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EVALUATIONS**
On the implementation of the European Investigation Order (EIO)
REPORT ON MALTA

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1. EXECUTIVE SUMMARY

The 10th round of mutual evaluations focuses on Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('the Directive'). The aim of the evaluation is to consider not only the legal issues but also the practical and operational aspects linked to the implementation of the Directive. It provides a valuable opportunity to identify areas for improvement, as well as best practices to be shared among Member States. The evaluation further promotes effective implementation of the instrument and aims to enhance mutual trust among the Member States' judicial authorities.

The visit was well prepared by the Maltese authorities, allowing the evaluation team to meet with all the relevant bodies dealing with the European Investigation Order ('EIO') in Malta. The evaluation team particularly appreciated the welcoming atmosphere in which discussions took place; the Maltese authorities proved to be very open and willing to reflect on the current practice of applying the EIO in Malta.

When it comes to the EIO, Malta has a highly centralised system. The Attorney General's Office (AGO) is responsible for the transmission and receipt of all EIOs. It acts as the validating authority when EIOs are issued by the police, and it handles all communication between Malta and other Member States regarding the EIO. The Maltese authorities involved in the evaluation visit, from both law enforcement and the judiciary, expressed their overall satisfaction with the central role the AGO plays and communication between the AGO and other national authorities certainly seems to be organised in a very efficient way. As a result of the AGO's considerable specialisation in international cooperation, communication with the other Member State is always established in the early stages when needed and proves to be successful. This applies to questions on execution, confidentiality and any other matter relating to the EIO (*see Best Practices Nos 2-6*).

According to the evaluation team, Malta is to be commended for its generally flexible and proactive approach when executing EIOs (*see Best Practices Nos 2 and 3*). By way of example, the evaluation team particularly appreciates the fact that the Maltese authorities do not generally require an additional EIO when mistakes are identified in bank account numbers or addresses.

Nevertheless, the evaluation team identified some areas for improvement that need to be addressed at the national and EU level (see Chapter 24).

During the visit, one noteworthy topic of discussion was how the measure of interception of telecommunications (Articles 30 and 31 of the Directive) was applied in Malta. According to Maltese law, every interception must be authorised by “the Minister”, meaning the Minister of Home Affairs. This means that use of this measure is not supervised by a judicial authority in Malta. It deserves to be mentioned that on this matter, the *Group of States against Corruption* (GRECO), has made recommendations to Malta in several evaluations. The evaluations team would like to reiterate the recommendation made by GRECO, as they are also fully applicable in the field of international judicial cooperation in criminal matters. It is therefore recommended that Malta considers amending the legal provisions and consequently empowers judicial authorities to order such investigative measures and safeguard the provision that evidence obtained by the issuing State following an EIO sent to Malta is admissible in court (*see Recommendation No 5*).

Furthermore, the evaluation team found that there may be a need for further clarification or revision at EU level regarding the speciality rule, the application of EIOs in connection with ensuring the accused person’s presence at trial, the concept of interception of telecommunications, the application of the Directive in relation to the Convention Implementing the Schengen Agreement (‘CISA’) in respect of cross-border surveillance and the use of investigative measures in the post-trial phase. Lastly, the Maltese authorities and the evaluation team expressed a wish for a secure tool for videoconferencing to be created and made accessible to all Member States (*see Recommendations Nos 18-23*).

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997¹ ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters ('CATS') agreed after an informal procedure following its informal meeting on 10 May 2022, that the 10th round of mutual evaluations would focus on the EIO.

The aim of the 10th round of mutual evaluations is to provide added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also – and in particular – relevant practical and operational aspects linked to the implementation of Directive 2014/41/EU. This will allow shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the EU.

More generally, promoting the coherent and effective implementation of this legal instrument to its full potential could significantly enhance mutual trust among Member States' judicial authorities and ensure better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice. Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of Directive 2014/41/EU.

Malta was the 17th Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS.²

¹ Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.

² ST 10119/22 and WK 6508/2023.

In accordance with Article 3 of the Joint Action, the Presidency drew up a list of experts for the evaluations to be carried out. Pursuant to a written request sent to delegations by the General Secretariat of the Council of the European Union, Member States nominated experts with substantial practical knowledge in the field.

Each evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the 10th round of mutual evaluations, it was agreed that the European Commission and Eurojust should be invited as observers.³

The experts entrusted with the task of evaluating Malta were Mr Alexandru Ciuciu (Romania), Ms Agnieszka Kępką (Poland) and Mr José Manuel Sánchez Siscart (Spain). Observers were also present: Ms Ana Wallis de Carvalho (Eurojust), together with Ms Anastasia Pryvalova from the General Secretariat of the Council.

This report was drawn up by the team of experts with the assistance of the General Secretariat of the Council. It is based on the findings of the evaluation visit that took place in Malta from 20 to 24 November 2023 and on Malta's detailed replies to the evaluation questionnaire, along with its detailed answers to the follow-up questions.

The evaluation team had the opportunity to meet representatives from the Ministry of Justice, the Judiciary, the Attorney General's Office, Malta's Police Force and the Chamber of Advocates. All of the individuals present provided the evaluation team with a detailed explanation of their institution's role in the EIO process in Malta.

³ ST 10119/22.

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters has been transposed in Malta into Subsidiary Legislation 9.25 (hereafter: S.L. 9.25).

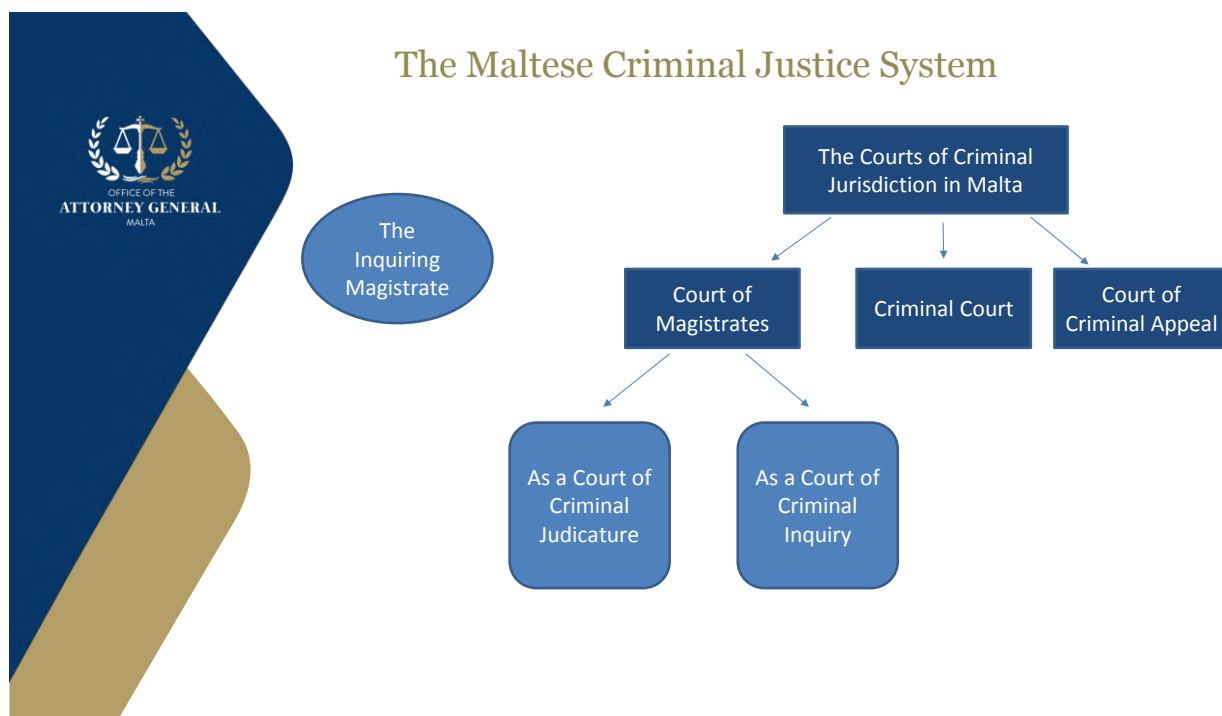
In Malta, S.L. 9.25 serves as the legal framework for implementing the EIO Directive within the Maltese legal system. It outlines the procedures and mechanisms for issuing, executing, and recognising EIOs in Malta.

S.L. 9.25 is the only act implementing the provisions of the EIO Directive in the Maltese legal system. In terms of content, its provisions largely constitute a copy of the provisions of the EIO Directive. Only under provisions that refer to specific solutions within the Maltese legal system, the regulation contains references to individual provisions of the Criminal Code of Malta. No other act has been issued that would regulate detailed issues regarding EIOs.

4. COMPETENT AUTHORITIES HANDLING THE DIRECTIVE 2014/41/EU

4.1. Maltese legal system

The Maltese legal system is characterised by a historic synthesis of various legal systems, resulting in its own unique mix. At the beginning of the visit, the Maltese authorities provided the evaluation team with a presentation of the Maltese legal system, which also provided a good starting point for understanding how the EIO is applied in practice in Malta. The image below provides a very useful overview of the Maltese criminal justice system.



Inquiring Magistrate

The Inquiring Magistrate, as illustrated above, is becoming more and more important in the application of the EIO in Malta. The role of the Inquiring Magistrate is similar to what other Member States may recognise as the “investigating” or “examining” judge. The Inquiring Magistrate does not have their own physical court but is rather a rotating system with different magistrates being on duty. When the police investigate a crime potentially resulting in more than a three-year term of imprisonment, the Inquiring Magistrate is competent to open an investigation.

For that purpose, the Inquiring Magistrate appoints experts such as technical experts or pathologists. The police support the Inquiring Magistrate but still conduct their own investigation in parallel. In reality, there is close cooperation between the police and the Inquiring Magistrate to avoid unnecessary duplications.

The Inquiring Magistrate is impartial and their investigation aims solely to preserve evidence. That is why as much evidence as possible is collected in this phase. After the investigation is conducted, the Inquiring Magistrate may decide that charges can be issued, more investigation is needed or that no crime has been committed. If it is decided that charges can be issued, the report of the Inquiring Magistrate is presented as a part of the collected evidence.

Furthermore, as illustrated above, the Courts of Criminal Jurisdiction in Malta can be divided into three courts.

Court of Magistrates

The Court of Magistrates can, in turn, be divided into two courts. The Court of Criminal Judicature deals with offences that are punishable by a maximum of two years of imprisonment. It may also decide on offences leading to a maximum of six years of imprisonment, as long as there is consent from the Advocate General and the accused person. The Court of Criminal Inquiry deals with offences with a punishment of between 6 and 12 years imprisonment. The aim of the Court of Criminal Inquiry is not to decide on the case, but to compile the evidence that will be put to the jury at the Criminal Court. Thus, this stage is still to be considered a pre-trial stage.

Criminal Court

The Criminal Court decides on cases concerning offences with a punishment potentially exceeding a 12-year prison term. The Criminal Court also presides over trials by jury.

Court of Criminal Appeal

The Court of Criminal Appeal has superior jurisdiction over the Court of Magistrates and the Criminal Court. It is important to note the difference in the Maltese system between the term “judge” and “magistrate”; judges preside over superior courts and magistrates preside over the lower courts.

Attorney General's Office

Moreover, the Maltese authorities informed the evaluation team about the position of the Attorney General (not displayed in the image). The Attorney General and the Office of the Attorney General (AGO) constitute the independent prosecution service of Malta. The AGO has undergone major reforms, which started in 2019. Previously, the Maltese police took the decisions on prosecuting offences before the court. Now, the AGO is gradually taking over the prosecution of all offences. Since 2021, the AGO has invested in a specific unit dedicated to international cooperation, and the six lawyers within that unit are specialists in this area.

