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**NOTE**

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from :	Maltese Delegation
to :	Working Party on Cooperation in Criminal Matters (Experts on the European arrest warrant)

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**Introduction**

This memorandum, drawn up by the Maltese Government, is meant to serve as a guide to assist other Member States of the European Union by explaining how Malta has implemented the Council Framework Decision of the 13th June 2002 on the European arrest warrant and the surrender procedure between Member States.

The memorandum is not intended to substitute legislative enactments but is meant to serve as a summary of their provisions. In cases of doubt reference should always be made to the legislation which has been annexed to this memorandum. The memorandum aims to provide Member States with an understanding of the procedure applied by Malta when a request for the surrender of a person from Malta is made using the European Arrest Warrant (EAW) procedures.

Consequently the memorandum does not apply to non-EU countries seeking the extradition of a person from Malta, in which case the Extradition Act, Chapter 276 Laws of Malta continues to apply together with any applicable orders made under its provisions. Similarly the said Act finds application in relation to those EU countries which do not apply the EAW procedure.

For further information it is advised to contact the offices named at the end of the Memorandum.

### **Date of Commencement**

The Deputy Prime Minister and Minister for Justice and Home Affairs made the Extradition (Designated Foreign Countries) Order (SL276/05) which transposes the Framework Decision into national law under the authority of the Extradition Act (Cap. 276). The Order applies to requests received or made by Malta on or after 7 June 2004 (which is also the date of commencement of the Order) for the return of a fugitive criminal to or from a scheduled country, or to persons returned to Malta from a scheduled country<sup>1</sup> in pursuance of a request made under the order .

### **Failure by other Member States to Implement the EAW**

If another Member State has not implemented the EAW and, therefore, is not listed as a scheduled country in terms of the Schedule to the Order, that State should continue to submit pre-EAW extradition requests. Malta will be in a position to process such requests although the applicable procedure would be that provided for in terms of the Extradition Act (Cap. 276) and, therefore, the simplified EAW procedure in terms of the order will not be applicable.

Malta retains the ability to issue pre-EAW extradition requests in relation to requests made by Malta on or after 7 June 2004 for the return of a fugitive criminal and to persons returned to Malta from a non-scheduled country. The Extradition Act (Cap. 276) will continue to apply in relation to non-scheduled countries.

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<sup>1</sup> "Scheduled country" means a country listed in Schedule 1 of the Order.

## **Date of Offence**

All requests made by Malta after 7 June 2004 will be in the form of EAW's irrespective of the date of the alleged offence. Similarly, Malta will accept and act on EAW's received after 7 June 2004 even if the alleged offence took place before that date. However, where a scheduled country has given notice that, as a requested State, it will apply its pre-EAW extradition legislation to acts committed before the date of commencement of its EAW legislation, Malta will continue to apply its pre-EAW extradition legislation with regard to that State.

## **When Malta is the Requested State**

### *EAW in respect of more than one offence*

Maltese law does not preclude dealing with an EAW issued for more than one offence. All the offences for which the person who is to be extradited is wanted should be listed on the same EAW.

In the event that more than one EAW is issued in respect of the same person, they will be treated as competing warrants and priority will be given to one of them. Consequently, the individual will be surrendered in respect of that alleged offence only and should the requesting authority wish to prosecute that person in respect of the other offence(s), a request for waiver of speciality according to the formalities prescribed by the Order, will be required.

Malta submits EAW's containing more than one offence and any Member State which finds this unacceptable should so inform Malta as early as possible.

## **Procedure for making a request for extradition**

### *Requests for prosecution*

Requests made to Malta for the surrender of a person for the purpose of prosecution must take the form of an arrest warrant which:

- (a) is issued by a recognised judicial authority of a scheduled country;

- (b) contains a statement that the person is accused in that scheduled country of an offence or offences specified in the warrant and that the warrant has been issued for purposes of the person's arrest and extradition to that scheduled country for the purpose of being prosecuted for the said offence(s);
- (c) contains the following information:
  - i. particulars including information sufficient to establish the person's identity and nationality;
  - ii. particulars of facts upon which, and the law under which, such person is accused, the legal description of the offence and a copy of the relative enactments or (if this is not practicable) a statement of the relevant law;
  - iii. particulars of any other warrant issued in the scheduled country for the person's arrest in respect of the offence(s) specified in the warrant;
  - iv. particulars of the sentence which may be imposed under the law of the requesting scheduled country in respect of the offence(s) if the person is convicted.

