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Report on Malta

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# RESTREINT UE



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REV 1

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**EVALUATION REPORT ON THE**  
**FOURTH ROUND OF MUTUAL EVALUATIONS**  
**"THE PRACTICAL APPLICATION OF THE EUROPEAN ARREST WARRANT AND**  
**CORRESPONDING SURRENDER PROCEDURES BETWEEN MEMBER STATES"**

**REPORT ON MALTA**

# **RESTREINT UE**

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## 1. INTRODUCTION

1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.

1.2. Following the discussion of a proposal introduced by the Belgian Presidency concerning the topic of the fourth round of mutual evaluations<sup>1</sup>, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.

1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005.

1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in document 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.

1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved document 13824/05, the revised sequence for the mutual evaluation visits. Malta is the eighteenth Member State to be evaluated during the fourth round of evaluations.

1.6. The experts charged with undertaking this evaluation were: Ms Imbi MARKUS (Head of International Cooperation Unit, Ministry of Justice, Estonia), Mr Alessandro DI TARANTO (Magistrates Office International Cooperation in Criminal Matters, Ministry of Justice, Italy), Ms Elli KANARI-MORPHAKI (Head of Unit for International Legal Cooperation, Ministry of Justice and Public Order, Cyprus). Two observers were also present: Ms Lynne BARRIE (Eurojust) and Mr Peter-Carel KORTENHORST (Commission), together with the General Secretariat of the Council.

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<sup>1</sup> Document 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

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1.7. This report was prepared by the expert team with the assistance of the Council Secretariat, based upon findings arising from the evaluation visit of 15-17 January 2008, and upon Malta's detailed and helpful responses to the evaluation questionnaire and a written request for further information.

1.8. The report makes reference to differing processes in respect of arrest and prosecution cases only insofar as there is a divergence of practice between the two procedures.

1.9. The expert team's overarching purpose was to evaluate the distinct practical processes operated and encountered by Malta both in its role as issuing and executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as it felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

## 2. THE AUTHORITIES AND THE LEGAL BASIS

### 2.1 THE AUTHORITIES

The Maltese judicial system has evolved under the influence of Roman Law, the Napoleonic Codes and Common Law principles, which have conferred on it some peculiarities almost unique in the international panorama of judicial systems.

In particular, as regards criminal law, the system incorporates some principles which are in-between these legal systems.

The separation of powers in the Maltese system is not as strict as in the American or French model. It takes the form of checks and balances as in the British tradition. The judiciary, judges and magistrates, are appointed by the President of Malta but are granted independence in the performance of their tasks through specific constitutional provisions.

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As regards the European Arrest Warrant (EAW) procedure, the following authorities are concerned.

- The Magistrates and the Magistrates' Courts (Court of Committal)

According to Article 62 of the law implementing the EAW, the Magistrates are the designated authorities competent to issue arrest warrants both for prosecution and conviction cases.

The Magistrates Court, composed of one magistrate, exercises both civil and criminal jurisdiction in first instance cases.

The Magistrates' Court has specific competences as regards the execution of EAWs received by Malta.

The only Court in the first instance dealing with extraditions and EAWs is the Court of Committal which conducts its hearings in Malta. Nothing precludes the initial hearing in Gozo if the person is arrested in Gozo and it is not practicable to arraign in Malta.

There are 16 magistrates in Malta, including 1 in Gozo. Only one magistrate deals with execution of EAWs.

- Attorney-General

The Attorney-General (AG) is appointed by the President of Malta in accordance with the advice of the Prime Minister and can be removed from office by a two-third majority vote of the members of the House of Representatives on the ground of proved inability to perform his functions or proved misbehaviour (Articles 91 and 97 of the Constitution).

According to the Constitution, the AG forms part of the executive power and as a part of his functions he acts as legal advisor to the Government on proposed legislation (drafting of Bills, attending sittings of the House of Representatives to advise Ministers on amendments).

Nevertheless the AG, when exercising the power to undertake prosecutions as conferred on him by the Constitution and by law, acts in an independent way in his individual judgement. Article 91, paragraph (3) of the Constitution states that the AG "shall not be subject to the direction or control of any other person or authority".

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Within the Office of the AG, the International Co-operation in Criminal Matters Unit (ICCMU) has been created, including three prosecutors at the time of the evaluation visit. The said Unit deals with international co-operation in criminal matters within and outside the European Union. Extradition procedures and mutual legal assistance requests are dealt with by the ICCMU and prosecutors working in the Unit participate in international working groups, conferences and seminars. The Eurojust national member for Malta and the European Judicial Network (EJN) contact point are designated within the ICCMU.

The AG has been designated as Malta's central authority for the purpose of EAW proceedings. In this function, he receives and certifies all incoming EAWs. When Malta is the issuing authority, the AG has to give his consent prior to the emission of an EAW. As regards incoming EAWs, the AG has a certification role with the aim of officially stating that the issuing authority is the competent authority.

At the hearings before the Court when executing an EAW, the AG is represented by one of the prosecutors of the ICCMU and has the possibility of filing an appeal against the decision of the Magistrates' Court.

- MALTA's Police

The police is organised as a centralised police force acting under the authority of the Police Commissioner.

Malta's Police has its headquarters in Floriana where most of the specialised branches are based. Eleven District Main Police Stations cover the whole territory of Malta and Gozo.

EAW competence is concentrated primarily in three branches of the Police: the Prosecution Unit, the Specialised Branches, the International Relations Unit (IRU). District Offices interact with the central branches in the processing of EAWs as appropriate. It is worth mentioning that prosecuting officers are located in every district so that initiatives to issue EAWs are taken also at local level.

The Prosecution Unit, together with the Inspector in charge of the prosecution of the person who has absconded from the island, prepares the documents and a memo addressed to the AG seeking his agreement to the issue of an EAW.

When Malta acts as executing Member State, the Prosecution Unit provides assistance in legal and court proceedings if and when required.

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Depending on the type of offence mentioned in the incoming EAW, the competent Specialised Branch is involved in arresting the person and bringing him to Court.

The IRU includes the SIRENE office, the Europol office, and the Interpol office. The SIRENE office started work on 1 September 2007 when Malta accessed the SIS One-4-All. The office employs 18 persons working on a 24/7 rota.

The IRU provides legal and administrative support and assistance to the other branches and to the AG when dealing with EAW proceedings.

- Court of Criminal Appeal (Inferior)

The Court of Criminal Appeal is the competent authority for hearing appeals from judgments delivered by the Magistrates' Courts in EAW proceedings. Both the accused person and the AG have a right of appeal before the Court of Criminal Appeal (Inferior) which sits with one judge in these cases.

- Constitutional Court

Application of redress in cases of alleged breaches against fundamental human rights arising from the EAW procedure can be filed before the 1st Hall Civil Court (Constitutional Jurisdiction) with the possibility to appeal before the Constitutional Court, which is competent to rule in cases involving alleged violations of human rights, the invalidity of laws and the interpretation of the Constitution.

The Maltese law implementing the EAW has been brought before the Superior Court of Appeal in two cases<sup>1</sup>. In both cases the issue of invalidity of the subsidiary legislation was pleaded because *ultra vires* the main Extradition Act. In both cases the Superior Court of Appeal has rejected the issue of invalidity.

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<sup>1</sup> Carmelo Borg and Geryl Serge v. Minister for Justice and Home Affairs and the Attorney General (1080/2005/1 judgment on 5 May 2006); Carmelo Borg v. The Attorney General, Minister for Justice and Home Affairs and the Prime Minister, 53/2005/JRM, judgment on 24 November 2005)



## 2.2 THE LEGAL BASIS

- Legal Notice 320 of 2004 (the "Extradition Order") as amended by Legal Notices 224 of 2006, and 275, 367, 390 and 396 of 2007, is the Maltese implementing legislation of the EAW Framework Decision, which entered into force on 7th June 2004.

The Extradition Order (hereinafter referred to as "the Order") has been adopted as subsidiary legislation under the authority of the Extradition Act (Chapter 276) which is often evoked in the Order as applicable in EAW proceedings.

The Order is composed of 77 Articles detailing the procedures regarding both the issuing and the execution of EAWs.

The text of the Order does not reproduce the terminology of the Framework Decision, but rather resorts to language which is clearly inspired by the traditional extradition system and the UK implementation of the EAW as well as common law traditions. Therefore, references to "Part II warrant" and "Part III warrant" have to be construed as references to incoming and outgoing EAWs respectively.

- Extradition Act (Chapter 276)

This is the main legislation applicable to extradition proceedings with non-EU countries and with EU Member States that for any reasons do not apply the EAW Framework Decision.

- Criminal Code

References to provisions of the Criminal Code are made in the Extradition Order as applicable to the EAW proceedings. In particular, the rules governing arrest, bail and legal aid are those applicable within the national system.

Article 649 et sequitur are the legislative provisions implementing international agreements, treaties and arrangements to which Malta is party.

- National Schengen Information System (SIS) Regulations 2007 (Processing of data)

The Regulations adopted by the Commissioner of Police in view of the access of Malta to SISOne4All in 2007 include the requirements of the *Schengen acquis* as regards data processing in the SIS.

