

THE EPPO/OLAF

Compendium of National Procedures

XIX

Desktop Codes on the Procedural Law of the
Member States with Annotations by National Experts

Pierre Hauck and Jan-Martin Schneider

Malta



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Volume XIX – Malta

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Volumes I (Austria) – XXVII (Sweden)

Volume XIX – Malta

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This volume has been reviewed and updated for accuracy of content with the kind assistance of Advocate Dr Veronica-Anne Spiteri LLD. Nevertheless, the authors take full responsibility for the content.

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The EPPO/OLAF Compendium of National Procedures: Malta

Logos Verlag Berlin



Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available on the Internet at <http://dnb.d-nb.de>.



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Cover image by Tom Fisk, pexels.com

Logos Verlag Berlin GmbH 2024
ISBN 978-3-8325-5869-7

Logos Verlag Berlin GmbH
Georg-Knorr-Str. 4, Geb. 10,
12681 Berlin
Tel.: +49 (0)30 / 42 85 10 90
Fax: +49 (0)30 / 42 85 10 92
<https://www.logos-verlag.de>



**Funded by
the European Union**

The research underlying this publication was funded by the European Union's HERCULE III programme (grant agreement No. 101015173).

The content of this publication represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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This publication was supported by the Open Access Publication Fund of the Justus Liebig University of Giessen.



The EPPO/OLAF Compendium of National Procedures

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* The Lithuanian chapter was also revised by a national expert. However, due to his or her prominent professional position, this person does not wish to be named so as not to give the impression that the chapter reflects the official position of the Lithuanian state authorities. Nevertheless, we thank this person very much for this valuable contribution.

Preface and Acknowledgements

Every year, millions of euros of taxpayers' money are lost to fraud against the European Union budget. The fight against fraud has therefore been a key element in protecting the Union's financial interests for decades, and it still is. Since then, many different political and legal approaches have been taken to create a secure situation.

In essence, this financial protection by way of fighting crime is nowadays not only provided by the national judiciary, but also to a significant extent by the EU's own investigative bodies of the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF).

These two authorities work on the basis of their own EU regulations, each of which has in common to refer to the national legal situation with regard to the conduct of investigations. This concerns the law of the EPPO as a whole, as far as the EPPO Regulation in Article 30 para. 1 and para. 4 refers to nationally to be created (para. 1) or nationally existing powers (para. 4). This also applies to OLAF's right to carry out so-called external investigations, which are so important, in the event that an economic operator refuses to participate in the investigation, so that in this case it is not Union law but national law that forms the basis for the investigation (cf. Article 3 para. 6 OLAF Regulation).

However, these references to national law are not enough; the problems of applying the law are only just beginning: Knowledge of national rules is usually reserved for those familiar with the national legal system, and at the level of the EU authorities these are very few. EU authorities, including the investigative authorities in question here, are rather characterized by the fact that they are made up of many employees from the most diverse member states. It is true that for both authorities, certain mechanisms (namely the EDPs as part of the EPPO and the AFCOS for OLAF) have been put in place to ensure that national legal competence is conveyed. But by and large, the respective national investigative procedure law remains a closed book in terms of criminal procedure or administrative law, not to mention the language barrier that threatens to become insurmountable for most people within the EU when seeking access to the law of other countries.

This publication series aims to remedy these shortcomings. It presents the law of criminal procedure and administrative investigation for all 27 Member States in English and in the language of the Member State. It thus provides easy access to the procedural rules of a foreign legal system, which are so important for EU investigative work. However, this presentation does not stop there, but explains these national rules, which are printed

in bilingual form, from a competent source, namely from national experts. In this way, an explanatory work has been created that clearly ensures access to and understanding of foreign areas of law in the field of criminal procedural and administrative fraud investigations.

The editors would like to thank the European Commission for generously supporting the research underlying this work with funds from the EU's Hercule III programme, and they would like to thank the Justus Liebig University of Giessen for generously supporting the open access publication of this work with funds from its Open Access Publication Fund.

Our sincere thanks go to our team at the University of Giessen, in particular Nur Sena Karakocaoglu and Alastair Laird, who have borne the main burden. Julian Doerk, Felina Frkic Wegener, Aleksandra Joachimiak, Tom Löwer, Maike Kappes, Luca Kloft and Sophie Meyer have greatly supported the project with a variety of research and formatting work. Corinna Haas and Vanessa Runge have accompanied the project from the beginning and have always backed us up with their sure eye for work-relevant aspects and processes, thus continuously supporting this ambitious project from start to finish.

The project was also successful because the third-party funding administration of the Justus Liebig University in the shape of Dr Christian Maarten Veldman, Anja Daßler and Jochen Stein took a lot of work off our shoulders.

Last but not least, our thanks go to the wonderful supervision and support of the publisher Volkhard Buchholtz and the production coordinator Katharina Kruse and Hannah Kropla from Logos Verlag in Berlin for everything it takes to bring a book to life.

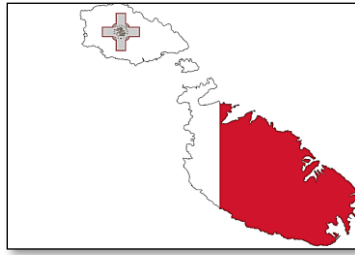
Fair comments and suggestions for improving the work are always welcome at eppo.olaf@web.de.

Giessen/Germany, in November 2023

Pierre Hauck & Jan-Martin Schneider

Suggested citation:

The suggested citation for the entire work is always “Hauck/Schneider, EPPO/OLAF CNP, Vol. [I-XXVII] [Member State], p., margin number“, but for the introductory chapters contributed by national experts with individual author references in the title it is “[Name of the national expert], in: Hauck/Schneider, EPPO/OLAF CNP, Vol. [I-XXVII] [Member State], p., margin number”.



Executive Summary: In Part A the volume gives an overview of the relevant Maltese national law for the actions of the EPPO in Malta. Part B guides the reader through the national law-related references and procedures of the EPPO Regulation and the EPPO Adoption Law. The chapter subsequently presents in Part C the relevant law for the investigatory tasks of OLAF and its national companions in external investigations. An introduction to important provisions in relation to the defence is presented by Dr. Spiteri in the main text before the chapter on the presentation of Union law and the related national law.

From a formal point of view, the volume contains partly an analysis and a deduction accompanied by the English translations of the positive legal text and the original text of the legislator in the footnotes to the main text. Judgements and case law are analysed and added if relevant. From a comparative point, the Maltese Chapter can be used for comparative views on investigation measures.

Part B refers to national cases as major EPPO cases have not been decided in Malta. Part C concentrates on OLAF conducting investigations on Maltese territory or in relation to Maltese jurisdiction. In the past, investigations lead to important national decisions (e.g. in relation to the status of the office or the relevance of reports, Article 11 OLAF Regulation).

Experts and authors: Dr. *Veronica-Anne Spiteri*, LL.D, Prof. Dr. *Pierre Hauck* LL.M. (Sussex). Compilation and research of the EPPO and OLAF Parts (B–C) by Prof. Dr. *Pierre Hauck* LL.M. (Sussex), *Jan-Martin Schneider* (Dipl.-Jur. MR; RA, University of Gießen)/*Alastair A. Laird* (RA, University of Gießen)/ *Nur Sena Karakocaoğlu* (Dipl.-Jur. FFM.; RA, University of Gießen) with the help of the expert. Compilation and research of the OLAF-Part C arranged with the special help of Questionnaire experts/organizations (AFCOS, OAFCN) consulted and submitted research material: Tax Compliance Investigation Department Public Documents, Public AFCOS Report, OLAF-Reports.

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Abbreviations

AA	Audit authority
ACA	Administrative cooperation agreement
acc.	according
AFCOS	Anti-fraud coordination service
AG	Attorney General (of the Republic of Malta)
ARB	Asset Recovery Bureau
Cap.	Chapter
CDD	Court Decision's Database
CFC	Fundamental Rights Charta
CfR	Controller of Revenue
CJEU/ECJ	Court of Justice of the European Union/European Court of Justice
COCOLAF	Advisory Committee for the Coordination of Fraud Prevention
ECP	European Chief Prosecutor
EDPs	European Delegated Prosecutors
EFAD	EU Funds Audits Directorate
EP	European Prosecutor
EPPO	European Public Prosecutor's Office
EUPA	European Union Programmes Agency
FCID	Financial Criminal Investigations Department
FID	Financial Investigations Directorate
GC (aka CFI ex-2009)	General Court of the EU / formerly Court of First Instance
GRECO	Group of States against Corruption
IAID	Internal Audit and Investigations Department
IRP	Internal Rules of Procedure
MRB	Malta Business Registry
NAO	National Audit Office
OAFCN (-Member)	OLAF Anti-Fraud Communicators' Network
OLAF	European Anti-fraud office
PA EAGF	Payment Agency

PCAC	Permanent Commission Against Corruption (PCAC)
SL	Subsidiary legislation
TCU	Compliance and Investigations Directorate (Tax Compliance Unit)
CAP	Common Agricultural Policy (
SEDIA	Funding and Tenders Portal
ERASMUS+ programme	European Region Action Scheme for the Mobility of University Students

* The list is not exhaustive. For any abbreviations, which are not listed here, please refer to the Cardiff Index to Legal Abbreviations. For the Maltese legal jargon, we recommend reading Felice-Pace, Maltese Legal Jargon, University of Malta, access: <https://bit.ly/4gbtOFj>, using EUR-lex EuroVoc: <https://eur-lex.europa.eu/browse/eurovoc.html> and the utilisation of Aquilina's Maltese-English Dictionary, Midsea Books Ltd, Malta 2006.

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Explanation of Symbols & Highlighting

Text passages highlighted in grey show Union law.

Text passages marked with **boxes** show relevant national law.



















Plain Tables display either a synopsis of a foreign law text and the English translation or a summary of institutions and relevant case law.

Tables with symbols in the first row contain case studies (EPPO & OLAF cases) or relevant jurisprudence.

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A. General Collection of Material for Part B and C

The first section of this volume offers a “**pool of cases**” within the **PIF** *acquis* area, with a particular focus on the roles played by the **EPPO** and **OLAF** in tackling EU financial crimes. The volume sections B and C provide a comprehensive examination of **Union law** and national law hereby exploring **potential investigation sceneries** that highlight the complexities surrounding the jurisdictional and collaborative aspects of these anti-fraud actors. This volume is designed to serve as a quick **reference tool** for legal practitioners, offering essential **insights into the application of relevant laws** and the procedural intricacies within the EU’s anti-financial crime framework in Malta.

1

I. Collection of Cases

The **efficient application, interpretation and enforcement of EU law** is guaranteed by the national courts and by the Court of Justice.¹ EDPs and seconded national experts need to follow the interpretation of laws in order to conduct impeccable investigations.

2

1. EPPO Regulation

a) Main Overview

Table 1 Collection of Cases and Examples from the Past for the Present Material Competence of the EPPO in Malta



Articles referred to	Judgement, ECLI etc.	Keywords, Content
Deciding courts: CJEU and national courts		
Article 22–26 Examples of Material Competence	Court of Magistrates (Criminal Judicature) Judiciary, <i>Demicoli Josette Parts, Police v Cohen Michael</i> , ECLI-USECLI:MT:PIN:2021:128178. 15/09/2021. Cases cited (Identify Card Fraud, Fraud detrimental to the State Budget, Administrative Expenses Fraud):	This decision is a not guilty case: Not enough evidence. No intent. Accusation: Complicity in ideological falsehood. Fraud, Article 42, 188, 293 (misappropriation), 308, 309, 405 (embezzlement) Criminal Code, Complicity in Forgery, Manual invoice, Administrative expenses. This is a case, which involved OLAF: a suspicion that the

¹ See only Terhechte 2020, pp. 569 et seq. focuses on the essential “conditions for the success” of the European judicial network. It is important to stay update if you are staff of a prosecution office or investigation team of one of the EU’s or national authorities as new decisions may interpret the law and provide new guidelines for practice by judicature. A.J. Mamo and Aquilina 2022, First Year Criminal Law, GhSL, → <https://bit.ly/3MVSMuI>, pp. 30.

	Same Court: <i>The Police</i> (Inspector Kevin J. Farrugia) (Inspector I. J. Abdilla) vs. <i>J. A. J. Manuel Galea</i> . <i>The Police vs. dr. Siegfried Borg Cole</i> . <i>Police vs. Glen Debattista</i> .	price that the European Union was paying for the tickets for members to travel was being inflated more than the true Price. The external partner of OLAF was the Internal Audit Investigating Department (IAID). It went to the location and explained to them that OLAF were conducting an investigation into the payment of tickets for members of the Association of Local Councils to attend meetings within Europe.
Article 27	Court of Magistrates (Criminal Judicature) <i>Judiciary Clarke Doreen Parts – The Police v Fenech Joseph</i> , ECLI:MT:PIN:2022:136063.	This is a decision with relevance for prescription.
Article 25, 26, 27	Court of Magistrates (Criminal Judiciary) <i>Police v. Langdale Hannah Marie</i> , 18/07/2022, 86/2020 ECLI:MT:PIN:2022:133463.	Prescription. Fraud. Forgery. Falsification of Documents. Article 5 of the Money Laundering Act, Chapter 373 of the Laws of Malta. Note on <i>ratio legis</i> of freezing.
Article 28	Constitutional Court of Malta, <i>The Police v Alvin Privitera</i> , Judgement of 11 April 2011.	With relevance to the right to have access to a lawyer while the investigation is being conducted.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>The Police v Esron Pullicino</i> , Judgement of 12 April 2011.	This is a case with relevance to the right to have access to a lawyer while the investigation is being conducted.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>The Police v Mark Lombardi</i> . And see <i>Cadder v Her Majesty’s Advocate</i> [2010] UKSC 43.	With relevance to the right to have access to a lawyer while the investigation is being conducted.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>Charles Stephen Muscat v The Attorney General</i> , Judgement of 8 October 2012.	Regarding accused’s fair trial rights.

Art. 26, 28, 41–42	Constitutional Court of Malta, <i>Joseph Bugeja v The Attorney General</i> , Judgement of 14 January 2013.	Regarding accused's fair trial rights.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>The Police v Tyron Fenech</i> , Judgement of 22 February 2013.	Regarding accused's fair trial rights.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>The Republic of Malta v Alfred Camilleri</i> , Judgement of 12 November 2012.	Violation of the accused's fair trial rights, in particular because he had not even been cautioned by the police.
Art. 26, 28, 41–42	Constitutional Court of Malta, <i>The Police v Amanda Agius</i> , Judgement of 22 February 2013.	Regarding accused's fair trial rights.
Deciding courts: National courts, ECtHR		
Art. 27, 41–42	ECtHR, <i>Case of Calleja v Malta</i> , Application no. 75274/01, Judgment of 7 April 2005.	The applicant alleged that his detention on remand and the criminal proceedings against him and were excessively long.
With relevance for Article 30 para 1 (d)	<p>Court of Magistrates (Criminal Judiciary), <i>Police v. Langdale Hannah Marie</i>, ECLI:MT:PIN:2022:133463.</p> <p>Cases cited: Court of Appeal, <i>Angelo Fenech pro et noe vs Carmelo Callus</i>, 4th February 1994.</p> <p>ECtHR, <i>Dzemic v Croatia</i> decided on the 17th May 2016.</p>	<p>Fraud. Forgery. Falsification of Documents. Article 5 of the Money Laundering Act, Chapter 373 of the Laws of Malta.</p> <p>Note on <i>ratio legis</i> of freezing. Freezing of all her salary. Director of the Assets Recovery Bureau. Salary of accused must remain excluded from freezing order. For sake of proportionality.</p>
Article 33	Court of Criminal Appeals (Superior) <i>The Republic of Malta v Aziz Ahmad</i> , 25/01/2023, 6/2021/1.	<p>Bail, Offences potentially committed: Fraud, VAT fraud, false invoices, fictitious documents, Defence: Breach of legal rights? Maltese citizen, Passport confiscated.</p> <p>Defence decided for fall court to file allegations: "alleged violations of human rights fall within the jurisdiction of the</p>

		Constitutional Court, and not of this Court”.
Article 28	ECtHR, <i>Martin DIMECH against Malta</i> , 22 May 2013, Application no. 34373/13.	With relevance to the right to have access to a lawyer while the investigation is being conducted.
Article 30	ECtHR, <i>Dzemic v Croatia</i> , 17th May 2016.	Freezing of proceeds of crime.
Article 30	ECtHR ² , <i>Sharazova vs Malta</i> , 3rd March 2022.	Proportionality of freezing measures.
Article 33	Application of John Hughes 1982 ³ .	The decision is relevant for <i>habeas corpus</i> situations.
Example of EPPO charges⁴		
In 2024 the EPPO Office in Valletta filed indictments against 11 suspects in a customs fraud and corruption investigation, including six customs officers, three customs operators, and two companies. The charges involved customs fraud, corruption, participation in a criminal organization, and money laundering. The suspects were arrested and brought before Malta’s Court of Magistrates. The case involved a scheme to evade customs taxes on goods imported from China by under-declaring their value and weight. The illicit activities caused significant damage to both Malta’s national budget and the EU budget. The EPPO seized property and goods totalling millions of euros to recover damages. All suspects are innocent until proven guilty in court. ⁵		

Source: The authors.

² A signatory to numerous other human rights treaties, Malta is a member of the European Convention on Human Rights. Whether or if EDPs are held liable under the ECHR Convention is the important legal question in this case. Their acts are evaluated in relation to the level of protection provided by the ECHR because they are subject to national laws and regulations as members of the national system. The EU's non-membership in the Convention and the possibility of different protection standards provide a challenge. Refer to Callewaert 2021, pp. 20–35, on this question. The cases listed and presented in the table do not refer to actions of the EPPO that have taken place, but to actions of national prosecutors and investigators. These decisions also apply to delegated prosecutors, as they are de facto national prosecutors with a “European hat”. This means that ultimately these decisions can also be relevant for EDP cases, e.g. when it comes to the rights of the accused, limits of (constitutional) coercion measures, etc.

³ See Filletti 2013, p. 481.

⁴ EPPO assigns special names like „Operation Octopus“ or „Operation Miza“ to its investigative operations as a way to manage and categorize large, complex cases apparently. These names often carry symbolic meanings or relate to specific aspects of the investigation. It is a tradition in law enforcement to name major operations. Other international bodies like Europol or Interpol, as well as national police forces (such as the FBI or German *Bundeskriminalamt*), also name their large operations. Once an operation is completed and becomes public, a memorable name like "Operation Octopus" may draw attention to the significance of the case, its complexity, or its symbolic nature (e.g., „Octopus“ suggesting a large, multi-faceted criminal network). This can help inform and educate the public about the EPPO’s work in protecting EU financial interests. Last but not least, using a codename helps maintain confidentiality during the initial stages of an investigation.

⁵ EPPO, Investigation into customs fraud and corruption of public officials, Press Release, 11 July 2024.

b) Special Cases

By Dr Veronica-Anne Spiteri, LL.D



Cases, which relate to the PIF-Acquis Area and which are summarized below with the help of our expert, shall be listed here again separately with annotations to the content:

3

1. Il-Pulizija (Supretendent Ian J. Abdila) vs Kenneth De Martino (1177/2011) (4th October 2016)
2. Eros Trading Limited (C7604) vs Direttur General Dwana (603/15GM) (9th January 2020)
3. Il-Pulizija (Spettur Anna Marie Xuereb) vs Antoine Gambin (702/2014) (9th January 2023)
4. Megasol Company Limited vs Direttur Ġenerali (Dwana) u Kummissarju tat-Taxxi (62/2015 LM) (10th May 2023) – THIS IS THE APPEAL – CONFIRMED COURT OF FIRST INSTANCE JUDGEMENT
5. Francis Busuttil and Sons (Marketing) Limited vs Il-Kontrollur tad-Dwana (37/11VG) (10th October 2016)
6. Spettur Chris Pullicino vs Joseph Borg (1238/2012) (21st March 2013)
7. Il-Kontrollur tad-Dwana vs Emmanuel Vella & Sons Limited (249/08/2 JRM) (27th October 2021)
8. Il-Pulizija vs Kenneth De Martino (473/2016)(29th October, 2018)

c) Case Summaries

a. Eros Trading Limited (C7604) vs Direttur Ġenerali Dwana

Eros Trading Limited (C7604) vs Direttur Ġenerali Dwana



- Explains the process which is undergone when products enter Malta from other countries of the EU, which have been imported from China.

4

The Court explained the process of calculating the ‘cleaned average price’ and the ‘lowest acceptable price’:

5

- “Jurgen Marke explains how the analysis by the OLAF Agency led to establishing a ‘cleaned average price’ and a ‘lowest acceptable price’ for various textile products and shoes, as a matter of fact, these were mainly imported by the concerned company. The ‘cleaned average price’ was determined for each imported textile product from China”

- “The cleaned average prices are calculated based on statistics from the COMEXT database over a period of 48 days, providing a value per kilogram for each CN (combined nomenclature⁶) product code, according to the country of origin and country of destination within the EU.”
- In order for these values to be applied in practice, an average of 28 cleaned average prices is taken through an arithmetic process; this process is of importance so that all member states are computed with equal importance (at the time there were 28 member states).
- The reason for calling the process ‘clean’ is because excessively high or low values are excluded from the computation.
- In order to calculate the lowest acceptable price, only 50% of the cleaned average prices are used.
- This mechanism is available to all third countries from which the EU imports these types of products, enabling the Chinese Customs authorities to determine whether the products are declared undervalued.
- Moreover, this mechanism allows Customs authorities in the Member States to identify dubious imports and take necessary actions and safeguards to rectify the EU’s error.

6 Articles referred to: Articles 28–36 of the EU Customs Code: Article 181a of Commission Regulation no. 2454/93

“1. The customs authorities need not determine the customs valuation of imported goods on the basis of the transaction value method if, in accordance with the procedure set out in paragraph 2, they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable as referred to in Article 29 of the Code.

2. Where the customs authorities have the doubts described in paragraph 1 they may ask for additional information in accordance with Article 178(4). If those doubts continue, the customs authorities must, before reaching a final decision, notify the person concerned, in writing if requested, of the grounds for those doubts and provide him with a reasonable opportunity to respond. A final decision and the grounds thereof shall be communicated in writing to the person concerned.”

Article 178(4) of Commission Regulation no. 2454/93:

“4. The lodging with a customs office of a declaration required by paragraph 1 shall, without prejudice to the possible application of penal provisions, be equivalent to the engagement of responsibility by the person referred to in paragraph 2 in respect of:

⁶ A tool for classifying goods, set up to meet the requirements of the Common Customs Tariff and of the EU’s external trade statistics (https://taxation-customs.ec.europa.eu/customs-4/calculation-customs-duties/customs-tariff/combined-nomenclature_en). Accessed 31 July 2024.

- *The accuracy and completeness of the particulars given in the declaration,*
- *The authenticity of the documents produced in support of these particulars, and*
- *The supply of any additional information or document necessary to establish the customs value of the goods.”*

Article 10 of Chapter 337 of the Laws of Malta, Professional Secrecy:

“It shall be a defense to a charge of disclosing secret information contrary to Article 257 of the Criminal Code to show that, at the time the information was revealed, the information had entered the public domain and had done so legitimately.”

Cases Mentioned: EURO 2004. Hungary Kft. v Nemzeti Adó- és Vámhivatal Nyugatudántúli Regionális Vám- és Pénzügyőri Főigazgatósága (decided 16th June 2016)

7

- The case also mentions the 4 ways in which the administration may act ultra vires and refers to Article 469A(1)(b) of Chapter 12 of the Laws of Malta.

b. Francis Busuttil and Sons (Marketing) Limited vs Il-Kontrollur tad-Dwana



The next case is:

8

Francis Busuttil and Sons (Marketing) Limited vs Il-Kontrollur tad-Dwana

- Deals with the question: Is customs duty a form of debt due to government? This case primarily deals with Article 466(1) as it was in 2011 and its amendment in 2012 as it was cited in a judicial letter
- The Director General (Customs) maintains that contrary to the contentions put forward by the applicant company, the collection of import duties falls within the parameters debt due envisaged in Article 466 of Chapter 12 of the laws of Malta, and in this case, there is no breach of any fundamental rights of the applicant company, apart from the fact that before the same company can seek any remedy, it must first exhaust the available ordinary remedy at its disposal.
- Sometime after the imported product had arrived and the preferential rate of 4.2% (instead of 12%) had been paid in favor of the applicant company without any issue, the Customs controller received communication from OLAF, regarding an investigation being conducted on the misdescription as to the origin of fish and prawns exported from the United Arab Emirates by various companies, including Seville Products Limited, indicated as originating from the United Arab Emirates, while in truth they originated from Pakistan, Oman and India.
- The customs department requested and obtained from the applicant company the documentation concerning this specific consignment of frozen cooked shrimps and forwarded it to OLAF for the purposes of their ongoing investigation.
- The investigation revealed that the shrimp originated from India.

- The duty rate for products originating from the United Arab Emirates was lower in this case, due to certain agreements between the EU and certain other countries, including the United Arab Emirates.
- The obligation of the Customs Controller to order the inspection of documentation and commercial information related to the import and export operations of the relevant goods or subsequent commercial operations involving such goods, stems from Article 11(2) and (3) of Chapter 337 of the Laws of Malta. Therefore, they have a right to investigate such products, especially if the previous investigation was based on wrong information or false evidence.
- The Court denied the payment of the sum stipulated as the request was not stipulated with sufficient evidence.

9 Articles referred to: Article 466(1) of Chapter 12 of the laws of Malta – proceedings for debts due to Government

“(1) Where the head of a government department or the person vested with the legal representation of a body corporate established by law or with the legal representation of a body corporate established by law or with the legal representation of any company or other body which has been authorized by or under any law to collect any amounts due to a government department or to a body corporate established by law, desires to sue for the recovery of a debt due to a government department or to any administration thereof or to a body corporate established by law, for any services, supplies, penalties, rent, ground rent, other burdens on property, compensation for occupation and or for any license or other fee or tax due, he may make a declaration on oath before the registrar, a judge or a magistrate wherein he is to state the nature of the debt and the name of the debtor and confirm that it is due:

Provided that the provisions of this Article shall also apply in respect of amounts due for the supply of water and electricity and for the rental of the relative meters but they shall not apply where prior to the service required under sub-article (2) the person from whom the amount is claimed shall have notified the claimant either by means of a judicial act or by registered post that he is disputing the metering, calculation or the charge in respect of such supply or rental.”

Article 39 of the Constitution of Malta – provisions to secure protection of law

Article 6 of the European Convention – right to a fair trial

10 Cases mentioned: Il-Kummissarju ta' l-Artijiet v. LHP Limited, Nru. 564/09, Joseph Scicluna et v. Grezzju Ciantar et, Appell Nru, 1033/93 (24th March 2004).

c. Il-Pulizija vs Kenneth De Martino (4th October 2016)



Il-Pulizija vs Kenneth De Martino (4th October 2016)

- 11** This case involved the buying of air tickets; fraud; corporate liability and falsification.

- It was noted that the Committee of the Regions informed OLAF that during the investigations carried out, there were potential irregularities that had been identified in the Maltese delegation's requests for travel ticket reimbursements for the attendance of members at the Committee of Regions meetings.
- Involved the members of the associations of local councils.

The Court gives a lengthy explanation of fraud, corporate liability, and falsification of documents. Ultimately the court did not find the accused guilty of any crime that he was accused of.

12

d. Spettur Chris Pullicino vs Joseph Borg

Spettur Chris Pullicino vs Joseph Borg



A case regarding blackmail and insult.

This case focuses on its parallel civil case. The defendant Joseph Borg sent an email to Rita Schembri demanding the money she owed him and he blackmailed her into giving him the money – if she did not give the money, he would have reported her to OLAF, the organization which she ironically made part of.

13

The Court had to examine the civil case as Joseph Borg and Rita Schembri had a clause in their agreement of rent which was significant to the case. This clause stated that Rita Schembri could not sub-let the commercial residence without Borg's permission and without him receiving his fair share.

Schembri and her husband entered two contracts with two different persons – the Schembri spouses went against the clause in their contract with Borg.

In essence, there was no pending court case that stated the payment of money to Borg and to the two persons who had an agreement with the Schembri spouses.

Thus, Borg demanded the payment of money without any title or mandate from a court. He neither had an affidavit from the two other persons.

The accused was guilty of slander which is no longer a crime under our Criminal Code. The accused was not guilty of blackmail.

e. Il-Kontrollur tad-Dwana vs Emmanuel Vella & Sons Limited

Il-Kontrollur tad-Dwana vs Emmanuel Vella & Sons Limited



First Hall case: *OLAF investigations into origin of goods leads to suspicion of Malta involved in sugar trade, false documents, sugar came from Brazil*

14

The Court decided that the defendant is not required to pay damages stipulated in the judicial letter dated March 3rd, 2008.

f. **Il-Pulizija vs Antoine Gambin****Il-Pulizija (Spettur Anne Marie Xuereb) vs Antoine Gambin**

- 15** The case involved a project ‘S.A.I.L’ which was being investigated. This project needed auditing. Only 79% of the documentation regarding expenses which were spent to Metis Company Limited, was found. OLAF investigated the case. The Court found the defendant guilty of fraud and guilty of falsely declaring information to a public authority, under Article 310(1)(a) of the criminal code and Article 188(1)(2) of the criminal code respectively.

2. OLAF Regulation

- 16** The OLAF cases, which are discussed or published in Maltese jurisprudence and, which might relate to a case under investigation or part of an interpretation, are collected in the following table:



Table 2 Collection of Jurisprudence regarding OLAF Actions, Administrative Anti-Fraud Investigations in Malta, OLAF Regulation (ECJ and National Courts)

Relates to following Article of the OLAF-Regulation	Judgement, ECLI, etc.	Content
CJEU and National Courts		
Article 3 Example for Involvement of OLAF	Tribunal Ta’ Revizjoni Amministrattiva Magistrat [Administrative Review Tribunal-Instructive] Dr. Gabriella Vella Seduta tas-27 ta’ Frar, 2014, <i>Rikors Numru. 43/2010 ISP Limited v Direttur Generali (Dwana)</i> .	OLAF, Involvement in external investigation. The Maltese Customs Authority investigated discrepancies in the declared values of plastic bags imported from China. The value per kilo was expected to be between \$1.30 and \$1.50, but ISP Ltd declared significantly lower amounts. John C[...] corroborated S[...] Grima’s evidence with certified documentation from the Chinese authorities.
Article 3 OLAF-Regulation	Court OF Magistrates (Criminal Judicature) Judiciary, <i>Demicoli Josette Parts, Police v Cohen Mi-</i>	Suspicious into irregularities for fraud at the expenses of the Union: “OLAF checked with Lufthansa airline and took a sample and it turned out that there was a substantial discrepancy between the documents collected by the travel agency and the association’s offices and the amounts that were actually paid. He continued that

	<i>chael</i> , ECLI-USECLI:MT:PIN:2021:12 8178. 15/09/2021. ⁷	in most cases there were two invoices for the same trip, i.e. one handwritten and the other generated by the computer and the latter had a low price. The manual invoice was submitted to the Committee of the Regions and the payment was made based on it. The agency was paid the low amount while the Committee of the Regions paid the high invoice. The discrepancy would go either to the Association's account or to the personal member's account although eventually the member would pass the excess amount to the same association."
Article 3 OLAF-Regulation	Qorti tal-Appell Kriminali Onor. Imhallef Dr. Consuelo Scerri Herrera LL.D., Appell Nru: 456/2016, <i>Il-Pulizija (Superintendent Ian J. Abdilla) v Dr. Ian Micallef</i> . ⁸	OLAF investigations into origin of goods leads to suspicion of Malta involved in sugar trade, false documents, sugar came from Brazil.
Article 3 OLAF-Regulation	The Administrative Review Tribunal, Judiciary <i>Vella Gabriella Partsisp Limited v Comptroller Of Customs</i> , ECLIUS, ECLI:MT:TTRA:2014:86 332, 27/02/2014.	Certificate of origin Case, OLAF Report ISP Limited was accused of declaring significantly lower values for the plastic bags they imported into Malta, compared to the actual prices provided by the Chinese exporters. The agency uncovered significant discrepancies between the declared value of imported goods, particularly plastic bags, and the actual value indicated in certificates from Chinese authorities. These falsified certificates of origin and invoices led to the underpayment of customs duties.
Article 3 OLAF-Regulation	The Administrative Review Tribunal, Judiciary <i>Vella Gabriella parties, Xxx Vs Direttur Tat-Taxxa Fuq Il-Valur Mizjud</i> , ECLI:MT:	VAT Fraud links. The company (Rikorrenti) based its appeal against the estimates issued by the Commissioner of VAT. In response, the Commissioner of VAT opposed the appeal, justifying the es-

⁷ And see CIVIL COURT, FIRST HALL Judiciary MICALLEF JOSEPH R.Parts DIRECTOR GENERAL (CUSTOMS) vs. EMMANUEL VELLA & SONS LIMITED PRO ET NOE, ECLIUSECLI:MT:CIVP:2016:103131, 27/10/2016.

⁸ Court of Criminal Appeal Hon. Judge Dr. Consuelo Scerri Herrera LL.D. Appeal No: 456/2016 *The Police (Superintendent Ian J. Abdilla) vs dr. Ian Micallef*.

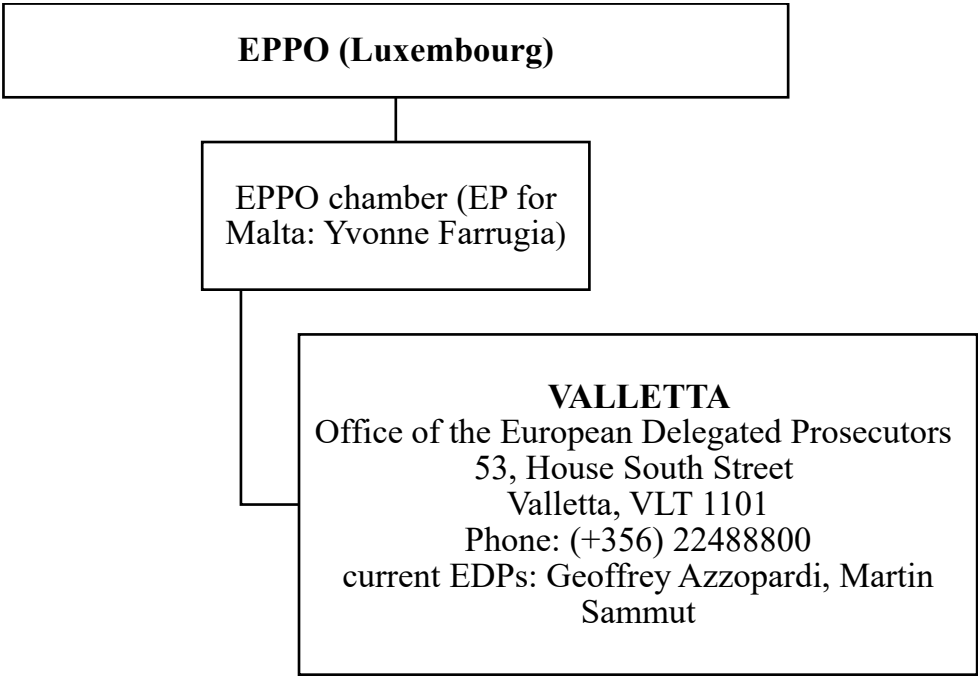
	TTRA:2018:112325.	timates for various tax periods and requested that the appeal be dismissed. The estimates were based on an Investigation Audit Report.
Article 1–4 OLAF Regulation	ECJ, C-615/19 P, 25.2.2021, <i>John Dalli v European Commission</i> , ECLI:EU:C:2021:133.	Allegedly illegal conduct of the European Commission and the European Anti-Fraud Office (OLAF), Procedural rules, governing the OLAF investigation – Opening of an investigation – Right to be heard
Article 3 OLAF-Regulation	The Administrative Review Tribunal, <i>Megasol Co. Ltd v Dir. Gen. (Dwana) Et Kumm. Tat-Taxxi</i> , ECLI:MT: TTRA:2022:132583.	Article 11 of Cap. 337 of the Laws of Malta, Anti-dumping Duty case, Container, imports, Shanghai, China, to Malta.
Article 4 Disciplinary proceedings OLAF-Regulation	The Special Tribunal, <i>No-vium AG v MFSA</i> , 13th July 2022.	Disciplinary proceedings, On-site inspection by national body, Bank, ECHR breaches.
Article 4 Internal Investigations OLAF-Regulation	ECJ, Case C-591/19 P, <i>European Commission v Fernando De Esteban Alonso</i> , Judgment of the Court (First Chamber) of 10 June 2021, ECLI:EU: C:2021:468.	Appeal – Civil service, Internal investigation by the European Anti-fraud Office (OLAF), Forwarding of information by OLAF to the national judicial authorities, Filing of a complaint by the European Commission, Concepts of an official who is ‘referred to by name’ and ‘implicated’, Failure to inform the interested party, Commission’s right to file a complaint with the national judicial authorities before the conclusion of OLAF’s investigation, Action for damages.
Article 10 OLAF-Regulation	GC, Case T-110/15, <i>International Management Group v European Commission</i> , Judgment of the General Court (Eighth Chamber) of 26 May 2016.	Example of a case, in which an OLAF Report and its Material were used as evidence in a criminal trial before a Maltese Appeal Court.

Article 11 OLAF-Regulation	<p>Court of Magistrates (Criminal Judicature) Judiciary, <i>Demicoli Josette Parts, Police Vs Cohen Michael</i>, ECLI:USEC LI:MT:PIN:2021:128178. 15/09/2021.</p>	<p>The case revolved around potential fraud and financial irregularities related to travel expenses for members of the Association, particularly for their participation in meetings of the Committee of the Regions. OLAF was informed by the Committee of the Regions and the Court of Auditors about possible irregularities in the reimbursement claims for travel expenses submitted by the Maltese delegation. These concerns were first raised in a letter from the Committee to OLAF in March 2007. OLAF, together with the Maltese police and the Internal Audit Investigations Department (IAID), conducted several inspections in 2008, including surprise searches of the KD Travel offices and the Association of Local Councils' premises. These inspections were authorized by a legal warrant and led to the collection of key documents. OLAF's investigation revealed significant discrepancies between the prices listed on the invoices submitted to the Committee of the Regions for reimbursement and the actual amounts paid to KD Travel. The invoices often inflated the ticket costs, with the extra funds going either to the Association's bank account or occasionally to personal accounts of members. OLAF verified these discrepancies through cross-referencing documents from Lufthansa. OLAF published a report that was submitted to the Attorney General in Malta and eventually to the Economic Crimes Unit of the Maltese police. This report became a central piece of evidence in the prosecution of those involved. A legal action according to Art. 11 OLAF Regulation followed.</p>
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II. Institutions

1. The EPPO in Malta

17 Table 3 The EPPO regional offices in Malta



2. Organisation of the Criminal Justice System in Malta

18 Table 4 National authorities involved in PIF investigations

Investigative and prosecuting authorities	Administrative authorities
Office of the Attorney General	Malta Business Registry (MBR)
Malta Financial Services Authority (MFSA)	Maltese Customs
Financial Intelligence Analysis Unit (FIAU) ⁹	Internal Audit and Investigations Department
Police Force	Office of the Commissioner for Revenue Compliance and Investigations Directorate (Tax Compliance Unit)
Financial Criminal Investigations Department (FCID)	National Audit Office

⁹ See in-depth Abela, Natho An analysis of the powers of the Financial Intelligence Analysis Unit and the Attorney General following the various amendments to CAP 373: the Prevention of Money Laundering Act, University of Malta, 2016.

Nota bene: The Asset Recovery Bureau (ARB) of Malta (see → assetrecovery.mt) is not directly prosecutorial in nature, rather it is an autonomous public entity, whose function is to trace assets, to manage assets and to dispose of such assets. Naturally these will be in connection to a crime which is being prosecuted.	Malta Agriculture and Rural Payments Agency
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Sources: Expert, AFCOS Report, Mamo 2020.

2. AFCOS – The Partner of OLAF in Malta

See → Article 12a OLAF Regulation below in Part C.

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III. Sources of Law

The following pages present a list of the applicable sources of law:

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1. General National Laws

a) EPPO and PIF-Investigation Related Laws and Administrative Documents

- Prevention of Money Laundering Act, Chapter 373 Laws of Malta.
- Chapter 9 Criminal Code to amend and consolidate the penal laws and the laws of Criminal Procedure. 10th June, 1854.
- Chapter 9 Laws of Malta, Book 2, Procedure Rules,
- Chapter 10 Code of police laws to amend and consolidate the police laws. 10th June, 1854.
- Chapter 37 Customs ordinance to make better provision for the management and regulation of customs. 16th September, 1909.
- Chapter 46 Internal audit and financial investigations act to provide for the regulation of the internal audit and financial investigative functions, including the power to carry out effective independent internal audits and financial investigations, providing for the necessary safeguards to ensure the protection of the financial interests of government including the funds it may receive or be required to manage under Malta's international obligations. 25th July, 2003.
- Chapter 164 of the laws of Malta police act
- Chapter 319 European convention act laws of Malta
- Chapter 326 permanent commission against corruption (PCAC) Act no xxii of 1988.
- Chapter 362 laws of Malta duty on documents and transfers act
- Chapter 382 laws of Malta excise duty act

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- Chapter 391 laws of Malta security service act to make provision about the security service including provision for the issue of warrants and authorisations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to establish a procedure for the investigation of complaints about the security service and to make provision for the establishment of a security committee to scrutinise this service; to prohibit the interception of communications and for connected purposes.
- Chapter 406 value added tax, act to make provision for the imposition of a value added tax in place of an excise tax system on imports, products and services. 1st January, 1999.
- Chapter 601 of the laws of Malta public finance management Act.
- Chapter 621 proceeds of crime act an act to provide for the identification, tracing, freezing and confiscation of proceeds of crime including laundered property, income and other benefits derived from such proceeds held by criminal defendants, property that is the proceeds of, or used in, or intended or allocated for use in the financing of terrorism, terrorist acts or terrorist organisations, for the setting up of the asset recovery bureau as a body, independent of the government, for the said purpose, for non-conviction based confiscation of proceeds of crime and other matters consequential or ancillary thereto. 12th March, 2021.
- subsidiary legislation 9.27 mutual recognition of freezing orders and confiscation orders regulations, 23th April, 2021.
- Subsidiary legislation 9.28 exchange of information and reporting of crime concerning fraud and counterfeiting of non-cash means of payment regulations, 1st June, 2021.
- Subsidiary legislation 601.03 Public procurement Regulations. 28th October, 2016 Legal notice 352 of 2016, as amended by legal notices 155no. xviii of 2017, 233 of 2017, 26 of 2018, 176 of 2018, 263 of 2018 and 195 and 301 of 2019 and 196, 413 and 446 of 2020, 56 of 2021 and 26 of 2022; act xxviii of 2018 and xxi of 2020.

b) OLAF and PIF-Investigation – Most Relevant National Laws Concerning OLAF Investigations

- 22** - Act no. VI of 2003 an act to provide for the regulation of the internal audit and financial investigative functions, including the power to carry out effective independent internal audits and financial investigations, providing for the necessary safeguards to ensure the protection of the financial interests of government including the funds it may receive or be required to manage under Malta's international obligations. internal audit and financial investigations act (Chapter 461).
- Chapter 601 public finance management act of the laws of Malta.

- Chapter 37 customs ordinance to make better provision for the management and regulation of customs. 16th September, 1909.
- Chapter 123 income tax act to impose a tax upon incomes. Amended by: XVII. 1994. 35. 1st January, 1949.
- Chapter 337 import duties act to make provision, in place of the import duties public finance management act, 1976, for import duties and for matters incidental thereto or connected therewith. 1st January, 1990.
- Chapter 382 excise duty Act.
- Chapter 406 value added tax act to make provision for the imposition of a value added tax in place of an excise tax system on imports, products and services. 1st January, 1999.
- Chapter 595 of the laws of Malta public administration Act.
- Chapter 273 inquiries Act.
- Chapter 396 auditor general and national audit office Act.

3. Act No. X of 2021 (Laws of Malta) for the Execution of the European Public Prosecutor's Office in Malta

23 Synopsis 1 EPPO Adoption Act

I assent.

(L.S.) GEORGE VELLA President

18th March, 2021

ACT No. X of 2021

AN ACT to further amend the Criminal Code, Cap. 9.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same as follows:

1. The short title of this Act is the Criminal Code (Amendment Short title. No. 4) Act, 2021 and this Act shall be read and construed as one with the Criminal Code, hereinafter referred to as “the Code”. Cap. 9.
2. In the Second book (Cap. 9) Part II of the Arrangement of Code, Amendment to immediately after the words “Title VIII of Mutual Assistance in Arrangement of Code.
3. Criminal Matters 628A - 628B” there shall be added the words “Title IX Of Cooperation between the National Authorities and the Office of the European Public Prosecutor 628C - 628G”.

Immediately after Title VIII of Part II of Second book (Cap. 9) of the Addition of the new Code there shall be added the following new Title:
Title to the Code.

“Title IX

Of Cooperation between the National Authorities and the Office of the European Public Prosecutor

Scope and 628C.

(1) The measures in this Title implement applicability. the provisions of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (“the EPPO”).

(2) This Title establishes rules concerning the cooperation between the national authorities and the European Public Prosecutor's Office in the performance of the functions of the European Public Prosecutor's Office on the territory of Malta in relation to the crimes within the jurisdiction of the European Public Prosecutor's Office..

**Exercise of Competence by
Prosecutors
628D.**

(1) The European Delegated Prosecutors shall have prosecutorial functions, whenever exercising the powers to investigate offences in accordance with Council Regulation (EU) 2017/1939, and they shall have the power to instruct the Police or any other law enforcement agency to conduct an investigation relative to offences falling within the competence of the European Public Prosecutor's Office.

(2) The European Delegated Prosecutors shall, when prosecuting offences, have the same powers as the Attorney General and the Executive Police.

(3) The European Delegated Prosecutors shall prosecute in the name of the Republic of Malta.

