

Judicial cooperation and mutual recognition in criminal matters in Malta¹

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1. State of play

Malta has so far implemented two out of the Council framework decisions adopted by the Member States, providing for cooperation in criminal matters on the basis of the principle of mutual recognition. The Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States² was implemented by means of the Extradition (Designated Foreign Countries) Order³ while the Council Framework Decision on the execution in the European Union of orders freezing property or evidence⁴ was implemented by means of the Freezing Orders (Execution in the European Union) Regulations⁵. However, neither of these implementing laws makes specific reference to the principle of mutual recognition. Malta has not yet implemented the Council Framework Decision on the application of the principle of mutual recognition to financial penalties⁶ and the

¹ The article contains opinions and comments of jurists, negotiators and drafters involved in the legal process relating to mutual recognition in Criminal Matters. These opinions and comments were taken during specific interviews held for the purposes of this article. The relative positions taken by the said interviewees and the comments made reflect their position and opinion and are not necessarily reflecting any official position.

² FD 2002/584/JHA, *OJ*, no. L 190, 18 July 2002, p. 1, hereinafter referred to as the FD EAW.

³ Subsidiary Legislation 276.05, hereinafter referred to as the EAW Order.

⁴ FD 2003/577/JHA, *OJ*, no. L 196, 2 August 2003, p. 45, hereinafter referred to as the FD Freezing Orders.

⁵ Subsidiary Legislation 9.13, hereinafter referred to as the Freezing Orders Regulations.

⁶ FD 2005/214/JHA, *OJ*, no. L 76, 22 March 2005, p. 16, hereinafter referred to as the FD on Financial Penalties.

Council Framework Decision on the application of the principle of mutual recognition to confiscation orders⁷.

While the FD EAW required implementation by the Member States before the 31st December 2003⁸, it was transposed into Maltese legislation by means of Legal Notice 320 of 2004, which was adopted under the Extradition Act⁹ and came into force on the 7th June 2004. It has since been amended several times, in order to be brought into line with provisions of the FD¹⁰.

2. Double criminality and territoriality clause

A. Double criminality

The Commission, in its 2005 Report, observed that Malta had implemented the double criminality list in complete conformity with the FD EAW. In fact, the list of offences found in Art. 2(2) of the FD EAW was reproduced in Schedule 2 annexed to the EAW Order, referred to as “scheduled conduct”.

The requisite that such offence be punishable in the issuing State with a custodial sentence or detention order for a maximum period of at least 3 years, in order to exclude verification of double criminality, has also been directly transposed into the EAW Order, however it has been limited to those cases where no sentence has as yet been imposed on the person whose surrender is requested¹¹.

Where a person’s surrender is requested for the purpose of executing a sentence which has already been imposed, Maltese legislation goes beyond what was required by the FD EAW with regard to double criminality. Art. 60 provides that when scheduled conduct occurs in the issuing Member State, double criminality is not checked if a sentence of imprisonment or detention for a term of 12 months or more has been imposed. Therefore, like the UK, Malta has reduced the threshold for non-verification of double criminality in conviction cases from 3 years to 12 months, further limiting the application of this principle and hence widening the scope of mutual recognition and facilitating surrender.

Furthermore, by means of LN 224 of 2006, the first amendment to the Order, Malta explicitly extended the abolition of the double criminality rule to attempt, conspiracy and complicity in relation to the scheduled conduct.

In the context of freezing orders, the verification of double criminality is abolished for the same list of offences, when they are punishable by a custodial sentence of a maximum period of at least 3 years. The Freezing Orders Regulations have transposed this provision with wording which is almost identical to that in the FD, although the list of categories of offences is included in a Schedule.

Although the fact that the list of offences for which verification of double criminality is excluded is in fact a list of general categories rather than specific offences, negotiators observe that this constitutes no difficulty. Negotiators consider that it is

⁷ FD 2006/783/JHA, *OJ*, no. L 328, 24 November 2006, p. 59, hereinafter referred to as the FD on Confiscation Orders.

⁸ Art. 34.

⁹ Chapter 276 of the Laws of Malta.

¹⁰ See Legal Notices 224 of 2006; 367 of 2007, 396 of 2007 and 397 of 2007.

¹¹ Art. 59.

up to the law and the authorities of the executing Member State to determine whether a particular act falls under one of the offences in the list, and that there is therefore no room for a definition of these offences at a European level. It is considered that the three-year or one-year imprisonment threshold as the case may be, serves as a sufficient “seriousness test” and was already a fragile compromise to agree on.