- Fiche Française<sup>1</sup>

Like other Member States, Malta has produced a memorandum explaining the Maltese EAW system. The Fiche Française provides Member States with information concerning the procedure applied by Malta when a request for the surrender of a person from Malta is made on the basis of an EAW. The Fiche Française dates from 16 September 2004 and was not updated following the amendment of the implementing law.

### 3. ORGANISATION AND PRACTICES - AS ISSUING MEMBER STATE

The experts team was informed that in 2007 Malta issued three EAWs, Only one of them was executed and led to the surrender of the person. One addressed to the UK was refused by the executing authority which went into the merits as to whether the offence of grievous bodily harm for which the EAW had been issued actually corresponded to the contested conduct. The third EAW was still pending at the time of the evaluation visit.

As regards the year 2006, three EAWs were issued, only two of which have been executed so far. One addressed to Austria was still pending at the time of the evaluation.

A chart reproducing detailed statistics is annexed to the report (see Annex E).

#### 3.1. THE DECISION TO ISSUE

According to Article 62 of the Extradition Order, the Magistrates are the competent authorities for issuing EAWs in both prosecution and conviction cases.

The decision to issue is preceded by a preliminary phase involving the police, which has to file the application asking for the issue of an EAW, and the AG who is the competent authority to give prior consent to the issue of an EAW.

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<sup>1</sup> Doc 12439/04 COPEN 107 EJM 59 EUROJUST 76.

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Article 62 of the Order provides for two alternative conditions to be met:

a) that the person has committed an extraditable offence. Extraditable offences are defined in Article 68 of the Order, which reproduces in a lengthy and very detailed way the basic criteria set out by Article 2 of the Framework Decision;

or

b) that the person is unlawfully at large<sup>1</sup> after conviction of an extraditable offence by a court in Malta. The experts team was advised that 'unlawfully at large' is interpreted by courts as a person who was convicted having served none or only part of his sentence because he absconded.

Once the AG has given his consent, the magistrate takes the decision on whether to issue the EAW on the basis of the request made by the police. When an EAW is issued in respect of a person whose location is not known, the Magistrate shall *ex officio* or at the request of the police order the issue of an alert in the SIS (Article 62A of the Extradition Order).

## 3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

The experts team was informed that although no mandatory provisions exist, it is standard practice to carry out checks on the Interpol and SIS data bases to see whether other EAWs or Article 95 alerts have been issued for the same person.

The Prosecution Unit of the police carries out these researches through the IRU, namely the Interpol and SIRENE office.

Parallel enquiries are made at national level to verify whether the person is wanted in Malta for other offences. In the affirmative case, a single EAW containing all the offences is issued as a matter of practice.

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<sup>1</sup> This requirement was also found in UK legislation until January 2007.

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## 3.3. THE APPLICATION PARTIES/PROCESS AND THE COMPLETION OF THE FORMS/COURT PAPERS

As explained in paragraph 3.1, before the Magistrate's decision to issue an EAW is taken, certain preliminary formalities must be completed by the police and the AG. In this first phase, the law requires and the practice is to draft or fill in some documents containing all the information needed for the completion of the EAW form.

The prior formalities require the police to check all the information required for the issue of an EAW and make an application in the form of a written report ('memo') addressed to the AG in order to get the consent required by Article 62 of the Extradition Order. The 'memo' provides information about the identity of the accused (photo, fingerprints, etc.), his/her possible location if known, the status of the prosecution in Malta, the offences and the punishment provided for and other relevant circumstances. In cases of EAWs for conviction purposes, the length of the sentence still remaining to be served is also mentioned as a matter for consideration.

In practice, one of the officers of the ICCMU within the AG's office checks the file to determine whether all the conditions for issuing an EAW have been met, including if the offences are extraditable in accordance with the criteria set by the EAW implementing law (Article 68 of the Extradition Order). On this basis the AG will give his consent.

Consent in writing is a *conditio sine qua non* for issuing the EAW.

According to Article 62 (2) of the Order, the AG's consent is given to issue an outgoing EAW, which is a distinct document drafted in accordance with the EAW form as outlined in the Annex to the Framework Decision (referred to as a "Part III warrant").

The Part III warrant, consisting of "the statement" and "the certificate", contains all information required by the EAW form. The Part III warrant is in practice drafted by the police with the assistance of the ICCMU if necessary.

The expert team was informed that a Part III warrant has the same legal value as a domestic arrest warrant and can be the basis on which the person can be arrested if found in Malta. This Part III warrant is always mentioned in the EAW form under b) as the decision (arrest warrant or judicial decision) on which the warrant is based.

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Once the AG's consent is given, the police files an application addressed to the Magistrate, which includes the AG's consent and the EAW form. The experts have been told that it is common practice for the police and the ICCMU to fill in the EAW form. In a few cases, the Magistrate has filled in the form in collaboration with the ICCMU.

During the evaluation visit, the experts were informed that guidelines outlining the procedure governing issue and execution of EAWs had been drafted by the Police's legal office and the ICCMU for the use of the police and were ready for imminent distribution.

The Maltese authorities informed the experts that, where the person sought has (allegedly) committed more than one offence, it is the usual practice to issue one EAW for all offences.

## 3.4. TRANSLATION OF THE EAW

Maltese and English are the official languages in Malta. In all cases where an EAW is issued, it is drawn up in English and Maltese.

If the location of the person is known or, following investigations carried out by the police, it emerges that the person is probably in a certain Member State, the EAW is translated into a language accepted by the State concerned.

Translation of outgoing EAWs is carried out by international translation agencies or the Ministry of Foreign Affairs.

## 3.5. TRANSMISSION OF THE EAW

As already mentioned, Malta has adopted a centralised system for dealing with EAW proceedings. As the designated central authority, the AG is the competent authority for transmitting EAWs. As general practice, the Maltese authorities consider that direct transmission to the executing authority is the most efficient and expeditious way. The ICCMU within the AG's office relies on the EJN Atlas and on the Fiches Françaises submitted to the Council of the European Union to identify the executing competent authority.

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If the police investigations have not revealed the whereabouts of the person, an Article 95 SIS alert is sent to all Member States and an Interpol Red Notice is sent at the same time.

## 3.6. ISSUES RAISED BY OR REQUESTS FOR FURTHER INFORMATION MADE BY EXECUTING MEMBER STATES AND COMMUNICATION CHANNELS RELIED UPON

Due to the limited number of EAWs issued by Malta since 2004, the authorities met during the evaluation visit did not have a wide range of issues to report as regards problems raised by executing authorities.

Nevertheless, the expert team was informed about three problems which occurred in relation to EAWs issued by Malta.

In two cases involving the UK, Malta was asked to provide further information in relation to EAWs issued for the purpose of prosecution for offences listed in Article 2(2) of the Framework Decision.

In the first case, which concerned trafficking in human beings, the UK authorities sought further information as regards the description of the facts and the circumstances of the criminal activity. The UK's requests were met by e-mail contacts between the ICCMU and SOCA and the Crown Prosecution Service and Malta was asked to issue a new EAW.

In the second case, which concerned grievous bodily harm offences, the Maltese authorities were requested to provide evidence proving the falsity of the accused person's claims in relation to the fact that he had not been granted interpretation during the hearing and other matters relating to the judicial proceedings held in Malta. The Maltese authorities were also asked to provide copies of the indictment and extracts from the Criminal Code.

The Maltese authorities met during the evaluation visit expressed the view that both requests made by the UK manifestly exceeded the spirit of the Framework Decision and the principle of mutual recognition.

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The third EAW, which concerned the surrender by Austria of an Austrian citizen for forgery and fraud to the detriment of the Maltese Treasury and the EU, was issued in 2006 and was still pending at the time of the evaluation, notwithstanding the intervention of Eurojust. On Austria's request, a detailed description of the offence and documents have been provided by the Maltese authorities, without any result however. The person has not been surrendered or prosecuted by Austria.

With regard to communication channels, it is common practice for the ICCMU to have direct contacts, by telephone or e-mail, with foreign authorities. Eurojust or EJM contact points are resorted to as well when difficulties arise.

## 3.7. LEGAL REGIME GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

In principle, the Maltese authorities have a flexible approach when dealing with surrender of nationals of the executing State and with the guarantees required by the latter.

However, the authorities met during the evaluation visit reported some cases where problems had arisen or additional guarantees had been requested.

Apart from the Austrian case mentioned in paragraph 3.6, two EAWs concerning a Dutch national were issued by Malta in relation to conspiracy and drug trafficking over a period of 15 years. In both cases, the Netherlands required that the person be sent back to the Netherlands to serve the sentence passed against him in Malta, as provided for by Article 5 (3) of the Framework Decision. In addition, a second guarantee was requested, namely that no objection be made by Malta to the Maltese sentence being converted into the sentence that would have been passed in the Netherlands for the same offences, taking into account the situation in the issuing Member State.

The Court after consultation with the AG, granted the two guarantees and authorised the surrender to the Netherlands.