*Requests following conviction*

Requests made to Malta in cases where a person has been convicted must take the form of an arrest warrant which:

- (a) is issued by a recognised judicial authority of a scheduled country;
- (b) contains a statement that the person is alleged to be unlawfully at large after conviction of an offence or of offences specified in the warrant by a court in the scheduled country and that the warrant has been issued with a view to his arrest and extradition to the scheduled country for the purposes of being sentenced for the offence(s) or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence(s);
- (c) contains the following information:
  - i. particulars including information sufficient to establish the person's identity and nationality;
  - ii. particulars of the conviction;
  - iii. particulars of any other warrant issued in the requesting scheduled country for the person's arrest in respect of the offence(s);

- iv. particulars of the sentence which may be imposed under the law of the requesting country in respect of the offence(s), if the person has not yet been sentenced for the offence(s);
- v. particulars of the sentence which has been imposed under the law of the requesting scheduled country in respect of the offence(s), if the person has already been sentenced for the offence(s).

Each of the above arrest warrants (warrant for prosecution and warrant following conviction) is referred to as a 'Part II Warrant'.

In a case falling under Article 2.2 of the Framework Decision, in addition to a Part II Warrant meeting the requirements explained above, there must be a certificate from a judicial authority of the scheduled country certifying that the offence(s) in question fall(s) within one of the categories listed in Schedule 2 of the Order<sup>1</sup> and attracts the appropriate penalty.

The EAW form, Annexed to the Framework Decision, setting out the information required by the same form constitutes a Part II warrant.

Malta has one designated central authority. All EAW requests should be sent to the Attorney General's Chambers (details below) which also certifies the incoming requests.

The Attorney General is required to certify that the incoming request has come from an authority having the function of issuing arrest warrants in the requesting country. Further information may be sought from the requesting authority if necessary for the purpose of this certification.

All requests must be in Maltese or English or be accompanied by a translation into Maltese or English. A Part II warrant may be transmitted by any secure means capable of producing written records and under conditions permitting the ascertainment of its authenticity.

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<sup>1</sup> "Scheduled conduct" is a conduct in the list of conduct set out in Schedule 2 of the Order

Malta operates the Schengen Information System. An Article 95 alert is deemed to be a Part II warrant issued by the authority of a scheduled country, pending the receipt of the original in due and proper form and any information sent with the alert relating to the case is deemed to be included in the warrant.

In urgent cases, where the EAW information required has not yet been transmitted to Malta, a provisional arrest warrant may be issued by a Magistrate and executed by a police officer not below the rank of Inspector. The person arrested must be brought before the court within 48 hours at which time an EAW certified by the Attorney General must be produced, failing which, the person must be discharged.

The court will have the power to remand the person arrested to custody or on bail.

### **Arrest**

Once the Attorney General has certified the incoming EAW, it will be passed to the police who have the function to search, identify and arrest the person whose extradition is being requested.

A Magistrate may also issue a provisional arrest warrant as explained above. A person arrested in pursuance of a warrant will be brought as soon as practicable before the Court of Magistrates, which in no case will be later than forty-eight hours, and in default once an application is made to that effect by the person arrested, the said person must be discharged.

### **The Initial Hearing**

During the initial hearing the following documents must be produced, namely:

- i. the request for the return of the fugitive criminal by the scheduled country where the warrant was issued (referred to as a 'Part II warrant');

- ii. the certificate issued by the Attorney General to the effect that the authority which issued the Part II warrant has the function to issue such warrants in the requesting country. In the case of an arrest effected on the basis of an article 95 alert, a certificate by the Attorney General stating that the alert was issued at the request of an authority which has the function to request the issue of alerts, will be produced.