Mutual recognition is not considered to be incompatible with the retention of dual criminality beyond the list of 32 offences found especially in the EAW and EEW FDs. Going beyond such list however could oblige MS to execute decisions that would be alien in the executing MS’ law. For this same reason, negotiators explain that during discussions concerning the FD on the transfer of sentenced persons, the insertion of the standard list of 32 offences was opposed by the Maltese representatives, who joined Ireland and the Netherlands on maintaining that this should be optional, in order to avoid having persons serving sentences in Maltese prisons for acts which do not constitute offences under Maltese law. Therefore, with reference to the FD on custodial sentences, the opt-out clause would be availed of, thus requiring double criminality in all cases.

B. Territoriality clause

The FD EAW includes territoriality as an optional ground for refusal and the domestic EAW Order has implemented this principle through the definition of “extraditable offences”, albeit limitedly. With regard to offences for which no verification of double criminality is allowed, it is specifically required that “the conduct occurs in the scheduled country and no part of it occurs in Malta”, in order for it to constitute an extraditable offence. On the other hand, where double criminality is satisfied and the offence is punishable with at least 12 months imprisonment, or a sentence has been imposed of at least 4 months, it is merely required that “the conduct occurs in the scheduled country”. The Maltese court gave its interpretation of the latter provision in *Police v. Emanuel Borg*¹², where reference was made to a decision handed down by the British House of Lords in similar circumstances. The Maltese court followed the position taken by the House of Lords that “it would impose a wholly artificial restriction on the extradition process if it were taken as meaning that all the conduct which resulted in the offence must have taken place exclusively within the [requesting] territory”. As a result, the court held not only that it is not necessary that no part of the conduct occurs in Malta, but that it is sufficient that the *effects* of the conduct occur in the issuing State, even if the conduct itself takes place, wholly or partially in Malta. This was subsequently confirmed by the same court in *Police v. Anthony Muscat*¹³.

Therefore, while the territoriality principle has been included in Maltese law concerning the EAW, it has also been ensured that application of this rule does not prevent surrender in cases where the offence in question is of a certain seriousness, as determined by the related punishment. Moreover, it may be argued that a balance is struck between the principle of double criminality and that of territoriality, since the

¹² Court of Magistrates (Court of Committal), Case no.700/2007, 7 September 2007.

¹³ Court of Magistrates (Court of Committal), Case no.701/2007, 12 September 2007.

latter's scope is restricted when the former is satisfied. Practitioners are against any further limitation on the territoriality rule.

3. Other grounds for refusal

A. *Mandatory grounds under Maltese law*

According to the Commission's 2005 Report the three mandatory grounds for non-execution of an EAW established in Art. 3 of the FD EAW, have been correctly transposed into Maltese Law.

The Commission has observed that many Member States have interpreted the optional grounds for refusing an EAW in Art. 4 of the FD, as meaning that the State may choose whether a judge is required to refuse surrender or whether he has discretion in the matter. As a consequence many States have made these grounds for refusal mandatory too. The Maltese legislator has transposed these grounds in varying ways, but many have in fact been made mandatory, namely:

- The non-fulfilment of the double criminality requirement when the conduct in question is not a scheduled offence. In fact, such conduct would not constitute an extraditable offence under Art. 59 and 60 of the Maltese legislation.
- Prescription: once the action is time-barred under Maltese law, and provided the acts fall within the jurisdiction of the Maltese court, the court must in all cases refuse to execute the EAW.
- Where a final decision has been given in a third country: the provision implementing the *ne bis in idem* rule as a mandatory ground of refusal does not distinguish between decisions given in another Member State and those given in a third country. (In fact, the FD on Freezing Orders, confiscation orders, and financial penalties do not distinguish between a sentence given in a Member State or third State).
- Where all or part of the offence was committed in the territory of the executing State (Art. 4(7)(a) FD EAW), and where the offence was committed outside the issuing Member State and the executing State does not allow for prosecution of that offence when committed outside its territory (Art. 4(7)(b) FD EAW). These have been negatively transposed as mandatory grounds in that they would not constitute extraditable offences according to Art. 59 and 60. However, their scope has been limited since the offence will nevertheless be extraditable if the double criminality rule is satisfied and the offence is punishable with at least 12 months imprisonment or detention under Maltese law, or the sentence imposed is of at least 4 months as the case may be. The Commission stated in both reports that these grounds were transposed into Maltese law only in respect of nationals. As observed in Malta's comments on the 2005 report however, neither Art. 59 nor Art. 60 make any distinction between nationals and non-nationals, and so would apply to any requested person.

The FD on Freezing Orders does not establish any grounds of mandatory non-recognition. However, all the optional grounds for refusal of recognition have been transposed into Maltese legislation as mandatory grounds for refusal. As such, the freezing order shall not be recognised if any of those grounds subsist. The result will

probably be similar to that arising with respect to the EAW, with different Member States applying these grounds to a different extent.

