best suited for the office on the basis of an assessment of eligible candidates' individual and relative merits against the requirements of that office."
- **8.10** It is not my intention at this point to make an in-depth study of the Public Administration Act and its far-reaching consequences. Enough has been said to underline what is relevant to this own-initiative investigation, namely,
- -8.10.1 the nature of these authorities and entities as vital components of the public administration;
- -8.10.2 their essential need to have a free hand in the recruitment and management of their staff; and
- -8.10.3 that in doing so they are bound to be guided by the rules of good governance to ensure a transparent, just and fair process.
- **8.11** It should be underlined that Article 33 of the Public Administration Act recognises that while the Merit Protection Commission has the function to monitor and suggest amendments to directives and guidelines on employment matters issued by the Principal Permanent Secretary in relation to agencies and government entities as well as the application of such directives and guidelines, the Commission cannot inquire into reports that these directives have not been adhered to if this was otherwise catered for in the legislation, order or instrument setting up the government entity, agency, board or commission.
- **8.12** This exclusion in Article 33(c) of the Act recognises and provides for the statutory autonomy that these authorities and entities enjoy, in varying degrees, also in employment matters.

C. Conclusions

9.1 This brief analysis of confrontational issues that could arise and have arisen between public authorities and entities and the national government regarding the implementation of family-friendly

measures and employment issues addressed, by way of example, highly sensitive areas of potential discord that need to be addressed and smoothed out. This analysis leads me to these conclusions.

- 9.2 In a general context and in varying degrees in conformity with their founding statutes, entities, public authorities, corporations and similar organisations that have a constitutional or conventional role of providing a public service or a service to the public have the duty to respect the decisions of the national government on matters regarding the public administration. However, to respect does not mean following blindly decisions on matters that can impinge on the proper, autonomous exercise of their functions. It means that these authorities should appreciate and apply the principle that the rules of good governance that bind the Government should also be taken as guidelines by them for the proper management of their affairs unless there are cogent reasons that militate against their doing so.
- 9.3 Moreover, they should also understand that this appreciation that stems from the fact that they form part of the public administration in a wide sense, should extend beyond the sphere of strict legality. It is not proper that these public authorities and entities consider that even in matters which do not directly or indirectly impinge on the exercise of their proper functions, they need not take any notice of government's official policy unless they are bound to do so by *ad hoc* legislation. It is my opinion that these autonomous institutions, whether set up by the Constitution or by law, should not lose sight of the institutional framework within which they are called upon to function.
- 9.4 As public authorities, they should readily accept that the House of Representatives is the supreme organ that lays down laws which regulate the rights and duties of citizens and which the executive is entrusted to implement. Constitutional authorities are intended to provide a system of checks and balances meant to verify, restrain and control the absolute power of the executive in specific areas of public administration. Similarly independent authorities and entities set up by law are intended to provide a more efficient management structure for specific, vital and essential services required for the common good. It is, therefore, proper that all these authorities and entities should digest the reality that, within their respective spheres of competence, they remain an integral part of the public administration accountable to the people they serve within the parameters and according to the procedures laid down in their founding statutes. They are all ultimately accountable to Parliament in this respect.
- **9.5** The independence and autonomy that they enjoy are not intended and should not be interpreted as affording them complete freedom to adopt administrative practices that do not reflect or that are even in contrast with the recognised rules of good governance that the public administration, which directly implements the policies of the executive, is bound to follow.
- 9.6 Even in the absence of any specific binding legal provision in this sense, these authorities should readily accept the fact that they are an integral part of the public administration as an underlying principle that should guide them in their decisions for the common good. They should not, therefore, interpret their acquired autonomy as giving them full freedom to ignore policies adopted by the national government when these in no way impinge on the exercise of their proper functions and there are no cogent reasons which militate against their adoption. On the contrary they should willingly adopt them while adapting them to their particular needs.
- 9.7 These authorities should be ever conscious of their institutional relationship with the central administration and perceive themselves as an extension of the national government in the wide sense, entrusted to manage specific areas of economic and social activities. This always within the context of the Government's declared policy and in accordance with laws laid down by the House of Representatives and strictly within the parameters of their proper functions and provided that there are no cogent reasons which militate against their adoption.
- **9.8** This means that while it is of the nature of things that diversity of procedures and non-conformity is a necessary corollary of the setting up of these various authorities and entities, one should not lose sight of the overall requirement to achieve a measure of administrative cohesion through the application of basic rules that should govern all areas of public governance. Transparency and accountability should therefore be the passwords for good governance throughout all the levels of the administrative pyramid.

- **9.9** I do not consider this approach to be an imposition by the national government nor as an undue limitation on the autonomy of these authorities. I rather consider it to be an exercise in self-regulation, inspired by their awareness of their *raison d'être* as essential instruments of an effective public administration that, in a modern society, thrives on a measure of devolution of power, necessary checks and balances as well as the efficient managerial, financial and economic management of the country's affairs.
- **9.10** As stated, the fact that these authorities should respect decisions of the national government regulating the public administration does not mean that they should blindly accept and implement them. They should retain the power to refuse to do so and indeed to resist the introduction of government inspired measures which interfere with the proper exercise of their functions or unduly impinge on their independence and autonomy as defined in their founding statutes or where there are cogent reasons not to adopt such decisions. In doing so, however, these authorities should at all times be in a position to justify their refusal by sound and plausible reasons.

D. Recommendations

Negotiating protocol procedures

- 10.1 Establishing guiding principles and preventively negotiating protocol procedures through fruitful discussion is the best way forward. As indicated above, the issues raised involve a number of autonomous regulatory bodies set up to oversee vital areas of public administration both at a national and international level, to serve as checks and balances to the executive. Promoting homogeneous practices and ensuring a measure of convergence in administrative procedure between Government and autonomous independent authorities and entities would certainly help not only to foster a better understanding of the interaction between Government and these authorities and entities but also to promote a good, fair, reasonable and consistent public administration.
- 10.2 In the specific issues under review, such better understanding would forestall real or perceived complaints that public sector employees are being discriminated against and unfairly treated, by being denied a benefit that applies to all public officers in the public service and that the national government intends to extend to all public sector employees. The rules of good governance require that the legitimate expectations of public employees should not be thwarted through a perception of improper discrimination. The CBM, for example, has a right at law to decide not to implement these family-friendly measures. It should only do so, however, after considering the issue from the perspective that they were positive measures that should be implemented unless they interfere in the exercise of its proper functions and obligations under national legislation and/or international conventions or there are cogent reasons to militate against their non-implementation. It should not, therefore, refuse to consider implementing them outright as a matter of principle.
- 10.3 Similarly public authorities and entities should ensure that they have in place well-planned, open and, as far as reasonably possible and practical, transparent recruitment processes that are fair, just and not improperly discriminatory. These processes should ensure that appointments are made by competitive selection on merit. They should follow the standards now laid down in the Public Administration Act (even if this law is not yet in force) that require that the selection of the candidate best suited for the office be made on the basis of an assessment of eligible candidates' individual and relative merits against the requirements of that office.
- **10.4** Implementing this recommendation means adopting the rules of good governance in the field of public employment. It would not in any way mean a diminution of the independence and autonomy that these public authorities and entities enjoy through their founding statutes. The same principles should, in my opinion, apply and be implemented across the board to all other areas of good governance.

