



Council of the  
European Union

133713/EU XXV. GP  
Eingelangt am 21/02/17

Brussels, 21 February 2017  
(OR. en)

14069/10  
DCL 1

GENVAL 10

#### DECLASSIFICATION

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of document:	ST 14069/10 RESTREINT UE
dated:	27 September 2010
new status:	Public

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Subject:	<b>EVALUATION REPORT ON THE FIFTH ROUND OF MUTUAL EVALUATIONS "FINANCIAL CRIME AND FINANCIAL INVESTIGATIONS" REPORT ON MALTA</b>
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Delegations will find attached the declassified version of the above document.

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# RESTREINT UE



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OF THE EUROPEAN UNION**

**Brussels, 27 September 2010**

**14069/10**

**RESTREINT UE**

**GENVAL 10**

**EVALUATION REPORT ON THE**  
**FIFTH ROUND OF MUTUAL EVALUATIONS**  
**"FINANCIAL CRIME AND FINANCIAL INVESTIGATIONS"**  
**REPORT ON MALTA**

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## 1. Introduction

At its meeting on 17 June 2008, the Multidisciplinary Group on Organised Crime (MDG) decided that the subject of the fifth round was to be "financial crime and financial investigations". The scope of the evaluation covers numerous legal acts relevant to countering financial crime. However, it was also agreed that the evaluation should go beyond examining solely the transposition of relevant EU legislation and take a wider look at the subject matter <sup>1</sup>, seeking to establish an overall picture of a given national system. On 1 December 2008 a detailed questionnaire was adopted by the MDG <sup>2</sup>.

The importance of the evaluation was emphasised by the Czech Presidency when the judicial reaction to the financial crisis was being discussed <sup>3</sup>. The significance of the exercise was once again underlined by the Council when establishing the EU's priorities for the fight against organised crime based on the OCTA 2009 and the ROCTA <sup>4</sup>.

Topics relating to the evaluation, in particular the improvement of the operational framework for confiscating and seizing the proceeds of crime, were mentioned by the Commission in its Communication on an area of freedom, security and justice serving the citizen <sup>5</sup>.

The most recent strategic document, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens" <sup>6</sup>, also attaches great importance to economic crime and corruption and other related criminal phenomena and sets out objectives which to a large extent correspond to the scope and the aims of the evaluation.

Experts with substantial practical knowledge in the field of financial crime and financial investigations were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG.

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<sup>1</sup> 10540/08 CRIMORG 89

<sup>2</sup> 16710/08 CRIMORG 210

<sup>3</sup> 9767/09 JAI 293 ECOFIN 360

<sup>4</sup> 8301/3/09 REV 3 CRIMORG 54

<sup>5</sup> 11060/09 JAI 404

<sup>6</sup> 5731/10 CO EUR-PREP 2 JAI 81 POLGEN 8

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At its meeting on 17 March 2009 the MDG discussed and approved the revised sequence for the mutual evaluation visits<sup>1</sup>. Malta is the tenth Member State to be evaluated during the round.

It is planned that the experts nominated by Member States should be accompanied each time by experts from the Commission (JLS and OLAF), Europol, Eurojust and the Council Secretariat.

The experts charged with undertaking this evaluation were Ms Kamila Brabcova (Detective, Unit Combating Corruption and Financial Crimes, Police of the Czech Republic - Police Presidium, Czech Republic), Capt. Gian Luigi Nanni (OIPC - INTERPOL, Italy) and Mr Marco Rehorst (Policy Adviser, Ministry of Justice, Law Enforcement Department, the Netherlands).

Three observers were also present: Mr Stefan de Moor, (OLAF, Commission), Ms Ritva Sahavirta (Eurojust) and Mr Carlo van Heuckelom (Europol), together with Mr Guy Stessens and Mr Michal Narojek from the General Secretariat of the Council.

This report was prepared by the expert team with the assistance of the Council Secretariat, on the basis of their findings during the evaluation visit, which took place from 17 to 20 May 2010, and Malta's detailed and helpful responses to the evaluation questionnaire.

## 2. National system and criminal policy

Malta is a small jurisdiction in comparison to other EU Member States. This is reflected in the size and internal organisation of its authorities, as well as in the cooperation model, which is based on personal relations between officers.

### 2.1. Specialized units

#### 2.1.1. Investigative authorities

##### 2.1.1.1 The Police

The police is the leading investigative authority in Malta. It is a service of 2000 officers, supported by 250 civilian employees. The country is divided into two community policing regions.

The main objectives of the force are listed in the Police Act:

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<sup>1</sup> 5046/1/09 REV 1 CRIMORG 1

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- (a) to preserve public order and peace, to prevent the commission of offences, to promote and enforce the observance of the laws, as a first guarantee of the rights of all persons in Malta, even before action is needed through the judicial system to repress, sanction or remedy any breach;
- (b) to respond immediately to any request for the protection and intervention of the law;
- (c) to apply the law without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status;
- (d) to promote the orderly and peaceful coexistence of all persons in Malta, paying due attention not only to private property rights but also to public property;
- (e) to seek to protect the environment as part of the common good;
- (f) to assist, within reasonable limits, any person seeking the help of a police or other public officer, even though the ultimate responsibility to provide such help may not lie with the Force;
- (g) to perform honestly and effectively all those duties assigned to it by the Act or by any other law.

The police are led by the Commissioner of Police, who is appointed by the Prime Minister and has the command, direction, management and superintendence of the Force.

The police have within their General Headquarters an Economic Crimes Unit (ECU).

The ECU is composed of an Assistant Commissioner, a Police Superintendent, five Police Inspectors dealing with the investigation and prosecution of financial crime in general, as well as two other Police Inspectors assigned to money-laundering investigations. The latter two make up the Money-Laundering Unit (MLU). On average, each Police Inspector has a complement of one sergeant and two constables.

Whilst no specific qualifications are required to be a member of this particular unit apart from the general basic requirements, a number of police officers stationed at the Economic Crimes Unit are in possession of degrees and other qualifications. Thus, for instance, one police inspector is an accountant by profession.

The ECU officers have the same powers as any other police officer within the Malta Police Force. These include the powers of arrest, detention of arrested persons for a maximum period of 48 hours and the power to obtain data regarded as secret or covered under data protection measures.

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In 2009, the unit investigated 435 cases, of which 147 were fraud-related, 52 concerned misappropriation and 20 concerned forgery.

In 2009 there were 19 VAT-related investigations, whereas in 2008 there were seven cases of this kind. The unit dealt with 21 money-laundering cases. The majority of them (17) were triggered by the FIAU.

The Malta Police Force is said to have been designated as the national Asset Recovery Office (ARO)<sup>1</sup>. The ARO is being set up within the Economic Crime Unit and is made up of two investigative officers, assisted by human and material resources as required from within the Economic Crime Unit. This Unit is assisted by a division dealing with international cooperation in criminal matters (ICCMD) of the Office of the Attorney General. It may also call upon resources from within the Internal Audit and Investigations Directorate (IAID), which is a separate agency, described below, when specialised audits and accounting expertise is required. Moreover, in investigating a crime, the Malta Police Force may invite experts, including forensic accountants appointed to assist in the tracing and / or identification of assets.

The activities of the ARO within the Malta Police Force are complemented by a Asset Management Unit (AMU) established by the Courts of Justice.

It is also envisaged that the Criminal Court Registrar will be appointed as the designated official to draw up the report, as requested by the Court, with regard to assets belonging to the person against whom a freezing order has been issued. The Criminal Court Registrar takes action based on court orders in cases where the confiscated assets are physically in the Registrar possession.

The AMU cooperates with the relevant authorities in order to:

- obtain information it needs to draw the reports ordered by the court;
- put in place all mechanisms which would ensure the actual execution and confiscation of assets in favour of the Government;
- pass on the relevant details to the appropriate entities to ensure that confiscation of assets is carried out in the proper manner.

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<sup>1</sup> The General Secretariat of the Council has not yet received the official notification, as stipulated in Art. 8 (1) of the Decision.

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The police do not themselves have the means to use investigative techniques like wiretapping. These techniques are deployed, if approved by the Minister for Home Affairs, by a security service, which is separate from the police.

## 2.1.1.2 The Customs Division

The Customs Division within the Ministry of Finance, Economy and Investment carries out its own investigations in cases involving evasion of customs or excise duties and trade in prohibited goods, information normally being shared with the Police Economic Crimes Unit. The Customs Division is also responsible for the enforcement of border controls on cash movements. Its actions and powers are governed, *inter alia*, by the Import Duties Act and Excise Duty Act, as well as the External Transactions Act.

The Division employs about 400 persons, 60 of whom work for the enforcement section, supported by an intelligence unit dealing with both passengers and cargo.

The officers have powers to arrest and, under certain conditions, conduct searches. However, private property cannot be searched. The service conducts administrative investigations, so certain actions, such as interrogations, have to be undertaken by the police. Customs officers have no right to apply special investigative techniques.

The service is partially funded by fines collected, as one third of their value goes to its budget.