In its reports on the EAW, the Commission criticized the fact that the Maltese implementing legislation did not specifically transpose the provision concerning privileges and immunities. Thus no provision required the executing judicial authority to request the waiver of the privilege or immunity when this lay with an authority in Malta and there was no explicit suspension of the time-limits in these cases either. In its comments to the 2005 Report Malta observed that this was considered an academic issue since the possibilities of immunities or privileges are extremely limited under domestic law. However, with the adoption of LN367 of 2007, Art. 20 of the FD dealing with privileges and immunities was transposed into domestic law, with almost identical wording.

With regard to freezing orders, the provision dealing with immunities and privileges was immediately transposed into domestic law as a ground for mandatory non-recognition, so that recognition of a freezing order must be refused if such privilege or immunity exists making execution impossible.

B. Optional grounds

The Maltese courts have been given a degree of discretion with regard to the optional ground referring to a person being prosecuted in Malta for the same act as that on which the arrest warrant is based. Initially, the Maltese court was obliged to adjourn the extradition hearing where the person was being prosecuted for *any* offence in Malta. Once the extradition hearing resumed, the court would then reconsider the question of *ne bis in idem*. Legal Notice 224 of 2006 however amended this position, removing the formerly mandatory nature of the adjournment and distinguishing between those cases in which the local proceedings are in respect of the same offence as that in the EAW and those which are not. At present therefore, when the requested person is the subject of a criminal prosecution in Malta for the same offence, the court has discretion as to whether or not to adjourn the extradition hearing until the domestic proceedings are concluded, whereupon the hearing is resumed and *ne bis in idem* is reconsidered.

On the other hand, an optional ground provided for in the FD which has not been included in the EAW order refers to the case in which the executing State has decided not to prosecute or to halt proceedings for that offence, or in which a final judgment has been passed in a Member State against the same person for the same offence, which prevents further proceedings. While these could be interpreted as elements of the *ne bis in idem* principle, it must be pointed out that Art. 14 of the EAW Order, referring to this rule, makes reference only to an acquittal or conviction, thus seemingly excluding the scenarios covered in this paragraph of the FD EAW. With particular reference to the third part of this paragraph, the situation is rather ambiguous as it seems that “final judgment” refers to a decision other than conviction or acquittal, as these would fall squarely within the *ne bis in idem* rule and constitute a mandatory ground for refusal when referring to another Member State, even under the FD itself. Nevertheless, given that the decision in question is a final judgment handed down by a Member State and preventing further proceedings, this too should

constitute a bar to surrender, particularly in light of the ECJ's decision in *Gözütok* and *Brügge*. On the other hand, all of these scenarios may well be considered by the court as falling under the principle of *ne bis in idem*, in spite of the restrictive wording in the EAW Order itself, since this principle is nevertheless found in the Maltese Constitution and the European Convention Act (implementing the European Convention on Human Rights).

The optional ground for non-execution of an EAW issued for the purpose of executing a custodial sentence or detention order when the requested person is a national or resident of the executing State and such State undertakes to execute the same sentence under its domestic law, has also been left out of the EAW Order. In fact, no special provision is made with regard to Maltese nationals or residents, hence refraining from creating any inroads in this regard to the principle of mutual recognition. The only provision which refers to the nationality or residence of the requested person is that dealing with transit for the purpose of executing a sentence, in which case the law provides that the Maltese court *may* refuse such transit. However, there is no further provision as to the execution of the sentence in Malta. It may be argued that this possibility for refusal of transit on the ground of nationality or residence is rather peculiar since, in view of Malta's location, it seems rather unlikely that its permission for transit will in fact be necessary. Effectively therefore, no distinction is made between persons who are Maltese nationals or residents and those who are not, evidence of which were the various orders for surrender made by the Maltese courts vis-à-vis Maltese nationals, with no guarantee imposed regarding their return to Malta in order to serve their sentence, such as *Police v. Emanuel Borg*¹⁴ and *Police v. Anthony Muscat*¹⁵.

The Freezing Orders Regulations have complied with the FD Freezing Orders insofar as no additional grounds for non-recognition or non-execution have been introduced into domestic law, although the optional grounds under the FD were implemented as mandatory. With regard to the third ground allowing for postponement of execution of such orders however, such postponement is allowed where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted. The FD limits this to cases where according to domestic law, the first order would have priority over subsequent national freezing orders in criminal proceedings. However, this limitation has not been included in the Maltese legislation, so that execution of a freezing order which has been transmitted to Malta can always be postponed if the property is already frozen in the course of local proceedings, whether criminal or not.