Consultative mechanism

- 11.1 I recommend the setting up of a consultative mechanism of review between the Government and these authorities and entities meant to promote good practices and to introduce procedures that guarantee high standards of good governance, ensuring transparency and accountability, while fully respecting the autonomy and independence these institutions enjoy. A workable *modus operandi* establishing a code of practice in the best interest of a good public administration could be the result of a positive outcome from this consultative mechanism.
- 11.2 Through such a consultative mechanism, Government can consult these authorities and entities prior to approving any measure which would be directed at them and they would be in a position to provide their feedback before the measure is approved by Government. This consultative mechanism would ensure that whilst these authorities and agencies are in a position to forecast any adverse effects which such a measure, if approved, would have on their operations, it would have the added advantage that they would have contributed to its formulation thereby making it easier for them to adopt.
- 11.3 This procedure is not new to administrative law. As a matter of fact, the European Union also has recourse to such a procedure in its law-making process: a directive, for example, does not come into being before it has been discussed by the competent EU institutions and this cross fertilisation of ideas provided by EU organs ensures that the end result is a wide consultation process bettering the original draft directive. When the directive is adopted, it would be familiar to one and all and is owned by all.
- 11.4 Such a mechanism would also have the added advantage of providing useful groundwork and information to the Principal Permanent Secretary when formulating directives and guidelines on employment matters in terms of the Public Administration Act.
- 11.5 Finally great care should be taken by the executive to avoid invading, directly or indirectly, the sphere of autonomy and independence that these public authorities and entities enjoy under their founding statutes. The executive is bound to respect and abide by the Constitution, conventions and legislation. It cannot, and should not, attempt to reduce or restrict their level of autonomy and independence through regulation or subsidiary legislation. It is stressed that this opinion is not intended to sanction such undue interference and should not be so interpreted.
- 11.6 A culture change, rather than legislative or administrative impositions, is required to achieve the desired results. A change that has to find its roots in the conviction that public authorities and entities exist to serve the people within the context of a wider public administrative structure that has to respond to the needs of the country and be accountable to it.

J Said Pullicino Ombudsman 30 September 2009



LEGAL UNIT 22 May 2008

CONFIDENTIAL

Note on the Central Bank of Malta's independence and autonomy in determining its staff policy and the conditions of employment of its staff

The status of the Central Bank of Malta

The Central Bank of Malta ('the Bank') is established by means of article 3(1) of the Central Bank of Malta Act ('the Act'), which also determines its status. While the Bank is an entity fully autonomous and independent from Government and does not form part of the public service, the Bank does "form an integral part of the European System of Central Banks as established under the Treaty and shall participate in carrying out the tasks and complying with the objectives conferred upon it by the Treaty and the Statute and shall assume all rights and obligations consequential to such a status."

The status of the national central banks ('NCB's) within the European System of Central Banks (ESCB) is set out in the EC Treaty and in the Statute of the European System of Central Banks and of the European Central Bank ('ESCB Statute'). Such status is not conditional upon the ownership of individual NCBs, which may be owned by government (as in the case of the Central Bank of Malta) or by private entities (as in the case of the Banca d'Italia, which is entirely owned by commercial banks). Each NCB is independent, has its own resources and budget and its own decision-making bodies, and any dismissal of its governors may only occur under grounds established in European Community law, and would be subject to judicial review by the European Court of Justice ('ECJ')² These factors are related and complimentary to the principle of independence of the ECB and NCBs, including the Central Bank of Malta, as enshrined in Article 108 of the EC Treaty and discussed below.

Within this context, it should be observed that the Bank (unlike any Maltese state entity, including the government) has an *international* legal personality of its own³ which is alternative to, and distinct from, that of the legal person 'Republic of Malta'. The Bank can thus enter into treaties⁴, public international law agreements, or be a member of international organisations in its own right, and not in representation of the State⁵. At law, this devolution and fragmentation of international legal personality within a State has been described as similar to the powers granted to *lander*, *cantons* or similar entities within certain federal states⁶.

¹ Central Bank of Malta Act, Cap. 204 of the Laws of Malta, article 3 (1)

² ESCB Statute, Article 14.2.

³ Brownlie, Principles of Public International Law, 4th ed., 1990, p. 58.

⁴ For example, the Central Bank of Malta has signed international treaties, including the ERM II Agreement: Agreement of 1 September 1998 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of Economic and Monetary Union, OJ (1998) C 345.

⁵ See Burdeau, Independance des banques centrales et droit international, in Weber A., (ed.), Wahrung und Wirtschaft. Das Geld im Recht. Festschrft fur Hahn, 1997, p. 17.

⁶ As described by Zilioli C. and Selmayr M., The External Relations of the Euro Area, Legal Aspects in Common Market Law Review: Dordrecht, Vol. 36, No. 2, April 1999, p. 278 (footnote 26).

The principle of independence

Article 108 EC sets out the principle of independence of the ECB and NCBs:

"When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks."

This provision is further reflected in Article 7 of the ESCB Statute. Both Article 108 EC and Article 7 of the ESCB Statute are directly applicable as law⁷ in Malta, and have supremacy over any Maltese law providing otherwise⁸ (including any provision of the Constitution of Malta⁹). Any Maltese law contrary to the provisions of directly applicable Community law must immediately be set aside by any national or European Court which considers the matter. However, the position under Maltese law with respect to central bank independence is in fact both in line and analogous with (though wider in scope than) the above provisions, which are repeated in article 5(2) of the Act:

"In accordance with the Treaty and the Statute, neither the Bank nor any member of the Board or any official of the Bank, when exercising any function, duty or power under this Act, shall seek or take instructions from the Government or any other body."

Therefore, the government may not instruct or seek to influence an NCB as to, for example, the determination of interest rates; however, this prohibition would be ineffectual if the legislator could intervene instead of the executive and enact law setting a rate itself. Following this logic, the ECB has consistently held that the ECB and NCBs' independence, though worded as a prohibition 'to seek or take instructions', precludes even Community or national legislation, also characterised as instructions, interfering with their tasks. The ECJ had the opportunity to discuss the notion of independence of the ECB and NCBs in the *OLAF* case," and supported the position of the ECB in that the principle of independence safeguarded the performance of the ECB and NCBs' Treaty-assigned tasks and precluded even legislative interference, adding that "the draftsmen of the EC Treaty clearly intended to ensure that the ECB should be in a position to carry out independently the tasks conferred upon it by the Treaty. "12" "Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute." 13

The institutions and bodies of the Community — with the notable exception of the Court of Justice — do not have the power to approve, suspend, annul or defer decisions of the ECB, nor are the institutions entitled to vote during the meetings of the Executive Board or the Governing Council. In the same way, the institutions and bodies of the Republic of Malta, with the exception of its Courts and Tribunals, do not have the power to approve, suspend, annul or defer decisions of the Bank, nor are they entitled to vote during the meetings of its decision making bodies.