In 2009 the service analysed about 55000 import declarations and 16000 export declarations. More than 15000 transshipment units were checked by the Container Monitoring Unit. In 2009, 20 drug-related cases were referred to the police for further investigations, as well as six cases related to Currency Control Regulations. There were also 143 customs infringements reported to the police in 2009.

## 2.1.2. Prosecuting authorities

In terms of Maltese law, the prosecutor before the Criminal Courts and the Court of Criminal Appeal is the Attorney General, whilst the police prosecute before the Magistrates' Courts.



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In practice, the police acts as a prosecuting service in cases where the crime in question is punishable with up to 10 years of imprisonment. The prosecution of cases involving infringement of customs legislation is also delegated to the Malta Police Force.

Certain prosecutions initiated by the police require the prior consent of the Attorney General.

In the remaining cases there is no formal requirement for the police to consult on charges with the Attorney General's Office. However, in practice this does happen.

The Office of Attorney General is established under the Constitution, whereby the Attorney General is appointed by the President, acting on the advice of the Prime Minister. The appointed person is eligible to hold office as Attorney General if he is qualified for appointment as a judge of the Superior Courts.

In the exercise of his powers to institute, undertake or discontinue criminal proceedings, as conferred on him by the law, which authorises him to exercise that power using his individual judgment, the Attorney General is not subject to the direction or control of any other person or authority.

The Attorney General vacates his office when he attains the age of sixty-five years and, like a judge of the Superior Courts, he may not be removed from office except by the President upon a resolution by the House of Representatives which must attain not less than two-thirds of the votes of all the members of Parliament. Such a request for removal would have to be based on proved inability to perform the functions of the office, or proved misbehaviour.

It is also the function of the Attorney General to advise the government on proposed legislation, to draft the necessary bills, and to attend the sittings of the House of Representatives during the passage of such bills in order to advise the Ministers concerned and draft any amendments which might be deemed necessary. In view of the bilingual publication of all legal enactments, the Attorney General's Office is also responsible for the translation of all laws <sup>1</sup>.

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<sup>1</sup> A more detailed description of the service is available here:  
<http://www.mjha.gov.mt/justice/attorneygeneral.html>

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Within the Attorney General's Office there is a division which, besides dealing with international cooperation in criminal matters (ICCMD), is also entrusted with assisting the police both by offering legal advice and by filing judicial acts before the Criminal Court to obtain the necessary precautionary / coercive orders. Once a person is arraigned before the Court, the case is handled by a prosecutor from the Prosecution Unit of the Attorney General's Office, although officers of the ICCMD assist as required. The ICCMD is composed of two lawyers.

Two prosecutors who deal with economic crimes do not constitute a separate unit nor have any extra powers. Moreover, no particular additional expertise is required for dealing with financial activities.

## 2.1.3. Other services

### 2.1.3.1 The Financial Intelligence Analysis Unit

The Financial Intelligence Analysis Unit (FIAU) is set up in accordance with Article 15 of the Prevention of Money-Laundering Act. It is responsible for the collection, collation, processing, analysis and dissemination of information with a view to combating money-laundering and the funding of terrorism. The FIAU is a member of the FIU.NET.

The unit is governed by a Board of Governors and a Director. The Board sets out the policy of the FIAU, whereas the Director executes the policy.

The Director is assisted in his duties by three financial analysts, a legal and international relations officer, a compliance officer and two administrative support officers.

The FIAU is an agency set up by national law. Although the Unit falls within the structures of the Ministry of Finance, the Economy and Investment, the law provides for its full autonomy in operational activities.

On an annual basis, the Unit presents a report of its operations and a copy of its annual accounts, certified by auditors, to the Minister of Finance, the Economy and Investment, who, in turn, tables a copy of the report before the National Parliament <sup>1</sup>.

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<sup>1</sup> The annual reports are available here: <http://www.fiumalta.org/Annual-Report>.

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The Board of Governors is composed of four members, appointed by the Minister of Finance, the Economy and Investment from within the Office of the Attorney General, the Central Bank of Malta, the Malta Financial Services Authority and the Malta Police Force.

All the members of the Board of Governors hold senior positions within their respective authorities. The Board is composed of the Attorney General, who serves as Chairman, the Head of the Financial Stability Department within the Central Bank of Malta, who holds the position of Deputy Chairman, the Registrar of Companies and an Assistant Commissioner of the Malta Police Force.

The Board meets as often as necessary or expedient, but not less than ten times a year. The meetings of the Board may be called by the Chairman on his own initiative or at the request of any two of the other members or at the request of the Director.

The Director is entitled to attend the meetings of the Board and to take part in the discussions, but has no right to vote.

The Board is responsible for the policy to be adopted by the Unit and to be executed and pursued by the Director, and ensures that the Director carries out that policy accordingly. The Board is also responsible for advising the Minister, as provided in Article 16(1)(g) of the Law, which says that the FIAU has to compile statistics and records, disseminate information, make recommendations, issue guidelines and advise the Minister on all matters and issues relevant to the prevention, detection, investigation, prosecution and punishment of money-laundering or funding of terrorism offences.

The service is divided into: the Financial Analysis Section, responsible for the analysis of suspicious transaction reports and preparation of analytical reports; the Compliance Section, which monitors and ensures compliance with relevant money-laundering legislation by subject persons; the Legal and International Relations Section, which advises on legal matters and manages the international aspects of the Unit's functions; and the Administration and IT Section.

The FIAU is responsible for the collection, collation, processing, analysis and dissemination of information with a view to combating money-laundering and the funding of terrorism. In fulfilling its mandate the FIAU performs a number of functions. The core function of the FIAU is to receive Suspicious Transaction Reports (STRs), analyse them after collecting additional information, draw up analytical reports, and, where a reasonable suspicion of money-laundering or financing of terrorism arises, forward the analytical report to the police for further investigation.

The Commissioner of Police details a police officer not below the rank of Inspector to act as a liaison officer to liaise with the Unit.

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Another important function of the FIAU is the monitoring of reporting entities' compliance with the Prevention of Money-Laundering and Funding of Terrorism Regulations. The FIAU is also responsible for cooperating and exchanging information related to money-laundering or the financing of terrorism with other supervisory authorities, both domestic and foreign, and financial intelligence units situated outside Malta.

The most significant power of the FIAU is the power to require information from any entity in Malta. In cases where suspicion exists of money-laundering or financing of terrorism, or on receipt of an STR, the FIAU may demand information deemed to be relevant and useful for the purposes of pursuing its functions from:

- the reporting entity suspected of having been used for money-laundering or the financing of terrorism;
- the reporting entity drafting the report;
- the Malta Police Force;
- any government ministry, department, agency or other public authority;
- any supervisory authority;
- any other person (natural or legal).

Other powers include:

- the power to delay the execution of a transaction deemed to be linked to money-laundering or to the financing of terrorism for 24 hours;
- the power to impose administrative penalties on reporting entities in the event of non-compliance with the Prevention of Money-Laundering and Funding of Terrorism Regulations;
- the power to require the closure of a branch or subsidiary of a credit institution in certain circumstances laid out in the Prevention of Money-Laundering and Funding of Terrorism Regulations.

The Courts of Justice assist the FIAU by sending a copy of the freezing order as proclaimed by the Courts, which the Registrar publishes in the Government Gazette. This is done so that the FIAU may, on its own website, inform all interested parties about the Court's freezing order in real time and avoid unwarranted repercussions which might occur between the freezing order and the date of publication.

## 2.1.3.2 The Internal Audit and Investigations Directorate

The Internal Audit and Investigations Directorate (IAID) is governed by the Internal Audit and Financial Investigations Act. It was set up in 2000. It is a self-contained, independent unit within the Cabinet Office, the Office of the Prime Minister. As from July 2003, when the Act entered into force, the Division has had legal status.

It is headed by a Director and has two separate and distinct functions: financial investigations and internal audit.

The two terms are explained in Part I of the Act.

"Financial investigation" <sup>1</sup> means in-depth examination of all circumstances relative to irregularities and cases of suspected fraud, including corruption of public officers, and, in that regard, the acquiring of records and/or information and the carrying out of related assessments, analysis and recommendations, such "financial investigation" being limited in scope to the possible financial implications of such an irregularity or suspected fraud.

"Internal audit" means an independent, objective assurance and consulting activity designed to add value and improve the operations of auditees, helping the auditee to accomplish its objectives by bringing a systematic, disciplined approach to evaluating and improving the effectiveness of risk management, control, and governance processes.

According to the Act, an internal audit in such a manner as may be prescribed by regulations may be carried out in any department of government or any entity falling under the supervision of Permanent Secretaries, for the purpose of assisting them in the effective discharge of their duties.

A financial investigation may be carried out in terms of the provisions of the Act in any department of government and in any other public or private entity which is in any way a beneficiary, debtor or manager of public funds, for the purpose of protecting public funds against irregularities and fraud, or otherwise to assess such public or private entities' liability to contribute to such funds.

In this context, "irregularity" and "public funds" are understood as follows: irregularity means any act or omission which unlawfully diminishes public funds and whatever is not consonant with the proper management thereof.