4.2. Issuing authorities

Under Article 2(a)(b) of S.L. 9.25, the authorities competent to issue an EIO in Malta are:

- a. a court of criminal jurisdiction;
- b. the Attorney General;
- c. an Inquiring Magistrate;
- d. the Police or any other competent authority in accordance with any law, acting in its capacity as an equivalent investigating authority in criminal proceedings with the competence to order the gathering of evidence in accordance with applicable law.

A Court of Criminal Jurisdiction (Court of Magistrates, Criminal Court and Court of Criminal Appeal) that is conducting criminal proceedings can decide that evidence from another Member State is necessary and may subsequently issue an EIO. At this stage, the prosecutor can also draw the court's attention to the need to issue the EIO. An EIO issued by a Court of Criminal Jurisdiction often relates to a request for a hearing via videoconference. Ultimately, the EIO is referred to the AGO for transmission to the competent authority in that Member State. The Maltese authorities have explained that the involvement of the AGO in these cases is purely for transmission purposes and in no way constitutes a procedure validating the EIO.

The AGO is also competent to issue an EIO. In practice, the EIO is not drafted by the AGO but by the police. National law states that when the EIO is issued by the police or an investigating authority, it needs to be validated by a judicial authority. Usually, the AGO validates the EIO when it is issued by the police, after confirming that the EIO meets the requirements in the law and the Directive. National law also states that if the EIO is issued by an authority other than a court of criminal jurisdiction, the authority that validates the EIO is considered to be the issuing authority. When asked if it can happen that the AGO does not validate the EIO drafted by the police, the Maltese authorities replied that this practically never occurs. What happens, however, is that certain formalities are not complied with and the EIO is sent back to the police to make the necessary amendments.

As mentioned above, the Inquiring Magistrate is competent to open an investigation in parallel to the police for offences punishable by at least a three-year term of imprisonment. The aim of the investigation is to collect evidence. At this stage (pre-trial), the Inquiring Magistrate may also issue an EIO. During the visit, the Maltese Magistrates explained that, in practice, the police usually draft the EIO for the Inquiring Magistrate. The draft will go to the AGO for a check, after which it is presented to the Inquiring Magistrate, who will sign the EIO and appoint a translator. The Inquiring Magistrate acts as the issuing authority, but the transmission of the EIO to the executing State goes through the AGO.

Lastly, the police or any other competent investigative authority is listed as competent issuing authority in Malta. According to the Maltese authorities, the police is the authority most often involved in issuing EIOs. If during ongoing pre-trial proceedings, the police see a need to ask another Member State to perform certain activities or obtain evidence, it drafts an EIO and sends it to the AGO for validation and further transferral to the executing State. When the EIO is issued as part of an investigation by the police, the role of the AGO also involves confirming that the conditions for issuing and transmitting the EIO, also mentioned in the Directive, have been met.

Therefore, the AGO checks whether the conditions set out in Article 6 of the Directive have been met, that is; necessity and proportionality, taking into account the rights of the accused/suspected person and whether the investigative measure indicated in the EIO could have been ordered under the same conditions in a similar domestic case. The drafting process of an EIO at this stage always takes place in close cooperation between the police and the International Cooperation Unit at the AGO. During the visit, the AGO pointed out that it is not possible for the Maltese national member of Eurojust to issue the EIO in urgent cases because they are not an issuing authority under Maltese law.

4.3. Executing authorities

The executing authorities in Malta are either the police or the Court of Criminal Jurisdiction. In accordance with Malta's transposing law, however, the AGO is competent to receive and recognise all incoming EIOs (Article 6 S.L. 9.25), after which the EIO is transferred to the police or the court.

Once the AGO receives an EIO, this is assigned to one of the six lawyers within the International Cooperation Unit. This lawyer is responsible for analysing and reviewing the EIO, and for sending out Annex B to the issuing State. During the visit, the representatives of the AGO explained that the decision to refer the EIO to the police or court depends on the measure and the competence to execute the measure in domestic law.

Although the AGO is, according to the Maltese authorities, not involved in the actual execution of the EIO, it has the competence (although rarely used) to refuse execution of the EIO if after the initial check it appears that the EIO cannot be executed. Furthermore, all communication with the issuing State regarding execution of the EIO will go through the AGO.

According to the information provided by the AGO, approximately 80% of EIOs sent to Malta are sent from the AGO to the police for execution. These are usually EIOs for obtaining financial information. However, incoming EIOs are sent from the AGO to the court if the EIO contains a request for hearing a witness under oath, or for conducting a videoconference or a search and seizure. If a court is competent to execute an EIO, the AGO will simultaneously forward the EIO to the court and the police, because the police are responsible for practical arrangements (such as locating the witness to be heard).

4.4. Central Authority

As mentioned above, the AGO is responsible for the transmission of all EIOs and is the authority to which all incoming EIOs are transmitted from other Member States (Article 6 S.L. 25). Furthermore, it has the role of validating (and issuing) authority when an EIO is issued by the police. In addition, all communication with the other Member State regarding the EIO goes through the AGO. Even though the transposition law does not literally use the term “central authority”, it was made clear to the evaluation team that Malta has a very centralised system and that the AGO is in fact the central authority when it comes to the EIO Directive.

4.5. Right of the suspect/accused person/victim to apply for an EIO

Article 4(2) of S.L 9.25 states that the issuing of an EIO by Malta under these regulations may be requested by a suspected or accused person, or by a lawyer on his or her behalf, within the framework of applicable defence rights, by filing an application before a Court of Criminal Jurisdiction. However, the S.L does not mention this right vis-à-vis a victim or lawyers representing them. Nor does it specify that a right of appeal exists specifically in such cases. However, if an accused person requests that an EIO is issued before the Court of Magistrates and the court refuses and finds the accused person guilty, the law does not prohibit the accused person from raising their grievance before the Court of Criminal Appeal. This right is not limited only to such cases.

During the visit, it was explained to the evaluation team that the defence can only ask for an EIO to be issued during court proceedings and not in the pre-trial phase. This request is addressed to the court, which will decide whether or not the EIO in fact needs to be issued. On the other hand, when during the court proceedings, the prosecution asks the court to issue an EIO (to hear a witness for example), the defence is given the opportunity to add questions if they so desire. The defence can also object to the issuing of the EIO on the grounds of unreasonable delays.

The evaluation team had the opportunity to speak with three representatives of the Maltese Bar Association and, to their knowledge, a defence team has never made use of the possibility of asking the court to issue an EIO or to add a request to an EIO initiated by the prosecution in court proceedings.

Regarding the right of the victim to apply for an EIO, the transposing law does not mention this possibility, as mentioned above. However, the Magistrates present during the visit indicated that a victim is a party to the proceedings in the trial stage and could (in theory) ask for an EIO to be issued although, to date, that has never happened. At the inquiry stage, the victim is not part of the proceedings but could express their wish for an EIO to be issued with the prosecution, according to the Magistrates.

The evaluation team welcomes this practice, as it supplements the victim's rights under Directive 2012/29/EU (*see Best Practice No 1*) and suggests that the Directive could be amended to allow the victim to request an EIO (*see Recommendation No 16*).

5. SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS

5.1. Scope of the EIO

Article 3 of the EIO Directive is correctly transposed into Article 5 S.L. 9.25. According to Maltese law, an EIO issued pursuant to these regulations shall apply to any investigative measure, with the exception of the setting-up of a Joint Investigation Team (JIT) and the gathering of evidence within such a team. This reflects the wording of Article 3 of the EIO Directive.

The investigative measures which, according to Maltese national legislation, fall within the scope of the EIO Directive, both as an issuing State and an executing State, are:

- Assistance for the hearing of witnesses and/or experts, victims;
- The gathering of evidence in real time, continuously or over a period of time;
- The identification of persons holding a subscription for a specified phone number or IP address;
- Covert investigation;
- The interception of telecommunications (with due authorisation as per national law);
- The transfer of person/s held in custody;
- Video or teleconference calls to give testimony;
- The obtaining of bank or financial accounts or operations;
- The obtaining of evidence which is already in the possession of the executing authority;
- The obtaining of evidence which is contained in databases held by the police or judicial authorities.

The AGO decides whether the incoming EIO remains within the scope specified by the provisions implementing the EIO Directive. In practice, as the Maltese authorities explained, difficulties are not usually encountered when it comes to identifying the investigative measure for which the EIO can be issued. This applies both to situations in which Malta is the issuing State and in which it acts as the executing State.

Most EIOs are issued by Malta in order to obtain banking or financial information from other States or to obtain information which Maltese authorities already know to be in the possession of the executing State.

In reply to the questionnaire, the Maltese authorities pointed out that the broad scope of Article 5 of S.L. 9.25. allows for the EIO's use for various purposes and not just to gather evidence. During the visit, the Maltese practitioners elaborated on this point, explaining that they would execute an EIO to serve a document for example. The evaluation team sees this flexible approach by Malta as a best practice (*see Best Practice No 2*).

However, cases in which the EIO is used for purposes other than gathering evidence are rarely encountered. Furthermore, should Malta receive an EIO concerning the freezing of assets, they would return the EIO to the issuing State and ask them to use the appropriate international cooperation instrument for this purpose.

Regarding the relationship between the EIO and the EAW, Maltese practitioners explained that they were not aware of cases where an EIO was used for the purpose of locating persons, whether as an issuing State or as an executing State. Usually, such requests are carried out via the Sirene channels or other police cooperation channels.

In a few cases, issues arose when Malta received an EAW requesting the surrender of a person located in Malta and simultaneously, an EIO requesting the hearing of the suspected person. In one particular case, for instance, both an EAW and an EIO were issued with respect to a person wanted in another State for prosecution. The EAW was executed and the person gave his consent to surrender. However, he was retained in Malta until proceedings pending against him in Malta were finalised. Had the person been physically surrendered to the issuing State on the basis of the EAW, the hearing of this person as a suspect would have been carried out by the issuing State. Given that the physical surrender could not take place, however, an agreement was reached with the issuing State to the effect that the taking of the statement requested in the EIO would be carried out by Maltese authorities in order also not to prolong the execution of the EIO.

When an EIO and EAW are received at the same time, both requests go to the police, but to different departments. Therefore, in such a case, coordination between individual police departments is necessary in the course of execution. The AGO informs the police about parallel EIOs and EAWs. However, for this to work well, it is crucial that the issuing State informs Malta when sending an EIO and that there is a parallel EAW (or the other way around). The evaluation team is of the opinion that all Member States should mention all relevant instruments (previous EIOs, EAWs, Freezing Orders, JITs, etc.) in Section D of the EIO form (*see Recommendation No 7*).

Recently, a few cases emerged where Malta issued an EIO during the pre-trial stage to gather information that had already been obtained via intelligence channels. This was done because intelligence is not admissible as evidence in a Court of law in Malta and therefore the request for information had to be done via formal (EIO) channels.

The Maltese practitioners were not certain that any EIOs had been issued by Malta in order to obtain information to enforce an administrative decision. Regarding the competence of administrative authorities, in its definition of an issuing authority, Maltese legislation provides that an EIO can be issued by an authority (other than the police) in its capacity as an investigating authority in criminal proceedings with the competence to order the gathering of evidence in accordance with the applicable law. Therefore, an administrative authority covered by this definition is considered to be an authority competent to issue an EIO. However, Maltese law does not include an exhaustive list of such authorities and nor does it include reference to a specific procedure that must be adopted in such cases. In practice, the procedure for executing such a request in Malta is the same as when the EIO comes from a police authority in the issuing State or any other competent authority.

5.2. Procedures in which an EIO may be issued

Article 4 of the EIO Directive is correctly transposed into Article 7 of S.L. 9.25. In the provision implementing the types of procedures in which an EIO can be issued, the content of Article 4 of the EIO Directive is quoted word for word.

Maltese practitioners explained that, as under Maltese law an issuing authority can be either the police or a Court of Criminal Jurisdiction or else an Inquiring Magistrate, the EIO can be used during the various stages of criminal proceedings.

