# 15 Selected Case Studies: The Case Study of Malta (MT)

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## 15.1 Implementing the PIF Directive in Malta

The PIF Directive has been implemented in Malta through sporadic legislative amendments and administrative interventions. When dealing with substantive crimes relating to the protection of the financial interests of the European Union, the Maltese Criminal Code already contains relative provisions referring to various instances of fraud[1] which adequately cover the offences within the PIF Directive. One can identify, *inter alia,* the offence of misappropriation,[2] obtaining money by false pretences[3] and the catch-all 'other fraudulent gain'.[4] The offence is aggravated if the perpetrator is a public officer or a person vested with some form of entrustment as well as aggravated by amount.

Malta also has an established solid anti-corruption legal framework[5] providing for bribery[6] (active and passive bribery of domestic public officials) and trading in influence.[7] The sanction in respect of bribery of public officials is imprisonment for a period of six months to eight years.[8] In the case of a magistrate or judge, the term of imprisonment can range from 18 months to 10 years, and in the case of a member of parliament, the sanction is imprisonment for a term from one year to eight years.[9] In addition to imprisonment, a person convicted of bribery may also be punished with temporary or perpetual interdiction, i.e., disqualification from holding a public office or employment with the public sector.[10] The punishment for trading in influence is imprisonment for a term of three years.

1 Section 293 *et seq*, Cap. 9, Laws of Malta.
2 Section 293, Cap. 9, Laws of Malta.
3 Section 308, Cap. 9, Laws of Malta.
4 Section 309, Cap. 9, Laws of Malta.
5 Council of Europe, Group of States against corruption (2009) *Third Evaluation Round: Evaluation Report on Malta, op. cit.,* pp. 18-19, paragraphs 94-95.
6 Chapter 9, Laws of Malta.
7 Arts. 115, 120 and 121A of the Criminal Code.
8 *Ibid.*, Art. 115.
9 *Ibid.*, Arts. 116-118.
10 *Ibid.*, Art. 119.

The Criminal Code contains provisions regarding prescription[11] (statute of limitation rules). The length of prescription varies according to the gravity of the offence, which is generally reflected by the punishment. For example, active/passive bribery of public officials with a maximum punishment of eight years imprisonment[12] has a prescription period of 10 years, and active/passive bribery of judges with a maximum punishment of 10 years imprisonment[13] has a prescription period of 15 years. The Criminal Code provisions on active and passive bribery also apply to corruption in the private sector.[14] Corporate liability for corruption offences is also specifically dealt with in the Criminal Code,[15] which states that where the person found guilty of a bribery offence is the director, manager, secretary or other principal officer of a body corporate or has the power to represent, take decisions or bind the body corporate, and the offence was committed for the benefit of that body corporate, then such person is deemed to be vested with the legal representation of the body corporate, which shall be liable to a fine.

The Code also criminalizes the conspiracy to commit an offence,[16] the attempt[17] and complicity in an attempt[18] of a criminal offence.

## 15.2 Malta's Efforts in Combating Financial Crime and Protecting the Financial Interests of the EU

Combating financial crime and protecting the financial interests of the EU requires effective implementation of EU legal norms in the domestic scenario. This requires not only the actual amendment of the law but also an effective implementation by local authorities and a correct application of specialized investigative legal instruments. When dealing with financial crime and more, in particular, the protection of the EU's financial interests, the following local key players can be identified:

The Attorney General (AG)[19] is the designated competent authority within the EJN and Eurojust, which is empowered to facilitate cooperation with other supranational agencies in Malta. The AG is not only formally represented in Eurojust[20] and actively participates in matters of coordination and facilitation of criminal activity of mutual concern, but is also the national contact point within the EJN. Within the AG's office, it is the Criminal Matters Unit, more specifically the International Cooperation Office,

11 Chapter 9, Laws of Malta. *See* Arts. 687-694.
12 Art. 115(c) of the Criminal Code.
13 *Ibid.*, Art. 116(a).
14 *Ibid.*, Art. 121(3).
15 *Ibid.*, Art. 121D.
16 Section 48A, Cap. 9, Laws of Malta.
17 Section 41, Cap. 9, Laws of Malta.
18 Section 42, Cap. 9, Laws of Malta.
19 Established in virtue of the Attorney General Ordinance, Cap. 90 Laws of Malta.
20 http://eurojust.europa.eu/about/structure/college/Pages/national-members.aspx.

which is responsible for coordinating activities with the respective contact points within the network.