## 3.8. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

The age of criminal responsibility in Malta starts at 9 years. From 9 to 14 years the mischievous discretion of the minor has to be proven and the punishments, which are negligible, can be transferred to the parents/tutors if it is ascertained that they could have avoided the misbehaviour of the minor through diligence. Minors from 14 to 18 years may be sentenced to prison, always for less than 4 years of imprisonment.

At the time of the evaluation visit, no EAW request had been issued in respect of minors.

## 3.9. EVOLVING BEST PRACTICES

The small size of the country and close cooperation among the few counterparts dealing with EAW proceedings are beneficial for the application of the EAW.

Regular meetings on practical issues or on procedural/legislative issues related to EAW are held, involving the ICCMU's officers, the police officers concerned and the Magistrate in charge of the executing procedure. Problems are discussed and solutions found in a coordinated way among specialised practitioners.

As a result of the fruitful cooperation between the police and the AG's office, guidelines on how to deal with issuing and executing procedures have been produced for the use of police. The guidelines include summaries of the procedures with a step-by-step approach and charts illustrating the authorities concerned by the EAW proceedings and their relative functions both in the issue and execution phase (see Annex F). The guidelines are electronically available.

## 3.10. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

The experts team was advised that as general practice the ICCMU takes care of establishing direct channels of communication with the executing authorities, by telephone or e-mail.

In cases where some difficulty or special issue might arise and bilateral communication is unsuccessful, contacts would be made either through the Eurojust national member or the appropriate EJM contact point.



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The authorities met during the evaluation visit pointed out that the level of communication regarding the progress of the EAW procedure or of any appeal is in general unsatisfactory and the executing authorities' communication about progress made or blockages in the execution is rarely spontaneous. According to the Maltese experience as issuing authority, only the Dutch authorities have given information in relation to every step of the EAW's execution.

## 3.11. THE MECHANICS OF THE SURRENDER/TEMPORARY SURRENDER

Once the decision to execute the EAW has been notified to the ICCMU by the executing authority, the SIRENE office and the Prosecuting Unit of Police are informed immediately. Arrangements for physical surrender are made by the police, namely for travel and for taking the person into custody and are communicated by e-mail or fax to the executing authority for coordination purposes. The Maltese authorities reported that no cases of breaches of the 10 day time-limit for surrender had occurred.

Temporary surrender is governed by the same practices as described above.

The experts team was informed that temporary surrender was resorted to only once. The condition imposed by the executing Member State was that the person temporarily surrendered remain in custody in Malta and that he be sent back to the executing State immediately if a Court granted bail in accordance with Article 70 (2) of the Order.

## 3.12. THE MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIME-LIMITS/GUARANTEES

The Maltese practice in respect of requested property is that such a request should be formalised in the EAW form and that no further MLA request would be needed.

The Maltese authorities reported that only one request for seizing and handing over property for the purposes of evidence was submitted to the executing authority. The request was not granted and the Maltese authorities were not given any reason for this. However the lack of evidence handed over did not have a significant impact on the Maltese proceedings.

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## 3.13. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

At the time of the evaluation, the Maltese authorities had not experienced any case of conflicting EAWs or competing EAW and extradition requests from another State.

The procedure for solving a conflict between EAWs and between an EAW and an extradition request is ruled by Articles 42 and 71 of the Order. A detailed description of the decision process and the criteria applicable in these cases is given in paragraph 4.16.

## 3.14. EXPENSES

The Maltese implementing law does not contain any provisions concerning expenses. The practice is that the executing Member State bears the expenses for the return of the sentenced person. No problems were reported by the Maltese authorities in this connection.

## 4. ORGANISATION AND PRACTICES - AS EXECUTING MEMBER STATE

The expert team was provided with statistic charts illustrating incoming EAWs and Article 95 SIS alerts, covering the calendar year 2007 and the period 1 September 2007-14 January 2008 respectively (see Annex E).

In 2007, Malta received 9 EAWs, 5 of which were still waiting to be executed at the time of the evaluation, 3 could not be executed because the persons were not in Malta and 1 had been executed.

### 4.1. RECEPTION PROCEDURES

Pursuant to Article 7(2) of the EAW Framework Decision, Malta has a designated central authority for the reception of all incoming EAWs. In practice, the ICCMU within the AG's office carries out this task.

The AG is required by Article 7 of the Order to certify that the issuing authority is competent to issue an EAW in the requesting country. The certificate by the AG is conclusive of its contents which means that the issue of competency cannot be raised in court.

The certificate is a *conditio sine qua non* for the execution of the EAW.

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Before the certificate is issued by the AG, the prosecutors in the ICCMU carry out checks on the form and content of the EAW in order to verify if the form has been completed correctly and that no essential information is missing.

Once the AG has certified the incoming EAW, it will be passed to the police for the necessary enquiries preceding the arrest.

The Maltese authorities, while acknowledging that the certification process is an additional step not provided for by the Framework Decision and therefore not essential, explained that it is meant as a facilitating and expediting process for preventing potential issues from jeopardising the EAW procedure at a later stage before the Court.

According to the police guidelines, when an Article 95 alert occurs and the police has ascertained that all the conditions governing apprehension of the person have been met, the police carries out the arrest and informs the AG's office as soon as possible by sending copy of the A and M forms and all relevant documents in order to enable the AG to issue the certificate pursuant to Article 7.

## 4.2. THE FORM OF THE WARRANT AND REVIEW PROCEDURES

According to Article 5(9) of the Order, the EAW can be transmitted by any secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity. The Maltese legislation does not require a certified copy or the original. At the time of the evaluation visit, only one original EAW had been received from Belgium while in all other cases faxes or e-mail transmissions had been deemed sufficient.

Malta accepts EAW in Maltese or in English.

In terms of the provisions governing the executing procedure, the person arrested under an EAW must be informed of its content as soon as possible and must appear in Court within 48 hours of his arrest at which point the EAW must be produced to the Court. This means that in principle a translated EAW has to be produced within a 48 hour period, except when the arrest is made following an Article 95 SIS alert which does not lay down a time-limit for translating and transmitting the EAW.

The Maltese authorities reported that no issues had ever arisen in relation to language matters and that, up to the time of the evaluation, the translated EAW had always been received before the first Court hearing.

## 4.3. REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/CLARIFICATION

When an EAW is received by the AG, it appears that in practice the certification process involves a more general checking of the EAW itself to ascertain whether anything is missing or anything may cause a problem at a later stage in court. Therefore it is usually at this stage that supplementary information or clarifications are requested by the ICCMU. The Unit in the AG's office has appropriate experience and expertise in international matters, which facilitates and expedites contacts with foreign counterparts. Direct contacts are prioritised, although Eurojust and EJN contact points are resorted to when bilateral discussions have been unsuccessful.

The experts team was informed that the ICCMU's checks and requests for clarification generally circumvent delays in the EAW execution process that might arise at a later stage in court. Nothing prevents the Court from requesting supplementary information if it finds the information provided by the issuing authority insufficient for deciding on the surrender (Article 13A of the Order as amended by L.N. 224 of 2006).

The prosecutors forming part of the ICCMU have not reported any problems in relation to failures to execute EAWs due to lack of responses to requests for additional information.

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However, for the brief period in which they had participated in the SIS One 4 All, the Maltese authorities mentioned six SIS alerts where no arrest could take place due to the fact that the alerts were either incomplete (e.g. because the offence for which the person concerned was sought was missing) or outdated. The SIRENE bureau therefore requested supplementary information from their counterpart in the issuing Member State. The expert team learned that after weeks, and in one case even after months, the Maltese SIRENE bureau had still not received the requested information. The interviewed officials showed a great deal of understanding for their counterpart SIRENE bureau, which apparently had to rely on judicial authorities in order to obtain the missing information. The experts were informed that, in the meantime, the Maltese police kept an eye on the persons concerned without placing them under 24h surveillance.

## 4.4. CIRCULATION PROCEDURES AND INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON

Once an EAW is received by the central authority, the EAW office and SIRENE office are immediately alerted in order to initiate enquiries for verifying the identity and the possible presence of the requested person in Malta.

In the event of an Article 95 SIS alert, the police guidelines stipulate that the police station where the hit has occurred must immediately inform the SIRENE office and the competent district police officer with a view to coordination and further action.

As regards SIS alerts, the experts were informed that the Maltese SIRENE office receives 60 alerts a day on average and all of them are checked.

Verifications on the possible location of the requested person are made by the police, SIRENE or Interpol Office in collaboration with the specialised branch involved in relation to the specific offences. Searches are made both physically and on databases. Police and governmental databases such as those concerning citizenship, immigration, social security and the public registry are consulted.

Given the limited geographical size of Malta, searches generally yield results within 24 hours. The police frequently draw upon intelligence in order to apprehend the requested person as soon as possible.

## 4.5. ARREST PROCEDURES/FIRST HEARING

Arrest procedures related to an EAW are governed by provisions of the Order as well as by rules laid down for the traditional extradition procedure and for domestic proceedings.