C. Additional grounds

Recital 12 of the FD EAW has been partially transposed as a mandatory ground for non-execution since surrender would be considered barred by reason of extraneous considerations if it appears to the Court of Committal that:

¹⁴ Court of Magistrates (Court of Committal), Case no.700/2007, 7 September 2007.

¹⁵ Court of Magistrates (Court of Committal), Case no.701/2007, 12 September 2007.

- the EAW was in fact issued for the purpose of prosecuting or punishing the requested person by reason of his race, place of origin, nationality, political opinions, colour or creed; or
- if returned, he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of race, place of origin, nationality, political opinions, colour or creed¹⁶.

No reference is made to the grounds of sex, language and sexual orientation.

Another mandatory ground of refusal is the death penalty, deriving from Recital 13. Surrender by Malta is barred if according to the law of the issuing State the offence in respect of which the return is requested is subject to death penalty. Surrender may however be allowed if the requesting country gives assurance accepted as sufficient by the Minister that the death penalty will either not be awarded or if awarded, will not be carried out¹⁷.

It is also apt to mention Malta's views on *in absentia* judgments. Indeed the approach is stringent since the presence of the person charged or accused is required for all stages of the criminal proceedings under Maltese law. Practitioners disagree with the recognition of decisions handed down in the absence of the accused when the proceedings are of a criminal nature, whereas it is important to ascertain that a defendant in civil proceedings was appropriately notified before recognising a decision given *in absentia*. They therefore favour the inclusion of further conditions to ensure that the person's right to a fair hearing is respected and to prevent the recognition of *in absentia* judgments which would violate fundamental procedural rules in domestic law. Establishing minimum procedural rules is also seen as insufficient insofar as *in absentia* judgments are concerned, as it would be necessary to examine whether such minimum threshold was actually observed in each particular case. Establishing further conditions which would enable refusal to execute a mutual recognition instrument issued in relation to a decision given in the absence of the accused or the defendant as the case may be would be a better option. As far as the FD on *in absentia* judgments¹⁸ is concerned, negotiators observe that this does not carry significant difficulty.

Malta did not itself limit the application of the EAW system to acts occurring after a specific time. In fact Malta applies its EAW provisions to all requests received or made by Malta on or after the 7th June 2004 irrespective of the date of the alleged offence.

4. Competent judicial authorities

According to negotiators, Malta is always very careful to safeguard its national systems and procedures. An important matter is the definition of judicial authorities,

¹⁶ Art. 13(b) and (15) of the EAW Order read in conjunction with Art. 10 of the Extradition Act.

¹⁷ Art. 22 of the EAW Order read in conjunction with Art. 11(2)(b) of the Extradition Act.

¹⁸ This FD was adopted on 26 February 2009: Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

in relation to which negotiators have insisted that competent authorities under mutual recognition instruments should be judicial and not administrative authorities. It is not accepted that decisions of a foreign administrative authority bind the Maltese courts.

Within the Maltese system, the competent judicial authority for issuing an EAW is the Court of Magistrates, whereas that for executing an EAW and deciding upon the request for surrender is the Court of Magistrates sitting as a Court of Criminal Inquiry (referred to as the Court of Committal). Malta's designated central authority is the Office of the Attorney General. In accordance with the FD EAW, the Attorney General is responsible for the transmission and reception of EAWs, requests for waiver of the speciality rule, and requests for consent to subsequent extradition. However, the Attorney General is also charged with certifying that any EAW or other request received was issued by an authority in the issuing Member State which has the function of issuing such EAW or request. This goes beyond the FD, insofar as this certification may be considered an added formality not provided for in the FD and not falling within the definition of 'administrative assistance'. Nevertheless Art. 10(5) of the FD EAW provides that difficulties concerning transmission or authenticity of any document shall be dealt with by direct contacts between the judicial authorities or with the involvement of the central authorities. Hence, the Attorney General's role of certification may well fall within the ambit of this provision.

The Attorney General also plays a role in the issuing of an EAW by the Maltese court. In fact the Attorney General's consent is required in order for the Court of Magistrates to issue an EAW upon a request lodged by a police officer. The Commission in its report considers that the EAW Order has not correctly transposed the FD as far as the role afforded to the Attorney General is concerned.

The Freezing Orders Regulations transposed the obligation in the FD on freezing orders requiring Malta to notify the issuing Member State of decisions regarding the refusal of recognition, impossibility to execute, postponement of execution and the grounds and expected duration thereof, cessation of grounds and execution thereupon, and any other restrictions to which the property is subject. However, no explicit reference was made to the duty of the Maltese authorities to give a report on the execution of the freezing order, to the issuing authority. Nevertheless, it is presumed that notification of such execution will in practice be given.

Similarly, the duty to notify the issuing authority as to the decision taken upon an EAW, has not been specifically transposed into domestic law. Nevertheless, Malta stated that it would in fact notify the issuing State of any such decision, as a matter of course and of good practice.