⁷ Case 26/62, NV. Algemene Transporten Expeditie Ondememing van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

⁸ Case 6/64, Flaminio Costa v ENEL [1964] ECR 585.

⁹ Case 11/70. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

¹⁰ Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629.

¹¹ Case C-11/00, Commission v. ECB, [2003] ECR I-7147.

¹² Ibid. at 130.

¹³ Ibid. at 134.

As the ECJ's Advocate General Jacobs makes clear, "[i]t is, as the ECB itself points out, clear that the independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB [and NCBs] from short-term political pressures the principle of independence aims to enable the ECB [and NCBs] effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community as required by Article 105(1) EC."14

The Governing Council of the ECB, on the basis of the law, case law and doctrine described above, maintains that:

- "Rights of third parties to give instructions to NCBs, their decision-making bodies or their members are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned.
- Rights of third parties to approve, suspend, annul or defer NCBs' decisions are incompatible
 with the Treaty and the Statute as far as ESCB related tasks are concerned.
- A right for bodies other than independent courts to censor, on legal grounds, decisions relating to the performance of ESCB-related tasks is incompatible with the Treaty and the Statute since the performance of these tasks may not be reassessed at the political level. A right of the Governor to suspend the implementation of decisions adopted by ESCB or NCB decisionmaking bodies on legal grounds and subsequently to submit them to political bodies for a final decision would be equivalent to seeking instructions from third parties." ¹¹⁵

Under Maltese law, in particular article 5(2) of the Act, the prohibition of interference is even wider in that it extends not only to ESCB-related tasks but also to the exercise of any function, duty or power under the Act.

Further to legal obligation, the ECB and the NCBs, including the Central Bank of Malta, maintain that the need to maintain the complete confidence of unstable financial markets across the euro area makes it essential to avoid any situation potentially capable, even from the aspect of form or mere appearances, of giving rise to fear that a national government might be in a position to influence a Central Bank within the ESCB.

The Bank's autonomy in determining staff policy

In light of the principle of independence, the employees and staff of the Central Bank of Malta are not public officers, employees or servants, and are not subject to the employment law applicable to the public sector. As laid down in article 14 of the Act "The appointment of officials and other employees of the Bank shall be made by the Board and on such terms and conditions as may be established by the Board." The Bank therefore enjoys the right to enact staff regulations or rules without government approval. As in the case of the ECB, which also autonomously defines its staff's conditions of employment, such autonomy forms part of the NCBs' independence as guaranteed by Article 108 of the Treaty and Article 36 of the ESCB Statute.

It has been stated explicitly in legal acts approved by the Governing Council of the ECB that "[national] regulations must not impair the ability of an NCB to employ and retain the qualified staff necessary for the performance of the tasks conferred upon it by the Treaty, [ESCB Statute] and national legislation in an independent manner. The ECB has noted that Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem related tasks. 16 Similarly, an NCB may not be put into a position where it has limited or no control over its staff or where a

¹⁴ Opinion of the Advocate General, Case C-11/00, Commission v. ECB, para. 50.

¹⁵ ECB May 2007 Convergence Report issued under Article 122(2) of the EC Treaty, p.17.

¹⁶ See ECB Convergence Report 2007, p. 19.

government of a Member State seeks to influence it in the performance of its tasks, as has been stressed in various opinions of the ECB in recent years¹⁷"18.

Furthermore, in its May 2008 Convergence Report under Article 122(2) of the EC Treaty, the ECB explicitly held that "Member States <u>may not impair an NCB's ability to employ and retain the qualified staff</u> necessary for the NCB to perform independently the tasks conferred on it by the Treaty and the Statute. In addition, an NCB may not be put into a position where it has limited or no control over its staff, <u>or where</u> the government of a Member State is in a position to influence its policy on staff matters¹⁹."²⁰

¹⁷ See ECB Convergence Report 2007, p. 20, footnote 7, referring, inter alia, to ECB Opinion CON/2004/1 of 20 January 2004 at the request of the Economic Committee of the Finnish Parliament on a draft government proposal to amend the Suomen Pankki Act and other related acts, which concerned the reduction of primary capital of the Suomen Pankki and a limitation on Suomen Pankki's right to create financial provisions.

¹⁸ Opinion of the European Central Bank of 21 February 2008 on the Deutsche Bundesbank's employment relationships with its staff (CON/2008/9).

¹⁹ See ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank; also ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law).

²⁰ P. 28, emphasis added.



EUROSYSTEM

DOCUMENT B

12 December 2008

Jean-Claude TRICHET President

Mr P. Nikiforos DIAMANDOUROS

The European Ombudsman

1, Avenue du Président Robert Schuman

CS 30403

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FRANCE

Dear Mr Diamandouros, LS/JCT/08/2040

Your reference: O8/2008/TN

I have received your letter of 20 November 2008 concerning the interpretation of Article 108 of the Treaty. More particularly, you are seeking the views of the European Central Bank (ECB) on 'whether Article 108 of the EC Treaty or any other provision of the Treaty or of the Statute of the ESCB would justify the refusal of a national central bank to apply to its staff family friendly policies (such as an increased right to parental leave) in force in that Member State'. This reply is limited to the question regarding the interpretation of Article 108 of the Treaty and is given on the basis of the information provided in your letter.

I understand that the Maltese Government has made a decision to give its male public officials 20 days parental leave and expects other employers in Malta to do the same. I also understand that this grant of 20 days parental leave to its male public officials is not established by legislation applicable to all male employees in Malta.

In this respect, Article 108 of the Treaty, as reproduced in Article 7 of the Statute of the ESCB, refers to the independence of the ECB and of the national central banks (NCBs) as follows:

'When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.'

The concept of central bank independence includes various aspects of independence that must be assessed separately, namely: functional, institutional, personal and financial independence. Over the past few

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years, opinions adopted by the ECB have refined the analysis of these aspects of central bank independence¹.

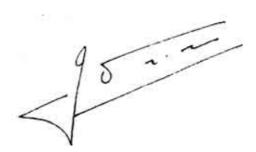
The requirement for independence also entails the autonomy of NCBs in staff matters. Member States may not impair the ability of an NCB to employ and retain the qualified staff necessary for the NCB to perform independently the tasks conferred on it by the Treaty and the Statute of the ESCB. In addition, an NCB may not be put into a position where it has limited or no control over its staff, or where the government of a Member State is in a position to influence its policy on staff matters².