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<sup>1</sup> In the report the term "financial investigations" is understood more broadly and is not limited to the scope of the definition from the Internal Audit and Financial Investigations Act

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Public funds include funds that government receives, pays (including funds to local councils) or is required to manage under Malta's international obligations, or any other public funds arising under any other law.

There is the Internal Audit and Investigations Board, appointed by the Prime Minister for such period as the Prime Minister may determine, and directly responsible to him.

The Board is composed of:

- (a) the Secretary to the Cabinet as Chairperson;
- (b) the Director;
- (c) the Permanent Secretary in the Ministry of Finance;
- (d) a person of recognised standing in the accounting and/or auditing profession, who is not a public officer; and
- (e) one other member:

At least two members must have expertise in disciplines related to public-sector financial management.

The Board meets at least quarterly.

The Board has the following functions:

- (a) to serve as an independent and objective body to monitor the public internal financial control function in Malta;
- (b) to oversee the work of the Directorate;
- (c) to safeguard the continued independence of the Director and officers of the Directorate;
- (d) to endorse or otherwise plans, budgets and schedules as proposed by the Director for the proper administration of the Directorate;
- (e) to require the Directorate to carry out specific tasks as provided under the Act, as and when necessary;
- (f) to set policies, procedures and methods for the proper functioning of public internal audit and for the carrying out of financial investigations.

IAID officers are entitled to enter any premises of an auditee for the purpose of conducting a financial investigation, where they have reason to suspect that irregularities and/or fraud have occurred or are occurring. Such entry must take place during the daytime.

If access is needed to any premises occupied in whole or in part for the purpose of habitation, such access requires the prior issue of a magistrate's warrant.



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The officers may require the auditee to produce any books, records, files, accounts, documents or information, including any computer data in any form or part thereof, including contracts, bills, vouchers and receipts relating to them, and, if deemed necessary by the Director, they may take such documents for the Director to retain in the original.

Investigative work includes:

- i. Gathering evidence (documents and interviews);
- ii. Documenting the evidence;
- iii. Determining the techniques used to perpetrate the fraud and the extent of the fraud;
- iv. Evaluating the case and drawing up the report.

Whenever, and as soon as, the Director firmly establishes the existence of suspected cases of irregularities and/or fraud concerning the responsibilities of the auditee under review, the Director, if he is of the opinion that the irregularity, if proved, would constitute a criminal offence, must immediately inform the Attorney General.

Otherwise, if the Director is of the opinion that the irregularity is of an administrative nature, he informs the Permanent Secretary of the auditee.

## 2.2 Training

As far as the police are concerned, there is no separate training scheme devoted to financial investigations. The basic training for constables, however, which takes about nine months, as well as two-week "refreshment" training courses in which each officer participates every three years, cover topics such as fraud, corruption, money-laundering and protection of intellectual property.

Officers from within the ECU regularly attend training seminars allowing them to keep abreast of developments in this field both of an investigative and of a prosecutorial nature. Moreover, the fact that officers from the Office of the Attorney General are working side by side with the Malta Police Force serves to provide constant training and harnessing of expertise.

The judiciary receive training in various aspects of the law, organised by the Judicial Studies Committee (JSC). However, no comprehensive training scheme for members of the judiciary devoted to financial crime and financial issues was presented to the evaluators. It seems that officers, especially prosecutors, rely on their own initiative to get external training.

The IAID has developed a course on fraud. This course is also attended by police personnel and personnel from other organisations dealing with the fight against financial crime. The idea is that the course will be used by attendees for the training of personnel within their own organisation.

It was also underlined that significant efforts were made by the Board of Governors, the Director and staff of the FIAU to contribute to addressing the increased demand for guidance and assistance to subject persons in adhering to their legal obligations. In fulfilling this commitment, FIAU representatives participated in various seminars and training sessions addressing the financial and non-financial sector. Indeed, staff of the FIAU and members of the Board of Governors participated as speakers in awareness sessions organised by the industry, by supervisory authorities in conjunction with supervisory bodies and by international bodies.

Financial crime is often a topic in international events, where Maltese authorities actively participate. Several events devoted to the issue have been held in Malta, including a FIU.NET workshop and an International Financial Crime Forum conference, where delegates from Europe, the Middle East and Asia were present. Maltese officers also benefit from international events of this kind to enhance their skills.

## 2.3 Criminal policy

There is no overarching national strategy on crime or, specifically, on financial investigations or asset recovery. With some exceptions, the evaluated authorities do not have strategies or action plans driving their actions and established goals to be achieved.

Certain solutions designed to deprive criminals of their assets can be found in the Criminal Code. They include the extended power of confiscation, regarding which the law says that, where it is established that the value of the property of the person found guilty of a relevant offence is disproportionate to his lawful income, and the court is fully convinced on the basis of specific facts that the property in question has been derived from the criminal activity of that person, that property is liable to forfeiture.

The Maltese authorities acknowledge that one of the best ways to tackle crime is to deny the criminals access to funds and assets which could be used to pursue their illicit activities. Therefore, confiscation of criminal assets is said to be one of the main aims of investigations.



On the other hand, the authorities admit their actions are not proceeds-oriented. There is no official investigation or prosecution policy to trace crime proceeds. Priorities are awarded to selected crimes and not the criminal assets as such.

The investigations are proceeds-oriented to a limited extent when inexplicable proceeds come to the fore during police investigations into criminal offences and a money-laundering investigation is initiated. Moreover, money-laundering and tracing of assets are said to be particularly frequent in relation to cases related the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance.

The only strategic document presented to the evaluators is the National Anti-Fraud and Corruption Strategy. The document explains the reasons why it was adopted; fraud and corruption are said to have serious consequences on any society, and if left unchecked there would be both economic and social negative effects. Over the years, legislation was developed in the area and a number of legal instruments have been set up.

Moreover, there are various international conventions on fraud and corruption to which Malta is a party. Malta's membership of the European Union has also brought up a requirement for the Island to protect the Community's financial interests. All these obligations, in the opinion of the Maltese authorities, increase the need for a National Anti Fraud and Corruption Strategy.

Apart from measures to be taken, as described below, the document defines - referring to legal acts of different kind - the following terms: irregularities, fraud and corruption. It also contains a detailed list of legal, administrative and institutional measures undertaken by the Maltese Government.

The aim of the Strategy is to set up a normative, institutional and operational framework for effectively fighting fraud and corruption in Malta, reflecting both local requirements and international obligations.

The intention is also to increase cooperation, coordination and communication between national authorities and with the EU institutions, as well as to reduce the incidence of irregularities, fraud and corruption as much as possible.

The main thrusts of the strategy are:

- prevention and deterrence of irregularities, fraud and corruption;
- detection of irregularities, fraud and corruption at an early stage;

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- identification and investigation of irregularities, fraud and corruption in the most effective manner;
- sanctioning and prosecution of irregularities, fraud and corruption;
- encouragement and facilitation of transparency, reporting and whistle-blowing.

The strategy has four main objectives:

## *1. Capacity-building*

The Strategy underlines that the fight against irregularities, fraud and corruption can only be effective and efficient if all the necessary skills and tools are available. Thus, it is envisaged that one of the main objectives is that the skills and tools required within all of the national partners be acquired or built up over a period of time, to make possible a professional and competent approach.

## *2. Communication Strategy*

One of the key tools in the fight against irregularities, fraud and corruption is a public relations strategy. This must, according to the document, include approaches to informing the public on the aims of the strategy, the wider public sector on their obligations and developed communication channels, and it must also target the people most involved in the processes most relevant to the initiative, namely managers and accounting officials.

The strategy must also provide secure and confidential means of making possible and encouraging the inflow of information to the relevant national partners.

## *3. Maximisation of national cooperation*

Cooperation and coordination between the national partners is imperative for the success of the strategy. This objective must include strategies that make it possible to build structures and systems that encourage and facilitate collaboration at an early stage of any investigation. In this way efficiencies, effectiveness and synergies would be generated, to the benefit of all.

## *4. Maximisation of international cooperation*

The Strategy says that the economic and business climate of today is an open system, with free movement of persons, capital, goods — and also crime. Cross-border irregularities, fraud and corruption are a reality that can only be addressed through collaboration with international partners. Thus, the strategy must address this area, through increased collaboration with international partners, not only to satisfy the international obligations of the country, but also to streamline and exploit all areas of collaboration.

The Strategy is complemented by an Action Plan, which outlines the specific actions, their assigned responsible body and the time-frames for their implementation. The timeline started to run immediately following the date of the adoption of the Strategy.

The tasks are assigned to specific authorities or to one of four sub-committees, which comprise bodies like the police, the customs service and FIAU.

## 2.4 Conclusions

The Maltese system seems to have structures and the potential to fight economic crime effectively. Due to the small size of the island, all officials involved are in touch with each other and there appears to be sound cooperation between the various authorities. As it is a small jurisdiction, the authorities have a direct overview of the crimes that take place on the island and are in a position to react to them without having to prioritise investigations and/or prosecutions on criteria other than operational ones.

This partially explains why the Maltese authorities are not, except in the fields of corruption and fraud, guided by any national strategy or plan. It leads however to the general assessment that the Maltese services, especially the police and the prosecution, are very reactive. Their activities are not based on any comprehensive threat assessments or analysis anticipating future criminal trends.