In default of these documents being produced before the court, once an application is made to that effect by the person arrested, the said person must be discharged. However, if the Court finds the information communicated by the authority which issued a Part II warrant to be insufficient to allow it to decide on surrender, it will request the necessary supplementary information subject to any time limit which it may lay down for the purpose.

During the initial hearing the Magistrate must, on a balance of probabilities, decide whether the person appearing before the court (the 'Court of Committal') is the person to whom the warrant refers. If the Court does not so find, then the said person must be discharged.

In the same hearing the Magistrate must:

- i. fix a date on which the main hearing is to commence which must not be later than 20 days from the date of the initial hearing;
- ii. inform the person of the contents of the warrant;
- iii. inform the person arrested that he may consent to return to the requesting scheduled country, in which case once the court is satisfied of the voluntariness of the said consent shall commit him to custody to await his return;
- iv. explain the procedure applicable once consent is given;
- v. explain that consent must be given before the court and is irrevocable;
- vi. upon an application of the person arrested, court may grant bail.

In these proceedings the requesting authority will be represented by the Executive Police who may be assisted by the Attorney General Chambers. The same arrangements apply to all subsequent legal proceedings.

## The Extradition Hearing

During the extradition hearing the Magistrate must decide whether the offence specified in the warrant is an extraditable offence.

### *Definition of an Extraditable Offence*

The following are extraditable offences:

#### *A. In an accusation case:*

1. An offence which occurs in the scheduled country and no part of which occurs in Malta and a certificate is issued certifying that the said conduct falls within the list in Article 2.2 of the Framework Decision and carries a maximum punishment of three years imprisonment (or other form of detention) or greater in the scheduled country.
2. An offence which occurs in the scheduled country, which would constitute an offence in Malta had it occurred in Malta and which carries a maximum punishment of 12 months' imprisonment (or other form of detention) or greater in the scheduled country.
3. An offence which occurs outside the scheduled country, which carries a maximum punishment of 12 months' imprisonment (or other form of detention) or greater in that country and in corresponding circumstances would constitute an extra-territorial offence in Malta punishable with a maximum sentence of 12 months' imprisonment (or other form of detention) or greater.
4. An offence which occurs outside the scheduled country and no part of it occurs in the Malta, which carries a maximum punishment of 12 months imprisonment (or other form of detention) or greater in that country and in corresponding circumstances would constitute an offence in Malta punishable with a maximum sentence of 12 months' imprisonment (or other form of detention) or greater.
5. An offence which occurs outside the scheduled country and no part of it occurs in Malta, which carries a maximum punishment of 12 months' imprisonment (or other form of detention) or greater in that country and the conduct constitutes or if committed in Malta would constitute the crime of genocide, a crime against humanity or a war crime.



*B. In a Conviction case*

1. An offence which occurs in the scheduled country and no part of which occurs in Malta and a certificate is issued certifying that the conduct falls within the list in Art 2.2 of the Framework Decision and a punishment of 12 months' imprisonment (or other form of detention) or greater has been imposed in the scheduled country.
2. An offence which occurs in the scheduled country, which would constitute an offence in Malta had it taken place in Malta, where a punishment of four months imprisonment (or other form of detention) or greater has been imposed in the scheduled country.
3. An offence which occurs outside the scheduled country, which in corresponding circumstances would constitute an extra-territorial offence in Malta punishable with a maximum punishment of twelve months' imprisonment (or other form of detention) or greater, when a punishment of four months imprisonment (or other form of detention) or greater has been imposed in the scheduled country.
4. An offence which occurs outside the scheduled country and no part of it occurs in the Malta, which in corresponding circumstances would constitute an offence in Malta punishable with a maximum punishment of twelve months' imprisonment (or other form of detention) or greater, when a punishment of four months' imprisonment (or other form of detention) or greater, has been imposed in the scheduled country.
5. An offence which occurs outside the scheduled country and no part of it occurs in Malta, where a sentence of four months' imprisonment (or other form of detention) or greater has been imposed in the scheduled country and the conduct constitutes or if committed in Malta would constitute the crime of genocide, a crime against humanity or a war crime.
6. If the issue is decided negatively then the court must discharge the person arrested, whilst if it decides the matter in the affirmative then it must determine whether any of the following bars to extradition subsist:
  - i. the rule of ne bis in idem;
  - ii. extraneous considerations;
  - iii. prescription or lapse of time;
  - iv. the person's age;
  - v. speciality;
  - vi. the person's earlier extradition to Malta from another scheduled country;
  - vii. the person's earlier extradition to Malta from a country other than a scheduled country;

- viii. amnesty;
- ix. death penalty.

