

# Judicial Co-operation and the Fight against Crime: Instruments and Measures

Donatella Frendo Dimech



## Presentation Outline:

- Existing Provisions & Instruments under domestic law to combat crime
- From Judicial Assistance to Mutual Recognition
- Relevance to practitioners

## How to combat crime?

- Extension of Jurisdiction
- Measures in Criminal Proceedings and Investigations
- Corporate Liability
- Measures of Judicial Cooperation

## 1. Extension of Jurisdiction

Criminal Code

➤ Article 5(1)

- **(d)** vs a citizen/per res who in any place/ship or aircraft guilty of :
  - ✓ 54A offences;
  - ✓ offences vs safety of Gov;
  - ✓ disclosing of official secrets; etc.

- **(e)** vs. any person being in Malta becomes guilty of offence of :
  - ✓ rape, carnal knowledge with violence
  - ✓ Abduction
  - ✓ Wilful homicide, grievous bodily harm
  - ✓ Threats and private violence, etc. or
  - ✓ Committed act which if committed in Malta would be an offence and involves bomb, grenade, automatic firearm etc.

EVEN if act committed outside Malta

- **(g)** vs. person being in MT who is principal/accomplice in certain crimes although committed outside Malta if act committed in circumstances prescribed therein
- **(h)** when no authority to proceed/order for return
- **(i)** for acts which constitute offences even though committed outside MT (e.g. Art.54G vs a person subject to military law who commits a war crime/genocide/crime vs humanity; vs MT citizen who conspires to commit such an offence; 310B: Of Fraud)

### ➤ Offence committed partly in Malta

- 121C: Crimes of abuse of public authority/unlawful exaction, bribery and extortion
- 208B: inducing minors into prostitution; instigation with violence of minors to prostitution/participation in pornographic performance, participation in sexual activities with minors. Offences relating to child pornography (208A(1),(1A))
- 2488E: trafficking of persons
- 328M: acts of terrorism, funding, ancillary offences
- 337E: cybercrime offences
- 310B: fraud

### ■ Offender a national/permanent resident

- ✓ 121C: (abuse of public authority/unlawful exaction, bribery and extortion)
- ✓ 208B: offences relating to sexual exploitation of minors
- ✓ 248E: trafficking of persons
- ✓ 310B: fraud (double criminality in locus delictii)
- ✓ 328M: terrorism/funding related offences

- 121C(c) When offence involves public officer/servant/MP/ Local Council member
- 121C(d) when offence involves a Maltese citizen/perm resident who is an officer/servant of international/supranational organization/body/its institutions; member of a parliamentary assembly of an international/supranational organization; holder of judicial office or official of any international court
  - ❖ Offences relating to abuse of public authority

### Other instances

- 208B: offence committed by a computer system accessed from MT notwithstanding not based in MT
- 310B: gain received in MT (fraud)
- 328M offence committed for benefit of legal person in MT

### 2. Measures in Proceedings Coercive measures

- 23: Forfeiture of Corpus Delicti
- 23A: Freezing of property of a person charged with a relevant offence (i.e. 12 months imprisonment and not an offence under DDO, MKPO, PMLA)
- 23B(1): Forfeiture of Proceeds of a person/body corporate convicted of a relevant offence or of such property the **value of which corresponds to the value of such proceeds.**
  - (2): if proceeds dissipated/not possible to identify and forfeit those proceeds or to order the forfeiture of such property corresponding to the value of the proceeds ....
  - ❖ Court SHALL sentence the person convicted to the payment of a fine (*multa*) **equivalent of the amount of the proceeds** AND
  - ❖ The fine shall be recoverable as a **civil debt** & the sentence shall constitute an **executive title**

### Confiscation

- **23B(1A):** Any property in/outside Malta belonging to /in possession/control of a convicted person shall be deemed to be derived from the relevant offence and liable to confiscation/forfeiture
- ❖ "proceeds" means 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" means 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