5. Content and form

The content and form required by the Member State is relevant for the purposes of ensuring that no extra information is demanded, beyond that which is allowed under the FD. Any request for such extra information would reveal a lack of trust in the systems of the other Member States and would make recognition and execution more difficult.

With reference to the details required upon transmission of an EAW, the Commission criticised the Maltese legislation as requiring information beyond that

permitted by the FD EAW. As a result, the EAW Order was amended several times so as to be brought into line with the FD. Art. 5A of the said Order now provides that the form contained in the Annex to the FD shall constitute a relevant EAW. Thus, no extra documentation or information is required under Maltese law as it stands following the latest amendment by means of LN 390 of 2007.

In the context of Freezing Orders, the Freezing Orders Regulations have directly incorporated the certificate annexed to the FD on Freezing Orders as a Schedule to the Regulations. This ensures that the domestic legislation is in conformity with the requirements of the FD. In fact, when reference is made to the provisions concerning freezing orders under the Dangerous Drugs Ordinance, the necessary adjustments are made so to avoid imposing extra requisites.

6. Time limits, postponement of execution or temporary surrender

A. Time limits

According to the FD on Freezing Orders the executing authority shall “forthwith” take the measures necessary for its “immediate” execution and the decision on the freezing order must be taken within 24 hours of its receipt if possible. The property should remain frozen until the executing State has responded definitively to the request for the transfer of evidence or confiscation of property, although the period of freezing could be limited by the executing State after consulting the issuing State and in light of the circumstances of the case.

The Freezing Orders Regulations make no reference whatsoever to the need for immediate execution, nor is any reference made to the time-limit within which a decision on the order is to be made. Rather, reference is made to a number of provisions dealing with freezing orders issued under the Dangerous Drugs Ordinance¹⁹, and which are to be applied to the execution of freezing orders transmitted according to the FD. However, this gives rise to some ambiguity. On one hand, the Freezing Orders Regulations require the Attorney General to certify that the issuing authority has the function of issuing such orders and provide that no further formality is to be required. On the other hand, the Dangerous Drugs Ordinance requires notice of the freezing order to be published without delay in the Government Gazette, and a copy to be registered in the Public Registry in respect of any immovable property. It is therefore unclear whether such publication is necessary when executing a freezing order transmitted according to the FD.

With respect to the duration of the freezing, the Freezing Orders Regulations again refer to the Dangerous Drugs Ordinance. Ambiguity arises in this regard too since on one hand, it is stipulated that the freezing order shall remain in force until the final determination of the proceedings, and in the case of a conviction until the sentence has been executed, whereas on the other hand, it is stated that such order shall remain in force for a period of *six months* from the date on which it is made. This six-month period may be renewed for further periods of six months on application by Attorney General and upon the court being satisfied that the conditions which led to the making of the order still exist, or that the accused has been convicted and the sentence or any

¹⁹ Chapter 101 of the Laws of Malta.

confiscation order consequential or accessory thereto has not been executed. Renewal is also made if, although no confiscation order was made in the sentence imposed upon conviction, the court is satisfied that civil or criminal proceedings for the making of such an order are pending or are imminent. Thus, it may be concluded that the freezing order will in any case remain in force until a final decision has been made or the sentence has been executed as the case may be. However it is uncertain whether the Attorney General's application for renewal every six months is necessary for a freezing order transmitted under the FD.

With regard to the EAW Order, some time-limits have not been transposed, while others were introduced recently. Firstly, when a person has consented to his surrender, the final decision must be given within 10 days from such consent, in full accordance with the FD EAW. The deadline for such decision in cases where no consent is given however, was only introduced into the EAW Order with LN 367 of 2007 which added Art. 27A, requiring the court to take a decision on surrender within one month from the person's arrest. This Legal Notice also tackled the absence of a time-limit for a decision at the appeal stage, imposing another one-month limit for the appeal decision. This brings the total length of the procedure to 2 months, in line with the 60 day time period envisaged in the FD EAW.

When the 10 days from the person's consent lapse, and no order has yet been made, the person must be discharged unless there is reasonable cause for delay. The possibility of retaining the person in custody should such "reasonable cause" exist was introduced with the abovementioned LN 367 of 2007, however no maximum time-limit was established for such cases. The 30-day extension allowed by the FD when the EAW cannot be executed within the time-limits, was not reproduced in the EAW Order, so that the 60 day limit stipulated by the FD may nevertheless be exceeded.

With regard to the lapse of the time-periods established for cases when no consent has been given, the EAW Order does not stipulate how the arrested person must be dealt with. While no provision is made for an extension of the time, the court is not required to order the person's discharge either, so that it seems that he may be kept in custody beyond the said periods.