Apart from political decisions, the problem seems to be related to lack of capacity-building and the attitude presented by the senior management. For example, the ECU has highly motivated and dedicated personnel, but there seems to be a complete absence of a concerted strategy, there is no vital management information available, and no performance management is implemented.

The experts were told that no automated case-management system and no crime-analysis software are put at the disposal of the unit. This, combined with limited capacity and unwillingness to undertake analytical efforts, has as a consequence that there is no pro-active approach to financial crime. This attitude to policing is considered largely reactive and old-fashioned and needs to be addressed by the Force's senior management.

The Prosecution Office seems to face similar problems to the Police Force. Again, it appears to have dedicated, capable and knowledgeable officers, but the evaluation team did not discover any firm strategy-driven policy on crime. Hardly any statistics or relevant management information exist. There were no identified priorities or objectives set with regard to financial crime, let alone

any effort being made to produce an assessment of the threat imposed by financial crime, in support of any policy cycle. The experts interviewed would like to see a more pro-active approach in applying for investigation orders.

The above-mentioned challenges are combined with a very limited training policy, which seems to be based, especially outside the police, on ad hoc seminars and training events.

The evaluators are convinced that, as financial aspects of crime gain in importance, a more structured training system could be developed, especially for prosecutors and judges.

The above-mentioned National Anti-Fraud and Corruption Strategy shows that, if a threat is considered a priority, an overarching strategic document involving different services can be drafted. If this is supposed to be a model for strategies in other fields or an element of an overall strategy against crime, certain methodological improvements need to be considered.

The Strategy does not refer to the scale of the problems tackled, and addresses the way they are committed only in a very general way. The evaluators therefore welcome the provision of the Strategy's Action Plan stating that a National Risk Assessment and a follow-up strategy on fraud and corruption, based on risk assessments undertaken by the relevant national authorities, are to be drafted. A thorough threat assessment seems to be a necessary starting point for all strategic documents of this type. On the other hand, the Strategy deserves to be praised for its clear objectives and the importance it attaches to international cooperation.

The experts were shown fragmentary statistics, gathered independently by different services. This may be one of the reasons why a full picture of law-enforcement and judicial actions and a comprehensive assessment of their efficiency cannot be drawn.

Whilst it is understandable that a small government administration like that of Malta may not have sufficient resources to devote to the establishment of complex statistics, thought might be given to ways to improve the establishment of statistical data. In this context, the evaluators welcome the statement that a statistical mechanism is being developed to monitor court decisions concerning criminal assets and their execution. Improvements of this kind should cover all elements of the procedure, from the investigation phase to the actual execution of the assets.

## 3. Investigation and prosecution

### 3.1. Available information and databases

The vehicles database includes owner details, engine and chassis numbers, vehicle colour and details concerning commencement and termination of licence and insurance.

With regard to the register of companies, the available data includes elements like the company name and registration number, the list of parties and annual accounts, together with images of documents received at the Malta Financial Services Authority (MFSA).

Whilst it is only the Malta Police Force that has access to the vehicles database, the Companies' Register is available to anyone who is granted access by the MFSA, often for a fee. The ICCMD also enjoys access to the MFSA database and the Civil Register database.

For other registers not available to the public or to which law enforcement personnel do not have direct access, the Malta Police Force can obtain the requested information upon the issue of a production order or, where the information is covered by privilege, through the issue of investigation / attachment orders.

In Malta there is no centralised register of bank accounts. However, the authorities have tools to identify an unknown bank account belonging to a specified person or the unknown owner of a specified bank account. Banks are notified in person by a police officer, who must have at least the rank of inspector, with the relevant court order.

Identification of operations from and to a specified bank account in a specified period in the past and monitoring of operations to and from a specified bank account in the future are also possible.

The Attorney General is the authority competent to request/take the measure. The Criminal Court is the authority competent to give the authorisation. In proceedings before the Magistrates' Court or in the course of a magistrate's inquiry, the magistrate may order the production of the said information.

## RESTREINT UE

The measures which allow the identification and monitoring of bank accounts are applicable in numerous cases; during investigations into any crime punishable by imprisonment of over 12 months; in cases listed in the Dangerous Drugs Ordinance and Medical and Kindred Professions Ordinance (as concerns narcotic and psychotropic substances); and the Prevention of Money-Laundering Act (as concerns money-laundering and financing-of-terrorism offences). Attachment and freezing orders may also be applied for by the Attorney General under the Malta Financial Services Act when a breach of any of the provisions of that Act is suspected or a person is charged with such a breach.

The monitoring order is described in Art. 435AA of the Criminal Code, which says that where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence he may apply to the Criminal Court for an order (referred to as a "monitoring order") requiring a bank to monitor for a specified period the banking operations being carried out through one or more accounts of the suspect. The bank, at the request of the Attorney General, must communicate to the person or authority indicated by the Attorney General the information resulting from the monitoring.

The maximum duration of the monitoring of a bank account is specified by the Attorney General in his application to the Criminal Court and as ordered by the said Court.

The persons requested to supply the information or to undertake the measure (e.g. banks in the case of monitoring orders), or any named garnishees who have property pertaining to or controlled by the suspect, would likewise have to be named in the order subsequently served upon them.

Suspects are not informed of investigative measures. In the case of attachment orders, however, suspects must be informed, since an integral part of the order is that the suspects named in the order do not transfer or dispose of their property.

Banks and subject persons are exonerated from professional secrecy. Only lawyer-client and confession privileges impede the execution of these measures.

Tools for international cooperation are also available. The 2001 Protocol to the Convention on Mutual Legal Assistance between Member States of the EU has been ratified by Malta. The relevant legal provisions on implementation of the Convention and its Protocol are Articles 435A, 435B,



435AA, 435BA of the Criminal Code, Articles 4 and 9 of the Prevention of Money-Laundering Act, Articles 24A and 24B of the Drugs Ordinance and 120C and 120D of the Medical and Kindred Professions Ordinance. Moreover, the Maltese authorities reported that there is also at present a draft bill before the national Parliament which seeks to better implement the same provisions under the Prevention of Money-Laundering Act as regards monitoring orders (Act VII of 2010).

The mechanism for data exchange between law-enforcement authorities provided for by the Framework Decision 2006/960/JHA is applicable if the bank-account-related information is already in the possession of the Malta Police Force.

## 3.2. Financial investigation and use of financial intelligence

As already stated, actions such as the tracing of assets are carried out in the framework of ordinary procedure, as there are no separate legal rules for financial investigations. Thus, for financial investigations, normal police powers as described in the title of the Criminal Code covering the Powers and Duties of the Executive Police in respect of Criminal Prosecutions are applicable. For example, according to Article 355 AD of the Criminal Code, any person considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to go to a police station to give as required any such information or document. No person is bound to supply any information or document which tends to incriminate him.

Article 435 of the Criminal Code says it is lawful for the Attorney General to collect and produce further evidence besides that resulting from an inquiry. An investigation order may thus be applied for. The Criminal Code refers to the Dangerous Drugs Ordinance to define the investigative tool.

Where, upon information received, the Attorney General has reasonable cause to suspect that a person is guilty of certain offences, he may apply to the Criminal Court for an investigation order requiring that a person (including a body or association of persons, whether corporate or unincorporated) named in the order, who appears to be in possession of particular material or material of a particular description which is likely to be of substantial value to the investigation of, or in connection with, the suspect, produce or grant access to such material to the person or persons indicated in the order. The person or persons so indicated have the power, by virtue of the investigation order, to enter any house, building or other enclosure for the purpose of searching for and seizing such material.

Where an investigation order has been made or applied for, whosoever, knowing or suspecting that the investigation is taking place, makes any disclosure likely to prejudice the said investigation, is guilty of an offence and, on conviction, is liable to a fine or to imprisonment not exceeding twelve months, or to both such fine and imprisonment. In proceedings for an offence under this subarticle, it is a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation.

Any person who, having been ordered to produce or grant access to material, without lawful excuse (the proof whereof lies on him) wilfully fails or refuses to comply with such investigation order, or who wilfully hinders or obstructs any search for such material, is guilty of an offence. That person is liable, on conviction, to a fine or to imprisonment not exceeding twelve months, or to both such fine and imprisonment.

The Prevention of Money-Laundering Act also has provisions referring to investigation and prosecution of offences, including a thorough description of the investigation order.

In practice, as the evaluators were told, if specific data, such as bank-related information, are needed, the investigation order needs to be applied for and ordinary investigative powers of the police are not sufficient.

The previously mentioned FIAU annual report for 2009 presents figures and analysis concerning Suspicious Transaction Reports (STRs), including their use for financial investigations. They deserve to be presented in detail.