There appear to be three ways in which a requested person may be brought before the Court of Magistrates in Malta, which is always within a 48 hour period following the arrest. In terms of Article 8(3) of the Order, a copy of the warrant must be given to the arrested person as soon as practicable after his arrest and at the latest at the first hearing, and in default, once an application is made, the person must be discharged.

### 1. *Arrest on a certified EAW*

When an EAW is received (in English or Maltese), the requested person will be arrested and again must be brought before the court within 48 hours. The certified EAW will be produced before the court and the arrested person pursuant to Article 8(3) of the Order.

The Maltese authorities reported that no problems had been encountered in relation to the 48 hour time-limit since all EAWs received had been translated into English beforehand.

### 2. *Arrest on an Article 95 SIS alert*

If an Article 95 SIS alert is received by Malta, this is deemed equivalent to an EAW, pending receipt of the EAW itself (Article 6A of the Order). The requested person will be arrested on the SIS alert and must appear before the court within 48 hours. The EAW is not required at this stage, however, and in fact there is no time-limit within which the EAW should be produced, as the SIS alert is considered to be equivalent to the EAW.

It is observed, however, that this has not yet been tested in practice, as so far the Maltese authorities have always received the EAW before the first court hearing.

### 3. *Provisional arrest*

The police may apply to a Magistrate for a provisional arrest warrant (Article 9 of the Order) if information is received that an EAW will be forthcoming, and there is urgency that justifies provisional arrest prior to receipt of the EAW. The same applies if an Interpol Red Notice is received and there is an urgent need to apprehend the person. It has to be noted that the Interpol Red Notice does not have the status of an arrest warrant under Maltese law.

# RESTREINT UE

In these cases, the requested person will be arrested on the provisional arrest warrant and must be brought before the court within a maximum of 48 hours. At this stage, the certified EAW must be available (in either English or Maltese) to be produced before the court and the requested person, on pain of discharge (Article 8(3) of the Order).

The expert team was informed that no provisional arrests had been undertaken at the time of the evaluation.

## *The initial hearing*

The arrested person must be brought before the Magistrates' Court within 48 hours of the arrest. Under Article 11 (1A) of the Order, he has the right to be assisted by a lawyer and by an interpreter if he does not understand the language in which the proceedings are conducted, which might be a problem since Malta does not have interpreters for all languages.

At the initial hearing, a copy of the EAW or the SIS alert and the AG's certificate have to be produced in default of which the person must be discharged once an application is made.

During the initial hearing, the Court must:

- decide, on the basis of probability, whether the person appearing before the Court is the one to whom the EAW refers. If the identity is not confirmed, the person must be released;
- ascertain whether he has legal counsel and an interpreter;
- inform the person about the content of the EAW;
- inform the person about the procedures for consent and the consequences thereof;
- fix a date for the extradition hearing to start, which cannot be later than 20 days from the date of the initial hearing.

If consent is given at the initial hearing, the Court must order the surrender of the person within a period of 10 days from the granting of consent (Article 44(5) of the Order) and no extradition hearing will take place.

Under Article 43 of the Order, consent must be given before the court with the assistance of a defence lawyer, must be recorded in writing and is irrevocable. The same formal requirements apply to consent / renunciation to the rule of specialty which has to be expressed at the same time of consent to surrender.

## 4.6. THE SURRENDER DECISION

The Magistrates' Court is the authority that is competent to decide on surrender under the EAW both for the purpose of prosecution and conviction. If the decision of the Magistrates' Court is appealed, the surrender decision will be taken by the Court of Criminal Appeal.

During the extradition hearing, the Magistrates' Court has to decide:

- whether the offence specified in the EAW is extraditable under Article 59 of the Order. This provision reproduces Article 2 of the Framework Decision. If the issue is decided negatively, the Court must discharge the person;
- whether any bars to extradition exist. In the affirmative, the Court must discharge the person.

Pursuant to Article 27A of the Order, the surrender decision must be taken within one month of the day of the arrest.

In practice, it can happen that more than one extradition hearing is held when the Magistrates' Court deems that it does not have sufficient information to decide or when the defence asks for evidence to be produced that might prove the existence of bars to surrender.

During the evaluation visit, the expert team was invited to attend three extradition hearings, which showed how the proceedings are carried out in practice.

The expert team was informed that the Magistrates' Court is able to decide within one month, even when the extradition hearings are adjourned because of procedural or substantive issues raised.

## 4.7. REFUSALS TO SURRENDER

Articles 13 to 24 of the Order define and detail the bars to extradition to which the Magistrates' Court must refer when deciding on surrender.

The Maltese authorities pointed out that the *ne bis in idem* ground for refusal was raised in only one case, without success, however.



# RESTREINT UE

According to the Order, possible bars to extradition or 'validity flags' can be raised by the parties before the Court at the initial hearing at the earliest and decided by the Court. The possible consequence of this is that if the EAW is not withdrawn despite an objective obstacle signalled to the issuing authority, the person must be arrested and cannot be released until the first hearing.

## 4.8. APPEALS PROCEDURES AND THE IMPACT ON TIME-LIMITS

Under Article 27A of the Order, the decision on surrender must take place within one month of the requested person's arrest.

Following the decision on surrender, the requested person has the right of appeal to the Court of Criminal Appeal within 3 working days,

The AG may also appeal to the Court of Criminal Appeal within 4 working days of the date of transmission of the records of proceedings of the Magistrates' Court.

The decision of the Court of Criminal Appeal shall be taken no later than one month starting from the day when the appeal was filed. Following the decision of the Court of Criminal Appeal there might be further appeal to the Constitutional Court (within 7 working days) on the grounds of breach of constitutional rights.

The Maltese authorities reported that in the first two EAW cases there were significant delays attributable to proceedings before the Constitutional Court and the Superior Court on the question of the proper transposition of the Framework Decision within the Maltese legal system. Both breaches of the 60 day time-limit have been reported to Eurojust.

A third breach of the time-limit was reported to Eurojust in a case where the person had pending criminal proceedings against him in Malta for the same act as the one for which the EAW had been issued.

It has to be noted that although the Order does not contain provisions implementing Article 17(7) of the Framework Decision, the Maltese authorities pointed out that breaches of the time-limit are reported to Eurojust as a matter of good practice.

# RESTREINT UE

## 4.9. OWN NATIONAL AND YOUTH ARREST AND SURRENDER ISSUES

The experts team was advised that Malta has no problems in extraditing its own nationals. No cases have been reported concerning the surrender of minors.

## 4.10. SPECIALTY

Article 13 (e) and 18 of the Order make specialty a mandatory ground for refusal when there are no specialty agreements with the issuing Member State.

Pursuant to Article 19, the consent of the issuing Member State is always required.

## 4.11. ONWARD SURRENDER/EXTRADITION

The Maltese authorities pointed out that Malta has not made notifications to the General Secretariat of the Council in relation to Article 28 of the Framework Decision.

At the time of the evaluation visit, no problems with onward surrenders had been experienced by Malta.

## 4.12. AD HOC ISSUES SURROUNDING UNDERTAKINGS

The Maltese authorities reported a case in which Malta had requested the issuing Member State (Italy) to provide guarantees that the surrendered person would be sent back to Malta to serve the sentence passed in Italy. In this case, the requested person, a Chinese, was already serving a sentence in Malta and had given his consent to the surrender.

Since no reply had been provided by the Italian authorities, Malta referred the case to Eurojust with a view to speeding up the procedure for obtaining the requested guarantee.

## 4.13. ARTICLE 32 EXPERIENCES

Articles 3 and 4 of the Order provide that all EAWs issued or received by Malta after 7 June 2004, irrespective of the date of the alleged offences, will be governed by the EAW rules.

# RESTREINT UE

In relation to Member States having stated that, as executing state, they will apply the traditional extradition system to acts committed before a certain date, Malta will continue to apply its extradition legislation with regard to those member States.

At the time of the evaluation visit no issues were reported to the expert team.

## 4.14. TEMPORARY/CONDITIONAL SURRENDER

Article 28A of the Order makes specific provisions for the temporary surrender of requested persons serving a sentence of imprisonment in Malta for offences other than those on which the EAW is based.

The competence to decide on temporary surrender relies on the Court, apart from any specific request from the issuing Member State.

## 4.15. THE MECHANICS OF SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS AND PROPERTY

Under Article 33(2) of the Order, the surrender shall not take place before seven days starting from the day on which the surrender decision has been taken. The 7 day time-limit comes from the Extradition Act and is due to the lapse of time granted for appealing before the Constitutional Court.

Article 34 of the Order, in compliance with the Framework Decision, specifies that the requested person must be surrendered within ten days after the final decision on the execution of the EAW has been taken, unless the Court is informed that the issuing authority has agreed to a later date, in which case surrender shall be within 10 days of the new date.

The SIRENE Office, in collaboration with the Prosecution Unit and the Corradino Correctional Facilities (CCF), verifies that no obstacles exist to the surrender and makes all the arrangements with the issuing authority for the handing over of the requested person. As a matter of practice, the detention period spent in execution of the EAW is spontaneously and automatically communicated to the issuing authority by the Maltese SIRENE office for the purpose of deduction of time.