If none of the bars to extradition applies the court must order the person's committal to custody to await his return.

The decision on surrender will be taken by the court within one month starting on the day when the person in respect of whom the Part II warrant was issued was arrested.

When a person is, therefore, committed to custody, the court, besides informing him that he will not be returned until after the expiration of seven days from the date of its order of committal, will also inform him that he may appeal to the court of criminal appeal and that, if he thinks that his return violates or may violate any of the dispositions barring the said extradition, or that his constitutional rights have been breached or that there has been a violation of any of his fundamental rights and freedoms, so as to justify a reversal, annulment or modification of the court's order of committal, he has the right to apply for redress.

In instances where the person is discharged from custody, the said person will remain in custody until the expiration of three working days from any such order. Where an appeal has been entered by the Attorney General, the person committed to custody must remain in custody until the appeal is disposed of or abandoned, or the Attorney General consents to his release.

### **The Appeal**

An appeal from an order committing a person to custody will be made, not later than four working days from the date of the order. The Attorney General may also appeal from an order discharging the person requested. Such an appeal must be made within three working days from the date of receipt of the records of the case. The appeal hearing will not, except with the consent of the Attorney General and the person requested, take place before the lapse of two working days after notice of the hearing has been given to the parties.

The decision by the Court of Criminal Appeal will be taken not later than one month starting on the day when an appeal is filed by the Attorney General or by the person in respect of whom the Part II warrant was issued.

## **Time for Extradition**

### *When return is ordered*

When a person's surrender is ordered and the person is not discharged by order of the Court of Criminal appeal or of any other court, he will not be returned to the requesting scheduled country before the lapse of seven days which commence to run with the day on which the order has been made.

### *When no appeal or other proceedings filed*

Where no appeal or other proceedings have been filed (and provided that the order for committal was not made following the person requested giving his consent to his return) the person requested must be surrendered to the scheduled country within ten days starting with the day on which the court makes the order, unless the court is informed that the requesting judicial authority has agreed to a later date in which case surrender must take place within ten days of that later date.

Failure to surrender the person requested within the said time-limits may, upon an application to that effect by the person requested, lead to the person's discharge unless reasonable cause is shown for such delay.

### *When an appeal or other proceedings filed*

Similarly, if the person committed to custody files an appeal or any other proceedings which may lead to the reversal, annulment or modification of the court's order and the outcome is that the person should be surrendered, the person must be returned to the scheduled country within ten days of the relative court's judgement.

In the case where there is established by law or there has been fixed by a court's order or judgement a time-limit within which such proceedings are to be instituted, or if the proceedings are withdrawn or abandoned, the ten day period commences to run with the date on which the time-limit would have lapsed or the said proceedings withdrawn or abandoned.

Where the court is informed that the requesting judicial authority has agreed to a later date for surrender, return must take place within ten days of that later date.

### **Consent to Extradition**

A person may consent to his surrender if consent is given before the court and is recorded in writing. If a person consents to his return he must also declare whether he waives the any right he would have (apart from the consent) not to be dealt with in the scheduled country for an offence committed before his return. Once given consent is irrevocable.

For consent to be valid in terms of the Order the person requested must be legally represented before the court at the time of giving his consent, or has been informed of his right to legal aid and having had the opportunity to apply for legal aid he has refused it or has failed to apply, or having applied for legal aid was refused it or after having been granted to him it was withdrawn.

Once consent has been given and the court assured of its voluntariness, all proceedings cease and the court must commit him to custody to await return. The court must then, within ten days, make an order for the person's surrender. The person must be surrendered within a further ten days of the court's order. Where the court and the requesting judicial authority agree to a later date the person requested must be surrendered within 10 days of that later date.