**Investigation
measures of the
European Delegated
Prosecutors. 628E.**

The European Delegated Prosecutors may order the following investigative measures:

(a) request the assistance of the Police to search any premises, land, means of transport, private home, clothes and any other personal property or computer system and to take measures necessary to preserve the integrity or to avoid the loss or contamination of evidence;

(b) request the assistance of the Police to obtain the production of any relevant object or document either in its original form or in some other specified form;

Cap. 586. (c) request the assistance of the Police to obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data in compliance with the Data Protection Act;

(d) request the courts to issue monitoring orders, investigation orders, attachment orders and freezing orders where there is reason to believe that the owner, possessor or controller of the proceeds will seek to frustrate the judgment ordering confiscation;

(e) request the competent authority to intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect

or accused person is using relative to the offences established in Articles 190C, 190E and 190G; and
(f) request the Police to track and trace an object by technical means including the conduct of a controlled delivery relative to offences established in Articles 190C, 190E and 190G.

Pre-trial arrest or detention of suspect. 628F.

The European Delegated Prosecutor may request the Police to arrest or retain in pre-trial detention the suspect or accused person.

Powers of the European Prosecutor. 628G.

The powers referred to in Articles 628D, 628E and 628F may be exercised by the European Prosecutor in exceptional cases as referred to in Article 28(4) of Council Regulation (EU) 2017/1939.

Competent national authority. 628H.

The Police shall act as competent national authority to:
(a) receive the information in accordance with Article 24(8) of Council Regulation (EU) 2017/1939;
(b) be consulted in accordance with Article 25(2) and (3) of Council Regulation (EU) 2017/ 1939; and
(c) give consent in accordance with Article 25(4) of Council Regulation (EU) 2017/ 1939.”

Passed by the House of Representatives at Sitting No. 440 of the 15th
March, 2021.

ANĠLU FARRUGIA *Speaker*

RAYMOND SCICLUNA

Clerk of the House of Representatives

B. EPPO-Regulation

I. General Introduction to the Role of the EPPO and OLAF and Their Investigations in Malta

Hauck, Schneider, Karakocaoğlu, Laird Justus-Liebig University of Gießen



Since 2018 it was clear that Malta would join the EPPO one day.¹⁰ Listening to the newspapers and podcasts in 2022 one could think that Malta has never seen EU frauds or corruption at all in the past.¹¹ Potential communication problems continued even when the European Chief Prosecutor visited the islands in April 2022. She was informed by most of the bodies that should fight fraud *in praxi*, some did only fight it on the paper. So even the European Chief Prosecutor had to think at first sight that there were no suspicions for EU Fraud since 1.6.2021 or at least since 31.10.2017.¹²

But this is wrong as can already be neutralized with information from Europol in 2021¹³, the investigative journalists' case¹⁴ and the following country chapter, which will show this with the help of an analysis of the **applicable national law** for the actions of the EPPO and case studies of past court cases (see for example → Part C on OLAF Actions in Malta: Anti-Dumping Case Sheet). It can as well be substantiated with information that Kövesi gathered after her **visit in 2022**, when she said, that apparently the national bodies do not really work closely together in potential EU Fraud Cases.¹⁵

This was expressed by a **typical saying**, which is common for internal communication problems, potential situations for corruption or bribery: "*It's not us, it's them!*"¹⁶ and is therefore a "gap in the picket fence" through which one can see the problems of the administrative and national anti-fraud structure of the state of Malta. In the eyes of the heads of EPPO, Malta still has a lot to do in the future.¹⁷

¹⁰ See Wahl 2018; For the history of Malta joining the block see Harwood 2014.

¹¹ EU Observer 2022.

¹² See the news article by Faruggia 2022.

¹³ See Europol 2021. See as well Shift News 2019.

Misfud & Misfud, Court Lists Elements to find Accused Guilty Of Fraud, <http://www.mifsudadvocates.com.mt/court-accused-fraud>.

¹⁴ See Kafteranis 2018, Europeanlawblog, <https://bit.ly/3WZs1eQ>: Pilatus Bank Case. This bank was involved in money laundering allegations, and there have been investigations into its connections to Maltese politicians.

¹⁵ See 2022 Faruggia.

¹⁶ Ibid: "Meanwhile, also speaking during Wednesday's meeting, German MEP Monika Hohlmeier likened the situation in Malta to that in Greece some years back. "The problems we saw in Malta were ones we used to see in Greece in the past. There was always someone new in charge. Someone was always ready to point to someone else who was absent unfortunately and unable to answer our questions.

¹⁷ See Faruggia 2022.

If Italian Police investigates Maltese people more often than national bodies do investigate against own officials, something seems to be wrong, a new investigation story shows.¹⁸

The EU will only calm things down once investigations have been successfully carried out in Malta as the EPPO shall simplify investigations across borders of EU Member States and be a surrogate to the European Investigation order, which must still be used in other cross-border crime sectors.¹⁹ The **national bodies** to act for the EPPO or to defend potential suspects exist.²⁰ From our research for the German volume, we know that several investigations were conducted in the Regional Offices Hamburg, Frankfurt am Main and Munich in the period 2021–2022, which also included **searches in Malta** and communication with the Maltese EDPs. This already clearly indicates that Malta is of **huge importance** – especially its ports and its **location** in the Mediterranean Sea.



- Grand harbour or *Valletta* (main and therefore principal seaport of Malta): “Approximately 1,800,000 tonnes of general cargo, 502,000 tonnes of dry bulk, 1,000,000 tonnes of liquid bulk cargo, 820,000 tonnes of containerised cargo and over 5000 cargo ships are handled at the port annually.”²¹
- *Marsaxlokk* Port or Malta Freeport²²: The Freeport has a huge container terminal, which can handle heavy cargo and is therefore an important port for any goods imported to EU and its Common Market. It even has a liquid terminal for e.g. oil and gas.
- *Ċirkewwa* Harbour. It is the major harbour for the *Gozo* Area of Malta.
- *Mġarr* Harbour. This special Harbour is developed to handle big and heavy cargo in the future.²³

- 3 As the **customs area** is prone to customs duties fraud that may damage the EU’s financial interests, it is important that the national authorities from this sector do not only work closely together with OLAF but also participate with the EPPO nowadays. It is of great importance for foreign law experts, economic operators and foreign EDPs of other regional offices of the EPPO to **know the Maltese law of investigations** and at least to be able to read or look them up in a form that they can understand. This chapter aims to present the applicable law. A picture of Malta is gradually emerging that shows that the **basis for effective investigations is in place**. Now this must also be carried out.

¹⁸ See Shift 2023: “Italian police on Thursday morning dismantled a massive ‘Ndrangheta mafia ring ruling over a large area of southern Calabria and seized assets of over €200 million that involved Malta and individuals in Malta. Two people from Malta have been placed under investigation who the Italian police say are tied to and working with the powerful mafia organisation, some of whom are top ‘Ndrangheta operatives currently imprisoned and have been charged in an ongoing ‘maxi-trial’.”

¹⁹ See Spiteri 2018 passim.

²⁰ See Government of Malta, <https://www.gov.mt/en/Life%20Events/Pages/Services%20and%20Information%20Pages/Justice/Legal-Professions-in-Malta.aspx>. Accessed 31 July 2024.

²¹ Marin Insight, <https://www.marineinsight.com/know-more/5-major-ports-in-malta/>. Accessed 31 July 2024.

²² See Wikipedia, Malta Freeport, https://en.wikipedia.org/wiki/Malta_Freeport. Accessed 31 July 2024.

²³ Marin Insight, <https://www.marineinsight.com/know-more/5-major-ports-in-malta/>. Accessed 31 July 2024.

II. Special Introduction to the National Perspective on Defence in Criminal Investigations and the Opening of Criminal Investigations in Malta

By Dr Veronica-Anne Spiteri, LL.D and Prof. Dr. Hauck, Schneider, Karakocaoğlu, Laird



1. Special Introduction to the Maltese Legal System in General and the Maltese Criminal Law System in Particular

Malta, which was called *Melita* by the Romans and *Melite* by the Greek, has a long history as a European island in the south of Europe. It was and still is “one of the most densely populated” islands of the world.²⁴ The **Maltese Legal System**²⁵ in general is a mixed legal system. Some have called this status the “Maltese legal hybridity”²⁶ or a “synthesis of the various legal cultures”²⁷ and asked if this system of different European components would be the ideal European system like it should be seen under a magnifying glass. The different historic stages, which the Maltese citizens had to deal with heavily influenced the way the society dealt with the law. The legal system was thus always open for changes from the outside.

Malta distinguishes between private and public law like most states. The legal system swings like a **pendulum** between both the common-law and the civil law system, whereby it has heavier influences from its very old past than from the more recent past, i.e. the British rule and its youngest past since 1964, the year of independence. The very old past dates back to ancient Roman times. Therefore, a huge part of the Maltese legal rules relates to the civil law system. Likewise, the **Maltese Criminal Code**, which stems from 1814, 1832, 1854²⁸, was influenced by this system.²⁹

The **history of Malta** is connected with the Order of the Knights of St. John which came to Malta in 1530, which ruled Malta in the late middle-ages against all odds and against all military actions by other states, including the wars between the Christian nations in the 15 and 16th century. Between 1530 and 1798 the *Diritto Municipale di Malta*, a variety of laws, governed the islands affairs.³⁰

Later, the Sovereign Military Order of Malta (SMOM), which is the official name still today, was led and controlled by the 70th Grand master of the Knights Hospitaller, the predecessor of SMOM, **Emmanuel de Rohan-Polduc**, a scion of the ancient French nobility family Rohan. In 1782 *Emmanuel de Rohan-Polduc*, a well-educated scholar

²⁴ U.S. Department of State 1979.

²⁵ See in depth Attard 2012 and see Barz and Galea (eds) 2012, passim and see Ganado 2013.

²⁶ Aquilina 2011.

²⁷ Chamber of Advocates, <https://www.avukati.org/public/law-system-in-malta/>. Accessed 31 July 2024.

²⁸ See Ganado 1949a, pp. 217; Ganado 1949b, pp. 258 et seq.

²⁹ Ganado 2015 258–277; Grima 2015.

³⁰ Vassallo History, Llegal System, vassallohistory.wordpress.com/the-legal-system/. Accessed 31 July 2024.

and grand master wrote a legal text, later called *Code de Rohan*, a codified law for the relationship and Maltese society.³¹ The text was used by the legal scholar and Grand Judge *Sir Adriano Dingli* for a civil law code, which was enacted only between 1866 and 1874 in parts after the French rule, and when the **British rule** took effect; therefore this text was influenced by the actions in the 19th century.³²

- 8 Some said: “The Bonapartist spell in Malta was short”³³ but it is correct that in 1799 Napoleon Bonaparte’s Republican Army led by himself invaded the islands of Malta.³⁴ When the French occupied Malta at the end of the 18th century, from 1798–1800, the influences from the civil law system were very strong and this even led to a codification of civil law in the Code Napoleon of 1804.
- 9 For a long time, influences from the British **common law system** were present but did not directly shape the pre-existing system permanently.³⁵ At the beginning of the 19th century, in 1814, the year of the Treaty of Paris (Fontainebleau)³⁶, which was signed after *Naopoleon I.* was defeated and had to abduct³⁷, the British took over the rule of Malta, and acted in a colonial manner. The Treaty of Paris of 1814 included a sentence on Malta, which read: “The Island of Malta and its Dependencies shall belong in full right and Sovereignty to His Britannic Majesty.”³⁸ In the years after the treaty was established the British fleet had a central position in the Mediterranean Sea.³⁹ Malta

³¹ Felice 2017.

³² Ibid.

³³ Frendo 1998, pp. 143–151.

³⁴ See the good article by Grima 2021.

³⁵ Chamber of Advocates, <https://www.avukati.org/public/law-system-in-malta/>. Accessed 31 July 2024.

³⁶ This treaty from 1814 is a treaty, which should not be confused with the Treaty of Paris from 1783 ending the War of the American Revolution.

³⁷ See The Napoleon Series, Archive, The Napoleon Series, Government, Governments and Politics https://www.napoleon-series.org/research/government/diplomatic/c_paris1.html. Accessed 31 July 2024.

³⁸ See for the whole original text: The Napoleon Series, Archive, The Napoleon Series, Government, Governments and Politics: A. Constitutional Statute. May 30, 1814. In the Name of the Most Holy and Undivided Trinity. His Majesty, the King of the United Kingdom of Great Britain and Ireland, and his Allies on the one part, and His Majesty the King of France and Navarre on the other part, animated by an equal desire to terminate the long agitations of Europe, and the sufferings of Mankind, by a permanent Peace, founded upon a just repartition of force between its States, and containing in its Stipulations the pledge of its durability, and His Britannic Majesty, together with his Allies, being unwilling to require of France, now that, replaced under the paternal Government of Her Kings, she offers the assurance of security and stability to Europe, the conditions and guarantees which they had with regret demanded from her former Government, Their said Majesties have named Plenipotentiaries to discuss, settle, and sign a Treaty of Peace and Amity; namely, There shall be from this day forward perpetual Peace and Friendship between His Britannic Majesty and his Allies on the one part, and His Majesty the King of France and Navarre on the other, their Heirs and Successors, their Dominions and Subjects, respectively. The High Contracting Parties shall devote their best attention to maintain, not only between themselves, but, inasmuch as depends upon them, between all the States of Europe, that harmony and good understanding which are so necessary for their tranquillity. The Kingdom of France retains its limits entire, as they existed on the 1st of January, 1792. It shall further receive the increase of Territory comprised within tile line established by the following Article: On the side of Belgium. Germany, and Italy, the Ancient Frontiers shall be re-established as they existed on the 1st of January, 1792, extending from tile North Sea, between Dunkirk and Nieuport to the Mediterranean between Cagnes and Nice, with the following modifications: [...].

³⁹ El Gaddari 2022, p. 11 et seq.

played even a major role for the actions of British agents, the fleet and the military in North Africa in the 19th and 20th century.⁴⁰

Between 1899 and 1903 the Italian influence on the Maltese islands was stronger than before.⁴¹ Grand Judge *Sir Adriano Dingli* was as well inspired by the law of Sicily.⁴² The influence from the Italian system and language became even more present and strong in the beginning of the 20th century. An important fact is that: “Up to 1933 the language of the Maltese courts was Italian and Italian influence is still present in Maltese legal jargon.”⁴³

Later in the 20th century, Malta enacted an **independent constitution**. This was in 1964. Malta herewith became a parliamentary democracy.⁴⁴ Since then the constitution was the supreme law of the state of Malta. However, separation from the British system was not complete.⁴⁵ The connection to the British Commonwealth remained e.g. in the administration of the court system, which stems from the time after 1814.⁴⁶ But, the British common-law had no such deep influence like in other states e.g. Ireland but it was still present. Maltese legal scholars and chief judges of the 20th century such as Professor Hugh W. Harding and his father William D. Harding put forward the argument that the civil-law system influence, at least in the civil law part of the Maltese legal system was stronger than the British influence.⁴⁷

Only in 1987 Malta implemented and incorporated the requisites of the European Convention on Human Rights into the domestic legislation.⁴⁸ Incorporated into Maltese Law, by means of the **European Convention Act**, the same act incorporates substantive Articles of the European Convention, together with its protocols into Maltese Law, hence rendering them directly enforceable by the courts of Malta.⁴⁹ Not only does the European Convention Act grant, a sort of **superiority**, save the Constitution, in that if an ordinary law is inconsistent with the Convention than that law is void due to the inconsistency, but it also allows for judgements of the European Court of Human Rights to be, in certain circumstances, enforced by the Constitutional Court in Malta, just like local judgements are enforced.⁵⁰

⁴⁰ Ibid, p. 11 et seq.; Cahiers de la Méditerranée Année 1998 57 pp. 147.

⁴¹ Smith 1953.

⁴² Felice 2017.

⁴³ Grima 2015.

⁴⁴ U.S. Department of State 1979, p. 2.

⁴⁵ Chamber of Advocates, <https://www.avukati.org/public/law-system-in-malta/>. Accessed 31 July 2024.

⁴⁶ U.S. Department of State 1979.

⁴⁷ Felice 2017.

⁴⁸ Chamber of Advocates, <https://www.avukati.org/public/law-system-in-malta/>. Accessed 31 July 2024.

⁴⁹ Attard 2012, p. 40

⁵⁰ Ibid.

- 13** At the beginning of the 21st century Malta entered the European Union, a dream which many Maltese politicians wanted to achieve. Years of negotiations had culminated towards **accession in 2004**, and as a matter of fact in 2024 Malta will celebrate its 20th year of accession. Malta is an ever-changing country, legislatively too, and the accession of Malta in the EU meant, that Malta is going to continue to develop and grow, in many aspects, including legislatively, in particular with the application of EU laws directly into domestic laws, as well as through cross-border participation with the spirit of **mutual recognition and mutual trust** in mind. “EU membership has renewed Malta’s geopolitical relevance as a small island state in the Mediterranean and it has led to fundamental political, economic and social developments. Years of increasing interconnectedness resulted in decreased insularity and increased international participation.”⁵¹
- 14** Summarizing all the influences, it becomes apparent that the law on criminal defence is well integrated or interconnected with the country’s historic steps. The rules on criminal defence are regulated within the **second book of the Maltese Criminal Code**, which we have seen above stems from 1814 in its original version. It incorporates therefore the civil-law tradition and includes principles from all past times.
- 15** Fair Trials analysed the Maltese legal defence rules in 2015 and produced a leaflet, which is very helpful for people, who want to get a quick overview.⁵²

2. How Does the Maltese Criminal Law Regulate Rules on the Defence in Criminal Proceedings?



By Dr Veronica-Anne Spiteri, LL.D

- 16** As stated here above-mentioned, criminal defence in Malta is regulated by Second book (Cap. 9) of the Maltese Criminal Code, which speaks about the rules of Criminal Procedure. The **defence plays a key role** within criminal proceedings, irrespective of the nature and stage of the said criminal proceedings. The role of the defence does not only enter into play once a person is formally charged in court, rather the role of the defence is **essential at pre-trial stage**.




The **defence at pre-trial stage** is necessary, not only because it keeps the investigators in check, as per law, but also because the defence has the ability to ensure that the suspects rights are adhered to, and may also possibly work to their client not even being

⁵¹ See https://malta.representation.ec.europa.eu/about-us/malta-eu_en. Accessed 30 March 2024.

⁵² See the very helpful leaflet with information on defence in Malta: Spiteri (Mifsud Bonnici and Camilleri Advocates, Malta), <https://www.fairtrials.org/app/uploads/2022/01/Criminal-Proceedings-and-Defence-Rights-in-Malta.pdf>. Accessed 30 March 2024.

charged in court. This scenario will be delved into at a later stage in this book, when the tripartite role of the Magistrate in Malta is further explained (see below → Mn. 32).

“Protecting the human rights of individuals subject to criminal proceedings is an essential element of the rule of law.”⁵³ Which in turn hence means, that the **role of the defence in criminal proceedings**, is an essential element which is required in order to ensure that the rule of law is continually safeguarded. Onor. 17

Madame Justice *Consuelo Scerri Herrera*, Madame Justice of the Superior Courts in Malta, in her book “Four Cardinal Rights of a suspect prior to an investigation”, analyses and outlines four (4) cardinal rights of a suspect, mainly, The Right to Legal Assistance, The Right to Information in Criminal Proceedings, the Right to Legal Aid, and the Right to Silence.⁵⁴ Madame Justice *Scerri Herrera*, considers these rights as cardinal, because they “provide a structure in guaranteeing the protection of all human rights”⁵⁵ 

The rights, here above referred to, and other ancillary rights, **are transpositions of EU Directives**, and are enshrined in Maltese Law in Book Second, Part I, Title I, Sub-Title IX of the Criminal Code of Malta, which regulates ‘Right to Legal Assistance and other Rights during Detention’. Article 355AT of the Criminal Code, explains the subject matter of sub-title IX, it transposes **Directive (EU) 2013/48 and Directive (EU) 2016/1919**, which transposes the four cardinal rights, here above explained into Maltese law. 18

Regulated by **Article 355AUA**, the **right of access to a lawyer** in criminal proceedings, protects the defences right to exercise the rights of defence practically and effectively. 19

A right which was completely excluded from the Maltese Criminal Code up until 2010, today, this right should be granted immediately, so much so that the law states that a suspect or accused shall have **access to a lawyer** without undue delay. This article of the law delves further, and states that this important right should be given in any of the following scenarios, whichever is the earliest, that is to say: “(a) *Before they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;* (b) *upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);* (c) *without undue delay after deprivation of liberty;* (d) *where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*”⁵⁶ 20

⁵³ EU Agency for Fundamental Rights 2016, p. 3.

⁵⁴ Herrera 2022.

⁵⁵ Ibid, 1. The book is highly and strongly recommended for any defence layer in the Maltese legal area from the whole team of authors. Many parts can also be interpreted for an EPPO defence situation.

⁵⁶ Chapter 9 of the Laws of Malta, Criminal Code, Article 355AUA(2).

- 21 Irrespective of whether the suspect or accused accepts his or her right to legal assistance or not, such is to be taken note of by the Executive Police, and if such legal assistance is refused, from a **practical point of view**, the Executive Police would ask them to sign a **note of refusal of legal assistance** (*Nota ta' Riffjut tal-Assistenza Legali*), which note will later be presented to court in the event that the suspect or accused is charged in court.
- 22 **Spearheaded by Directive (EU) 2012/13** of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, today this right is one which has been enforced throughout many Member States in the EU, hence bringing about uniformity across the whole spectrum.
- 23 Considered by many to be a quint-essential right, the **right to information**, the letter of rights which the accused should always receive, and coupled with this, the right of access to the materials of the case, more commonly known as the **right to disclosure**, are rights which are necessary and which should always be safeguarded. The accused not only has a right to know what is happening, to know what his rights are, but he also has a right to be informed of everything and anything the executive police, in Malta's case, has against that same accused.
- 24 The right to information cannot stand alone, alone this right will have little to no use, however once this right is coupled with the **right to legal assistance**, this right will flourish because through the assistance of a lawyer, the said lawyer would be able to explain all documentation which is necessary for the accused to know, both in cases where the accused denies the charges, but especially when the accused would be admitting to the charges.⁵⁷
- 25 The right to be assisted by a lawyer is so essential, that Article 420 of the criminal code of Malta, also grants the right to access an advocate of legal aid, an advocate, engaged by the state to help people who are accused of crimes, but who do not have the financial means to engage such advocate. Throughout Europe, and in various member states, the right to legal aid is either means tested or merit tested, Malta however is a different scenario.
- 26 Article 570 of the criminal code of Malta states the following: "*The Advocate for Legal Aid shall **gratuitously** undertake the defence of any accused who has briefed no other advocate or who has been admitted to sue or defend with the benefit of legal aid in any court mentioned in this Code.*"⁵⁸ This makes one purport to think that the right to legal aid is given quite freely in Malta. This contrasts with the Constitution of Malta,

⁵⁷ Herrera, Consuelo 2022, p. 37.

⁵⁸ Criminal Code, Chapter 9 of the Laws of Malta, Article 570(1).

specifically Article 39(6)(c), which states the following: “*Every person who is charged with a criminal offence...shall be permitted to defend himself in person or by a legal representative and a person **who cannot afford to pay** for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense*”.

Hence, despite what is written in the criminal code, the Constitution of Malta purports to impose the requirement that the accused has to be in a situation whereby he/she is unable to pay for legal representation. In practice, when it comes to criminal cases, irrespective of the calibre of such cases, this right is given quite freely, without any means or merits tests, rather these tests then do feature in Malta when it comes to cases of a civil or family nature. 27

Probably a right which is recognised mostly on an international level is the right to silence. A right known by the ordinary reasonable man, and hopefully a right which enters the mind of the suspect or accused at first instance upon the arrest or detainment of the said accused. The suspect or accused, not only has a **right to remain silent**, but has a right to not incriminate oneself whether by acts of commission or omission. Introduced into Maltese law by ACT No. XXXII of 2018, relatively recent, the right to silence and not to incriminate oneself is granted through Article 366E of the criminal code of Malta. Although one may think that these rights are one and the same thing, despite the fact that they are closely linked and connected, so much so that they both aim to guarantee the right to a fair trial as enshrined in Article 6 of the Convention, they are somewhat different. In *Saunders v. the United Kingdom*⁵⁹, the European Court of Human Rights explains that the right not to incriminate oneself applies to criminal proceedings irrespective of the criminal offence, from the least complex, to the most complex.⁶⁰ Hence the right to remain silent is a **broader right**, which encompasses within it the scenario of not only having a right not to answer incriminating questions, but a right to remain completely silent. Therefore the right to silence includes the right not to incriminate oneself.⁶¹ 28

Article 355 et seq. of the Criminal Code of Malta, contemplates many other rights, which are however ancillary, or as a result of the above-mentioned rights. The rights of the defence are essential elements to ensure that investigations in Malta are done in a fair and just manner. 29

⁵⁹ ECtHR, *Saunders v. the United Kingdom* [GC] 1996, § 74.

⁶⁰ ECtHR 2022, 41/130, Last update: 31.08.2022.

⁶¹ Herrera 2022, p. 50.

3. The Magistrate in Malta and Actions of the Magistrate in Investigations

- 30** Prior to delving into the different stages of an investigation in Malta, it is important to understand the **role of the Magistrate** in Malta. The Magistrate in Malta has a tripartite role; the Magistrate conducts Inquiries, compiles evidence, and gives final judgements. The Courts of Magistrates is divided into the Courts of Magistrates as a Court of Criminal Inquiry, hence that court which compiles evidence for the Criminal Court and the eventual possible trial, and the Court of Magistrates as a Court of Criminal Judicature, hence that court which decides the case before it, either because the case falls within the original competence of the Court of Magistrates, or because the case falls within the extended competence of the Court of Magistrates. Apart from this dual role, the third role of the Magistrate, in his/her personal vestiture however, is that of the Magisterial Inquiry, which is conducted by the duty Magistrate.
- 31** Malta has a duty Magistrate, whereby Magistrates between themselves have a roaster and decides who should be duty Magistrate for the day. The duty Magistrate starts his/her day from 9.00am up until 8.59am the next day, wherein at 9am on the follow day the next magistrate will take on duty.
- 32** Any accidents, incidents or crimes which happen within those twenty-four (24) hours would be referred to the duty Magistrate, by the executive police in Malta, in order to decide whether a magisterial inquiry should be held or not.
- 33** The inquiries of the Duty Magistrate are referred to as “*In Genere*” proceedings, or Magisterial Inquiries. Such Magisterial inquiries may be initiated upon “*the receipt of any report, information or complaint in regard to any offence liable to the punishment of imprisonment exceeding three years*”⁶² Hence a duty magistrate cannot initiate an investigation on her own accord, rather the initiation of a magisterial inquiry must be based on either a report (*‘rapport’* in Maltese), information (*‘denunzja’* in Maltese) or complaint (*‘kwerela’* in Maltese). In addition to this, the report, information or complaint has to be coupled with the investigation of an alleged crime, which punishment of such crime exceeds three years imprisonment. This is the general rule; however the law provides a number of provisos and scenarios where an “*in genere*” inquiry should or must be initiated, whereby such scenarios are contemplated from Articles 546, together with all its sub-articles, till Article 547. Despite the fact that the duty magistrate, as explained previously, cannot decide to investigate a case without the report, information or complaint, the executive police, in relation to certain crimes, may proceed with investigations and charging the suspect in court in relation to crimes which are deemed to be *ex officio*, and which do not require the complaint of the injured party.

⁶² Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 546.

Once the **duty magistrate** decides that an “*in genere*” inquiry should be initiated, then the Magistrate has a right to appoint experts to help her out with her investigation, and the Magistrate is also obliged to draw up a ‘*proces-verbal*’ (Report) of the said investigation, with all expert reports, findings, and recommendations of who the suspect is, if any, and of whether the said suspect should be charged in court, and if so, under what articles of the law and for what offences. The Magistrate has **60 days**, from the report, complaint or information, to draw up the ‘*proces-verbal*’ of the said investigation, however if such is not draw up within 60 days, the Magistrate has to inform the Attorney General stating the reason for the delay, and asking for an extension of such 60 day time period.⁶³ Once the ‘*proces-verbal*’ of the said investigation is concluded by the Magistrate, this will be given to the Attorney General, who will in turn direct the Executive Police to charge the suspected people in court, unless such suspect would have already been charged in court. Such overlapping will be explained further on when the stages of an investigation in Malta will be analysed.

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The Magistrate also sits as such in the **Court of Magistrates**, both as a Court of Criminal Inquiry, and as a Court of Criminal Judicature. **Article 367** of the criminal code states that “*Every Court of Magistrates shall consist of a magistrate and shall have a twofold jurisdiction, namely, as a court of criminal judicature for the trial of offences which fall within its jurisdiction, and as a court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal.*” Hence, at its onset, one realises that the Court of Magistrates has an original competence, and likewise has offences which fall outside its competence. It is pertinent to point out, that the Court of Inquiry mentioned in Article 367, is not the “*In Genere*” inquiry explained above, but is rather the compilation of evidence, in preparation for a criminal trial. Maltese law also establishes that a Court of Magistrates, in both its jurisdictions, needs to be set up for both the Island of Malta, as well as for the Island of Gozo and Comino.⁶⁴ This, however, is not the case when it comes to the Criminal Court, such court sits solely, and is established only on the Island of Malta.

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Delving firstly into the **original competence** of the Court of Magistrates, the Court of Magistrates as a Court of Criminal Judicature shall be competent to hear all cases relating to contraventions, and all crimes which have the punishments of contraventions or which have punishments which do not exceed two (2) years imprisonment.⁶⁵ When the punishment of the crime at hand exceeds two (2) years imprisonment, but is less than twelve (12) years imprisonment, the Attorney General may ask that the said case is tried by the Court of Magistrates as a Court of Criminal Judicature, if there is no object on

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⁶³ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 550A.

⁶⁴ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 367(2).

⁶⁵ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 370.

the part of the person charged, then the court converts from a court of criminal inquiry to a court of criminal judicature, and hence then has the power to decide the case. Such is considered to be the extended competence of the Court of Magistrates as a Court of Criminal Judicature.

- 37 One has to keep in mind, that with regard to offences, the punishment of which is from 2 till 12 years imprisonment, the Court of Magistrates would have been already conducting its role as a Court of Criminal Inquiry, and from a **practical point of view**, the Attorney General asks that the said case be tried by the Court of Magistrates in its Criminal Judicature once the prosecution would have compiled all the evidence necessary for the person to be tried. Hence, with respect to the extended competence of the Court of Magistrates, and at the point that the Attorney General asks that the case at hand is tried by the Court of Magistrates in its Criminal Judicature, the Court asks whether the accused objects or accepts that his case would be heard summarily by the Court of Magistrates in its competence as a court of Criminal Judicature.⁶⁶ If the accused accepts that the case is tried summarily, then at such point, his acceptance is recorded in the acts of the case and the Court of Magistrates becomes competent to hear such case.⁶⁷ In the event that the accused objects to his/her case being tried summarily, then Court of Magistrates orders that an electronic copy of the acts of the case be transmitted to the attorney general, in order to issue the bill of indictment, for the case to be tried before the Criminal Court.⁶⁸

⁶⁶ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 370(3)(a),(b).

⁶⁷ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 370(3)(c).

⁶⁸ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 370(3)(d).

With regard to offences, the punishment for which is imprisonment for a term exceeding two years but not exceeding six years, the court shall, during the examination of the accused, ask the accused whether he objects to his case being dealt with summarily, if the accused does not object, than the Court asks the prosecuting officer whether the consent of the Attorney General has been given to be able to try the case summarily. If such consent has not been given, then the case will continue to proceed as a court of criminal inquiry. In the event that consent is given, then the court conducts itself as a Court of Magistrates as a Court of Criminal Judicature. **38**

Article 389 of the Criminal Code explains that for offences which fall outside the competence of the court of magistrates as a court of criminal judicature, hence for offences which have a punishment which exceeds two (2) years imprisonment, “*the Court of Magistrates shall proceed to the necessary inquiry.*”⁶⁹ **39**

The inquiry in this stage, is also referred to as the **compilation of evidence**, simply because the role of the Court of Magistrates in this role is to be a foreseer, not an adjudicator, in that the evidence begin put before it is being compiled in a fair and just manner. The Magistrate in such a role is the defender of rights of both the prosecution and defence, and aims to strike a balance between the two. At this stage, and until such court converts to a court of criminal judicature, the Magistrate remains solely a foreseer who despite lacking the competence to finally decide the case at such a stage, still has a right to take other relevant decisions. Such decisions include requests on bail, requests for the accused to go abroad, requests on evidence and any other requests which may arise at compilation of evidence stage. **40**

⁶⁹ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 389.

4. The Criminal Trial in Malta: Different Stages of the Investigation

- 41 The criminal trial starts at **pre-trial stage**, because the procedure and mode of investigation at pre-trial stage will affect the possible outcome of the actual criminal trial *per se*. Hence, it is for this reason that the rights of the defence are safeguarded not only throughout the criminal trial, but also from the initiation of the investigation. An investigation in Malta is either initiated on the complaint of the injured party, or else on the basis of reasonable suspicion of the executive police, more commonly known as *ex officio*.
- 42 The **investigative role** in Malta is granted to the **Executive Police**,⁷⁰ whereby naturally, prior to the arrest of a suspect, the same police would have already started their investigations. Police investigate cases either based on complaints, reports or information which they would have obtained from citizens or other third parties. The arrest of a suspect initiates a substantial number of rights which need to be, not only explained to the suspect, but protected *ad unguem* by the investigating officers. The 48 Hour Rule, as part of the *habeas corpus* rights has to also be safeguarded. In Malta, irrespective of the offence, the Police have 48 hours to take the suspect and charge him/her in court. At the outset, the arrest of a suspect likewise probably initiates a Magisterial Inquiry, especially in respect to a crime which carries with it a punishment of more than three (3) years, as explained previously. Hence after arrest, you have two (2) concurrent investigations which are taking place, the investigation of the Duty Magistrate and that of the Executive Police. Although, in practice there does tend to be an overlap, the Executive Police doesn't afford the same time the Duty Magistrate has of 60 days to conclude, the executive police officers have to charge the suspect in court within 48 hours.
- 43 **Depending on the punishment** of the crime for which the suspect is charged with, the case then either goes to the Court of Magistrates as a Court of Criminal Inquiry, or to the Court of Magistrates as a Court of Criminal Judicature. In the case of the latter, evidence is gathered, witnesses are heard, prosecution and defence present their evidence and the Magistrate delivers final judgement, which may be appealed by the accused within 12 days from date of final judgement, or by the Attorney General within 12 days from the receipt of a copy of the acts. Once appealed, the case goes to the Court of Criminal Appeal (Inferior Jurisdiction), whereby such a case is now heard by a Judge. In such a scenario, when final judgement is delivered the case becomes *res judicata* and no further appeal may be filed.

⁷⁰ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 346.

In the event that the case at hand has a punishment which either exceeds 6 years imprisonment, or if the punishment is between 2 to 6 years imprisonment but is without the consent of the Attorney General to hear the case summarily, then the case goes before the Court of Magistrate as a Court of Criminal Inquiry where the compilation of evidence is conducted, as previously explained. In order to understand the overlap between the *in genere* and the Court of Magistrates as a Court of Criminal Inquiry, it is at this point that the *proces-verbal* of the duty Magistrate would be presented as evidence in the compilation of evidence, hence connecting the tripartite role of the Magistrate. As we have already seen, there may be a scenario that the Court of Criminal Inquiry converts and transforms to a Court of Criminal Judicature. However there is also a scenario where the Court of Criminal Inquiry then concludes and the acts are sent to the Attorney General to issue the bill of indictment before the Criminal Court. 44


Once the **bill of indictment** is issued (see Art. 438), and all preliminary pleas are decided upon, then the trial by jury may be initiated. The decision of the jury is final and the judge in this scenario simply delivers punishment based on the verdict of the jurors, but the verdict of guilt or otherwise lies in the hands of the jurors and their decision is final. Article 500 of the Criminal Code of Malta speaks about appeals from juries, whereby such appeals may be done to the Court of Criminal Appeal (Superior Jurisdiction), “*a person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction in all cases or against the sentence passed on his conviction unless the sentence is one fixed by law.*”⁷¹ Article 500 et seq of the Maltese Criminal code, also grants the right of appeal to the Attorney General albeit trying to control such right of appeal, in order to strike a balance between the defence, the public at large and/or the *parte civile* (victim). 45

5. Who Enforces These Laws? The Role of the Prosecutorial Bodies in Malta

Prosecution in Malta is **solely vested** in the office of the **Attorney General**. For many years the Attorney General has only featured as prime prosecutor in the Criminal Court or in the Criminal Court of Appeal in both its competences. It was always natural practice that before the Court of Magistrates as a Court of Criminal Inquiry and as a Court of Criminal Judicature, the role of the Attorney General as prosecutor would be delegated to the Executive Police, whereby for many years, it was the Executive Police which would feature in the inferior courts. In fact, Article 347A of the Criminal Code of Malta, speaks of the powers of the Attorney General, and states that “*Without prejudice to the two preceding articles, the Attorney General shall have the following functions and powers: (a) to delegate to the Commissioner of Police prosecutorial functions vested in the Attorney General; and (b) notwithstanding anything provided in* 46

⁷¹ Criminal Code of Malta, Chapter 9 of the Laws of Malta, Article 500(1).

any other law, and in his discretion, to prosecute any offence, alone or together with the Executive Police or together with any other authority having prosecution powers.”

- 47 The Attorney General therefore always had discretion as to whether to delegate its powers to the police or not, and recently the provisions of Article 347A(b) has been used more frequently especially in crimes outside of the original competence of the Courts of Magistrates, and in particular when it comes to offences of Money Laundering and Fraud. Such cases are being prosecuted by the Attorney General, with the assistance of the Executive Police.
- 48 The recent **increase of Money Laundering trials** in Malta, has also brought about the office of the Asset Recovery Bureau. Established under Legal Notice 357 of 2015, and enshrined in Article 6 of Chapter 621 Proceeds of Crime Act, the Asset Recovery Bureau is an autonomous public entity whose role is to trace, manage and dispose of assets. The Proceeds of Crime Act⁷², places a duty on the Attorney General, to inform the Asset Recovery Bureau of any person charged before the Courts in Malta with a crime which is contemplated in the said act. Although not directly a prosecutor, and not regarded as such within the laws of Malta, the Asset Recovery Bureau is rather an aide to the prosecution, in that it assists in trying to determine whether the person charge would have in any way benefitted from proceeds of a crime, and if so, in what way.
- 49 In light of the above, and with the spirit of financial crimes in mind, in such a scenario, one has to also mention the **Financial Intelligence Analysis Unit** (‘FIAU’). The FIAU is a government agency, established under the Prevention of Money Laundering Act⁷³, it is responsible for the collection, collation, processing, analysis and dissemination of information to combat money laundering and the funding of terrorism within the Republic of Malta.⁷⁴
-  The FIAU in Malta does its **own investigations** relating to crimes of money laundering and funding of terrorism, and it is usually on the **reports and conclusions** of the FIAU that further investigation both at national and/or at EU level, when crimes are in relation to the embezzlement of EU Funds, that people are charged in court.

⁷² Chapter 621 of the Laws of Malta.

⁷³ Chapter 373 of the Laws of Malta.

⁷⁴ See <https://fiaumalta.org/>. Accessed 31 July 2024.

III. Special Look at the Rules on Defence in the Investigation Phase

First of all, the investigation was explained in general. The investigation itself requires further action from the other side of the prosecutorial viewpoint, i.e. the defence side.

1. Further Provisions on Defence Laws Relating to EPPO Actions Concerning PIF Crime Offences

The defence is particularly important in the investigation phase – especially if a suspect or at a later stage accused (see above → II. 1., Mn. 6) – faces such an enormous opponent i.e. not-primarily national, but prosecutorial, supranational “beast” as the EPPO e.g. in an interrogation⁷⁵. Despite the partial harmonization through the EU legislator in this area, national peculiarities remain.⁷⁶ **50**

a) Access to Lawyers

Malta as an island does not contain lawyers acting only or primarily in White Collar Crime matters – especially in EU Fraud offence cases. Malta has an excellent Bar, which lists many experts in criminal procedural matters. **51**

b) Defence in the Investigation Phase

a. Input from Regulation 2017/1939

(1) Access to National Case Files

Book 2 – Laws of Criminal Procedure

534AF. (1) Where a person is arrested and detained **at any stage** of the criminal proceedings, any documents in the possession of the Police which are related to the specific case and which are essential **to challenge effectively the lawfulness of the arrest or detention**, shall be **made available** to the arrested person or to his lawyer.

(2) The person suspected or accused shall have access, which shall be free of charge, to all material evidence in the possession of the Police, whether for or against the said suspect or the accused, or to his lawyers in order to safeguard the fairness of the proceedings and to prepare his defence.

(3) Without prejudice to sub-article (1), access to the material evidence referred to in sub-article (2) shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission on the merits of the accusation. Where further material evidence comes into the possession of the Police, access shall be granted to it in due time to allow for it to be considered by the suspect or the accused or by his lawyer.

⁷⁵ Anastasi 2018.

⁷⁶ Bonett 2016.

(4) Notwithstanding the provisions of sub-article (2) and (3) and provided that this does not prejudice the right to a fair trial, after hearing the prosecution, a court or magistrate may refuse access to certain materials if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest or where it could prejudice an ongoing investigation or national security.

(2) Access to EPPO Case File

52 The access to the EPPO case file i.e. the file that is submitted to the EPPO by the local EDP is regulated by the EPPO Regulation and the Guidelines of the EPPO.

b. Defence During Ongoing Investigations, Articles 28–33 of the EPPO Regulation

53 For all phases the rules of Part 1 of Book 2 of Chapter 9 Laws of Malta apply:

- Title VI Of the Rights of Suspects and Accused 534A–534AG
- Title VII Of the Rights of Children who are Suspects or Accused Persons 534AGA–534AFQ

c. In Cases Involving Investigative Measures Under Article 30 of the EPPO Regulation

54 Searches are highly intrusive investigation measures. Therefore they are mostly already addressed by the fundamental rights in the Constitution of democratic states and societies, who respect rule of law as the strongest and most effective principle to control the powers of the State or a supranational body acting on behalf of the Union, which is common to the rule of law principle.

55 38. [Constitution of Malta]

(1) Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision –

(a) that is reasonably required in the interest of defence, public safety, public order, public morality or decency, public health, town and country planning, the development and utilisation of mineral resources, or the development and utilisation of any property in such a manner as to promote the public benefit;

(b) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;

(c) that authorises a department of the Government of Malta, or a local government authority, or a body corporate established by law for a public purpose, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property or installation which is lawfully on those premises and which belongs to that Government, that authority, or that body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing judgment or order of a court, the search of any person or property by order of a court or entry upon any premises by such order, or that is necessary for the purpose of preventing or detecting criminal offences, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

An example is the **complaint** against the interception of telecommunications, which is possible under the Security Service Act with a questionable restriction in paragraph 2: **56**

13. (1) The Commissioner shall also investigate complaints about the Security Service in the manner specified in Schedule 1 to this Act.

(2) The decisions of the Commissioner under Schedule 1 to this Act shall not be subject to appeal or liable to be questioned in any court.

d. Defence in Case of Arrest and Pre-Trial Detention, Article 33 of the EPPO Regulation

First and foremost the Articles of the Constitution of Malta apply. Chapter 4 stipulates the protection from arbitrary arrest and detention: **57**

34. [Constitution of Malta]

(1) No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say –

(a) in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the sentence or order of a court, whether in Malta or elsewhere, in respect of a criminal offence of which he has been convicted;

(c) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the House of Representatives punishing him for contempt of itself or of its members or for breach of privilege;

(d) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

(e) for the purpose of bringing him before a court in execution of the order of a court or before the House of Representatives in execution of the order of that House;

- (f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;
 - (g) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
 - (h) for the purpose of preventing the spread of an infectious or contagious disease;
 - (i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; or
 - (j) for the purpose of preventing the unlawful entry of that person into Malta, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Malta or the taking of proceedings relating thereto or for the purpose of restraining that person while he is being conveyed through Malta in the course of his extradition or removal as a convicted prisoner from one country to another.
- (2) Any person who is arrested or detained shall be informed at the time of his arrest or detention, in a language that he understands, of the reasons for his arrest or detention: Provided that if an interpreter is necessary and is not readily available or if it is otherwise impracticable to comply with the provisions of this sub-article at the time of the person's arrest or detention, such provisions shall be complied with as soon as practicable.
- (3) Any person who is arrested or detained –
- (a) for the purpose of bringing him before a court in execution of the order of a court; or
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought not later than forty-eight hours before a court; and if any person arrested or detained in such case as is mentioned in paragraph (b) of this sub-article is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.
- (4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person.
- (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the taking during such a period of public emergency as is referred to in paragraph (a) or (c) of sub-article (2) of Article 47 of this Constitution of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.
- (6) If any person who is lawfully detained by virtue only of such a law as is referred to in the last foregoing sub-article so requests at any time during the period of that detention not earlier than six months after he last made such a request during that period, his case shall be reviewed by an independent and impartial tribunal established by law and

composed of a person or persons each of whom holds or has held judicial office or is qualified to be appointed to such office in Malta.

(7) On any review by a tribunal in pursuance of the last foregoing sub-article of the case of any detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by whom it was ordered, but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

Next, Chapter 9 of the Laws of Malta, which stipulates the **right to legal assistance** and other rights during the detention applies in cases of urgent measures by the EPPO as it is the specific national law, which is relevant for Art. 33 EPP Regulation:

Chapter 9 Laws of Malta

Book 3 Sub-title IX RIGHT TO LEGAL ASSISTANCE AND OTHER RIGHTS DURING DETENTION

355AS. (1) The suspect or accused person shall, at his request, be allowed to consult a medical practitioner of his choice and, if such medical practitioner is not readily available, any other medical practitioner. (2) Immediately upon arrest and without undue delay, the Executive Police or any other law enforcement or judicial authority shall inform the suspect or an arrested person of such a right. (3) A record shall be kept that the suspect or accused person has been duly informed of such right by the Executive Police or by any other law enforcement or judicial authority. (4) The words “the suspect” and “the accused person” in this Article have the same meaning assigned to them by Article 355AT(2).

355AT. (1) This Sub-title transposes the provisions of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, published in the Official Journal of the European Union on 6 November 2013 (L 294/1) and the provisions of Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

(2) This Sub-title lays down minimum rules concerning the rights of:

(a) the suspect (hereinafter in this Sub-title referred to as “the suspect”), that is, a person who is detained or arrested by the Executive Police or any other law enforcement or judicial authority where such person has not been charged before a court of justice of criminal jurisdiction and who is being questioned by the Executive Police or any other authority as aforesaid in relation to any criminal offence;

(b) a person charged or accused of having committed a criminal offence (hereinafter referred to in this Subtitle as “the accused person”);

(c) a person subject to proceedings pursuant to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) published in the Official Journal on 18 July 2002 (L 190/1), hereinafter referred to as “the European arrest warrant proceedings”.