A review of the number of STRs received by the FIAU from the date of its establishment to the end of 2009 reveals that the FIAU has now received a total of 470 STRs. According to the report, these have given rise to 410 different cases in respect of which a financial analysis was carried out by the FIAU. During the year under review, 63 STRs were submitted to the FIAU, a drop of 9 percent from the previous year. The figure for 2009 falls slightly short of the annual average of 67 STRs. However, it can be seen that the number of STR submissions is reaching a certain level of stability, with the number of reports received by the FIAU in the last three years consistently between 60 and 70 STRs. This figure may lead one to conclude that there has been no increase in the level of awareness of the obligations of subject persons over the said period. Nevertheless, other figures cited in the report, particularly those showing a marked increase in the number of STRs submitted by certain categories of subject persons such as members of the accountancy and legal profession, estate agents and investment services licence holders, may suggest otherwise.



The main originators of STRs submitted to the FIAU have traditionally been credit institutions, accounting for almost 60 percent of STRs. This trend was sustained from one year to the next up to the end of 2008, with the proportion of STRs submitted by credit institutions never falling below 50 percent of the total STRs.

Traditionally, credit institutions were then followed by financial institutions, supervisory authorities, insurance business licence holders (including intermediaries), investment services licence holders, trustees and fiduciaries, and the various other categories of subject persons. The trend seen in 2009 was an absolute reversal of the pattern in previous years. Reporting by credit institutions has been on a downward trend, although between 2004 and 2008 there seems to have been some stabilisation. Thus, with the filing of 26 STRs, credit institutions were responsible for approximately 41 percent of the total STR submissions in 2009. Other categories experiencing a drop in the number of STRs filed with the FIAU during 2009 were financial institutions, insurance business licence holders and trustees and fiduciaries. The lowest figure for reports by credit institutions was registered during 2009, this being complemented by a stark increase in the diversity of categories of sources of STRs.

Worth mentioning are STRs filed by members of the accounting profession (an increase of four STRs), regulated markets (an increase of three STRs), investment services licensees (an increase of three STRs), estate agents (an increase of two STRs), independent legal professionals (an increase of two STRs) and supervisory authorities (an increase of two STRs). Moreover, other categories of subject persons have kept STR submissions on last year's level or have increased reporting by one STR. These are company service providers, casinos and companies providing remote gaming.

While stating at the outset that it is undoubtedly premature to determine conclusively that there has been a definite change in the sources and trends of reporting entities, a number of observations may still be made, says the Annual Report. Possibly the most prudent inference from this new development would be that the reduction in the number of STRs submitted by credit institutions could be a direct consequence of greater diligence in internal STR-filtering by credit institutions. Nevertheless, the possibility of a progressive tactical move by suspected money-launderers and terrorist abettors to distance themselves from credit institutions cannot be discarded. Such a hypothetical trend could be attributable to the success of banks in deterring potential money-launderers by creating a compliance culture within the institutions, assume the authors of the report. Indeed, the marked increase in the number of STRs submitted to the FIAU from other sources tends

to support this hypothesis, even though this pattern would have to be proven over time in order for more conclusive determinations to be made. Without discarding the possibility that money-launderers may be shifting their attention from credit institutions to other areas as a result of increased vigilance, it may also be appropriate to remark that the increase in the number of STRs received from other subject persons is a positive signal that awareness of the obligations of subject persons under the Prevention of Money-Laundering and Funding of Terrorism Regulations (PMLFTR) to report suspicious transactions is on the increase.

In the report, the FIAU underlines its will to further intensify its efforts to achieve a greater level of awareness among all the categories of subject persons listed in the PMLFTR. Such awareness will continue to enhance the quantity and quality of reports. Persons trading in cash on a habitual basis, estate agents and independent professionals present a particular challenge since the level of awareness in these areas is still relatively low, a difficulty shared by other EU Member States where the number of STRs originating from these entities and individuals also remains comparatively low. Another development is the fact that the increase over the past years of the gaming business in Malta has started to have an impact on the type of STRs received by the FIAU. Indeed, seven STRs in total over the past two years (2008 and 2009) were received from casinos and remote gaming companies. The need for vigilance in this sector cannot be over-stressed as it remains a potential target for perpetrators. The discussions being held between the FIAU and the Lotteries and Gambling Authority with a view to bringing remote gaming license holders within the scope of the PMLFTR are deemed to be a crucial step forward in this area.

Substantiating last year's experience, the number of STRs filed was evenly spread between Maltese and foreign nationals. In fact, 26 STRs were filed solely in connection with foreign nationals while 28 STRs were filed in relation to Maltese nationals. Nine other STRs concerned both Maltese and foreign subjects. Further analysis conducted in relation to the contents of STRs revealed that 44 STRs (70 percent) were submitted in relation to natural persons only. Nine other STRs were filed in respect of legal persons while the remaining ten STRs concerned both companies and natural persons. The STRs analysed in 2009 led the FIAU to request information from several countries. In particular, pronounced collaboration was registered with the UK, Spain, Russia, Italy, Switzerland and Hong Kong.

The main suspected predicate offence during year 2009 has been identified as fraud, accounting for five cases sent to the police for further investigations. Drug trafficking, organised crime and living off the earnings of prostitution are listed in the report as the suspected predicate offence in three other cases. In seven cases sent to the police for further investigation on suspicion of money-laundering, the FIAU was not in a position to specifically identify the underlying predicate offence from which illicit proceeds were allegedly being laundered.

However, the system dealing with the STRs described above has certain features that may limit its full use, especially for proactive law-enforcement.

Malta has no operational database on financial intelligence contained in SARs.

This is primarily because Malta opted for an FIU of an administrative nature, and thus has only limited opportunities to share intelligence with the police and to conduct integrated analysis in a proactive way. The information within the FIAU is completely shielded off, as the FIAU only communicates suspicious transactions to the police when they have decided there is due suspicion of money-laundering activity, based upon an assessment by their own analytical department.

Moreover, the data provided by the FIAU can be used solely in money-laundering and terrorism financing cases, which limits their use in the fight against other types of crime. An important shortcoming of the Maltese FIU is obviously the complete absence of any appropriate analytical software.

### 3.3. Cooperation with Europol and Eurojust

#### 3.3.1. Cooperation with Europol

Since the beginning of 2005 the Economic Crime Unit has been the Unit which has contributed most information to the Europol National Unit. Moreover, the Europol channels have been used by Economic Crime Unit officials to obtain relevant information which may assist them in their investigations. These cases related to money-laundering, euro-counterfeiting and horizontal fraud. Currently, the Malta Police Force is considering the best options for extending access to the Information System and SIENA to all units within the Economic Crime Unit. Certain officers are

also subscribers to the Financial Crime Information Centre. Malta has never had a case of Joint Investigation Teams (JITs) on financial matters in which Europol supported its investigators. Europol is considered a vital facilitator of intelligence exchange that, if necessary, leads to further requests for mutual legal assistance.

The Maltese authorities expect the agency to foster cooperation in cases of individuals suspected to be linked with organised groups establishing criminal links both domestically and, above all, in foreign countries.

Europol underlines that Malta is making considerable efforts to engage with the criminal-asset-recovery products and services being offered by Europol and is also very cooperative on demand. Cooperation with Europol with regard to financial crimes and financial investigation is improving. Nevertheless, the Maltese response remains very reactive and on request solely. The lack of information and training on Europol's products hinders cooperation.

For example, the FIAU were not aware of the existence of AWF Sustrans, which actually is an EU supranational platform for pro-active integrated analysis of STRs. This is obviously a significant shortcoming which explains why Europol has never received any Maltese STRs. Generally speaking, the Maltese contribution to the AWFs is considered to be below average.

### 3.3.2. Cooperation with Eurojust

The Maltese authorities are of the opinion that Eurojust has proved invaluable in pushing forward investigations and prosecutions. This has been achieved thanks to outstanding support, including financial support, and translation facilities coupled to its capacity to host video-conferences. The Maltese authorities underline that these meetings, which bring together the relevant prosecuting and investigating officers of different Member States, have been instrumental in leading to better-planned coordination and sharing of information, often leading not only to the strengthening of evidence but also revealing to another Member State hitherto unknown criminal activity.

Referring to the future role of Eurojust, the Maltese authorities stressed that, as crime becomes more transnational, they expect the agency's role in coordination meetings and setting up JITs to increase.

Eurojust assesses cooperation as good, as the national member is Head of the International Co-operation in Criminal Matters Division with the Attorney General's Office and has knowledge of all the cases linked to other Member States.

## 3.4 Conclusions

Malta has the necessary mechanisms to conduct investigations, including their financial aspects, and to gather and exchange relevant information. Legal tools for investigations are in place, but are contained in different legal acts. Thus the structure of the law is not immediately clear.

Moreover, the evaluators are concerned as to whether the authorisation of special investigative techniques by a minister rather than a judicial body guarantees the impartiality of investigations, especially against politically exposed persons.

Experts interviewed admitted that a central register of bank accounts would greatly facilitate their work. Although the number of banking institutions is limited to about 25, it now takes a couple of weeks to identify a bank account of a given person, which slows down investigations.