It is also possible for the Minister for Justice to communicate requests to a Magistrate. Article 649(3) provides that:

> where the Minister responsible for justice communicates to a magistrate a request made by the judicial authority of any place outside Malta for the examination of any witness present in Malta, touching an offence cognizable by the courts of that place, the magistrate shall examine on oath the said witness on the interrogatories forwarded by the said authority or otherwise, notwithstanding that the accused were not present, and shall take down such testimony in writing.

This residual power vested in the Minister for Justice is essential. Whereas the AG is generally the first contact point for such a request it is also clear that for the AG to handle such a request, it must have been issued within the framework of a treaty, convention or agreement based on the principle of mutual assistance as per Section 649 (2) of the Criminal Code.[21]

In all other cases, where the AG is not competent to act, requests for cooperation can be made to the Minister of Justice who would then proceed, if he so accepts and agrees, to forward such a request to a Magistrate in Malta. Procedures under this subsection would also require the consent and political discretion of the Minister for Justice, depending on the case and its circumstances. This power can be seen as an umbrella, or catch-all, provision to allow for incoming requests to be processed even if they do not fall within the strict parameters of a treaty or come from the AFSJ.

The Economic Crimes Unit is a specialized unit within the Maltese Police Force,[22] and it is the special branch or unit which liaises mostly with Europol. The Economic Crime Unit handles all investigations relating *inter alia* to offences against property, corruption, embezzlement, theft, all forms of fraud, money laundering and white-collar crime. The Economic Crime Unit, therefore, is authorized to act as the official interlocutor with Europol. It is empowered to forward and request sensitive and relative data in the course of investigations as well as to request or provide assistance within Europol channels in the course of an investigation.

Since the Economic Crime Unit is the designated national asset recovery office, it is enabled to communicate through the Camden Asset Recovery Inter-Agency Network.[23]

21 Cap. 9, Laws of Malta.

22 Established in virtue of the Police Act, Cap. 164, Laws of Malta.

23 This is an informal association of national contact points whose aim is to develop and improve criminal asset recovery or proceeds of crime. This network or association is open to all EU Member States reserving observer status to non-EU Member States. This association is housed within Europol.

The Economic Crimes Unit offers other assistance where requested by other specialized agencies, such as OLAF, in the course of their investigation.

The Internal Audit and Financial Investigations Unit[24] is the official interlocutor of DG OLAF in Malta. The Financial Investigations and European Anti-Fraud Office Related Matters Unit within the IAID has the remit to conduct financial investigations in government departments and in any other public or private entities which are in any way beneficiaries, debtors or managers of public funds, including EU funds, for the purpose of protecting such funds against irregularities and fraud or otherwise to assess public or private entities' liability to contribute to such funds.

Since the IAID is the designated interlocutor of DG OLAF in Malta and is the Anti-Fraud Co-Coordinating Service (AFCOS) for Malta, the IAID Unit can conduct joint investigations with OLAF, the European Anti-Fraud Office, with respect to EU funds availed of by Malta.[25] The Unit reports irregularities to DG OLAF on a quarterly basis with respect to pre-accession funds, transition facility funds, structural funds, cohesion fund and agricultural funds. The Unit also provides substantial contributions, including feedback, to various sub-units within OLAF all in charge of protecting the EU's financial interests under different facets.