(3) The persons mentioned in sub-article (2) shall enjoy the following rights:

(a) to have access to a lawyer;

(b) to have a third party informed of the deprivation of their liberty; and

(c) to communicate with third persons and with consular authorities whilst deprived of their liberty.

(4) For the purpose of this Sub-title, the expression “lawyer” means an advocate or a legal procurator who is authorised by law to exercise that respective profession in terms of law.

(5) For the purpose of this Sub-title, the expression “legal aid” means funding by the Minister, of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.

355AU. (1) This Sub-title applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the Executive Police or by any other law enforcement or judicial authority, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty.

(2) This Sub-title applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or the accused person has committed an offence, including, where applicable, sentencing and the resolution of any appeal.

(3) This Sub-title applies also to persons subject to European arrest warrant proceedings in terms of Framework Decision 2002/ 584/JHA referred to in Article 355AT(2)(c) (hereinafter referred to as “the requested persons”) from the time of their arrest in accordance with Article 355AUJ.

(4) The provisions relating to legal aid under this Sub-title shall apply: (a) to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to this Sub-title and who are: (i) deprived of liberty; (ii) required to be assisted by a lawyer by law; or (iii) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following:

(A) identity parades;

(B) confrontations;

(C) reconstructions of the scene of a crime; and

(b) to a requested person upon an arrest under Article 355AUT(2)(c) persons who have a right of access to a lawyer under this Sub-title;

(c) under the same conditions as provided for in paragraph (a), to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.

(5) This Sub-title also applies, under the same conditions as provided for in sub-article (1), to persons other than the suspect or the accused person who, in the course of questioning by the Executive Police or by another law enforcement or judicial authority, become suspects or accused persons.

(6) Without prejudice to the right to a fair trial, in respect of minor offences –

(a) where the law provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or

(b) where deprivation of liberty cannot be imposed as a sanction, this Sub-title shall only apply to the proceedings before a court having jurisdiction in criminal matters: Provided that, in any event, this Sub-title shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

355AUA. (1) The suspect or the accused person shall have the right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively.

(2) The suspect or the accused person shall have access to a lawyer without undue delay. In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the Executive Police or by another law enforcement or judicial authority in respect of the commission of a criminal offence;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

(3) A request for legal assistance shall be recorded in the custody record together with the time when it was made unless the request is made at a time when the person who makes it is at court after being charged with an offence in which case the request need not be so recorded.

(4) Once a request for legal assistance is made, the suspect or the accused person shall be provided with a list of lawyers drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the Executive Police and to any other law enforcement and judicial authority, from which the suspect or the accused person may select a lawyer of his own choice. Alternatively, the suspect or the

accused person may elect to be assisted by the Advocate for Legal Aid in which case the Advocate for Legal Aid shall assign a lawyer for this purpose.

(5) Without prejudice to the provisions of Article 355AUI(3), any police officer who indicates or attempts to indicate to a person detained the advocate or legal procurator who should be engaged during the detention of such person, shall be guilty of an offence and shall be punishable with a fine (ammenda) and this without prejudice to any disciplinary proceedings that may be taken against him as a consequence of a finding of guilt in respect of such an offence or in lieu of prosecution for such an offence in accordance with any disciplinary regulations in force from time to time.

(6) Where the person detained chooses not to seek legal assistance the Executive Police, investigating officer or any other law enforcement or judicial investigating authority shall record this fact in writing in the presence of two witnesses and thereupon questioning may proceed immediately. It shall not be admissible for the prosecution to comment during any proceedings before a court of justice of criminal jurisdiction on the fact that the suspect or the accused person did not avail himself of the right to legal assistance in the course of his detention under arrest.

(7) Where in any proceedings before a court of justice of criminal jurisdiction against a person for an offence, evidence is given that the suspect or the accused person –

(a) at any time before he was charged with the offence, on being questioned by the Executive Police or by any other law enforcement or judicial authority trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the suspect or the accused person could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, no inference may be drawn from the suspect's or the accused person's failure to mention facts which may be considered as evidence of guilt or as amounting to corroboration of any evidence of guilt of the suspect or the person accused.

(8) The right of access to a lawyer shall entail the following:

(a) the suspect or the accused person, if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

(b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;

(c) the suspect or the accused person shall have the right for his lawyer to be present and participate effectively when questioned. Such participation may be regulated in

accordance with procedures which the Minister responsible for Justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using where possible in the opinion of the interviewer audiovisual means in terms of paragraph (d): Provided that the right of the lawyer to participate effectively shall not be interpreted as including a right of the lawyer to hinder the questioning or to suggest replies or other reactions to the questioning and any questions or other remarks by the lawyer shall, except in exceptional circumstances, be made after the Executive Police or other investigating or judicial authority shall have declared that it has no further questions;

(d) questioning, all answers given thereto and all the proceedings related to the questioning of the suspect or accused person, shall where possible in the opinion of the interviewer be recorded by audio-visual means and in such case a copy of the recording shall be handed over to the suspect or the accused person following the conclusion of the questioning. Any such recording shall be admissible in evidence, unless the suspect or the accused person alleges and proves that the recording is not the original recording and that it has been tampered with. No transcription need be made of the recording when used in proceedings before any court of justice of criminal jurisdiction, nor need the suspect or the accused person sign any written statement made following the conclusion of the questioning once all the questions and answers, if any, are recorded on audio-visual means; (e) the suspect or the accused person shall have the right for his lawyer to attend the following investigative or evidence-gathering acts if the suspect or accused person is required or permitted to attend the act concerned: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of an offence.

(9) General information to facilitate the briefing of a lawyer by suspects or accused persons shall be made available in terms of sub-article (4) or such other procedure as the Minister responsible for Justice may by regulations establish.

(10) Notwithstanding the provisions of this Sub-title concerning the mandatory presence of a lawyer, the Executive Police or any other law enforcement or judicial authority shall ensure that suspects or accused persons who are deprived of liberty shall be in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 355AUG.

(11) In exceptional circumstances and only at the pre-trial stage, a temporary derogation may be made from the application of the right provided for in sub-article (2)(c) where the geographical remoteness of the suspect or the accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

(12) In exceptional circumstances and only at the pre-trial stage, a temporary derogation from the application of the rights provided for in sub-article (8) may be made to the extent justified in the light of the particular circumstances of the case, on the basis of

one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

(13) For the purposes of this Sub-title, the expression “pre-trial stage” means the stage immediately prior to the filing of the bill of indictment in the Criminal Court or, as the case may be, before the Attorney General sends the record of proceedings to the Court of Magistrates as a Court of Criminal Judicature, in terms of Article 370(3), for the person accused to be tried by that court.

355AUB. (1) The confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the **right of access to a lawyer** provided for under this Sub-title shall be respected.

(2) Such communication shall include meetings, correspondence, telephone conversations and any other form of communication permitted by law.

- 61 It should be taken into account that an Economic operator might be as well arrested or detained on the basis of the **Customs Laws**, which included Chapter 382, the Customs Excise Duty Act. S. 24 allows the customs officials – in case of suspicion for an offence annexed to this Act – to detain a person. Even in these cases defence is necessary and arrest may be unlawful. A suspect should be provided direct access to a lawyer as foreseen by Article 6 ECHR.

62 **[Excerpt Chapter 382 Customs Excise Duty Act]**

23.A [Obligation to give information.] Customs official may require any person whom such officer has reasonable cause to believe to be guilty of an offence under Article 16(1) or Article 17, to furnish to such officer –

(a) his or her name and surname, address and other details,

(b) a document of identification; and

(c) all such information in relation to the goods subject to excise duty as may be reasonably required by such Customs official or member, which goods are in the possession or procurement of such person.

24. Where a Customs official has reasonable grounds to suspect that a person is committing an offence against this Act and its subsidiary legislation, then such officer may detain such person without warrant and as soon as immediately practicable thereafter and in any case not later than two hours after such detention, place such person in the custody of an officer of the Police force where upon such officer of the Police force shall either release such person or proceed to present such person before a court and the

provisions of the Criminal Code relating to arrest shall *mutatis mutandis* apply to the Customs official and the officer of the Police force.

25. [Detention of goods and vehicles.] (1) Where a Customs official or a Police officer reasonably suspects that any products, subject to excise duty or any other goods, are liable to forfeiture under this Act then –

- (a) all such excisable goods or other goods,
- (b) any other thing being made use of in the conveyance of such products or goods, and
- (c) any vehicle, aircraft or vessel in or on which or attached to which any such products or goods are found,

shall be detained by such Customs official or Police officer until such examination, enquiries or investigations as may reasonably be deemed necessary by such Customs official or another Customs official, or Police officer have been made for the purposes of determining whether or not such products, goods, thing, vehicle, aircraft or vessel are liable to forfeiture.

(2) When a determination referred to in sub-article (1) has been made in respect of any such products, other goods, thing or vehicle or on the expiry of a period of ninety (90) working days from the date on which such products, goods, thing or vehicle were detained under that sub-article, whichever is the earlier, such products, goods, thing or vehicle are to be either seized as liable to forfeiture under the Act, or released.

2. Articles 26, 27 EPPO Regulation

a) Defence in the Formal Accusation Phase and the Trial Phase

Foremost the Constitution of Malta applies and ensures the **right of the suspect** to secure protection of law. Article 39 para 2 Constitution of Malta ensures the right to a fair trial as stipulated by Article 6 ECHR. Therefore, this Article is of great importance for any defence lawyer in order to protect the rights of its client.

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39. [Constitution of Malta] (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(3) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's

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civil rights or obligations before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

(4) Nothing in sub-article (3) of this article shall prevent any court or any authority such as is mentioned in that sub-article from excluding from the proceedings persons other than the parties thereto and their legal representatives -(a) in proceedings before a court of voluntary jurisdiction and other proceedings which, in the practice of the Courts in Malta are, or are of the same nature as those which are, disposed of in chambers;

(b) in proceedings under any law relating to income tax; or

(c) to such extent as the court or other authority – (i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or

(ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality or decency, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty: Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

(6) Every person who is charged with a criminal offence –

(a) shall be informed in writing, in a language which he understands and in detail, of the nature of the offence charged;

(b) shall be given adequate time and facilities for the preparation of his defence;(c) shall be permitted to defend himself in person or by a legal representative and

a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense;

(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(7) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after

judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence: Provided that nothing in any law shall be held to be inconsistent with or in contravention of this sub-article by reason only that it authorises any court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so however that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(10) No person who is tried for a criminal offence shall be compelled to give evidence at his trial.

(11) In this Article “legal representative” means a person entitled to practise in Malta as an advocate or, except in relation to proceedings before a court where a legal procurator has no right of audience, a legal procurator.

The rules on the **trial phase** and the **indictment phase** are stipulated by Chapter 9 of the Laws of Malta:

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[Excerpt, Chapter 9 Laws of Malta]

Title II Of the Court of Magistrates 367–429

Sub-title I Of the Court of Magistrates as Court of Criminal
Judicature 370–388

Sub-title II Of the Court of Magistrates as Court of Criminal
Inquiry 389–409A

General Provisions applicable to the Court of
Magistrates, whether as Court of Criminal

Judicature or as Court of Criminal Inquiry 410–412D

Sub-title III Of Appeals from Judgments of the Court of
Magistrates as Court of Criminal Judicature 413–429

Title III Of the Attorney General 430–435E

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Title IV Of the Criminal Court 436–496

Title V The Court of Criminal Appeal 497–515

Provisions applicable to the Courts of Criminal
Justice 516–534

Sub-title XII OF THE PRESUMPTION OF INNOCENCE

The measures provided for in this Sub-title transpose the provisions of Directive (EU) 2016/343 of the European Parliament and the Council of the 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Presumption of innocence.

366A. (1) Every person suspected or accused of having committed a criminal offence or an alleged criminal offence shall be presumed to be innocent until the decision on the final determination of whether that person has committed the criminal offence has become definitive: Provided that the provisions of this Article shall be without prejudice to the proviso to sub-article (5) of Article 39 of the Constitution and to the enforcement, as may be provided by law, of a judgement of the Court of Magistrates or of the Criminal Court pending the hearing of an appeal after the accused has been found guilty of having committed a criminal offence by one of the said Courts.

Burden of proof.

366B. (1) The burden of proof for establishing the guilt of suspects or accused persons shall lie with the prosecution: Provided that the provisions of this Article shall be without prejudice to:

(a) the proviso to sub-article (5) of Article 39 of the Constitution;
(b) any obligation of a judge, magistrate or any court or tribunal to seek both inculpatory and exculpatory evidence; (c) the right of the defence to submit any evidence according to law.

(2) Any reasonable doubt as to the question of guilt shall benefit the suspect or accused person including where the court assesses whether an accused person should be acquitted.

Right to silence and not to incriminate oneself.

366E. (1) Suspects and accused persons shall have the right to remain silent in relation to the criminal offence which they are suspected or accused of having committed and shall have the right not to incriminate themselves.

(2) The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be obtained through the use of legal powers of compulsion which exist independently of the will of the suspects or accused persons.

(3) The exercise by suspects or accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to constitute evidence that they have committed the criminal offence concerned.

Title II Amended by: VIII.1990.3. OF THE COURT OF MAGISTRATES

367. (1) Every Court of Magistrates shall consist of a magistrate and shall have a two-fold jurisdiction, namely, as a court of criminal judicature for the trial of offences which fall within its jurisdiction, and as a court of inquiry in respect of offences which fall within the jurisdiction of a higher tribunal. Number of Courts of Magistrates.

(2) There shall be two Courts of Magistrates, one for the Island of Malta and one for the Islands of Gozo and Comino to be styled Court of Magistrates (Malta) and Court of Magistrates (Gozo) respectively.

[...]

400. The accused may, in the course of the inquiry, be assisted by advocates or legal procurators

b) Customs Procedure

The customs procedure may lead to the forfeiture of goods as stipulated by s. 60 of Chapter 37 of the Laws of Malta (Customs Ordinance): **67**

XI PREVENTION OF SMUGGLING OFFENCES AND PENALTIES

Forfeiture of smuggled goods. Amended by: XIII. 1979.25;XXXVI. 1989.2;XXXII. 2007.23.XVI. 2017.9;VII.2018.9.60. **68**

(1) Save as otherwise expressly provided in any other law –

(a) if any goods liable to the payment of duties are unshipped from any ship in Malta, duty not being first paid or secured; or (b) if any prohibited goods or goods the importation of which is restricted are imported or brought into any part of Malta; or (c) if any goods are removed from any ship, quay, wharf, or other place in Malta previously to the examination thereof by the proper Customs official or, being entered to be warehoused, are carried into the warehouses, except under the care or authority of

such official and in such manner, and by such roads or ways, and within such time as he may direct; or

(d) if any goods entered to be warehoused, after the landing thereof, are removed or withdrawn from any quay, wharf, or other place in Malta, so that no sufficient account is taken thereof by the proper Customs official, or so that the same are not duly warehoused; or where in any other manner, except in the case of force majeure, the conveyance of the goods after landing is not according to the instructions given by the Customs officials, or

(e) if any goods whatever which have been warehoused or otherwise secured in Malta, either for consumption in the same or for exportation, or have been delivered from any warehouse or other place without payment of duty for removal to any other warehouse or place, are clandestinely or illegally removed from or out of any warehouse or place of security, or are not duly delivered at the place to which such goods were destined to be removed; or

(f) if any goods which are prohibited to be exported are put on board any vessel with intent to be laden or shipped for exportation, or are brought to any quay, wharf, or other place in Malta in order to be put on board any vessel for the purpose of being exported; or

(g) if any goods which are prohibited to be exported are found in any package produced to any Customs official as containing goods not so prohibited; or

(h) if any goods subject to any duty or restriction in respect of importation, or which are prohibited to be imported into Malta, are found or discovered either before or after landing, to be, or to have been concealed in any manner on board any vessel, within the limits of Malta; or Cap. 337.

(i) if any goods imported free of duty by any person as is mentioned in Article 6 of the Import Duties Act, are sold or disposed of for use or consumption in Malta and a perfect entry thereof is not made within the term fixed in Article 6(3) of the said Act by the person liable to duty thereon in terms of the said Article; or Cap. 337. (j) if any goods imported or taken out of bond in terms of Article 17(2)(d)(ii) of the Import Duties Act, are not re-exported within the time stipulated in accordance with the same subparagraph; or

(k) if any goods are imported by any person who is knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of customs, or of the laws and restrictions of customs, relating to importation, unshipping, transshipping, landing and delivery of goods or otherwise contrary to this Ordinance, then and in every such case, all such goods shall be forfeited together with:

(i) any other goods which together with them make up one whole object, even if they are separable in anyway or they can be removed or be separated; an

(ii) any other goods which may be found packed with them; and

(iii) any other goods used in concealing them.

(2) The forfeiture provided for in this Article should never be understood to mean that an object entering Malta can be split into parts in such a way that at the moment of forfeiture it is in any way different from the way it was when entering Malta.

67. Notwithstanding the provisions of any other law, any goods seized under the provisions of this Ordinance and exhibited in court during the relative proceedings, shall (a) where on conviction by the Court of Magistrates the goods seized are to be forfeited and no appeal from the conviction is entered before the expiration of the time allowed for entering an appeal or any such appeal is abandoned; or

(b) on an appeal entered by the defence or by the prosecution, where the Court of Appeal confirms the conviction or finds the accused guilty, become the property of the Government and no application shall be required to be made to the competent court by the Commissioner to take possession thereof.

69. (1) All ships, goods, vehicles or other conveyances, together with all horses and other animals and things liable to forfeiture, may be seized in any place, either upon land or water, by any Customs official or Police officer, and ships, goods, vehicles or other conveyances together with all horses and other animals and things so seized shall forthwith be delivered into the care of the Commissioner or in any other way be securely placed in a place where the Commissioner exercises control.

(2) The forfeiture of any ship, vehicle or animal shall be deemed to include the tackle, apparel and furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found and all contents thereof.

73. (1) Where any person desires to sue in any court as a consequence of, or incidentally to, the seizure of any goods under the provisions of this Ordinance, the proceedings shall be instituted by an application.

(2) The application shall, under pain of nullity, state clearly and concisely the nature of the complaint, the facts out of which the complaint arises, the reasons why such complaint should be upheld, and the claim for the release of the goods seized.

(3) The applicant shall attach to the application all such documents in support of his claim as it may be in his power to produce, and shall indicate in his application the names of all the witnesses he intends to produce stating, in respect of each, the proof which he intends to make.

(4) The court shall, without delay, set down the application for hearing at an early date, which date shall in no case be later than thirty days from the date of the filing of the application.

(5) The application, and the notice of the date fixed for hearing, shall be served on the Commissioner without delay, and the said Commissioner shall file his reply thereto within fifteen days after the date of the service of the application.

(6) The Commissioner shall, in his reply, state clearly and concisely whether he agrees to the facts set out in the application, and the reasons why he objects to the claim; he shall moreover state in his reply the names of the witnesses in support of his reasons and shall attach thereto all the documents in support thereof.

(7) On the day fixed for the hearing of the application, the court shall consider the issues of fact and of law as are ascertainable only from the application, reply or documents filed by either of the parties, or from the evidence indicated by either of the parties in the application or reply, as the case may be, or from the oral pleading of either of the parties.

(8) The court shall hear the application expeditiously and the procedure at first instance shall be concluded within one (1) year from the presentation of the application, provided that this time limit may be extended only once for a period of three (3) months. Cap. 12.

(9) Saving the preceding provisions of this Article, the provisions of the Code of Organization and Civil Procedure shall apply in relation to any such application.

77. [Burden of proof in smuggling cases]

If, in any claim in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or in any prosecution for the recovery of any pecuniary penalty or otherwise under this Ordinance, any dispute arises whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully transhipped or unshipped, or concerning the place from where such goods were brought, then and in every such case the proof thereof shall be on the person making such claim or on the defendant in such prosecution, as the case may be.

78. In all cases where the value of the goods is relevant for the determination of any penalty, such value shall, as regards proceedings in court, be determined in accordance with the rules contained in the Third Schedule to the Import Duties Act, and the Annex thereto.

III. Criminal Investigations According to the EPPO Regulation Based on National Law (Measures)

SECTION 1 Rules on investigations

1. Article 26

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b) Relevant Sources of Indica- tions for a Criminal Offence Falling within the Competence of the EPPO	92	(b) Prevention of Money Laundering Act, Chapter 337 Laws of Malta.....	104
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1. Where, **in accordance with the applicable national law**, there are **reasonable grounds to believe that** an offence within the competence of the EPPO is being or has been committed, a European Delegated Prosecutor in a Member State which **according to its national law** has jurisdiction over the offence shall, without prejudice to the rules set out in Article 25(2) and (3), initiate an investigation and note this in the case management system.

2. Where upon verification in accordance with Article 24(6), the EPPO decides to initiate an investigation, it shall without undue delay inform the authority that reported the criminal conduct in accordance with Article 24(1) or (2).

3. Where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation.

4. A case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed. A European Delegated Prosecutor of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a

deviation from the rule set out in the previous sentence is duly justified, taking into account the following criteria, in order of priority:

- (a) the place of the suspect's or accused person's habitual residence;
- (b) the nationality of the suspect or accused person;
- (c) the place where the main financial damage has occurred.

5. Until a decision to prosecute under Article 36 is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:

- (a) reallocate the case to a European Delegated Prosecutor in another Member State;
- (b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it,

if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor in accordance with paragraph 4 of this Article.

6. Whenever the Permanent Chamber is taking a decision to reallocate, merge or split a case, it shall take due account of the current state of the investigations.

7. The EPPO shall inform the competent national authorities without undue delay of any decision to initiate an investigation.

The following table gives an **overview of the material** discussed within the first sections of this compendium volume on Maltese criminal investigations into EU fraud offences and PIF *Acquis* crimes:

1

Table 5 Overview Box Article 26 EPPO Regulation (PIF offences etc.)

Overview	
Relevant national law	<p>Main Sources:</p> <ul style="list-style-type: none"> · CHAPTER 9 CRIMINAL CODE To amend and consolidate the Penal Laws and the Laws of Criminal Procedure. 10th June, 1854. · CHAPTER 9 Criminal Procedure Rules Laws of Malta, Book 2. 10th June, 1854. · CHAPTER 37 CUSTOMS ORDINANCE To make better provision for the management and regulation of customs. 16th September, 1909. · CHAPTER 373 Prevention of Money Laundering Act, Laws of Malta.

	<ul style="list-style-type: none"> · CHAPTER 406 VALUE ADDED TAX, ACT to make provision for the imposition of a value added tax in place of an excise tax system on imports, products and services. 1st January, 1999. · CHAPTER 621 PROCEEDS OF CRIME ACT AN ACT.
“An offence within the competence of the EPPO”	<p>For the text of the offences that are mentioned by Article 26 EPPO Regulation “an offence within...” see:</p> <p>Chapter 9 Laws of Malta, Criminal Laws, BOOK 1 PART II OF CRIMES AND PUNISHMENTS Sub-title IV Of Abuse of Public Authority 112–141</p> <ul style="list-style-type: none"> · Of Unlawful Exaction, of Extortion and of Bribery 112–121E · Of Abuse of Authority, and of Breach of Duties pertaining to a Public Office 133–140 Title V Of Crimes affecting Public Trust 166–190 · Sub-title I Of Forgery of Papers, Stamps and Seals 166–178 · Sub-title II Of Forgery of other Public or Private Writings 179–188 · Sub-title III Of Counterfeiting Of Currency 188A–188I · General Provisions applicable to this Title 189–190 · Sub-title III of Fraud against the European Union’s Financial Interests · 190A–190K [see below → IV. 1. b) bb. (1) “PIF offences in Malta” Full text of the Laws]. · Title IX Of Crimes against Property and Public Safety 261–337H · Sub-title I Of Theft 261–289 · Sub-title II Of other Offences relating to Unlawful Acquisition and Possession of Property 290–292 · Sub-title III Of Fraud 293–310BA General Provision Applicable To Offences Under Sub-titles I, II and III 310C · Sub-title IIIA Of Fraud And Counterfeiting of Non-cash Means of Payment 310D–310K

Sanctions for legal persons	The sanctions for legal persons are based on special laws in Chapter 9, Laws of Malta, Book 1. Mostly these provisions are annexed to the offences, which are stipulated in the Laws of Malta.
“[competence of] a European Delegated Prosecutor in a Member State [Malta]”	<p>Article 628D. Chapter 9 Laws of Malta, Criminal Procedure Rules</p> <p>Exercise of Competence by Prosecutors</p> <p>(1) The European Delegated Prosecutors shall have prosecutorial functions, whenever exercising the powers to investigate offences in accordance with Council Regulation (EU) 2017/1939, and they shall have the power to instruct the Police or any other law enforcement agency to conduct an investigation relative to offences falling within the competence of the European Public Prosecutor’s Office.</p> <p>(2) The European Delegated Prosecutors shall, when prosecuting offences, have the same powers as the Attorney General and the Executive Police.</p> <p>(3) The European Delegated Prosecutors shall prosecute in the name of the Republic of Malta.</p>
“jurisdiction”	<p>Cf. ss. from the Maltese Criminal Code and cf. Article 11 of the PIF Directive (EU Fraud Commentary)</p> <p>The jurisdiction depends on general rules of Criminal Law.⁷⁷</p> <p>The first sections in Chapter 9, Criminal Laws of Malta, and Book 1 Criminal Code stipulate the rules that implement the requisites of Article 11 PIF Directive (partially).</p> <ul style="list-style-type: none"> · Territory principle (Island of Malta, Gozo Districts) <p>Example: Someone importing goods from Indonesia to a Maltese port (e.g. bikes with electronic batteries) could be suspected of avoiding to pay anti-dumping duties (because of the steel used for the bikes). If this offence falls into the competence of the EPPO (see → Articles 23–25 EPPO Regulation below), it would need to be informed but prior to that: If an official,</p>

⁷⁷ A.J. Mamo, First Year Criminal Law (revamped by Christopher Aquilina), pp. 68 et seq.

	<p>who wants to control the goods at the port, where they arrive from their sea shipment, is on the grounds of Malta, the customs controls services could, using their rights as customs police (see below → Part B Laws on OLAF and national authorities carrying out on-the-spot-checks), take him into arrest, seize materials and documents and investigate.</p> <ul style="list-style-type: none"> · Nationality principle
--	--

Source: Own Research.

a) Initiation of Investigations by Virtue of Article 26 Paragraph 1 of the EPPO Regulation

2 Article 26 needs to be seen independent from Article 27. Article 26 stands on its own and describes from our point-of-view a **principle of legality**⁷⁸ at **Union level**, which has the effect of protecting the Union's (own) financial interests.

3 Before the EPPO existed, these assertions were mainly based on Chapter 9 Laws of Malta. Book 2 would apply for criminal investigations:

4 **SECOND BOOK LAWS OF CRIMINAL PROCEDURE**
PART I OF THE AUTHORITIES TO WHICH THE ADMINISTRATION OF
CRIMINAL JUSTICIES ENTRUSTED
 Title I Of the Powers and Duties of the Attorney General and the Executive Police in respect of Criminal Prosecutions 346–366 [...].

5 The following figure shows the exercise of jurisdiction by the EPPO in a typical scenario. All possibilities are included in the figure:

⁷⁸ For the terms see e.g. “Legality (Procedural) vs. Opportunity” Katja Šugman Stubbs and Miha Hafner, in: by Caeiro, Gless, Mitsilegas, João Costa, Encyclopedia of Crime and Criminal Justice, Elgar 2024. <https://bit.ly/3MRt5vg>. Accessed 31 July 2024.

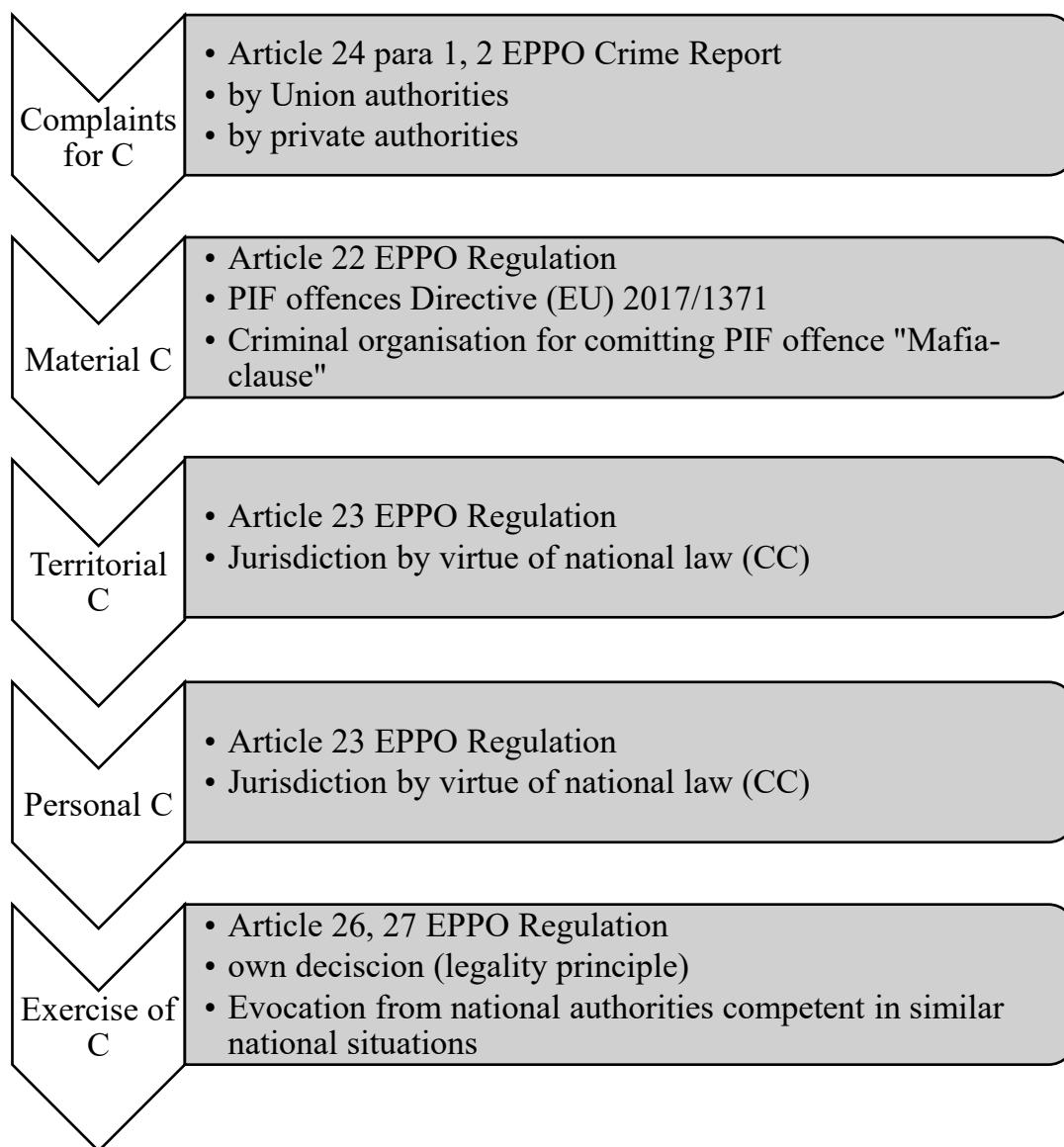


Figure 1 EPPO Exercise of competence in general

But what is the effect of the reference to national law? How have the cases been exercised in practice and what is the situation after one year of operational work?

6

b) Relevant Sources of Indications for a Criminal Offence Falling within the Competence of the EPPO

- 7 Hearing the following citation, it becomes obvious that the communication within the EU, within the EPPO, within the national prosecution offices and the investigative bodies is highly important: “In order to achieve its goals, the EPPO will need to establish smart information flows between the central office in Luxembourg, delegated prosecutors, and national authorities and, at the same time, avoid causing delays in the information exchange. [...] In this regard, some of the existing EU mechanisms concerning de facto reporting of PIF crimes seem to be obsolete, as well as national law duties to report such information to a national prosecution office in advance or in parallel to the EPPO.”⁷⁹ *De facto* the EPPO has nowadays established a good flow of information.
- 8 A distinction can be made between the direct and the indirect path for the transfer of information related to the competence. Natural and legal persons may report suspicious actions and conduct. The motivation to report information is influenced by the level of protection and the duties in national criminal law.⁸⁰

Figure 2 National (indirect way of) Obtaining information for the EPPO competence and the exercise of jurisdiction



See → Article 24 para 8 EPPO Regulation.

Article 628H. Chapter 9 Laws of Malta, Book 2.

Competent national authority.

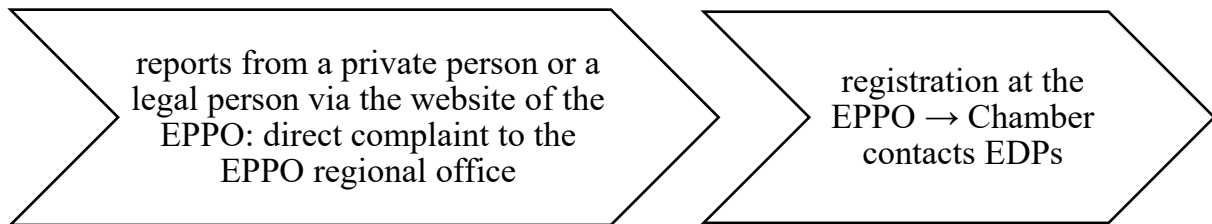
The Police shall act as competent national authority to:

- (a) receive the information in accordance with Article 24(8) of Council Regulation (EU) 2017/1939;
- (b) be consulted in accordance with Article 25(2) and (3) of Council Regulation (EU) 2017/1939; and
- (c) give consent in accordance with Article 25(4) of Council Regulation (EU) 2017/1939.

⁷⁹ Klement 2021, 51–52.

⁸⁰ See Warne and Louise 2018.

Figure 3 Supranational (direct way of) Obtaining information for the EPPO competence and the exercise of jurisdiction



Another, third source of information are the Union bodies, which are obliged to report either to OLAF or to the EPPO (e.g., by obliged by Working Agreements) – depending on the seriousness of the suspected conduct: irregularities only or clear foundations for potential criminal offences. National authorities, who report to OLAF need to obey the Maltese “Guidelines on how to report irregularities and fraud to the European Commission” issued by the Maltese AFCOS. If e.g. a Maltese Customs official discovers while being on duty⁸¹ a potential irregularity that may lead to a criminal suspicion he needs to contact the relevant authorities, which might include AFCOS and the EPPO.

OLAF will either way report conduct that falls in the EPPO’s competence by virtue of Article 12c OLAF Reg.

aa. Determination of Competence and Verification of Crime Reports

The first task of the EDPs in the Maltese regional office is to determine whether the EPPO has competence and jurisdiction or can obtain competence and exercise jurisdiction (see below → Article 27). Similar rules on crime reports in the national situation exist in Part 2, Book 2 of Chapter 9 Laws of Malta, Title I of Reports, Information and Complaints 535–545.

These are formal but essential questions. They are determined by means of Union secondary legislation and special delegated guidelines required by secondary legislation,

⁸¹ Chapter 37 (Customs Ordinance) issues: “28.(1) Upon the entry and landing of any dutiable goods to be warehoused, or within such period as the Commissioner may direct with respect to the same or any of them, the proper Customs official shall, before such goods are warehoused, take an account of the same, and shall enter in a book kept for that purpose, the name of the importing vessel and of the person in whose name they are entered, the marks, numbers and general description of the goods, and the warehouse or place in the warehouse in which the same are to be deposited: Provided that, where any such goods are entered to be warehoused for exportation or transshipment only, there shall be taken the number and description only of the packages and marks of all such goods entered to be warehoused for exportation or transshipment only, unless the Commissioner directs that a full examination be made; and when the same are so deposited with the authority of such official, he shall certify that the entry and warehousing of such goods are complete, and such goods shall from that time be considered goods duly warehoused.(2) If any such goods are delivered, withheld or removed from the proper place of examination before the same have been examined and certified by such official, such goods shall be deemed to be goods not duly entered or warehoused and shall be forfeited.”

the so-called **Internal Rules on Procedure [of the EPPO]**. This depends on the criteria of the Regulation (see → Articles 22, 23).

✍ *Nota bene:* There are rules issued by the EPPO Chamber but they apply for Article 27 Right of evocation. Article 26 para 5 and 6 refer to special rules on splitting or merging cases on Italian territory if different regional offices have initiated an investigation in similar cases.

(1) Union Standards, Article 24 Paragraph 6 et seq. of the EPPO Regulation

- 13** For the EPPO to be competent, the requirements of the Regulation must be met. Either an examination according to Article 24 para 6 must show that the EPPO is competent or the delegated prosecutor carries out an examination and assessment by virtue of Article 26 para 1 EPPO Regulation himself/herself without informing the Permanent Chamber and initiates an investigation about which he/she subsequently informs the Permanent Chamber.
- 14** The IRP rules state the following:

Article 40 Verification of information [Internal Rules of Procedure, 2020-12-/2020.003 IRP – EPPO]

1. The verification for the purpose of initiating an investigation shall assess whether:
 - a) the reported conduct constitutes a criminal offence falling under the material, territorial, personal and temporal competence of the EPPO;
 - b) *there are reasonable grounds under the applicable national law* to believe that an offence is being or has been committed;
 - c) there are obvious legal grounds that bar prosecution;
 - d) where applicable, the conditions prescribed by Article 25(2), (3) and (4) of the Regulation are met.
2. The verification for the purpose of evocation shall additionally assess:
 - a) the maturity of the investigation;
 - b) the relevance of the investigation with regard to ensuring the coherence of the EPPO's investigation and prosecution policy;
 - c) the cross-border aspects of the investigation;
 - d) the existence of any other specific reason, which suggests that the EPPO is better placed to continue the investigation.
3. The *verification shall be carried out using all sources of information available* to the EPPO as well as any sources *available to the European Delegated Prosecutor, in accordance with applicable national law*, including *those otherwise available to him / her if acting in a national capacity*. The European Delegated Prosecutor may make use of the staff of the EPPO for the purpose of the verification. Where appropriate, the EPPO

may consult and exchange information with Union institutions, bodies, offices or agencies, as well as national authorities, subject to the protection of the integrity of a possible future criminal investigation.

4. The European Delegated Prosecutor shall finalise the verification related to the evocation of an investigation at least 2 days before the expiration of the deadline prescribed by Article 27(1) of the Regulation. The verification related to initiating an investigation shall be finalised no later than 20 days following the assignment.

5. If the European Delegated Prosecutor does not finalise the verification on whether or not to initiate an investigation within the prescribed time limit, or he/she informs their inability to do so within the foreseen time limit, the European Prosecutor shall be informed and where deemed appropriate extend the time available or issue an appropriate instruction to the European Delegated Prosecutor.

6. Where it concerns a decision on evocation, the European Delegated Prosecutor may ask the European Chief Prosecutor to extend the time limit needed to adopt a decision on evocation by up to 5 days.

7. Where the European Delegated Prosecutor does not issue a decision within the time limit, it shall be treated as a consideration not to evoke a case, and Article 42 applied accordingly.

The requirements of Article 25 para. 2 and 3 must be observed but he/she can still initiate an investigation “without prejudice to the rules set out in Article 25(2) and (3)”. The provisions, jurisdiction (e.g. territory), thresholds i.e. euro thresholds of the Regulation and orders of the Luxembourg Chamber must exist for the exercise of competence.

15

Article 22 Material competence of the EPPO

PIF Implementation (see above → Table 5).

Article 23 Territorial and personal competences of the EPPO

The EPPO is competent if:

- the criminal offenses were committed, in whole or in part, on the territory of one or more participating EU Member States;
- the criminal offenses were committed by a national of a participating EU Member State,
- the criminal offenses were committed by a person subject to the Staff Regulations or rules applicable to EU officials.

Article 24 Communication, registration and verification of information

- 16 The transfer of information to the relevant EDPs or the chamber of the EPPO is mainly regulated by Article 24 EPPO Regulation. Two sources can **help to understand the transfer of information**: Notification of the Government from 2021 by virtue of Article 117 EPPO Regulation.⁸²

(2) Competence of the EPPO

- 17 The competence of the EPPO in the special case of different investigations in several EU and EPPO countries requires an **evaluation of the situation** on the basis of the fundamental rule established by Article 26 para 4 EPPO Regulation. This rule is further described in the EPPO Guidelines (→ see the Guidelines online, 1. b)).

(3) Jurisdiction of the European Delegated Prosecutor

- 18 The jurisdiction of the EDPs in Malta is made possible by the EPPO Adoption Act (see above → III.). Next, it is based on the general criminal law, the PIF harmonization and the theory of jurisdiction in relation to territory and nationality.⁸³

bb. How to Assess and Verify the Suspicion Level According to Article 26 Paragraph 1 and the CPC for a Criminal Offence Falling within the Competence of the EPPO

- 19 The initial suspicion is only to determine the impetus - the “ball” that gets the criminal proceedings rolling if saying it by using a metaphor. *Filletti* once stated for Malta that: “An investigation relating to the commission of an offence can be triggered with **any form of suspicion** [...]s. The police will have to establish whether in fact an offence has been committed, and establish the identities of the suspects, and eventually, of the perpetrators of the offence. On this basis, the police may commence their investigation.”⁸⁴
- 20 The way in which the public prosecutor’s office learns, for example, of the suspicion of subsidy fraud or an offence detrimental to the Union’s financial interests is regulated in the Maltese **EPPO Adoption Act and the PIF Implementation** within Chapter 9 of the laws of Malta, which contains the first book of the Criminal Code and addresses the relevant Union law by transposition. Next, the EPPO has established own rules, e.g. for the communication with the national authorities (see → Article 40 para 3 IRP [2020.003 EPPO]).

⁸² From the point-of-view of Brodowski et al. 2022 Article 117 EPPO is only an indication for PIF implementation laws and has no legal validity character.

⁸³ See J. Mamo, First Year Criminal Law (revamped by Christopher Aquilina).

⁸⁴ See Filletti 2013, p. 476.

(1) PIF Offences in Malta

The PIF offences in Malta are *de facto* the **material scope of investigation** of the EDPs of the Maltese Regional Office of the EPPO and “specialized crimes (...) requiring to a certain extent, uniform interpretation throughout the EU and the AFSJ”⁸⁵. They are mainly to be found in the Maltese Criminal Code, which stems from 10th June 1854.⁸⁶ It is enshrined in the laws of Malta and therefore called Chapter. 9. It contains two major books to amend and consolidate the Penal Laws and the Laws of Criminal Procedure for the Island of Malta. It has been amended several times in the past 170 years (see → Preamble and above II.). In the last five years – especially since 2017 – the Maltese Legislator needed to implement the PIF Directive (EU) 2017/1371. It therefore amended the Criminal Code again. The following overview presents the **general rules on criminal liability**⁸⁷ as an excerpt and the full wording of the offences:

FIRST BOOK PENAL LAWS PART I OF PUNISHMENTS AND GENERAL RULES FOR THEIR APPLICATION, OF THE WILL AND AGE OF THE OFFENDER, OF ATTEMPTED OFFENCE, OF ACCOMPLICES AND OF RECIDIVISTS

Title I Of Punishments and General Rules for their application 7–32

Sub-title I Of Punishments to which Offences are subject 7–15

Sub-title II General Provisions respecting the Infliction and Execution of Punishments 16–30

Sub-title III Of the Ascent and Descent from one Punishment to another 31–32

Title II Of the Will and Age of the Offender 33–40

Title III Of Attempted Offence 41

Title IV Of Accomplices 42–48

Title IV Bis Of Conspiracy 48A

Title V Of Recidivists 49–54

⁸⁵ Filletti 2020, p. 284.

⁸⁶ See Ganado 1949, p. 211 et seq. tracing the development from the very beginnings.

⁸⁷ See as well Filletti 2023 with a precise chapter on the Maltese doctrine in this regard. And see First Year Criminal Law, Prof. A.J. Mamo Revamped by Christopher Aquilina, GhSL, → <https://bit.ly/3MVSMuI>, pp. 9, 84 et seq.; Second Year, Criminal Law, Prof. A. J. Mamo, Revamped by Christopher Aquilina 2022 → <https://bit.ly/47BA31d>. On p., 197 et seq. we can see that the question whether intent (*dolus*) is required is strongly connected e.g. to the offence of forgery. Even in Maltese law has a strong connection to English common law, it has its own way of interpreting the conditions of a crime: “There is no doubt, of course, that a criminal intent is indispensable for this and of crime as it is, generally, for all wilful crimes. The Romans said: *non sine dolo male falsem*. It is, therefore, clear that mere negligence is not sufficient.” And p. 210: “So that criminal liability for the crime may arise, the Prosecutio must *prove* that the public officer acted knowingly, that is, with the knowledge that the payment of the money or delivery of the effects had already been affected.”

The offences in the PIF *acquis* area can mainly be found in Part II, Title V, Sub-title III, Article 190A et seq.:

23 *Sources and national sections 1: PIF offences in Malta*

FIRST BOOK

PART II OF CRIMES AND PUNISHMENTS

[All offences might be committed in connection with the General Rules on Criminal Liability.⁸⁸]

Sub-title IV Of Abuse of Public Authority 112–141

Of Unlawful Exaction, of Extortion and of Bribery 112–121E

Of Abuse of Authority, and of Breach of Duties pertaining to a Public Office 133–140

Title V Of Crimes affecting Public Trust 166–190

Sub-title I Of Forgery of Papers, Stamps and Seals 166–178

Sub-title II Of Forgery of other Public or Private Writings 179–188

Sub-title III Of Counterfeiting of Currency 188A–188I

General Provisions applicable to this Title 189–190

Sub-title III of Fraud against the European Union's Financial Interests

190A–190K

Title IX Of Crimes against Property and Public Safety 261–337H

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Sub-title IIIA Of Fraud and Counterfeiting of Non-cash Means of Payment

310D–310K

(a) Chapter 9 Laws of Malta Book 1

24 Other kinds of forgery and use of forged documents. Amended by: IX.1911.10. Substituted by: V.1956.16.189.

Whosoever shall commit any other kind of forgery, or shall knowingly make use of any other forged document, not provided for in the preceding Articles of this Title, shall be liable to imprisonment for a term not exceeding six months, and if he is a public officer or servant acting with abuse of his office or employment, he shall be punishable with imprisonment for a term from seven months to one year.