An EIO can be used by police authorities during ongoing investigations and also by an Inquiring Magistrate preserving evidence after the commission of a crime. In some other cases, the EIO is also used during the pre-trial stage, which under Maltese law would be the stage at which the Court of Magistrates would be compiling evidence so that such evidence could eventually be used during the trial phase.

The latter phase of criminal proceedings is peculiar to Maltese law and in some instances, questions are raised by executing States as to whether this is considered to be the trial phase or not. Although proceedings are considered to be ongoing during that phase, it is possible that the court issuing the EIO is not the court that ultimately decides the case (especially in cases involving serious crimes).

Maltese practitioners are not aware of cases where the EIO had been issued or received by Malta for the purpose of executing a sentence or in the process of enforcing a final decision. However, if such a case arose, the Maltese authorities would not rule out the possibility of using an EIO at this stage, should the EIO be the correct instrument to use.

6. CONTENT AND FORM OF THE EIO

6.1. General challenges

Article 5 of the EIO Directive is transposed in Article 8 S.L. 9.25. Unlike the EIO Directive, Article 8 does not refer to Annex A but to a form in the “First Schedule”, which is an annex to S.L. 9.25. However, Annex A and the form in the First Schedule are identical.

In general, the Maltese authorities indicated that they see Annex A as self-explanatory and straightforward to fill in. Therefore, problems are not usually encountered and Annex A is considered sufficient for fulfilling the goals of cross-border cooperation in criminal matters. In the view of the Maltese authorities, there is no need to revise Annex A, as it is satisfactory and the form in incoming EIOs is usually completed correctly. However, in the view of the Maltese authorities, a useful amendment would be to introduce the possibility of “shortening” Annex A in cases where not all sections need to be filled in. The evaluation team notes that suggestions for possible improvements to Annex A have come up in several evaluations to date. That is why the evaluation team calls on the Commission to consider looking into ways of making Annex A more user-friendly (*see Recommendation No 17*).

Furthermore, the AGO pointed out that, for the executing State, the most common issue with incoming EIOs is when it concerns a request for the hearing of a witness, and it is not clear about what type of hearing is requested. Maltese law includes the concept of the hearing of a witness under oath which, in general terms, means that the witness must tell the truth and could otherwise be prosecuted for perjury. This also means that this type of request can only be executed by a Court of Criminal Jurisdiction. In cases where the exact request is not clearly described in Annex A, the Maltese executing authority consults with the issuing authority to establish what type of hearing will be admissible and acceptable to the issuing State. This influences the decision regarding which authority would be best suited to execute the EIO (a court or alternatively the police, who are able to ask questions and ask the witness to give a statement but cannot administer oaths).

In Malta, 80% of all incoming EIOs concern financial crimes and thus most EIOs are forwarded from the AGO to the Financial Crimes Investigation Department (FCID) within the Maltese Police Force. During the visit, the representative of the FCID indicated that they do encounter EIOs that are incomplete or unclear and for which additional information needs to be requested from the issuing State. Multiple examples were mentioned by the FCID, such as a poor (or entirely missing) description of the requested investigative measure, unclear status of the person to be heard (victim or suspect) or where the money-laundering box is ticked but the description of the facts does not refer to this offence. In the latter example, it determines which unit will execute the EIO and it has happened that an EIO was mistakenly forwarded to the money laundering unit when in fact this was not the correct authority. The evaluation team is of the opinion that all issuing Member States should pay particular attention to the quality of the EIO, and specifically the description of the facts and the requested measure (*see Chapter 21.4 and Recommendation No 8*).

6.2. Language regime

According to Article 8(3) S.L. 9.25, Malta accepts EIOs in Maltese and English. The AGO pointed out that if the translation of the incoming EIO is not satisfactory, the EIO is returned to the issuing State to correct the translation so that the EIO is understandable. Furthermore, incoming EIOs are sometimes translated using machine translation, which means that they are not of good quality. The Maltese police also indicated that poor translation quality is a challenge they face regularly in the execution of EIOs from abroad.

During the visit, the Maltese practitioners stressed that it is better for them to receive an EIO that is well translated into English than a poor-quality translation into Maltese. It is very difficult to obtain a good quality translation into Maltese because there are not many translators of this language in other Member States.

Based on the discussions with the Maltese practitioners, the evaluation team would like to recommend that all Member States pay attention to the quality of the translation when issuing an EIO (*see Recommendation No 9*).

The Maltese police working on the execution of the EIO explained that, if they receive the EIO in English, they process everything in English and also send the results in English to the issuing State. Although the official language in the courts is Maltese, the Magistrates involved in the execution of EIOs also execute and prepare the results of the EIO in English.

When Malta is the issuing State, the police or the court are responsible for the translation of the EIO. During the visit, the police indicated that they draft EIOs in English and translate it to another language if necessary. Usually, qualified translators recommended by the courts are used for this purpose. The AGO transmits both the English original version and the translation to the executing State.

According to practitioners, it is difficult to find translators for some European languages in Malta. The evaluation team encourages all Member States to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language, in the spirit of Article 5(2) and recital 14 of the Directive (*see recommendation No 10*).

As stated by a police officer, translators often charge a fee for translating the standard text in Annex A, despite the availability of the translation of this form on the EJM website. For this reason, it should be emphasised that these forms are to be used to reduce translation costs.

Furthermore, direct contact between Member States may be challenging due to language barriers, according to the Maltese practitioners. In order to ensure smooth and effective direct communication, the evaluation team is of the opinion that all Member States should make sure that the contact person mentioned in the EIO should speak English to a sufficient level (*see Recommendation No 11*).

6.3. Multiple requests in one EIO and additional EIOs

The practitioners from the AGO stated that, as issuing State, if Malta needs to issue an EIO with multiple requests, competence for which is shared between the AGO and the investigating judge, the police and magistrate work together. The EIO would usually be drafted by the police in close cooperation with the Inquiring Magistrate.

As executing authority, Maltese practitioners stated that multiple requests in one EIO that possibly have to be executed in different regions do not pose any challenges. Malta is a small island and is highly centralised.

As mentioned in Chapter 5, challenges are sometimes encountered when Malta is asked to execute an EIO but information on its link to a previous EIO sent to Malta is missing. However, efforts are made to identify incoming EIOs that have the same subject matter as ones already received or executed. AGO clerks check whether an EIO regarding the same matter had been received at an earlier date. In such cases, the EIO receives the same reference number.

In the case of missing or incorrect information in an incoming EIO, such as an incorrect address or bank account number, mistakes can be corrected via email and no additional EIO is necessary. Furthermore, during the visit, the FCID explained that a company address listed in the EIO is frequently no longer accurate. As for the FCID, if it is obvious what the EIO is referring to, they will simply state the correct new address on the warrant, without needing a correction from the issuing State. The evaluation team considers this flexible approach to be a best practice (*see Best Practice No 3*).

When Malta is the issuing State, and an additional EIO is issued, the reason for the need to issue an additional EIO is explained in the EIO itself and the reference number of the previous EIO is also indicated.

6.4. Orally issued EIOs

According to the Maltese authorities, S.L. 9.25 does not provide for the possibility of an EIO being issued verbally, and they are not aware of any cases where this has been done. The evaluation team asked what can be done if Malta receives a phone call requesting an urgent measure and the AGO indicated that they can always make preparatory arrangements and inform all the relevant executing authorities that an urgent EIO will be received soon.

7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURES

Article 6 of the EIO Directive has been correctly transposed into Article 9 of S.L. 9.25.

During the visit, the Maltese authorities explained that there are no established criteria for assessing necessity and proportionality when issuing an EIO. In practice, the condition of “indispensability” is used. In cases where an EIO is issued by a Court of Criminal Jurisdiction, upon an application by the Prosecution, the court is required to determine, in line with the Maltese Criminal Code, that the transmission of that EIO is “indispensably necessary”.

In cases where the EIO is issued by the police and then validated by the AGO, concerns may arise regarding necessity and proportionality because it would involve, for example, a low level of damages. The AGO mentioned the fact that, because there are no established criteria, it may be difficult to justify to the police why an EIO is not necessary and proportionate, especially since the police might not be able to continue with the investigation without the information from another Member State. Therefore, usually, whilst there are no established criteria, this condition of indispensability is used to determine necessity and proportionality.

According to the Maltese authorities, if an EIO is requested during criminal proceedings or compilation of evidence proceedings, the other party has the right to contest the request, even on the grounds of proportionality. However, Malta has to date not encountered any cases in which an EIO did not meet the necessity/proportionality principle. All EIOs requested, even when these have been contested by the suspect/accused, have been deemed necessary and proportionate. If such cases arise, consultation between the two States would undoubtedly be central to overcoming such an obstacle and finding a solution, according to Malta.

As experts pointed out, whether the EIO is proportional or not may also be influenced by the fact that the legality principle applies in Malta.

Regarding the possibility of recourse to a different type of investigative measure, the evaluation team confirmed that Article 10 of the EIO Directive has been fully transposed into Article 13 S.L. 9.25.

During the evaluation visit, the AGO explained that an executing authority is to have recourse, whenever possible, to an investigative measure other than that provided for in the EIO when the investigative measure indicated in the EIO does not exist under Maltese law or when the investigative measure is not available in a similar national procedure. The AGO claimed to have full flexibility in this respect in order to achieve the goal of executing the EIO. In practice however, Maltese authorities indicated that they have never encountered a case where they decided to seek recourse to another investigative measure.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

As an issuing authority, the Maltese authorities do not usually encounter any difficulties with identifying the competent executing authority, because the EJM website and the Judicial Atlas are used in practically all cases before transmitting an EIO. In some cases, communication between EJM contact points has also been used. Eurojust may also be used in more urgent or complex cases.

In Malta, EIOs are still transmitted physically by courier in almost all cases, except when an EIO is transmitted via Eurojust. According to Malta, this is done to provide the executing State with the original signed version of the EIO to show its authenticity. When receiving an EIO, the Maltese authorities believe that transmission by electronic means is sufficient. After the EIO has been transmitted, in most cases, communication takes place directly, especially where the executing State also has a central authority.

The Maltese practitioners explained that, even though the mandatory notification of Eurojust has not been transposed into national law, in practice, the AGO always informs the Maltese national member at Eurojust if they send an EIO to multiple Member States.

During the visit, the evaluation team inquired whether Malta is, or preparing to be, connected to the e-Evidence Digital Exchange System (e-EDES). The Maltese authorities responded that, although they really wish to be on board, the technical infrastructure that would allow such a connection has not yet been built. It is still uncertain how and when preparations to connect to e-EDES will start. The evaluation team notes that e-EDES will bring much-needed development to improve the transmission of EIOs between Member States and therefore encourages the Maltese authorities to take concrete steps to be able to connect to the system (*see Recommendation No 1*).

9. RECOGNITION AND EXECUTION OF AN EIO AND FORMALITIES

9.1. Transposition and compliance

Article 12 of S.L. 9.25 correctly transposes Article 9 of the Directive and refers to the obligation to recognise and execute an EIO without any formalities being required, and in the same way and with the same modalities as if the investigative method had been ordered by a competent domestic judicial authority. This imposes an obligation on the Maltese executing authorities to respect the formalities and procedures indicated by the issuing authority and ensures the admissibility of the evidence in the issuing State, as long it is not contrary to the fundamental principles of the law of Malta. Article 12 appears to transpose Article 9 of the Directive word for word, creating the grounds for an apparently very thorough and compliant recognition and execution procedure.

9.2. Formalities and practical application

As executing State

As already mentioned in Chapter 4 of this report, the authority competent to receive and recognise EIOs is the AGO. The whole procedure is a two-step process, meaning that once the EIO is received, it is reviewed by the assigned lawyer and is recognised by the AGO in the sense that they conduct a preliminary assessment and if no problems are revealed, it is sent for execution to the competent authority. The AGO is not involved in the actual execution of the investigative measure. All further communication between the executing authority and issuing State is conducted through the AGO, including the sending of Annex B.