# RESTREINT UE

The ICCMU officers reported that they send the information on detention periods only upon request of the issuing authority.

The expert team was advised that no cases of delayed surrender had been experienced up to the time of the evaluation.

No specific issue was reported to the experts team as regards surrender of property.

## 4.16. CONFLICT OF EAWS/EXTRADITION REQUESTS

Articles 42 and 71 of the Order deal respectively with conflicting EAWs and competing EAW and extradition requests regarding the same person.

The decision on which EAW should have priority is taken by the Court, while in the case of conflicting EAW and extradition requests it is up to the Minister to decide.

In reaching the decision, the Court and the Minister are required to take into consideration the following matters:

- the seriousness of the offence;
- the date on which the EAW/extradition request was issued;
- the nationality of the requested person or his ordinary residence;
- the place where the offences were alleged to be committed;
- whether the person is accused of its commission or is alleged to be unlawfully at large after conviction.

Although Maltese legislation is silent on the possibility of seeking advice from Eurojust, the interviewed authorities said that in practice nothing would prevent them from doing so. There had been no cases of conflicting requests at the time of the evaluation.

## 4.17. EXPENSES

Reference can be made to paragraph 3.14 in relation to the arrangements concerning expenses.

At the time of the evaluation, no difficulties had been experienced by Malta as executing State on this regard.

## 5. TRAINING PROVISION

Officers within the AG's office (from the ICCMU) and police officers have training sessions on an annual basis.

Specific training on the EAW is provided through participation in seminars and conferences, which is encouraged. Seminars organised by Eurojust on this issue have been attended regularly by officers from the AG's office and from the police.

The small size of the country and the limited number of practitioners dealing with the EAW procedure allow a significant degree of cooperation and specialization. Regular meetings are held between ICCMU officers, police officers and the Magistrate dealing with the execution of the EAW. The meetings focus on specific cases or on legislative and/or procedural aspects related to EAW proceedings.

## 6 DEFENCE PERSPECTIVES

Requested persons arrested under an EAW have the right to be assisted by a lawyer and, if necessary, by an interpreter, when they are brought before Court within 48 hours of the arrest.

During the evaluation visit, the expert team had the opportunity to meet representatives of the Bar who expressed their views on the EAW system in general and on the practical application of it in Malta.

With regard to the EAW system, the defence lawyers expressed general appreciation of the efficiency and expediency of the instrument. However, they pointed out some critical points that can be summarised as follows.

## RESTREINT UE

The differences between national laws and criminal procedures in the European Union are still significant and, when dealing with EAWs, it should be ensured that the requested person and the defence lawyer have access not only to the EAW form but also to previous documentation from the issuing authority that led to the arrest of the person. In other words, the defence lawyers' view was that the principle of fair process is not respected since the defence's role in dealing with EAWs is limited to checking the form and in many cases the defendant needs to hire another lawyer in the issuing State in order to be able to defend himself adequately.

Moreover, the defence lawyers raised the issues of proportionality in relation to EAWs issued for minor offences, which result in the deprivation of liberty for the individual and the need to envisage some form of compensation for being unduly kept in custody.

In relation to practical application of the EAW by Malta, the defence lawyers highlighted that the close relations and mutual trust between Bar representatives and the AG's office facilitate the smooth processing of EAWs.

As regards the rights of the defendant following the arrest, the expert team was informed that the requested person is subject to the rules applicable at domestic level.

In terms of the Order, the person is allowed to see a lawyer within 48 hours before appearing before the Court. In practice, this happens just before the first hearing since usually the time between the arrest and the arraignment is relatively short.

If the person does not have the means to pay for a lawyer or refuses to appoint a lawyer, legal aid is provided. The expert team was informed that lawyers do not undergo specific training on EAW and that only a few lawyers in Malta have experience of the EAW. The possibility of legal assistance being provided by inexperienced lawyers cannot therefore be ruled out.

Finally, the representatives of the defence stated that Courts in Malta are quite reluctant to grant bail even when safeguards and evidence provided demonstrate that there is no risk of absconding.

## 7. CONCLUSIONS

### 7.1 General conclusions

The expert team appreciated the standard of presentations received and the clear commitment and professionalism of all the officials involved in the practical application of the EAW.

The expert team had the immediate feeling that because of the small size of the country, the EAW proceedings benefited from the proximity and the limited number of the practitioners, who work in close cooperation.

It is difficult to evaluate a system with such limited jurisdiction, where there is a limited number of EAW cases. In future, the Maltese authorities will probably face a number of difficulties with which they had not yet been confronted at the time of the evaluation. Thus, no EAW had so far been refused because of the existence of a bar to surrender and therefore the Maltese judicial authorities had no practical experience in that context.

The expert team noted that although the system appears to work efficiently in Malta at present, there is necessarily an element of speculation and hypothesis regarding how the system would function in certain future situations.

Malta should be commended for its willingness, after having taken due notice of a number of the comments made in the first Commission report on the implementation of the EAW, to amend its legislation so as to comply better with the EAW Framework Decision. Following these amendments, the Maltese system has become more compliant with the Framework Decision. This information however does not appear in the Fiche Francaise.

# RESTREINT UE

The expert team noted that the Maltese legislation implementing the EAW Framework Decision is still imbued with what must be called a common law tradition rather than having taken steps to espouse the European dimension of the EAW. For instance, the legislation makes continuous use of the same terminology inherited from the traditional extradition procedure, obviously by drawing inspiration from, and sometimes copying, UK legislation. In the experts' view this may cause confusion among foreign issuing or executing authorities with regard to the applicable regime. What may be of concern, however, is that its own judicial authorities use old case law and practice related to the traditional extradition procedure for situations that the Framework Decision sought to abolish. It may in any case be more difficult to reconcile this with the principle of mutual recognition in certain instances.

## 7.2 Conclusions in respect of Malta's activities as an issuing Member State

### 7.2.1 Issues

#### 7.2.1.1 - Return of nationals

The issue of nationality seems to be a problem in relation to some Member States which require guarantees beyond the scope of the Framework Decision concerning the surrender of their citizens. The Maltese experience, even if limited, has shown that Member States do not apply the same rules to the surrender of nationals arrested under an EAW, thus creating disparities of treatment within the European Union. The Council of Europe Convention on the transfer of sentenced persons is widely applied to EAW surrenders by a number of Member States that do not consider the Framework Decision as the appropriate legal basis.

#### 7.2.1.2 - Communication with the executing Member State

The expert team shared the practitioners' view on the need for the issuing State to be informed in a timely and appropriate way about the state of play of the executing procedure of the EAW. Information about the apprehension of the requested person, appeals, denial to consent and content of the final decision on surrender should be given as soon as possible.



## 7.2.2 Good practices

### 7.2.2.1 - Co-ordination and Guidelines

The expert team appreciated the close relationship and collaboration among all national authorities involved in the EAW proceedings which (in their view) ensure the expediency and uniformity of action of the process. As a result of the close collaboration between the AG's office and Malta Police, guidelines on the procedures for issuing and executing EAWs have been produced for the use of the police.

The expert team considered the guidelines as a useful tool for practitioners dealing with EAWs.

## 7.3 Conclusions in respect of Malta's activities as an executing Member State

### 7.3.1 Issues

#### 7.3.1.1 - Certification process

The certification process by the AG is a common law feature of the Maltese EAW system. Unlike some common law jurisdictions, however, the certification is carried out by a judicial authority and, as a matter of principle, is therefore in compliance with the EAW. It is a procedure for recognising an EAW of another MS whereby the arrest takes place on the basis of a recognised EAW. In practice it seems that the AG's office also uses this competence to ensure that additional information (which, in its view, is required in order to ensure the efficient handling of the EAW before the court) is obtained from the issuing authority. Therefore certification might sometimes be postponed pending the receipt of such additional information. Whilst no difficulties had been signalled in this respect, failure to arrest the person where there is a risk of absconding should be avoided. It should also be noticed that the Framework Decision does not provide for the certification process and that under Article 15(2) of the Framework Decision it is the executing judicial authority that has the power to request supplementary information.

Under the EAW Framework Decision, an Article 95 alert is tantamount to an EAW. The purpose of this provision in the Framework Decision is to enable the immediate arrest of a person who is the subject of an alert, in conformity with the Schengen Convention. This is also acknowledged by Maltese legislation. However, the requirement of certification that is imposed by Maltese law also in the context of the execution of a SIS alert, could, in theory, pose problems with a view to efficient application of the EAW if, in case of a hit, the arrest is delayed because of a pending certification, and is furthermore not in conformity with the Schengen Convention.

## RESTREINT UE

It should be emphasised that the evaluation team has seen no evidence of such difficulties. On the contrary, the police guidelines stipulate that, in the event of a hit, certification will take place only after the person has been apprehended. The expert team was informed that, in practice certification will take place while the SIS alert on which a hit has occurred is being checked.