⁸⁸ A.J. Mamo, First Year Criminal Law (revamped by Christopher Aquilina) [in the following Mamo 2020, p.], pp. 156 et seq. Rules on Attempts under Maltese Criminal Law; Rules on Complicity, pp. 178 et seq.; Rules on Punishment 224 et seq.; On the Purpose of Criminal Punishment, pp. 283 et seq.

Definition of document, etc. Added by: III.2002.34.189A.

For the purposes of this Title, “document”, “instrument”, “writing” and “book” include any card, disc, tape, soundtrack or other device on or in which information is or may be recorded or stored by mechanical, electronic or other means. Additional punishment of perpetual general interdiction.190. In all crimes of forgery when committed by public officers or servants, the punishment of perpetual general interdiction shall always be added to the punishment laid down for the crime. Added by: XVIII.2020.2.

Sub-title III OF FRAUD AGAINST THE EUROPEAN UNION’S FINANCIAL INTERESTS

The measures in this Sub-title transpose the provisions of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law. Scope and applicability.

190A. (1) This Sub-title establishes rules concerning the combating of fraud and other illegal activities affecting the European Union’s financial interests.

(2) In respect of revenue arising from VAT own resources, this Sub-title shall apply only in cases of serious offences against the common VAT system. For the purposes of this Sub-title, offences against the common VAT system shall be considered to be serious where the intentional acts or omissions defined in paragraph (d) of Article 190C are connected with the territory of Malta and another Member State or Member States of the European Union and involve a total damage of at least ten million euro (€10,000,000).

(3) Nothing in this Sub-title shall affect the structure and functioning of the tax administration of Malta.

(4) The sanctions for the offences under this Sub-title shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officers.

(5) The application of administrative measures, penalties and fines as laid down in European Union law, in particular those within the meaning of Articles 4 and 5 of Regulation (EC, Euratom) No.2988/95, or in national law adopted in compliance with a specific obligation under European Union law, shall be without prejudice to this Sub-title. Any criminal proceedings initiated on the basis of this Sub-title shall not unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings, laid down in European Union or national law. Interpretation.

190B. For the purposes of this Sub-title the following definitions, unless the context otherwise requires, shall apply: “public officer” shall have the same meaning as is assigned to it in Article 92 and shall also include a Union official or a national official of

a Member State of the European Union other than Malta and any national official of a third country;

(i) “Union Official” means a person who is: - an official or other servant engaged under contract by the European Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No. 259/68 (the ‘Staff Regulations’), or - seconded to the European Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants: Provided that, without prejudice to the provisions on privileges and immunities contained in Protocols No. 3 and No. 7 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Members of the European Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them;

(ii) “national official” shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official; “European Union’s financial interests” shall mean all revenues, expenditure and assets covered by, acquired through, or due to: (a) the European Union budget;

(b) the budgets of the European Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them. Fraud affecting the Union’s financial interests.

190C. (1) Whosoever intentionally commits fraud affecting the European Union’s financial interests shall be liable, on conviction, to imprisonment for a term of six (6) months to four (4) years. (2) For the purposes of this Sub-title, the following shall be regarded as fraud affecting the European Union’s financial interests:

(a) in respect of non-procurement-related expenditure, any act or omission relating to:

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the European Union budget or budgets managed by the European Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or

(iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted; (b) in respect of procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the European Union’s financial interests, any act or omission relating to:

- (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of assets from the European Union budget or budgets managed by the European Union, or on its behalf;
- (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
- (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the European Union's financial interests;
- (c) in respect of revenue other than revenue arising from VAT own resources referred to in paragraph
- (d), any act or omission relating to:
 - (i) the use or presentation of false, in correct or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the European Union budget or budgets managed by the European Union, or on its behalf;
 - (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
 - (iii) misapplication of a legally obtained benefit, with the same effect;
- (d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:
 - (i) the use or presentation of false, in correct or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the European Union budget;
 - (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
 - (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Penalties.

190D. (1) Any public officer who, directly or through an intermediary, requests or receives advantages of any kind for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the European Union's financial interests shall be liable, on conviction, to imprisonment for a term of six (6) months to four (4) years.

(2) Whosoever promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public officer for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the European Union's financial interests shall on conviction be liable to a term of imprisonment of six(6) months to four (4) years.

190E. Any public officer who is directly or indirectly entrusted with the management of funds or assets, and who commits or disburses funds or appropriates or uses assets contrary to the purpose for which they were intended in any way which damages the European Union's financial interests shall be liable, on conviction, to imprisonment, for a term of three (3) to eighteen (18) months. Incitement, aiding and abetting, and attempts.

190F. Whosoever incites, aids, abets or attempts any offence under Articles 190C, 190D or 190E shall be guilty of an offence and shall be liable on conviction to the punishment laid down for the offence aided, abetted or instigated.

Corporate liability for offences under this Sub-title.

190G. (1) Where any offence under this Sub-title is committed for the benefit, in part or in whole, of a body corporate by a person acting individually or as part of an organ of the body corporate, and having a leading position within the body corporate, based on: (a) a power of representation of the body corporate, (b) an authority to take decisions on behalf of the body corporate, or (c) an authority to exercise control within the body corporate, Cap. 12. such body corporate shall be liable to the payment of a fine (multa) of not less than twenty thousand euro (€20,000) and not more than two million euro (€2,000,000), which fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

(2) A body corporate shall also be held liable for an offence under this Sub-title where the lack of supervision or control by person referred to in sub-article (1) has made possible the commission of the offence, by any person under its authority, for the benefit of that body corporate, which shall upon conviction be liable to the punishment laid down in sub-article (1).

(3) Corporate liability pursuant to sub-articles (1) and (2) shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 190C, 190D or 190E or who are criminally liable under Article 190F.

(4) Without prejudice to the application of the punishment under sub-articles (1) and (2), where a body corporate is held liable pursuant to this Article the following sanctions may simultaneously be applied: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from public tender procedures; (c) the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity; (d) placing under judicial supervision; (e) the compulsory winding up of the body corporate; or (f) the temporary or permanent closure of establishments which have been used for the commission of the criminal offence.

(5) This Article shall not apply to States or public bodies exercising State authority, or to public international organisations aid.

190H. (1) Where the offences referred to in Articles 190C, 190D, 190E and 190F involve considerable damage or advantage, the offender shall be liable, on conviction, to imprisonment, for a term of four (4) to eight (8) years.

(2) The damage or advantage resulting from the criminal offences referred to in Article 190C(2)(a), (b) and (c) and in Article 190D shall be presumed to be considerable where the damage or advantage involves more than one hundred thousand euro (€100,000).

(3) The damage or advantage resulting from criminal offences referred to in Article 190C(2)(d) and in respect of Article 190A(2) shall always be deemed to be considerable. Aggravating circumstances. 190I. The punishment for the offences referred to in Articles 190C, 190D, 190E and 190F shall be increased by one to two degrees where the offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/ 841/JHA of 24 October 2008 on the fight against organised crime.

Jurisdiction.

190J. (1) Article 121C shall apply *mutatis mutandis* to the offences under this Sub-title.

(2) Without prejudice to the generality of sub-article (1), the Maltese courts shall also have jurisdiction over the offences laid down in this Sub-title where the offender is subject to the Staff Regulations of Officials of the European Union at the time of commission of the criminal offence, and that person is at the same time a citizen or permanent resident in Malta within the meaning of Article 5(1)(d): Provided that the application of this sub-article shall fully respect the principle of *ne bis in idem*.

Recovery.

190K. (1) This Sub-title shall be without prejudice to the recovery of any VAT not paid in the context of the commission of the offences referred to in Article 190C(2)(d) or in Articles 190D, 190E or 190F.

(2) This Sub-title shall be **without prejudice** to the application of any **administrative measures, penalties and fines** laid down in law, and any criminal proceedings initiated pursuant to this Sub-title shall not unduly affect the proper and effective application of such administrative measures, penalties and fines.

The **general fraud offence** of Maltese criminal law can be found in the Sub-title III (Of Fraud 293–310BA General Provision applicable to offences under Sub-titles I, II and III 310C).

25

(c) Prevention of Money Laundering Act, Chapter 337 Laws of Malta

- 26 **3.** (1) Any person committing any act of money laundering shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding two million and five hundred thousand euro (€2,500,000), or to imprisonment for a period not exceeding eighteen years, or to both such fine and imprisonment provided that an act of money laundering shall be aggravated when:
- (a) the offence was committed within the framework of criminal organisation within the meaning of Framework Decision 2008/841/JHA; or (b) the offender is an obliged entity within the meaning of Article 2 of Directive (EU) 2015/849 and has committed the offence in the exercise of his professional activities:
- Provided further that the Court may impose any one (1) or more of the following additional sanctions:
- (a) in the case where an act of money laundering is committed by natural persons:
- (i) the temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;
- (ii) the temporary or permanent disqualification from the practice of commercial activities;
- (iii) the temporary bans on running for elected or public office;
- (b) in the case where an act of money laundering is committed by a body of persons, whether corporate or unincorporate:
- (i) the exclusion from entitlement to public benefits or public aid;
- (ii) the temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;
- (iii) the temporary or permanent disqualification from the practice of commercial activities;
- (iv) the placing under judicial supervision;
- (v) its dissolution and winding up;
- (vi) the temporary or permanent closure of establishments which have been used for committing the offence.
- (2) Where an offence against the provisions of this Act is committed by a body of persons, whether corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.
- (2A) (a) Every person charged with an offence of money laundering under this Act shall be tried in the Criminal Court or before the Court of Magistrates (Malta) or the Court of Magistrates (Gozo), as the Attorney General may direct, and if he is found guilty shall be liable –

- (i) on conviction by the Criminal Court to the punishment of imprisonment for a term of not less than four years but not exceeding eighteen years, or to a fine (multa) of not less than fifty thousand euro (€50,000) but not exceeding two million and five hundred thousand euro (€2,500,000), or to both such fine and imprisonment; or
- (ii) on conviction by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) to the punishment of imprisonment for a term of not less than twelve months but not exceeding nine years, or to a fine (multa) of not less than twenty thousand euro (€20,000) but not exceeding two hundred and fifty thousand euro (€250,000), or to both such fine and imprisonment:

Provided that

- (i) in giving a direction in accordance with this sub-article the Attorney General shall give due consideration to the age of the offender, the prior conduct of the offender, the value of the property laundered and all the other circumstances of the offence;
- (ii) where the Attorney General has directed that the person accused is to be tried in the Criminal Court in accordance with this sub-article, upon the termination of the inquiry, if the Court of Magistrates as a Court of Criminal Inquiry decides that there are sufficient grounds for committing the accused for trial on indictment, the accused may, by application to be filed in the Criminal Court within seven days from the conclusion of inquiry or within seven days from the date on which the accused is served with the bill of indictment, demand the said court to order that he be tried in the Court of Magistrates and the Criminal Court shall, after ordering the service of the application upon the Attorney General and granting him at least seven days to reply and after having heard oral submissions from the accused and the Attorney General if it considers this necessary, decide upon the Courting which the accused is to be tried and the accused shall be tried in accordance with the decision of the Criminal Court:

Provided that an application in terms of this sub-paragraph may only be filed once in the course of any proceedings:

Provided further that persons who on the date of the coming into force of this sub-paragraph are awaiting trial in the Criminal Court further to direction given in terms of this sub-article may, notwithstanding the other provisions of this sub-article, file an application in the said court in terms of this sub-paragraph within one month from the said date;

- (iii) where upon conviction the accused is liable to the punishment provided in terms of sub-paragraph (a)(i) of this sub-article and the court competent to sentence the accused is of the opinion that when it takes into account the age of the offender, the prior conduct of the offender, the value of the property laundered and all the other circumstances of the offence, the punishment provided for in sub-paragraph (a)(i) of this sub-article would not be appropriate, it may, giving reasons apply the punishment provided in sub-paragraph (ii) of this sub-article.

(b) Notwithstanding that the Attorney General has directed in accordance with the provisions of paragraph (a) that a person be tried in the Criminal Court, he may, at any time

before the filing of the bill of indictment or at any time after filing the bill of indictment before the jury is empanelled, and with the consent of the accused, direct that that person be tried before the Court of Magistrates, and upon such direction the Court of Magistrates as a court of criminal judicature shall become competent to try that person as if no previous direction had been given. Where the Attorney General has given such new direction after the filing of the bill of indictment, the registrar of the Criminal Court shall cause the record to be transmitted to the Court of Magistrates, and shall cause a copy of the Attorney General's direction to be served on the Commissioner of Police. Cap. 9.

(c) Notwithstanding the provisions of Article 370 of the Criminal Code and without prejudice to the provisions of sub-article (2), the Court of Magistrates shall be competent to try offences of money laundering under this Act as directed by the Attorney General in accordance with the provisions of this sub-article.

(3) In proceedings for an offence of money laundering under this Act the provisions of Article 22(1C)(b) of the Dangerous Drugs Ordinance shall *mutatis mutandis* apply. Cap. 9.

(4) Where it is established that an offence of money laundering under this Act was committed by an officer of a body corporate as is referred to in Article 121D of the Criminal Code or by a person having a power of representation or having such authority as is referred to in that Article and the offence was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this Act be deemed to be vested with the legal representation of the same body corporate which shall be liable to the punishment laid down in sub-article (1):

Provided that where legal representation no longer vests in the said person, for purposes of this Article, legal representation shall vest in the person occupying the office in his stead or in such person as is referred to in that Article.

(5) (a) Without prejudice to the provisions of Article 23 of the Criminal Code the court shall, in addition to any punishment to which the person convicted of an offence of money laundering under this Act may be sentenced and in addition to any penalty to which a body corporate may become liable under the provisions of sub-article (4), order the forfeiture in favour of the Government of the proceeds 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 referred to in the said sub-Article (4) and any property of or in the possession or under the control of any person found guilty as aforesaid or of a body corporate s mentioned in this sub-article shall, unless proved to the contrary, be deemed to be derived from the offence of money laundering and liable to confiscation or forfeiture by the court even if in the case of immovable property such property has since the offender was charged passed into the hands of third parties, and even if the proceeds of property, movable or immovable, are situated in any place outside Malta:

Provided that, for the purposes of this sub-article, “proceeds” means any economic advantage and any property derived from or obtained, directly or indirectly, through criminal activity and includes any income or other benefit derived from such property.

(b) Where the proceeds of the offence have been dissipated or 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 shall 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 (multa) which is the equivalent of the amount of the proceeds of the offence. The said fine shall be recoverable as a civil debt and for this purpose the sentence of the court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure. Forfeiture of property derived from criminal activity.

(c) Where it is established that the value of the property of the person found guilty of an offence of money laundering under this Act is disproportionate to his lawful income and the court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that person, that property shall be liable to forfeiture.

(6) Without prejudice to the provisions of Article 5 of the Criminal Code, the Maltese courts shall also have jurisdiction over any offence of money laundering under this Act in the same circumstances as are mentioned in Article 121C of the Criminal Code. Cap. 9:Cap. 101.

(7) The provisions of Article 248E(4) and Title IV of Part III of Book Second of the Criminal Code and those of Article 22(3A)(b),(d) and (7) of the Dangerous Drugs Ordinance shall apply mutatis mutandis to the offence of money laundering under this Act.

4.(1) Where, upon information received, the Attorney General has **reasonable cause to suspect** that a person (hereinafter referred to as “the suspect”) is guilty of the offence mentioned in Article 3, he may apply to the Criminal Court for an order (hereinafter referred to as an “investigation order”) that a person(including a body or association of persons, whether corporate or unincorporate) 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 (whether by itself or together with other material) to the investigation of, or in connection with, the suspect, shall produce or grant access to such material to the person or persons indicated in the order; and the person or persons so indicated shall, by virtue of the investigation order, have the power to enter any house, building or other enclosure for the purpose of searching for such material.

(2) Where an investigation order has been made or applied for, whosoever, knowing or suspecting that the investigation is taking place, discloses that an investigation is being undertaken or makes any other disclosures likely to prejudice the said investigation shall be guilty of an offence and shall, on conviction, be liable to a fine(multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87)

or to imprisonment not exceeding twelve months, or to both such fine and imprisonment: Provided that in proceedings for an offence under this sub-article, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation.

(3) An investigation order -

(a) shall not confer any right to production of, access to, or search for communications between an advocate or legal procurator and his client, and between clergyman and a person making a confession to him, which would in legal proceedings be protected from disclosure by Article 642(1) of the Criminal Code or by Article 588(1) of the Code of Organization and Civil Procedure; (b) shall, without prejudice to the provisions of the foregoing paragraph, have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by any law or otherwise; and (c) may be made in relation to material in the possession of any government department.

(4) Where the material to which an application under sub-article (1) relates consists of information contained in a computer, the investigation order shall have effect as an order to produce the material or give access to such material in a form in which it can be taken away and in which it is visible and legible.

(5) Any person who, having been ordered to produce or grant access to material as provided in sub-article (1) shall, without lawful excuse (the proof whereof shall lie on him) wilfully fail or refuse to comply with such investigation order, or who shall wilfully hinder or obstruct any search for such material, shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment.

(6) Together with or separately from an application for an investigation order, the Attorney General may, in the circumstances mentioned in sub-article (1), apply to the Criminal Court for an order (hereinafter referred to as an “attachment order”) - (a) attaching in the hands of such persons (hereinafter referred to as “the garnishees”) as are mentioned in the application 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 movable property so attached; and (c) prohibiting the suspect from transferring or otherwise disposing of any movable or immovable property.

(6A) 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 shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment not exceeding twelve months, or to both such fine

and imprisonment: Provided that in proceedings for an offence under this sub-article, it shall be a defence 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.

(7) Before making an investigation order or an attachment order, the court may require to hear the Attorney General in chambers and shall not make such order –

(a) unless it concurs with the Attorney General that there is reasonable cause as provided in sub-article (1); and

(b) in the case of an investigation order, unless the court is satisfied that there are reasonable grounds for suspecting that the material to which the application relates –(i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and(ii) does not consist of communications referred to in sub-article (3)(a).

(8) The provisions of Article 381(1)(a), (b)and(e) and of Article 382(1) of the Code of Organization and Civil Procedure shall, mutatis mutandis, apply to the attachment order

(9) An investigation order shall be served on the persons referred to in sub-article (1) and an attachment order shall be served on the garnishee and on the suspect by an officer of the Executive Police or by an officer of the issuing authority or by an officer of the Courts or of the Asset Recovery Bureau:

Provided that such orders may also be served on the garnishee and the persons referred to in sub-article (1), except for the suspect, by electronic mail in which case the person upon whom the order is served shall acknowledge receipt by return electronic mail by not later than one working day from such service. In default of receipt of such acknowledgement the order shall be served physically by any of the officers referred to in this sub-article without prejudice to the validity of the service made by electronic mail: Cap. 101.

Provided further that the procedure stipulated in this sub-article shall apply, in addition to that provided in sub-article (9) of Article 24A of the Dangerous Drugs Ordinance, with regard to service of investigation orders and attachment orders issued under the said Ordinance.

(10) Any person who acts in contravention of an attachment order shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment:

Provided that where the offence consists in the payment or delivery to any person by the garnishee of any moneys or other movable property attached as provided in sub-article (6)(a) or in the transfer or disposal by the suspect of any movable or immovable property in contravention of sub-article (6)(c), the fine shall always be at least twice the value of the money or property in question:

Provided further that any act so made in contravention of that court order shall be null and without effect at law and the court may, where such person is the garnishee, order the said person to deposit in a bank to the credit of the suspect the amount of moneys or the value of other movable property paid or delivered in contravention of that court order.

(11) An attachment order shall, unless it is revoked earlier by the Attorney General by notice in writing served on the suspect and on the garnishee in the manner provided for in sub-article (9), cease to be operative on the expiration of six (6) months from the date on which it is made; and the court may, upon application of the Attorney General, and where it is satisfied that sufficient grounds exist, extend the validity of the attachment order for another six (6) months. The court shall not make another attachment order with respect to that suspect unless it is satisfied that substantially new information with regards to the offence mentioned in Article 3 is available:

Provided that the period of validity as established in this sub-article shall be held in abeyance for such time as the suspect is away from these Islands and the Attorney General informs of this fact the garnishee by notice in writing served in the manner provided for in sub-article (9).

(12) In the course of any investigation of an offence against Article 3, the Executive Police may request a magistrate to hear on oath any person who they believe may have information regarding such offence; and the magistrate shall forthwith hear that person on oath. Cap. 9.

(13) For the purpose of hearing on oath a person as provided in sub-article (12) the magistrate shall have the same powers as are bylaw vested in the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) as a court of criminal inquiry as well as the powers mentioned in Article 554 of the; provided that such hearing shall always take place behind closed doors.

(14) It shall not be lawful for any court to issue a warrant of prohibitory injunction to stop the execution of an investigation order.

(d) Customs Ordinance and Excise Duty Act offences and penalties

27 Chapter 37 of the Laws of Malta contain provisions on the customs offences:

28 **18.** If any person shall import or cause to be imported any package containing goods not corresponding with the entry thereof, or shall, directly or indirectly, import or cause to be imported or entered any package of goods as of one denomination which shall afterwards be discovered, either before or after delivery thereof, to contain other goods, or goods subject to a higher rate or other amount of duty than those of the denomination by which such package or the goods in such package were entered, such person shall be liable for every such offence to a fine (multa) equivalent to three times the amount of duty payable on the goods contained in such package or five hundred and eighty-two

euro and thirty-four cents (€582.34), whichever is the greater, so however that one third of the said amount shall be considered as a civil debt owed and payable to the Department of Customs, and such package and the goods therein shall be forfeited.

[...]

26. If the licensed weigher or measurer, or any other person employed by the Government to weigh or measure such goods, or to superintend the weighing or measuring thereof, shall defraud or attempt to defraud the Government of any part of any duty payable thereon, such weigher or measurer, or such other person shall be deprived of his licence or employment, and shall be liable to a fine (multa) of not less than two hundred and thirty-two euro and ninety-four cents (€232.94) but not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37); and if he shall so defraud or attempt to defraud at the instance of the importer, such goods shall be forfeited: Provided that if such person is a Government employee the said loss of employment shall only be incurred following disciplinary proceedings taken in terms of any disciplinary regulations applicable to such employees.

The main penalties, which are relevant for the whole Maltese customs procedure are presented at the end of the law in s. 62:

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62. Every person who in contravention of this Ordinance –

(a) imports or brings or is concerned in importing or bringing, into Malta any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or

(b) unships, or **assists** or is otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or

(c) delivers, removes or withdraws from any ship, quay, wharf, or other place, previous to the examination thereof by the proper Customs official, except under the authority or care of such official, any goods imported into Malta, or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper official, or so that the same are not duly warehoused; or

(d) carries into any government or other warehouse any goods entered to be warehoused, or to be re-warehoused, except with the authority or under the care of the proper Customs official, and in such manner, and by such roads or ways and within such time as such official may direct; or

(e) **knowingly assists** or is otherwise concerned in the illegal removal or withdrawal of any goods from any government or other warehouse or place of security in which they have been deposited; or

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- (f) knowingly harbours, keeps or conceals, or knowingly permits or suffers, or causes or procures to be harboured, kept or concealed, any prohibited, restricted, or uncustomed goods, or any goods which have been illegally removed without payment of duty from any government or other warehouse or place of security in which they have been deposited; or
- (g) knowingly acquires possession of any such goods; or
- (h) is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud the Government of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or
- (i) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of customs, or of the laws and restrictions of customs, relating to the importation, unshipping, transshipping, landing and delivery of goods or otherwise contrary to this Ordinance; or
- (j) obstructs any Customs official or other person duly employed for the prevention of smuggling, in the execution of his duty or in the seizing of any goods liable to forfeiture under this Ordinance, or fails to do anything he is requested to do by a Customs officer in the performance of his duties; or
- (k) **aids, abets or assists in committing any of the foregoing offences;** or
- (l) exports, or attempts to export, or knowingly aids or abets the exportation of any article the exportation of which is subject to the payment of duty or to any restrictions or to the observance of any conditions, without the payment of duty or the observance of any such restrictions or conditions; or
- (m) makes or gives or submits or is instrumental in the making or the giving of any declaration, document or information to the Commissioner, and which to his knowledge is false in any detail: Provided that a person who makes an incorrect declaration and requests the Commissioner in writing to amend it:
 - (i) before the Commissioner informs the person that the details of the customs declaration are not correct; and
 - ii)
 - (aa) during the period when it is not yet known, in the systems relating to the processing of customs declarations, whether manual or electronic, if there is going to be control of the goods; or
 - (bb) within ten (10) working days from the date of the release of the goods, which goods were released without control; and
 - (iii) such amendment does not tend to make the declaration applicable to other goods, other than those which were originally declared, in the sense that the only amendment that may take place in the declaration is one (1) or more amendments from those listed in the Third Schedule, that person shall be deemed not to have committed the offence under this paragraph; or Cap. 337.

- (n) fails within the time stipulated in Article 6(3) of the Import Duties Act, to make a proper entry of any goods on which he is liable to pay duty in terms of sub-article (2) of the said Article; or
- (o) knowingly or negligently registers or presents for the second time or more a customs declaration of the same objects; or
- (p) except where any other law provides otherwise for this offence, knowingly or negligently fails to perform his duties within the time limit given to him by the Customs officer or imposed upon him by any legislation, or knowingly or negligently fails to pay the duty or taxes due within the time limit granted to him by any officer or imposed by law; or
- (q) knowingly or negligently fails to give to the Customs official information required by law, or knowingly or negligently fails to give to the official any document or records requested according to law or knowingly or negligently neither places the goods under any Customs procedure nor exports them within the given time limit; or
- (r) knowingly presents an incomplete declaration to the Commissioner, including when the person is not in possession of a document which is required with the declaration: Provided that a person who makes an incomplete declaration and requests the Commissioner in writing to amend it:
- (i) before the Commissioner informs that person that the details in the customs declaration are not complete; and
- (ii)
- (aa) during the period when it is not yet known, in the systems relating to the processing of customs declarations, whether manual or electronic, if there is going to be control of the goods; or
- (bb) within ten (10) working days from the date of the release of the goods, which goods were released without control; and
- (iii) such amendment does not tend to make the declaration applicable to other goods, other than those which were originally declared, in the sense that the only amendment that may take place in the declaration is one (1) or more amendments from those listed in the Third Schedule, that person shall be deemed not to have committed the offence under this paragraph, Cap. 9. shall, on conviction, for each such offence be liable to a fine (multa) equivalent to three times the amount of duty payable on the goods or five times the amount of the endangered duty, whichever is the lesser, so however that in each case it will not be less than six hundred euro (€600), such that one-third of such amount shall be considered as a civil debt owed and payable to the Department of, or to such fine together with imprisonment for a term not exceeding three years, and the offender may be either detained or proceeded against by summons, in the manner and form, and subject to all other provisions laid down in the Criminal Code:
- (a) ***in the case of offences relating to tobacco*** mentioned in the First Schedule, on conviction the offender is liable for each such offence to a fine (multa) equivalent to three

times the amount of duty payable on the goods or five times the amount of duty endangered, whichever is the lesser, but in each case not less than four thousand euro (€4,000), and such that one-third of such amount shall be considered as a civil debt owed and payable to the Department of Customs, together with imprisonment for a term not exceeding three years, and the offender may be either detained or proceeded against by summons, in the manner and form, and subject to all other provisions laid down in the Criminal Code;

(b) where the goods in respect of which the offender is proceeded against are any of the goods set out in the First Schedule, the punishment of imprisonment herein prescribed shall in every case be applied; and

(c) in the case of a second or subsequent conviction for any offence under this Article within a period of twelvemonths from the date of the previous conviction, the offender shall be liable to imprisonment for a term from six months to four years, in addition to the pecuniary penalties herein prescribed.

- 31 Section **65A**. is quite important for the definition and consequences for a crime as it stipulates that:

65A. (1) Every offence provided for in this Ordinance shall, to all legal intents and purposes, be deemed a crime within the meaning of the Criminal Code and, subject to the special provisions of this Ordinance, be dealt with as such.

(2) The provisions of the Criminal Code relating to the punishment described in that Code as a fine (multa) shall apply to the pecuniary penalties laid down in this Ordinance.

- 32 Next, the **chapter 382 of the Laws of Malta** may be mentioned as it contains the excise duties. Attached to this field of regulation are the penalties and offences with a certain relevance for revenue frauds that might damage the EU budget:

- 33 **[Excise Duty Act]** (1) Any person who –
- (a) produces excisable goods by a process which is not permitted in terms of this Act or of any regulations made thereunder; or
 - (b) produces excisable goods in any establishment other than an authorised tax warehouse; or
 - (c) makes any alterations in the productive facilities and storage areas in a authorised tax warehouse or affecting the security of a authorised tax warehouse without the prior notification thereof to the Commissioner; or
 - (d) forges a die, stamp, mark or other device used by the Government, or under its authority, for making excise revenue bands or stamping or marking such bands for the purposes of this Act or any regulations made thereunder; or

- (e) makes with such forged die, stamp, mark or other device an impression on any material; or
- (f) sells or exposes for sale or utters or uses any forged die, stamp, mark or device or any impression made therewith; or
- (g) knowingly and without lawful excuse (the proof whereof shall lie on the accused) has in his possession any forged die, stamp, mark or device or impression made therewith; or
- (h) makes fraudulent use of any genuine die, stamp, mark or device or commits any of the acts contemplated in paragraphs (e),(f), and (g) with regard to impressions fraudulently made with genuine instruments; or
- (i) makes or gives or submits or is instrumental in the making or the giving of any declaration, document or information to the Commissioner, which to his knowledge is false in any detail: Provided that a person who makes an incorrect declaration and requests the Commissioner in writing to amend it:
 - (i) before the Commissioner informs the person that the particulars of the customs declaration are not correct; and
 - (ii) (aa) during the period when it is not yet established, in the systems relating to the processing of customs declarations, whether manual or electronic, if there is going to be control of the goods; or
 - (bb) within ten (10) working days from the date of release of the goods, which goods were released without control; and
 - (iii) such amendment does not tend to make the declaration applicable to other goods, other than those which were originally declared, in the sense that the only amendment that may take place in the declaration is one (1) or more amendments from those listed in the Ninth Schedule, that person shall be deemed not to have committed the offence under this paragraph; or
- (j) is in any way knowingly concerned in any evasion or attempt at evasion of the duty leviable under the Act; or
- (k) obstructs the Commissioner or any Customs official or other persons duly charged with the prevention and detection of offences against this Act with the carrying out of any of the provisions of this Act or of any regulations made thereunder; or
- (l) recommends a retail price for cigarettes in excess of the established retail price on the basis of which excise duty has been computed in terms of the relevant Schedule to the Act; or (m) sells cigarettes at a price in excess of the retail price established by the local manufacturer, or importer, and on which excise duty has been computed in terms of the relevant Schedule to this Act; or
- (n) knowingly aids, abets or assists in the commission of any of the foregoing offences; or
- (o) is the person in whose name a authorised tax warehouse is registered and fails to report, within the time prescribed by regulations made under this Act, any quantity of

excisable goods released for consumption or for free circulation, and fails to show to the satisfaction of the court that any such act or thing done or omitted to be done by any person in his employment or subject to his authority or control, was done or omitted without his knowledge, and that he could not with reasonable diligence have obtained knowledge thereof; or

(p) stores and, or offers for sale containers of alcohol or wine to which there is affixed an excise stamp that was already affixed to another alcohol or wine container; or

(q) imports for the purpose of sale or stores for the purpose of sale or prepares for the purpose of sale or offers for sale or offers for free water-pipe tobacco (also known as shisha tobacco) when not authorised as a registered consignor, registered consignee or an authorised tax warehouse keeper: Provided that whoever shows that he has acquired water-pipe tobacco from a registered consignor, registered consignee or an authorised tax warehouse keeper shall be deemed not to have committed a crime; or

(r) stores for the purpose of sale or prepares for the purpose of sale or offers for the purpose of sale or offers for free, water-pipe tobacco (also known as shisha tobacco) while the tobacco is neither in its box, packet or container with the band or stamp still affixed to it, nor is it in the water-pipe itself; or

(s) is a wholesaler of tobacco, a distributor of tobacco or is a first retail outlet of tobacco and is not authorised or registered in the system of Track and Trace; or

(t) imports or brings into Malta, or has in his possession, or disposes of, tobacco which is not listed in the Third Schedule, without the permission of the Commissioner, shall be guilty of an offence and shall for every such offence be liable on conviction to a fine (multa) of not less than five hundred euro (€500) and not more than twenty-five thousand euro (€25,000):

Provided that in the case of conviction for an offence related to manufactured tobacco mentioned in the Third Schedule to this Act, the offender shall be liable to a fine (multa) of not less than three thousand five hundred euro (€3,500) and not more than twenty-five thousand euro (€25,000):

Provided further that in the case of a conviction relating to the evasion or attempted evasion of excise duty, the offender shall be liable to a fine (multa) equivalent to three times the excise duty due on goods or five times the endangered duty, whichever is the lesser, but in any case not less than six hundred euro (€600) which fine may exceed twenty-five thousand euro (€25,000): Provided further that in the case of a conviction relating to the evasion or attempted evasion of excise duty related to manufactured tobacco mentioned in the Third Schedule to this Act, the offender shall be liable to a fine (multa) equivalent to three times the excise duty due on goods or five times the endangered duty, whichever is the lesser, but in any case not less than four thousand euro (€4,000) which fine may exceed twenty-five thousand euro (€25,000):

Provided further that in the case of importation or bringing into Malta or possession or disposal of tobacco that is not listed in the Third Schedule, the offender shall be liable, upon conviction, to a fine (multa) equivalent to twice the value of the tobacco:

Provided further that in the case of a conviction relating to the evasion or attempted evasion of excise duty by means of an item of excise duty found in the Seventh Schedule, the offender shall be liable to the fine (multa) provided for in the relevant provisos of this Article as the case may be together with imprisonment for a term not exceeding three (3) years:

Provided further that one-third of the fine (multa) shall be deemed as a civil debt owed and payable to the Department of Customs.

(2) (Deleted by Act I. 2010.56.).

(3) In the case of a second or subsequent conviction under this Article, the offender shall be liable, at the discretion of the court, to be sentenced to imprisonment for a term not exceeding six months in addition to the penalties herein prescribed.

(4) In the case of a conviction for an offence against the provisions of paragraph (a) or (b), the stock of excisable goods to which the conviction relates shall be forfeited in favour of the Government, and such forfeiture shall be executed without the necessity of any express order of the court for the purpose.

(5) In the case of a second or subsequent conviction under sub-article (1)(a) or (b), it shall be lawful for the Commissioner to seize and take possession of any machinery, equipment, receptacles, utensils, materials and ingredients used in the production of excisable goods, and to dispose of the same as provided in Article 38.

(6) In the case of a conviction for an offence against the provisions of sub-article (1)(d), (e),(f),(g) or (h) the offender shall, in addition to the penalties laid down in sub-Article (1), be liable to a term of imprisonment from one to four years.

(7) Any person who negligently makes or gives or submits or causes to be made or given any declaration, document or information to a Customs official which is false in any detail shall be liable, on conviction, for every such offence, to a fine (multa) equivalent to three (3) times the duty endangered, but not less than three-hundred and fifty euro (€350): Provided that a person who makes an incorrect declaration and requests the Commissioner in writing to amend it:

(i) before the Commissioner informs the person that the particulars of the customs declaration are not correct; and

(ii)

(aa) during the period when it is not yet established, in the systems relating to the processing of customs declarations, whether manual or electronic, if there is going to be control of the goods; or

(bb) within ten (10) working days from the date of release of the goods, which goods were released without control; and

(iii) such amendment does not tend to make the declaration applicable to other goods, other than those which were originally declared, in the sense that the only amendment that may take place in the declaration is one (1) or more amendments from those listed in the Ninth Schedule,
that person shall be deemed not to have committed the offence under this paragraph.

(e) Import Duties Act, Chapter 337 Laws of Malta

34 26. [Offences in connection with claim for drawback.]

(1) Any person who obtains or attempts to obtain, or does anything whereby there might be obtained by any person, any amount by way of drawback of any duty which is not lawfully payable or allowable or which is greater than the amount payable or allowable, shall be guilty of an offence and shall be liable, on conviction by the Court of Magistrates, at the instance of the Commissioner,

(a) if the offence was committed with intent to defraud the Government, to a fine (multa) of three times the value of the goods or four hundred and sixty-five euro and eighty-seven cents (465.87), whichever is the greater;

(b) in any other case, to a fine (multa) of three times the amount improperly obtained or allowed or which might have been improperly obtained or allowed or two hundred and thirty-two euro and ninety-four cents (232.94), whichever is the greater. Cap. 9.

(2) The punishments provided under the last preceding sub-article shall be without prejudice to any higher punishment incurred under the provisions of the Criminal Code or of any other law.

(3) Any goods in respect of which an offence under sub-article (1) of this Article is committed shall be liable to forfeiture:

Provided that, in the case of a claim for drawback, the Commissioner may, if he sees fit, instead of seizing the goods, either refuse to allow any drawback thereon or allow only such drawback as he considers proper.

(4) Without prejudice to the foregoing provisions of this Article, if in the case of any goods upon which a claim for drawback has been made, it is found that –

(a) those goods, if sold, do not correspond with any entry made thereof in connection with that claim; or

b) the goods, if sold for home use, would realize less than the amount claimed, the goods shall be liable to forfeiture and any person by whom any such entry or claim was made shall be guilty of an offence and shall be liable, on conviction by the Court of Magistrates, at the instance of the Commissioner, to a fine (multa) of three times the amount claimed or two hundred and thirty-two euro and ninety-four cents (232.94), whichever is the greater:

Provided that paragraph (b) of this sub-article shall not apply to such goods or Articles contained therein or used in the manufacture or preparation of goods as may be specified by the Minister by an order published in the Gazette.

(f) VAT Act Offences, Chapter 406 Laws of Malta, Part X

X Offences and Punishments [Failure to apply for registration, or to keep or deliver records and returns.]

Any person who –

- (a) fails to apply for registration at the time and in the manner required by Article 10 or 12;
- (b) fails to keep or to store records, documents and accounts for the time and in the manner required by this Act or any regulations made under this Act;
- (c) fails to furnish a tax return when required to do so in virtue of this Act;
- (d) fails to furnish any additional return, statement or information or to produce any books, records, documents and accounts, or fails to pay any tax or administrative penalty due when required to do so in virtue of this Act or of any regulations made under this Act;
- (e) supplies goods or services having failed to provide the security requested by the Commissioner under Article 63(5) shall, on conviction, be liable to a fine (multa) of not less than seven hundred euro (€700) and not exceeding three thousand and five hundred euro (€3,500) and, on a request by the prosecution, the court shall, in respect of an offence under paragraph (c), order the offender to comply with the law within a time sufficient for the purpose, but in any case not exceeding three months, and in default the offender shall be liable to the payment of a further fine (multa) of five euro (€5) for every day that the default continues after the lapse of the time fixed by the Court:

Provided that the offender may, within thirty days after final judgement, apply to the Court which convicted him, requesting a total or partial remission of the penalty imposed under this Article. The Court may grant a total or partial remission of such penalty provided that the prosecution, with the written concurrence of the Commissioner to be filed with any reply to such application, agrees to such request. Any such application shall be served on the prosecution which shall reply within fifteen working days from such notification.

77. [Irregularities in records, etc., and false representations]

Any person who –

- (a) knowingly fails to account for any taxable supply or any intra-community acquisition made by him in the records, documents and accounts required by this Act or any regulations made under this Act;

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- (b) gives any return, statement or information required for any of the purposes of this Act which he knows to be incorrect or misleading in any material respect;
- (c) falsifies any records, documents or accounts required to be kept under this Act or prepares or draws up or helps in the preparation or drawing up or makes use of any false records or documents;
- (d) with the intent of concealing any evidence which he knows or is reasonably expected to know to be relevant for any purpose of this Act destroys, erases, damages or conceals any stored information or any records, documents or accounts, or is in possession of or supplies to another person any software application that would erase, destroy, damage or conceal any stored information or any such records, documents or accounts;
- (e) fails to provide or produce a tax or other invoice or document as and when required by Articles 50, 51 or 52 or provides any such tax or other invoice or document which is incorrect or misleading in any material respect or fails to provide to the Commissioner, without any valid reason, all copies of any used or unused manual fiscal receipts where required by the Commissioner;
- (f) is an employee or agent of another person, and whose functions in that capacity include that of providing or producing a tax or other invoice or document which that other person is required to provide or to produce in terms of Articles 50, 51 or 52, fails to provide or produce such tax or other invoice or document or provides any such tax or other invoice or document which is incorrect or misleading in any material respect;
- (g) provides an invoice or other document in respect of supply showing tax to be chargeable on that supply in a case where he knows that no tax is chargeable or where the tax chargeable is less than that shown or otherwise knowingly adds to or includes in a price for a supply any amount purporting to represent tax which is not due or which is higher than the tax due;
- (h) applies to be registered under Article 11 in circumstances indicating that he knows or could with due diligence have known that he is not entitled to be so classified;
- (i) being registered under Article 11 and not being eligible to remain so registered does not apply for the cancellation of that registration in the manner required and within the time laid down in this Act;
- (j) being registered under Article 11 purports in connection with any transaction not to be so registered for the purpose of obtaining any financial gain;
- (k) not being registered under Article 11 purports in connection with any transaction to be so registered for the purpose of obtaining any financial gain;
- (l) having added to or included in a price for goods or services supplied by him to another person any amount purporting to represent tax chargeable under this Act, knowingly fails to account for that amount in his records and accounts or to pay that amount to the Commissioner;

(m) acquires possession of or deals with any goods, or accepts the supply of any services having reason to believe that the tax on the supply of the said goods or services has been or will be evaded;

(n) supplies or offers to supply to another person goods or services the acquisition or dealing with which or the acceptance of which would render that other person guilty of an offence in virtue of paragraph (m);

(o) supplies or offers to supply to another person and, or puts up for sale goods, without being in possession, at the place where he supplies or offers to supply to another person and, or puts up for sale goods, of a fiscal cash register or manual fiscal receipt books as issued or approved by the Commissioner;

(p) being a credit or financial institution which supplies money or grants credit by way of a loan account facility or by means of any other kind of facility to a customer in connection with the supply of goods or services by third parties to that customer for the construction, re-construction, repair, refurbishment or maintenance of immovable property or for fixtures related thereto, and which effects payment for such goods or services either directly to the vendor or supplier thereof or to a third party or to the customer subject to an understanding or to an express or implied condition that the amount paid will be passed on to the said vendor or supplier, by the debit of the customer's loan account or other facility, on the basis of supporting documents, including contracts, invoices, receipts, architects' or other certificates, or similar documents, submitted by or on behalf of the customer or by or on behalf of suppliers, contractors or other third parties, and which fails to inform the Commissioner of the names and VAT registration numbers of the said suppliers, contractors or other third parties as aforesaid, other than the customer, to whom it has directly or indirectly made payments as specified in this paragraph, in the form required by the Commissioner, as well as of the amounts of such payments, by not later than the end of the calendar quarter immediately following the calendar quarter during which it directly or indirectly made any payment as aforesaid, shall be guilty of an offence and shall, on conviction,

be liable –

(i) to a fine (multa) of not less than six thousand euro (€6,000) and not exceeding ten thousand euro (€10,000) for an offence committed under paragraphs (c) and (d); and

(ii) to a fine (multa) of not less than seven hundred euro (€700) and not exceeding three thousand five hundred euro (€3,500) for an offence under the other paragraphs, and in addition, for any offence as above referred to in all paragraphs, except for paragraph (p), where tax amounting to more than one hundred euro (€100) would be endangered, to a further fine (multa) equal to two times the endangered tax or to imprisonment of not more than six months or to both such fines and imprisonment: Provided that, the two times fine (multa) for the endangered tax shall in no case be less than one thousand euro (€1,000).

In addition, on a request by the prosecution, the court shall order the offender to comply with the law within a time sufficient for the purpose, but in any case, not exceeding one month, and, in default, the offender shall be liable to the payment of a further fine (multa) of five euro (€5) for every day on which the default continues after the lapse of the time fixed by the Court.

78. (1) Where a person has been convicted under either Article 76 or Article 77 and is again convicted of an offence under either of the said Articles committed within six months from the date of the previous conviction, the fine (multa) shall in no case be less than one thousand and two hundred euro (€1,200).

(2) Where a person has been convicted of four offences committed under either of the Articles aforesaid in a period of twenty-four months, the court shall on the latest of the said convictions impose a fine (multa) of not less than two thousand and five hundred euro (€2,500) and in addition to the punishment for that conviction order the suspension for a determinate time of not less than one week and not more than one month of all licences, permits, warrants or other authorisation granted by the Police or by any other authority to carry on the economic activity or activities to which the offences relate.

79. [Obstruction of official]

Any person who –

(a) obstructs, hinders, impedes or does anything which is calculated to obstruct, hinder or impede, or molests or assaults the Commissioner or any person duly engaged in the exercise of any power or duty conferred or imposed on him by or under this Act;

(b) being a person in charge of any premises which the Commissioner or any person authorised by the Commissioner is empowered to enter in terms of Article 53(a) fails to allow access to the said premises to the Commissioner or authorised officer or fails to take such measures as may be reasonably required of him for the purpose of any such access or of any inspection of that premises or of any goods, assets, books, records or documents kept therein, shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) of not less than five hundred euro (€500) and not more than two thousand and five hundred euro (€2,500), or to imprisonment of not more than six months, or to both such fine and imprisonment.

80. [Offences relating to importations.] (1) The provisions of Articles 18, 60 and 62 of the Customs Ordinance shall apply to this Act as if all references to duties contained in those Articles were references to tax due under this Act, and any person who is in contravention of the provisions of the said Articles construed as aforesaid in relation to any goods whose importation is subject to tax under this Act shall, without prejudice to any liability incurred under the said Ordinance, be guilty of an offence under this Act

and shall on conviction, be liable to a fine (multa) equivalent to three times the tax payable or to a fine (multa) of three hundred and fifty euro (€350), whichever shall be the greater, so however that one third of the said amount shall be deemed as a civil debt due to the Commissioner, or to imprisonment for a term not exceeding two years or to both such fine and imprisonment and the offender may be either detained or proceeded against by summons, in the same manner and form, and subject to all other provisions laid down in the Criminal Code.