- The Permanent Commission Against Corruption (PCAC) is a specialized body dealing exclusively with the investigation of alleged or suspected corrupt practices within the public administration. In 2010, a bill[26] was presented to amend the Permanent Commission Against Corruption Act and widen the scope of the PCAC to include private citizens and legal entities. The bill also provides for the appointment of a Special Prosecutor who will file reports to the police on any act or omission which, if proven, would constitute a corrupt practice; and if the Commissioner of Police fails to take action, the Special Prosecutor will make an application before the competent court. These amendments, however, are not yet in force.
- The Ombudsman is an officer of Parliament and a Commissioner for Administrative Investigations[27] who investigates and resolves citizens' grievances about government departments and public bodies.[28] The Ombudsman reports to the House of Representatives. However, the Ombudsman's recommendations are not binding, and he has no power to enforce them.

24 Established in virtue of the Internal Audit and Financial Investigation Act, Cap. 461 of the Laws of Malta.

25 In fact Art. 2 of Cap. 461 of the Laws of Malta defines public funds as including: "funds that Government receives, pays, including funds to local councils, or is required to manage under Malta's international obligations, or under any other public funds arising under any other law".

26 Bill 57 of 2010 – Permanent Commission Against Corruption (Amendment) Act, 2010.

27 Art. 3 of the Ombudsman Act, Chapter 385, Laws of Malta.

28 Ombudsman's Website *Mission Statement* [WWW] Ombudsman. Available at: www.ombudsman.org.mt/index.asp?pg=missionstatement, accessed 12 September 2012.

– The National Audit Office (NAO) has a mandate to encourage accountability of public officers and to contribute towards better management of public funds and resources.[29] The Public Accounts Committee (PAC) of the House of Representatives is one of the standing committees of Parliament.[30] It is empowered to inquire into matters related to public accounts and expenditure, examine the accounts of statutory authorities and consider reports by the NAO and ask the NAO to investigate and report back to the PAC.

In combating financial crime, including the protection of the financial interests of the EU, there are several legal tools at one's disposal:

Without a shadow of a doubt, the European Arrest Warrant (EAW) has been successfully applied in many cases. The EAW has been successful when Malta requested the surrender or return of a foreign national[31] or the surrender of persons resident in Malta to a foreign jurisdiction. There is likewise, no doubt, that the EAW, even from Malta's perspective, constitutes an important investigative and judicial tool in combating crime. It has aided and facilitated prosecuting officers, to a large extent, in bringing offenders to justice. With the application of the principles of mutual assistance and recognition, the EAW is a streamlined, more efficient and less cumbersome version of the traditional extradition process.

Another instrument of note when discussing European criminal law is that relating to the European Evidence Warrant (EEW). This EEW is one of the strongest expressions of mutual recognition and assistance.[32] It actually allows foreign judicial figures to request and obtain evidence which can be found in other Member States' territory with minimal scrutiny to be exercised by the executing or requesting State. The EEW was introduced at the EU level in virtue of the Council Framework Decision 2008/978 JHA dated 18 December 2008. The EEW is a judicial decision in consequence of which data, documents or any *repertus* may be lifted and obtained from another Member State. The issuance of the warrant ought to be ordered by a judge, magistrate, court, public

29 Nao Website *History of the National Audit Office* [WWW] NAO. Available at: www.nao.gov.mt/page.aspx?id=84, accessed 12 September 2012.

30 *See* Kamra Tad-Deputati Malta Website *Parliamentary Committees: Public Accounts Committee* [WWW] Kamra tad-Deputati. Available at: www.parlament.mt/publicaccountscommittee, accessed 12 September 2012.

31 In the case *Police vs Fabio Zulian*, (decided 3 January 2015, Court of Magistrates, per Magistrate Dr M. Hayman) a request was made for the return of the accused from Torino, Italy; in the case of *Police vs Dimitrios Drossos* (decided 5 September 2012, Court of Magistrates, per Magistrate Dr A. Vella) a request was made for the return of a Greek national from Greece; in the case of *Police vs Stephen John Smith* (decided 28 December 2012 Court of Magistrates) a request was made for the return of an English national from London, United Kingdom.