### Confiscation of property derived from criminal activity

- ❖ **23C(1):** Where established that value of the person convicted of a relevant offence is disproportionate to his lawful income and court convinced that property derived from his criminal activity – **FORFEITURE**

## Investigative measures

- **435A:** Investigation and Attachment Orders for all relevant offences
- **435AA:** Monitoring Order of Banking Operations: AG can request a bank to monitor for a specified time particular accounts of a suspect and information will be forwarded by the said bank to the FIAU
- **435AB:** Temporary surrender of a person in custody to a foreign country for purposes of an investigation being carried out/to be carried out at the request of a judicial/prosecuting/administrative authority in Malta

## Controlled deliveries and JITs

- AG may authorise Police/Customs to allow a controlled delivery (identifying persons involved in the commission of any criminal offence under the laws of Malta or under the laws of another country).
- the illicit/suspect consignment may consist of anything whatsoever and that the consignment may be intercepted and allowed to continue with the original contents intact or removed or replaced in whole or in part.
- AG may also authorise Police or a person under the supervision or direction of the Police, to acquire/procure an illicit or suspect consignment of anything from any person or place.

## Definition of recidivist: amended

**49:** A person is deemed to be a recidivist, if, after being sentenced for any offence by a judgment which has become absolute, he commits another offence:

Provided that the court may, in determining the punishment, take into account a judgment delivered by a foreign court which has become absolute.

## 3. Corporate Liability

- Corporate liability being increasingly extended to embrace more crimes
- when commission of offence was rendered possible due to lack of supervision/control by a person cited in 121D (director, manager, secretary, power of authority/representation)
- ❖ E.g. abuse of public authority, sexual exploitation of minors, fraud, trafficking of persons, terrorism, cybercrime

## 4. Judicial Cooperation

- Malta party to all major conventions regulating MLA:
  - ✓ 2000 MLA Convention
  - ✓ 2005 CoE Convention on Laundering
  - ✓ UNTOC (2000) & Protocols
  - ✓ UN Convention on Corruption
  - ✓ UN Convention against Illicit traffic in narcotics (1988)
  - ✓ CoE Convention on laundering, search, seizure, and confiscation of proceeds of crime (1990)
  - ✓ COE Convention on MLA 1959

### (i) Malta as Requesting State

- 399 (1) Court decides witness/other act indispensably necessary, the letter of request and court's decision served on AG, who may within 5 working days make submissions
- (2) Accused may within 4 working days appoint counsel
- (3) The provisions of article 622B of Cap. 12. apply

## (ii) Malta as Requested State MLA measures

- **435B:** Investigation and attachment orders
- **435C:** Freezing Orders
- **435D:** Confiscation Orders by a foreign court and includes judgements/declarations/decision even by a civil court
- **23(4):** Where AG communicates to Magistrate request for the return of an article obtained by criminal means for purposes of restitution to its rightful owner, the court may after hearing the parties and if it deems it proper so to act, order that the forfeiture of any such article shall not take place and that the article shall be returned to the requesting foreign authority.

## MLA tools (ii)

- **314D: Co-operation in the suppression of offences at sea.** Commander AFM informed by foreign authority and with concurrence of PM may authorise necessary action.

This relates to offences which would tantamount to: offences relating to making/possession of explosives; use/possession etc of nuclear material and lethal devices for unlawful objectives or for proliferation purposes.

The vessel must be a private one used for commercial or private purposes which is entitled to fly the Maltese flag and exercises freedom of navigation.

## MLA Tools (iii) Controlled deliveries and JITs

- **435E(3) :** AG 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
- "competent authorities of another country" and "official from another country" shall be construed as including officials of bodies set up pursuant to the Treaty on European Union as defined in article 2 of the European Union Act.