(2) The provisions of Article 77 of the Customs Ordinance shall apply in relation to goods whose importation is subject to tax under this Act as if any reference contained therein to the duty therein mentioned were also a reference to the tax chargeable under this Act.

(3) The importation of goods subject to tax under this Act shall, for all purposes of any law, be deemed as a prohibited importation unless the said tax is duly paid or, where the payment of the tax has been postponed in accordance with any provisions of this Act, the conditions imposed in connection with such a postponement are duly observed.

81. [General offence.] Any person who knowingly contravenes or fails to comply with any of the provisions of this Act or any regulations made under this Act shall be guilty of an offence and shall on conviction, unless the offence is subject to a greater punishment under any other provision of this Act or any other law, be liable to a fine (multa) of not less than two hundred and fifty euro (€250) but not exceeding one thousand and two hundred euro (€1,200), or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

82. [Offences by principal officers of bodies of persons and by employers.]

(1) In addition and without prejudice to any liability of an employee or other person, where any thing is done or omitted to be done by a body of persons, the provisions of this Part shall apply as if such thing were done or omitted to be done by every director, manager or other principal officer of that body of persons: provided that a director, manager or other principal officer of a body of persons shall not be guilty of an offence in virtue of this sub-article if he proves that he was unaware and could not with reasonable diligence be aware of such act or omission and that he did everything within his power to prevent that act or omission.

(2) Where anything is done or omitted to be done by an employee in the course of his employment, or by any person acting on behalf of the registered person, whether such other person is an employee or not, the provisions of this Part shall apply as if such thing were done or omitted to be done both by the said employee or other person and by the employer or registered person: provided that such an employer or registered person shall not be guilty of an offence in virtue of this sub-article if he proves that he was unaware

and could not with reasonable diligence be aware of such an act or omission and that he did everything within his power to prevent that act or omission.

83. [Prosecution.] (1) No proceedings under this Part shall be taken except at the instance or with the sanction of the Commissioner, and proceedings that have been so taken may, at any time before final judgment, be withdrawn at the request of the Commissioner. Cap. 9.

(2) Notwithstanding the provisions of the, the Attorney General shall have a right of appeal to the Court of Criminal Appeal from any judgment given by the Court of Magistrates in respect of criminal proceedings under this Part.

(3) Deleted 2019.

(4) Article 21 of the and the Probation Act shall not apply with respect to any conviction under this Act.

(5) In any criminal proceedings under this Part the Commissioner personally or any other officer designated by him may, notwithstanding the provisions of any other law, produce the evidence, plead and otherwise conduct the prosecution instead of or jointly with the police

(6) Should the evidence of the Commissioner or of the officer designated by him as aforesaid be required as part of the case for the prosecution, he shall be heard before assuming the duties of prosecuting officer unless the necessity of his giving evidence arises at a later stage: provided that the Commissioner or other officer as aforesaid may state the facts constituting the offence before giving evidence.

84. [Compromise penalty] (1) Notwithstanding any other provisions of this Act, the Commissioner may, in the case of an offence under this Act, enter into an agreement in writing with the offender whereby the said offender pays a sum equivalent to the fine (multa) that may be imposed by way of penalty in accordance with this Act on the conviction of that person for the said offence, so however that where a minimum and a maximum amount is provided for in respect of the fine (multa) that may be so imposed, the sum payable pursuant to the said agreement shall be a sum equivalent to the said minimum amount increased by one half of the difference between the said minimum and maximum amounts, and upon the signing of any such agreement by the Commissioner and the offender all criminal liability of the offender under this Act with regard to the offences in relation to which the agreement has been entered shall be extinguished.

(2) The provisions of sub-article (1) shall apply also in any case where the offender has been charged before a court in relation to the offence but before final judgment has been given in the case: Provided that where proceedings before a court have not been commenced, the sum payable in accordance with any agreement as contemplated in sub-Article (1) shall be reduced by ten per cent.

(3) Notwithstanding the provisions of sub-articles (1) and (2), the Commissioner may, in the case of an offence by any person against the provisions of Articles 76(b), 77(e),

77(f), and 77(o), enter into an agreement with the offender, whereby the said offender pays to the Commissioner within fifteen days from receipt of a notice to this effect by the Commissioner the following: (a) one hundred euro (€100) in the case of a first offence; (b) two hundred euro (€200) in the case of a second offence; (c) four hundred euro (€400) in the case of a third offence; and (d) five hundred euro (€500) in the case where the offender and, or any of his employees or any other person acting on his behalf is found in default on two separate occasions within a period of six months; and upon the payment of such fine (multa), all criminal liability under this Act with regard to the offences in relation to which the fine (multa) has been paid, shall be extinguished.

(4) Any sum due in virtue of an agreement entered into in terms of sub-article (1) or sub-Article (3) shall be due to the Government as a civil debt. The Commissioner shall not enter into an agreement as is referred to in sub-article (1) or sub-article (3) unless such agreement is accompanied by the payment of the sum due or sufficient security for its payment.

(5) The provisions of this Article shall be without prejudice to any proceedings or forfeiture instituted or having effect in virtue of any other law.

(6) The said agreement and the payment of the fine (multa) so imposed shall be without prejudice to any tax, interest and administrative penalty due under this Act: Cap. 37. Provided that the Commissioner, as head of the Department of Customs, may impose and collect penalties relating to tax on importation due under this Act, in the case of an agreement having been reached in accordance with the provisions of Article 63 of the Customs Ordinance, and may also impose and collect penalties in the case of an agreement having been reached in accordance with the provisions of Article 63A of the said Ordinance, so however that any reference to the duty in the fine (multa) referred to in Article 63A shall be construed as if it were a reference to the tax due under this Act.

(2) Collecting Information and Documenting the Initiation of an Investigation

(a) Impetus of Fraud Knowledge Patterns

Recent studies have analysed and frequently analyse the peculiarities and typologies of (EU-) frauds quite extensively and they are therefore important for EDPs and their knowledge about the structures of this crime area (criminological insights): **36**

- National level: Office of the Prime Minister, National Anti-Fraud and Corruption Strategy, Malta, 2021.
- EU-level: PIF Reports, Rule of law Report, “Impact of Organised Crime on the EU’s Financial Interests”⁸⁹

⁸⁹ See the “Impact of Organised Crime on the EU’s Financial Interests”, 2022, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697019/IPOL_STU\(2021\)697019_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697019/IPOL_STU(2021)697019_EN.pdf). Accessed 31 July 2024.

Nota bene: The Anti-Fraud Knowledge Centre hosted by the EU Commission/OLAF provides information on fraud patterns, prevention tools and case studies.

(b) Special National Databases for PIF Offences/Digital Investigations, Article 40 Paragraph 3 IRP 2020.003

- 37 Maltese police bodies, customs departments, the Controller of Revenue (CfR) and the Financial Departments have access to databases. In a case explored below in Part B (Actions of OLAF in Malta) we learn that Maltese customs authorities often ask OLAF (e.g. in Anti-Dumping cases) to verify import information e.g. in relation to containers coming into the EU. This is a useful communication line that may also help the EDPs in EPPO cases. As explored below, we will see that Maltese EDPs can on the basis of Article 28 EPPO Regulation work closely together with the national investigation bodies (including customs authorities).

cc. Examples and Precedents

(1) In National Case-Law

- 38 There are **distinct types of fraud** against the EU budget. A basic distinction must be made between fraud on the revenue side and fraud on the expenditure side. This separation applies not only to investigations by the delegated public prosecutors, but also to OLAF investigators and national authorities in administrative procedures (especially on the expenditure side, for example in the case of subsidies). The first EPPO crime report therefore correctly distinguishes between:
- 39 The information stem from the EPPO's first crime report (published March 2022) and serves as a basis for explaining the initial suspicion scenarios in this area. References can be made to national case law:
- Non-procurement expenditure fraud
 - Procurement expenditure fraud⁹⁰
 - VAT revenue fraud
 - Non-VAT revenue fraud
 - corruption cases⁹¹ (4% in 2021).

(a) Peculiarities Differentiated by PIF Offences (Typologies of EU Frauds)

(b) Fraud

- 40 What *Button, Hock et al.* have analysed for the rise of fraud in England and Wales, can be partly transferred to the EU member states. They suggest that the increase in fraud is

⁹⁰ See the Public Procurement Regulations (Subsidiary Legislation 601.03) of Malta.

⁹¹ See the role of the Permanent Commission Against Corruption (PCAC), Chapter 326 of the Laws of Malta.

not just a temporary spike but rather a significant shift (a “flip”) in the structure of criminal activity. This social-criminological theory regards frauds as influenced by a balance between “threats” (opportunities for fraud, enablers, and the population of fraudsters) and “safeguards” (cultural values, law enforcement, and resilience). The weakened safeguards in a state, especially in terms of enforcement and legal adaptation, suggest that high levels of fraud will persist unless there is a concerted national effort to strengthen protective measures.⁹² The breadth of the offence also makes it difficult to legislate fraud as an offence – especially in a country like Malta, which has seen many influences (see above → Introduction).⁹³

(aa) Revenue Frauds

Revenue frauds are manifold. First, the scheme should be identified. For this, it is worthwhile to compare the suspected behaviour with known behaviour patterns. From a legal as well as a police point of view, the overview of crime patterns is useful. Malta is part of the illicit trade of tobacco products and it discusses steadily⁹⁴ on how to fight these offences that may as well fall into the competence of the EPPO. The common law offence of “cheating the revenue” is considered a revenue fraud and it was established in English common law as part of the broader category of “cheating.”⁹⁵ The offence is historically tied to frauds against the public, especially tax-related frauds that result in the evasion of public revenues owed to the Crown (see *R v Hudson* (1956)).

41

(bb) Expenditure Frauds

Expenditure frauds relate to subsidy frauds⁹⁶, procurement frauds, agricultural Direct Payments etc. The fraud with all these EU money allocations has been studied well in the past. From the past studies it is clear that fraud in the agriculture sector is a heavy factor of EU frauds in general.

42

(c) Corruption Offences

Corruption is fought quite actively and with positive results in the past, but it still lacks determination sometimes as a lot of listed cases in the Court Decision’s Database show.

43

⁹² Button and Hock et al. 2023, pp. 3–5.

⁹³ See The Law Commission 1999, Consultation Paper No 155, p. 1: „Although there is no offence of fraud as such in England, we do have offences which cover it – principally deception, theft, conspiracy to defraud, fraudulent trading and cheating the revenue.“ For more information on the Maltese notion nowadays see Filletti 2023, pp. 121–126 and see Mamo 2022, Second Year, pp. 134.

⁹⁴ Galea 2017.

⁹⁵ Alldridge 2017, pp. 41 et seq; and see The Law Commission 1999, Consultation Paper No 155, p.

⁹⁶ For a still valuable general overview see Sieber 1996, pp 357–395.

Besides the Statistics, one can refer to the institutions that were established with specific tasks in this area as well as the Maltese Anti-Fraud and Anti-Corruption Strategy.⁹⁷

- 44 One of the laws is Chapter 326 Permanent Commission Against Corruption (PCAC) Act No XXII of 1988, which constitutes an institution to fight corruption more effectively in Malta. International assessment boards, like GRECO put forward critique in 2022 and said that Malta could do more to fight corruption.⁹⁸

(d) Money Laundering with PIF Crimes

- 45 In this area the Prevention of Money Laundering Act, which is stipulated by Chapter 373 of the Laws of Malta applies. This area is partly represented by sub-judice cases. While this area cannot be examined here in-depth, a few cases can be enumerated:

- *Repubblika ta' Malta vs Alfio Schembri et* - Malta Enterprise and other public entities.
- *Repubblika ta' Malta vs Adrian Hillman* - Money Laundering to the detriment of Progress Press Ltd (Private Company) and Malta Enterprise (a Public entity which grants EU Funding).
- *Repubblika ta' Malta vs Lorraine Falzon and Matthew Pace* - Accused of aiding Keith Schembri (In case 1 above) to Launder money through Zenith Finance Limited, a Maltese Based Investment Company.


(e) Embezzlement

- 46 Embezzlement often happens in connection with public procurement rules. The Public Procurement Regulations (Subsidiary Legislation 601.03) apply in this area.

(2) Excerpts and Information from Selected Judgements Decided by the Courts in the PIF Crimes Area

- 47 The Maltese criminal law **doctrine** often refers to influences from the continental Development of the fraud offence.⁹⁹

Case Study 1 Judgments

	Case Studies
<p>In the following excerpts and information from the judgements are presented: Examples for (tax) fraud offences:</p>	

⁹⁷ Office of the Prime Minister, National Anti-Fraud and Corruption Strategy, Malta, 2021, https://parlament.mt/media/112436/national-anti-fraud-and-corruption-strategy_en.pdf, p. 26 et seq. Accessed 31 July 2024.

⁹⁸ See <https://newsbook.com.mt/en/greco-malta-failed-to-implement-national-anti-corruption-strategy/>. See GRECO, GrecoRC5(2021)5, <https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680a69ed2>. Accessed 31 July 2024.

⁹⁹ In depth Mizzi 2017; Ciappara 2017, 437 et seq.; Ganado 2013, 211 et seq.

In relation to the general fraud/misappropriation offences:

- Rex vs. Antonio Pisani (1941) distinguishing theft from fraud
- Police vs. Anthony Chircop (1944)
- Police vs. Alfred Spiteri (1945)
- Police vs. Cassar Parnis
- Police vs. Mario Schembri (1979)
- Rex vs. Azzopardi
- Police vs. Tancred Fleri Soler (1975) distinguishing misappropriation and fraud

c) Actions if the “Decision to Open a Case” (Regulation + Rules in IRP, 2020.003 EPPO)

If he/she decides to initiate an investigation he/she **must note this in the case management system (Article 45 para 1 EPPO Regulation, 38 IRP¹⁰⁰)**. In addition, the numerous obligations to provide information from Article 24 para 3 to 8. **48**

If an investigation is opened by virtue of Article 26 para 1 EPPO Regulation, he/she must insert the following information in the Case Management System according to **Article 38 para 3 IRP**: **49**

- 50**
- “a) the possible legal qualification of the reported criminal conduct, including if it was committed by an organised group;
 - b) a short description of the reported criminal conduct, including the date when it was committed;
 - c) the amount and nature of the estimated damage;
 - d) the Member State(s) where the focus of the criminal activity is, respectively where the bulk of the offenses, if several, was committed;
 - e) other Member States that may be involved;
 - f) the names of the potential suspects and any other involved persons in line with Article 24(4) of the Regulation, their date and place of birth, identification numbers, habitual residence and / or nationality, their occupation, suspected membership of a criminal organisation;
 - g) whether privileges or immunities may apply;
 - h) the potential victims (other than the European Union);
 - i) the place where the main financial damage has occurred;
 - j) inextricably linked offences; [...]” [see again last footnote]
 - k) any other additional information, if deemed appropriate by the inserter

¹⁰⁰ See <https://www.eppo.europa.eu/sites/default/files/2020-12/2020.003%20IRP%20-%20final.pdf>. Accessed 31 July 2024.

- 51** Specific information is presented by the IRP. Article 41 relates to the initiation according to Article 26 EPPO Regulation:

Article 41: Decision to initiate an investigation or to evoke a case

1. Where, following the verification, the European Delegated Prosecutor decides to exercise EPPO's competence by initiating an investigation or evoking a case, a case file shall be opened and it shall be assigned an identification number in the index of the case files (hereinafter the Index). A permanent link to the related registration under Article 38(1) above shall be automatically created by the Case Management System.

If an investigation procedure is to be started, the competent national authorities must be informed:

2. The corresponding reference in the Index shall contain, to the extent available:

a) As regards suspected or accused persons in the criminal proceedings of the EPPO or persons convicted following the criminal proceedings of the EPPO,

i. surname, maiden name, given names and any alias or assumed names;

ii. date and place of birth;

iii. nationality;

iv. sex;

v. place of residence, profession and whereabouts of the person concerned,

vi. social security numbers, ID-codes, driving licences, identification documents, passport data, customs and tax identification numbers;

vii. description of the alleged offences, including the date on which they were committed;

viii. category of the offences, including the existence of inextricably linked offences;

ix. the amount of the estimated damages;

x. suspected membership of a criminal organisation;

xi. details of accounts held with banks and other financial institutions;

xii. telephone numbers, SIM-card numbers, email addresses, IP addresses, and account and user names used on on line platforms;

xiii. vehicle registration data;

xiv. identifiable assets owned or utilised by the person, such as crypto-assets and real estate.

xv. information whether potential privileges or immunities may apply.

b) as regards natural persons who reported or are victims of offences that fall within the competence of the EPPO,

i. surname, maiden name, given names and any alias or assumed names;

ii. date and place of birth;

iii. nationality;

iv. sex;

v. place of residence, profession and whereabouts of the person concerned;

vi. ID-codes, identification documents, and passport data;
vii. description and nature of the offences involving or reported by the person concerned, the date on which the offences were committed and the criminal category of the offences.

c) as regards contacts or associates of one of the persons referred to in point (a) above,

- i. surname, maiden name, given names and any alias or assumed names;
- ii. date and place of birth;
- iii. nationality;
- iv. sex;
- v. place of residence, profession and whereabouts of the person concerned;
- vi. ID-codes, identification documents, and passport data. The categories of personal data referred to above under points (a) (x) - (xv) shall be entered in the Index only to the extent practicable, taking into account the operational interest and available resources. The reference in the Index shall be maintained up to date during the investigation of a case file. The Case Management System shall periodically notify the European Delegated Prosecutor if certain categories of information are not entered in the Index.

3. The Case Management System shall notify the supervising European Prosecutor and the European Chief Prosecutor and shall randomly assign the monitoring of the investigation to a Permanent Chamber, in accordance with Article 19.

4. Where the handling European Delegated Prosecutor considers that in order to preserve the integrity of the investigation it is necessary to temporarily defer the obligation to inform the authorities referred to in Articles 25(5), 26(2) and 26(7) of the Regulation, he/she shall inform the monitoring Permanent Chamber without delay. The latter may object to this decision and instruct the European Delegated Prosecutor to proceed with the relevant notification immediately.

d) Consequences of the “Decision to Open a Case”

If this decision has been achieved the EDPs will need to plan on how to conduct the investigation and gather the relevant evidence in order to collect all information that is necessary to prove a criminal offence i.e., a criminal liability and the elements that constitute the whole concept of crime in general.¹⁰¹ A PIF offence will need to be assessed by the relevant conditions for a crime i.e., the elements of a particular PIF offence of the present country.

52

¹⁰¹ *Nota bene*: The concept of crime is complex and this section in the present chapter is just a reminder to the EDP or reader with law skills and i.e. a rough introduction into Maltese Criminal Law for foreign EDPs, readers and experts; see Mamo 2020, pp. 84 et seq. citing Salmond, pp. 344 et seq. The theory on criminal liability in Malta is based on Italian, French and English Law Doctrines. In short: It is a mix of different cultures, theorems and arguments. Despite this mix, it is still closely related to the General Doctrine of Criminal Liability, which is internationally accepted. See Filletti 2023 with precise explanations of the current Maltese doctrine.

- 53 The EDPs will need to focus on the *actus reus* and the *mens rea* conditions of the relevant offence.¹⁰² In other words: What e.g. German criminal justice calls the objective element of an offence (“*Tatbestand*”¹⁰³), in relation to the substantive criminal law enshrined in the Criminal Code or partly in ancillary (not: secondary) criminal law (see above → Frist table prior to Article 26) needs to be assessed according to the requirements that the legislator set up, which includes the concretization of the objective elements (*actus reus*) of the crime¹⁰⁴, the subjective elements (*mens rea*, see above, which includes intentional and negligent commitment¹⁰⁵)¹⁰⁶ as well as the unlawfulness of the conduct (i.e. no written or unwritten justifications/justificatory defences¹⁰⁷ must intervene) and last but not least the guilt of the offender, which is given if the potential perpetrator is not excused for his/her conduct in relation to a PIF offence.¹⁰⁸
- 54 Similar or the same conditions exist in relation to the general part of the offense (i.e., a PIF offence, Article 22 EPPO Regulation, Articles 1–5 PIF Directive) in every country in the EU, with a divide running where common law differs and civil law countries encounter.
- 55 In addition, it is important to determine how the indictment should look like: Are several people involved and is there not an isolated act, but possibly a complicity or an indirect perpetrator? In addition, the questions of the criminal liability of a participant must be clarified in order to be able to determine whether an incitement to a PIF offense or an abetting to such an act exists.¹⁰⁹

¹⁰² See for the common terms in comparing criminal law and criminal procedure Child and Simester et al. 8th edn, Chapter 4 et seq.; Chapter 5, Chapter 15 on Fraud (relevant for Ireland, Malta, Cyprus). This area is called General Criminal Law Theory, see Mamo 2020, p 1 et seq. “Distinction between Criminal Offences and Civil Wrongs”, Penal Laws, pp. 25 et seq.

For the typical arguments from the Maltese point-of-view see Mizzi 2017 putting emphasis on the fact that Maltese fraud jurisprudence for example, originates from French and Italian influences in many ways.

¹⁰³ Bohlander 2009, 29 et seq.

¹⁰⁴ These include in the most criminal law systems questions of causal links, Authorship, causality, “scientific causation” (emphasis added to the cited book) adequacy, limitation of an endless *sine qua non formula*, etc., see recently Walen and Weiser 2022, 57–94.

¹⁰⁵ Mamo 2020, pp. 85 et seq. See for criminal negligence, pp. 99 et seq. But mostly the crimes in the PIF Acquis Area require intent. On defence and justification for crimes see 149 et seq.

¹⁰⁶ See only out of many Safferling 2008 who points at the fact that the traditional German terms are “Intention” and culpability. But even if the terminology is not congruent and differs in detail, it can be said that these are elements of the subjective offense that occur in continental European criminal codes and are also required separately by the PIF Directive for PIF offenses.

¹⁰⁷ This is a worldwide recognized condition as a basic element of the concept of crime, see Stasi, General Principles of Thai 2019, pp 31–47.

¹⁰⁸ See Eser 1987 17–65, online: <https://d-nb.info/112342229X/34> on the historical implications and the differences between the common law and civil law approach; Bohlander, principles of German criminal law, Hart Publishing, Oxford, Oregon, Portland, 2009, 29 et seq., 77 et seq. (*Rechtswidrigkeit*), 115 et seq. (“Guilt and Excusatory Defences”).

¹⁰⁹ See EU Fraud Commentary, Commentary on PIF Directive, Article 5. For the various translations of these terms see the EUR-Lex database translations of the PIF Directive 2017/1371.

If there is no success to a crime, the question arises as to whether a criminal offense can be determined because of the attempt of a PIF offence.¹¹⁰ **56**

For all of these questions and purposes, the EDPs can additionally to the present presentations, analysis and volume series references rely on the existing legal commentaries on the penal codes of the EU Member States and the code of criminal procedures of the Member States, which participate in the EPPO, insofar as national law is concerned, e.g. in the concept of a criminal offence or the start of an investigation. **57**

¹¹⁰ See EU Fraud Commentary, Commentary on PIF Directive, Article 5.

2. Article 27 Right of Evocation

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1. Upon receiving all relevant information in accordance with Article 24(2), the EPPO shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than 5 days after receiving the information from the national authorities and shall inform the national authorities of that decision. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time limit by a maximum period of 5 days, and shall inform the national authorities accordingly.

2. During the periods referred to in paragraph 1, the national authorities shall refrain from taking **any decision under national law** that may have the effect of precluding the EPPO from exercising its right of evocation.

The national authorities shall take any urgent measures necessary, **under national law**, to ensure effective investigation and prosecution.

3. If the EPPO becomes aware, by means other than the information referred to in Article 24(2), of the fact that an investigation in respect of a criminal offence for which it could be competent is already undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. After being duly informed in accordance with Article 24(2), the EPPO shall take a decision on whether to exercise its right of evocation. The decision shall be taken within the time limits set out in paragraph 1 of this Article.

4. The EPPO shall, where appropriate, consult the competent authorities of the Member State concerned before deciding whether to exercise its right of evocation.

5. Where the EPPO exercises its right of evocation, the competent authorities of the Member States shall transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence.

6. The right of evocation set out in this Article may be exercised by a European Delegated Prosecutor from any Member State whose competent authorities have initiated an investigation in respect of an offence that falls within the scope of Articles 22 and 23.

Where a European Delegated Prosecutor, who has received the information in accordance with Article 24(2), considers not to exercise the right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State with a view to enabling the Permanent Chamber to take a decision in accordance with Article 10(4).

7. Where the EPPO has refrained from exercising its competence, it shall inform the competent national authorities without undue delay. At any time in the course of the proceedings, the competent national authorities shall inform the EPPO of any new facts which could give the EPPO reasons to reconsider its decision not to exercise competence.

The EPPO may exercise its right of evocation after receiving such information, provided that the national investigation has not already been finalised and that an indictment has not been submitted to a court. The decision shall be taken within the time limit set out in paragraph 1.

8. Where, with regard to offences which caused or are likely to cause damage to the Union's financial interests of less than EUR 100 000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 9(2), issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.

The guidelines shall specify, with all necessary details, the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to fully recover the damage to the Union's financial interests.

9. To ensure coherent application of the guidelines, a European Delegated Prosecutor shall inform the competent Permanent Chamber of each decision taken in accordance with paragraph 8 and each Permanent Chamber shall report annually to the College on the application of the guidelines.

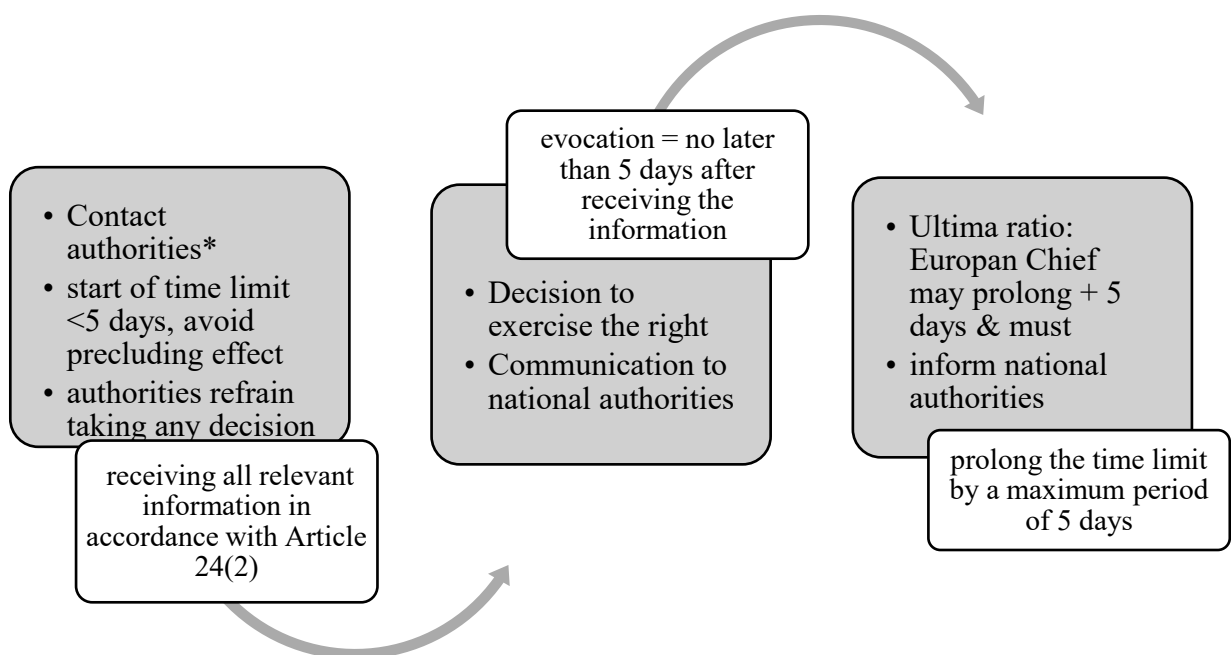
If the EDPs do not exercise the EPPO's competence by virtue of the Union's legality principle in due time on their own and hereby on behalf (*proprio motu*) of the Union and the Union's interests by analysing the *notitiae crimini europea*, i.e. the obligatory European PIF offences notices, which are sent to the European Prosecution Office in order to inform that a PIF offence is alleged or has been committed, the EDPs and the

1

Chambers must decide on the evocation of cases from the national authorities¹¹¹ on to the level of the Union competence. If the national prosecutor or a national office vested with investigative powers have already started investigating or the relevant person has taken any steps applying national law afterwards, these actions may have a precluding effect on the Right of evocation of the EPPO (cf. para 2 of Article 27 EPPO Regulation).

✍ *Nota bene:* In addition to that, if reading the following provisions one can take into account that some of them will apply as well to the EDPs if they want to file an indictment by virtue of the EPPO Regulation, i.e. the area, which is not in the focus of this Manual as the country chapters have the focal point on the start of investigations, the phase, in which, most likely a huge number of operations will cease already. But the same provisions that apply to the national authorities while standing still until the EPPO has decided to exercise its right of evocation or not (Article 27) will apply in cases of EPPO indictments (Articles 34 et seq.) and preclude the filing of formal accusation by virtue of national law before a national court.

Figure 4 Right of evocation/time limits/refrain taking decisions that have a precluding effect



Caption: For the Maltese Authorities see in the footnote and Art. 28 EPPO Regulation.¹¹²

¹¹¹ See for the system of prosecution Calleja, Joel A comparative study of prosecution systems leading to a reform of the Maltese prosecution system and the establishment of a prosecution service, University of Malta 2017.

¹¹² See Part 2, Book 2 of Chapter 9 Laws of Malta, Title IX Of Cooperation between the National Authorities and the Office of the European Public Prosecutor 628C–628H.

a) Provisions with a Precluding Effect for the Right of Evocation of the EPPO, Paragraph 2

a. Limitations by Time and Statutes of Limitation

The effect of a (former) criminal law can cease by time.¹¹³ But more important for the evocation of offences and cases by the EPPO are the rules on prescription (statutes of limitations)¹¹⁴ of Chapter 9 Laws of Malta, Criminal Code, Articles 686 et seq. *Darmanin* summarizes the *telos* of prescription on point:

“From a criminal law perspective, the concept of prescription is of great significance due to the fact that through prescription, the legislator attempts to safeguard the accused from having a case instituted against him a long time after the occurrence of the crime. Its objective is to restrain the executive police from charging suspects with crimes arising from the loss of evidence, death, loss of memory of witnesses and obscurity of facts.

The institute of prescription is of paramount importance in a democratic society, in attempting to strike a balance between the rights of society at large and those of the alleged perpetrator.

[...]

Contrastingly, if a criminal case is filed once the prescriptive period laid down by law has lapsed, the plea of prescription may be raised by both the defence as well as *ex officio* by the court. This would then lead to the extinction of the criminal action.”¹¹⁵

Still, it can be stated that despite the fact that crimes, and in turn their prosecution are limited by time, an analysis of Article 688 Chapter 9, shows that the time limitation takes into consideration the seriousness of the offence. In fact, the Legislator grants that the more serious crimes, are given a longer prescriptive period, which gives investigators more time to investigate and ultimately prosecute that crime.

¹¹³ Mamo 2020, pp. 44 et seq. See V. Crim. Appeal “*The Police vs. S. Chircop*” et, 13XI 1943; A.J. Mamo Aquilina 2022, First Year Criminal Law, GhSL, → <https://bit.ly/3MVSMuI>, pp. 30.

¹¹⁴ Rene Darmanin (Azzopardi, Borg & Abela Advocates), Times of Malta, The application of the Statute of Limitation in Malta <https://timesofmalta.com/articles/view/the-application-of-the-statute-of-limitation-in-malta.809154> referring to ‘The Police v Tanya Carmen Chetcuti’ decided by the Court of Criminal Appeal in its Inferior Jurisdiction on July 14 2020; see as well the recent reform related to sexual offences and a bachelor thesis from the University of Malta 2018, Chetcuti, K. (2018). A study on the limitations of prescription in cases of rape, defilement and sexual assault in Maltese criminal law (Bachelor's dissertation).

¹¹⁵ Rene Darmanin, Times of Malta, The application of the Statute of Limitation in Malta, <https://timesofmalta.com/articles/view/the-application-of-the-statute-of-limitation-in-malta.809154>. Accessed 31 July 2024.

5

Article 686.

The provisions of the Code of Organization and Civil Procedure relating to the respect due to the court, are applicable to the courts of criminal jurisdiction.

Title VI OF PRESCRIPTION Sentences not barred by prescription. Amended by: XI.1900.92; III.2002.156.687.

(1) Sentences awarding punishment shall not be barred by prescription notwithstanding the lapse of any time.

(2) The period of prescription in respect of all criminal offences shall be suspended from the moment a charge and, or bill of indictment is served on the person charged or accused until such time as a final and definitive judgment is delivered in the proceedings which commenced as a result of such charge or bill of indictment.

Article 688. [Prescription barring criminal actions. Amended by: XI.1900.92; VIII.1909.62; XXI.1971.36; XLIX.1981.4]

Save as otherwise provided by law, criminal action is barred-

(a) by the lapse of twenty years in respect of crimes liable to the punishment of imprisonment for a term of not less than twenty years;

(b) by the lapse of fifteen years in respect of crimes liable to imprisonment for a term of less than twenty but not less than nine years;

(c) by the lapse of ten years in respect of crimes liable to imprisonment for a term of less than nine but not less than four years;

(d) by the lapse of five years in respect of crimes liable to imprisonment for a term of less than four years but not less than one year;

(e) by the lapse of two years in respect of crimes liable to imprisonment for a term of less than one year, or to a fine (multa) or to the punishments established for contraventions;

(f) by the lapse of three months in respect of contraventions, or of verbal insults liable to the punishments established for contraventions.

Article 689. [Extenuating circumstances and previous conviction not to be taken into account in reckoning period for prescription. Amended by: XI.1900.92]

For the purposes of prescription, regard shall be had to the punishment to which the offence is ordinarily liable, independently of any excuse or other particular circumstance by reason of which the offence is, according to law, liable to a lesser punishment; nor shall any regard be had to any increase of punishment by reason of any previous conviction.

Article 690. [Reckoning of time according to calendar. Amended by: XI.1900.92.]

In computing the period established for prescription, the months and years shall be reckoned according to the ordinary calendar.

Article 691. [Commencement of prescription. Amended by: XI.1900.92]

(1) With regard to a completed offence, the period of prescription shall run from the day on which the offence was completed; with regard to an attempted offence, from the day on which the last act of execution was committed; with regard to a continuous offence, from the day on which the last violation took place; and with regard to a continuing offence from the day on which the continuance ceased. Suspension of prescription.

(2) Where the criminal action cannot be instituted or proceeded with except on a special authorisation, or after the determination of any issue upon separate proceedings, the period of prescription shall be suspended, and shall continue from the day on which the authorisation is granted or the issue is determined.

Article 692. [Prescription not to run when offender is unknown. Amended by: XI.1900.92] The period of prescription in respect of crimes shall not commence to run when the offender is unknown

Article 693. [Interruption of prescription. Amended by: XI.1900.92]

(1) The period of prescription is interrupted by any act of the proceedings served on the party charged or accused in respect of the fact with which he is charged.

(2) The period of prescription is also interrupted by the warrant of arrest or, where there are no grounds for the arrest, by the summons, although the warrant of arrest or the summons shall have had no effect on account of the fact that the party charged or accused had absconded or left Malta.

(3) Where the period of prescription has been interrupted, it shall recommence to run from the day of the interruption.

(4) The interruption of prescription shall operate in regard to all persons who took part in the offence, even though the act of interruption takes place against one person only.

Article 694. [Application of prescription ex officio. Amended by: XI.1900.92]

Prescription shall be applied *ex officio*, and it shall not be lawful for the party charged or accused to waive prescription.

b. Amnesty and Pardon

- 6 Maltese law differentiates like other European legislation between amnesty and pardon and calls the latter prerogative of mercy¹¹⁶. Article 93 of the Constitution of Malta prescribes the conditions and the issuing authority.¹¹⁷



The President of Malta needs to take the action. Although such power is, in practice, vested in the President, the President cannot decide on its own, but rather is given a recommendation through cabinet. Hence, as is normal in Maltese Legislation, when the law gives power to the president, the president exercises his power always on the advice and recommendation of the cabinet (government). Therefore, there is a possibility that this may be flawed because it will be used solely in circumstances where and when the government wants.

- 7 It may bring about a lot of questions, as cabinet is not obliged to consult, neither the AG, nor the Commissioner of Police. It may be a decision taken by cabinet alone.

- 8 **93.** (1) The President shall have power to –
- (a) grant to any person concerned in or convicted of any offence a pardon, either free or subject to lawful conditions;
 - (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any sentence passed on that person for any offence;
 - (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
 - (d) remit the whole or part of any sentence passed on any person for an offence or for any penalty or forfeiture otherwise due to the State on account of any offence.
- (2) (a) Where any person has been sentenced to death by any court in Malta, the President shall cause a written report of the case from the trial judge, or, in the case of a court-martial the person presiding, and such other information derived from the record of the case or elsewhere as the President may require, to be sent to the Minister responsible for justice.
- (b) The said Minister shall send such written report and information (if any) to the Cabinet, and the Cabinet shall advise the President whether he should grant the offender a pardon or respite in the exercise of the powers conferred on him by this Article.

- 9 *Magri* explains quite thoroughly that presidential pardons might be used tactically by prosecution authorities:

¹¹⁶ Nota bene that this is asked for by means of a letter addressed to the President of the Republic of Malta.

¹¹⁷ See *Magri*, Presidential Pardons, Explained, <https://abalegal.eu/presidentialpardons/>. Times of Malta, Bonello, Justice as a present from the sovereign: criminal pardons between 1814 and 1834 How were pardons granted in 19th century Malta, and who received them? 13.1.22, <https://timesofmalta.com/articles/view/justice-as-a-present-from-the-sovereign-criminal-pardons-between-1814.924931>. Accessed 31 July 2024.



“Generally, when granted, a presidential pardon either exonerates, conditionally or unconditionally, an individual from criminal prosecution for his/her involvement in a crime or else discontinues the effects of a criminal conviction by, for instance, ordering that an inmate serving an imprisonment sentence be immediately released from prison. The President may also, in terms of Article 93 of the Constitution, substitute a less severe form of punishment for any punishment imposed on any person for any offence, at his discretion or owing to a change in law where the relative punishment would have been decreased.

Many a times, presidential pardons are granted in exchange for inside knowledge or information that would help the investigative authorities and prosecutorial bodies secure the convictions of the true masterminds of the crime concerned. Such pardons are generally subjected to a number of conditions, the standard one being that the individual pardoned has to give State evidence and reveal the whole truth in Court and more so cooperate fully with the prosecution in arriving at the truth. If the person does not abide by any of these lawful conditions, the pardon may be revoked”¹¹⁸

It remains questionable if the same circumstance applies in EPPO investigations. The EPPO is a supranational body and the EDPs would need to have good contacts for tactical investigations. **10**

c. Criminal Complaint

A criminal complaint may lead to the competence of a national prosecutor in the first place. A complaint, which is not issued to the EPPO or the Regional office does not hinder the evocation by the EPPO in a later moment, but the national prosecutor must quickly refer the information about a potential offence falling into the remit of the EPPO to its officials. **11**

In practice (without prejudging the real circumstances) one could imagine the steps like follows: A criminal complaint, may contemplate a scenario where a private person (because a criminal complaint may be filed by a lay person and not necessarily a lawyer) who is not knowledgeable on the jurisdiction of the EPPO, go to the local police, as a way of first recourse. However, the police then have to in turn recognise their duties and jurisdiction. **12**

d. Prosecution before the Trial Court

The prosecution before the trial court in case of an offence, which was not reported to EPPO but could have been evoked at an earlier stage e.g. when the investigations took **13**

¹¹⁸ See Magri, Presidential Pardons, Explained, <https://abalegal.eu/presidentialpardons/>. Accessed 31 July 2024.

place, could hinder the evocation as the prosecution at this stage cannot easily be transferred.

e. Opposing Legal Validity and *Ne Bis in Idem*

- 14 Book 2 of Chapter 9 of the laws of Malta, contains the presumption of innocence guarantee, which is enshrined in Sub-title XII (of the Presumption of Innocence 366A–366F).

b) Urgent Measures of National Authorities for Securing an Investigation and Prosecution 1

- 15 As seen above, the magistrates have a certain duty in the Maltese criminal justice system. They need to open so-called magisterial inquiries if, like it happens usually, when an accident, or crime i.e. a major crime is suspected to lead to more than three years of imprisonment.¹¹⁹
- 16 The **urgent measures** might be carried out by the police acting on behalf of the magistrates but most likely the urgent measure will depend on the area of EU budget affected. In the area of VAT frauds, the Compliance and Investigations Directorate of Malta, which operates under the Supervision of the Revenue Commissioner will be responsible to take actions. In the area of potential customs fraud (e.g. Anti-Dumping Frauds see → “Case Study Sheet below → Article 3).
- 17 In addition, in other areas that might be affected the **following authorities** might act: NAO, the National Audit Office and its Investigations Directorate might be competent before it submits the case to a prosecution office. Moreover, it might be the case that the Financial Intelligence Analysis Unit (FIAU) of Malta investigates. In this case it may act on the basis of Chapter 373 Laws of Malta. The Economic Crime Unit (ECU), which is since 2018 called the Financial Crimes Investigations Department (FCID) within the Maltese Police¹²⁰ has the task to investigate in cases of fraud, misappropriation, special frauds and economic offences such as forging of documents to be duly granted wrong sums of money etc.¹²¹ The FCID has, which is quite remarkable an own “Blockchain Investigation Unit” and can therefore investigate traces of offences within cryptocurrencies. The special rules on urgent financial investigations might apply. Article 355 AD is

¹¹⁹ The usual situation and exercise of this inquiry is described in a newspaper article <https://www.independent.com.mt/articles/2023-07-29/local-news/Magistrates-must-open-inquiries-if-accident-crime-can-lead-to-criminal-charges-6736253756>. Accessed 31 July 2024.

¹²⁰ Filletti 2020, p. 279 reminding that the ECU is as well the „designated national asset recovery office“.

¹²¹ Office of the Prime Minister, National Anti-Fraud and Corruption Strategy, Malta, 2021, https://parlament.mt/media/112436/national-anti-fraud-and-corruption-strategy_en.pdf, p. 13 et seq: “The FCID encompasses two (2) squads, the Anti-Money Laundering and Terrorism Financing Squad (AMLS/TF), and the Economic Crimes Squad (ECS). Furthermore, the Financial Crimes Analysis Unit (FCAU) forms part of the FCID, and the International Unit which is still in process will also form part of the FCID”.

a general rule and should not be considered a special rule on urgent financial investigations.

Last but not least, it is clear from quite recently published laws that the Office of the Attorney General has been given the task to investigate in cases of “Money laundering, Cases of fraud and misappropriation where the financial loss caused is of at least fifty thousand euro (€ 50, 000) and Cases of evasion of customs, excise or other import duty where the duty evaded amounts to at least five hundred thousand euro (€ 500, 000)”¹²².

18

c) Competent National Authorities in Paragraphs 3 to 7 of Article 27

Customs officials and police may, in case of customs offences, take the following measures on the basis of Chapter 37 of the Laws of Malta (Customs Ordinance):

19

70. Where a Customs official has **reasonable grounds to suspect** that a person is committing an offence against this Ordinance and or against its subsidiary legislation, or against any law and or its subsidiary legislation where the Commissioner is empowered to act, then such official may detain such person without a warrant and as soon as immediately practicable thereafter, and in any case not later than two hours after such detention, place such person in the custody of an officer of the Police force whereupon such officer of the Police force shall either release such person or proceed to present such person before a court and the provisions of the Criminal Code relating to arrest shall *mutatis mutandis* apply to the Customs official and the officer of the Police force. (1) For the **purposes of investigation related to crimes of contraband, fraud, evasion of tax or duty**, money laundering or financing of terrorism, in order to fulfil his obligations under customs laws, **the Commissioner may, without prejudice to any obligation of professional secrecy** imposed by an explicit provision of the law, **demand and collect details of transactions** that have taken place, are taking place or which still have to take place, both if involving the person or entity to which the demand is made and if the said transactions are between third parties, from any person or entity, and every said person or entity shall give to the Commissioner the requested details within the time frame established by him. The said obtained details may be used by the Commissioner as evidence in proceedings before any court. (2) When the Commissioner suspects that the details of transactions collected could amount to proof of the crimes of money laundering or financing of terrorism, the Commissioner shall pass on the said details to the **Financial Intelligence Analysis Unit**.

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¹²² Office of the Prime Minister, National Anti-Fraud and Corruption Strategy, Malta, 2021, https://parlament.mt/media/112436/national-anti-fraud-and-corruption-strategy_en.pdf, p. 13 et seq. Accessed 31 July 2024.

71. (1) If any Customs official or Police officer has reasonable cause to suspect that any prohibited or uncustomed goods are harboured, or kept or concealed in any house, building or other enclosure, within the meaning of Article 355E of the Criminal Code, and this is made to appear by a declaration on oath before the Attorney General or a magistrate, it shall be lawful for the Attorney General or such magistrate, **by warrant under his hand, to authorize such official or officer to enter and search such house, building or other enclosure, and to seize and carry away any prohibited or uncustomed goods found therein:** are harboured, or kept or concealed in any such place as aforesaid and has reasonable cause to apprehend that there is imminent danger that any such goods will be removed or suppressed, such Customs official, if authorised in that behalf by the Commissioner, or such Police officer, if authorized in that behalf by the Commissioner of Police may exercise in relation to such place as aforesaid, the powers mentioned in this Article in the same manner as if he were authorized so to do by a warrant issued under this Article.

(2) It shall be lawful for such official or officer, in case of resistance, to break open any door and to force and remove any impediment or obstruction to such entry, search or seizure as aforesaid.

72. [Seizures in Customs Procedure]

(1) Whenever any seizure is made, except in the presence of the offender or owner, of any things as forfeited under this Ordinance, the seizing official shall give notice in writing of such seizure and of the grounds thereof to the owner of the things seized, if known, within a period of ninety (90) working days from when the seizure takes place, either by delivering the same to him personally or by letter addressed to him and transmitted by registered post to or delivered at his last known place of abode or business in Malta.

Seizures to be claimed within thirty days.

(2) All seizures made under this Ordinance shall be deemed to be forfeited as of right, and may be sold or otherwise disposed of as the Minister responsible for customs may direct, unless the person from whom such seizure has been made, or the owner thereof, or some person authorized by him, within thirty days from the date of seizure, gives notice in writing to the Commissioner, that he claims the things so seized or intends to claim them, whereupon proceedings shall, within thirty days from the date upon which such notice was given, be instituted by the claimant before the Administrative Review Tribunal, in default of which the claim shall be taken to be abandoned. Provisions regarding the finalization of the national investigation, para 7.