Malta has encountered cases where Section I (*formalities*) was not filled in. However, the need for Section I to be filled in also depends on the type of assistance being requested. In cases where the hearing of a witness or suspected person is requested and Section I is not filled in, communication is established with the issuing authority before execution, to ensure that the taking of evidence also complies with the laws in the issuing State, as long as these are not contrary to the applicable laws in Malta.

Applying the principle of mutual trust, the Maltese authorities do not require the issuing State to attach the relevant authorisation from the competent issuing authority. Maltese practitioners mentioned that such authorisation is never requested.

Malta makes a consistent effort to follow all the formalities outlined in the EIO. According to the practitioners, they have not encountered any difficulty in adhering to the formalities required to ensure the admissibility of evidence in the issuing State.

After executing the investigative measures, the Maltese practitioners revealed that the results are sent to the issuing State together with a cover letter drafted in English, which contains details concerning the execution of the EIO. Such practice is seen by the evaluation team as a good example of communication and is considered a best practice (*See Best Practice No 4*).

As issuing State

The Maltese authorities have not encountered any case where a formality requested by Malta was described as contrary to fundamental principles of law in the executing State. However, Malta has had issues where the giving of evidence under oath was required for ongoing criminal proceedings in Malta and the executing State explained that this would not have been possible in a domestic case and therefore it was not able to comply with the formalities. Whenever Malta requests a hearing under oath, it is explained in the EIO why it is crucial in relation to the admissibility of evidence. Presenting the results of a hearing not conducted under oath in the Maltese court is always a risk, as the defence could appeal the use of such evidence.

As the issuing State, the Maltese authorities reported that in general, the formalities are respected and, apart from the case mentioned above, there have not been other instances where such issues arose.

10. ADMISSIBILITY OF EVIDENCE

There have been cases where Malta was the issuing State and assistance was requested to obtain financial information needed to be presented in court in ongoing criminal proceedings. The EIO included a request for the bank representative to present that evidence under oath. There have been cases where the executing State provided the information but it was not confirmed under oath. This is especially problematic when the EIO is issued by the court during ongoing criminal proceedings. Under Maltese law, any evidence presented by a witness in a court of law in Malta must be presented under oath. In cases where that did not happen, evidence gathered via the EIO was still presented to the court and so far, the AGO has not had any cases where the admissibility of such evidence was challenged. However, the court adjudicating the case is likely to take this into account when considering the probatory value of the evidence obtained from abroad. Recently, and to overcome this problem, EIOs issued by Malta for the hearing of a witness include a request for a hearing via videoconference and usually the court in Malta is able to confirm the oath from the witness via videoconference in this manner.

During the on-site visit, the Maltese authorities mentioned that they have received requests from other issuing Member States to assist them in the execution of EIOs in order to ensure compliance with certain formalities and thus the admissibility of the evidence. The Maltese practitioners reported that they provide all the assistance they can and, at times, allow foreign agents to ask questions during the interrogation of a suspect, even though their role is limited to observation. The evaluation team has endorsed this practice, as the authorities conducting the investigation have a comprehensive understanding of the case and are best placed to determine the relevant information and questions. On the other hand, there was a case where the Maltese authorities refused a request from the issuing State to pay for an interpreter in the official language of that State while their agents were present in Malta.

As an issuing State, the AGO mentioned that they have no knowledge of any requests made by Malta to other countries for assistance. However, they did mention that if such requests were made, the police would be responsible for handling them.

With regard to executing authorities, Malta is proactive in seeking consultations on the content of the EIO and the investigative measures requested. This is to ensure that the evidence requested is admissible in the issuing State and to prevent further EIOs from being issued in the same case. By doing so, Malta is able to comply with the laws of the issuing State and ensure in practical terms that EIOs can be executed.

11. SPECIALITY RULE

During the evaluation visit, the Maltese authorities reported that, although the rule of speciality was not explicitly stated in Maltese law or the Directive, it is applied in practice. As the executing State, consent to the issuing State to use evidence in other proceedings is given based on mutual trust, cooperation, and the principles of necessity, proportionality, and reciprocity. The Maltese authorities would first consult and assess the nature of these other proceedings by communicating with the issuing State. Malta mentioned that, in practice, consent has been granted in all cases after carrying out the above-mentioned analysis.

Furthermore, when acting as an executing State, the Maltese authorities reported that they rarely saw any need to use the evidence obtained after the execution of the EIO. This being said, the AGO stated that it had faced instances where there was a need to use evidence obtained after the execution of an EIO. In such instances, the issuing authority was duly informed, and consent was requested.

If it becomes clear that Malta has jurisdiction over a crime that is revealed during the execution of the EIO, a domestic investigation is launched. The issuing State is informed when it concerns an inter-border crime, and that State is also concerned by that offence.

The Maltese authorities systematically inform the issuing authorities of scenarios where they need to use evidence obtained through an EIO and when opening a new case based on such evidence. The evaluation team commends this practice of the Maltese authorities and considers it a best practice (*see Best Practice No 5*).

The Maltese authorities reported that, after they execute EIOs, they do not mention *expressis verbis* in the cover letter sent to the issuing State that the evidence obtained through the EIO should not be used in other cases or proceedings without Malta's prior authorisation. However, in practice, some Member States do ask for consent, and if a court has executed the EIO, it has the competence to give consent. This practice highlights the absence of a unified approach among Member States regarding EIOs, and it should be clarified to avoid confusion.

Except for the case of temporary transfers, neither the Maltese legislation nor the Directive contain provisions concerning the rule of specialty. Although this principle is mentioned in many other international legal instruments of the EU, different Member States apply it in varying ways in respect to the EIO, and some do not feel obliged to abide by it at all. The evaluation team and the Maltese authorities are of the opinion that this concept needs to be clarified to ensure a uniform approach regarding its application in the EIO and taken into account in a future amendment of the Directive (*see Recommendation No 18*).

12. CONFIDENTIALITY

The Maltese authorities indicated they have never had any problems relating to rules on disclosure, either as an issuing State or as an executing State. Malta has never sent or received any notifications under Article 19(2) of the EIO Directive, which states that ‘the executing authority cannot comply with the requirement of confidentiality’. If the EIO is issued by the Maltese Court during criminal proceedings or the compilation of evidence phase (i.e. charges have been issued against the accused person), the EIO is always disclosed to the accused person and therefore the accused person can make submissions before the court with regard to that EIO.

During an investigation, a suspect may not yet have been identified, or disclosing the EIO to the suspect might lead to adverse repercussions and prejudice to the investigation. If, later on during proceedings, charges are issued against a particular person, the prosecution would need to present the evidence obtained via the EIO before the court and would therefore then disclose the EIO.

Article 22(5) of S.L. 9.25 states that the provisions of the Criminal Code will apply *mutatis mutandis* in respect of any breach of confidentiality, making it a criminal offence. However, during the visit, neither the magistrates nor the AGO clearly confirmed this aspect. It appears that breaching confidentiality is not a separate crime and is punishable only in cases where there is a specific order of non-disclosure issued by a magistrate.

During the inquiring phase, the procedure is generally not open to the public and, as such, no problems relating to confidentiality can arise. However, the situation is not clear on how the confidentiality principle can be applied when the accused person has the right to consult the file or when the suspect has the right or needs to be personally present during certain investigative measures, such as hearings and search and seizure. According to Article 534 AB and Article 534 AF of the Maltese Criminal Code, the suspect has the right to access their case file. In those instances, the Maltese authorities apply a proactive approach and reported that they will consult the issuing State before deciding to give access to the case files. If the issuing State does not agree with the disclosure, the measure can be delayed in the interests of the investigation. The evaluation team agrees with such practice and considers it to be very useful when sensitive information needs to be kept confidential in the interests of the investigation (*see Best Practice No 6*). In such cases, the Maltese court still has the right (based on human rights grounds) to decide that the suspect must have access to all the files, including the EIO. To date, however, this has never happened.

13. GROUNDS FOR NON-EXECUTION

13.1. General

Article 14 of S.L. 9.25 implements Article 11 of the EIO Directive verbatim, providing a domestic legal basis for a compatible procedure in line with the Directive. As in the EIO Directive, all the grounds for refusal are optional.

The Maltese authorities apply a proactive, flexible approach and in cases where issues arise with the execution of an EIO, communication is always established with the other State. This is reflected in the low refusal rate, as Maltese authorities have only reported a single case of refusal (*see Best Practice No 2*).

The Maltese authorities have had cases where they returned EIOs that did not comply with the form of Annex A due, for example, to being partially or completely incomprehensible.

In theory, if an EIO were to be refused, this would be done either by the AGO, the police or the court. The refusal would be transmitted through a cover letter and either a note from the court or a report from the police would be sent to the issuing State, informing them of the reasons for the non-execution. This, again, as previously mentioned, is seen as a good practice by the evaluation team (*see Best Practice No 2*).

13.2. Dual criminality

The Maltese authorities are not aware of any cases in which the dual criminality test was applied in relation to the offences set out in Annex D. The same goes for the investigative measures listed in Article 10(2) of the EIO Directive.

The AGO reported during the on-site visit that they would still attempt to execute an EIO, even if the condition of dual criminality were not met. This illustrates the flexible and proactive approach of the Maltese judicial authorities in executing EIOs, rather than refusing execution. The evaluation team commends this approach and believes it aligns with the broader course of action taken by the Maltese authorities.

13.3. Ne bis in idem

Maltese authorities reported that they have never refused the execution of an EIO on this ground. The AGO mentioned that there is a central database of all criminal cases and, in theory, cases where the *ne bis in idem* principle might apply could be identified.

13.4. Fundamental rights

Regarding the topic of fundamental rights, the Maltese authorities have refused an EIO that concerned a hearing by videoconference. The suspect raised fundamental rights issues and insisted on being personally present during his hearing as a suspect in the issuing State, in order to conduct a proper defence. However, he was unable to do so at that time, as he was subject to domestic judicial control.

Furthermore, the Maltese authorities have observed that some Member States are hesitant to execute EIOs to allow accused persons to be present at their trial via videoconference. These issues are sometimes related to fundamental rights but also to the scope of the EIO, since such a measure could be considered not to represent the collection of evidence (see also Chapter 21.2).

14. TIME LIMITS

The time limits outlined in Article 12 of the EIO Directive have been correctly integrated into Article 15 of S.L. 9.25. As a result, the time limits specified in the Maltese regulations are fully compliant with the provisions and intent of the EIO Directive.

When Malta is the executing State, the Maltese authorities aim to adhere to the prescribed time limits, particularly in cases where a request is urgent. However, there may be instances where they are unable to execute the request within the given timeframe. This could be due to insufficient information provided, the need for clarifications or the complexity of the investigative measure. In such cases, the Maltese authorities discuss matters with the issuing authority. To assess the urgency of the EIO, the Maltese authorities consider whether 'Section B' of the EIO form has been filled in. Otherwise, the contents of the EIO are assessed to determine the urgency. If it is apparent from the contents of the EIO that the request is of an urgent nature, as in cases of a request for search and seizure, time-sensitive data, the possible destruction of evidence, an imminent trial date or due to the fact that any other information could be depleted or destroyed, the Maltese authorities will treat the EIO as urgent.

The most common reasons for delays are the complexity of the case, the number of requested investigative measures, delays in receiving a response from banks when trying to obtain bank information (due to the fact that banks have no legal deadline for responding) and sometimes delays are caused by the lack of a (timely) reply by the issuing State where additional information was needed.

The Maltese authorities have reported a problem with receiving EIOs that are deemed urgent, even though they do not appear to require immediate attention based on the reasons and nature of the investigation. However, the Maltese authorities still attempt to execute these EIOs as urgent and consult with the issuing authorities to determine whether they are truly urgent. The evaluation team suggests for all Member States that, in order to avoid redundancy, Section B should be indicated only in cases where the EIO is considered urgent or for other pertinent reasons that justify real urgency in the case. This will ensure that the urgent procedure is not overused (*see Recommendation No 12*).