The expert team cannot, however, exclude a potential danger with the process of certification if it were to involve any delay in the execution of the EAW. Such danger would be significant if the requested person was about to leave Malta, for example. When asked about this, the prosecutors in the AG's office assured the evaluation team that there would not be any delay and that the Deputy Attorney-General or another member of staff would be available to certify incoming EAWs in the AG's absence. The AG did confirm, however, that when he was present he would take sole responsibility for certifying and would not delegate this task to any other staff (although legally this would be possible). It was observed that the staff of the AG's office is small, and the AG himself has a relatively wide remit (as public prosecutor, judicial authority, and chief legal officer for government). There may be merit in the AG allowing either his Deputy, or another member of the legal staff, to routinely certify incoming EAWs, as this may ensure that no delay is caused at this stage.

### 7.3.1.2 - Further information, clarifications

The expert team was advised that, for the period during which Malta had participated in the SIS One 4 All (since 1 September 2007), six Article 95 alerts out of the 14 addressed to Malta were either incomplete or outdated so that no arrest could take place.

The expert team considered that the attitude of certain foreign authorities of delaying the supply of information for weeks and even months is not very conducive to the smooth operation of the EAW. When SIS alerts are incomplete, the alerting authorities should do their utmost to provide the executing Member State with the missing information as soon as possible. Delays of several weeks are unacceptable and the police authorities of the executing Member State cannot be expected to keep an eye on the requested person pending the receipt of this missing information.

## 7.3.1.3 - 48 hour period

Some concerns were raised by the evaluation team that the 48 hour period was too short for the issuing state to obtain and transmit a translated EAW. It was observed, however, that this problem can be overcome by the issuing State issuing an Article 95 SIS alert. This will mean that the requested person is arrested immediately and the 48 hour time-limit to translate and transmit the EAW does not apply.

It was also observed that the fact that the requested person must appear in court within 48 hours and be provided with information at that stage is an important safeguard of his rights, and is something to be commended in that respect. At the first hearing, according to Maltese law, the identity of the person arrested must be confirmed, and he must be informed of the contents of the EAW and given information on consent.

Although the procedure had not been applied in practice up to the time of the evaluation, the 48 hour period for obtaining a translated EAW might be problematic when a provisional arrest is carried out on the basis of urgency (e.g. the requested person might abscond) prior to the receipt of an EAW.

## 7.3.1.4 - Grounds for non-recognition

The expert team noted that Maltese implementation of the grounds for non-recognition is not fully compliant with the Framework Decision and relies on bars which usually apply to the traditional extradition procedure. In particular, they noted that "extraneous considerations" and "prescription" are mentioned as mandatory grounds for refusal while in the Framework Decision they are not mentioned at all or are optional grounds respectively.

Malta has transposed the ground for non-recognition on the basis of statutory limitation by making it mandatory.

Furthermore, the (non exhaustive) transposition of Recital 12 of the Framework Decision concerning persecution as a mandatory ground for non-recognition appears to run counter to the spirit and the principles underlying mutual recognition and mutual trust within the European Union, although it has to be admitted that a number of Member States like Malta have found it necessary to make this an explicit ground for non-recognition.

# RESTREINT UE

The Framework Decision gives the optional ground for the judicial authority to refuse to execute the EAW where it relates to offences committed in whole or in part in the territory of the executing State (Article 4.7(a) of the Framework Decision). The Maltese implementing legislation makes it a mandatory ground for refusal in Articles 60.2 and 60.5 of the Order which limit the scope of the EAW to conduct of which no part occurred in Malta. Such a mandatory ground for refusal seems to be contrary to the reality of trans-national crime where in some circumstances another jurisdiction may be better placed to initiate proceedings. The expert team was informed that in practice even if a part of the conduct occurred in Malta surrender could be possible if the effects of the offence were felt in the issuing Member State. This practice is not reflected in the legislation.

## 7.3.1.5 - Obstacles to executing an EAW

The expert team expressed some concern about the individual's rights in relation to the legislative provision stating that bars to extradition and 'validity flags' can only be formally raised and dealt with by a magistrate, therefore not before the first hearing. The experts envisaged the case where a person, notwithstanding the existence of an objective bar to extradition, has to be arrested and then released after the first hearing.

The expert team was informed that in practice, if it is clear that there is a bar to extradition, SIRENE office would immediately inform its counterparts in the requesting state so that the alert would be withdrawn.

## 7.3.1.6 - Appeals procedures

The expert team noted that the two cases in Malta in which there were significant delays were attributable to proceedings before the Constitutional Court.

A point which arose during the meeting with the Chief Justice and Magistrates was that although constitutional cases used to be rare, they are now not uncommon. The expert team is of the view that a Constitutional appeal cannot be deemed to be an exceptional circumstance as foreseen in Article 17(7) of the Framework Decision and that provision should be made to ensure that constitutional cases in Malta do not delay EAW proceedings beyond the time limit set by the Framework Decision.

# RESTREINT UE

## 7.3.1.7 - Notification to Eurojust for breaches of time-limits

The experts team noted that, although missed deadlines have been reported to Eurojust, the Maltese implementing law has not transposed Article 17(7) of the Framework Decision so no provision has been made for informing Eurojust of breaches of 10, 60 and 90 day limits.

## 7.3.1.8 - Proportionality

The expert team shared the defence's concerns as regards the issue of EAWs for very minor offences which may result in deprivation of liberty for individuals which is disproportionate compared to the gravity of the offence.

## 7.3.1.9 - Compensation in cases of discharge

The experts pointed out that the issue of compensation in case of acquittal with regard to extradition cases is currently under discussion at the PC-OC Committee of the Council of Europe. They shared the view that a parallel debate should be started at EU level as regards financial compensation in cases of discharge following the execution of an EAW for the purpose of prosecution.

A point of discussion raised by the lawyers was the additional possibility of legal aid being provided in the issuing State from the moment of the arrest in the executing State, if appropriate. This theme might also be debated at EU level.

## 7.3.1.10 - Staffing/Personnel

The evaluation visit clearly showed that police and prosecutors within the AG's office are dedicated, experienced, and knowledgeable about the law and that there is a dedicated Magistrate who deals with extradition cases. It is the experts' view that all of this allows the development of a centre of expertise and good practice and makes it easier to communicate, coordinate, and respond quickly. The corresponding risk, however, is that the entire system would suffer from the absence of one of the persons concerned. In a small jurisdiction this may be difficult to avoid.

## 7.3.1.11 - Rules governing the use of languages

The Maltese authorities' expressed the wish to define criteria for a common linguistic regime including a limited number of languages to be used for issuing EAWs and for supplying supplementary information.

# RESTREINT UE

## 7.3.2 Good Practice

### 7.3.2.1 - Domestic co-ordination and flexible approach

There appeared to be very good working relationships between the prosecution and the police, defence, and magistrates, which assist the smooth operation of the system. The authorities in Malta appear to be co-ordinated and flexible in their approach, trying to assist other States where possible, which is to be commended. The prosecutors in the AG's office stated that even where an incoming EAW form had not been completed correctly (for example no box ticked, although it was clearly an offence which fell within the framework list) they would make any effort to execute the EAW.

### 7.3.2.2 - Communication with the issuing authorities

The expert team appreciated the practice in place within the Maltese SIRENE Office of spontaneously transmitting information about deduction of time from detention periods spent in prison because of the EAW. Such information is forwarded to the issuing authority as soon as the surrender decision has been taken.

## 8. RECOMMENDATIONS

### 8.1 RECOMMENDATIONS FOR MALTA

#### 8.1.1 As issuing Member State

The experts team had no remarks to make in relation to the Maltese issuing procedure.

#### 8.1.2 As executing Member State

Recommendation 1 - It is recommended that the Maltese authorities take care to ensure, in accordance with the current practice, that the execution of EAW and SIS alerts and the consequent arrest of persons is not delayed because of the certification by the AG (see 7.3.1.1).

# RESTREINT UE

Recommendation 2 - Adopt a flexible approach in those cases of provisional arrest, where a SIS alert has not been issued, as regards the 48 hour time-limit for receiving a translated EAW: the discharge of the person solely because of the lack of a translated EAW should be avoided. The receipt of an EAW in the language of the issuing State should be taken into consideration to avoid jeopardizing the execution procedure and every attempt should be made to obtain the information required by the law within 48 hours by other means (direct contacts with issuing authorities, recourse to Eurojust), while respecting the defendant's rights (see 7.3.1.3).

Recommendation 3 - Envisage addressing the issue of grounds for non-recognition in the light of the spirit of mutual recognition and mutual trust in order to have a position closely in line with the Framework Decision. In particular, consider amending the implementing legislation as regards the transposition of Article 4.7(a) of the Framework Decision, so as to make it an optional ground for refusal (see 7.3.1.4).

Recommendation 4 - Consider the possibility, at least in cases where there are manifest and objective grounds for refusal, of anticipating the Magistrate's intervention to raise the invalidity of the EAW's request with a view to avoiding the arrest. An amendment to the implementing law should be envisaged (see 7.3.1.5).

Recommendation 5 - Consider measures to prevent domestic national appeals before the Constitutional Court from hindering the surrender of requested persons within the time-limits provided for by the Framework Decision (see 7.3.1.6).