(3) When anything seized in accordance with this Article is a ship or vessel or is of a perishable nature or is, in the opinion of the Commissioner, likely to suffer very substantial loss of value by the lapse of time, or consists of a living creature, the same may,

by direction of the Commissioner, be sold, and the proceeds thereof retained to abide the results of any claim that may be legally made in respect thereof and for the purpose of any proceedings taken under this Ordinance in respect of the seized goods, such proceeds shall represent and substitute the said seized goods.(4) Where a seizure made in accordance with this Article is contested in accordance with sub-article (2) thereof, the Commissioner may, at any time, if he sees fit and notwithstanding the pendency of the proceedings wherein the seizure is contested, deliver anything seized to any claimant upon his paying to the Commissioner such sum as the Commissioner thinks proper, not exceeding that which in the opinion of the Commissioner represents the value of the thing, including any duty, levy or tax chargeable thereon, which has not been paid or upon giving to the Commissioner such security acceptable to the said Commissioner for the payment of such sum. Such sum or such security, as the case may be, shall be retained to abide the result of any claim that may be legally made in respect thereof and shall for the purpose of any proceedings taken under this Ordinance in respect of the seized goods represent and substitute the said seized goods.

Part 2 of Book 2 of Chapter 9 Laws of Malta applies. It describes the indictment situation:

PART II
OF MATTERS RELATING TO CERTAIN MODES OF
PROCEDURE AND TO CERTAIN TRIALS

See → Title V Of the Indictment 588–602

Nota bene: If Article 27 EPPO Regulation is completed or exercised the same rules as presented above under “Actions if decision to open a case”, Article 26 EPPO Regulation shall apply.

3. Article 28 Conducting the Investigation

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1. The European Delegated Prosecutor handling a case may, in accordance with this Regulation **and with national law**, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, **in accordance with national law**, ensure that all instruc- tions are followed and undertake the measures assigned to them. The handling European Delegated Prosecutor shall report through the case management system to the competent European Prosecutor and to the Permanent Chamber any significant developments in the case, in accordance with the rules laid down in the internal rules of procedure of the EPPO.

2. At any time during the investigations conducted by the EPPO, the competent national authorities shall take urgent measures **in accordance with national law** necessary to ensure effective investigations even where not specifically acting under an instruction given by the handling European Delegated Prosecutor. The national authorities shall without undue delay inform the handling European Delegated Prosecutor of the urgent measures they have taken.

3. The competent Permanent Chamber may, on proposal of the supervising European Prosecutor decide to reallocate a case to another European Delegated Prosecutor in the same Member State when the handling European Delegated Prosecutor:

(a) cannot perform the investigation or prosecution; or

(b) fails to follow the instructions of the competent Permanent Chamber or the European Prosecutor.

4. In exceptional cases, after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally, either by undertaking personally the investigation measures and other measures or by instructing the competent authorities in his/her Member State, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution by reasons of one or more of the following criteria:

(a) the seriousness of the offence, in particular in view of its possible repercussions at Union level;

(b) when the investigation concerns officials or other servants of the Union or members of the institutions of the Union;

(c) in the event of failure of the reallocation mechanism provided for in paragraph 3.

In such exceptional circumstances Member States shall ensure that the European Prosecutor is entitled to order or request investigative measures and other measures and that he/she has all the powers, **responsibilities and obligations** of a European Delegated Prosecutor in accordance with this Regulation and national law.

The competent national authorities and the European Delegated Prosecutors concerned by the case shall be informed without undue delay of the decision taken under this paragraph. As part of the recurring introduction to Article 28 EPPO Regulation in this manual, which is relevant to all EDPs and also affects the academic and political debate about **specialized investigative personnel**¹²³, the following can be said: The conduct of investigations is dependent on instruction relationships, whereby in contrast to the dependency in classically national systems, in the area of EU anti-fraud investigations the EPPO (i.e. the college level) has supervisory powers as it is a supranational, independent body.

Already in her speech for the first anniversary of the EPPO, given at the conference “EPPO one year in action – Towards Resolving Complexity and Bringing Added Value”¹²⁴ in the *Hémicylce* in Luxembourg on 1st June 2022, Laura Kövesi outlined that in order to enhance the detection rates of EU fraud specialised customs units and specialized financial experts, groups of specialized EU investigators educated in the typologies of EU frauds are needed to enhance the conduct of investigations. She underlined

¹²³ Xuereb, Times of Malta, <https://timesofmalta.com/article/judiciary-ministers-handle-warrants-wiretapping-eu-prosecutor.1096003>, Comment by Farrugia: “At the moment, we liaise directly with one police inspector who has pending national investigations. We would prefer to have a dedicated team of inspectors working exclusively on EPPO investigations, as this would enable us to conclude many more investigations.”

¹²⁴ Organized by the University of Luxembourg (Prof. Katalin Ligeti), ECLAN and the EPPO.

that these special units could be set up tomorrow and that doing so depended only on political will.¹²⁵

- 4 As long as there are no special units in all countries as the first Attorney General of the EPPO requested, the **detection rates** depend on the conduct of investigations and the cooperation with established national authorities – especially the assignment and instruction of investigative tasks to “those national authorities”. The situation in Malta will be analysed below, stating the cooperation level and important actions to be taken.
- 5 The investigations on national level and at Union-level must be distinguished. Especially at the Union level, the investigation is different than at the national level. In many cases, investigations will be conducted in Union institutions (EU IBOAs). The EPPO has started to set up **working arrangements** for this type of investigation. For example, the one with the European Investment Bank provides for cooperation with the in-house fraud detection service (“a kind of internal investigation commission”).
- 6 In the following we shall focus on the national investigations level regarding the present country. For the different PIF offences, the Maltese system provides different investigative bodies acting by virtue of different national codes such as the General Tax Code, the police laws and the customs laws including the customs administration laws. It depends, for the analysis of Article 28 EPPO Regulation, on whether a centrally governed country of the EU is affected or whether there is a federal system with differentiated competences of the federal units.
- 7 In addition, the **lawfulness of the action** is particularly important as a generalization of all instructions from the staff, which are made available to the EPPO and the EDPs from the national resource area.

a) Handling EDP and EP Conducting Investigative Measures, Paragraphs 1 and 4

- 8 The handling EDP of the regional Office in Malta may on the basis of Article 628 carry out investigative measures on his/her own suspicions.

¹²⁵ EPPO, European Public Prosecutor's Office One Year In Action, <https://www.youtube.com/watch?v=v2oU-UyTEPFU>; Laura Kövesi, So kommt die EU im Kampf gegen Verbrecherbanden in die Offensive, Die Welt (Welt am Sonntag), Stand: 05.06.2022, <https://www.welt.de/debatte/kommentare/article239196661/So-kommt-die-EU-im-Kampf-gegen-die-Kriminalitaet-in-die-Offensive.html>: “I therefore call on all competent national authorities to adopt this best practice and set up specialised units combining financial, tax and customs investigators to support our investigations. I propose that we set up an elite force of highly qualified financial fraud investigators within the EU, working transnationally through the EPPO. No law needs to be changed for this; it is purely an organisational decision by the competent national authorities. It could happen tomorrow”. These statements were republished by various newspapers and journals across Europe (see eg Figaro article in the French country chapter).

Article 628D. Exercise of Competence by Prosecutors

(1) The European Delegated Prosecutors shall have prosecutorial functions, whenever exercising the powers to investigate offences in accordance with Council Regulation (EU) 2017/1939, and they shall have the power to instruct the Police or any other law enforcement agency to conduct an investigation relative to offences falling within the competence of the European Public Prosecutor's Office.

(2) The European Delegated Prosecutors shall, when prosecuting offences, have the same powers as the Attorney General and the Executive Police.

(3) The European Delegated Prosecutors shall prosecute in the name of the Republic of Malta.

628G. Powers of the European Prosecutor.

The powers referred to in Articles 628D, 628E and 628F may be exercised by the European Prosecutor in exceptional cases as referred to in Article 28(4) of Council Regulation (EU) 2017/1939.

b) Instructions and Assignment of Investigative Measures to National Authorities

Figure 5 Instructed and assigned National authorities

- Attorney General
- Customs
- Police Force and Financial Crime Investigation Department, Economic Crime Squad, The Oaks Business Centre, Farsons Street (Historically the police force was divided into executive and judicial police. While the executive police were headed by the inspector general (today: Commissioner of Police), the judicial police were headed by the Magistrates for Malta (and Gozo).¹²⁶
- Economic Crimes Unit


a. Criminal and Judicial Police Area

Article 346, which can be read in its full wording below, is a duty placed on the police, to collect *all* evidence *in Favour* and *against* the accused. Therefore, this provision is as well a very important provision from the point-of-view of any defence lawyer.

Prior to the introduction of the AG being the prosecutor for Fraud over 50,000 euro the Police used to prosecute, and they had this duty. However now that the AG is prosecuting, it could be interpreted that the duty enshrined in 346 does not extend to the AG.

¹²⁶ Official website of the Malta Police Force, History of the Malta Police, see <https://pulizija.gov.mt/en/police-force/Pages/History-of-the-Malta-Police.aspx>. Accessed 31 July 2024.

Police Investigation Authorities 1

	SECOND BOOK (CAP. 9) LAWS OF CRIMINAL PROCEDURE PART I
<p>Duties of the Police</p> <p>346. (1) It is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.</p> <p>(2) Notwithstanding the generality of sub-article (1), where authorised by law and in the manner so provided, the Police may delay its immediate intervention for the prevention of the commission of an offence.</p> <p>(3) In the carrying out of their duties, the Police shall take all measures necessary for the immediate protection of victims following an assessment as the case may be.</p> <p>Powers of the Attorney General.</p> <p>347A. Without prejudice to the two preceding Articles, the Attorney General shall have the following functions and powers:</p> <p>(a) to delegate to the Commissioner of Police prosecutorial functions vested in the Attorney General; and</p> <p>(b) notwithstanding anything provided in any other law, and in his discretion, to prosecute any offence, alone or together with the Executive Police or together with any other authority having prosecution powers.</p> <p>Complaint by the injured party.</p> <p>347. The Police shall not institute criminal proceedings, except on the complaint of the injured party, in cases where the law does not allow criminal proceedings to be instituted without such complaint.</p> <p>Title IX</p> <p>OF COOPERATION BETWEEN THE NATIONAL AUTHORITIES AND THE OFFICE OF THE EUROPEAN PUBLIC PROSECUTOR</p> <p>[...]</p> <p>Competent national authority</p> <p>628H. The Police shall act as competent national authority to:</p> <p>(a) receive the information in accordance with Article 24(8) of Council Regulation (EU) 2017/1939;</p>	

- (b) be consulted in accordance with Article 25(2) and (3) of Council Regulation (EU) 2017/1939; and
- (c) give consent in accordance with Article 25(4) of Council Regulation (EU) 2017/1939.


b. Tax Area

The Office of the Commissioner of Revenue can be contacted by any OAFCN member, economic operator via a web-based e-mail system. AFCOS, OLAF and the EPPO have their own working relationships and internal staff might help you to find out contact details e.g the Legal Secretary Bureau. As of 1st July 2024, the Commissioner for Tax and Customs in Malta will be appointed as the authorised representative of the Minister responsible for finance concerning specific duties of the Competent Authority. These duties include: Administrative Cooperation in Taxation: Overseeing duties under the EU Council Directive 2011/16/EU, which relates to administrative cooperation in tax matters within the EU, Combating VAT Fraud: Managing responsibilities under Council Regulation (EU) No 904/2010, aimed at administrative cooperation to fight VAT fraud, Exchange of Information: Handling exchange of information requests under Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs) to which Malta is a party, Mutual Administrative Assistance: Managing Malta's obligations under the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in tax matters, Mutual Agreement Procedures (MAP): Administering MAPs under DTAs, ensuring double taxation disputes are resolved, Transfer Pricing Adjustments: Overseeing the Convention on the elimination of double taxation related to the adjustment of profits of associated enterprises.¹²⁷

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Tax Investigation authorities 1

14


	Relevant laws
	<p>Possible codes to consult:</p> <ul style="list-style-type: none"> - Criminal Code, Book 2 - VAT Act - Excise Duty Act - Income Tax Act - Proceeds of Crime Act <p>For all Acts mentioned see → “Sources of Law”.</p>

¹²⁷ See <https://cfr.gov.mt/en/inlandrevenue/itu/Pages/Competent-Authority-Details.aspx>. Accessed 31 August 2024. It should be asked for the tax compliance unit to really conduct tax audits.

d. Customs Area

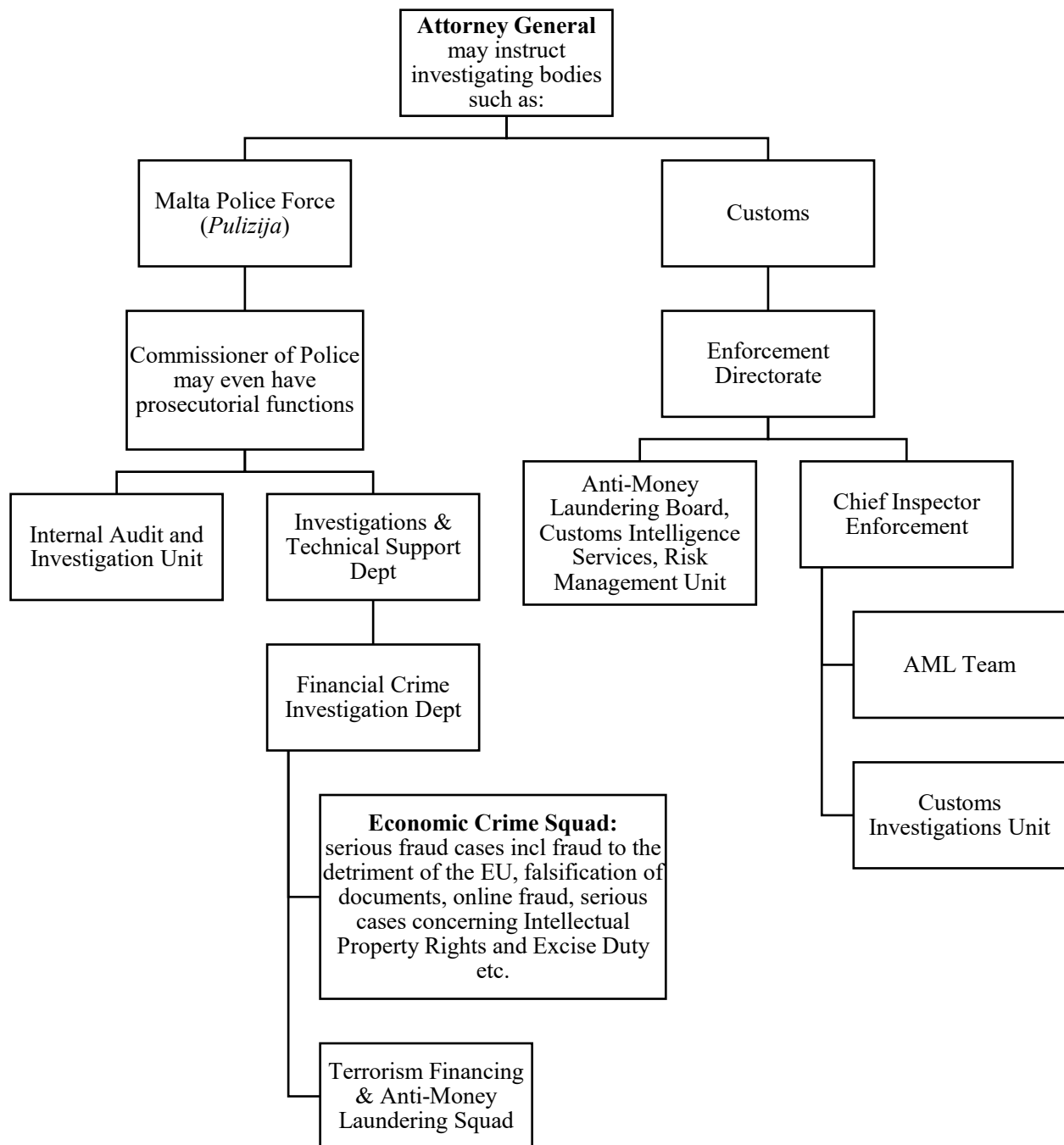
15 The Custom Office is managed by the Office of the Commissioner for Revenue and has following contact details: Customs Office Custom House, Lascaris Wharf, Valletta VLT 1920 Malta, Email: malta.customs@gov.mt, Phone Number: 23783310/11/12/14/15/16

16 *Customs Investigation Authorities 1*

	Chapter 37 Laws of Malta → Customs Ordinance
<p>Part XII Powers and Procedure</p> <p>Articles 657–9 Officers may search premises by warrant granted by Attorney General or magistrate on reasonable cause shown.</p> <p>71. (1) If any Customs official or Police officer has reasonable cause to suspect that any prohibited or uncustomed goods are harboured, or kept or concealed in any house, building or other enclosure, within the meaning of Article 355E of the Criminal Code, and this is made to appear by a declaration on oath before the Attorney General or a magistrate, it shall be lawful for the Attorney General or such magistrate, by warrant under his hand, to authorize such official or officer to enter and search such house, building or other enclosure, and to seize and carry away any prohibited or uncustomed goods found therein:</p> <p>Provided that, where any Customs official or Police officer has reasonable cause to suspect that any prohibited or uncustomed goods are harboured, or kept or concealed in any such place as aforesaid and has reasonable cause to apprehend that there is imminent danger that any such goods will be removed or suppressed, such Customs official, if authorized in that behalf by the Commissioner, or such Police officer, if authorized in that behalf by the Commissioner of Police may exercise in relation to such place as aforesaid, the powers mentioned in this Article in the same manner as if he were authorized so to do by a warrant issued under this Article.</p> <p>(2) It shall be lawful for such official or officer, in case of resistance, to break open any door and to force and remove any impediment or obstruction to such entry, search or seizure as aforesaid.</p>	

4. Visualization of Instructions

Figure 6 Assignment of investigative measures for “those national authorities”



Source: The authors, Maltese AFCOS Report. Cf. Official website of the Police Force, Financial Crimes Investigations Department, see <https://pulizija.gov.mt/en/police-force/police-sections/Pages/Economic-Crimes-Unit.aspx>, latest access on 31.5.2024; Organizational chart on the official website of the Maltese Police Force, see <https://pulizija.gov.mt/en/police-force/Pages/Organisational-Chart.aspx>, latest access on 31.05.2024.

a) General Investigation Provisions

17 SECOND BOOK (CAP. 9) Criminal Code

Powers according to law

349. (1) A police officer shall only have such powers as are vested in him by law and to the extent authorised by law and in this provision the word law has the same meaning assigned to it in Article 124 of the Constitution.

(2) The omission of any precaution, formality or requirement prescribed under this Title shall be no bar to proving, at the trial, in any manner allowed by law, the facts to which such precaution, formality or requirement relates.

Title IX

OF COOPERATION BETWEEN THE NATIONAL AUTHORITIES AND THE OFFICE OF THE EUROPEAN PUBLIC PROSECUTOR

[...]

Exercise of prosecutorial functions by European Delegated Prosecutors.

628D. (1) The European Delegated Prosecutors shall, whenever exercising the powers to investigate offences in accordance with Council Regulation (EU) 2017/1939, instruct the Police or any other law enforcement agency to conduct an investigation relative to offences falling within the competence of the European Public Prosecutor's Office.

(2) The European Delegated Prosecutors shall, when prosecuting offences, have the same powers as the Attorney General and the Executive Police.

(3) The European Delegated Prosecutors shall prosecute in the name of the Republic of Malta.

Investigation measures of the European Delegated Prosecutors.

628E. The European Delegated Prosecutors may order the following investigative measures:

(a) request the assistance of the Police to search any premises, land, means of transport, private home, clothes and any other personal property or computer system and to take measures necessary to preserve the integrity or to avoid the loss or contamination of evidence;

(b) request the assistance of the Police to obtain the production of any relevant object or document either in its original form or in some other specified form;

(c) request the assistance of the Police to obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data in compliance with the Data Protection Act;

- (d) request the courts to issue monitoring orders, investigation orders, attachment orders and freezing orders where there is reason to believe that the owner, possessor or controller of the proceeds will seek to frustrate the judgment ordering confiscation;
- (e) request the competent authority to intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using relative to the offences established in Articles 190C, 190E and 190G; and
- (f) request the Police to track and trace an object by technical means including the conduct of a controlled delivery relative to offences established in Articles 190C, 190E and 190G.

Pre-trial arrest or detention of suspect.

628F. The European Delegated Prosecutor may request the Police to arrest or retain in pre-trial detention the suspect or accused person.

Powers of the European Prosecutor.

628G. The powers referred to in Articles 628D, 628E and 628F may be exercised by the European Prosecutor in exceptional cases as referred to in Article 28(4) of Council Regulation (EU) 2017/1939.

b) National Administrative Decrees/Regulations under Criminal Procedural Law

a. Subsidiary legislation

- Subsidiary Legislation 9.04: Finger-prints, Photographs and Measurements of Accused Persons Regulations
- Subsidiary Legislation 9.07: Property held under the Criminal Code Notice
- Subsidiary Legislation 9.08: Designated Places of Detention Order
- Subsidiary Legislation 9.09: Criminal Procedure (Regulation of Registries, Archives and Functions of Director General (Courts) and Other Court Executive Officers) Regulations
- Subsidiary Legislation 9.11: Court Practice and Procedure and Good Order (Criminal Code) Rules of Court
- S.L9.14: Financial Penalties (Execution in the EU) Regulation
- Subsidiary Legislation 9.15: Confiscation Orders Execution in the European Union) Regulations
- Subsidiary Legislation 9.17: Custodial Sentences or Measures Involving Deprivation of Liberty Orders (Execution in the European Union) Regulations
- Subsidiary Legislation 9.18: Joint Investigation Teams (EU Member States) Regulations

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- Subsidiary Legislation 9.19: Decisions on Supervision Measures (Execution in the European Union) Regulations
- Subsidiary Legislation 9.20: Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings Regulations
- Subsidiary Legislation 9.21: European Protection Order (Execution) Regulations
- Subsidiary Legislation 9.22: Method of Service of Judicial Acts Regulations
- Subsidiary Legislation 9.24: Interview of Suspects and Accused Persons (Procedure) Regulations
- Subsidiary legislation 9.25: European Investigation Order Regulations
- Subsidiary Legislation 9.26: Service Of Summons Of Jurors Regulations
- Subsidiary Legislation 9.27: Mutual Recognition Of Freezing Orders And Confiscation Orders Regulations
- Subsidiary Legislation 9.28: Exchange Of Information And Reporting Of Crime Concerning Fraud And Counterfeiting Of Non-Cash Means Of Payment Regulations
- Subsidiary Legislation 9.29: Facilitating The Use Of Financial And Other Information For The Prevention, Detection, Investigation Or Prosecution Of Certain Criminal Offences Regulations

b. Specific Decrees

- 19** For the following specific decrees consult the Codes of practice and see the Police Act:

PART III Investigations

Title I Codes of Practice and Interviews

38.(1) The Minister may by regulations issue codes of practice in connection with –

(a) the exercise by police officers of statutory powers –

(i) to search a person without first arresting him;

(ii) to search a vehicle without making an arrest;

(b) the detention, treatment, questioning and identification of persons by police officers;

(c) searches of premises by police officers; and

(d) the seizure of property found by police officers on persons or premises.

(2) The Code of Practice for the Interrogation of Arrested Persons in the Third Schedule shall be deemed to be a Code of Practice issued by the Minister under the provisions of this Article and may at any time be amended, repealed or substituted accordingly.

(3) A police officer who fails to comply with any provision of a code of practice issued under this Article shall be liable to disciplinary proceedings for an offence against discipline.

(4) A failure on the part of a police officer to comply with any provision of such a code shall not of itself render him liable to any criminal or civil proceedings.

(5) In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

c) Urgent Measures in Accordance with National Law Necessary to Ensure Effective Investigations

The urgent measures in accordance with national law, which are necessary to ensure effective investigation encompass classic measures to secure evidence. Provisions in relation to the gathering potential evidence for a fraud offence quickly are e.g.:

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Limitation as to search, etc.

353. Except in urgent cases and when a person is apprehended in flagrante delicto nothing in this Title authorises the search of person by a police officer of the opposite sex, or that a search be conducted by a police officer not in uniform unless clearly identified by the production of a police identity card.

Procedure for warrants.

355AH. (1) Whenever according to law the carrying out of an act by the police requires the issue of a warrant by a Magistrate a police officer may apply in person to a Magistrate requesting the issue of the appropriate warrant stating the grounds for the request and giving the Magistrate all such information that will enable the Magistrate to decide on the request. Before deciding whether to issue the warrant the Magistrate may require the police officer to confirm on oath the information supplied by him and the warrant shall only be issued upon the Magistrate being satisfied that sufficient grounds for the issue of the warrant exist.

(2) In cases of urgency, the request for the issue of the warrant and the warrant may be communicated even by facsimile: Provided that, as soon as practicable, the original warrant shall be delivered for record purposes.

(3) Any warrant issued by a Magistrate shall be issued in favour of the Commissioner of Police and may be executed by any police officer.

(4) Whenever a police officer requests the issue of a warrant of arrest or search from a Magistrate in accordance with the provisions of this Code and the Magistrate refuses to issue the warrant the Police may request the issue of the same warrant from a Judge who ordinarily sits in the Criminal Court.

The right of access to a lawyer in criminal proceedings

355AUA

[...]

(8) The right of access to a lawyer shall entail the following:

(a) the suspect or the accused person, if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

(b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;

(c) the suspect or the accused person shall have the right for his lawyer to be present and participate effectively when questioned. Such participation may be regulated in accordance with procedures which the Minister responsible for Justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using where possible in the opinion of the interviewer audiovisual means in terms of paragraph(d): Provided that the right of the lawyer to participate effectively shall not be interpreted as including a right of the lawyer to hinder the questioning or to suggest replies or other reactions to the questioning and any questions or other remarks by the lawyer shall, except in exceptional circumstances, be made after the Executive Police or other investigating or judicial authority shall have declared that it has no further questions;

(d) questioning, all answers given thereto and all the proceedings related to the questioning of the suspect or accused person, shall where possible in the opinion of the interviewer be recorded by audio-visual means and in such case a copy of the recording shall be handed over to the suspect or the accused person following the conclusion of the questioning. Any such recording shall be admissible in evidence, unless the suspect or the accused person alleges and proves that the recording is not the original recording and that it has been tampered with. No transcription need be made of the recording when used in proceedings before any court of justice of criminal jurisdiction, nor need the suspect or the accused person sign any written statement made following the conclusion of the questioning once all the questions and answers, if any, are recorded on audiovisual means;

(e) the suspect or the accused person shall have the right for his lawyer to attend the following investigative or evidence-gathering acts if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of an offence

[...]

(12) In exceptional circumstances and only at the pre-trial stage, a temporary derogation from the application of the rights provided for in sub-article (8) may be made to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Urgent cases

364. Where the urgency of the case does not admit of any delay, the person may be summoned to appear forthwith or at a given time during the same day. If the person fails to appear, he may, upon a warrant of the court, be arrested and brought before it.

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5. Art. 29 Lifting Privileges or Immunities

5. Art. 29 Lifting Privileges or Immunities	160	cc. Provisions on the lifting of immunities?	163
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1. Where the investigations of the EPPO involve persons protected by a privilege or immunity **under national law**, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting **in accordance with the procedures laid down by that national law**.

2. Where the investigations of the EPPO involve persons protected by privileges or immunities under the Union law, in particular the Protocol on the privileges and immunities of the European Union, and such privilege or immunity presents an obstacle to a specific investigation being conducted, the European Chief Prosecutor shall make a reasoned written request for its lifting in accordance with the procedures laid down by Union law.

a) Immunity Provisions

aa. Parliamentary Privilege and/or Immunity

- 1 First of all, it should be remembered that Members of Parliament have absolute freedom of speech in the House of Representatives for its members. This situation in Malta is comparable to most of the other EU countries. This constitutional mechanism keeps the instruments of **checks and balances** in place. Although, it might be unjust for the private individual, it also guarantees a **level of transparency**. The *telos* and *ratio legis* are to ensure that they also enjoy freedom from arrest for any civil debt.
- 2 Still this freedom is limited in exceptional cases. The Parliament has the following competences and rules in this regard¹²⁸:

¹²⁸ See <https://www.parlament.mt/en/menues/about-parliament/how-parliament-works/parliament-procedures/>. Accessed 31 July 2024.

bb. National Legislation**PART 2 and Procedure of Parliament to make laws.****3**

(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.

(2) Without prejudice to the generality of sub-article (1) and subject to the provisions of sub-articles (3), (4) and (5) of this Article, *Parliament may by law determine the privileges, immunities and powers of the House of Representatives and the members thereof.*

(3) No civil or criminal proceedings may be instituted against any member of the House of Representatives for words spoken before, or written in a report to, the House or a committee thereto for by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise.

(4) For the duration of any session members of the House of Representatives shall enjoy freedom from arrest for any civil debt except a debt the contraction of which constitutes a criminal offence.

(5) No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of the House of Representatives while the House is sitting or through the Speaker, the Clerk or any officer of the House.

Another Ordinance must be consulted to receive the rules in details. They are enshrined in the House of Representatives (Privileges and Powers) Ordinance (Cap. 113). The provisions contain the information that Actions, words said in the House are privileged. This is also conferred to the committees.

4**3. [House of representatives (Privileges and Powers) Ordinance (Cap. 113)]****5**

(1) For the duration of the session members of the House shall enjoy freedom from arrest for civil debt provided this be not fraudulent or otherwise in contravention of the Criminal Code.

(2) The privileges established by this Ordinance shall be in addition to and not in derogation of any other privilege established under the provisions of any other law now in force.

12. No person shall be liable in damages or otherwise howsoever for any act done under the authority of the House and within its legal power or under or by virtue of any warrant issued under such authority.

15. The powers and the privileges herein conferred on the House and on the Speaker of the House are conferred equally on the Committees of the House, whether they be Committees of the whole House or Select Committees, and on the Chairman thereof.

[SUBSIDIARY LEGISLATION CONST.02STANDING ORDERS OF THE HOUSE OF REPRESENTATIVES ORDER 16th March, 1962]

120D. (1) The Standing Committee on Privileges shall have power to consider cases referred to it by the Speaker or by the House and to take such decisions and to make such recommendations as provided in these standing orders and in the House of Representatives (Privileges and Powers) Ordinance or in any law from time to time substituting the said Ordinance.

(2) The standing committee shall be constituted of the Leader of the House, two members nominated by the Prime Minister and two members nominated by the Leader of the Opposition.

(3) The provisions of paragraphs (3), (4), and (5) of standing order 120C shall *mutatis mutandis* apply to the Standing Committee on Privileges.

(4) The Standing Committee on Privileges shall, without prejudice to the provisions of standing order 164, have power and authority to summon witnesses and order the production of documents before it. The Standing Committee on Privileges may request the attendance of the Attorney General or of his representative, who may also be authorised to participate in the proceedings, but he shall in no case have a vote thereat.

Article 161. The House of Representatives and the members there of *shall enjoy all the privileges, immunities and powers defined in the House of Representatives (Privileges and Powers) Ordinance.*

- 6** Chapter 9 of the Laws of Malta may be cited as it contains certain rules that apply in this area. Sections 118, 120, 208 and 604 of the area of relevance to determine the scope of the protection.¹²⁹
- 7** The provision by the Constitution shall not be confused with:
- Chapter 191 Diplomatic Immunities and Privileges Act to make provision for certain immunities and privileges of diplomatic and consular representatives, international organizations and representatives thereof and certain other persons and for purposes incidental to or connected with the matters aforesaid. 14th January, 1966.
 - Subsidiary Legislation 191.05 Application Of Part III of the Diplomatic Immunities and Privileges Act (European Court Of Human Rights) Order. 26th February, 2013.

¹²⁹ See <https://www.parlament.mt/en/menues/about-parliament/how-parliament-works/parliament-procedures/>. Accessed 31 July 2024.

cc. Provisions on the lifting of immunities?**4. [House of Representatives (Privileges and Powers) Ordinance (Cap. 113)]****8**

(1) The House shall have power to order the attendance of witnesses and experts before it to give evidence or an opinion on any matter relating to or connected with the Government of Malta, or on any matter regarding which the House considers it in the public interest to have information. Cap. 12.

(2) Articles 566, 588, 589, 590(1) and 590(2) (so far as it refers to the discovery of naval, military and air force matters) of the Code of Organization and Civil Procedure shall apply to witnesses or experts giving evidence or an opinion before the House. Cap. 12.

(3) The House may administer an oath or an affirmation where an affirmation would be admitted in a court of justice as provided in Article 111 of the Code of Organization and Civil Procedure to all persons examined before it as aforesaid

(4) Any such oath or affirmation shall be administered by the Clerk of the House

b) Immunities and Privileges under union law, para 2

Cf. → Article 29 EPPO Regulation and the subsequent analysis. Union law differs from national law and is not researched here in-depth. **Union law contains a protocol**, which will apply if the immunity or a privilege of a Union official needs to be lifted. It is enshrined in the consolidated version of the Treaty on the Functioning of the European Union **Protocol (No 7) on the privileges and immunities of the European Union** (OJ C 326, 26.10.2012, p. 266–272)¹³⁰.

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¹³⁰ Cf. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012E/PRO/07>. Accessed 31 July 2024.

IV. National Law Applicable in EPPO Investigation with Special Focus on Investigation Measures

SECTION 2

Rules on investigation measures and other measures

1. Article 30 Investigation Measures and Other Measures

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(b) National Provision in Relation to Article 15(1) s. 2 of This Directive	176	d) Para 3: Conditions/Thresholds for Investigation Measures	184
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1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures:

(a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;

(b) obtain the production of any relevant object or document either in its original form or in some other specified form;

(c) obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council;

(d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.

(e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;

(f) track and trace an object by technical means, including controlled deliveries of goods.

2. Without prejudice to Article 29, the investigation measures set out in paragraph 1 of this Article may be subject to conditions in accordance with the applicable national law if the national law contains specific restrictions that apply with regard to certain categories of persons or professionals who are legally bound by an obligation of confidentiality.

3. The investigation measures set out in points(c), (e) and (f) of paragraph 1 of this Article may be subject to further conditions, including limitations, provided for in the applicable national law. In particular, Member States may limit the application of points (e) and (f) of paragraph 1 of this Article to specific serious offences. A Member State intending to make use of such limitation shall notify the EPPO of the relevant list of specific serious offences in accordance with Article 117.

4. The European Delegated Prosecutors shall be entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases, in addition to the measures referred to in paragraph 1.

5. The European Delegated Prosecutors may only order the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for taking the measures shall be governed by the applicable national law.

Article 30 EPPO Regulation contains many possibilities to discover EU frauds and includes intrusive and effective means of investigative tools¹³¹. Conducting the investigations, it is important to closely obey the law and follow the details. The following provisions from the Criminal Procedure Rules in Chapter 9, Laws of Malta, Book 2 is not “law in the books” but the fundamental requisite to combat EU frauds *in praxi*.

1

a) Member States Shall Ensure That the European Delegated Prosecutors Are Entitled to Order or Request

a. Adaption Law of the Member State

Nota bene: The authorisation of an EDP (the “handling” EDP in one of the MS) to order or request could/should or must be enshrined in the new adaption laws which the Member States enacted to be fully operational for the EPPO and its tasks. As most of the Member States either amended their Criminal Procedure Code or their Code of the Organization of the Judiciary and/or the Prosecutors Act, the relevant provision(s) is (are) presented in the following.



In this regard Article 629 Laws of Malta, Chapter 9, Book II applies:

2

Article 629 The European Delegated Prosecutors may order the following investigative measures:

(a) request the assistance of the police to search any premises, land, means of transport, private home, clothes and any other personal property or computer system and to take measures necessary to preserve the integrity or to avoid the loss or contamination of evidence;

(b) request the assistance of the Police to obtain the production of any relevant object or document either in its original form or in some other specified form;

Cap. 586.

(d) request the courts to issue monitoring orders, investigation orders, attachment orders and freezing orders where there is reason to believe that the owner, possessor or controller of the proceeds will seek to frustrate the judgment ordering confiscation;

(e) request the competent authority to intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using relative to the offences established in Articles 190C, 190E and 190G; and

(f) request the Police to track and trace an object by technical means including the conduct of a controlled delivery relative to offences established in Articles 190C, 190E and 190G.

¹³¹ See Filletti 2023, pp. 137–159 on Maltese investigation powers, e.g. of the police.

- 3 The national law provisions mentioned within or by Article 628 will be reproduced and analysed below on the following pages of this compendium on Maltese EU fraud investigations:

b. Provision in the CPC (Chapter 9, Book 2 Laws of Malta)

- 4 **General 346–350**
Sub-title I Power to Stop and Search 351–354
Sub-title II Road Checks 355–355D
Sub-title III Powers of Entry, Search and Seizure under Warrant 355E–355J
Sub-title IV Powers of Entry and Search without Warrant 355K–355O
Sub-title V Seizure and Retention 355P–355U
Sub-title VI Powers of Arrest and Detention 355V–355AF
Sub-title VII Warrants 355AG–355AK → see below, Article 33 EPPO Regulation.
Sub-title VIII Detention 355AL–355AR → see below, Article 33 EPPO Regulation.
Sub-title IX Right to Legal Assistance and other Rights during Detention 355AS–355AUK
Sub-title X Taking of Samples, Fingerprinting and other Investigative Procedures 355AV–BD
Sub-title XI Powers and Duties of the Police in respect of Court Proceedings 356–366

b) Investigation Measures of the EPPO in Malta

aa. Para 1(a)

(1) Search Measures

- 5 The Maltese Criminal Procedure Rules, enshrined in Chapter 9 Laws of Malta, Book 2 distinguishes between searches *with* warrant and *without* warrant (see → Article 355K. et seq.). If speaking from the procedural point-of-view, it should be added that the issuance of a warrant is based on the notion of reasonable suspicion. This particular warrant is issued by the duty magistrate. It is issued at his/her discretion. The following pages list the relevant applicable Maltese legislation in a coherent matter:

(a) Search Any Premises or Land

- 6 **Chapter 9 Laws of Malta Book 2**
351. (1) A police officer may, in a public place, or in any place to which the public is admitted, even against payment of an entrance fee, search any person or vehicle, if he has a reasonable suspicion that the search will discover the possession of things, which are prohibited, stolen or acquired as the result of any offence whatsoever, or which may be used or may have been used in the commission of an offence or which may serve in the investigation of an offence.

(2) For the purposes of sub-article (1), the Police may stop a person or a vehicle until the search is performed and shall seize anything discovered during the search and the possession of which is prohibited or which may be connected with an offence.

(3) Pursuant to and for the purposes of the Convention of the 19th June, 1990 implementing the Schengen Agreement of the 14th June, 1985 an offence under this Article shall be deemed to be an offence even when committed outside Malta.

352. Where the search to be performed is required in an unattended vehicle and it is not possible to obtain the attendance of its registered owner, then a police officer may only carry out the search if he has a warrant from a superior officer not below the rank of an inspector.

354. Anything seized as a result of a search under the preceding Articles of this title shall be preserved and the Police carrying out the search shall draw up a report stating all the particulars of the search and including a detailed list of the things so seized.

355E. [Powers of entry, search and seizure under warrant] (1) Saving the cases where the law provides otherwise, no police officer shall, without a warrant from a Magistrate, enter any premises, house, building or enclosure for the purpose of effecting any search therein or arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence unless –

(a) the offence is a crime and there is imminent danger that the said person may escape or that the corpus delicti or the means of proving the offence will be suppressed; or

(b) the person is detected in the very act of committing a crime; or

(c) the intervention of the Police is necessary in order to prevent the commission of a crime; or

(d) the entry is necessary for the execution of any warrant or order issued by any other competent authority in the cases prescribed by law; or

(e) the arrest is for the purpose of apprehending a person who is unlawfully at large after escaping from lawful arrest or detention; or

(f) the entry is necessary for purposes of: (i) executing the arrest, or ascertaining the whereabouts, of a person in respect of whom an alert has been entered in the Schengen Information System and there is an imminent danger that the said person may escape; or (ii) discovering any property in respect of which an alert has been entered in the Schengen Information System and there is an imminent danger that the property may be concealed, lost, damaged, altered or destroyed; or

(g) the entry is necessary for the protection of any person.

(2) The expression “enclosure” does not include any plot of land enclosed by rubble walls.



(3) A warrant may also be issued by a Magistrate as mentioned in sub-article (1) for the purpose of:

- (a) effecting the arrest or ascertaining the whereabouts of a person in respect of whom an alert has been entered in the Schengen Information System; or
- (b) discovering and seizing any property in respect of which an alert has been entered in the Schengen Information System.

355F. In cases where a police officer is empowered to enter into any of the places mentioned in the last preceding Article, it shall be lawful for such officer to open or break any door or window, if, after giving notice of his office and object, he cannot otherwise obtain entry.

- 7 The whole search can only be carried out if the measure itself respects the requisites of Article 350G., which requests a search warrant and excludes legal privilege documents (see → Article 30 para 2 EPPO Regulation below).
- 8 Searches without warrant are restricted to situations that require imminent action and no further waiting. Searches are de facto used in **special and exceptional circumstances**. From the procedural point-of-view, it is once again important to note that Article 355N of Chapter 9 states that a report needs to be drawn up when such method is used.

9 **POWERS OF ENTRY AND SEARCH WITHOUT WARRANT**

Cases admitting no delay.

355K. Any police officer may enter and search without a warrant any premises, house, building or enclosure in the circumstances laid down in Article 355E(1)(a) to (e).

355L. (1) The Police have the power to enter and search any premises, house, building or enclosure used, occupied or controlled, even temporarily, by a person who is under arrest, if they have reasonable grounds for suspecting that there is evidence, other than items subject to legal privilege, that relates to the offence or a connected offence, and such search shall be limited to the extent that is reasonably necessary for discovering such evidence: Provided that if offences other than the offence or offences for which the person was arrested are discovered in the course of the search then the search may extend to the extent required for the purposes of such other offences.

(2) Without prejudice to the provisions of Sub-title V, the Police may in the course of a search carried out in pursuance of the provisions of sub-article (1) seize and retain anything not subject to legal privilege and which constitutes relevant evidence for the purpose of any offence mentioned in the same sub-article.

(b) Search Any Means of Transport

It is possible to base the search of any means of transport on Articles 355–355D (Road Checks), which must be read in connection with Articles 351 till 354. **10**

(c) Search Any Private Home

A private home can be searched if the requisites of Article 351–354 of Chapter 9 are respected. **11**

(d) Search Any Clothes and Any Other Personal Property

Last but not least, Articles 351–354 Chapter 9 allow as well to search any clothes and any other personal property as the EPPO Regulation asks for.¹³² **12**

(e) Search Any Private Home

355P. The Police, when lawfully on any premises, may seize anything which is on the premises if they have reasonable grounds for believing that it has been 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. **13**
Computer data. Added by: III.2002.74.

355Q. The Police may, in addition to the power of seizing computer machine, require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which it is visible and legible.

(2) Conservatory Measures: Necessary to Preserve Their Integrity / Necessary to Avoid the Loss / Necessary to Avoid the Contamination of Evidence

Conservatory measures are particularly important in cases of financial fraud, corruption, or other crimes affecting the EU's financial interests, as these crimes often involve complex data, documents, digital evidence, and assets that could easily be hidden or altered. Suspects in fraud investigations may attempt to destroy or hide key evidence, especially in financial crimes where transactions or records can be altered. In this area, the research can only refer to the verbatim “transposition” of the EPPO text to Chapter 9 Laws of Malta, Book 2, Rules on Criminal Procedure: **14**

628E. The European Delegated Prosecutors may order the following investigative measures: (b) *request the assistance of the Police to obtain the production of any relevant object or document either in its original form or in some other specified form;* **15**

¹³² See Sammut, Melanie The power of strip search by the executive police: a critical analysis through past and recent case law, 2016, Uof Malta, Dissertation.

Cap. 586.

(c) request the assistance of the Police to obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data in compliance with the Data Protection Act.

See 440 para 2: “(2) The registrar shall take the necessary precautions for the preservation of all the documents, exhibits, and record in the state in which they are at the moment in which they are filed.”

- 16** The national laws, which might apply in this regard are the Customs Ordinance, the Tax Act, the VAT Act and the Chapter 621, Proceeds of Crime as well as the rules on Money Laundering (see above → Sources of Law).

bb. Obtainment of the Production of Any Relevant Object or Document, Either in Its Original Form or in Some Other Specified Form

17 Sub-title V SEIZURE AND RETENTION

General rules of seizure. Added by: III.2002.74. Amended by: L.N. 274 of 2007.

355P. The Police, when lawfully on any premises, may seize anything which is on the premises if they have reasonable grounds for believing that it has been 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.

355R. [Receipt for seized thing] The Police shall always issue to the person on the premises or in control of the thing seized a receipt for anything seized and on request by any such person, the Police shall, against payment and within a reasonable time, supply to him photographs, or a film, video recording or electronic image or copies of the thing seized, unless the investigating officer has reasonable grounds for believing that this would be prejudicial to the investigation or to any criminal proceedings that may be instituted as a result thereof.

355U. Unless a thing is liable to forfeiture, nothing shall be retained if a photograph, film, video recording or electronic image or a copy of the thing would be sufficient: Provided that before releasing the thing the Police may, where they deem so necessary, apply to a Magistrate for a reports to be drawn up and the provisions of Title II of Part II of Second book (Cap. 9) of this Code shall apply.

c. Para 1(c): Obtainment of the Production

(1) Obtainment of the Production of Stored Computer Data, Encrypted or Decrypted

(a) General Provisions in the Criminal Code (Book 2)

355Q. The Police may, in addition to the power of seizing a computer machine, require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which it is visible and legible.