Maltese authorities explained that another important element in complying with time limits as executing State, is the internal process of referring an incoming EIO to the executing police authority. Maltese authorities explained that when AGO receives an EIO, it is transmitted to the court or the police within a few days. However, within the police, it is not uncommon that it takes up to one month before the EIO lands on the correct desk for execution, as administrative procedures require the obtaining of numerous signatures from specific police departments (for example even an immigration department had a signature and a stamp on the referral document). According to the evaluation team, complying with the time limits is crucial for smooth cooperation and the effectiveness of the EIO. Therefore, the evaluation team would like to recommend that Malta consider how the internal process of referring an EIO could be improved (*see chapter 21.4 and Recommendation No 2*).

When Malta is the issuing State, the Maltese authorities find that there is more compliance from some countries than others. During the evaluation visit, the Maltese authorities mentioned that they had delays in the execution of EIOs issued by Malta. However, generally speaking, EIOs issued by a Maltese Judicial Authority are executed within the stipulated timeframe and where urgent EIOs are concerned, they request the support of Eurojust or the EJN.

As an issuing authority, the Maltese authorities fill in ‘Section B’ as a matter of priority. The Maltese authorities also tend to contact the executing authority in order to facilitate matters and also to communicate clearly what information is needed in order to avoid delays.

15. GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

Article 18 of S.L. 9.25 contains the grounds for postponement of recognition or execution of an EIO covered by Article 15 of the EIO Directive. It sets out the same reasons for the postponement of an EIO and the obligation to inform the executing authority as soon as the grounds for postponement cease to exist.

During the evaluation visit, the Maltese authorities mentioned that as executing State, they have only had one case that was postponed. The magistrate ordered that evidence already obtained should not be released because the same company was being investigated in Malta and the crimes were linked.

16. LEGAL REMEDIES

Article 17 of S.L 9.25 states that all legal remedies available in a similar domestic case shall apply to the investigative measures indicated in the EIO. Article 17 of S.L 9.25 has correctly transposed the provisions of Article 14 of the Directive, mainly by copying and slightly adapting its text.

From the perspective of the executing State, the legal remedies can only concern the recognition and execution of investigative measures mentioned in the EIO. Even though the execution process is a two-step procedure - recognition and execution - the former is not a judicial procedural act in a written form that can be contested. As a standalone document, the EIO is not contestable in the Maltese legal system; only the procedural act that authorises an investigative measure is subject to all legal remedies available in the same way as if the measure had been authorised in a similar domestic case. In the case of some investigative measures, such as search and seizure, for example, the defence will be informed about the measure only after its execution, and the suspect or concerned person only has the right to challenge the legality of the execution of the measure and the manner in which the search is conducted and not the substantive reasons. Such reasons can only be brought before the competent authorities of the issuing State, without prejudice to the guarantees of fundamental rights provided for in Maltese legislation in accordance with Article 17(2) of S.L 9.25.

With regard to the perspective of the issuing State, the *Gavanozov II* judgment (CJEU, case C-852/29) was touched upon during the visit. According to the judgment, a Member State that does not provide any legal remedy against the issuing of an EIO for the purpose of carrying out search and seizure, or for the purpose of hearing a witness via videoconference, is precluded from issuing the EIO. On the other hand, the judgement left some questions unanswered, such as whether the legal remedy should be available before or after the execution of the requested acts. Of course, if a legal remedy is available in advance, it would most probably render the EIO useless. In Malta, there is no legal remedy against the issuing of the EIO *ex ante* as such, and the judgement did not lead to a legislative amendment of the Maltese Criminal Code. For practical reasons, a legal remedy in the pre-trial stage is only possible once the investigative measure has already been executed. It falls to the court to decide if the measure is proportional to the actual intrusion with the rights of the suspect or accused person before its authorisation and, later on, such a measure can be contested in front of a higher court or during trial.

It is the issuing judicial authorities that are competent for the substantive reasons for authorising such a measure. As in most Member States, the legal remedies in the pre-trial stage mainly concern the *post-factum* executed or outgoing investigative measures and not the actual issuing of the EIO.

Nonetheless, given the particularities of the Maltese justice system, there is a difference between the different judicial phases. For example, during the inquiring phase, there are generally no legal remedies against investigative measures because, as previously explained, this phase is not public, and its scope is just to gather and preserve evidence and establish whether a crime has been committed. During this phase, the suspect does not have the right to give evidence. However, it is compulsory under Maltese criminal law that the prosecution/police provide evidence for both the suspect's prosecution and defence. Intrusive measures such as search and seizure are authorised by a magistrate, who analyses the necessity and proportionality of such a measure, with the exception of the interception of telecommunications, which is a competence of Malta's Security Services (MSS), an intelligence service under the authority of the Minister for Home Affairs and National Security and the Prime Minister (see also Chapter 21.6).

The AGO has clarified that during the inquiry phase, there is no obligation to inform the suspect about the investigation. However, if the concerned person becomes aware of the investigation against them or of the issuance of an EIO during the inquiry phase, they can file for legal remedies. It is also possible to contest the legality of the evidence obtained during the trial phase. Moreover, the suspect has the right to contest any decision at any point in the proceedings regarding human rights complaints, which will be judged by the constitutional court.

During the evaluation visit, the Maltese practitioners mentioned that there is a possibility of actually contesting the issuing of an EIO during trial; if, for example, the prosecution asks the court to carry out an investigative measure, the defence can challenge the need for such a measure or its content. In this regard, the Maltese provisions are in accordance with *Gavanozov II*, as the suspect can during the trial appeal the issuing of an EIO concerning the hearing of a witness by videoconference. The AGO mentioned that there was a case where the defence, during the trial phase, contested the issuing of an EIO, mainly regarding its content.

If the EIO concerns an investigative measure for which Maltese law permits the presence of a defence lawyer during the execution of the measure without prior notice, the decision to recognise the EIO must be communicated to the defence lawyer of the person involved, either during the execution of the measure or immediately after, in order to contest the measure.

According to Article 399 of the Maltese Criminal Code, when the court decides on the examination of any witness or any other process of the inquiry by a foreign authority, there is a possibility for the suspect to submit an additional request for the examination of any witness or any other process of the inquiry and to appoint a person to represent him or her at the examination or process.

During the meeting with the Maltese Bar Association, the lawyers mentioned that they rarely had any experience with the EIO from the defence point of view. The Bar Association, due to its limited experience concerning EIOs, did not report any practical issues concerning legal remedies. The defence lawyers stated that there is a legal possibility to challenge evidence gathered through EIOs that were unlawfully executed, although they had never had such cases.

Where a legal remedy is admitted and the recognition and execution are consequently revoked, the AGO must inform the issuing authority of this decision (Article 17(5) of SL 9.25). The legal remedy shall not, unless provided for in a similar domestic case, suspend execution of the EIO.

In general, the Maltese authorities did not report any problems concerning legal remedies that were admitted in the Maltese courts against the recognition and execution of EIOs. Nor did they report any cases where a legal remedy was admitted in the issuing State that could lead to the EIO being rendered invalid.

17. TRANSFER OF EVIDENCE

The provisions of Article 13 of the EIO Directive concerning the transfer of evidence were transposed to Article 16 S.L. 9.25, in compliance with the Directive.

The Maltese authorities receive and send the results of EIOs either by post or by email. Generally, the evidence is sent via courier delivery services.

During the on-site visit, Maltese practitioners identified several practical issues. These included incorrect email addresses provided by issuing authorities, damaged CDs containing evidence when sent through postal services and instances where data had been accidentally erased. In some cases, results were password-protected but the issuing State did not provide the password. These issues can typically be resolved through direct contact or with the assistance of Eurojust and the EJN.

If a legal remedy is raised, the transmission of evidence may be postponed pending a decision from the competent court (Article 16(2) S.L. 9.25). The Maltese practitioners did not report any issues regarding this matter.

18. OBLIGATION TO INFORM - ANNEX B

As an issuing State, instances whereby the AGO receives Annex B are very few and far between. The AGO sometimes receives confirmation of receipt of the EIO in the form of an official letter from the competent judicial authorities, who will act as an executing authority but not in the format prescribed by the Directive (i.e., Annex B). When the AGO does not receive any type of communication pertaining to a specific EIO, and when the case is of an urgent nature, the AGO communicates with the executing authority to confirm that the EIO was in fact received. The AGO faced some challenges when sending EIOs to larger countries that subsequently forwarded the execution to different regional competent authorities without informing them. Consequently, Malta received multiple responses from the competent authorities of various regions in the executing State. This led to confusion about whether the EIO had been fully executed or not. The evaluation team would like to recommend that all executing Member States provide a cover note when sending materials back to the issuing State, explaining whether the execution of the EIO is partial or complete (*see Recommendation No 13*).

The Maltese national authorities strive to send Annex B in as many cases as possible, notwithstanding issues of resources and logistics. Where Malta is either the issuing or executing authority, and especially where the request is of an urgent nature, the AGO would be in constant communication with the other Member State and therefore, confirmation of receipt is often delivered in a way other than Annex B.

Article 16(1) of the Directive states that this obligation is applicable both to the central authority and to the executing authority that receives the EIO from the central authority. The AGO (Maltese central authority) is the only authority responsible for sending Annex B, and not the actual executing authority. The AGO's practice is part of their broader role, which involves acting as the only channel for sending and receiving EIOs.

In the opinion of the AGO, the Annex B form is a simple yet effective form enabling the competent judicial authorities to confirm receipt of a request and therefore, no foreseeable amendments to this form are considered at this stage.

Annex B is a vital component in establishing direct communication between the authorities that issue and execute EIOs. As a result, the evaluation team recommends that Malta and all Member States submit Annex B to facilitate direct contact and keep themselves informed about the progress of the EIO procedure (*see Recommendations No 3 and 14*).

19. COSTS

Article 21 of the EIO Directive is transposed into Article 24 of S.L. 9.25. Analysing in detail the content of both of these provisions, it can be seen that the final part of Article 24(2) contains the words "and how", which is not included in the provisions of Article 21(2) of the EIO Directive. Article 24(2) of S.L. 9.25 reads as follow:

*“Where the executing authority considers that the costs for the execution of the EIO may be deemed exceptionally high, it may consult with the issuing authority on whether and how the costs could be shared or that the EIO be modified **and how**.”*

It seems that the Maltese legislator, by adding these words, indicates that in the event of consultations regarding the high costs of implementing the EIO, it is possible to determine with the issuing authority whether and how the costs can be divided or to change the EIO, but also to determine how to change the EIO, which is not included in the content of the Directive.

Of course, in the overall context, the S.L.9.25 provision does not have a different meaning, but it is interesting from the point of view of overall implementation. Most of the provisions of S.L.9. 25 are identical in content to the provisions of the Directive, which makes the introduction of additional words an interesting change. It seems that the legislator expects the agreement on the allocation of EIO costs to be more detailed and to concern not only the agreement that the EIO will be changed, but also how.

As mentioned above, as both issuing and executing authorities, the Maltese authorities have never encountered any issues regarding costs. Also, the Maltese authorities have never had to examine the merits of costs, as the issue has never occurred, either as an issuing authority or as an executing authority. The Maltese authorities mentioned that they could not indicate what criteria would cause them to consider costs to be exceptionally high.

20. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS

Since extensive coordination is needed when simultaneous searches and/or investigative measures must be executed in a single action day, Eurojust or EJM are usually the most favourable channels to carry out such measures, according to the Maltese authorities. Difficulties related to the investigative measure are usually minimal, since in such cases, a coordination centre is specifically drawn up on a particular day to update the requesting State and other participating States in real time. Some difficulties were encountered when it comes to the course of action, as most Member States implement different procedures to execute an order.

21. SPECIFIC INVESTIGATIVE MEASURES

21.1. Temporary transfer

The temporary transfer of persons held in custody is a specific investigative measure regulated in Articles 25 and 26 of S.L. 9.25, in line with Articles 22 and 23 of the Directive, which have been fully transposed word for word, with minor changes.