Finally, no reference is made to the duty to report breaches of the deadlines to Eurojust. However, according to the "Replies to the questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2005"²⁰ Malta in fact exceeded the time-limit in relation to EAWs received in that year, and Eurojust was informed of such delays in each case.

B. Postponement of execution or temporary surrender

The Freezing Orders Regulations have implemented the grounds for postponement permitted according to the FD on Freezing Orders. However, with regard to an order freezing property in criminal proceedings with a view to its subsequent confiscation, such freezing order transmitted to Malta for the purpose of subsequent confiscation, can always be postponed if the property is already frozen in the course of local

²⁰ Doc. 9005/5/06 REV5, 18 January 2007.

proceedings, whether criminal or not, giving absolute priority to orders issued by local courts.

With respect to the EAW, the FD envisages various situations in which postponement might be necessary due to the local proceedings against the same person, or as a result of such person having a sentence to serve in Malta. However, the FD also allows for temporary surrender in such cases, so as to avoid prolonging procedures and safeguarding effectiveness and efficacy.

According to the FD EAW, once surrender has been ordered, the executing authority may either postpone return until the person is prosecuted or serves a sentence for an offence, other than that on which the EAW is based, within the executing State or it may temporarily surrender the person under conditions to be determined by mutual agreement between the Member States. Initially the EAW Order required the court to adjourn the hearing when the person was charged with any offence in Malta. On the other hand it had discretion to decide whether or not to adjourn such hearing if the person were serving a sentence in Malta. Thus, postponement was possible even before the final decision on whether or not to execute the EAW, while temporary surrender was not contemplated at all. This was criticised by the Commission in its reports and was subsequently amended.

With LN 224 of 2006, when the court orders surrender and the person is still serving a sentence in Malta, the court has the option of postponing surrender or ordering temporary surrender on the condition that such person is retained in custody and returned to Malta to serve the remainder of his sentence upon completion of the prosecution proceedings or once his sentence has been served in conviction cases. However, in *Police v. Yi Lin*²¹, the court interpreted the EAW Order as excluding its discretion in this regard when the surrender order has been made upon the person's consent. It held that in this case it has no option but to order temporary surrender on the abovementioned conditions. The court seems to favour temporary surrender when the person is serving a sentence in Malta, which may be considered a more favourable approach from the perspective of mutual recognition and mutual confidence.

LN 224 of 2006 failed to provide for the possibility of temporary surrender with regard to a person facing charges for an offence in Malta, giving the court no option but to postpone surrender in that case. This was subsequently rectified too with LN 367 of 2007, which introduced this option with regard to charges for an offence other than that on which the EAW is based. In practice however, it seems that temporary surrender in these cases is unlikely. As the court observed in *Police v. Emanuel Borg*, and *Police v. Anthony Muscat*, domestic law requires that criminal proceedings take place in the presence of the person charged or accused. Therefore surrender, even if temporary, when such proceedings are still under way would necessarily hinder such proceedings. Moreover, in cases where the local proceedings are still in the committal stage²² temporary surrender would interfere with the time limits imposed

²¹ Court of Magistrates (Court of Committal), Case no. 699/2007, 31 August 2007.

²² The committal stage refers to the proceedings before the Court of Magistrates sitting as a Court of Criminal Inquiry, which precede the formal accusation or indictment of such person.

by the Criminal Code for the conclusion of such inquiry, and is therefore not a suitable option (*Police v. Emanuel Borg* and *Police v. Ebeid Osama*²³). In all of these cases therefore, the court proceeded with the extradition hearing and ordered the person's surrender, while it postponed the actual return until the determination of the domestic proceedings.

When the person is facing charges in Malta for the same offence as that in the EAW, no temporary surrender is provided for, as the EAW Order merely provides that the court may adjourn the extradition hearing until those proceedings are determined, whereupon the said extradition hearing is resumed and the question of *ne bis in idem* must be (re)considered.

7. Protection of human rights

The general provision in the FD EAW and the FD Freezing Orders referring to Art. 6 EU on fundamental rights, has not been explicitly transposed into the Maltese implementing legislation. However, the possibility of redress on the grounds of the provisions of the Constitution and of the European Convention Act (implementing the ECHR) is always possible and the EAW Order specifically requires a court which orders surrender to inform the person of his rights in this respect. In this respect, practitioners agree that the non-transposition of such reference does not in any way diminish the actual respect of such fundamental rights.