32 *See* C.C. Murphy, 'The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust?', King's College London – The Dickson Poon School of Law, 1 September 2010, in Eckes and Konstadinides, eds., *Crime Within the Area of Freedom, Security And Justice: A European Public Order*, Cambridge University Press, 2011.

prosecutor or judicial authority in the issuing State. The warrant would be then transmitted to the competent local authority for onward transmission to the competent local authority of the requested State for execution. This legal instrument has not been successful application-wise and, in fact, few countries have actually implemented it.

Another instrument which generates considerable interest at EU level is the cross-border enforcement of orders for the freezing of assets. Freezing orders are an essential investigative tool aimed at freezing assets in the hands of third parties, allowing for more time to conduct investigations and, more importantly, to secure the confiscation of assets upon conviction. Without such precautionary orders, assets would be dissipated even before a conviction can be secured. This tool has certain draconian effects and can be prejudicial to persons subject to similar orders. Pursuant to the application of the principle of mutual recognition and assistance, a freezing order may be issued upon a request made by a foreign competent authority,[33] pursuant to section 435C of the Criminal Code and Article 10(1) of the Prevention of Money Laundering Act.[34] The effect is similar to a civil garnishee order and is applicable to all offences. This order is governed by Article 4(6) of the Prevention of Money Laundering Act.[35]

Joint Investigative Teams[36] (JITs) are of interest because they offer the possibility for national investigative teams to work together on crimes committed in a number of jurisdictions. This is a matter which is of relevance to the central thesis hypothesis, especially when one considers that the rules of investigation and collection of evidence vary from one jurisdiction to another. There remains a thorny issue as to the probative value of illegally obtained evidence in jurisdictions where such evidence is admissible. JITs were originally envisaged in Article 13 of the 2000 MLA Convention. Given the slow ratification of the Convention, the Commission adopted an FD on JITs.[37] It was

33 The Framework Decision on the execution in the European Union of orders freezing property or evidence (2003/577/JHA) was transposed and implemented by means of Subsidiary Legislation number 9.13, Freezing Orders (Execution in the European Union) Regulations made under the Criminal Code, published in Legal Notice 397/07 and subsequently amended by Legal Notice 354/09.

34 Prevention of Money Laundering Act, Cap. 373 of the Laws of Malta.

35 Section 4(6) of the Prevention of Money Laundering Act: "Together with or separately from an application for an investigation order, the Attorney General may, in the circumstances mentioned in sub-article (1), apply to the Criminal Court for an order (hereinafter referred to as 'attachment order'): (a) attaching in the hands of such persons (hereinafter referred to as 'the garnishees') as are mentioned in the application all moneys and other movable property due or pertaining or belonging to the suspect; (b) requiring the garnishee to declare in writing to the Attorney General, not later than twenty-four hours from the time of service of the order, the nature and source of all money and other movable property so attached; and (c) prohibiting the suspect from transferring or otherwise disposing of any movable or immovable property."

36 The FD was implemented in local law in virtue of the Joint Investigation Teams (EU Member States) Regulations.
Pursuant to these Regulations, the Attorney General is empowered to request the setting up of a JIT with the forces of other Member States. The terms of reference would have to be subject to a specific agreement to that effect. The overall aim would be to request for assistance in any investigation which would need to be carried out in another Member State.

37 2002/465/JHA which had to be implemented by 1 January 2003.

originally envisaged that JITs would be useful to bring together the various law enforcement agencies and forces of the various Member States. However, there was great reluctance by the Member States to actually establish and create JITs. The Hague Programme also called upon States to put forward national experts and also to promote the use of JITs.