Recommendation 6 - Consider amending the implementing law as regards the transposition of Article 17(7) of the Framework Decision, so as to bring domestic law in line with current practice (see 7.3.1.7).

Recommendation 7 - Prevent the absence/unavailability of one of the specialised officials dealing with EAW from hampering the execution of EAWs. In particular, the involvement and training of one or more Magistrates and prosecutors in the AG's office should be envisaged (see 7.3.1.10).

# RESTREINT UE

Recommendation 8<sup>1</sup> - Update the Fiche Francaise in accordance with the latest amendments to the implementing legislation (see general conclusions).

## 8.2 RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 9 - Maintain regular contacts with the issuing authority by informing it about the main stages of the executing procedure and the content of the final decision as provided for by Article 22 of the Framework Decision (see 7.2.1.2).

Recommendation 10 - Consider the benefits of drafting guidelines outlining the issuing and executing procedures for the EAW, illustrating tasks and modus operandi of all the authorities involved. Recourse to charts might be advisable (see 7.2.2.1).

Recommendation 11 - The alerting Member State which is informed of a hit upon an alert it has issued and which is requested to supply missing information, should do so with urgency and within a few days at the utmost. Complete and up-to-date information should be supplied with the utmost urgency so as to allow the arrest of the person and to avoid defeating the purpose of the EAW Framework Decision (see 7.3.1.2).

Recommendation 12 - It is recommended that EAW should always be accompanied by Article 95 SIS alerts containing precise, up-to-date and comprehensive information (see 7.3.1.3 and 7.3.1.2).

Recommendation 13 - Take into account the principle of proportionality when issuing an EAW and avoid using EAWs for minor offences (see 7.3.1.8)

Recommendation 14 - It is recommended as a matter of good practice, regardless of the size of the country, that the greatest possible collaboration and co-ordination be encouraged at national level among all authorities involved in the issue/execution of EAWs (see 7.2.2.1 and 7.3.2.1).

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<sup>1</sup> The expert team was informed that after the evaluation visit Malta has updated the Fiche Francaise in accordance with Recommendation 8. The new version will be published on the Council EAW website.



# RESTREINT UE

Recommendation 15 - Encourage timely and accurate communication with the issuing State. In particular, the information on residual detention periods should be forwarded as soon as practicable by the competent executing authority (see 7.3.2.2).

Recommendation 16 - Update the Fiche Francaise in accordance with the latest version of the implementing legislation (see general conclusions).

## 8.3 RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 17 - Consider the possibility of introducing uniform rules governing the return of nationals (see 7.2.1.1).

Recommendation 18 - Consider the possibility of defining legal requirements regarding the proportionality principle in relation to the issue of EAWs (see 7.3.1.8).

Recommendation 19 - Envisage the possibility of holding a debate at EU level on the issues of compensation to be awarded in the event of discharge of the requested person and additional provision of legal aid in the issuing State, if appropriate (see 7.3.1.9).

Recommendation 20 - Consider the possibility of analysing the potential benefits of introducing common rules governing the use of languages, including a limited number of languages for EAW proceedings (EAWs, additional information) (see 7.3.1.11).

# RESTREINT UE

ANNEX A

## PROGRAMME OF VISITS

### Tuesday 15 January 2008

**9.30** Pick up from hotel  
**10.00–11.10** Presentation by Dr. Donatella Frendo Dimech LL.D., Attorney-General's Chambers, on domestic legislation implementing the European Arrest Warrant Framework Decision  
**11.00–11.20** Coffee Break  
**11.30–13.00** Court of Committal, Courts of Justice: Extradition Hearings  
**13.15–14.30** Lunch hosted by the Commissioner of Police  
**14.45–15.45** Presentation by the SIRENE Office – Police Inspector George Cremona L.P. and Police Sergeant Dr. Mario Cuschieri LL.D.  
**15.45–16.00** Coffee Break  
**16.00–17.00** Presentation by the EAW office – Police Superintendent Peter Paul Zammit L.P. and Police Inspector Dr. Domenic Micallef LL.D.  
**17.00** Return to hotel  
**19.45** Pick up from hotel  
**20.00** Dinner hosted by the Attorney-General

### Wednesday 16 January 2008

**9.30** Pick up from hotel  
**10.00–10.45** Meeting with the Attorney-General  
**11.00–11.45** Meeting and discussion with representatives from the Chamber of Advocates  
**12.00–13.20** Lunch Break  
**13.30–14.45** Meeting and discussion with the Hon. Chief Justice and members of the Judiciary  
**15.00–17.00** Cultural Tour  
**17.00** Return to Hotel

### Thursday 17 January 2008

**10.00-** Concluding Meeting ( Hotel Boardroom)

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## LIST OF PERSONS INTERVIEWED

### **The Attorney-General's Chambers**

Dr. Silvio Camilleri, the Attorney-General

Dr. Donatella Frendo Dimech, Senior Counsel for the Republic

### **The Judiciary**

Dr. Vincent Degaetano, the Chief Justice

Dr. Joseph Apap Bologna, Magistrate

Dr. Jacqueline Padovani, Magistrate

### **Malta Police**

Mr John Rizzo, Police Commissioner

Mr. Peter Paul Zammit L.P, Police Superintendent

Dr. Domenic Micallef, Police Inspector

Mr George Cremona L.P, Police Inspector

Dr. Mario Cuschieri, Police Inspector

Mr. Christopher Mangion, Police Constable

### **Ministry of Justice and Home Affairs**

Mr. Charles Deguara, The Permanent Secretary

Dr. Josette Zerafa, Director, EU Directorate

### **Chamber of Advocates**

Dr. Michael Sciriha

Dr. Joseph Giglio

Dr. Stefano Filletti

Dr. Franco Galea

Dr. Ian Farrugia



**LIST OF ABBREVIATIONS/GLOSSARY OF TERMS**

<b>ACRONYM ABBREVIATION TERM</b>	<b>ENGLISH EXPLANATION</b>
AG	Attorney-General
CCF	Corradino Correctional Facilities
EAW	European Arrest Warrant
EJN	European Judicial Network
ICCMU	International Co-operation in Criminal Matters Unit
IRU	International Relations Unit
MLA	Mutual Legal Assistance
SIS	Schengen Information System
UK	United Kingdom

GROUND FOR REFUSAL TO SURRENDER

<u>Legislative reference</u> ( <u>Legal Notice 320 of 2004 +</u> <u>amendments</u> )	<u>Grounds</u>	<u>Relevant provisions of the</u> <u>Framework Decision</u>
Articles 13 + 14	Rule of <i>ne bis in idem</i>	Article 3.2
Articles 13 + 15	Extraneous considerations	Recital 12
Articles 13 + 16	Prescription or lapse of time	Article 4(4) (optional ground for non-execution)
Articles 13 + 17	Age of criminal responsibility	Article 3(3)
Articles 13 + 18	Specialty	N/A
Articles 13 + 19	Earlier extradition from Member State	Article 28
Articles 13 + 20	Earlier extradition from non- member State	Article 21
Articles 13 + 21	Amnesty	Article 3.1
Articles 13 + 22	Death penalty	Recital 13

**Article 95 SIS Alerts  
received by Malta from 1 September 2007 until 14 January 2008**

<u>Requesting Country</u>		<u>Status</u>	<u>Annotation</u>
<u>Italy</u>	1	Awaiting surrender	(pending Proceedings)
<u>Italy</u>	2	Awaiting surrender	(on bail)
<u>Italy</u>	1	Extradition hearing	Appeal stage
<u>Italy (1); Federal Republic of Germany(1)</u>	2	Extradition hearing	(currently serving a sentence of imprisonment)
<u>Italy</u>	2	Extradition hearing	
<u>Italy</u>	6	pending	Awaiting supplementary Information

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<u>Italy</u>	3	Not traced in Malta	(removed prior to SIS Alert)
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### Malta as Issuing State

Year					
	Warrants	Surrender	No Surrender	Requested State	Remarks
04	0	0	0	0	
05	1	1	0	NL	NL requested art 5.3 guarantees
06	3	2	1	1 UK 1 NL 1 AT	NL requested art 5.3 guarantees; AT refused to prosecute its own national on VAT fraud (case pending)
07	3	1	1 refused  1 pending	1 FR; 1 IT 1 UK	FR surrendered  IT pending  UK refused after going into evidence compiled against defendant in criminal proceedings from which he absconded in Malta, that charges (brought in 2003) were amended to bring them in line with EAW. Charges were amended –as evidenced by documentation which was already before their Lordships, on 16 <sup>th</sup> May 2003 after subject was arraigned on 12 <sup>th</sup> may 2003. Moreover offences were Scheduled offences, Grievous bodily harm and thus there was a violation of the FD relating to the application of Art.2.2
08(-18/01/08)	2 (1 re-issue following UK refusal)		2 pending	2 UK	