Furthermore, although all Member States have ratified the ECHR, and despite the fact that the FD EAW is founded on the principle of mutual recognition and hence mutual trust, the domestic legislation allows examination of whether or not certain fundamental rights have been or might be violated, when deciding upon the request for surrender. As outlined in addressing the grounds for refusal, the violation or possible violation of certain rights such as the possibility of prosecution on grounds of race, place of origin, nationality, political opinions, colour or creed, requires non-recognition of an EAW. With regard to *in absentia* judgments, a guarantee is required from the issuing States in order to safeguard the requested person's rights, whereas in cases where humanitarian reasons exist, surrender may be postponed.

While the adoption of a FD on procedural rights could contribute to a higher level of mutual confidence, this would depend on the level which the FD adopts and the standards it imposes as well as observance in practice of such level. Maltese negotiators are in favour of an instrument requiring practical cooperation between Member States in the context of guaranteeing procedural rights of defendants in criminal proceedings. On the other hand, Malta together with a number of other Member States are against any type of harmonization of substantive and procedural laws. This is also due to the fact that Art. 6 ECHR and the jurisprudence of the European court of Human Rights are considered as affording sufficient protection of the rights to due process.

²³ Court of Magistrates (Court of Committal), Case no.722/2007, 14 September 2007.

8. Some specific issues related to EAW

A. Multiple requests

When competing EAWs are received in Malta, the court must decide which should be executed, taking into consideration all the circumstances and particularly those identified in the FD EAW namely, the relative seriousness and place of the offences, the respective dates of the EAWs and whether the EAW was issued for prosecution or execution of a sentence. However, the EAW Order also specifically refers to consideration of the nationality, citizenship and ordinary residence of the person concerned in making such decision. Once again, it seems that the legislator gave Maltese courts the possibility of deciding to execute one EAW rather than another on the basis of the nationality or residence of the person in question, whereas no special consideration is given to the fact that a subject of an EAW is a Maltese citizen or resident, even where such consideration would be allowed under the FD. This is an indication of the fact that the EAW Order seeks to ensure that surrender takes place with the fewest limitations possible. The possibility of consulting the EJM when multiple requests are received has not been transposed into the domestic law.

With regard to an EAW and a competing extradition request from a third country, the competent authority to make such decision is the Minister, who may order deferral of the proceedings on the EAW (whether the hearing or the surrender) until the competing extradition request is decided. In making such decision he is to consider the same elements that the court would consider in the case of competing EAWs. Once the competing extradition request is disposed of the court can order resumption of the proceedings concerning the EAW. Such order must be made within 21 days from when the extradition request was disposed of, otherwise the court must discharge the person concerned if he makes an application to that effect.

Malta, in its *Fiche Française* notifying implementation of the FD EAW, declared its commitment to accept EAWs issued in respect of multiple offences. Such offences must all be mentioned in the same EAW however, since multiple EAWs in respect of multiple offences will be considered as competing warrants and a request for consent to the person being dealt with in respect of the other offence would be required.

B. Rule of speciality

Malta has not given notification under Art. 28(1), which would exclude application of the speciality rule vis-à-vis other Member States making similar notifications. Malta's consent would not be required in respect of:

- any lesser offence proved by the facts proved before the Court of Committal the offence in respect of which the person is returned;
- an extraditable offence disclosed by the same facts as that offence;
- an extraditable offence in respect of which the Court gives its consent to the person being dealt with;
- an offence which is not punishable with imprisonment or another form of detention;
- an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;

- an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

The EAW Order, read in conjunction with the Extradition Act, therefore reproduces the list of scenarios in Art. 27(3)(a)-(f) of the FD, in which the speciality rule cannot be applied. Hence, the Commission's concern that consent would be required and possibly refused by the Maltese authorities in these cases, is misplaced. In fact, the EAW Order goes beyond the cases listed in the FD, and allows a person to be dealt with, without consent being required, for any offence which is disclosed by the same facts as the offence for which he was surrendered and any lesser offence which is proved by the same facts. Application of the speciality rule is therefore limited further than is strictly necessary under the FD, enhancing the efficacy of the EAW on the basis of mutual confidence.

In line with the FD EAW, the speciality rule is also inapplicable and consent is not required, if the person concerned has the opportunity to leave the country and

- (a) does not do so within 45 days from when he arrives in the scheduled country; or
- (b) if he did so within that period, he returns there.

To begin with, the EAW Order also excluded speciality when a person consented to his return, since such person was "taken to have waived any right he would have not to be dealt with in the scheduled country for an offence committed before his return". While this reduced the application of the speciality rule, it was criticised by the Commission as possibly discouraging consent, thus prolonging the surrender procedure. This provision was amended by LN 224 of 2006, requiring a person who gives his consent to surrender to declare also whether or not he waives the right deriving from the speciality rule. This was in fact the case in *Police v. Yi Lin*²⁴, wherein the defendant consented to his surrender but specifically stated that he was not renouncing his right to the rule of speciality.