Confiscation orders allow the Member States, subject to certain conditions, to seize and confiscate assets of subject persons in another Member State. This is an important tool to combat trans-boundary crime and to ensure the recovery of assets. This having been said, the confiscation of assets is not a matter free from legal difficulty. The FD on confiscation orders (2006/783/JHA) (as amended by FD 2009/299/JHA), the FD on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2005/212/JHA), together with the Council Directive on return of cultural objects unlawfully removed from the territory of a Member State (Directive 93/7/EEC) were all implemented into Maltese law, by virtue of S.L. 9.15, Confiscation Orders (Execution in the European Union) Regulations made under the Criminal Code, published in Legal Notice 464/10 and amended by Legal Notice 426/12. The implementation of these instruments means that it is possible for local courts to order the confiscation of assets in Malta upon a request by a foreign authority in the execution of a foreign court order to that effect.

More problematic are the ramifications of a directive proposal[38] identifying two main legislative efforts in the field of confiscation, namely,

i. the non-conviction based confiscation of assets and
ii. third party confiscation of assets,

two areas which were found absent in the EU legal framework.[39] The current legal framework in Malta does not support the confiscation of criminal assets in the absence of a criminal conviction. Therefore, substantial amendments would need to be carried out. Furthermore, such types of confiscation are not even in line with the fundamental principles embraced in the penal code, namely, that there can only be the forfeiture of a *corpus delicti* (in this case being the proceeds of crime) strictly as a consequence of a conviction of a crime. This is so much so that certain alternative modes of punishment such as probation orders, conditional or unconditional discharges cannot order the

38 Brussels, 12 March 2012, COM (2012) 85 final, 2012/0036 (COD).

39 In fact the current legal framework on freezing and confiscation envisages the following instruments: Framework Decision 2001/500/JHA13, obliging States to enable confiscation, to allow value confiscation where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings; Framework Decision 2005/212/JHA15, which harmonizes confiscation laws; Framework Decision 2003/577/JHA17, which provides for mutual recognition of freezing orders; Framework Decision 2006/783/JHA18, which provides for the mutual recognition of confiscation orders; and Council Decision 2007/845/JHA19 on the exchange of information and cooperation between national Asset Recovery Offices.

forfeiture of the *corpus delicti* simply because such judgments are not convictions at law. Even more debatable would be a confiscation order issued against a person who has not been tried or found guilty of any offence.[40] Since it is not possible, under Maltese law, to issue non-conviction-based confiscation orders, this deficiency also extends to foreign-issued non-conviction-based confiscation orders. The position is slightly different with respect to third-party confiscations. It can be argued that actually, we have one example of third-party confiscation. Under the Customs Ordinance,[41] the forfeiture occurs automatically and independently of whether the proprietor is the defendant or a third party who is not involved in the offence.[42] In addition, the forfeiture takes place independently of the knowledge of the commission of the offence in question. Furthermore, it is also possible under Maltese law to confiscate any criminal assets that have been passed on to a third party in bad faith. However, this is only possible in the case that provisional measures have already been implemented against the suspect or accused (i.e., attachment or freezing orders). In this case, by virtue of Article 4(10) and Article 6 of the PMLA, the property transferred would be liable to confiscation, and if the third-party transferee had knowledge of the illicit nature of the transfer, he might be guilty of the offence of money laundering.

There are other additional investigation measures available at the domestic level: financial criminal investigations, surveillance, infiltration and controlled deliveries.

## 15.3 Observations

There are practical difficulties when implementing and applying these instruments and measures at the domestic level. A first difficulty encountered was how to ensure the correct interpretation and application of certain trans-boundary criminal offences in Malta. Most of the offences introduced, such as money laundering and crimes protecting the financial interests of the EU, are specialized crimes requiring to a certain extent, a uniform interpretation throughout the EU and the AFSJ. Case law has shown, for instance, that there could still be language barriers and translation difficulties in executing instruments of mutual recognition between the Member States. Clearer definitions and judicial training are a must to reduce, as much as possible, wrong application and interpretation of local norms giving effect to Malta's international obligations.