In Malta, the requirement for independence is reflected in Article 5(2) of the Central Bank of Malta Act³, which provides that neither the Central Bank of Malta (CBM), nor any member of its Board of Directors or any official of the CBM, when exercising any function, duty or power under the Act, shall seek or take instructions from the Government or any other body. Article 8(1) of the Act reflects Article 14.2 of the Statute of the ESCB, while Article 14 of the Act⁴ makes it amply clear that the CBM's Board of Directors is solely responsible for the appointment of officials and other CBM employees, on such terms and conditions as may be established by the Board.

It follows that the CBM is an independent body with its own distinct legal personality, separate from the Maltese Government, and with its own decision-making bodies, recruitment policies and conditions of employment for staff.

Similarly to Maltese Government employees, CBM employees are public officials, however they are not civil servants. Unless established by legislation applicable to all male employees residing in Malta, the CBM is not bound to grant the parental leave in question to its male employees. The Maltese Government has not enacted any such legislation and I understand that it has used instruments applicable only to the public officials it employs. Consequently, the grant of the parental leave in question does not in any way affect the terms and conditions of employment of CBM employees, nor does it entail an obligation for the CBM to follow such a move.

Yours sincerely



cc: Michael C. Bonello, Governor of the Central Bank of Malta

See the ECB Convergence Report 2008, p. 17, available on the ECB's website at www.ecb.europa.eu.

See ECB Opinion C0N/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank; also ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law).

³ Chapter 204 of the Laws of Malta.

⁴ Ibid.

Office of the Parliamentary Ombudsman, Malta

Own-initiative report by the Parliamentary Ombudsman

Principles that should govern relations between the national government and public authorities and entities

Views and comments on own-initiative report by the Parliamentary Ombudsman by selected government authorities and public bodies



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CHAIRMAN'S OFFICE

14th December 2009

The Parliamentary Ombudsman 11 St Paul Street Valletta

Dear Sir

I refer to your letter of the 19th November regarding the Own Initiative Investigation in relation to relations between the National Government and public authorities and entities.

I do concur with your recommendations with one proviso. You correctly make reference in your recommendation to the concept of public administration. In my opinion, there needs to be a clear distinction between what is considered as Public Service, what is considered as Public Administration and what is considered as Public Sector.

Unfortunately the Public Sector is taken to include organisations such as Air Malta. However it cannot be considered to form part of the Public Administration as the company cannot and does not receive any subventions from the State and competes in the commercial world as if it were a privately owned airline. In such a scenario it may not be appropriate to burden Air Malta with conditions of work that would otherwise not apply to a commercial company.

The fact that the government owns 98% of Air Malta's equity is incidental. On the other hand I do agree that independent entities such as the Central Bank of Malta do form part of the Public Administration.

I believe that unless there is clarity in the definitions, there will continue to be situations that create conflicting views on what is applicable and for who they are applicable.

If you have any queries on the above, kindly let me know.

Yours faithfully

Lawrence Zammit Chairman

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

29 January 2010

The Ombudsman
The Ombudsman's Office
11 St Paul Street
Valletta

Att: Ms M Muscat

Dear Sir

Case No I 0530

We refer to your letter addressed to our Chairman dated 15th December 2009.

We apologize for replying so late, which is partly due to current absence of staff and partly to the complexity of the subject matter.

We have carefully examined your Own Initiative Report dated 30 September 2009 on the subject: "Relations between the National Government and Public Authorities and Entities". This matter has been discussed at internal management and Board of Governors levels involving the MFSA's most senior officials. We are obviously interested in this Report and its findings and we would very much wish to participate in this discussion.

Stated in brief terms, the MFSA broadly agrees with the position described by the Central Bank of Malta. In particular, and in a similar manner to the Central Bank of Malta, the MFSA is a public entity which is assigned by law its own separate and distinct legal personality and which is governed by its own legal framework and by a code of conduct for employees. The legislation applicable to the MFSA has allowed the MFSA's employment conditions to be better than those applicable to Government employees in certain respects throughout its existence. Public authorities are the creation of law and they were devised precisely to operate in manners different to government departments. In many instances these authorities often set standards and benchmarks which government departments failed and still fail to match. The Report seems to rest on the wrong and unsustainable assumption that it is always the government that sets standards and that public authorities merely follow or comply. This is not a true reflection of the reality.



We agree with many statements in your Report which describe correctly the legal status and nature of the autonomy assigned to public authorities in the laws that set them up. This is a very sensitive and complex area which merits extensive discussion on the legal and administrative implications. The Report rightly does not take these matters lightly but appears weak in its understanding of the regulatory implications. Indeed, there are several points with which we disagree — in several areas this may be a question of emphasis rather than principle. In some instances, however, our opinion is that the Report is incorrect or insufficient and may have misinterpreted the legal and regulatory framework and its underlying objectives and justifications. In this area, in our view, the Report stops short of recognizing the significance and the value of the degree of autonomy established and indeed mandated by legislation and not assumed voluntarily on the part of the Authority.

We agree with your suggestion for a wider consultation with public entities on this subject which has long been insufficiently studied and we would therefore be pleased to discuss our views further with your office.

We trust there is still time for a proper exchange of views and we therefore hope to receive a favourable reply from you in this regard.

While thanking you for communicating with us and for giving us a pre-publication copy of the Report, we look forward to an interesting dialogue with your Office in a spirit of productive collaboration, as has always been the case since the inception of the Office of the Ombudsman.

David Fabri Board Secretary

Head of the Legal Unit

CC Chairman

Dr Andre Spiteri — MFSA Ombudsman Liaison Officer



23rd December 2009

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Email: info@heritagemalta.org www.heritagemalta.org

Ms M Muscat Senior Administrative Officer Office of the Ombudsman 11 St Paul's Street Valletta VLT1210

Dear Ms Muscat

I am directed by the Chairman of the Board of Directors to write to you in reply to your letter of the 15th December 2009.

We have gone through the 'Own Initiative Investigation I 0530' and taken note of its content. Rest assured that Heritage Malta is very sensitive to such matters and strives to implement them in so far as the exigencies of the Agency permit.

Yours sincerely

Frank Mifsud

Board Secretary and Acting CEO



22, Triq Pietro Floriani, Furjana FRN 1060. Tel: 21247851-21248260/5. Fax 21243284.

21st December 2009

Chief Justice Emeritus Dr Joseph Said Pullicino Parliamentary Ombudsman 11, St Paul Street Valletta VLT 07

Dear Dr Said Pullicino,

Reference is made to the 'Own Initiative Report' (Case No I 0530), dated 30th September 2009.

We wish to congratulate you for this report and for the recommendations made therein.

As an Authority responsible for the provision of Social Housing, we fully agree that there should be a certain amount of autonomy and independence from central Government.

Even more important, entities such as the Housing Authority (Authority) should adopt good corporate governance in their daily operations, in order to ensure that there is a high level of accountability and transparency.