Failure to adhere to the prescribed time-limits may lead to the discharge of the requested person.

## **Competing Part II Warrants**

Maltese law provides that in the event of competing EAW's the decision as to which should take priority, is made by the Court which may order further proceedings on the Part II warrant under consideration to be deferred until the other warrant has been disposed of or, if an order for his return in pursuance of the warrant under consideration has been made, it may order the person's return to be deferred until the other warrant has been disposed of.

In deciding which EAW should take priority, the court must take into account the seriousness of the offence, the date on which each request was made, the nationality or citizenship of the person concerned and his ordinary residence, the place where each offence was committed (or was alleged to have been committed) and whether in the case of each offence, the person is accused of its commission (but not alleged to have been convicted) or is alleged to be unlawfully at large after conviction.

## **Competing Requests for Extradition**

### *When requested person has not been returned*

Where an EAW (i.e. a Part II warrant and a certificate by the Attorney General has been issued as afore-said) competes with an extradition request from a non-scheduled country and the person has not yet been returned in pursuance of the warrant, the decision as to which should take priority is made by the Minister responsible for Justice. In deciding the issue the Minister must take into account the seriousness of the offence, the date on which each request was made, the nationality or citizenship of the person concerned and his ordinary residence, the place where each offence was committed (or was alleged to have been committed) and whether in the case of each offence, the person is accused of its commission (but not alleged to have been convicted) or is alleged to be unlawfully at large after conviction.

## **Matters arising before end of extradition hearing**

### *Persons Serving Sentence in Malta*

If in the extradition hearing the court is informed that the requested person is serving sentence of imprisonment or other form of detention in Malta, the court may adjourn the extradition hearing until sentence has been served or surrender the person requested on a temporary basis.

### *Persons charged with offence(s) in Malta*

If during the extradition hearing the court is informed that the person in respect of whom a Part II warrant is issued is charged with an offence in Malta, which is based on the same act on which the Part II warrant is based, the court may adjourn the extradition hearing until the charge is disposed of, the charge is withdrawn, the proceedings in respect of the charge are discontinued, or the proceedings are put off sine die. However if before the court adjourns the extradition hearing the court has decided whether the person's return is barred by reason of the rule against ne bis in idem, the court must decide that question again after resumption of the hearing.

If during the extradition hearing the court is informed that the person in respect of whom a Part II warrant is issued is charged with an offence in Malta, which is based on an act other than the act on which the Part II warrant is based, if the court commits the person to custody to await his return and the person is still being prosecuted for the said offences, it may:

- (a) postpone the surrender of the person until the charge is disposed of, the charge is withdrawn, the proceedings in respect of the charge are discontinued, or the proceedings put off sine die: Provided that at any time after the decision to postpone, the court may grant bail to the person whose surrender has been temporarily postponed, so however that, when any of the events afore-mentioned occurs, the court shall forthwith order the re-arrest and surrender of the person; or
- (b) temporarily surrender the person under conditions agreed in writing with the authority which issued the Part II warrant.

If the court commits the person to custody to await his return and the person has been sentenced and has not yet served his sentence the court may postpone surrender until the person has served his sentence, or temporarily surrender the person under conditions agreed in writing with the authority which issued the Part II warrant.

### **Prosecution for other offences / Subsequent Surrender or extradition**

Malta does not intend to make notifications under Articles 27.1 and 28.1 of the Framework Decision.

### **Outgoing Requests**

A EAW may be issued by a Magistrate in Malta upon an application from a police officer not below the rank of inspector and provided that the Attorney General has given his consent to the issue of the warrant and that there are reasonable grounds for believing that the person requested has committed an extraditable offence or that he is unlawfully at large after conviction of an extraditable offence by a court in Malta.

## Contacts

Questions relating to the law implementing the Framework Decision, practicalities of the new system, pre-EAW requests or policy issues should be addressed to the Attorney General's Chambers (International Co-operation in Criminal Matters) and the International Relations Unit with the Police. The following are the contact details:

Address: Attorney General's Chambers  
(International Co-Operation in Criminal Matters)  
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