When Malta's consent is required, the request for consent transmitted by another State is received by the Attorney General who certifies that the requesting authority has the function of making such requests. The person is notified unless it is not practicable to do so, and a consent hearing must begin within 21 days from receipt of the request by the Attorney General, which period may be extended by the court if that would be in the interests of justice. Consent *must* be refused if the 21 days lapse and there is no extension. On the other hand, the EAW Order does not establish the 30-day time-period provided for in the FD for a decision on consent to be given. During the consent hearing the court first decides whether such consent is in fact required. In that case, the court will decide to give or refuse its consent in the same way as it would decide upon the surrender of the person for the offence in question.

The rule of speciality according to the EAW Order is therefore in line with the provisions of the FD EAW, with the only difference being that no consent is required for the person to be dealt with for another offence disclosed by the same facts.

²⁴ Court of Magistrates (Court of Committal), Case no. 699/2007, 31 August 2007.

C. Accessory surrender

The question of accessory surrender i.e. where an EAW is issued for an offence falling within the scope of the FD but also refers to other offences outside that scope, is not dealt with under the FD EAW but is contained in the 1957 Council of Europe Convention on Extradition. This lack of EU legislation in this area has resulted in varied practices occurring with some Member States accepting the possibility of accessory surrender whilst others do not. In terms of Maltese legislation, surrender can only be granted for extraditable offences, thus necessarily excluding accessory surrender, and limiting recognition strictly to those offences which are covered by the EAW Order.

D. Subsequent extradition

Under the EAW Order, execution of an EAW may be refused on the ground that such person was earlier extradited to Malta from another Member State. However this is only possible if there are arrangements between Malta and that Member State requiring the latter's consent for such further surrender, and such consent has not been given. It is presumed that the FD EAW itself constitutes an arrangement dealing with further surrender, so that while as a general rule consent of the initial surrendering State is necessary, that consent would not be required in certain cases, namely:

- when the person could have left the country and did not do so within 45 days from final discharge, or if he has returned after having left it; or
- when the requested person consents to further surrender; or
- when the requested person is not subject to the speciality rule because he waived such right, or because the Member State's consent was given for him to be dealt with for another offence, or because he could have left the Member State but did not do so within 45 days or returned after having left.

Therefore, in these cases, earlier extradition from a Member State will not bar surrender by Malta to another Member State, and Malta will not need to request consent from the Member State from which the person was surrendered to it.

In other cases, consent will be required, and Malta will only surrender the person to another Member State if the first Member State grants such consent.

When Malta is itself asked for consent in order for a Member State to further surrender the person to a third Member State, such request is decided at a consent hearing. According to the EAW Order such hearing must begin within 21 days from receipt of the request, but no provision is made for the decision on consent to be given within 30 days as stipulated in the FD EAW. The court will decide whether such consent is required, presumably according to the FD, since the Order only specifically excludes the need for consent with respect to cases where the person had the opportunity to leave the Member State and did not do so within 45 days, or having done so, subsequently returned to that Member State. In case consent is in fact needed, the court will give or refuse such consent in the same way as it would decide upon whether or not the person should be surrendered.

Thus, as long as the FD is in fact considered an arrangement between the Member States for the purposes of determining whether consent for subsequent surrender is

needed, the EAW Order fully implements the provisions of the FD in this regard, with the exception of the 30-day time-limit, which may constitute an obstacle to the efficacy of the EAW mechanism.

9. Conclusion

It may be noted that despite the limitations on surrender in the implementing legislation, no EAW had been refused by the Maltese courts until 2006²⁵. On the other hand, Malta seems to have had difficulty with regard to an EAW issued to Austria in April 2006, as no surrender had taken place, nor had the Austrian authorities proceeded to prosecute the person in question.

Nevertheless, practitioners and negotiators agree that EAW and Freezing Orders have been effectively recognised and no difficulties have been met vis-à-vis efficacy of the system.

The FD on the EAW and that on Freezing Orders have been completely implemented in Maltese law and applied in practice with little difficulty. General principles such as double criminality, territoriality and speciality continue being considered important, and any further limitation of their application seems to be unlikely from the Maltese perspective. Nevertheless, these principles with their scope limited as it is in the mutual recognition instruments, are considered compatible with the principle of mutual recognition itself and have not affected the effectiveness and efficacy of the instruments in practice. On the other hand, protection of the right to due process, afforded to the person charged or accused, is held to be paramount, in itself imposing some limits on the extent to which mutual recognition can be stretched.

²⁵ *Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2005*, doc. 9005/5/06 REV 5, 18 January 2007 and *Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2006*, doc. 11371/2/07 REV 3, 3 October 2007.