When examining EAWs in Malta, it can safely be concluded that this instrument has worked with success in achieving notable results. However, at both the EU and local level,

40 J. Boucht, *Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR,* NJEL, 2014/2, Intersentia, 2014.

41 Cap. 37, Laws of Malta.

42 *P. v. Osama Salem Algrig,* Court of Criminal Appeal, 1992.

further action is necessary to limit the legal issues. At the EU level, the application of EAWs raises two key issues: proportionality and fair trials. With respect to proportionality, rules have to be properly streamlined and a balance sought between this procedure and the seriousness of the offence. The EAW should never be used to cover frivolous or minor offences. On the contrary, it should be reserved for the more serious offences, also taking into account the length of the applicable sentence and the cost-benefit of using this mechanism. Equally, EAWs have to lead to the surrender of individuals to legal systems which will guarantee a fair trial. This would tally with minimum rights and minimum defence rights available for every person within the AFSJ applicable with regard to any criminal trial throughout the various Member States.

A basic form of a minimum guarantee of fair trial throughout the Member States would thus be ensured. From a domestic perspective, the application of EAWs has raised issues of unnecessary delays, overstay and, in certain circumstances, lack of proportionality in the application. Regarding proportionality, selected Maltese cases have shown that where a person effectively rectifies his wrong, or even where a person firmly believes that he is unjustly prosecuted, that person would still be subjected to the execution of an EAW and surrendered to the requesting State. It may be alleged that in certain cases, the execution of the EAW was not motivated to bring justice or to vindicate the injured parties who were already satisfied with payment. These circumstances are difficult to contest, if at all, and in most cases, the real reasons to request the issuance of an EAW remain obscure. It is likewise possible that the execution of these instruments may also be affected by political motivations which are hard to detect and identify. Possible solutions, by way of remedy, could be the introduction of an obligation on the competent authority to declare, whenever challenged or requested to do so, the reasons for the return of an individual in cases where it becomes clear that either the facts for which a person was requested have been remedied or where it is abundantly clear that the punishment to be imposed would be such that it would not justify the arrest and return of an individual pursuant to an EAW, thus introducing the principle of proportionality not only at the issuance of an EAW request but also in the committal stage. Possibly a measure could be introduced whereby an individual facing judicial proceedings pursuant to an EAW abroad, would be afforded the possibility to file an application to the Criminal Court in Malta to have the request for the issuance of the EAW reviewed. It cannot be the case that justice must be done at all costs, but rather a balance ought to be struck respecting the need to sanction criminal offences while weighing the overwhelming effects EAWs have on citizens. Equally, from a purely domestic scenario, local case law has shown that EAWs may create unnecessary delays in procedural and physical overstay in Malta to the detriment of the person subject to an EAW.

Another instrument of note is the EEW, which can be considered as one of the strongest expressions of mutual recognition and assistance. It actually allows foreign judicial authorities to request and obtain evidence which can be found in other

Member States' territory with minimal scrutiny to be exercised by the executing or requesting State. This legal instrument has not been successful application-wise, and in fact, few countries have actually implemented it. Many reasons can be adduced for the poor record. At the political level, the cessation of sovereignty and control over things and persons could be considered too much and really invasive. Equally, at the political level, there is still some level of mistrust of other Member States' judicial systems and therefore receiving a judicial order for the production of evidence might not be immediately acceptable from certain jurisdictions. As has been shown, there are further practical complications worth mentioning, such as, but not limited to, the cost involved in the execution of such warrants. The execution of such warrants would additionally require the involvement of local police forces and specialized individuals, where necessary, to identify and collect the documents and data requested. These documents, according to the circumstances need to be preserved, copied or lifted, rendered secure and then transmitted back to the issuing State. All this involves procedures and monies, even more so if a particular State (for example a State specializing in financial services, including Malta) is being served with a multitude of such warrants for companies operating or registered in its jurisdiction. Moreover, such warrants could require specialized procedures given that the powers of search, seizure and retention in most cases, including in Malta, are directly linked with the investigation of a criminal offence. It is unsure whether this instrument will come into effect and whether Malta, in particular, would, if it had the opportunity, implement it. A thorny issue could be the collection of illegally obtained evidence. It is apt to note, however, that it is not clear if the evidence which would otherwise be excluded being illegally collected evidence, can still be adduced in trial simply because in terms of the requested State that is actually collecting the evidence, such evidence is either considered to be legally collected or, in any case, admissible.