We would like to take this opportunity to thank you for your contribution in preparing this report. Should you require any assistance from our end please let us know.

Yours sincerely,

Chairman /



From: Abela Reginald at ITS [reginald.abela@gov.mt]

Sent: 21 December 2009 10:43 **To:** office@ombudsman.org.mt

Ms. M. Muscat, Senior Administrative Officer, Office of the Ombudsman Valletta

Dear Ms. Muscat,

Reference is made to the letter received from the Ombudsman dated 19th November with attached report, and to your reminder of the 15th December.

Kindly note that we have no comments to make but state that we do agree with the Ombudsman's conclusions.

Regards and Best Wishes

to a se.

Reginald Abela Chairman



HUMAN RESOURCES OFFICE

Case No. I 0530

4th January 2010

The Ombudsman (Attn. Ms M. Muscat, Senior Administrative Officer) 11 St Paul Street Valletta VLT 1210

Dear Ms Muscat

I refer to your letter dated 15th December 2009, and inform you that the considerations made in the Own Initiative Report are deemed very relevant.

Yours sincerely

Joyce Hill

HR & Development Manager

Administration Building M C A S T Main Campus Corradino Hill, Paola PLA 9032 Phone: (+356) 2398 7100 Fax: (+356) 2398 7316

E-mail: information@mcast.edu.mt URL: www.mcast.edu.mt



8 December 2009

RE: Following is MCA's feedback

MCA agrees with family friendly measures that promote flexibility and efficiency. In fact MCA has a substantial number of staff working reduced hours, number of staff on study leave, and a number on a tele-working basis and prides itself in having a high ratio of female employees occupying senior management and technical positions.

MCA gets its funding for its activities from the telecom operators who are all privately owned. In this respect MCA has to "lead by example" and all measures need to enhance efficiency, productivity and cost savings. Working conditions should be such as to promote utmost flexibility and manage to attract and retain the best performing "can do" attitudes. For example, the fact that MCA now has to give permanent contracts to its staff and not three year ones as is done by our counterparts in UK or Sweden does not attract the best "high flyers" to our organization. It only attracts people who are after a "job for life" which in today's telecom world does not exist.

Any measures which increase the cost of operation of MCA need to be properly evaluated. The Ombudsman's report argues that authorities should follow all HR measures of the public sector without mentioning the financial implications. An organization like MCA with strict financial regulations scrutinized annually by the EU cannot afford to overlook these cost issues. All increases in cost have a direct bearing on the contributions of the private telecom operators. The report just mentions "when this in no way impinges on the exercise of functions proper to them".

The report touches on the recruitment process and MCA has no problem in observing Government procedures as long as they are fast and comparable in speed to those of the private sector. MCA is competing for resources with the likes of Vodafone, Melita and GO. There is no question about having rigid standards of transparency and good governance but the latter can also be achieved in a timely fast way.

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Good rules of governance should also apply in all matters including dismissal of people who for example do not perform satisfactorily. MCA finds the public sector regulations very limited in this area and just as the positive conditions for family friendly conditions should be encouraged the less pleasant ones of dismissal should be brought in line with the needs of 21st century organizations.

MCA agrees that a cultural change is needed, as the report concludes, yet one should not just address the soft conditions but due consideration be given to flexibility, efficiency, performance and cost.

Regards,

f/ Philip Micallef
Executive Chairman

Paul Tricell



Your Ref.: Case No I 0530 Out Ref.: CPA/ADMIN/045/95

1st December 2009

Hon. Chief Justice Emeritus J. Said Pullicino Parliamentary Ombudsman 11 St Paul Street Valletta VLT 07

Dear Sir

I refer to your letter dated 19th November 2009 enclosing the pre-publication of the Own Initiative Investigation which was prompted by complaints involving issues on relations between the National Government and public authorities and entities.

I have gone through your report and must admit that I never thought that such issues might arise between the Parliamentary Ombudsman and other Government entities, whereby such entities would claim that Government policies would not apply to them. Besides, I must say that I have never before made the distinction between Public Service and Public Sector.

I agree with your conclusions of convergence for good governance of each public entity and the setting up of a consultative mechanism. In my opinion, for the consultation mechanism to be effective, Government has to officially recognise such body and have clear terms of reference when it should be consulted. In order to have an even playing field for all public entities, at the drawing up of the terms of reference, Government has to identify which are those areas or decision making processes which because of their "independence" should be excluded "a priori".

I would also like to suggest that certain entities because of their specific role, should be allowed to have specific conditions of work for their employees due to specific duties to be carried out. I would however expect that as far as possible, all employees across the public sector should enjoy the basic conditions including all family friendly conditions, unless specifically excluded through their respective collective agreements. I give a lot of importance to collective agreements, as Unions normally on these issues ask from the employer more than what is necessary.

Finally, I do not mind if you have to publish my comments as appendix as requested in your letter.

MALTA ENVIRONMENT & PLANNING AUTHORITY L-AWTORITA` TA` MALTA DWAR L-AMBJENT U L-IPPJANAR

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Austin Walker Chairman

MALTA INFORMATION TECHNOLOGY AGENCY



MITA's reply to Ombudsman Own Initiative Investigation 18th December 2009

Reference is made to the Own Initiative Investigation which sought to study the relationship between the National Government and its public authorities and entities and the associated prepublication report which was submitted to the Malta Information Technology Agency (MITA) for our reaction.

As a preamble to MITA's feedback, we would like to congratulate you and your office for taking up such an initiative to address a long-standing point of debate, which essentially reflects the hazy parameters governing the identity of national authorities and entities in general. We would like to extend our sincerest appreciation towards the commitment and diligence shown in articulating an informed and holistic opinion about the interface between National Government and its public authorities and entities from the perspective of the broader definition of public administration. We are confident that the present investigation can be used as a foundation to establish baseline principles that should underpin the rapport between the National Government and its entities and to address the existing institutional lacunae between public service and public sector.

The requirement to lay down clear guidelines that crystallise the relationship between National Government and public entities and that conceptualise the interplay between the autonomy and the obligation borne by these entities has long been felt. In this regard, we concur with your opinion that apart from favouring and promoting good governance, these principles will help:

- 1. To ensure correct and smooth relations between public service and public sector authorities and entities;
- 2. To redefine the role of these authorities and entities as being an administrative instrument and an integral part of public administration in its wider scope and as defined by the Public Administration Act, and thereby rendering a service to the public;
- 3. To generate a sense of consistency and cohesion across Government at large;
- 4. To promote more accountability and transparency in how these entities manage their administrative affairs; and
- 5. To forestall perceptions of discrimination and contrast between public service and public sector employees.

MITA believes that in so far as the general directives of policy and procedures inspired by Government for the correct conduct of public affairs do not interfere or impinge negatively on the exercise of the functions of the entity, these entities should take the opportunity to follow Government's lead and implement measures that satisfy good administrative practice.