To date, the Maltese authorities have not had any cases of temporary transfer.

During the on-site visit, the Maltese authorities informed the evaluation team about the scope of this measure, although they had no previous experience of such measures, such as carrying out an investigative act. This does not include bringing a person before a court for the purposes of standing trial (for the purpose of prosecution), which would require an EAW for a temporary surrender in accordance with Framework Decision 2002/584/JHA, as also referred to in recital 25 of the Directive. This also applies when the threshold of custodial sentence excludes the issuing of an EAW.

The EIO is a sufficient legal basis for deprivation of liberty in Malta in the case of temporary transfer and where no other national detention order is needed. The transferred person will remain in custody, unless the executing State applies for his/her release (Article 25(6)), but Malta has had no practical experience of such a case.

There is no special procedure in place to determine whether a person will consent to his or her temporary transfer. By virtue of Article 25(3) S.L. 9.25, where the executing State considers it necessary and the person in custody cannot make such a decision in view of their age or physical or mental condition, the opportunity to state the opinion on the temporary transfer shall be given to the legal representative. Lack of consent may result in non-execution, in line with Article 22(2) a) of the Directive.

Transit of the person in custody through Malta shall be granted on application, accompanied by the EIO, documents attesting the identity of the person in custody and identity details of the officers accompanying the person (Articles 25(4) and 26(2) S.L. 9.25).

Since no request for temporary transfer has been issued or executed, no problems have been encountered so far.

21.2. Hearing by videoconference

Hearing by videoconference, as mentioned in Article 24 of the EIO Directive, is transposed verbatim, with minor changes, in Article 27 S.L. 9.25.

Under Maltese legislation, the videoconference hearing takes place in the presence of a magistrate and, where necessary, with the assistance of an interpreter. As mentioned in Chapter 4, the AGO is competent to receive all incoming EIOs and forwards them to the competent executing authority which, in the case of a videoconference, is always the court. Simultaneously, such an EIO is forwarded to the police because they are responsible for the practical arrangements such as locating the witness to be heard and serving the summons to appear. During the visit, the Maltese police explained that it is also possible for a witness to give a statement to the police and simply confirm this statement under oath before a court at a later time. This is only possible with third-party witnesses such as banks, however.

The logistics of the execution are also handled through communication between the AGO and the issuing State. Where necessary, communication is also established via EJM contact points or Eurojust, especially with regard to urgent requests or where there is an issue with establishing direct communication.

The Maltese authorities rarely encounter problems in cases where a hearing takes place by videoconference. As executing authority, Malta is willing to collaborate with other States for this request to be fulfilled accordingly.

To date, the Maltese authorities have never had cases in which a hearing by videoconference was refused on the grounds that it was contrary to the fundamental principles of law of the executing State.

Logistics

The one issue Malta sometimes encounters is when the issuing authority asks for a specific date and time for the hearing to take place, which Malta is not always able to fulfil due to court schedules. This is most common when the request is received very close to the requested date, as court officials would have already scheduled other court sittings. On the on-site visit, the advice from the Maltese authorities was to send the EIO for a hearing by videoconference at least two months in advance, because locating and summoning the person to be heard usually takes some time.

However, when the Maltese Authorities are the issuing authority, it is very rarely the case that they are not able to arrange such a hearing with the executing authority.

In order to avoid technical issues related to the compatibility of systems, Malta always proposes to carry out a preliminary test with technicians present, so that the videoconference can go ahead without any problems. In this area, the Maltese authorities and also the evaluation team consider it would be most beneficial and convenient for there to be an EU-wide technical solution for holding videoconferences, overcoming technical problems relating to the compatibility of systems used at the national level. That is why the evaluation team recommends that the Commission look into providing a secure tool for videoconferencing that all Member States can access (*see Recommendation No 19*).

Suspects/accused persons

Maltese national legislation provides for the possibility of a suspect being heard via videoconference when requested by other Member States. Regulation 27 S.L. 9.25 deals with these instances. This regulation provides that an issuing authority may issue an EIO for the purpose of hearing a suspected or accused person by videoconference or any other audio-visual transmission. When summoning such a suspect or accused person, the detailed rules of the executing authority will be followed, whilst also informing the individual of the rights offered to them by the issuing authority so that they have time to exercise their right of defence effectively. As executing State, the Maltese authorities are not aware of cases in which the suspect/accused did not consent to the hearing via videoconference. He/she is obliged to attend the hearing, and then he/she can refuse to give testimony after been advised by his/her lawyer. So, the absence of consent is not a mandatory ground for refusal to execute the EIO.

Nevertheless, Maltese authorities will not issue an EIO for the hearing of a person against whom charges have been brought, since the attendance in person of such a person is mandatory in their national proceedings.

Status of the person to be heard

Regarding the status of the person whose testimony is sought, the AGO had one instance where a witness was asked to give his testimony via videoconference, but through his lawyer, he refused to do so, as his lawyer claimed that investigations into the witness were in progress and therefore whatever he said might incriminate him in those investigations and in possible subsequent proceedings. Even though this may be the case, in Malta, such a witness cannot simply refuse to appear in court, resulting in the court having to summon him. The witness would have to appear in court and declare that, by giving their deposition, they would incriminate themselves. Only then could the Magistrate presiding over the sitting exempt the witness from giving their deposition.

As issuing authority, Maltese national authorities have never encountered problems regarding the status of the person to be heard. When the EIO is issued as part of an investigation by the police, the role of the AGO also involves confirming that the conditions for issuing and transmitting the EIO, also mentioned in the Directive, have also been met. In this regard, national law replicates the Directive in Article 6, namely, the principles of necessity and proportionality, taking into account the rights of the accused/suspected person, and that the investigative measure indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

Participation of the defendant in a trial via videoconference

As issuing authority, it would not be possible to issue an EIO for the purpose of letting a person participate in the trial via videoconference, since Maltese national legislation does not allow for trials in absentia. The participation of the defendant in the trial through videoconference would breach the right to a fair trial under the fundamental principles of Maltese national law, even if the defendant agrees to participate via videoconference.

As executing State, Maltese authorities would also refuse an EIO for the purpose of hearing and participation of the accused person throughout the main trial leading to a conviction and would only execute it if the EIO is specifically related to taking evidence during the trial. However, several other countries execute similar EIOs. Some Member States only for the actual hearing of the defendant, while others also do so for the participation of the defendant in the whole trial during several hearings. Practitioners find that videoconferencing is a “softer” option compared to an EAW and surrender. The evaluation team is of the opinion that more clarification on the application of the EIO to ensure the presence of the defendant at the main trial would be beneficial to all Member States, to ensure a more coherent approach on the matter (*see Recommendation No 20*).

Videoconference without EIO

During the on-site visit, the evaluation team was informed about the possibility of videorecording any evidence required from a witness residing abroad, falling outside the scope of the EIO, if the court deems it proper so to act (Article 647A of the Criminal Code, Chapter 9 of the Laws of Malta). However, the Maltese practitioners informed the evaluation team that this possibility has rarely been used.

Considering the principles enshrined in the EIO Directive and the sovereignty principle, the evaluation team wishes to recommend that all Member States refrain from conducting a hearing via videoconference in another Member State without using an EIO (*see Recommendation No 15*).

21.3. Hearing by telephone conference

Article 25 of the EIO Directive has been fully transposed, with minor changes, into Article 28 S.L. 9.25. This means that it is possible for Malta, as executing State, to recognise and execute an EIO for the hearing of a witness or expert by telephone conference, requested by another Member State, where it is not appropriate or possible for the person to be heard to appear in its territory in person, and after having examined other suitable means.

However, to date, the Maltese authorities have not encountered any cases of hearings via telephone conference as executing State. Legally, the procedure would be the same as for a hearing via videoconference.

As issuing State, the Maltese authorities will not issue an EIO for that purpose to any other executing State, since a telephone conference cannot be used under Maltese Law to hear a witness or expert (or a suspect/accused person) by telephone conference as a national measure.

Since no request for hearing by telephone conference has been addressed to the Maltese authorities, no problems have been encountered so far.

21.4. Information on bank and other financial accounts, and on banking and other financial operations

Article 26 (information on bank and other financial accounts), Article 27 (information on banking and other financial operations) and Article 28(1) (monitoring in real-time of banking and other financial operations) of the EIO Directive have been fully transposed, with minor changes, into Articles 29, 30 and 31 S.L. 9.25.

Articles 26 and 27 regulate information from the past concerning accounts and operations. The Executive Police have the power to request that banks/financial institutions provide information in connection with bank accounts or any related information. In such cases, the AGO receives the request, and the Executive Police execute the request.

Article 28(1) regulates operations that will be carried out in the future (“monitoring order”). In such cases, Articles 435AA and 435 BA of the Criminal Code (Chapter 9 of the Laws of Malta) also apply. Where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence, they may apply to the Criminal Court for a "monitoring order", requiring a bank to monitor for a specified period the transactions or banking operations being carried out through one or more accounts of a person suspected of a relevant offence, or in the name of the suspect, or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons. The bank shall, at the request of the Attorney General, communicate to the person or authority indicated by the Attorney General.

For the purposes of this article, "relevant offence" means an offence, not involuntary in nature, consisting of any act or omission which, if committed in Malta, or in corresponding circumstances, would constitute an offence liable to punishment by imprisonment or detention for a term of more than one year.

According to Maltese legislation, only this last type of evidence (“monitoring order”) requires the authorisation of the Criminal Court in the case of a “relevant offence”, while the first two types can be carried out directly by the Executive Police because, under the Maltese Legal System, such a measure is not deemed intrusive in nature.

The vast majority of EIOs received by Malta (more than 80%) concern bank information. Nevertheless, Malta does not report any problems in relation to requesting bank information as executing State.

In Malta, it is not possible to request bank information on an account held by a witness. The most that can be done is to check whether a witness holds a bank account. However, for companies that are not suspects, it is easier to obtain bank information, according to the FCID.

If the EIO is related to financial crimes, the International Office (set up in June 2021) within the FCID of the Malta Police will be involved. This office is composed of one inspector, one police sergeant and two police constables.

During the on-site visit, the evaluation team was informed that there was a need for more staff in this unit to cope with the ever-increasing number of EIOs related to banking and financial information in Malta, in order to meet the time-limits provided for in the EIO Directive. In fact, the information gathered by the evaluation team reveals a significant delay in the execution of this type of measure. This is even the case where the procedure seems to be very simple due to the limited number of banks and financial institutions in Malta and the direct contact between them and the FCID.

As mentioned in Chapter 14 on Time Limits, the evaluation team was informed that there is a considerable delay, lasting around one month, after the EIO is sent by the AGO to the contact point in the Malta Police Force and then to the FCID, while this is considered a mere administrative procedure. This delay has a serious impact on the time it takes to execute an EIO and often makes it impossible to meet the deadlines set out in the EIO Directive. Considering that the vast majority of EIOs executed by Malta are related to banking and financial information, overcoming staff shortages at this stage could lead to a significant improvement in the overall rate of compliance of the EIO with deadlines in Malta and a significant impact on the swift assistance requested by other Member States (*see Chapter 14 and Recommendation No 2*).

Centralised Bank Account Register

Since 2020, banking information has been available on the Centralised Bank Account Register (CBAR), which is a data collection and retrieval system for information on accounts identifiable by IBAN, safe deposit boxes and safe custody services provided by credit and financial institutions within the Maltese territory. The system is accessible exclusively to the Financial Intelligence Analysis Unit (FIAU) and other designated national competent authorities for the purposes of preventing, detecting, investigating or prosecuting money laundering, associated predicate offences, funding of terrorism or any other serious criminal offence, according to the amendments carried out by Directive (EU) 2018/843, obliging Member States to establish centralised automated mechanisms for the collection and retrieval of data on bank and payment accounts, as well as on safe custody services, and Directive (EU) 2019/1153 laying down the rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences. Credit and financial institutions presently offering the above-mentioned services in Malta are required to register as a Reporting Entity on the CBAR Registration portal.