- Where the AG has authorised the setting up of a joint investigation team the foreign officials participating in the said investigation shall be **entitled to be present** when investigative measures are being taken and, if so authorised by the competent officer of the Executive Police, **to take investigative measures.**

- AG may authorise 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.**

## MLA tools (iv)

- **435BA:** Monitoring Orders
- **435BB:** The AG may, with the concurrence of the Minister responsible for Justice, give his consent to the temporary surrender of a person in custody in a foreign State for the purpose of investigations to be carried out or being carried out in Malta at the request of a judicial, prosecuting or administrative authority of that State.
- **LN 397 of 2007:** Framework Decision 2003/577/JHA of 22.7.03 on Freezing Orders

## Execution of MLA Requests

**649:** AG communicates to Magistrate a request made by a judicial/prosecuting/administrative authority or by an international court for:

the examination of any witness present in Malta, for any investigation, search or/and seizure,

- Magistrate shall examine on oath the said witness on the interrogatories forwarded and take down the testimony in writing, or shall conduct the requested investigation, or order the search or/and seizure

- The order for search or/and seizure shall be executed by the Police.

- The magistrate shall comply with the formalities and procedures indicated in the request of the foreign authority unless these are contrary to the public policy or the internal public law of Malta.



### Traditional forms of Judicial Assistance

- European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and its two Protocols of 17 March 1978 and 8 November 2001 (Council of Europe)
- European Convention on Extradition of 13 December 1957 and its two Additional Protocols of 15 October 1975 and 17 March 1978 (Council of Europe)
- European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 (Council of Europe)
- Convention on the Transfer of Sentenced Persons of 21 March 1983 (Council of Europe) and its Additional Protocol of 18 December 1997
- Within the European Union, the 1959 Convention is supplemented by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and its 2001 Protocol.

Under these arrangements, measures to be taken are determined by law of executing state. No direct enforcement or recognition of orders of issuing State



### European Convention on Mutual Assistance in Criminal Matters of 20 April 1959

- **One of the first multilateral MLA treaties**
- **Entered into force in 1962**
- **All EU MSs have ratified**
- **Applies to all offences except military offences**
- **No sentencing threshold or double criminality requirement for its use except for search and seizure measures (Article 5)**
- **Assistance through exchange of letters rogatory (written requests sent by judicial authorities in the requesting State to the relevant authorities in the foreign State)**



- **Requests normally sent between Ministries of Justice, but in urgent cases directly between judicial authorities**
- **Locus regit actum principle: requests generally executed in accordance with national law and practice in the requested State**
- **Assistance may be refused if request likely to prejudice the sovereignty, security, ordre public or other essential interests of the requested State**
- **First Protocol to the Convention removes exemption for fiscal offences**



### Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 29 May 2000

- **In force in large majority of MSs**
- **Conceived to supplement the 1959 CoE Convention in order to facilitate movement of evidence between EU MSs**
- **Improves the speed and efficiency of judicial cooperation**
- **General rule: requests and communications are made directly between judicial authorities with territorial competence (however, still via central authorities in some particular cases)**
- **Forum regit actum principle: requested MS must normally comply with the formalities and procedures indicated by the requesting MS**



- **Requested MS must execute the request asap, taking account of deadlines indicated by requesting MS**
- **If deadline set cannot be met, the requesting MS should be informed asap and they may try to agree on further action**
- **Mechanisms involving modern communication methods (hearing by videoconference, teleconference, interception of telecommunications, etc.)**
- **Spontaneous exchange of information (i.e. without prior request) possible**



### Protocol of 16 October 2001 to the Convention of 29 May 2000

- **Primarily concerned with financial crime**
- **Assistance relating to**
  - requests for information on bank accounts
  - requests for information on bank transactions
  - requests for monitoring bank accounts
- **Obligation of requested authorities to inform requesting authorities about their investigations**
- **Forwarding of additional requests for mutual assistance**
- **Abolition of the fiscal offence exception**
- **Abolition of the political offence exemption (although MSs may limit this abolition to specific offences)**