The FIAU annual report shows the number of STRs received slightly decreasing every year. This, as the report states, could lead one to conclude that there had been no increase in the level of awareness of the obligations of subject persons over the said period. Nevertheless, other figures reported may, according to the report, suggest otherwise — particularly those showing a marked increase in the number of STRs submitted by certain categories of subject persons, such as members of the accountancy and legal profession, estate agents and investment services licence holders. Taking into consideration the limited resources of the FIAU, the quality, not the number, of STRs is of major importance. Thus, systematic awareness-raising activities need to continue, and should be combined with sound monitoring of compliance, especially among professions such as lawyers and estate agents, which could further improve their performance.

One important shortcoming of the Maltese FIU is obviously the complete absence of any appropriate analytical software. The unit is looking for funding to make necessary purchases, which, in the opinion of the evaluators, would be a tremendous help in enhancing their capability as an FIU. The lack of specialized IT tools that could be used for analytical purposes by the FIAU constitutes a serious challenge and needs to be addressed.

Moreover, the percentage of STRs relating to foreign citizens combined with the ambition to establish a genuine financial centre in Malta underline the need for efficient international cooperation and data exchange, as well as a more proactive approach, including the full use of Europol's analytical capabilities. Information contained in STRs passed to the police from FIAU can only be used for money-laundering and terrorism-financing investigations. Malta believes that FIAU would be in breach of both national legislation and international standards if it were to permit the use of information disclosed for any purposes. FIAU consent for further dissemination of this information is required. The experts consider these conditions limiting.

On the other hand, the unit receives no structured and regular feedback from the police. These challenges lead to the general assessment that the capacity of the FIAU and the Maltese mechanisms serving both national and international cooperation need to be further developed and based on a more proactive approach.

Awareness of the different products and services provided by Europol has clearly not reached many Maltese officers; this could be addressed easily, since the number of experts involved is very limited.

The Maltese authorities could consider that Europol offers scalable, sustainable and affordable support to Maltese financial analysis in order to enhance the proactiveness of their contributions to AWF Sustrans. Technical assistance and budgetary support to enhance the necessary capacity-building would certainly be justified.

#### 4. Freezing and confiscation

##### 4.1 Freezing

##### 4.1.1. At national level

Article 355P of the Criminal Code says that the police, when lawfully on any premises, may seize anything on the premises if they have reasonable grounds for believing that it was obtained in consequence of the commission of an offence or that it is evidence in relation to an offence or it is the subject of an alert in the Schengen Information System, and that it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed.

An attachment order may be also applied for. The Criminal Code refers to the Dangerous Drugs Ordinance to define the investigative tool.



# RESTREINT UE

It says that together with or separately from an application for an investigation order, the Attorney General may apply to the Criminal Court for an attachment order:

- (a) attaching in the hands of such persons as are mentioned in the application (hereinafter referred to as "the garnishees") all moneys and other movable property due or pertaining or belonging to the suspect,
- (b) requiring the garnishee to declare in writing to the Attorney General, not later than twenty-four hours from the time of service of the order, the nature and source of all money and other moveable property so attached, and
- (c) prohibiting the suspect from transferring or otherwise disposing of any moveable or immoveable property.

Where an attachment order has been made or applied for, whosoever, knowing or suspecting that the attachment order has been so made or applied for, makes any disclosure likely to prejudice the effectiveness of the said order or any investigation connected with it is guilty of an offence and, on conviction, is liable to a fine or to imprisonment not exceeding twelve months, or to both such fine and imprisonment.

It is for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation or the effectiveness of the attachment order.

An attachment order must be served on the garnishee and on the suspect by an officer of the Executive Police not below the rank of inspector. Any person who acts in contravention of an attachment order is guilty of an offence and, on conviction, is liable to a fine or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment.

An attachment order, unless it is revoked earlier by the Attorney General by notice in writing served on the suspect and on the garnishee, ceases to be operative on the expiration of thirty days from the date on which it is made. The court may not make another attachment order with respect to that suspect unless it is satisfied that substantially new information has come to light.

Investigation, attachment and freezing orders are generally requested by the Office of the Attorney General at the instance of the police. Measures are enforced by the entities upon whom the order is served, namely those entities required to provide the information or other documents or garnishees in whose hands proceeds are attached or frozen. The Court order is physically notified to the

## RESTREINT UE

persons affected by an officer not below the rank of Police Inspector. As to freezing orders, the accused is informed directly by a court decree, whilst the court order ordering the freezing of all assets and property pertaining to the accused is published in the Government Gazette for general information.

Article 5 of the Prevention of Money-Laundering Act and Article 22A of the Dangerous Drugs Ordinance define the procedure freezing the property of the person accused. Articles 120A(2A) of the Medical and Kindred Professions Ordinance and 17B of the Malta Financial Services Authority Act also refer to the procedure. Article 23A of the Criminal Code refers to the procedure, broadening the scope of its application. Thus, it is applicable to money-laundering, financing of terrorism, narcotic- and psychotropic-drug-related offences and all other criminal offences subject to penalties exceeding 12 months' imprisonment.

Where a person is charged, the court at the request of the prosecution makes an order:

- (a) attaching in the hands of third parties in general all moneys and other movable property due or pertaining or belonging to the accused, and
- (b) prohibiting the accused from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property,

provided that the court determines in such an order what moneys may be paid to or received by the accused during the subsistence of such order, specifying the sources, manner and other modalities of payment, including salary, wages, pension and social security benefits payable to the accused, to allow him and his family a decent living in the amount, where the means permit, of about fourteen thousand euro every year.

The court may also authorise the payment of debts which are due by the accused to bona fide creditors and which were contracted before such order was made; and on good ground authorise the accused to transfer movable or immovable property.

Such an order becomes operative and binding on all third parties immediately it is made, and the Registrar of the Court must cause a notice thereof to be published without delay in the Gazette, and also cause a copy thereof to be registered in the Public Registry in respect of immovable property. It remains in force until the final determination of the proceedings, and in the case of a conviction until the sentence has been executed.

The court may for particular circumstances vary such order.



## RESTREINT UE

Where any money is or becomes due to the accused from any person while such order is in force such money must, unless otherwise directed in that order, be deposited in a bank to the credit of the accused.

In terms of Title IV of Part III of Book Second of the Criminal Code entitled 'Of Property Belonging to the Person Charged or Accused or to other Persons and Connected with Criminal Proceedings', all property connected with criminal proceedings will be delivered by the court to the registrar and will, subject to the provisions of that Title, remain in the custody of the registrar except when required by the court for the hearing of such proceedings.

When such order ceases to be in force, the Registrar of the Court must cause a notice to that effect to be published in the Gazette, and enter in the Public Registry a note of cancellation of the registration of that order.

These provisions remain in force for the duration of the Court proceedings until final judgement is pronounced.

The freezing order can be withdrawn upon an application by the Attorney General.

### 4.1.2. Cooperation at European level - Implementation of Framework Decision 2003/577/JHA

The Framework Decision was transposed and implemented by means of Freezing Orders (Execution in the European Union) Regulations made under the Criminal Code, published in Legal Note 397/07 and amended by Legal Note 354/09.

The Maltese authorities are of the opinion that as in all other instruments of mutual recognition, the added value is that in applying this principle based on mutual trust of judicial systems and between judicial authorities, proceedings employed in the fight against crime, in this case by depriving accused persons of their ill-gotten gains, become more efficient and faster by curtailing to a minimum the formalities attaching to execution of similar orders under traditional forms of mutual legal assistance. They suggest however that it would be advisable to agree on a number of the more common language regimes which can be accepted by all Member States.

# RESTREINT UE

Following the transposition of this Framework Decision, once the Attorney General, who receives the said order, certifies that it satisfies all requirements and formalities and that the accompanying certificate is duly completed, he issues a certificate confirming that the Issuing Authority is competent to issue such an order. This is then passed on to the Malta Police Force for execution. When Malta is the issuing State, it is the Criminal Court that issues such an order and transmits it to the Attorney General, who will append to the Order a certificate certifying as authentic the contents thereof.

A freezing order must be transmitted with the certificate, by any means capable of producing a written record under conditions allowing the executing State to establish authenticity.

Maltese authorities consider it far too early to assess the mechanism, since to date Malta has not issued any freezing orders under the legislation transposing the Framework Decision. To date only one order has been received.

## 4.1.2.1. Experience when acting as an issuing State

The Criminal Court is competent to issue a freezing order as referred to in Framework Decision 2003/577/JHA. It is also the authority mentioned in part © of the certificate as being the one which must be contacted by the executing authorities.

Given that no experience exists with regard to the freezing order, it is envisaged that, as in the case of the European Arrest Warrant (EAW), the mode of transmission favoured is that of direct transmission from the Office of the Attorney General to the designated authority competent to receive the said orders. Nothing excludes the use of Eurojust if it is so warranted.

The European Judicial Network (EJN) atlas, in addition to information obtained through Eurojust, could be used to facilitate locating the unknown recipient authority should the need arise.

## 4.1.2.2 Experience when acting as an executing State

An order received by Malta has the same effect as a freezing order, as referred to in Article 22A(1) of the Dangerous Drugs Ordinance, and the provisions of the Article apply *mutatis mutandis* to the freezing order.