Banking and financial information is often stored for five years, and it is often possible to provide the information in electronic format.

Fulfilment of the EIO

As mentioned in Chapter 6.1, Maltese local authorities underlined the need for the EIO to be filled in accurately, and reported problems related to incorrect identifiable data (e.g. IBAN numbers) regarding the banking information being requested, and sometimes because money laundering is ticked in Section G, point 3, but the facts do not justify this offence. This can be a serious problem, since the nature of the crime often determines the competence of the police unit that executes the EIO (*see Chapter 6.1 and Recommendation No 8*).

21.5. Covert investigations

Article 29 of the EIO Directive (“covert investigations”) is transposed nearly verbatim into Article 32 S.L. 9.25, which also refers to Article 435E of the Criminal Code (Chapter 9 of the Laws of Malta) which regulates the procedure to be adopted in these investigations. Article 435E (3) stipulates the following: *Pursuant to any arrangement, including any treaty, convention, agreement or understanding, to which Malta is a party or which is otherwise applicable to Malta, the Attorney General may authorise the competent authorities of another country to conduct in Malta, jointly with or under the supervision or direction of the Executive Police, investigations into criminal offences by officers acting under covert or false identity, provided that the Attorney General is satisfied of the true identity and official capacity of the officers in question and is fully informed of the nature of any documents which purport to guarantee, certify or authenticate the false identity assumed by any such officers.*

Maltese legislation only refers to the fact that the issuing authority needs to indicate why these covert investigations are relevant for the purpose of criminal investigations. Furthermore, the Maltese authorities are not aware of any cases in which differences in national law complicated the execution of an EIO for covert investigations. Under Maltese Regulations, civilians or third persons (whistleblowers or *pentiti*) will not be allowed to act as covert agents, because Maltese Legislation does not provide for this possibility.

Controlled deliveries

Controlled deliveries are regulated in Article 435E. Under Maltese law, a controlled delivery is defined as the technique of allowing an illicit or suspect consignment of a dangerous drug or of money, property or proceeds to pass out of, through or into Malta, or from one place or person in Malta to another place or person in Malta, or into the territory of another country, intact, or removed or replaced in whole or in part, with the knowledge and under the supervision of the Executive Police and, where appropriate, of the Customs Authorities and of the competent authorities of such other country, with a view to identifying persons involved in commission of offences under the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) or under the corresponding law in force in the territory of such other country.

It shall be lawful for the Attorney General to authorise the Executive Police and, where appropriate, the Customs authorities to allow a controlled delivery to take place with a view to identifying persons involved in the commission of any criminal offence under the laws of Malta or under the laws of another country.

In the case of EIOs, the issuing authority shall indicate in the EIO why it considers the information requested relevant for the purpose of the criminal proceedings concerned. The right to act, to direct and to control operations related to the execution of such an EIO shall lie with the competent authorities of the executing State. A JIT may also be set up for this purpose.

When the EIO is issued for the purpose of executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time, such as controlled deliveries taking place in Malta, its execution may be refused, in addition to the grounds for non-recognition and non-execution in the EIO Directive, if the execution of the investigative measure concerned would not be authorised in a similar domestic case.

21.6. Interception of telecommunication

In general terms, the Maltese authorities have never encountered an EIO for the purpose of any type of interception of telecommunications.

The evaluation team noted the lack of information from Malta on the EJM website (*Fiches Belges*) about the following investigative measures:

- A.50 Interception of telecommunications and other forms of electronic communications
- A.51 Interception of telecommunication without the technical assistance of another MS (Annex C of the EIO)
- A.52 Tracing of telecommunications and other forms of electronic communications
- A.54 Control of regular mail
- A.55 Surveillance and tracking of a person (tracking device being installed/put by an executing state)
- A.56 Room surveillance
- A.60 Agents – infiltration
- A.70 Cross-border surveillance
- A.71 Cross-border hot pursuit
- A.72 Cross-border tracking (tracking device being installed/put by an issuing state)

The evaluation team highly recommends that this type of information be provided because of its added value for all Member States and its crucial importance for the fight against transnational and organised crime (*see Recommendation No 4*).

Regulation 33 of Subsidiary Legislation 276.05 deals with requests pertaining to the interception of telecommunications and electronic surveillance. This regulation provides that an ‘EIO may be issued for the interception of telecommunications in Malta from which technical assistance is needed.’ Therefore, the scope for which an EIO can be issued in this respect is wide and inclusive, and although not detailed, it would include anything for which technical assistance is needed.

On a separate note, particularly with reference to Chapter 391 of the Laws of Malta, the Security Service Act also tackles interception, for cases when this is required in local investigations. The legislation mentions the various kinds and forms of interception applicable under Maltese law, which include, among other things, the obtaining possession of, disrupting, destroying, opening, interrupting, suppressing, stopping, seizing, eavesdropping on, surveilling, recording, copying, listening to and viewing of communications and the extraction of information from such communications. The various aforementioned forms of interception can only be carried out by means of a warrant issued in line with national legislation.

The evaluation team was informed that, in Malta, every interception of or interference with communications in the course of their transmission by post or by means of a radiocommunication or telecommunication system or by any other means must be authorised by a warrant issued by the “Minister” (Article 6 of the Security Service Act, Chapter 391 of the Laws of Malta), within the meaning of Article 2 of the same act as the “Minister” from time to time designated by the Prime Minister as being responsible for the Security Service (currently the Minister of Home Affairs).

This aspect should be emphasised in light of the conclusions described in the Fifth Evaluation Round Report of Malta “Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies adopted by *The Group of States against Corruption* (GRECO)⁴ at its 82nd Plenary Meeting (Strasbourg, 18-22 March 2019), page 33, paragraph 108:

108. The GET also recalls that the investigation and prosecution of corruption will often require the use of special investigative techniques because of its eminently secretive nature. The on-site discussions showed that this subject-matter remains another weakness of Malta’s criminal justice system, which could contribute to explain the lack of results with regard to cases involving PTEFs in recent years. The situation has remained unchanged since the First Round evaluation of Malta. Such covert operations are conducted by Malta’s Security Services (MSS) and regulated by the Security Services Act of 1996 (amended last in 1997). This act provides for broad discretion of the executive – the Minister for Home Affairs and National Security, but also the Prime Minister (art.11) – as regards the use of the above techniques, which are not supervised by a judicial authority. The supervision currently in place involves a mere commissioner who is appointed by the Prime Minister and reports to him/her (art.12), and a Security Committee composed of the Prime Minister, two other members of government and the leader of the opposition (art.14). Surveillance measures can be applied for a renewable term of 6 months without absolute upper limit, the warrant can be modified at any time by the minister etc. Inconsistent information was available to the GET as to whether the information gathered can be used as evidence in court (and under which circumstances), or only for intelligence purposes.

In parallel, new trends have appeared concerning the use of data traffic. The GET noted that the current situation remains over the years a source of controversies and more than ever, Malta needs to provide for a proper system of checks and balance, as well as a balance between the needs of an effective fight against corruption (and other forms of serious crime) and the preservation of fundamental rights.

⁴<https://rm.coe.int/grecoeval5rep-2018-6-fifth-evaluation-round-preventing-corruption-and-/168093bda3>

The recommendation from the first evaluation remains largely pertinent and it is to be reiterated. GRECO recommends that i) legislation be issued giving criminal investigation bodies the authority to seek and use special investigative techniques (such as wiretaps and other similar measures) in the investigation of corruption offences, empowering the judicial authority to authorise their use, and making the evidence obtained thereby admissible in court, while respecting the case law of the European Court of Human Rights and that ii) it be made clear to all authorities involved in the investigation of corruption that the evidence lawfully obtained by such means is admissible evidence in court.

In the 2019 evaluation report for Malta, GRECO recommended that the country take measures to amend its legislation. Specifically, GRECO advised Malta to grant criminal investigation bodies the authority to use special investigative techniques (such as wiretaps) in the investigation of corruption offences. It also suggested empowering the judicial authority to authorise their use and making the evidence obtained admissible in court. It is worth mentioning that GRECO has been recommending such measures to Malta since its first report after the first evaluation round but that the situation has remained unchanged ever since.

The evaluation team is of the opinion that this ongoing recommendation is also fully applicable in the field of international judicial cooperation in criminal matters, and therefore recommends that the legal provisions be amended to empower judicial authorities to order such investigative measures and safeguard that evidence obtained by the issuing State following an EIO sent to Malta is admissible in court (*see Recommendation No 5*).

In practice, if Malta receives an EIO to intercept telecommunications, the AGO will recognise the incoming EIO and will forward it to the Maltese Security Service, who will ask for a warrant from the Minister. The Maltese Security Service will carry out the interception.

Under Maltese law (Chapter 391 of the Laws of Malta), the concept of “interception of telecommunications” includes GPS tracking, bugging a car, installing spyware on a device and audio/video surveillance.

The evaluation team agrees with the suggestion of introducing a common and broader definition of ‘telecommunications interception’ in this field (covering wiretapping but also audio-video surveillance, the bugging of homes, private places vehicles and computer systems, the use of software and the temporary removal of protection on computer systems), and therefore a more extensive application of Article 31 of the Directive when technical assistance is not needed and crossing borders only becomes apparent during the interceptions, allowing for ex-post notifications that would lead to the smoother practice of different types of interception (such as GPS tracking), which is indispensable for the fight against transnational crime, including organised crime. Considering these findings, the evaluation team finds it appropriate to recommend that the EU legislator clarify the concept of ‘interception of telecommunications’ (*see Recommendation No 21*).

At the same time, Member States have different approaches when it comes to cross-border surveillance and the extent to which it is a measure of police (Article 40 CISA) or judicial cooperation. Furthermore, questions remain regarding the meaning of Article 34(1)(b) and recital 9 of the EIO Directive in the case of surveillance measures such as a GPS tracker or an audio/video recording device in a vehicle. The evaluation team would call on the Commission to also clarify the application of the EIO Directive in relation to Article 40 CISA, especially with regard to measures covering the surveillance of vehicles with a GPS tracker or an audio/video recording device (*see Recommendation No 22*).

In accordance with Article 31 of the EIO Directive, transposed in Article 34 of S.L. 9.25, the Maltese authorities do indeed accept an ex-post notification issued by means of Annex C as stipulated. Furthermore, Maltese authorities stressed that, after the ex-post notification, there is always the possibility to either stop the interception or request that material already collected is not used, if the interception would not have been authorised in a similar domestic case.

However, during the on-site visit, the evaluation team was informed that the Maltese authorities have never received an Annex C notification. There is no provision under the Maltese Legal System concerning the procedure to be followed after receiving an Annex C notification. According to the AGO, the Annex C would be sent to the police, and then to the Maltese Security Services, who will send the Annex C to the Minister of Home Affairs.

Since the Maltese authorities have never received or used an Annex C concerning interception measures, they do not consider themselves able to suggest amendments to this form.

Furthermore, the evaluation team would like to note that it is not clear if it is admissible to issue or execute an EIO for the interception of telecommunications in the post-trial phase (e.g., to locate the convicted person). The Maltese authorities have no experience in this matter. A wider approach should be harmonised in line with Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings. This regulation allows the obtention of traffic and content data for the execution of a custodial sentence or a detention order of at least four months, following criminal proceedings, imposed by a decision that was not rendered in absentia, in cases where the person convicted absconded from justice. The evaluation team would therefore like to call on the Commission to also clarify the application of the EIO Directive in relation to the interception of communications and other types of investigative measure in the post-trial phase (*see Recommendation No 23*).

21.7. Other investigative measures (e.g. house searches)

Regarding other investigative measures, the AGO also receives and transmits requests as a central authority. The same procedure is followed, regardless of whether it is an EIO or MLA request.