## From Mutual Assistance to Mutual Recognition

### Mutual ASSISTANCE

Request to another State to assist with the operation of the criminal justice system. The decision forms part of the requested State's legal system



### Mutual RECOGNITION

The decision of the issuing State takes effect *as such* within the legal system of the executing State



**Revolutionary shift**



## Evolution of Mutual Recognition

Oct. 1999 ⇒ Tampere European Council proclaims MR as the “cornerstone” of judicial cooperation in both civil and criminal matters

Dec. 2009 ⇒ Lisbon Treaty (Article 82 TFEU):  
“Judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States”

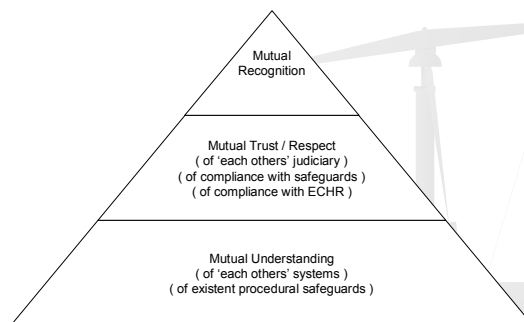


## What is Mutual Recognition?

- The competent judicial authorities of the executing State shall recognise judicial decisions taken by the issuing State without any further formality being required and shall take all the necessary measures for its execution
- It applies to all stages of criminal proceedings, including enforcement of pre-trial orders



## Mutual Recognition - Requirements



## Mutual Recognition: the role of Eurojust

- Art. 7 (3) new EJ Decision: “(...) a competent authority may report to EJ recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition and request the College to issue a non-binding opinion on the matter (...)”.
- Art. 13 (7) (c) new EJ Decision: “Member States shall ensure that their national member is informed of repeated difficulties or refusals regarding the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition”.



## Main Mutual Recognition instruments

### MR instruments adopted so far:

- FD on European Arrest Warrant ( 2002 )
- FD on Execution of Freezing Orders ( 2003 )
- FD on MR of Financial Penalties ( 2005 )
- FD on MR of Confiscation Orders ( 2006 )
- FD on European Evidence Warrant ( 2008 )
- FD on Transfer of Sentenced Persons (2008)
- FD on Probation Measures and Alternative Sanctions (2008)
- FD on Decisions Rendered in the Absence of the Person Concerned at the Trial (2009)
- FD on European Supervision Order ( 2009 )



### FD on European Arrest Warrant

- Applicable from 1 January 2004, except some delays
- Replacing extradition
- Main elements of the EAW:
  - ✓ It is an order, not a request
  - ✓ Speedy action. Less scope for refusal
  - ✓ Exhaustive list of grounds for refusal
  - ✓ Surrender of own nationals
  - ✓ Derogation from double criminality for a list of 32 crimes
  - ✓ Deadlines: decision 10 days if consent. 60 days, extensible up to a further 30 days. Surrender not later than 10 days after decision.



### EAW: Role of Eurojust

- Advisor and facilitator of the issuing and implementation of EAWs in the context of coordination of parallel investigations and prosecutions involving two or more States.
- Facilitator of the execution of EAWs.
- Advisor in cases of conflicts of EAWs (art. 16 EAW FD) and (possibly) in cases of conflicts between EAWs and extradition requests presented by a third country.
- EU body in charge of the registration of the reasons for delays (art. 17 EAW FD).