## RESTREINT UE

Where the Attorney General receives a freezing order, he will, on his own individual judgement, issue a certificate to the effect that the authority which issued a freezing order has the function of issuing freezing orders in the issuing State and such certificate will be conclusive of its contents. Where a certificate has been issued by the Attorney General, the order shall be executed by a police officer not below the rank of Inspector. The ARO plays no role as yet, although it is foreseen that the Inspector heading the ARO will be entrusted with the execution of the order.

Where the competent judicial authority of the issuing State has expressly indicated the formalities and procedures to be observed in the execution of the freezing order, the Attorney General shall direct the executing officer to comply with these formalities and procedures unless the Attorney General is of the opinion that those formalities and/or procedures are contrary to the fundamental principles of law in Malta.

Procedure for liaising with the issuing State to keep its authorities informed of progress in proceedings cannot be presented, since there are no cases to analyse. However, the Maltese authorities assume they will follow the practice established in relation to the European Arrest Warrant. Normal practice is to inform the requesting authority of developments, either telephonically or via email, once execution is effected.

The accused can request the court, and the court can act *ex officio* upon issuing the freezing order, to determine what money may be paid to or received by the accused during the subsistence of such order, specifying the sources, manner and other modalities of payment, including salary, wages, pension and social security benefits payable to the accused, to allow him and his family a decent living in the amount, where the means permit, of about fourteen thousand euro every year. The court may also authorise the payment of debts which are due by the accused to *bona fide* creditors and which were contracted before such order was made and on good ground authorise the accused to transfer movable or immovable property. Moreover, where any money is or becomes due to the accused from any person while such order is in force such money will, unless otherwise directed in that order, be deposited in a bank to the credit of the accused.

## 4.2. Confiscation (including 2005/212/JHA and 2006/783/JHA)

Article 23 of the Criminal Code says that the forfeiture of the *corpus delicti*, of the instruments used or intended to be used in the commission of any crime, and of anything obtained by such crime, is a consequence of the punishment for the crime as established by law, even though such forfeiture be not expressly stated in the law, unless some person who has not participated in the crime has a claim to such property.

Article 23B says that, without prejudice to the provisions of the above-mentioned Article 23, the court shall, in addition to any punishment to which the person convicted of a relevant offence may be sentenced and in addition to any penalty to which a body corporate may become liable, order the forfeiture in favour of the Government of the proceeds of the offence or of such property the value of which corresponds to the value of such proceeds, whether such proceeds have been received by the person found guilty or by the body corporate. Any property, whether in or outside Malta, of or in the possession or under the control of any person convicted of a relevant offence or in the possession or under the control of a body corporate, unless proved to the contrary, is deemed to be derived from the relevant offence and is liable to confiscation or forfeiture by the court.

Where the proceeds of the offence have been dissipated or where for any other reason whatsoever it is not possible to identify and forfeit those proceeds or to order the forfeiture of such property the value of which corresponds to the value of those proceeds, the court will sentence the person convicted or the body corporate, or the person convicted and the body corporate *in solidum*, as the case may be, to the payment of a fine which is the equivalent of the amount of the proceeds of the offence. The said fine may be recovered as a civil debt, and the sentence of the Court constitutes an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

Article 23B defines “proceeds” as meaning any economic advantage and any property derived from or obtained, directly or indirectly, through the commission of the offence, and includes any income or other benefits derived from such property. “Property” is understood as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.

Similar rules and provisions can be found in Article 3 (5) (a) of the Prevention of Money-Laundering Act.

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Article 23 C of the Criminal Code reflects option c) given to the Member States in Article 3 of the Council Framework Decision 2005/212/JHA.

Specifically, it says that, where it is established that the value of the property of the person found guilty of a relevant offence is disproportionate to his lawful income and the court is fully convinced on the basis of specific facts that the property in question has been derived from the criminal activity of that person, that property is liable to forfeiture.

The same Article says that when a person has been found guilty of a relevant offence and in consequence thereof any moneys or other movable property or any immovable property is liable to forfeiture, the following provisions of the Dangerous Drugs Ordinance apply *mutatis mutandis*.

When a person has been found guilty of one of certain drug-related offences, the court will, in addition to any other punishment, in its sentence or at any time thereafter, at the request of the prosecution, order the offender to pay a fine of not less than about eleven thousand and six hundred euro but not exceeding about sixty-nine thousand and eight hundred euro. This is applicable in cases where the offender is not the absolute owner but holds any other real title on the immovable property, or has a title, other than a real title, in virtue of which he has the control of or a right of access to such property.

The court also orders the forfeiture in favour of the Government of all moneys or other movable property and of the entire immovable property of the person so found guilty, even if the immovable property has since the offender was charged passed into the hands of third parties, and even if the said monies, movable property or immovable property are situated in any place outside Malta.

Moreover, the Dangerous Drugs Ordinance provides for two further options, which are, however, not referred to in the Criminal Code. Thus, they are applicable to drug-related crimes only. Namely the court will, in addition to any other punishment, in its sentence or at any time thereafter, at the request of the prosecution, where any immovable property, in Malta or in any place outside Malta, has been used for the keeping or storing, or for the selling or dealing in such drug, as described in the bill of indictment or in the charge, order the forfeiture in favour of the Government of any real title which the offender holds on such immovable property. The same would apply to any vessel or vehicle used for keeping or storing, or for selling or dealing in drugs.

Plea bargaining, although not binding for the court, is possible under Maltese law. The amount of assets to be confiscated can be also a subject of negotiation between the accused and the prosecution in cases where confiscation is not mandatory.

The legislation to transpose Framework Decision 2006/783/JHA on confiscation orders has not yet been implemented into national law. To date, such orders are executed on the basis of traditional instruments of mutual assistance to which Malta is a party. As with the regime on freezing orders which transposes the Framework Decision on Mutual Recognition of Freezing Orders, it is envisaged that the Criminal Court will be the competent issuing authority, whilst the executing authority will be the Attorney General.

## 4.3. Conclusions

The structure of legal provisions on confiscation-related tools is complex. They are spread over different laws and certain provisions are repeated in different legal instruments pertaining to different offences (for example drug-related offences, money-laundering and crime in general). However, the existing solutions provide Maltese authorities with sound tools to address criminal assets effectively.

Framework Decision 2006/783/JHA still needs to be implemented.

As indicated above, where the Attorney General receives a freezing order, he issues a certificate to the effect that the authority which issued a freezing order has the function of issuing freezing orders in the issuing State, and such certificate will be conclusive of its contents. The evaluators have doubts as to whether this solution is in line with Art. 5 (1) of the Framework Decision 2003/577/JHA, which says that "the competent judicial authorities of the executing State shall recognise a freezing order (...) without any further formality being required (...)."

Although the available tools seem to be well known to practitioners and to be commonly applied, the lack of comprehensive statistics hampers overall assessment of the system. As data on seizure, freezing and confiscation, including the actual execution, are not available, it is not possible to identify weaknesses in the procedure and areas requiring further improvement.



The Court Registrar's office, which has a very important role with regard to the enforcement of confiscation orders and the recovery of assets, has the expertise to carry out its tasks. It appears, however, to be understaffed. Thus, the evaluators welcome the idea that its capacities are to be enhanced, leading also to more structured gathering and analysis of statistical data.

As far as prosecution is concerned, especially with regard to financial crime, it seems problematic to have a trial before a jury of laypeople, due to the highly complicated nature of the crimes in question. Furthermore, magistrates are said to be afraid of making assumptions, although they are legally possible, concerning the criminal origins of assets.

## 5. Protection of the financial interests of the EU - available mechanisms, particularly cooperation with OLAF

The IAID is the designated Maltese interlocutor of the European Anti-Fraud Office (OLAF). It acts as the Anti-Fraud Coordinating Service (AFCOS) for Malta; this implies that this IAID Unit can conduct joint investigations with OLAF with regard to EU funds availed of by Malta. During the evaluation it was also explained that it is the IAID that should be sent information on matters liable to result in criminal proceedings, obtained by OLAF during internal investigations, as stipulated in Article 10 (2) of Regulation (EC) 1073/1999. The evaluators have doubts however, as to whether the IAID can be considered a judicial authority in the meaning of the Article.

The Financial Investigations and European Anti-Fraud Office Related Matters Unit within the IAID has the remit to conduct financial investigations in government departments and in any other public or private entities which are in any way beneficiaries, debtors or managers of public funds, including EU funds, for the purpose of protecting such funds against irregularities and fraud, or otherwise to assess such public or private entities' liability to contribute to such funds. The IAID, acting as AFCOS, cooperates with other authorities. The Office of the Attorney General is frequently called to assist on legal issues and is immediately informed by the IAID when facts, if proved, would constitute a criminal offence.

Whenever, and as soon as, the IAID Director firmly establishes the existence of suspected cases of irregularities or suspected cases of fraud, the Director, if he is of the opinion that the irregularity, if

proved, would constitute a criminal offence, will immediately inform the Attorney General. Otherwise, if the Director is of the opinion that the irregularity is of an administrative nature, he will inform the Permanent Secretary of the auditee.