MITA is a newly-established Agency constituted by Government and falling under the Public Administration Act. MITA is effectively a public sector entity and accordingly a protagonist in national public administration. The Agency operates in terms of a statute which was approved by the Cabinet of Ministers. Among other things, the Statute stipulates the legal personality of the Agency and determines the parameters of its autonomy as per Article 4.1 and Article 7 of the Statute.

The affairs and the business of the Agency shall be the responsibility of the Agency itself.... the executive conduct of the Agency, its administration and organisation and the administrative control of its officers and employees, shall be the responsibility of the Chief Executive Officer of the Agency" (Article 4.1)

"The appointment of officers and other employees of the agency shall be made by the Agency. The terms and conditions of employment shall be established by the Agency with the concurrence of the Minister' (Article 7)

MALTA INFORMATION TECHNOLOGY AGENCY



Taking over from the Malta Information Technology and Training Services Limited (MITTS) as its predecessor, MITA has inherited a strong Human Resources (HR) policy suite that governs various facets of human resources management, including benefits and family-friendly measures and recruitment and employment of staff; the two key areas of concern highlighted by the report.

Prior to Government's declaration in the 2008 Budget Speech to introduce and grant family-friendly measures to public officials, the organisation had already in place a number of family-friendly measures that were being enjoyed by its employees. In most instances, the incentives offered by the organisation were even more favorable than the ones introduced by Government. To date, the HR Policy handbook comprises of a whole section covering benefits and family-friendly measures; including flexible work schedule, reduced hours, teleworking, unpaid leave, special paid leave, maternity and paternal leave, compassionate transfer of leave, child care reimbursement scheme, health insurance and others. From time to time these policies are reviewed to ensure that they are comparable or even better to the incentives offered by central Government.

With regard to the recruitment and employment of staff, MITA has an exhaustive recruitment policy which systematically outlines the recruitment procedure to be adopted by the Agency in all its recruitment and selection processes. All appointments within the Agency take place through a competitive selection process. The Policy overtly states that

"MITA will aim to attract the brightest and the ablest. The Agency shall adopt a flexible, just in time approach in its recruitment processes and will strive to select the best candidates through the adoption of best practice.

"The Agency's recruitment strategy shall comply with all related legislation and any vacancies will be filled on the basis of merit."

MITA believes in providing opportunities to its employees and in view of this all vacancies which arise from resignation, moves of personnel to other positions, and a requirement for additional or new types of products/services shall be issued as internal call for applications. The Agency may in exceptional circumstances and for justifiable reason decide through the CEO not to issue the call internally.

All recruitment processes shall be professional, transparent and of the highest integrity and will be open to scrutiny by parties both internal and external to the Agency."

Selection criteria are established prior to the onset of the recruitment and selection process and a interview selection report is compiled for every recruitment call issued by the Agency. MITA also has an Appeals Process which is regulated by means of an Appeals policy. Through this policy, the Agency gives the right to employees who participated in an internal selection process and in a career progression process to appeal against the decision taken by the Agency within an environment that is free from threat and reprisal.

In exceptional circumstances the Agency may opt to fill a vacancy through a direct appointment; however, this approach is also governed by a specific HR policy.

It is also important to note that MITA's recruitment policy and procedure are reflective of the Guidelines on Recruitment and Selection issued by the Ministry of Infrastructure, Transport and Communication (MITC) in 2008. These guidelines set out to delineate a baseline framework intended to serve as a *modus operandi* for internal and external recruitment and selection of employees for all entities falling within the portfolio of MITC.

It is clear that the chief argument generated by the Own Initiative Investigation centers around the adoption of good administrative practice. The organisation has always strived to adopt best practice in all its administrative and operational functions so much so that the Agency is ISO 9001-2008 certified and Investors in People recognised. The organisation was awarded the prestigious Investors in People Certification in 2003, which recognition status is reviewed every three years.



MALTA INFORMATION TECHNOLOGY AGENCY

The Investors in People Standard provides a well-established and flexible framework to assist organisations to realise objectives and enhance competitiveness through improved people performance. The Investors in People is essentially a tool for delivering business improvement through good practice in Human Resources Management and Development. The Investors in People Standard deals with a number of Human Resources Management (HRM) and Human Resources Development (HRD) related functions, including organisational strategy, learning and development, equity and equal opportunities, performance management, employee recognition, leadership, employee involvement and empowerment and continuous improvement.

With regard to the Recommendations Section of the Own Initiative Investigation report, I fully concur with your suggestion to establish a consultative mechanism between Government and its authorities and entities to promote good practice and guarantee high standards of good governance. Such a feedback mechanism would give a chance to Government entities to enter into discussion with Government regarding measures intended to be approved and introduced by Government. Such involvement would ensure more buy and ownership on the part of all stakeholders.

On a closing note, we incerely augur that the Own Initiative Investigation will generate a productive debate amongst all parties concerned, in a resolute attempt to improve public administration delivery for the benefit of the people whom we serve.



Malta Investment Management Co. Ltd.

Enterprise Centre, San Gwann Industrial Estate San Gwann SGN 3000, Malta Tel: (356) 21497970 Fax: (356) 21499568 www.mimcol.com email: info@mimcol.com

Case No I 0530

4th December 2009

Mr J Said Pullicino Parliamentary Ombudsman 11 St Paul Street Valletta VLT 07

Dear Sir

Reference is made to your letter dated 19th November together with the pre-publication copy of your Own Initiative Report which we found very interesting.

Our reaction to your recommendations is a positive one. As an organisation we endeavour to adopt best practices and as far as possible to be 'ideal employers'. The Company has in fact introduced the family friendly measures soon after these were issued by the National Government. We realise that both the organisation and the employees stand to gain from these arrangements as while valuable resources are retained, employees manage to sustain a good work - life balance.

With regards to recruitment, as an organisation we rigorously follow fair and transparent procedures by going through the Employment and Training Corporation, obtaining necessary permits and conducting interviews to eligible candidates. The only exception is in the case of a position of special trust wherein we appoint the person directly, in accordance with Section 15, Paragraph 2(I) of the Employment and Training Services Act 1990. This procedure requires prior approval from the Office of the Prime Minister.



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In the light of the above, we welcome the idea of a consultative mechanism which would result in the establishment of a code of practice for the wider public sector. In this way, while keeping their autonomy and independence, Government entities would have a uniform set of guidelines they can follow in respect of working conditions and recruitment procedures.

In conclusion whilst thanking you for consulting with us prior to publishing your report, we find no objection in publishing our comments as an annex to same.

Yours sincerely

Mario Mizzi Chief Executive



MALTA MARITIME AUTHORITY

22nd December 2009

Dr. J. Said Pullicino Ombudsman 11 St. Paul Street Valletta VLT07

Dear Dr. Said Pullicino,

Case No I 0530

1 refer to your letter of 19th November.