### FD on Execution of Freezing Orders

- Purpose: MR of freezing orders
- It applies to freezing orders issued for purposes of
  - ✓ securing evidence, or
  - ✓ property
- Orders issued by a judicial authority are transmitted directly to the competent judicial authority for execution.
- Exhaustive list of grounds for non-recognition or non-execution



### FD on MR of Financial Penalties

- Fines imposed on natural and legal persons in one MS are to be enforced in another MS (traffic fines)

### FD on MR of Confiscation Orders

- MR and execution of orders to confiscate property so as to oblige a MS to recognise and execute in its territory orders issued by a court competent in criminal matters of another MS



### FD on European Evidence Warrant

- Implementation deadline: 19 January 2011
- Definition: A judicial decision issued by the competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in judicial proceedings and certain administrative proceedings
- Only covers existing and available documents, objects and data
- Does not apply, e.g. to statements from suspects or witnesses, DNA samples, interception of communications, monitoring of bank accounts
- Direct transmission between judicial authorities
- Grounds for refusal very limited
- Process to take a decision: max. 60 days



### EEW: Role of Eurojust

- Advisor and facilitator of the issuing and implementation of EEWs in the context of coordination of parallel investigations and prosecutions involving two or more States.
- Facilitator of the execution of EEWs.
- Advisor in cases foreseen in art. 13.4 EEW FD: "Where a competent authority considers using the ground for refusal under paragraph 1(f)(i) of art. 13 (territoriality clause), it shall consult Eurojust before taking the decision. Where a competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it give the reasons for its decision and that the Council be informed".

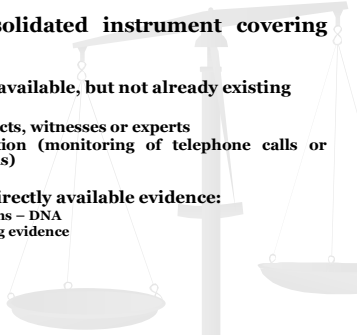


## European Evidence Warrant

### Next step:

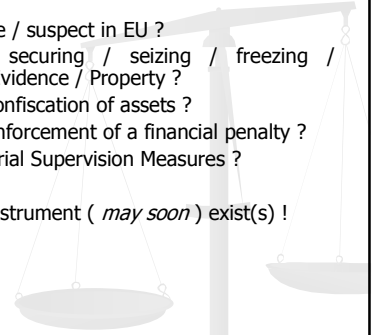
#### One single consolidated instrument covering also:

- > Evidence directly available, but not already existing
  - Statements of suspects, witnesses or experts
  - Real-time information (monitoring of telephone calls or banking transactions)
- > Existing but not directly available evidence:
  - bodily examinations – DNA
  - Analysis of existing evidence

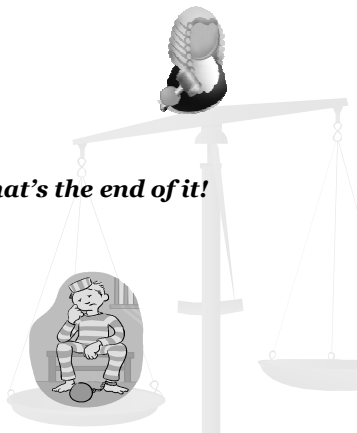


## Mutual Recognition Relevance to Practitioners

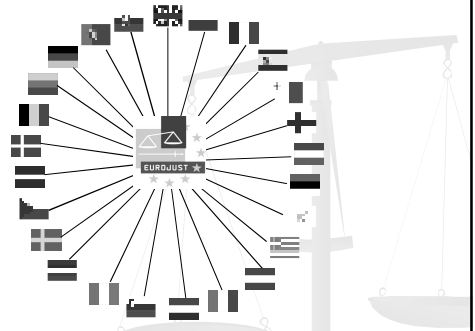
- ❖ Do you e.g.
  - ✓ Seek a fugitive / suspect in EU ?
  - ✓ Require the securing / seizing / freezing / gathering of Evidence / Property ?
  - ✓ Require the confiscation of assets ?
  - ✓ Require the enforcement of a financial penalty ?
  - ✓ Require Pre-Trial Supervision Measures ?
- ❖ If Yes.... A MR Instrument ( *may soon* ) exist(s) !



*And that's the end of it!*



## Working for More Effective Judicial Co-ordination & Co-operation



[www.eurojust.europa.eu](http://www.eurojust.europa.eu)