628E. The European Delegated Prosecutors may order the following investigative measures:

(a) request the assistance of the Police to search any premises, land, means of transport, private home, clothes and any other personal property or computer system and to take measures necessary to preserve the integrity or to avoid the loss or contamination of evidence;

(b) request the assistance of the Police to obtain the production of any relevant object or document either in its original form or in some other specified form;

(c) request the assistance of the Police to obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data in compliance with the Data Protection Act;

(d) request the courts to issue monitoring orders, investigation orders, attachment orders and freezing orders where there is reason to believe that the owner, possessor or controller of the proceeds will seek to frustrate the judgment ordering confiscation;

(e) request the competent authority to intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using relative to the offences established in Articles 190C, 190E and 190G; and

(f) request the Police to track and trace an object by technical means including the conduct of a controlled delivery relative to offences established in Articles 190C, 190E and 190G.

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(c) Special Provisions in the Customs Ordinance

19 Customs Ordinance

PART XII POWERS AND PROCEDURE

Access to systems and records 65. (1) Every economic operator shall give access to his computer systems and all his records to the Commissioner so that a systems-based audit can be carried out as and when requested by the Commissioner.

(2) For the purposes of sub-article (1), the Commissioner may delegate to any person any right, duty, power and other function vested in him, conferred to him or imposed upon him by this Ordinance as the Minister may direct in writing: Provided that the Commissioner may not delegate those rights, duties, powers and other functions vested in him to any person, if that person is not considered by the Commissioner as a fit and proper person to exercise those rights, duties, powers and other functions.

(3) Every person having been so delegated together with all his employees, shall be bound by the duty of secrecy and confidentiality of public officers as provided in the relevant laws, and the person and all his employees shall also be subject to the rules of protection of data according to the relevant laws.

(4) For the purposes of this Article, the term “system-based audit “means” an audit procedure including auditing of electronic systems, designed to obtain audit evidence as to whether key controls are operating continuously, consistently and effectively as planned in preventing, or detecting and correcting, material mis-statements or instances of non-compliance throughout the period being audited. This audit is also conducted through different types of tests of controls, such as documentation review, enquiry and confirmation, inspection, observation, recalculation and re-performance”.

(2) Obtainment of Banking Account Data and Traffic Data

20 Criminal Code

Book 2, Laws of Criminal Procedure

Issuing of monitoring order of banking operations

435AA. (1) Where the Attorney General has reasonable cause to suspect that a person is guilty of a relevant offence (hereinafter referred to as “the suspect”) he may apply to the Criminal Court for an order (hereinafter referred to as a “monitoring order”) requiring a bank to monitor for a specified period the transactions or banking operations being carried out through one or more accounts in the name of the suspect, or through one or more accounts suspected to have been used in the commission of the offence or which could provide information about the offence or the circumstances thereof, whether before, during or after the commission of the offence, including any such accounts in the name of legal persons. The bank shall, on the demand of the Attorney General, communicate to the person or authority indicated by the Attorney General the information resulting from the monitoring.

(2) Where a monitoring order has been made or applied for, whosoever, knowing or suspecting that the monitoring is taking place or has been applied for, discloses that such monitoring is taking place or has been applied for or makes any other disclosures likely to prejudice the monitoring operation shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding twelve thousand euro (€12,000) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment: Provided that in proceedings for an offence under this sub-article, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the monitoring operation.

(3) For the purposes of this Article, “relevant offence” means an offence, not being one of an involuntary nature, consisting of any act or omission which if committed in these islands, or in corresponding circumstances, would constitute an offence liable to the punishment of imprisonment or of detention for a term of more than one year.

See above for → **Article 628E Criminal Code** which is also applicable here.

Customs Ordinance

Power of Commissioner to demand information

70C. (1) For the purposes of investigation related to crimes of contraband, fraud, evasion of tax or duty, money laundering or financing of terrorism, in order to fulfil his obligations under customs laws, the Commissioner may, without prejudice to any obligation of professional secrecy imposed by an explicit provision of the law, demand and collect details of transactions that have taken place, are taking place or which still have to take place, both if involving the person or entity to which the demand is made and if the said transactions are between third parties, from any person or entity, and every said person or entity shall give to the Commissioner the requested details within the time frame established by him. The said obtained details may be used by the Commissioner as evidence in proceedings before any court.

(2) When the Commissioner suspects that the details of transactions collected could amount to proof of the crimes of money laundering or financing of terrorism, the Commissioner shall pass on the said details to the Financial Intelligence Analysis Unit.

(3) Exception of Data Specifically Retained in Accordance with National Law (Pursuant to the Second Sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council)

(a) Transposition of This Directive

The directive was transposed with the Data Protection Act L.N. 109 of 2005, which is regulated in Chapter 440 of the laws of Malta. It was amended with the Processing of

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Personal Data (Electronic Communications Sector) (Amendment) Regulations in 2005.¹³³

Nota bene: Chapter 440 has been repealed and replaced by Chapter 586. The name of the Act remains the same.

(b) National Provision in Relation to Article 15(1) s. 2 of This Directive

22 Data Protection Act – Chapter 586

PART II

Applicability

4.(1) Subject to the provisions of sub-article (2), the provisions of this Act shall apply to the processing of personal data, wholly or partly, by automated means and to such processing other than by automated means where such personal data forms part of a filing system or is intended to form part of a filing system:

Provided that this Act shall not apply to the processing of personal data:

- (a) In the course of an activity which falls outside the scope of Union law;
- (b) by the Government of Malta when carrying out activities which fall within the scope of Chapter 2 of Title V of the Treaty on European Union;
- (c) by a natural person in the course of a purely personal or household activity; or
- (d) *by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security:*

Provided further that the Minister may by regulations, after consultation with the Commissioner and with the concurrence of the Minister responsible for the Police, make provisions on the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

[...]

d. Para 1(d): Freezing Instrumentalities or Proceeds of Crime, Including Assets

- 23** In the area of freezing instrumentalities or proceeds of crime, including assets Malta brought its **Asset Recovery Bureau (ARB)** and the **FIAU Malta** at the forefront to act against economic crime scenarios. The relevant legislation in this area stems from Chapter 337 Prevention of Money Laundering Act as well as the Chapter 621, the Proceeds

¹³³ See Official publication: The Malta government gazette; Number: 17753; Publication date: 2005-04-12; pp. 01585–01586.

of Crime Act¹³⁴. And the criminal procedure Articles in Book 2 of Chapter 9 of the laws of Malta contain the rules on freezing orders:

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435C. (1) Where the Attorney General receives a request made by a judicial, prosecuting or administrative authority of any place outside Malta or by an international court for the temporary seizure of all or any of the moneys or property, movable or immovable, of a person (hereinafter in this Article referred to as “the accused”) charged or accused in proceedings before the courts of that place or before the international court of a relevant offence, the Attorney General may apply to the Criminal Court for an order (hereinafter in this title referred to as a “freezing order”) having the same effect as an order as is referred to in Article 22A(1) of the Ordinance, and the provision of the said Article 22A shall, subject to the provisions of sub-article (2), apply mutatis mutandis to that order.

(2) The provisions of Article 24C(2) to (5) of the Ordinance shall apply to an order made under this Article as if it were an order made under the said Article 24C.

(3) Article 22B of the Ordinance shall also apply to any person who acts in contravention of a freezing order under this Article.

435D. (1) A confiscation order made by a court outside Malta providing or purporting to provide for the confiscation or forfeiture of any property of or in the possession or under the control of any person described in the order shall be enforceable in Malta in accordance with the provisions of Article 24D (2) to (11) of the Ordinance.

(2) For the purposes of this Article “confiscation order” includes any judgement, decision, declaration, or other order made by a court whether of criminal or civil jurisdiction providing or purporting to provide for the confiscation or forfeiture of property as is described in sub-article (1).

(3) For the purposes of this Article and of Articles 435B and 435C: “the Act” and “the Ordinances” shall have the same meaning assigned to them respectively by Article 23A(1); “relevant offence” means an offence consisting of any act or omission which if committed in these Islands, or in corresponding circumstances, would constitute an offence, other than a crime under the Ordinances or under the Act, liable to the punishment of imprisonment or of detention for a term of more than one year.

CHAPTER 337 Prevention of Money Laundering Act.

10. (1) Where the Attorney General receives a request made by a judicial or prosecuting authority of any place outside Malta for the temporary seizure of all or any of the moneys or property, movable or immovable, of a person (hereinafter in this Article referred to

¹³⁴ See Farrugia, Yvonne, A holistic analysis of the provisions of freezing and confiscation orders and the effectiveness of interim remedies available to the parties in the case, Malta University, Dissertation, 2018 and see Filletti 2023, pp. 205–212.

as “the accused”) charged or accused in proceedings before the courts of that place of an offence consisting in an act or an omission which if committed in these Islands, or in corresponding circumstances, would constitute an offence under Article 3, the Attorney General may apply to the Criminal Court for an order (hereinafter referred to as a “freezing order”) having the same effect as an order as is referred to in Article 22A(1) of the Dangerous Drugs Ordinance, and the provisions of the said Article 22A shall, subject to the provisions of sub-article (2) of this Article, apply mutatis mutandis to that order. Cap. 101.

(2) The provisions of Article 24C(2) to (5) of the Dangerous Drugs Ordinance shall apply to an order made under this Article as if it were an order made under the said Article 24C. Cap. 101.

(3) Article 22B of the Dangerous Drugs Ordinance shall also apply to any person who acts in contravention of a freezing order under this Article

CHAPTER 621 PROCEEDS OF CRIME ACT

AN ACT to provide for the identification, tracing, freezing and confiscation of proceeds of crime including laundered property, income and other benefits derived from such proceeds held by criminal defendants, property that is the proceeds of, or used in, or intended or allocated for use in the financing of terrorism, terrorist acts or terrorist organisations, for the setting up of the Asset Recovery Bureau as a body, independent of the Government, for the said purpose, for non-conviction based confiscation of proceeds of crime and other matters consequential or ancillary thereto. 12th March, 2021

3. [Proceeds of crime, facilitating property, and property subject to confiscation.]

(1) “Proceeds of crime” means any economic advantage or other benefit derived directly or indirectly from a relevant offence, including but not limited to any property or interest in property that would not have been obtained or retained but for the commission of the offence.

(2) Proceeds of crime may consist of any kind of property of any description and of whatsoever nature, whether movable or immovable, corporeal or incorporeal irrespective of whether such property is situated in Malta or otherwise and irrespective of by whom such property is held, and includes any subsequent reinvestment or transformation of proceeds.

(3) Proceeds of crime means the gross proceeds of a relevant offence without credit or deduction for any costs incurred in committing the offence or taxes paid or owing.

(4) “Facilitating property” means any property used or intended to be used to commit or to facilitate the commission of a relevant offence, such as by making the offence less difficult to commit or more or less free from obstruction or hindrance.

(5) “Property involved in money laundering” includes any proceeds of crime that are the subject of the money laundering transaction, any property commingled with the proceeds of crime at the time the money laundering transaction occurs, any property in which the proceeds or crime are invested or for which they are exchanged in the course of the money laundering offence, and any property used to facilitate the money laundering offence.

(6) “Property subject to confiscation” includes the proceeds of crime, facilitating property, and all property involved in a money laundering offence. Relevant offence.

4.A [Relevant offence] “relevant offence” is any offence under any law, and not being an offence of an involuntary nature, liable to the punishment of imprisonment or detention for a maximum term of at least one (1) year unless otherwise provided for in another Part of this Act.

An **important differentiation** shall be recalled once more within this section. The EPPO Regulation regulates requisites for prosecutors, which are granted powers from the respective member states, which is part of the enhanced cooperation. As the Regulation speaks only of the prosecutor, which according to Article 13 and Article 5 EPPO Regulation has equal powers as the national prosecutor, the interpretation of the EPPO Regulation makes it clear that no other national bodies, institutions etc. are addressed by its wording or e.g. granted powers. Thus, the Maltese Asset Recovery Bureau, which is de facto no prosecutor, is just **an aide to the prosecution**. Its main tasks, functionality, components, staff and administration can be retrieved from the wording of the legal text:

25

II The Asset Recovery Bureau

6. [Establishment of the Asset Recovery Bureau.]

(1) There shall be established a body, independent of the Government, to be known as the Asset Recovery Bureau.

(2) Subject to the provisions of this Act and of any other law, it shall be the function of the Bureau to trace and identify proceeds of crime and any other property subject to confiscation, and to take action for their confiscation as well as their proper administration and disposal, and to assist other law enforcement and regulatory authorities in the fight against crime.

(3) The Bureau shall be a body having a distinct legal personality from that of the Government and shall be capable subject to the provisions of this Act to enter into contracts, to hold and dispose of property of any kind for the purpose of its functions, to sue and be sued and to enter into all such other transactions as are incidental or conducive for the proper performance of its functions.

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(4) In the exercise of its functions under this Act, the Bureau shall not be subject to any direction or control by any person, authority or body.

(5) The Bureau shall consist of a Board and of a Directorate.

(6) The legal and judicial representation of the Bureau shall vest in the Chairperson: Provided that the Board of the Bureau may appoint the Director or any one or more of the members of the Directorate staff to appear in the name and on behalf of the Bureau in any judicial proceedings and in any act, deed, contract or instrument or other document whatsoever.

(7) Any document purporting to be an instrument made or issued by the Bureau and signed by the Chairperson on behalf of the Bureau shall be received in evidence, and shall unless the contrary is proved, be deemed to be an instrument made or issued by the Bureau

17. [Prosecution informs the office] When a person is charged before a Court of Criminal Jurisdiction in Malta, with a relevant offence:

(a) that has an economic, financial, monetary and/or pecuniary dimension;

(b) where proceeds of crime allegedly subsist; or

(c) which is inextricably linked to that provided in paragraph (b), it shall be the duty of the prosecuting officer to inform the Bureau, as soon as practicable and in any case not later than the lapse of one (1) week of such person being charged, and to keep the Bureau informed of the progress of the procedures against such person, in particular of any conviction or acquittal and of any appeal and the result thereof.

18. [Prosecution to liaise with Bureau for the issue of orders under this Act.]

It shall be the duty of the prosecuting officer in any case where a person has been charged with a relevant offence, as notified to the Bureau in accordance with Article 17, to give to the Bureau all necessary information that may be required to determine whether that person has benefited from proceeds of crime, and to determine whether any measure needs to be taken under this Act with regard to that person or his property.

19. [Administration and disposal of forfeited property, and of property confiscated in favour of the Government.]

(1) Where any property has by a final judgement of a court been forfeited or confiscated in favour of the Government, it shall be incumbent on the Registrar of such court to inform the Bureau of such forfeiture or confiscation and to transmit to the Bureau a copy of the judgement, ordering the forfeiture or confiscation or in virtue of which the forfeiture or confiscation has taken place.

(2) The said Registrar shall moreover hand over to the Bureau any property so forfeited or confiscated and, or any title to such property that may be in the possession of the court.

- (3) Without prejudice to the provisions of any other law providing for forfeiture as a consequence of a conviction for a criminal offence, the confiscation in favour of the Government of all property subject to confiscation pertaining to a person found guilty of a relevant offence is a civil consequence of any such conviction, and does not need to be pronounced in the judgement finding his guilt. Where such confiscation includes the proceeds of crime, it is not limited only to proceeds deriving from the offence to which the judgement refers, but extends to the proceeds of other relevant offences shown on a balance of the probabilities to have been committed by the same person.
- (4) (a) Where any property so forfeited or confiscated consists of money in a currency other than the euro it shall be converted to euro at the rate of exchange in force.
- (b) When such property consists of objects or other assets, it shall be disposed of by the Bureau in a manner that ensures the greatest benefit to the Government.
- (5) Proceeds from the disposal of any property by the Bureau shall be transferred by the Director to the Consolidated Fund or to such other fund which may be set up by regulations made by the Minister with the concurrence of the Minister responsible for finance for use in support of efforts to combat money laundering and financing of terrorism as soon as may be after receipt: Provided that such portion of, or such sum derived from such proceeds, as may be determined in the estimates approved by the Minister, may be retained by the Bureau as a reserve to cover on-going and future expenses.
- (6) The Bureau shall also be entitled, with the authorisation of the Civil Court (Asset Recovery Section), to take possession of and manage, value, maintain and administer property which is frozen and in the process of being confiscated and to sell such property which is of a perishable nature or which requires substantial expense to maintain or is subject to substantial depreciation. For this purpose the Bureau may be assisted by its contractors or outsourced professionals.

Last but not least subsidiary legislation may apply: Subsidiary Legislation 9.27 Mutual Recognition of Freezing Orders and Confiscation Orders Regulations, 23th April, 2021.

27

e. Para 1(e): Interception of Electronic Communications to and from the Suspect or Accused Person

Article 629 The European Delegated Prosecutors may order the following investigative measures:

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(e) request the competent authority to intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using relative to the offences established in Articles 190C, 190E and 190G; and [...].

The execution of the interception of electronic communications (wire-tapping) is requested by the EDP via the Security Service Act.

Warrants: General. 6. (1) No entry on or interference with property shall be unlawful if it is authorised by a warrant issued by the Minister under this article. (2) No interception of or interference with communications in the course of their transmission by post or by means of a radio communications or telecommunication system or by any other means shall be unlawful if it is authorised by a warrant issued by the Minister under this article. (3) The Minister may, on an application made by the Security Service, issue or modify a warrant under this article authorising the taking of such action as is specified in the warrant in respect of any property so specified or in respect of any communications so specified if the Minister

(a) thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting the Service in carrying out any of its functions under this Act; and

(b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means; and

(c) is satisfied that satisfactory arrangements are in force under this Act with respect to the disclosure of information obtained by virtue of this article and that any information obtained under the warrant will be subject to those arrangements.

7.(1) Subject to subarticle (2), the interception or interference with communications required by a warrant shall be the interception of or interference with - (a) such communications as are sent to or from one or more addresses specified in the warrant, being an address or addresses likely to be used for the transmission of communications, to or from - (i) one particular person specified or described in the warrant; or (ii) one particular set of premises so specified or described; and (b) such other communications (if any) as it is necessary to intercept or interfere with in order to intercept or interfere with communications falling within paragraph (a).

(2) Subarticle (1) shall not apply to a warrant if - (a) the interception or interference required by the warrant is the interception or interference, in the course of their transmission by means of a radio communications or telecommunication system, of - (i) such external communications as are described in the warrant; and (ii) such other communications (if any) as it is necessary to intercept or interfere with in order to intercept or interfere with such external communications as are so described; and (b) at the time when the warrant is issued, the Minister issues a certificate certifying the descriptions of information the examination of which he considers necessary as mentioned in article 6(3)(a).

- 29 There is currently a debate on legislation in Malta, which was initiated by the European Prosecutor for Malta. The EP is calling for **wiretap warrants** in criminal investigations to no longer be authorised by the Minister for Home Affairs, but by the judiciary. This is to ensure that decisions on the surveillance of suspects are made without political

influence: Currently, under the **Security Services Act**, investigators in Malta must submit such requests to the Minister for Home Affairs. However, Farrugia argues that, similar to search and arrest warrants, surveillance measures should also be assessed by judges who are better placed to judge the proportionality of such measures.¹³⁵

EP *Farrugia* also emphasised that surveillance measures are crucial in cases of organised crime, corruption and serious crimes, as they often provide the necessary evidence for a prosecution. The **change in legislation** could also improve the admissibility of evidence in court.¹³⁶ It also emphasises that more staff support for EPPO investigations would be desirable as the agency currently relies on limited resources and works closely with the Malta Police Force and the Public Prosecution Service.¹³⁷

This discussion on the independence of investigations goes, according to news articles, back to proposals made in 2011, when then MP Franco Debono had called for bugging **warrants** relating to ordinary crime not to fall into the hands of the Home Affairs Minister, but to be **handed over to the judiciary**.¹³⁸

f. Para 1(f): Tracking & Tracing an Object

Article 629 The European Delegated Prosecutors may order the following investigative measures:

(f) request the Police to track and trace an object by technical means including the conduct of a controlled delivery¹³⁹ relative to offences established in Articles 190C, 190E and 190G.

c) Para 2: Specific Restrictions in National Law That Apply With Regard to Certain Categories of Persons or Professionals with an LLP Obligation, Article

Without prejudice to Article 29, the investigation measures set out in paragraph 1 of this Article may be subject to conditions in accordance with the applicable national law if the national law contains specific restrictions that apply with regard to certain categories of persons or professionals who are legally bound by an obligation of confidentiality.

aa. For Searches With Warrant

Chapter 9 Laws of Malta Book 2 355G. [Certain restrictions to search measures, warrant requirement] (1) Any entry and search warrant issued under this Subtitle and any

¹³⁵ Xuereb, Times of Malta, Judiciary, not ministers, should handle warrants for wiretapping – EU prosecutor, 29 July 2024.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ See Filletti 2023, pp. 187.

search or seizure made under the provisions of this Sub-title shall not extend to legal privilege or to any excluded material.

(2) An entry and search warrant issued under this Sub-title shall be deemed to have been granted to the police officer or officers executing it. (3) Without prejudice to the right of obtaining a new warrant for the same purpose, an entry and search warrant may not be executed after the lapse of one (1) month from the date of issue.

bb. For Other Measures

33 See above → Article 30 para 1 (b) and 1 (c) as well as 1 (d).

d) Para 3: Conditions/Thresholds for Investigation Measures

The investigation measures set out in points(c), (e) and (f) of paragraph 1 of this Article may be subject to further conditions, including limitations, provided for in the applicable national law. In particular, Member States may limit the application of points (e) and (f) of paragraph 1 of this Article to specific serious offences. A Member State intending to make use of such limitation shall notify the EPPO of the relevant list of specific serious offences in accordance with Article 117.

34 355H. No warrant of entry and search may be executed after sunset unless the Magistrate has otherwise authorised in the warrant, or unless the executing Police officer has reasonable cause to believe that the purpose of the entry and search will be frustrated if the execution of the warrant is delayed.

Copy of warrant to person. Added by: III.2002.74.

355I. The executing officer shall hand over a copy of the warrant to the person occupying and present at the place searched or to any other person who appears to the said officer to be in charge of the same place and who happens to be present during the search. If there is no person present who appears to the executing officer to be in charge of the premises the copy of the warrant shall be left in an easily visible place on the premises. Added by: III.2002.74.

355J. A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued:

Provided that if, in the course of the search, offences other than the offence or offences mentioned in the warrant are discovered, the search may extend to the extent required for the purposes of such other offences. [...]

355L. (1) The Police have the power to enter and search any premises, house, building or enclosure used, occupied or controlled, even temporarily, by a person who is under arrest, if they have reasonable grounds for suspecting that there is evidence, other than items subject to legal privilege, that relates to the offence or a connected offence, and such search shall be limited to the extent that is reasonably necessary for discovering such evidence: Provided that if offences other than the offence or offences for which the person was arrested are discovered in the course of the search then the search may extend to the extent required for the purposes of such other offences.

(2) Without prejudice to the provisions of Sub-title V, the Police may in the course of a search carried out in pursuance of the provisions of sub-article (1) seize and retain anything not subject to legal privilege and which constitutes relevant evidence for the purpose of any offence mentioned in the same sub-article.

cc. Serious Offences Limitation for Offences of Para 1(e) and (f)

The limitations are enshrined in Article 629 Chapter 9 Laws of Malta. The investigation methods are only allowed “relative to the offences established in Articles 190C, 190E and 190G”. For the PIF Acquis Offences in Malta, see above → Chapter 9 Laws of Malta Book 1.

35

dd. Notifications According to the Last Sentence of Para. 3

Malta has not made such a notification public.

36

e) Para 4: Any Other Measure(s) in the EDP’s Member State

*The European Delegated Prosecutors shall be entitled to request or to **order any other measures in their Member State that are available to prosecutors under national law in similar national cases**, in addition to the measures referred to in paragraph 1.*

Chapter 9 Laws of Malta Book 2

435E. [Controlled deliveries and joint investigations with the competent authorities of other countries.] (1) Notwithstanding anything contained in any other law it shall be lawful for the Attorney General to authorise the Executive Police and, where appropriate, the Customs authorities to allow a controlled delivery to take place with a view to identifying persons involved in the commission of any criminal offence under the laws of Malta or under the laws of another country.

- 37 The Part 3, Book 2 of Chapter 9 Laws of Malta contains certain measures and typical investigatory tasks that might be carried out by the criminal police (see above → Article 28 EPPO Regulation) in Malta in addition to the general requirements of the EPPO Regulation. They are partly harmonized by EU law, e.g. EU Directive 2016/718:

- 38 **PART III**
OF MATTERS APPLICABLE TO ALL
CRIMINAL TRIALS
 Title I Of Witnesses and Experts 629–657
 Sub-title I Of Witnesses 629–649
 Sub-title II Of Experts 650–657
 Title II Of Confessions 658–661
 Title III Of Decisions and their Execution 662–666

f) Para 5: National Procedures and National Modalities

*The European Delegated Prosecutors may only order the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. **The procedures and the modalities for taking the measures shall be governed by the applicable national law.***

- 39 Rules of Book 2, Chapter 9 Laws of Malta are relating to the investigation measures cited and were presented above (→ Article 30 para 1(a) et seq.): **For searches** Article 355E may apply. And it should be especially paid attention to Article 355F., which allows e.g. to break windows entering a building on a premise for a search. Subsidiarity must be respected.

- 40 **355H.** No warrant of entry and search may be executed after sunset unless the Magistrate has otherwise authorised in the warrant, or unless the executing Police officer has reasonable cause to believe that the purpose of the entry and search will be frustrated if the execution of the warrant is delayed.

Copy of warrant to person. Added by: III.2002.74.

355I. The executing officer shall hand over a copy of the warrant to the person occupying and present at the place searched or to any other person who appears to the said officer to be in charge of the same place and who happens to be present during the search. If there is no person present who appears to the executing officer to be in charge of the premises the copy of the warrant shall be left in an easily visible place on the premises.

Limitation. Added by: III.2002.74.

355J. A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued: Provided that if, in the course of the search, offences other than the offence or offences mentioned in the warrant are discovered, the search may extend to the extent required for the purposes of such other offences.

Without warrant:

355M. (1) The powers mentioned in Article 355L may be exercised by a police officer not below the rank of inspector or by officers of a lower rank if so authorised in writing by an officer not below the rank of inspector.

(2) Where the police officers on the scene are all below the rank of inspector and the matter admits of no delay and the person occupying or in control of the premises is present and his presence is necessary for the effective investigation of the offence, the said police officers may proceed to enter and search the premises without the authorisation in writing referred to in sub-article (1).

355N. A police officer who has exercised any of the powers mentioned in Articles 355K and 355L shall, as soon as practicable, draw up a report of the entry and search without warrant, stating the grounds for which it was exercised, and describing the results of the search.

3. Articles 31 and 32 EPPO Regulation

- 1 Article 31 and 32 EPPO Regulation govern the procedures for **cross-border investigative measures** by the EPPO within the EU. It mandates cooperation between the EPPO and national authorities, requires judicial authorization, ensures compliance with national laws, and protects defense rights.
- 2 Both articles are crucial for effectively investigating cross-border crimes while maintaining cooperation between Member States and upholding fundamental rights. On December 21, 2023, the CJEU issued its first ruling on the EPPO in **Case C-281/22**, addressing cross-border investigative measures by the EPPO.
- 3 In the CJEU, the court said and clarified that when the EPPO conducts cross-border investigative measures, the law of the issuing state (where the investigation originates) applies to the decision authorizing the measure. However, the law of the executing state (where the measure is carried out) governs how the measure is implemented, ensuring compliance with national procedural safeguards and fundamental rights in the executing Member State. The impact of the decision was widely discussed by academia and lawyers.¹⁴⁰
- 4 The case clarified that the assisting Member State can only review procedural aspects of the measures, while substantive legality falls under the handling Member State's jurisdiction. This delineation is key to understanding the Court's interpretation of Article 31 of the EPPO Regulation and impacts future EPPO investigations, emphasizing that assisting states have limited judicial review capabilities compared to handling states.
- 5 Article 32 complements Article 31 by allowing EDPs to **assign** investigative measures across different Member States. These measures include actions like **executing** e.g. Maltese search warrants, seizing evidence, or conducting interrogations. Article 32 emphasizes the importance of respecting national legal principles while facilitating cross-border investigations.¹⁴¹

¹⁴⁰ Herrnfeld 2024, pp. 370-380 pointing out that efficiency (what remembers of the effet utile debate) is very important for the ECJ. And see another critical comment Pfister 2024, 1.

¹⁴¹ Cf. the Bulgarian (Vol. III) and German Volume, which include specific overviews for all member states. They can be accessed on the Logos Open Access Platform.

4. Article 33 Pre-trial arrest and cross-border surrender

3. Articles 31 and 32 EPPO Regulation.....	188	b) Para 1: Provisions for Arrest and Pre-Trial Detention	190
4. Article 33 Pre-trial arrest and cross-border surrender	189	a. Arrest	190
a) General Relation to National Law: Applicable Codes	189	b. Pre-trial detention	192
		c) Para 2: Cross-Border Surrender	195

1. The handling European Delegated Prosecutor may order or request the arrest or pre-trial detention of the suspect or accused person **in accordance with the national law applicable in similar domestic cases.**



2. Where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling European Delegated Prosecutor is located, the latter shall issue or request the competent authority of that Member State to issue a European Arrest Warrant in accordance with Council Framework Decision 2002/584/JHA.

Bail, arrest and detention are important in financial criminal investigations¹⁴², which can often endure a long time period and require to **secure the potential suspect**. The problem in this area is the **justification of the measure** limiting the freedom of the person suspected of having committed an offence that falls into the EPPO competence.

1

a) General Relation to National Law: Applicable Codes

Chapter 9 Laws of Malta, Book 2, Part 1 applies:

2

Chapter 9 Laws of Malta [Excerpt & Overview]

Book 2

Sub-title VI Powers of Arrest and Detention 355V–355AF

Sub-title VII Warrants 355AG–355AK

Sub-title VIII Detention 355AL–355AR

3

¹⁴² See Mula, Herman Bail: a critical analysis of recent juridical interpretation by the Maltese Criminal Court Malta University, 2017 and see Filletti 2023, pp. 161–180 on the rights of persons, who are arrested.

b) Para 1: Provisions for Arrest and Pre-Trial Detention

a. Arrest

- 4 Different arrest forms must be distinguished. Maltese law knows the arrest by everyone (alike s. 127 CPC of Germany) and the arrest by police.

- 5 **355E.** (1) Saving the cases where the law provides otherwise, no police officer shall, without a warrant from a Magistrate, enter any premises, house, building or enclosure for the purpose of effecting any search therein or arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence unless –
- (a) the offence is a crime and there is imminent danger that the said person may escape or that the corpus delicti or the means of proving the offence will be suppressed; or
 - (b) the person is detected in the very act of committing a crime; or
 - (c) the intervention of the Police is necessary in order to prevent the commission of a crime; or
 - (d) the entry is necessary for the execution of any warrant or order issued by any other competent authority in the cases prescribed by law; or (e) the arrest is for the purpose of apprehending a person who is unlawfully at large after escaping from lawful arrest or detention; or
 - (f) the entry is necessary for purposes of:
 - (i) executing the arrest, or ascertaining the whereabouts, of a person in respect of whom an alert has been entered in the Schengen Information System and there is an imminent danger that the said person may escape; or
 - (ii) discovering any property in respect of which an alert has been entered in the Schengen Information System and there is an imminent danger that the property may be concealed, lost, damaged, altered or destroyed; or
 - (g) the entry is necessary for the protection of any person.
- (2) The expression “enclosure” does not include any plot of land enclosed by rubble walls.
- (3) A warrant may also be issued by a Magistrate as mentioned in sub-article (1) for the purpose of:
- (a) effecting the arrest or ascertaining the whereabouts of a person in respect of whom an alert has been entered in the Schengen Information System; or
 - (b) discovering and seizing any property in respect of which an alert has been entered in the Schengen Information System.

Sub-title VI**POWERS OF ARREST AND DETENTION**

355V. Where there are lawful grounds for the arrest of a person, the Police may request a warrant of arrest from a Magistrate, unless in accordance with any provision of law the arrest in question may be made without a warrant.

Arrest by private persons.

355W. (1) Any person not being a police officer may arrest without warrant anyone who is in the act of committing or has just committed any crime concerning sexual offences, any crime of wilful homicide or bodily harm, or any crime of theft or of wilful unlawful entry or damage to property.

Arrest by police without warrant.

355X. (1) Any police officer may arrest without warrant anyone who is in the act of committing or has just committed a crime punishable with imprisonment, or whom he reasonably suspects to be about to commit or of having just committed such a crime.

(2) Any police officer may also proceed to the arrest of any person in respect of whom an alert for his arrest has been entered in the Schengen Information System.

(3) Any police officer may also proceed to the arrest of any person who knowingly, or after due warning, obstructs or disturbs him in the execution of his duties, or disobeys his lawful orders.

(4) The powers mentioned in sub-articles (1), (2) and (3) shall only be exercised until it is strictly necessary for the police officer to convey the person arrested to a police station and deliver him to a superior officer not below the rank of sergeant.

Detention without warrant under Schengen Information System.

355XX. Any police officer may detain without warrant any person who is indicated in an alert in the Schengen Information System as a missing person or a person who, for his own protection or in order to prevent threats, needs temporarily to be placed under police protection.

Arrest for minor offences.

355Y. (1) In the case of contraventions, or of crimes not subject to the punishment of imprisonment, it shall be lawful for the Police to proceed to the arrest of any person without a warrant, provided that -

(a) the person be detected in the very act of committing the offence; or

(b) the arrest be necessary to prevent the commission of an offence in respect of which the Police may institute criminal proceedings without the complaint of the injured party; and

(c) in either of the cases mentioned in paragraphs (a) or (b) one of the conditions mentioned in Article 355Z is satisfied.

(2) A person shall be deemed to be detected in the very act of committing an offence, if he is caught, either in the act of committing the offence, or while being pursued by the injured party or by the public hue and cry.

General arrest conditions.

355Z. The general arrest conditions are –

(a) that the identity of the person is unknown or cannot be readily ascertained by the police officer; or

(b) there is a doubt whether the particulars furnished by the person are true; or

(c) that the person has not furnished a satisfactory address for service, or there are doubts about whether the address provided is satisfactory for service, or that at least some other person may according to law receive service on his behalf at the address given; or

(d) that the arrest is necessary to prevent the person –

(i) causing physical harm to himself or to any other person; or

(ii) suffering physical injury; or

(iii) causing loss or damage to property; or

(iv) committing an offence against public decency; or

(v) causing an unlawful obstruction on any public road; or

(e) that the police officer has reasonable grounds for believing that the arrest is necessary to protect a child or any other vulnerable person.



Pre-trial arrest or detention of suspect.

628F. The European Delegated Prosecutor may request the Police to arrest or retain in pre-trial detention the suspect or accused person.

b. Pre-trial detention

Criminal Code

SECOND BOOK (CAP. 9)

LAWS OF CRIMINAL PROCEDURE

IN RESPECT OF CRIMINAL PROSECUTIONS

Sub-title VII

POWERS OF ARREST AND DETENTION

Detention without warrant under Schengen Information System.

355XX. Any police officer may detain without warrant any person who is indicated in an alert in the Schengen Information System as a missing person or a person who, for

his own protection or in order to prevent threats, needs temporarily to be placed under police protection.

Sub-title VIII

DETENTION

Right to be released (immediately).

355AL. (1) It shall be duty of the custody officer to order the immediate release from custody of any person in police detention in the circumstances mentioned in Article 355AJ(3) or where the custody officer becomes aware that the grounds for the detention of that person have ceased to apply and there are no other lawful grounds on which the continued detention of that person could be justified.

(2) Before ordering the release from custody of a person under sub-article (1) the custody officer shall inform the investigating officer and a Magistrate and the final decision shall be taken by the Magistrate.

(3) A person whose release is ordered under the provisions of sub-article (1) shall be released unconditionally unless it appears to the custody officer –

(a) that there is need for further investigation of any matter in connection with which he was detained at any time during the period of his detention; or

(b) that proceedings may be taken against him in respect of such matter, and if it so appears, he shall be released subject to the conditions, reduced to writing and signed by the person to be released, that he will not attempt or do anything to leave Malta without the authority of the investigating officer under whose authority he was arrested and that he will attend at such police station at such time as the custody officer may appoint and, or that he will attend before the Court of Magistrates at such time and such place as the court may appoint.

(4) Where a custody officer has granted bail to a person subject to a duty not to attempt or do anything to leave Malta without authority or to appear at a police station, the custody officer may give notice in writing to that person that the condition not to attempt or do anything to leave Malta without authority no longer applied or that his attendance at the police station is not required.

(5) Any person who fails to comply with any condition imposed upon him upon his release as provided in sub-article (3) shall be guilty of a contravention.

(6) A police officer may arrest without a warrant any person who, having been conditionally released under sub-article (3) subject to a duty not to attempt or do anything to leave Malta without authority or to attend a police station or subject to a duty to appear before the Court of Magistrates, attempts or does anything to leave Malta without authority or fails to attend at that police station or before the Court of Magistrates at the time appointed for him to do so.

(7) For the purposes of this Sub-title a person who returns to police station to answer to bail or is arrested under sub-article (6) shall be treated as arrested for the offence under

sub-article (5) and for the offence in connection with which he was granted bail and the provisions of this article shall apply to such person.

(8) The conditions made under sub-article (3) shall not remain in force for more than three months from the date on which they were imposed unless they are renewed by a Magistrate for further periods of three months each period upon an application by the Police which shall be served for his reply upon the person on whom the conditions were imposed.

(9) At any time during which the conditions made under sub-article (3) are in force the person on whom those conditions were imposed may by an application to be served on the Police for a reply request a Magistrate that those conditions be removed or modified.

(10) The Minister may issue guidelines to be followed by custody officers in the exercise of their discretion to impose conditions under sub-article (3).

Pre-trial arrest or detention of suspect.

628F. The European Delegated Prosecutor may request the Police to arrest or retain in pre-trial detention the suspect or accused person.

Customs Ordinance

PART XII

POWERS AND PROCEDURE

Suspected persons

70B. Where a Customs official has reasonable grounds to suspect that a person is committing an offence against this Ordinance and or against its subsidiary legislation, or against any law and or its subsidiary legislation where the Commissioner is empowered to act, then such official may detain such person without a warrant and as soon as immediately practicable thereafter, and in any case not later than two hours after such detention, place such person in the custody of an officer of the Police force whereupon such officer of the Police force shall either release such person or proceed to present such person before a court and the provisions of the Criminal Code relating to arrest shall mutatis mutandis apply to the Customs official and the officer of the Police force.

Excise Duty Act

Power to detain

24. Where a Customs official has reasonable grounds to suspect that a person is committing an offence against this Act and its subsidiary legislation, then such officer may detain such person without warrant and as soon as immediately practicable thereafter and in any case not later than two hours after such detention, place such person in the custody of an officer of the Police force whereupon such officer of the Police force shall

either release such person or proceed to present such person before a court and the provisions of the Criminal Code relating to arrest shall *mutatis mutandis* apply to the Customs official and the officer of the Police force.

c) Para 2: Cross-Border Surrender

Competent authority to make decisions on EAW:

6

- Office of the Attorney General.

The following provisions can be consulted on the surrender and extradition procedures in Malta:

7

Criminal Code

Temporary surrender of person in custody to foreign country.

435AB. (1) Pursuant to and in accordance with any treaty, convention, agreement or understanding to which Malta is a party or which is otherwise applicable to Malta, the Attorney General may, with the concurrence of the Minister responsible for Justice, give his consent to the temporary surrender of a person in custody for the purpose of an investigation to be carried out or being carried out by a judicial, prosecuting or administrative authority of anyplace outside Malta at the request of a judicial, prosecuting or administering authority in Malta.

(2) The person surrendered shall be kept in custody in the place outside Malta to which he has been surrendered.

(3) Any time spent in custody in the place outside Malta shall be deemed to be time spent in custody in Malta.

Powers of investigation in connection with offences cognizable by courts outside Malta.

435B. (1) Where the Attorney General receives a request made by a judicial, prosecuting or administrative authority of any place outside Malta or by an international court for investigations to take place in Malta in respect of a person (hereinafter in this Article and in Article 435BA referred to as “the suspect”) suspected by that authority or court of a relevant offence, the Attorney General may apply to the Criminal Court for an investigation order or an attachment order or for both and the provisions of Article 24A of the Dangerous Drugs Ordinance, hereinafter in this title referred to as “the Ordinance”, shall *mutatis mutandis* apply to that application and to the suspect and to any investigation order or attachment order made by the court as a result of that application.

(2) The phrase “investigation order” in sub-articles (2) and (5) of the same Article 24A of the Ordinance shall be read and construed as including an investigation order made under the provisions of this Article.

(3) The phrase “attachment order” in Article 24A(6A) of the Ordinance shall be read and construed as including an attachment order under the provisions of this Article.

Temporary surrender of person in custody to Malta.

435BB. (1) Pursuant to and in accordance with any treaty, convention, agreement or understanding to which Malta is a party or which is otherwise applicable to Malta, the Attorney General 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. Cap. 101.(2) The provisions of Article 30C of the Dangerous Drugs Ordinance shall apply mutatis mutandis to a person temporarily surrendered to Malta under sub-article (1).

Temporary surrender to foreign country of person in custody in Malta at request of foreign authority.

435BC. (1) Pursuant to and in accordance with any treaty, convention, agreement or understanding to which Malta is a party or which is otherwise applicable to Malta, the Attorney General may, with the concurrence of the Minister responsible for Justice, give his consent to the temporary surrender of a person in custody in Malta for the purpose of an investigation to be carried out or being carried out by a judicial, prosecuting or administrative authority of any place outside Malta at the request of the said authority. (2) The person surrendered shall be kept in custody in the place outside Malta to which he has been surrendered. (3) Any time spent in custody in the place outside Malta shall be deemed to be time spent in custody in Malta

C. OLAF-Regulation

I. General Introduction: Investigation Powers and National Law Related to OLAF in Malta (Articles 3–8 OLAF Regulation)

OLAF's task and role as well as its actions are determined primarily by Union law. The history of OLAF can be traced back to the early 2000s and its predecessor UCLAF.¹⁴³ OLAF has a renewed role within the changed **anti-fraud architecture** of the Union in the 2020s and is an important actor against fraud within the multi-annual framework legislation and the Union's policies, which depend on the action of the Member States and the agreements concluded on the political levels.

In addition to that OLAF and its investigators shall follow **internal guidelines**¹⁴⁴, manuals on procedures¹⁴⁵ reports and working arrangements with union partners¹⁴⁶ as well as Administrative Cooperation Agreements (ACAs) with national partners, EU external actors¹⁴⁷. OLAF issues compendia, researches itself, organizes meetings and conferences and workshops for its national partners. All of these **non-binding guides and handbooks** might be useful in the course of investigations.¹⁴⁸ The statistics on latest actions and the past year can be deduced from the OLAF Reports, equal to the new EPPO's annual report and the PIF Report, which is issued by the EU Commission in close cooperation with OLAF, IBOAs and the EPPO as well as the input from ECA and national AFCOS, governments and researchers.

¹⁴³ See EU Fraud Commentary, Chronology Part 3 and 4 as well as the Commentary on Article 1 OLAF Regulation.

¹⁴⁴ See EU Commission 2021; OLAF Guidelines on Data Protection for Investigative Activities, Ref(Ares) 2021, 7266396 – 25/11/2021; and see EU Commission 2016. For a summary of translations see: https://anti-fraud.ec.europa.eu/guidelines-investigations-olaf-staff_en. Accessed 31 July 2024.

¹⁴⁵ Br ner et al. 2009, whereby it is unclear if certain Manuals are really still used by investigators and the Office staff.

¹⁴⁶ OLAF, Working Arrangement between EPPO & OLAF, Point 4: "Exchange of information", 4.5 and 4.6 (cross double check between the databases for a PIF offence action), 5 ("Mutual Reporting and transmission of potential cases"), 5.1, 5.1.1. European Commission – "Agreement establishing the modalities of cooperation between the European Commission and the European Public Prosecutor's Office" 18 June 2021, Article 5 para 1, 4, 5 ("Reporting by the Commission") in combination with Annex I Contact points: "information will be transmitted via the head of OLAF to the head of operation at EPPO/central office", Annex III.A ("Information on the Initiation of an Investigation – template")

¹⁴⁷ Prosecution Office of Hungary and OLAF. See State of Play – July 2022 Administrative Cooperation Arrangements (ACAs) with partner authorities in non-EU countries and territories and counterpart administrative investigative services of International Organisations, online: https://anti-fraud.ec.europa.eu/system/files/2022-07/list_signed_acas_en.pdf. Accessed 31 July 2024.

¹⁴⁸ See European Commission 2011, EU Commission 2017; EU Commission 2012; EU Commission 2009; EU Commission (DG Policy, U 2) Handbook, The role of Member States' auditors in fraud prevention and detection for EU Structural and Investment Funds Experience and practice in the Member States.

- 3 OLAF is well accommodated in the Union anti-fraud architecture these days and the academic research is extensive and long lasting since the 2000s.¹⁴⁹ Last decade's **landmark judgement** "*Sigma Orionis SA vs European Commission*", decided by the European General Court¹⁵⁰, clarified the application of national law and Union law¹⁵¹ in relation to external investigations of OLAF.¹⁵² In the light of this jurisprudence the resistance to the actions of OLAF, in order to awaken national law, might be a defence strategy that Economic operators use. If this is the case, OLAF has to rely on national homologue investigators and thus as well limitations, thresholds and conditions of national law i.e., investigative powers in various areas of budget spending and structural funds (direct management) and revenue-related obligations (indirect management).
- 4 Current debates evolve around the **effectiveness of investigations** regarding digital evidence by virtue of the Regulation 2185/96, which stems in parts from a more analogue society.¹⁵³ More and more it becomes clear the analogue society, which is still present in law enforcement and the area of criminal justice in many countries at the beginning of the 2020s is a major concern and a real problem if the digital age is pertinent to all areas. The analogue structures in our society can become obstacles to effective investigations.
- 5 The **access to bank accounts** and registers is incredibly important for OLAF investigators as well as their national homologues. The relationship to the EPPO, especially the regional centres of the EDPs in the present country should be close. In addition to that the external investigations require a good coordination, which shall be governed by the relevant AFCOS (see below → Article 12a OLAF Regulation), which has been part of the current study and answered a questionnaire or commented and reviewed (for some countries that are very prone to frauds or countries that have recently changed their anti-fraud prevention in order to fulfil the requests for a national anti-fraud prevention strategy) Part B. of this chapter.
- 6 Another question and debate have ever since existed concerning the Reports of OLAF (cf. → Article 11 OLAF Regulation), which can and shall constitute evidence – even – in national criminal trials. They concern EPPO cases (see → Articles 23–28 EPPO Regulation) or cases below the thresholds for which the EDPs could exercise their competence and jurisdiction on behalf of the EPPO. This area has been professionally researched by *Luchtman/Vervaele/Ligeti* in OLAF studies from the last decade, which we

¹⁴⁹ Brüner 2001, 17–26; Brüner 2009; Brüner AW-Prax 2009, 85–88.