As we had the occasion to confirm in previous correspondence, the Malta Maritime Authority is in favour of adopting processes and procedures which reflect principles of good governance and transparency, whether in the ambit of recruitment, or internal selection or promotions. Our position is the same with regards to the implementation of family friendly measures such as flexible and/or reduced hours.

However, the adherence to what are at times strict and rigid processes aimed at ensuring at least the perception of good governance and transparency, should not be such as to impinge on the efficiency of the organisation. The potential delays and costs associated with the implementation of certain measures should be borne in mind particularly in specialist sectors, such as the maritime industry. A public sector entity such as MMA has to compete with the private sector for the retention and employment of skilled and competent personnel who are not available by the dozens. Certain selection and promotion procedures, especially in the context of management grades, can unnecessarily lengthen the process which consequently impacts on the efficiency of the organisation which, in our case, is competing not only with the private sector (as mentioned above) for the retention and recruitment of the required skills, but also with other jurisdictions (EU and non-EU) in the cutthroat field of ship registration.

With particular regard to the adoption of family friendly measures which were the subject of the CBM case, MMA indeed already adopts such measures to an extent which, in my view, goes beyond what may be reasonably expected. Again, it has to be pointed out that this does come at a cost since, in order to reduce the impact on the organisation's efficiency, we would need to recruit more personnel to cover those hours where



MALTA MARITIME AUTHORITY

personnel who are availing themselves of these measures, are not available. We are then embroiled in a vicious circle where we need to justify to a central deciding body (such as the RRAG) why we need to employ additional personnel. Unfortunately we are not always successful in doing so as the considerations above are not always obvious to all. It would therefore also appear necessary to ensure that any body external to the entity concerned (MMA in our case) which/who is to be consulted when the public sector entity needs to implement HR decisions, is sensitive to the business case and is bound by finite timelines to deliver a decision. This would certainly be of benefit in ensuring that efficiency and good governance are not mutually exclusive.

Yours sincerely

Stanley Portelli

CEO





From: Farrugia Francis E at MSA [francis.e.farrugia@msa.org.mt]

Sent: 22 December 2009 22:08
To: office@ombudsman.org.mt

Subject: Re:Case No I 0530

Dr. J. Said Pullicino Parliamentary Ombudsman

With reference to the pre-publication document 'Own Initiative Report (Case No. I 0530)' we agree with the recommendations being put forward in the report. Our involvements in International Institutions some of which covered by International Treaties imposes functional independence at various levels.

No objections for publishing the above comments.

Ing. Francis E. Farrugia Chairman Malta Standards Authority Evans Building, Second Floor Merchants Street Valletta, VLT1179 MALTA

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Malta Statistics Authority

Awtorita` ta' I-Istatistika ta' Malta

Chairman's Office

Uffiċċju taċ-Chairman

24.12.2009

The Parliamentary Ombudsman Ombudsman Office Valetta.

Dear Sir

Thank you for sending me a copy of your report on issues relating to the relations between National Government and public authorities and entities. The Malta Statistics Authority is one of these public authorities and has been established by Act No. XXIV of 2000 The report is, therefore, of considerable relevance to us.

The own-initiative report has been prompted by a request from a CBM employee to be allowed (a further period of) parental leave on the basis of the recently family-friendly measures introduced by government. As in the case of the CBM, we are also faced, at times, with problems of the same nature.

One has to state at the outset that family-friendly measures, not necessarily similar to those outlined in the 2008 Budget, were already introduced in a number of public authorities and entities well before that date. These are usually provided for in the pertinent Collective Agreements that may differ from one entity to another but one may observe that as a general rule, such concessions are usually more generous and cover wider areas than those generally related to government conditions of service.

It is pertinent to point out that the Own Initiative Report was prompted by a complaint filed by a former female employee of the CBM who felt aggrieved when the Bank refused to approve an extension of a period of reduced hours until her son reached a certain age. In this respect, one may observe (a) that the Bank had already approved the employee's first request for reduced hours and (b) a second concession could establish a precedent that the Governor felt could go against good governance within such an important institution as a Central Bank.

What is of primary importance and significance in the report is not the specific case as such but the several arguments, norms, guidelines and concepts contained therein. One should, therefore, concentrate wholly on these authoritative conclusions of the report in order to be guided in taking decisions related to cases involving family-friendly measures as may arise from time to time.

The MSA Board had, on occasions, to discuss and decide on matters relating to family-friendly measures. Decisions are based on two basic principles that may be

considered in consonance with what is stated in the report. However, one should not completely disregard any amount of discretion on the part of the Head of the Entity as a result of promoting 'homogenous practices and ensuring a measure of convergence in administrative procedure between Government and autonomous independent authorities and entities'.

In our case, every complaint involving family-friendly measures is dealt with on its own merits provided it does not infringe statistical principles that are either enshrined in the local Statistics law or in the European Statistical Code of Practice and, at times, taking also into account the employee's grade and responsibilities.

Most cases (complaints) refer to requests for teleworking. In our case, teleworking would involve the transfer of official questionnaires to the individual's home. These documents contain *confidential* information relating to individuals and/or business establishments. In the case of data on individuals or households, the documents contain complete information on the age, marital status, wage and other earnings. In the case of business establishments, information will cover employees' status and income. Other documents would also show the performances of individual businesses including production and profits.

In its careful consideration of requests, the MSA Board is inspired by the principle that public entities' employees should not be deprived of benefits 'extended to government employees that go further from those enjoyed by them as of right by statute or agreement'. For this reason, in most cases, the request was upheld; in a few cases, the pertinent requests were not approved.

Having said that, the report's recommendations at D2, D3, D4 are agreed to. However we have some reservations in connection with D1 (as already pointed out) and D5.

This, notwithstanding, the MSA Board believes that family-friendly measures were positive arrangements and should be considered an integral part of good governance irrespective of the legal form and nature of public organisations. The report further provides a clear and sound basis for a uniform approach and underlying principles in the application of family-friendly measures in both Government departments and in autonomous public authorities and other entities.

I would like to apologise for the delay in sending my submissions.

Yours sincerely

Aprillar/

Reno Camilleri Chairman

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Malta Transport Authority

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Public Transport • Licensing Ex Testing Network Infrastructure • Transport Strategy Corporate Services

Our Ref: 510/exec/06

Chief Justice Emeritus Dr. J. Said Pullicino Parliamentary Ombudsman Office of the Ombudsman 11 St. Paul Street Valletta

2nd December 2009.

Mr. Justice

Re: Own Initiative Report

We are in receipt of your letter dated 19^{th} November wherein you attached a prepublication copy of your report.

Whilst congratulating you on your initiative, I wish to inform you that I have no comments to add.