Incoming requests are executed by the police, but any search or seizure must be authorised by the magistrate. The magistrate shall comply with the formalities and procedures indicated in the request of the foreign authority unless these are contrary to the public policy or the internal public law of Malta (Article 649(1) of the Maltese Criminal Code).

Officials of the requesting Member State may be present during a search for observation purposes only.

If the request cannot be executed, or fully executed, in accordance with the formalities, procedures or deadlines indicated by the requesting foreign authority, the requesting authority shall be informed, indicating the estimated time within which or the conditions under which execution of the request may be possible.

The police may seize and retain anything not subject to legal privilege and which constitutes relevant evidence. "Items subject to legal privilege" means any communication between a professional legal adviser and his client or any person representing his client and any document or record enclosed with or referred to in such communication and made in connection with the giving of legal advice or in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, but the expression does not include items held with the intention of furthering a criminal purpose (Article 350 of the Maltese Criminal Code).

In one case, as the evaluation team was informed, after the search and seizure, the affected person lodged a constitutional complaint requesting that the seized items not be transmitted to the issuing State.

According to information obtained from the Chamber of Advocates, when a legal privilege may apply, there is no special legal provision imposing the presence of a representative of that Chamber and they are not required to provide such a representative by the executing authorities. In such cases, the court shall hire an expert to define what is privileged and what is not.

22. STATISTICS

Malta was asked to provide statistics for the last five years concerning the number of incoming/outgoing EIOs, cases of refusal and cases in which the execution of the EIO was postponed. The Maltese authorities provided the expert team with the following tables.

2018				
EIOs				
	Pending	Executed	Cancelled	Total
Incoming	17	49	2	68
Outgoing	14	4	0	18
Total	31	53	2	86

2019				
EIOs				
	Pending	Executed	Cancelled	Total
Incoming	15	162	4	181
Outgoing	3	22	1	26
Total	18	184	5	207

2020				
EIOs				
	Pending	Executed	Cancelled	Total
Incoming	23	160	12	195
Outgoing	29	53	9	91
Total	52	213	21	286

2021				
EIOs				
	Pending	Executed	Cancelled	Total
Incoming	132	144	7	283
Outgoing	55	15	5	75
Total	187	159	12	358

2022				
EIOs				
	Pending	Executed	Cancelled	Total
Incoming	192	12	2	206
Outgoing	112	4	2	118
Total	304	16	4	324

As of 31st August 2023						
EIOs						
	Pending	Executed	Cancelled	Refused	Postponed	Total
Incoming	231	50	1	1	0	283
Outgoing	44	2	1	0	0	47
Total	275	52	2	1	0	330

The tables contain data for the years 2018 (June-December) to 2023 (August 31, 2023) regarding both incoming and outgoing EIOs, divided into pending, executed and cancelled. Additionally, refused and postponed items have been added to the table for 2023.

In the course of detailing the information contained in the tables, lawyers from the AGO indicated that ‘cancelled’ means withdrawn, and ‘postponement’ means cases where the EIO has already been executed but the documents have not been sent yet, because the proceedings in Malta connected with the company being investigated are still ongoing. The statistics are collected manually by the AGO.

Additional statistics were presented by the FCID:

Year	Total MLAs received	Total MLAs executed	Total EIOs received	Total EIOs executed
June – December 2021	191	186	150	148
2022	395	298	321	251
January – September 2023	415	227	360	197

These do not match the statistics presented by the AGO, because they concern a smaller timeframe and only cases that were forwarded to the FCID for execution.

23. TRAINING

In Malta, no statistics are gathered on the number of training courses provided on the subject of international cooperation and, more specifically, the EIO. During the visit, the evaluation team learned from the discussions with all relevant parties that there is a strong desire to receive more training on this topic.

The magistrates stated that the members of the judiciary were obliged to take part in regular training sessions (once every two months), covering various issues related to their work. However, they were unable to recall whether any of this training related to EIO issues.

The AGO stated that they had never been trained on the EIO or on issues related to international cooperation in general but would be very willing to participate in such a course. Similarly, the presentation given by the Maltese police indicated as one of the challenges that practically no training is provided in the field of international cooperation, including regarding the EIO. Lastly, the representatives of the Chamber of Advocates also expressed the need for a recommendation to the Chamber to provide more training on international cooperation and on the EIO in particular.

Based on the above, the evaluation team is also convinced that it would greatly benefit the application of the EIO in Malta if structural training courses on international cooperation, including the EIO, were organised for all parties dealing with the EIO in Malta (*see Recommendation No 6*).

24. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

24.1. Suggestions by Malta

The Maltese authorities involved in the evaluation visit, both from law enforcement and the judiciary, expressed their overall satisfaction with the central role the AGO plays in the application of the EIO in Malta. As executing State, the specialised lawyers at the AGO review the incoming EIO and transfer it to the competent executing authority as soon as possible. They remain the main point of contact for the issuing State and coordinate the overall execution of the EIO. If additional information is needed from the issuing State, the AGO will organise such consultations.

When acting as the issuing State, the AGO works closely with law enforcement while drafting the EIO. The specialised lawyers keep an eye on the proportionality and necessity of issuing the EIO and can advise their colleagues to resort to police-police cooperation first. Furthermore, the Maltese Magistrates also appreciate and make use of the central role of the AGO when dealing with EIOs.

During the visit, Maltese authorities pointed out that translations of EIOs they receive in Maltese are very often of poor quality. Malta encourages Member States to send their EIOs to Malta in English, as it is often difficult to find a good translator into Maltese abroad. At the same time, as Malta is a small country, it was argued that it can be difficult to find a translator in Malta into other languages apart from English. According to Malta, it would be very convenient if all Member States accepted EIOs in English (see also Chapter 6.1 and 6.2).

24.2. Recommendations

Regarding the application and implementation of Directive 2014/41/EU, the team of experts involved in assessing Malta found the Maltese system to be satisfactory.

The evaluation team sees fit to make a number of suggestions for the attention of the Maltese authorities. Furthermore, based on the various good practices identified, related recommendations are made for the attention of all Member States and the EU. Malta should conduct an 18-month follow-up to the recommendations referred to below after this report has been agreed by COPEN.

24.2.1. Recommendations to Malta

Recommendation No 1: To consider taking concrete steps to be able to connect to e-EDES (*Chapter 8*).

Recommendation No 2: To consider how the internal process of referring an EIO could be improved, ensuring compliance with the time limits. (*Chapters 14 and 21.4*).

Recommendation No 3: To send Annex B systematically (*Chapter 18*).

Recommendation No 4: To fill in all relevant information concerning the Maltese investigative measures in the *Fiches Belges* on the EJM website (*Chapter 21.6*).

Recommendation No 5: To consider amending national law to empower the judicial authorities to authorise measures for the interception of telecommunications (*Chapter 21.6*).

Recommendation No 6: To organise structural training on international cooperation, including on the EIO, for all parties dealing with the EIO in Malta (*Chapter 23*).

24.2.2. Recommendations to the other Member States

Recommendation No 7: Member States should mention all relevant instruments (previous EIOs, EAWs, Freezing Orders, JITs, etc.) in Section D of the EIO form (*Chapter 5.1*).

Recommendation No 8: Member States should pay particular attention to the quality of the EIO, and specifically to the description of the facts and the requested measure (*Chapters 6.1 and 21.4*).

Recommendation No 9: Member States should pay attention to the quality of the translation when issuing an EIO (*Chapter 6.2*).

Recommendation No 10: Member States are encouraged to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language, in the spirit of Article 5(2) and recital 14 of the Directive (*Chapter 6.2*).

Recommendation No 11: Member States should ensure that the contact person(s) mentioned in the EIO speak(s) English at a sufficient level to allow for effective direct communication (*Chapter 6.2*).

Recommendation No 12: Member States should make sensible use of the ‘urgent’ label and should provide the executing State with all relevant information to justify the urgency (*Chapter 14*).

Recommendation No 13: Member States should provide a cover note when sending materials back to the issuing State, explaining whether the execution of the EIO is partial or complete (*Chapter 18*).

Recommendation No 14: Member States should systematically send Annex B (*Chapter 18*).

Recommendation No 15: Member States should refrain from conducting hearings via videoconference in another Member State without issuing an EIO (*Chapter 21.2*).

24.2.3. Recommendations to the European Union and its institutions.

Recommendation No 16: The Commission is invited to look into the possibility of amending the Directive to include the victim's right to request that an EIO be issued (*Chapter 4.5*).

Recommendation No 17: The Commission is invited to consider making the forms more user-friendly (*Chapter 6.1*).

Recommendation No 18: The Commission is invited to clarify the application of the speciality rule in relation to the EIO (*Chapter 11*).

Recommendation No 19: The Commission is invited to look into providing a secure tool for videoconferencing, accessible to all Member States (*Chapter 21.2*).

Recommendation No 20: The Commission is invited to clarify the application of the EIO in connection with ensuring the accused person's presence at their trial (*Chapter 21.2*).

Recommendation No 21: The Commission is invited to clarify the concept of interception of telecommunications (*Chapter 21.6*).

Recommendation No 22: The Commission is invited to clarify the application of the EIO Directive in relation to Article 40 CISA, especially with regard to measures covering the surveillance of vehicles with a GPS tracker or an audio/video recording device (*Chapter 21.6*).

Recommendation No 23: The Commission is invited to clarify the application of the EIO in relation to interception of telecommunications and other types of investigative measures in the post-trial phase (*Chapter 21.6*).

24.3. Best practices

This section includes a list of best practices to be adopted by other Member States.

Malta is to be commended for:

1. The possibility for victims to request that an EIO be issued (*Chapter 4.5*).
2. Its general flexible and proactive approach when executing EIOs; for example, by executing an EIO for the sole purpose of serving a document. The flexible approach is also illustrated by the direct consultations established with the issuing State when issues arise and by the very low refusal rate (*Chapters 5.1 and 13.1*).
3. Its flexibility in correcting mistakes in bank account numbers or addresses when executing an EIO, in direct consultation with the issuing State, without requiring an additional EIO (*Chapter 6.3*).
4. Providing the issuing State with a cover letter drafted in English, explaining whether the EIO has been executed fully or partially (*Chapter 9.2*).
5. As executing State, always informing the issuing State where evidence obtained through an EIO is used to open a new domestic case (*Chapter 11*).
6. As executing State, always consulting with the issuing State before deciding to give the suspect access to the case files (*Chapter 12*).

ANNEX A: PROGRAMME FOR THE ON-SITE VISIT AND PERSONS INTERVIEWED/MET

21 November 2023 – Valletta, Malta

09:30-11:00	Welcome and presentations, AGO, Admiralty House: <ul style="list-style-type: none">- Ministry of Justice- Attorney General's Office- Malta Police Force
11:00-11:45	Travel to Law Courts
11:45-12:30	Meeting with the Chamber of Advocates, Law Courts
12:30-14:00	Lunch
14:00-16:30	Meeting with the Judiciary, Law Courts

22 November 2023 – AGO Admiralty House, Valletta, Malta

09:30-12:30	Meetings with representatives of: <ul style="list-style-type: none">- Attorney General's Office- Malta Police Force
12:30-14:00	Lunch
14:00-16:30	Meeting with the Financial Crimes Investigations Department of the Malta Police Force

23 November 2023 – AGO Admiralty House, Valletta, Malta

09:30-10:30	Final Q&A with representatives of the Attorney General's Office, Malta Police Force and the Ministry of Justice
10:30-12:00	Wrap-up meeting

ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
AGO	Attorney General's Office
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CBAR	Centralised Bank Account Register
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
EAW	European Arrest Warrant
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
FCID	Financial Crimes Investigation Department
FIAU	Financial Intelligence Analysis Unit
GRECO	Group of States against Corruption
JIT	Joint Investigation Team
MLA	Mutual Legal Assistance
MSS	Malta Security Services
S.L. 9.25	Subsidiary Legislation 9.25