A point must also be raised on the general application of instruments of mutual recognition and assistance, which is particular only to Malta. A common ground for the refusal of execution of these instruments is that of *ne bis in idem*. It is the particular definition of *ne bis in idem* which could create difficulties. Whereas the most acceptable definition would be that *ne bis in idem* would offer protection from persons not to be prosecuted twice for the same offence, Maltese law uses the term 'fact' rather than 'offence'. This necessarily means, as has been shown, that there can be cases for the refusal to execute any request even though there is no problem concerning *ne bis in idem* in the issuing State. There is not much which can be done to resolve any conflicts which may arise. The only solution would be to restrict the definition of *ne bis in idem* to bring it in line with its European counterparts. However, from a local perspective, this would go against years of court decisions and interpretation. It must not follow that for the sake of uniformity, and the smooth application of legal instruments, the principle of *ne bis in idem* as embraced in the local judicial and legal field should be narrowed.

Freezing and confiscation orders have proven to be a difficult issue. As has been shown, freezing orders have the effect of freezing all assets of the subject matter indiscriminately. Such wide application can be considered as an interference with the enjoyment of one's property. The issue in Malta is that freezing orders do not conform to any rule or principle of proportionality. Moreover, the problem similarly arises in the execution of foreign requests for the freezing of assets. If and when the Criminal Court issues a freezing order pursuant to a foreign request, all assets of the person or company concerned are frozen indiscriminately, leading very often to various difficulties. A freezing order, being precautionary in nature, has a devastating and deeply prejudicial effect on the person concerned. A person affected by a freezing order cannot operate any business whatsoever and can hardly conduct an ordinary life with access simply to a small sum of money provided for one's maintenance. Such dire consequences arising from freezing orders are untenable. A possible solution could be the introduction of a mechanism whereby it would be possible to afford discretion to the issuing court of criminal jurisdiction to limit the effects of the order. The only reasonable solution would be to allow the court the means to calculate or quantify any rewards received in furtherance of any criminal activity and freeze that amount, rather than indiscriminately and wrongly freezing the totality of assets. This could, however, be a lengthy process involving scrutiny of evidence regarding assets, and possibly the setting up of a specialized asset management unit.

Worse still is the position with respect to foreign freezing orders. In this case, no contestation could legally be presented in a court in Malta. The only way such an order could be removed is if the foreign order would no longer be in force. It is clear that the lack of an effective remedy to challenge the issuance of freezing orders is a serious shortcoming. The effects of a freezing order are far too serious not to afford a remedy where it is alleged that the freezing order is being issued for an offence which does not amount to or rather should not amount to an offence warranting the issuance of a freezing order. The national courts should always retain a residual, albeit very limited, discretion in issuing orders to ensure the proper and correct application of the law. Arguing that a remedy does exist, and yet admit that the remedy to this situation is that challenge proceedings may be brought in the issuing State, cannot be enough.

Confiscation orders usually follow convictions in cases where freezing orders would have been issued. It has been shown that confiscation orders have proven extremely complex to execute, especially in ranking creditors and apportioning revenues between creditors and the requesting State. Legal issues remain in giving effect to the civil liquidation of assets and the remittance of funds to the requesting State.