Yours sincerely,



Simon Vella Executive Chairman

MINISTERU GĦALL-POLITIKA SOĊJALI



MINISTRY FOR SOCIAL POLICY

Ufficcju tas-Segretarju Permanenti (Politika Socjali)

Office of the Permanent Secretary (Social Policy)

Our Ref: MSP/19/99/Vol II Your Ref:

22nd December, 2009

Ms M Muscat Senior Administrative Officer Office of the Ombudsman 11, Triq San Pawl Valletta

Ombudsman Case No. 1 0530 — Own Initiative Report

Reference is made to the Ombudsman's letter, addressed to the President of the Foundation for Social Welfare Services dated 17th November 2009, regarding subject in caption.

Please be informed that I have no comments to make about the Report in caption.

FRANS BORG

Permanent Secretary



National Audit Office Notre Dame Ravelin Floriana VLT2000 Malta Phone: (+356) 22055555
Fax: (+356) 21220708
E-mail: nao.malta@gov.mt
Website: www.nao.gov.mt

Auditor General

Our Ref: NAO 76/2009 Your Ref: Case No. I 0530

17th December 2009

Ombudsman
Office of the Ombudsman

Dear Sir,

Please refer to your letter of 19 November, 2009.

I have perused the draft report sent to us by your Office and would like to put forward the following comments.

NAO has analysed carefully the Own Initiative Investigation undertaken by your Office which essentially focuses on the institutional relations between central Government and the various public authorities and entities set up by the Constitution of Malta or though *ad hoc* legislation. Even though, these entities are not deemed to form part of the public service it is a fact that ultimately they have been set up to provide a service to the public. Although this Investigation was triggered off by a particular case involving an employee of the Central Bank of Malta, you came to the conclusion, shared by the NAO, that the principles involved should actually be applicable across the board to all such organizations.

After careful reflection NAO endorses the main conclusions reached by your Office. Indeed, whilst highlighting the need to safeguard, without any compromise or exception, the autonomy and independence of such entities particularly in so far as 'the exercise of their declared functions within their exclusive jurisdiction' is involved, there is no reason why these constituted authorities, 'should not be expected to adopt administrative measures inspired by Government in favour of public officersunless there are cogent reasons that militate against such a decision'. There is no doubt that the employees engaged by these entities, whilst not being 'public officers', fall under the category of 'public sector employees'. Suffice it to refer to the interpretation provision of the Public Administration Act (Chapter 497) whereby the definition of 'public employees' includes public officers and employees of Government agencies and entities.

The opinion presented by your Office focuses on two separate, even if somehow related areas; namely, (i) the availability of family friendly measures and (ii) the recruitment and employment processes within such entities.

As regards the former, NAO strongly feels that public authorities and entities, corporations and similar organizations should not without good reason or capriciously deprive their employees of utilising family friendly opportunities. At the same time the approval of such facility, on a case by case basis, falls within the sole and exclusive prerogative of that particular entity's management. Such managerial discretion needs to take into account any constraints that may be imposed by particular work commitments and functions. This is expressly stated in the new Collective Agreement for NAO employees signed recently — 'The Auditor General agrees to introduce 'Family Friendly Measures' according to the Public Service Management Code and according to work exigencies and commitments'. Whilst appreciating the need to have in place such facilities, which should ideally result in win-win situations both for management as well as the employees involved, NAO would like to emphasise that the granting of such facility per se is not an automatic right that management cannot refuse. At the same time, management should consider family friendly measures as an opportunity — keeping in view today's need to strike an acceptable work-family balance — to employ and retain the qualified staff necessary for the execution of the entity's mandate as defined by law. The excessive costs of retraining cannot be ignored.

Regarding the latter, NAO also endorses your opinion that, within full respect of their autonomy and independence, public entities should strive to follow the principle that 'the rules of good governance that bind the Government should also be taken as guidelines for the proper management of their affairs unless there are cogent reasons that militate against their doing so'. Thus, all recruitment and engagement policies and procedures should be manifestly fair, objective and transparent with such factors as merit, knowledge of subject matter and qualifications as the underlying criteria for selection.

Finally, NAO would like to convey its full support to the recommendation being put forward by you that ideally the relationship between central Government and these entities should be based solely on a systematic ongoing and managed consultation process rather than legislative or administrative imposition. Such consultative mechanism would ensure that any potential measures or actions that may lead to negative results on a particular entity's commitments or operations are duly avoided whilst ownership of decisions will surely lead to more timely, effective and efficient implementation.

I hope that my feedback will prove useful and I have no problem if the above comments are published as an Appendix to your report.

Yours faithfully

Chillifer >

A. C. Mifsud

AWTORITA' GHAS-SAHHA U S-SIGURTA' FUQ IL-POST TAX-X0GHOL

OCCUPATIONAL HEALTH & SAFETY AUTHORITY

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23rd December 2009.

The Ombudsman,

11, St Paul Street,

Valletta VLT 1210.

Dear Dr. Said Pullicino

I would like to refer to your letter of the 19th November addressed to the Chairperson of this Authority regarding the Ombudsman's Own Inititiative involving issues that touch on the relations between the National Government and public entities.

Personally, I do not feel, for ethical reasons, that I should pass comment on that part of your opinion concerning your investigation of another public entity.

With regards to your conclusions, it is opportune to point out that the OHS Authority has, since its inception, considered itself to be an intrinsic part of the Central Administration, and therefore has taken on board and followed all policies and rules of good governance that are established by the Government.

As a matter of fact, and especially in so far as employment issues are concerned, the OHSA remains guided by those policies established by the Office of the Prime Minister (and the Management and Personnel Office) from time to time, including on matters concerning salaries (these are determined by Government's Collective Bargaining Unit with reference to equivalent public service salary scales) other conditions of employment and recruitment.

Having said that, and especially with regards to small entities such as this Authority, managerial discretion in the implementation of several of the measures, should be guaranteed and should remain a prerogative, as it is of the essence, so as not to disrupt the operational capabilities of the entity.

I hope that you find this information useful.

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Yours sincerely,

Dr. Mark Gauci,

Chief Executive Officer



Public Broadcasting Services

21st December, 2009

The Ombudsman 11 St Paul Street Valletta

For the attention of Ms M. Muscat - Senior Administrative Officer

Report on Case No. 10530

PBS Ltd would like to forward the following comments:

Family friendly measures should be willingly adopted by Public Entities, however, adopting them to their needs. Transparency and accountability should always be practised for good governance throughout all levels.

Therefore, the entities concerned (e.g. PBS Ltd) should respect the decisions of the National Government regulating public administration, but they should not blindly accept and implement them. In doing so, however, authorities should at all times be in a position to justify their refusal by sound reasons.

PBS therefore agrees with the recommendation of the setting up of a consultative mechanism of review between the Government and public entities meant to promote good practices and to introduce procedures that guarantee high standards of good governance, ensuring transparency and accountability, while fully respecting the autonomy and independence these institutions enjoy.

Edmund Tabone

Manager Corporate Services