### Malta as Requested State

Year	Warrants	Surrender	No surrender	Requesting State	Remarks
04					
05	5	3	2 (IT): 1 refused (in 08) ne bis in idem; 1 withdrawn	4 IT 1 BE	2 breach of time limits due to Constitutional Proceedings <sup>1</sup>
06	3	0	1 PL 1 AT: withdrawn 1 EL: withdrawn	PL AT EL	PL EAW not executed since subject not traced. AT & EL EAWs withdrawn.
07	9	6	3 (IT) not found	8 IT 1 DE	(5 pending return due to criminal proceedings/execution of sentence in Malta against them, Art.24.1) 1 (DE) decision delivered in 2008
08 (- 18/01/08)	2	1			1 decision expected on 29/01/08

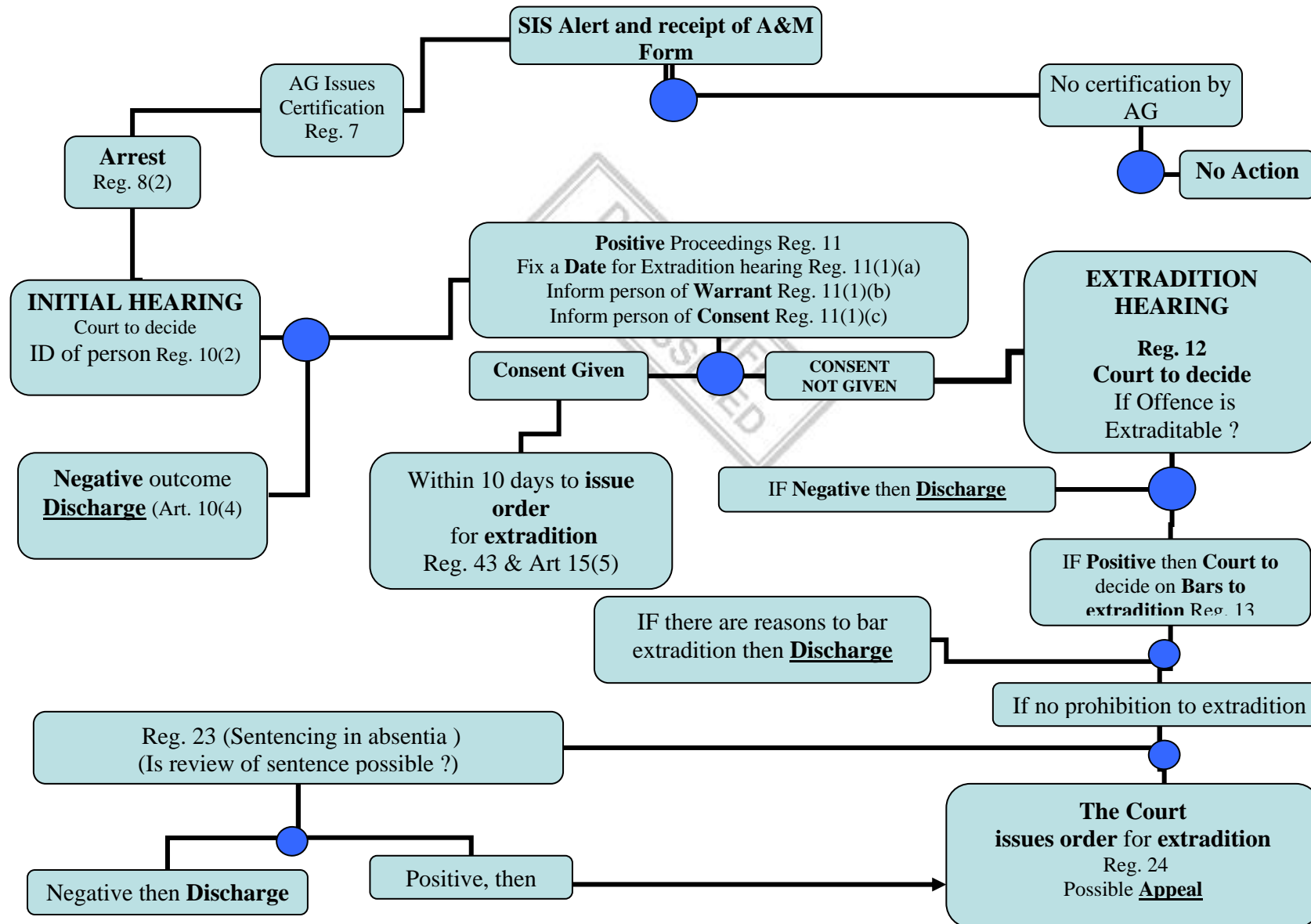
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<sup>1</sup> *Carmelo Borg and Geryl Serge vs Minister for Justice and Home Affairs and The Attorney General* (839/2005 decided on 6/10/05; appealed and decided on 8 Nov 2005: Court of Appeal); *Carmelo Borg and Geryl Serge v Minister for Justice and Home Affairs and The Attorney General* (1080/2005/1 decided 15 May 2006: Constitutional Court); *Carmelo Borg vs The Attorney General, Minister for Justice and Home Affairs and The Prime Minister*, 24 November, 2005 (53/2005/JRM, First Hall of the Civil Court (Constitutional Jurisdiction)).

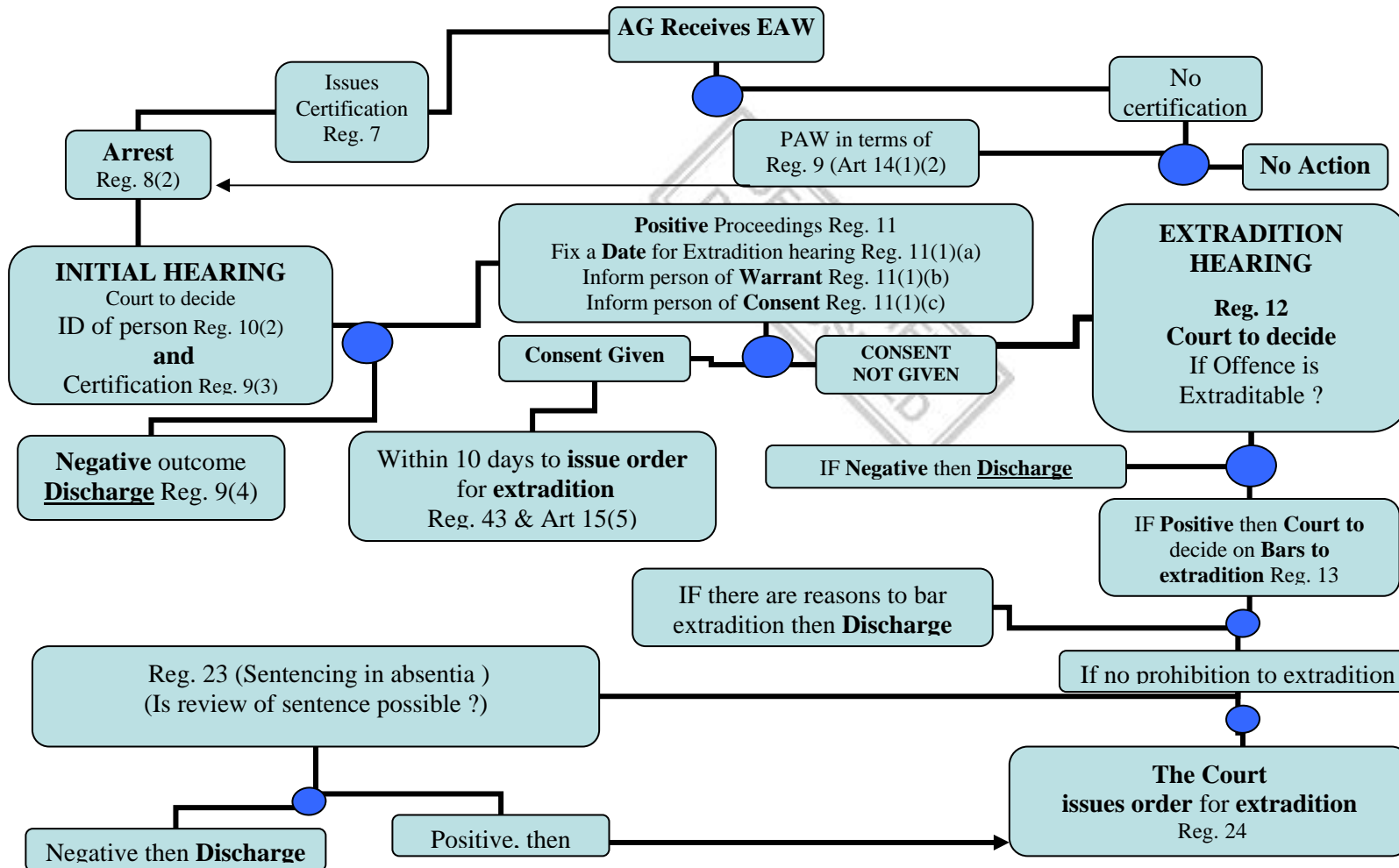


# SIS ALERT AND RESPECTIVE HIT

ANNEX F



## RECEIPT OF EAW BY AG



## Request for the issue of an EAW