According to Article 21 of the Internal Audit and Financial Investigations Act, in conducting an internal audit or a financial investigation concerning funds managed by Malta in terms of its international obligations, the Director of IAID may be assisted by representatives of the international organisation concerned, who may participate jointly with the Director in the audit or the investigation. For such purpose the representatives will be considered to be under the same obligations as officers of the Directorate and, before entering upon their duties, must take the oath specified in the Schedule to this Act.

Article 435E of the Criminal Code provides that the Attorney General may authorise the competent authorities of another country to conduct in Malta, jointly with or under the supervision or direction of the Executive Police, investigations into criminal offences by officers acting under covert or false identity. The Attorney General must be satisfied of the true identity and official capacity of the officers in question and must be fully informed of the nature of any documents which purport to guarantee, certify or authenticate the false identity assumed by any such officers. These provisions apply *mutatis mutandis* to any official from another country taking part in any operation in Malta as aforesaid even if none of the officers taking part in the operation is acting under covert or false identity. The Article goes on to explain that ‘competent authorities of another country’ and ‘official from another country’ will be construed as including officials of bodies set up pursuant to the Treaty establishing the European Union as defined in Article 2 of the European Union Act, therefore, including agents from OLAF.

Participation in a JIT would also mean that the agents would be able to testify in the same capacity as any other investigating officer. Otherwise, under Maltese law, unless they are court-appointed experts, witnesses cannot give an opinion. However, they can testify as to the facts of which they personally have knowledge.

The IAID reports irregularities to DG OLAF on a quarterly basis with respect to Pre-accession Funds, Transition Facility Funds, Structural Funds, Cohesion Fund and Agricultural Funds. The Unit also provides contributions, including feedback, to various sub-units within OLAF all responsible for protecting facets of the EU's financial interests. Article 7 of the Administrative



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Cooperation Arrangement between OLAF and IAID, signed in June 2003, lays down that the IAID as AFCOS for Malta will strive to ensure, coordinate and monitor the exchange of relevant information at all levels within the national administration and with the Commission.

Furthermore, the above-mentioned National Anti Fraud and Corruption Strategy provides measures for the strengthening of international cooperation, particularly in meeting Malta's obligations.

Moreover, the Malta Police Force, the Customs Department and the Office of the Attorney General may be required to furnish information to OLAF when so requested in terms of applicable legislative instruments. Staff from these departments regularly participate in seminars hosted by OLAF in a bid to promote training, whilst also serving to bring counterparts together. The Customs Department also participates in Joint Operations coordinated by OLAF involving the participation of Customs administrations from several Member States.

Maltese authorities stress that there are no obstacles preventing the exchange of information with OLAF. The above-mentioned Article 7 of the Administrative Cooperation Arrangement between OLAF and the IAID facilitates the exchange. It is also important to point out that in the case of reporting any irregularities to OLAF in the case of EU funds, the IAID is required to report if a court case was initiated, and also its eventual outcome.

In a criminal investigation involving fraud against the financial interests of the European Communities (EC), the Commission may act as a plaintiff or a complainant or it may be represented as a civil party in such proceedings. In a Bill to be published shortly which will provide for the protection of the European Communities' financial interests and make provision for the criminal prosecution of fraudulent conduct injuring those interests whilst adopting a common definition, it is unequivocally stated that for the avoidance of any doubt, the provisions on fraud in the Criminal Code and the provisions of the Prevention of Money-Laundering Act will, *mutatis mutandis*, apply when the offences covered therein are committed to the detriment and to the prejudice of the European Communities.

The general assessment of the Maltese authorities is that OLAF can significantly contribute to their work by making available its agents, whose expertise is undoubtedly beneficial to any investigation, forensic accountants and analysts as well as modern software which could make possible a better

visualisation of how offences, particularly complex money-laundering cases, are carried out. Continuous and updated training opportunities, particularly in contemporary and developing trends, are considered imperative so that national authorities will be in touch with the latest developments.

Some changes to Maltese national law are still expected. A bill adopting a common definition of fraudulent conduct injuring the EU's financial interests is still to be published but the provisions on fraud of the Criminal Code apply to expenditure and resource fraud as defined in Article 1 of the Convention on the Protection of EC financial interests of 26/07/1995.

Moreover, Malta has not ratified the Convention and its 1st and 2nd Protocols, and Maltese law does not provide for the liability of legal persons for fiscal offences.

## 6. Recommendations

### 6.1. Recommendations to Malta

1. A coherent, overarching strategy towards crime, promoting a proceeds-oriented approach that would cover all relevant authorities, should be developed. (See 2.4)
2. The policy described in the strategy should be supported by a comprehensive training scheme for relevant staff at all levels, including prosecutors and judges. The training should also cover available tools for international cooperation, including those of Europol, Eurojust and OLAF. (See 2.4)
3. The policy described in the strategy should be supported by sound management within the Police Force, in order to promote a proactive, intelligence-led and proceeds-oriented approach. (See 2.4)
4. A high-level coordination mechanism should be established to supervise the implementation of the strategy, giving due attention to the actual effectiveness of tools like seizure, freezing and confiscation. The implementation of the strategy should be combined with a sound statistical methodology. (See 2.4)

5. Financial intelligence gathered by the competent Maltese authorities should be more proactively exchanged with Europol. The use of STRs sent to the police shall not be limited to money-laundering and terrorism financing cases. The Police should provide the FIAU with feedback (See 3.4).
6. Compatible IT analytical tools should be made available to investigators and experts of relevant services, especially the FIAU and the ECU. (See 3.4)
7. Efforts undertaken to establish and enhance specialized units such as the Asset Recovery Office should continue. (See 2.4)
8. The judicial authority competent to receive information obtained by OLAF during its internal investigations into matters liable to result in criminal proceedings needs to be nominated. (See 5)  
The Convention for the Protection of the Financial Interests of the European Communities and its Protocols should be ratified.
9. Framework Decision 2006/783/JHA needs to be implemented. (See 4.3)
10. Consideration needs to be given to whether a jury of laypeople is appropriate to try complex financial cases. (See 4.3)
11. Establishment of a centralized register of bank accounts should be considered. (See 3.4)
12. Due consideration should be given to whether discretionary powers concerning the execution of special investigative techniques should continue to be attributed to a member of the executive. (See 3.4)

Malta is requested to inform the Council Secretariat within 18 months of the adoption of this report of the action it has taken on these recommendations. The information will be submitted to, and if necessary discussed by, the relevant working group.

## 6.2 Recommendations to the European Union, its Member States, institutions and agencies

1. EU institutions and agencies are invited to support all actions undertaken by Malta in order to implement the recommendations listed above and enhance financial investigations. In particular, relevant EU bodies should support Maltese authorities in acquiring IT tools useful for financial investigations.
2. European bodies, namely OLAF, Eurojust and Europol, should, in close cooperation with Maltese counterparts, promote and explain their potential added value for investigation and prosecution. Their analytical capabilities, information and intelligence exchange, available communication channels and means of practical assistance need to be communicated to practitioners involved.
3. European bodies should, via training and guidelines, promote a uniform application of relevant legal tools agreed at European level. This should also entail the use of a common statistical methodology.

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## PROGRAMME FOR VISIT

### Fifth Round of Mutual Evaluations

### Financial Crime and Financial Investigations

#### Judiciary

Hon. Judge Dr. David Scicluna LL.D.

#### Attorney General's Office:

Dr Donotella Frendo Dimech LL.D.

#### Economic Crime Unit:

A.C. Michael Cassar

Supt. Paul Vassallo

#### FIAU:

Dr Manfred Galdes - Director

#### IAID:

Rita Schembri – Director

Christopher Magri

Mario Debono

#### Customs:

J.P. Brincat - Controller

Manwel Sammut

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## Tuesday 18<sup>th</sup> May 2010

09.30 – 11.00      Representatives from the Attorney General's Office/Prosecution Office

11.30 – 13.00      Representatives from the Financial Intelligence Analysis Unit (FIAU)

Lunch

15.00 – 16.30      Representatives from the Internal Audit Investigations Department (IAID)

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## Wednesday 19<sup>th</sup> May 2010

09.30 – 12.00      Representatives from the Economic Crimes Unit – Malta Police

Lunch

14.30 – 16.00      Representatives from Customs Department

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## Thursday 20<sup>th</sup> May 2010

09.30 – 11.00      Representatives from the Judiciary

Lunch

14.00 – 16.00      Final Meeting

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## LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
AFCOS	Anti-Fraud Coordinating Service
ARO	Asset Recovery Office
AWF	Analytical Work File
EAW	European Arrest Warrant
ECU	Economic Crimes Unit
EJN	European Judicial Network
FIAU	Financial Intelligence Analysis Unit
IAID	Internal Audit and Investigations Directorate
ICCMD	International Cooperation in Criminal Matters
JITs	Joint Investigation Teams
JLS	Justice, Freedom and Security
MDG	Multidisciplinary Group on Organised Crime
MFSA	Malta Financial Services Authority
MLU	Money-Laundering Unit
OCTA	Organised Crime Threat Assessment
OLAF	European Anti-Fraud Office
PMLFTR	Prevention of Money-Laundering and Funding of Terrorism Regulations
ROCTA	Russian OCTA
STRs	Suspicious Transaction Reports