¹⁵⁰ GC (aka CFI), Case T-48/16, 3.5.2018, *Sigma Orionis SA v. Commission*, paras. 70 et seq., 80–81 published in the electronic Reports of Cases (Court Reports - general) and in the OJ, 01/06/2018.

¹⁵¹ See De Bellis 2021, 431 et seq.; Herrnfeld 2020 p. 426 et seq.; recently Wouters, 2020, 132 et seq.

¹⁵² De Bellis 2021, 431 et seq.; see OLAF Website, List of rulings of the Court of Justice of the EU concerning OLAF.

¹⁵³ See Carrera and Mitsilegas 2021.

can refer to.¹⁵⁴ Part C, alike to the first Part B on the EPPO and its investigative powers, gives a *bilingual* collection of the relevant laws – including the recently adopted on-the-spot checks laws (in relation to Regulation (EC) 2185/96) of certain countries – in relation to investigations and investigative powers as well as examples from Case law and trials, which relied upon evidence gathered by OLAF (Selected Case Studies from our jurisprudence and studies). In addition to the analysis parts of this chapter mentioned above the national authorities and the role of *the* special unit, body, or agency, which acts as AFCOS is explained below (see → Article 12a OLAF Regulation).

1. Art. 1 Objectives and Tasks

1. In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union and of the European Atomic Energy Community (hereinafter referred to collectively, when the context so requires, as ‘the Union’), the European Anti-Fraud Office established by Decision 1999/352/EC, ECSC, Euratom (‘the Office’) shall exercise the powers of investigation conferred on the Commission by:

- (a) The relevant Union acts; and
- (b) The relevant cooperation and mutual assistance agreements concluded by the Union with third countries and international organisations.

2. The Office shall provide the Member States with assistance from the Commission in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud. The Office shall contribute to the design and development of methods of preventing and combating fraud, corruption and any other illegal activity affecting the financial interests of the Union. The Office shall promote and coordinate, with and among the Member States, the sharing of operational experience and best procedural practices in the field of the protection of the financial interests of the Union, and shall support joint anti-fraud actions undertaken by Member States on a voluntary basis.

3. This Regulation shall apply without prejudice to:

- (a) Protocol No 7 on the privileges and immunities of the European Union attached to the Treaty on European Union and to the Treaty on the Functioning of the European Union;
- (b) the Statute for Members of the European Parliament;
- (c) the Staff Regulations;
- d) Regulation (EU) 2016/679 of the European Parliament and of the Council;
- (e) Regulation (EU) 2018/1725 of the European Parliament and of the Council

¹⁵⁴ See the volume of Luchtman and Vervaele 2017.

4. Within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties ('institutions, bodies, offices and agencies'), the Office shall conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union. To that end, it shall investigate serious matters relating to the discharge of professional duties constituting a dereliction of the obligations of officials and other servants of the Union liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or staff members of institutions, bodies, offices or agencies not subject to the Staff Regulations (hereinafter collectively referred to as 'officials, other servants, members of institutions or bodies, heads of offices or agencies, or staff members').

4a. The Office shall establish and maintain a close relationship with the European Public Prosecutor's Office (EPPO) established in enhanced cooperation by Council Regulation (EU) 2017/1939 (3). That relationship shall be based on mutual cooperation, information exchange, complementarity and the avoidance of duplication. It shall aim in particular to ensure that all available means are used to protect the financial interests of the Union through the complementarity of their respective mandates and the support provided by the Office to the EPPO.

5. For the application of this Regulation, competent authorities of the Member States and institutions, bodies, offices and agencies may establish administrative arrangements with the Office. Those administrative arrangements may concern, in particular, the transmission of information, the conduct of investigations and any follow-up action.

- 7 Art. 2 of the OLAF Regulation contains definitions, which apply for e.g. **for all assessments** of seconded national experts, investigators, AFCOS staff or national authorities managing structural funds or other EU programmes. The definitions might be cited e.g. for an OLAF Report (see → Art. 11 below) in order to **subsume and assess a conduct**, which was investigated.

2. Art. 2 Definitions

The definitions have legal value and force. They stem from the original legislator of the Regulation. They are open to interpretation by parties and courts:

For the purposes of this Regulation:

(1) 'financial interests of the Union' shall include revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them;

(2) 'irregularity' shall mean 'irregularity' as defined in Article 1(2) of Regulation (EC, Euratom) No 2988/95;

- (3) ‘fraud, corruption and any other illegal activity affecting the financial interests of the Union’ shall have the meaning applied to those words in the relevant Union acts and the notion of ‘any other illegal activity’ shall include irregularity as defined in Article 1(2) of Regulation (EC, Euratom) No 2988/95;
- (4) ‘administrative investigations’ (‘investigations’) shall mean any inspection, check or other measure undertaken by the Office in accordance with Articles 3 and 4, with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation; those investigations shall not affect the powers of the EPPO or of the competent authorities of Member States to initiate and conduct criminal proceedings;
- (5) ‘person concerned’ shall mean any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by the Office;
- (6) ‘economic operator’ shall have the meaning applied to that term by Regulation (EC, Euratom) No 2988/95 and Regulation (Euratom, EC) No 2185/96;
- (7) ‘administrative arrangements’ shall mean arrangements of a technical and/or operational nature concluded by the Office, which may in particular aim at facilitating the cooperation and the exchange of information between the parties thereto, and which do not create additional legal obligations;
- (8) ‘member of an institution’ means a member of the European Parliament, a member of the European Council, a representative of a Member State at ministerial level in the Council, a member of the Commission, a member of the Court of Justice of the European Union (CJEU), a member of the Governing Council of the European Central Bank or a member of the Court of Auditors, with respect to the obligations imposed by Union law in the context of the duties they perform in that capacity.

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[...] 2. The Office shall ***carry out on-the-spot checks and inspections in accordance with this Regulation and, to the extent not covered by this Regulation, in accordance with Regulation (Euratom, EC) No 2185/96.***

4. Where, in accordance with paragraph 3 of this Article, the ***economic operator concerned submits*** to an on-the-spot check and inspection authorised pursuant to this Regulation, Article 2(4) of Regulation (EC, Euratom) No 2988/95, the third subparagraph of Article 6(1) of Regulation (Euratom, EC) No 2185/96 and Article 7(1) of Regulation (Euratom, EC) No 2185/96 ***shall not apply insofar as those provisions require compliance with national law*** and are capable of restricting access to information and documentation by the Office to the same conditions as those that apply to national administrative inspectors.

5. At the request of the Office, the ***competent authority of the Member State*** concerned shall, without undue delay, provide the staff of the Office with the assistance needed in order to carry out their tasks effectively, as specified in the written authorisation referred to in Article 7(2).

The ***Member State concerned shall ensure***, in accordance with Regulation (Euratom, EC) No 2185/96, that the ***staff of the Office are allowed access to all information, documents and data relating to the matter under investigation which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently, and that the staff are able to assume custody of documents or data to ensure that there is no danger of their disappearance.*** Where privately owned devices are used for work purposes, those devices may be subject to inspection by the Office. The Office shall subject such devices to inspection only under the same conditions and to the same extent that national control authorities are allowed to investigate privately owned devices and where the Office has reasonable grounds for suspecting that their content may be relevant for the investigation.

6. Where the staff of the Office find that an ***economic operator resists*** an on-the-spot check and inspection authorised pursuant to this Regulation, namely where the economic operator refuses to grant the Office the necessary access to its premises or any other areas used for business purposes, conceals information or prevents the conduct of any of the activities that the Office needs to perform in the course of an on-the-spot check and inspection, the ***competent authorities, including, where appropriate, law enforcement authorities of the Member State concerned shall afford the staff of the Office the necessary assistance so as to enable the Office to conduct its on-the-spot check and inspection effectively and without undue delay.***

Article 2(4) of Regulation (EC, Euratom) No 2988/95

Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.

the third subparagraph of Article 6(1) of Regulation (Euratom, EC) No 2185/96

Subject to the Community law applicable, they shall be required to comply, with the rules of procedure laid down by the law of the Member State concerned.

Article 7(1) of Regulation (Euratom, EC) No 2185/96

Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.

On-the-spot checks and inspections may concern, in particular:

- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators,
- computer data,
- production, packaging and dispatching systems and methods,
- physical checks as to the nature and quantity of goods or completed operations,
- the taking and checking of samples,
- the progress of works and investments for which financing has been provided, and the use made of completed investments,
- budgetary and accounting documents,
- the financial and technical implementation of subsidized projects.]

When providing assistance in accordance with this paragraph or with paragraph 5, the competent authorities of Member States ***shall act in accordance with national procedural rules applicable to the competent authority concerned. If such assistance requires authorisation from a judicial authority in accordance with national law***, such authorisation shall be applied for.

10. As part of its investigative function, the Office shall carry out the checks and inspections provided for in Article 9(1) of Regulation (EC, Euratom) No 2988/95 and in the sectoral rules referred to in Article 9(2) of that Regulation in Member States and, ***in accordance with cooperation and mutual assistance agreements and any other legal instrument in force***, in third countries and on the premises of international organisations.

12. Without prejudice to Article 12c(1), where, before a decision has been taken whether or not to open an external investigation, the Office handles information which suggests that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union, it may inform the competent authorities of the Member States concerned and, where necessary, the institutions, bodies, offices and agencies concerned.

Without prejudice to the sectoral rules referred to in Article 9(2) of Regulation (EC, Euratom) No 2988/95, the competent authorities of the Member States concerned shall

ensure that appropriate action is taken, in which the Office may take part, *in accordance with national law*. Upon request, the competent authorities of the Member States concerned shall inform the Office of the action taken and of their findings on the basis of information referred to in the first subparagraph of this paragraph.

On-the-spot checks have been discussed in the last decade quite thoroughly¹⁵⁵, but not enough for all countries. Art. 3 OLAF Regulation is of high importance for OLAF's operations, which is known for a long time as on-the-spot checks are **complex investigations**: “[An] element is that of the proper conduct of an investigation, particularly on-the-spot checks in member states which, according to the EU legislation, must be conducted in accordance with national rules. Here again **there is a significant need for magistrates in OLAF** who can inform the investigators and provide them **with information about the exact nature of the various national rules** so that they can be followed. The committee also looks into this when analysing the reports from OLAF, but unfortunately we are not provided with enough information about national regulations.”¹⁵⁶ It is therefore worth taking a closer look at the general Union rules and the applicable Maltese provisions in a coherent way-of-thinking: 1

a) On-the-Spot Checks and Inspections – Renouncing the Applicable National Law – Paras 2, 4

The national law is renounced if the economic operator, the beneficiary, the grant recipient etc. submits to the investigation of the Office. In this case Union law applies. 2

b) Assistance Needed, Competent Authorities, and Access to Information in the Member States, Para 5

Even in the case that Union law applies, OLAF may need the help and information from national authorities in the Member states (managing authorities, control bodies, customs, and tax offices, etc.). 3

c) Resistance by the Economic Operator vs. Law Enforcement and Effective Investigations, Para 6 or the New Model and the Relevance of Resistance or Conformity of the Economic Operator

If the economic operator, the beneficiary, the grant recipient etc. resists this conduct influences the applicability of law. The ECJ rules in *Sigma Orionis* that national law applies in the case of resistance, which means that the investigations need to be in conformity with the national law applicable in similar national investigations. 4

¹⁵⁵ See Bovend'Eerd 2018.

¹⁵⁶ OLAF's Supervisory Committee—Oral evidence (QQ 36-47), Evidence Session No. 2. Heard in Public. Questions 36–47, WEDNESDAY 7 NOVEMBER 2012, p. 136.

d) The Basic Principle of Conformity to Regulations 2185/96 and 883/2013

a. Submission: Compliance with Union Law

- 5 In the case of compliance of an economic operator Union law applies, thus the Regulation allows OLAF officials to conduct on-the-spot checks without prior information of national authorities.

b. Resistance: Assistance in Conformity with National Procedural Rules Applicable

- 6 Does the participant, the personal or economic operator concerned resist to the application of Union law, the Regulation indicates that OLAF must follow national law and inform national authorities that can aid in conformity with national procedural rules applicable.¹⁵⁷

e) Competent Authorities

- 7 The table shows non-extensively the most important competent authorities, which need to be contacted if the Economic operator resists and thus national law applies if OLAF wants to conduct investigations into irregularities:

Table 6 Authorities involved in external investigations of OLAF in Malta

National authorities	Competence (area)
NAO = National Audit Office	NAO is only competent for Maltese bodies and acts on behalf of the Maltese State, but it must report to FID and IAID Unit as well as OLAF in case of EU irregularities or fraud. It acts on the basis of the Internal Audit and Financial Investigations Act No. IV. of 2003.
Payment Agency Structural Funds (e.g. EAGF and EAFRD funds)	See → FID and IAID Unit.
VAT Administration Payment Agency Anti-Dumping Authorities Customs	Revenue Expenditure Expenditure Revenue

¹⁵⁷ ECJ, Case T-48/16 Sigma Orionis v the Commission, Margin Number 112: “Finally, it should be noted that, according to the rules applicable to the actions carried out by OLAF, the requirement to obtain a judicial authorisation, if provided for by national law, only applies in the case of an objection raised by the economic operator and that OLAF must then have recourse to national police forces which, according to the rules applicable to them, must comply with national law.”

Financial Investigations Directorate (FID) within IAID Unit = AFCOS MALTA Sub-Directorates EU Funds Audits Directorate (= Audit Authority (AA) for EU Funds in Malta, see → Article 123 (4) Regulation (EU) No. 1303/2013.¹⁵⁸	FID “conducts financial investigations in Government Departments and in any other public or private entities”. Conditions: If [they] “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.”
European Union Programmes Agency	To promote, implement and manage the Erasmus+ Programme, and other programmes and initiatives of the European Union

Source: The authors, Maltese AFCOS Report.

Thus, we can summarize that to determine who is responsible in Malta depends like in most other countries (→ Compare within the volume series¹⁵⁹) on which area is affected (direct or shared management) and which type of irregularity or fraud is suspected, as well as in which payment (expenditure) or payment (revenue) area.

8

f) National Law and “Checks and Inspections” of OLAF

The national law regarding “checks and inspections” of OLAF in Malta is primarily determined via the relevant area and therefore determined by the relevant law that establishes the Maltese authorities for administrative investigations as well as restricts their competences to certain tasks. Malta has apparently, unlike Sweden, the Netherlands or Lithuania¹⁶⁰ **no special “On-the-spot-checks-Law”**, which would stipulate special rules for all national bodies. The situation is therefore not harmonized but divergent (see e.g. Art. 8 et seq. Agriculture Act). The FID within the IAID Unit (see above → “Competent authorities”) acts therefore fully on the basis of Regulation (Euratom/EC) 2185/96, various national laws and the OLAF Regulation as well as the subsequent ECJ jurisprudence interpreting these Regulations. The first question to be answered is: How does a suspicion of an irregularity come up and reaches the relevant organs and bodies? Most likely, it can be assumed that in Economic related matters,

9

¹⁵⁸ Competence encompasses: OPI – Fostering a competitive and sustainable economy to meet our challenges; OPII – Investing in human capital to create more opportunities and promote the wellbeing of society; SME Initiative (SMI); Food and/or Basic Material Assistance Operational Programme (FEAD); European Maritime and Fisheries Fund (EMFF); Italia-Malta Programme; Internal Security Fund (ISF); Asylum, Migration and Integration Fund (AMIF); Rural Development Programme (RDP); The European Economic Area Financial Mechanism and Norwegian Financial Mechanism.

¹⁵⁹ See → Bulgaria, Cyprus, France, Portugal.

¹⁶⁰ Cf. the other volumes of this series.

customs procedures and VAT actions fewer Reports will be made than in other irregularity sectors, so that national audits and terminated annual audits may lead to a suspicion. The Internal Audit and Financial Investigations Act of Malta holds therefore, that comparable to the situation if a criminal suspicion arises, a Report has to be sent to the relevant Director or authority:

- 10** **[Internal Audit and Financial Investigations Act of Malta]** If an entity has reason to suspect any irregularity and, or a suspected case of fraud of public funds, it shall refer the matter forthwith to the Director, and shall supply to the Director all information in his possession relating thereto.

* The same will apply in case of an irregularity to the detriment of the EU.

18. Whenever, and as soon as, the Director firmly establishes the existence of suspected cases of irregularities and, or suspected cases of fraud concerning the responsibilities of the auditee under review, the Director shall, if he is of the opinion that their regularity, if proved, would constitute a criminal offence, immediately inform the Attorney General; otherwise, if the Director is of the opinion that the irregularity is of an administrative nature, he shall inform the Permanent Secretary of the auditee: Provided that in the case of the Central Bank of Malta, where the Director is of the opinion that the irregularity is of an administrative nature, he shall inform the Chairman of the Audit Committee of the Bank.

- 11** In the course of investigations, the conclusion might be drawn that the suspicion reveals an irregularity that affects the Union's budget. The relevant law in this case will then possibly change to the applicable EU Regulations, which in some cases refer back to national law e.g. for the investigation powers, which are explored in this Manual Chapter below.
- 12** The inaction of a public official responsible to report an irregularity or fraud is often part of a liability called omission and might be sanctioned via administrative fines in the minor cases. It may lead as well to disciplinary proceedings:

- 13** **17. [Internal Audit and Financial Investigations Act of Malta]**
(1) Where the Director or the Board considers that there would be a conflict of interest if the Director himself were to conduct an internal audit or a financial investigation, the Board may appoint a senior public officer from amongst the officers of the Directorate to conduct that investigation in his stead.
(2) It shall be the duty of every officer of the Directorate who has any form of a conflict of interest in any internal audit or financial investigation, he is assigned to work upon, whether such conflict is direct or indirect, to immediately disclose to the Director his

interest and refrain completely from involving himself in that particular case: S.L. Const. 03.

Provided that any officer of the Directorate who knowingly acts in contravention of this sub-Article shall be guilty of an offence against this Act and shall, on conviction, be liable to a fine (multa) of not more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37), and shall also be subject to disciplinary proceedings as provided for in the Public Service Commission (Disciplinary Procedures) Regulations.

The Maltese Government has presented in a Report from 2021 the functioning of OLAF and national bodies by describing the role of the AFCOS Malta:

14

“The IAID is the designated interlocutor of OLAF in Malta and is the AFCOS for Malta which was established during the negotiations for accession under Chapter 28. An administrative Cooperation Arrangement (ACA) was signed between OLAF and IAID as the AFCOS Malta in June 2003, and which became operative as from 1st June 2003. In a letter to the Director of OLAF, the Director of the IAID stated that the Arrangement was also agreed to with the relevant investigative and prosecuting authorities in the Maltese Government structures. In a letter dated 18th November 2016, OLAF informed IAID that a number of ACAs, including the one with Malta, were being terminated given that since their conclusion, Regulation (EU, Euratom) No 883/2013 which sets out the framework for cooperation between OLAF and AFCOS has been revised. It provides an appropriate basis for cooperation with Member States’ authorities and as a result it was considered that an ACA was no longer needed for OLAF and AFCOS Malta to keep working together.”¹⁶¹

See as well below → Article 12a OLAF Regulation.



Malta has thus, since it joined the EU created several bodies and a new AFCOS to fully comply with EU law and the relevant action laws for OLAF operations.

15

aa. Administrative Procedure in General

bb. Special Administrative Powers and Provisions in Certain Areas of Revenue and Expenditure

For example, the tax audit is part of a special administrative area, the tax collection area. The tax audit is a sub-measure within this complex administrative procedure. It is e.g. conducted by Tax compliance unit within the office of the Commissioner for Revenue.

16

¹⁶¹ Office of the Prime Minister, National Anti-Fraud and Corruption Strategy, Malta, 2021, https://parlament.mt/media/112436/national-anti-fraud-and-corruption-strategy_en.pdf. Accessed 31 July 2024.

For OLAF and its staff, it can be important to get to know the details of a special administrative procedure. Therefore, the special administrative powers and provisions in certain areas of revenue and expenditure are explored cursorily.

(1) Administrative Provisions

- 17 The following section will explore the administrative provisions and explain the structure and the tasks of the respective authorities.

(a) Administrative Provisions in the Area of Customs Duties and Value Added Tax (VAT) = Revenue

- 18 In the **area of revenue**, the Maltese Commissioner for Revenue (CfR) has a special role. He or she supervises the whole area that contributes to the Revenue of which a part is dedicated to the EU budget and is essentially the head of the tax authority. CfRs are responsible for the administration and enforcement of tax laws. Therefore, the CfR of Malta is very important to the EU and its institutions.¹⁶²

(aa) Customs Law

- 19 The Customs law is regulated by Chapter 37 of the Laws of Malta, which establishes the so-called Customs Ordinance, which stems initially from 1909 and was last amended 2022.¹⁶³ Part XII. Regulates the powers and the procedure under this Ordinance.
- 20 At the beginning in s. 2 of the Ordinance the term of the **Revenue Commissioner** is explained as “‘Commissioner for Revenue’ (hereinafter referred to as the “Commissioner”) means the Commissioner for Revenue, and includes any other person having an express or implied authority to act for the said Commissioner in carrying out the provisions of this Ordinance”. The Commissioner is the head of several sub-directorates. For example, the Collection services, that deal with the collection of VAT and other taxes. He or she is furthermore supervising the customs sector and operates the Compliance and Investigations Directorate important definitions are duty and public official in customs matters:



“**customs declaration**” means the act by which a person indicates in the prescribed form and manner the desire to place goods according to a particular customs procedure;
“**Customs official**” means any official of the Department of Customs as authorised and empowered by the Commissioner, by virtue of the relevant legislation and includes any other person having an express or implied authority to act for the said Commissioner in

¹⁶² Nota bene: Malta must be distinguished from the so-called Gozo Jurisdiction relating to Gozitan taxpayers, see Annual Report Maltese Government.

¹⁶³ For information on Maltese Customs see <https://customs.gov.mt/>. And see for the history: <https://customs.gov.mt/about-us/our-history>. Accessed 31 July 2024.

carrying out the provisions of this Ordinance as authorised for this purpose by the applicable legislation;

“**duty**” means any duty charged by the Commissioner for Revenue on imported goods and includes import duty, export duty, agricultural duty, anti-dumping duty, countervailing duty and excise duty

“imported goods” or “goods imported into Malta” mean goods produced outside, and imported into or brought into, Malta and include goods produced in Malta, exported therefrom, and afterwards imported there into;

“**importer**” means any person having goods standing in his name on the books of the customs department [...].

(bb) VAT Law

The VAT legislation covers a bright range of Acts, Amendments and Regulations. The current VAT Act stems from ACT XXIII of 1998, as amended 2022. It is arranged as follows: 21

Table 7 Arrangement of Maltese VAT Act, Chapter 406 Laws of Malta 22

ARRANGEMENT OF ACT

Part	Heading	Articles
Part I	Preliminary	1 – 3
Part II	Scope of the Tax	4 – 9
Part III	Registration and tax period	10 – 17
Part IV	Determination and Payment of the Tax	18 – 26
Part V	Returns, Assessments, Penalties and Appeals	27 – 47
Part VI	Records and Information	48 – 56
Part VII	Special Cases	57
Part VIII	Collection, Security and Refunds	58 – 71
Part IX	Miscellaneous	72 – 75
Part X	Offences and Punishments	76 – 84
Part XI	Transitional Provisions	85 – 86

Many legal notices are necessary to keep track of the ever-changing conditions.¹⁶⁴ 23

¹⁶⁴ See Government of Malta, <https://cfr.gov.mt/en/vat/legislation-and-LNs/Pages/default.aspx>. Accessed 31 July 2024.

23. Every person registered under Article 10 who furnishes a tax return for a tax period shall have the right to deduct from the output tax for that period -(a) the input tax credit for that period;(b) any other deductions to which he may be entitled for that period in accordance with the Tenth Schedule.

24. (1) Saving the other provisions of this Act, when the deductions allowable to a person registered under Article 10 for a tax period exceed the output tax of that person for that period the excess shall be an excess credit of that person for that period.

(2) The amount of excess credit of a person registered under Article 10 for a tax period shall, to the extent that it is not set off against any amount due by that person to the Commissioner in accordance with Article 21(1), be a refund payable to that person by not later than five months from the expiration of the time allowed for the furnishing of the tax return for that tax period or from the day on which the said return has been furnished to the Commissioner, whichever is the later: Cap. 372. Provided that where a person to whom a refund is payable in terms of this sub-article has, by the date the refund claim is made, failed to submit a return of income in respect of the year of assessment 1999 or any subsequent years of assessment by the date required to be submitted in terms of the provisions of the Income Tax Management Act and such failure persists until the date such refund becomes payable, any such refund shall not be paid to such person and shall be withheld by the Commissioner until such time as the said return of income is submitted; and provided further that notwithstanding any other provisions of this Act, no interest shall be due by the Commissioner in respect of the period during which the said refund was withheld on account of failure to submit a return of income for the purposes of the Income Tax Management Act.

(3) Interest shall be due to a person to whom a refund is due in accordance with this Article at the rate specified in or prescribed in terms of Article 21(4) from the date by which the refund is payable in accordance with this Article until the date when it is paid or when a cheque or draft for the payment thereof is given or posted to that person by the Commissioner: Provided that no interest shall be due for any period during which such person fails to produce information and, or documentation as may be requested by the Commissioner, for the verification of the amount claimed. (4) For the purpose of any such verifications as he may consider necessary to ascertain the amount refundable, the Commissioner may, by notice in writing to the person to whom a refund is due, extend the time limit referred to in sub-article (2) by not more than twelve months: Provided that the running of interest on the said refund shall not be meanwhile suspended.

25. (1) A person who is not registered or liable to be registered under Article 10 but who is treated as a taxable person by reason of the fact that he makes an exempt supply of new means of transport may claim a refund of the tax charged on the supply to him or the intra-community acquisition or importation by him of that new means of transport:

Provided that the refund shall not exceed the tax that would be chargeable if the supply by him of the new means of transport in question were a taxable supply.

(2) A taxable person who is not registered or liable to be registered under Article 10 and who is not established in Malta but is established in another Member State may claim a refund of his input tax.

(3) A taxable person who is not registered or liable to be registered under Article 10 and who is not established in the Community may claim a refund of his input tax if, in terms of the laws of the country in which he is established, a taxable person established in Malta would be entitled to a comparable benefit with respect to value added tax or similar taxes levied in that country.

(4) When goods transported from a third territory are imported into Malta by a non-taxable legal person, and when the place of arrival of the goods transported is a Member State other than Malta, the importer may claim a refund of the tax on the importation of those goods if he establishes that his acquisition of those goods was subject to value added tax in that other Member State.

50. [Tax invoice]

(1) Every person registered under Article 10 who makes a supply, other than an exempt without credit supply, to another person who identifies himself for the purpose of that supply by means of a value added tax identification number shall provide that other person a tax invoice within the time determined in accordance with the provisions of the Twelfth Schedule.

(2) When there is an application, disposal, transport or use of goods for which no consideration is charged or paid but which is deemed in terms of the Second Schedule to be a supply made by a person for consideration, that person shall, if he is a person registered under Article 10, issue a tax invoice in which he indicates himself both as the person who made the supply and as the person to whom the supply is made.

(3) Every taxable person shall issue a tax invoice within the time stated in sub-article (1) in respect of every distance sale made by him.

(4) Where a person provides a document to himself which purports to be a tax invoice in respect of a taxable supply made to him by a person registered under Article 10, that document may, subject to the provisions of the Twelfth Schedule, be treated as the tax invoice required to be issued and delivered by the supplier in terms of this Article.

(5) A tax invoice shall be issued in the form and in the manner and shall contain the particulars set out in the Twelfth Schedule.

52. [Production of invoices by persons to whom a supply is made] (1) A person to whom any tax invoice or other invoice, receipt or document is provided as required by Article 50 or 51 shall, if so requested in accordance with the other provisions of this Act,

produce the said invoice, receipt or other document to the Commissioner or to any officer authorised by the Commissioner.

(cc) Principle of Investigation (General Tax Code, Excise Duty Act, Customs Ordinance)

- 24** The Excise Duty Act contains provisions on investigation measures as well as inspections and audits that might lead to the conclusion or the discovery of an irregularity. S. 40 of this Act says. “40. The **powers of enforcement for collection of duty** under the Import Duties Act and its subsidiary legislation apply mutatis mutandis for collection of excise duty due under this Act.”
- 25** The Customs Ordinance prescribes a **system-based audit** in s. 65, which includes systems and records. S. 65 para 4 contains a legal definition of a system-based audit: “(4) For the purposes of this Article, the term “system-based audit” means “an audit procedure including auditing of electronic systems, designed to obtain audit evidence as to whether key controls are operating continuously, consistently and effectively as planned in preventing, or detecting and correcting, material mis-statements or instances of non-compliance throughout the period being audited. This audit is also conducted through different types of tests of controls, such as documentation review, enquiry and confirmation, inspection, observation, recalculation and re-performance”.”
- 26** Speaking of investigations, the Internal Audit and Financial investigations Act, which applies if Maltese bodies act to the detriment of the Maltese State, defines financial investigation as follows and hereby introduces the preliminary step for a principle of investigation:
- 27** “5.A **financial investigation** may be carried out in terms of the provisions of this 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.”

(dd) External Audit (General Tax Code, Excise Duty Act, Customs Ordinance)

- 28** The Excise Duty Act contains provisions on audits and inspections in ss. 18, SIXTH SCHEDULE (Article 13(4)) PART A Excisable Goods Regulations.

(ff) Tax and Customs Investigation (Customs Code/General Tax Code, Excise Duty Act, Customs Ordinance)

Very often the parties and OLAF dispute about **anti-dumping duties**, which are suspected of having not been provided in the moment of importation into the EU. The national authorities might discover cases with the help of OLAF providing data from its systems. A dispute often leads to court actions and court cases. One of those court cases is explored on the next pages in more detail and in order to offer investigators, lawyers and interested people a glimpse into the reality at the ports of Malta – the first gate to fight fraud against the Union apparently.


29

Nota bene: The case, which we collected with the national expert, was appealed and judgement of appeal given on the 10 May 2023. The appeal judgement confirmed in its entirety the judgement of the court of first instance. The judgement of first instance follows:



Case Study 2 Anti-Dumping Duty Case – Photovoltaic panels/Appeal Case

30

	CASE STUDY SHEET
CASE NAME/ or INVESTIGATION ACRONYM * Source ¹⁶⁵	“Photovoltaic Panels Anti-Dumping Case”; Parties: <i>Megasol Company Limited vs. Director General (Customs) and Commissioner of Taxes.</i>
RELATED CJEU CASES/Relevant Union law	Regulation (EU) No. 1238/2013 and Article 2(1)(a) of Implementing Regulation (EU) No. 1239/2013
KEYWORDS/ AT ONE GLANCE: Anit-Dumping Duty, Solar panels, China, Malta, EU Regulation, claimant society,	Countries Involved/Member States concerned: Malta (Customs) and OLAF on behalf of the EU, Chinese Company (Suspected) Crime(s) or Administrative Wrongdoings and relevant Sections: Regulation (EU) No. 1238/2013 and Article 2(1)(a) of Implementing Regulation (EU) No. 1239/2013, Chapter 37 Laws of Malta

¹⁶⁵ See <https://ecourts.gov.mt/online-services/Judgements/Details?JudgementId=0&CaseJudgementId=132583>. Accessed 31 July 2024.

OLAF helps Customs, Director General, wrong opponent in appeal proceedings.

Article 11 of Cap. 337 of the Laws of Malta

Data: May 2015–October 2015 (Court proceedings for appeal: seven years later).

Extend of damage: €308,531

Investigative actions taken: Maltese Customs, Administrative Act issued, Inspection of Barcodes on Panels, stopping of importation process, ordering documents. Request addressed to OLAF for help with the Union’s Computer-based Customs Control System, Amend the declaration of the goods after their release, Examination of the goods, post-release inspections.

Investigative authorities involved:

Maltese Customs, Malta Financial Services Authority, Director of Maltese Customs, Maltese Department of Value Added Tax (Ministry of Finance), Tax Commissioner as a supervising authority, OLAF

Where did the Initial suspicion come from?

Chinese supplier was affected to a company, Comerco Services, registered in the British Virgin Islands; failing to pay the higher rate of anti-dumping and countervailing duty; different labelling as seen by our Officers on the solar panels as opposed to those declared on the various documents presented; further investigations by OLAF after first impression than an irregularity existed; OLAF send shortly afterwards feedback that saved the “investigation” and made the evidence more stable.

SUMMARY & FACTS

A company imported photovoltaic panels from China (Shanghai) to Malta. It said that no Anti-Dumping Duty was due as the panels were not subject to Anti-Dumping Duties as this only applied to Chinese products and these were her products. The court later summarized the facts as follows:

“From the evidence produced and from the procedural acts it appears that in April of the year 2015, the Claimant society imported a shipment of photovoltaic panels through five containers. These five containers were declared through two Customs declarations with Numbers TDID 2015602341850 and TDID 2015602337026. One of the containers in question appears to have been released without problems but the other containers were released only after the Claimant society deposited guarantee in the amount of €308,53125 - subsequently reduced to €308,849 - in order to make up for the Anti-Dumping Duty and Countervailing Duty.

The investigation in relation to the containers imported by the Claimant society was triggered after during the inspection of one of these containers - actually the second container after the first one had been released - the officers of the Customs noted that on the panels, which according to the Claimant company's Declarations had been manufactured, sold and exported by the company Jiangyin Shine Science & Techonolgy Co. Ltd., there was a label called Kingstone Energy Technology Corporation, which company had been identified by OLAF, the European anti-fraud office, through an alert with Number AM2014/02 (2015) SO2, exhibited as Doc. “CA7” a fol. 363 and 364 of the process.

From this alert it appears that the company Kingstone Energy Technology Corporation was involved in the transshipment of Chinese solar panels through Taiwan, a practice that was not being accepted by the European Union and that the same Union wanted to prohibit and stop.” (see → *Judgement acronyms above).

The opponent to the claimant before the Administrative Review Tribunal was the Tax Commissioner but the Tribunal was of the opinion that a preliminary exception raised by the Tax Commissioner and the Director General (Customs) in the sense that the Tax Commissioner is not the legitimate opponent of the Applicant society is very important and must be dealt with in the Judgement at first.

LEGAL RE-SULTS/STEPS TAKEN

Examination of goods lead to “freezing” of goods. Claimant society took steps to review the actions of Maltese Customs and went to the Appeal proceedings before the Administrative Review Tribunal of Malta.

CASE ANALYSIS	Customs Authority and OLAF's Arguments	Defendants Arguments
	<p>The opponent, Maltese Customs with the help of OLAF put forward the argument that the Claimant society's claims are unfounded in fact and in law as they are untenable in terms of the provisions of Cap. 37 of the Laws of Malta and Cap. 337 of the Laws of Malta and this because: (a) the procedures de quo concern the importation of 3468 photovoltaic panels imported by the Claimant society according to a declaration made by the same society with the Customs through the Customs documents bin -Numbers TDID 2015602341850 and TDID 2015602337026, together with various other documents required for the purposes of such declarations. In the documentation in question the Claimant society stated that it would import photovoltaic panels declared under HS Code 8541409021B843 but when the Customs officers inspected the goods and the details of origin that were indicated on it and compared them with the infor-</p>	<p>The arguments of the defendant (in this case the claimants society against the actions of Maltese Customs with the help of OLAF) was that the Tribunal: (i) annul and revoke the decisions taken by the Director General (Customs) and the Commissioner of - Taxes on 1 October 2015 and 22 October 2015 where, in an abusive and legal way, they decided that the HS Code applicable to the panels imported from Jiangyin Shine Science & Technology Co. Ltd. it was HS Code 8541409021B843 and not HS Code 8541409021B999 and therefore they imposed the payment of an Anti-Dumping Duty even though it was not due and they refused to release the second batch of panels without the payment of the deposit of €308,531. So the "smooth" release of the first container without any sign of a Duty is, from the point-of-view</p>

mation on the same documentation submitted for the purpose of declarations, including the invoices of the same goods, discovered that in fact it details on the panels and their packaging did not comply with the description and requirements of the HS Code as stated by it. Consequently this delivery of photovoltaic panels did not comply with the Regulation of the European Union with Number 1238/13; (b) as a consequence of the incorrect declaration submitted by the Claimant company in relation to the goods in question originating in China, the Claimant company would evade Anti-Dumping Duty, Countervailing Duty and Value Added Tax due on the total value of the panels in question; (c) thus, contrary to what was alleged in the Promoting Claim, the goods in question were not compliant with Regulation 1238/13 and therefore such Regulation cannot be applied to the facts of the present case.

of the claimant an argument against a duty for the second container. It said therefore that it wants the Tribunal to (ii) declare and decide that the importation of the solar panels in question from the society Jiangyin Shine Science & Technology Co. Ltd. is excluded from Anti-Dumping Duty as it is regulated by HS Code 8541409021B843 and that these same solar panels were imported directly from China to Malta by the Applicant company. Last but not least it wants to be clear that it (iii) orders the Director General (Customs) and the Commissioner of Taxes, or any of them, to refund the Claimant society the sum of €308,531, plus interest from 14 May 2015, representatives the Anti-Dumping Duty unduly paid by it since the goods, consistent in solar panels of the form Polycrystalline Solar Module 250W of the brand name Kingstone, were imported from Shanghai, China, to Malta, by the society

**Court's Assessment/Reasoning**

The Court applied, in order to answer the question of the right opponent of the claimant society in this Anti-Dumping Duty Review Case, applied Article 2 of Chapter 37 of the Laws of Malta and interpreted its scope as well as Article 3 para 3 of the Act on the Commissioner of Taxes, Cap. 517 of the Laws of Malta. As a result of legal amendments, the legal opponent of the claimant society can, due to the court's assessment, since 2012, only be the Director of the Customs Authority ("the judicial representation of the Government of Malta in today's proceedings is not vested in the Tax Commissioner but is vested in the Director General (Customs)").

With regard to the appeal of the claimant society the court said that the evidence for the false invoices and the solar panels was quite well established and proved with evidence from Maltese Customs.

With regard to the complex situation concerning several companies the court said that: "As many times as the Claimant company is contending that the Comerco Services Limited company was acting as a commercial agent for it, the Tribunal considers that the same Claimant company had the burden of proving that this was so by observing d provisions of Articles 70 et seq. of the Commercial Code, Chapter 13 of the Laws of Malta, in particular of Article 71 of Chapter 13 of the Laws of Malta, which failure to observe such provisions of the A law can effectively lead to criminal liability in terms of Article 73 of Chapter 13 of the Laws of Malta.

17 shareholders of the Claimant society, does not render the business relative to the supply and delivery of the photovoltaic panels merit of these procedures a direct sale as required and in terms of Article 3(1)(a) of the Regulation of the European Union 1238/2013 and of Article 2(1)(a) of the Regulation of the European

**JUDICIAL CONSIDERATIONS (RUBRIC)
JUDGEMENT (IF AVAILABLE)**

ACADEMIC DISCUSSION (COMPARISON & FUNCTIONAL ANALYSIS)

Union 1239/2013, but it remains what it is, namely a clear case of triangulation. How many times instead the Claimant company is contending that the company Comercio Services Limited was only its agent in relation to this particular business, in the same way it has not submitted any evidence to show this in a satisfactory way.

[...] The Tribunal absolutely does not agree with these submissions of the Claimant company, apart from the fact that it reiterates that from the evidence produced it does not satisfactorily result that the Comercio Services Limited company was acting as an agent for the Claimant company and it is also not true that Comercio Services Limited forms part of the Claimant company or vice versa, even the issue of VAT Deferment is being deliberately distorted by the Claimant company to try to get rid of the obligation to pay Anti-Dumping Duty and Countervailing Duty.

[...].”

In the end the court assessed that the appeal was unfounded: “In light of all this observed, the Tribunal therefore considers that the appeal of the Claimant society from the decisions of the Director General (Customs) of 1 October 2015 and 22 October 2015 is not justified and as such should be rejected and instead the said decisions be confirmed.”

The academic discussion arises around the question on how much commercial law plays a role as a “sleight of hand” for companies alike that try to circumvent the duty to pay anti-dumping sums.

LESSONS LEARNED/FAILURES PERSPECTIVE FOR National as well as OLAF Investigators

The investigation gathered the following evidence material:

- heard the testimony of Person X, in representation of the Director General (Customs),
- Documents annexed to the statement,
- Testimony of an Inspector within the Department of Value Added Tax,
- Several documents clearly marked by each person that gave testimony,
- a true and complete copy of the Department's file relative to the Claimant society,
- presentation of the statement of the Defendant of the Claimant society,
- Investigations carried out by Maltese Customs,
- Sales Contract
- Certificates of Origin
- Several Invoices
- VAT Number
- Bill of Lading
- Barcode on the panels ("This Barcode is located in the panels themselves and shows the provenance of the panels since this cannot be altered without damaging the panels, and it is the said Barcode that determines who the manufacturer is and where they were manufactured and not a simple sticker or label that can be easily altered, removed or manipulated").
- undertaking invoices and the undertaking certificates

From the point of view of the process, the arguments of the other side (claimant) are particularly important. Arguments were often put forward that are reminiscent of "smokescreens", in particular that the same goods had already been brought into the Netherlands (Rotterdam) and no antidumping duty had been incurred.

Evidence of this was never presented, as the court points out. It shows once again that the opposing side in fraud and irregularity cases is trying to play off the sometimes-inconsistent situation of the legal information flows within the Union against the authorities that are active in protecting the EU budget.

It is therefore important to improve the better flow of information from the authorities about statements, untruths and potential misleading information (*Nebelkerzen*). Very important for the investigators are the objects, documents and other types of investigations that bear the evidence in this process.

Legend

* = Source is indicated

** = Team of the Chair visited Court and followed Proceedings live.

*** = Relevant academic literature was published.

All others = €.

Country Acronyms:

Belgium = BE, Greece = EL, Lithuania = LT, Portugal = PT, Bulgaria = BG, Spain = ES, Luxembourg = LU, Romania = RO, Czech = CZ, France = FR, Hungary = HU, Slovenia = SI, Denmark = DK, Croatia = HR, Malta = MT, Slovakia = SK Germany = DE, Italy = IT Netherlands = NL, Finland = FI, Estonia = EE, Cyprus = CY, Austria = AT, Sweden = SE, Ireland = IE, Latvia = LV, Poland = PL

Currency: **Bulgaria** = Bulgarian Lev BGN B; **Croatia** = Croatian Kuna HRK kn (since 1.1.23 “€”); **Czech Republic** = Czech Koruna CZK Kč; **Denmark** = Danish Krone DKK kr; United Kingdom = **British Pound**; **British Pounds (GBP) £ (not in the EU 31.1.20)**; **Hungary** = Hungarian Forint HUF Ft; **Poland** = Polish Złoty PLN zł; **Romania** = New Romanian Leu RON lei; **Sweden** = Swedish krona SEK kr.

Source: Our Research.

The appeal judgement decided by Judge Lawrence Mintoff (Case number 02/2015LM) confirmed the judgement of first instance. **31**

(gg) Fiscal Supervision

The fiscal supervision is done by the Maltese Ministry of Finance. **32**

(c) Administrative Provisions in the Area of Structural Funds and Internal Policies (Interne Politiken) = Expenditure

(aa) Structural Funds

- 33** Structural funds are regulated by special Adoption Laws implementing the Union policies and assigning the supervision and payment tasks to special Maltese authorities.
- 34** The Special Report on the Fight against Fraud in Malta from 2021, the situation is described as follows:
- 35** “The IAID is the designated interlocutor of OLAF in Malta and is the Anti-Fraud Coordinating Service (AFCOS) for Malta; this implies that this IAID Unit can conduct joint investigations with OLAF, the European Anti-Fraud Office, with respect to EU funds availed of by Malta. The Unit reports irregularities to OLAF on a quarterly basis with respect to Pre-accession Funds, Transition Facility Funds, Structural Funds, Cohesion Fund and Agricultural Funds.”¹⁶⁶
- 36** In the area of agricultural funds and agricultural matters the Agriculture Act applies. It contains many provisions on powers of national officials, such as the enforcement rights in cases of irregularities or suspicions for an offence.
- 37** The following provisions may be of relevance in case of internal audits and financial investigations in general:

Internal Audit and Financial Investigations Act (Chapter 461)

PART I

PRELIMINARY

2. [...]

“financial investigation” means the in-depth examination of all circumstances relative to irregularities and cases of suspected fraud, including the 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 financial implications that could arise out of such an irregularity or suspected fraud;[...]

PART II GENERAL PROVISIONS

Separate functions 3. The Directorate shall have two separate and distinct functions: internal audit and financial investigations.

Internal audit.

¹⁶⁶ See <https://iaid.gov.mt/en/Pages/IAID-Directorates/Financial-Investigations-Directorate.aspx>. Accessed 31 July 2024.

4. An internal audit in the 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.

Financial investigation.

5. A financial investigation may be carried out in terms of the provisions of this 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.

PART IV THE INTERNAL AUDIT AND INVESTIGATIONS DEPARTMENT

The Directorate.

10. The Internal Audit and Investigations Department, shall be the body charged with exercising and performing the functions assigned to it under this Act. The Directorate shall be headed by the Director.

PART V FUNCTIONS OF THE OFFICERS OF THE DIRECTORATE

Suspicion of irregularity.

16. If an entity has reason to suspect any irregularity and, or a suspected case of fraud of public funds, it shall refer the matter forthwith to the Director, and shall supply to the Director all information in his possession relating thereto.

Public Finance Management Act (Chapter 601)

PART VII FINANCIAL CONTROL

Financial control.

44. Save as otherwise provided under any law, financial control of public funds shall be managed and exercised as prescribed by or under this Act.

PART VIII AUDIT AND ASSURANCE

Measures against fraud and irregularities

57. (1) Where, on the detection of any irregularity or fraud against public moneys, a report made in terms of the provisions of the Auditor General and National Audit Office Act or the Internal Audit and Financial Investigations Act is sent or referred to a Head of Department, all necessary measures for the protection of such public moneys, including the levying of administrative penalties in accordance with regulations made under Article 55 and legal action for the recovery of the amount of any deficiency, loss, improper payment caused or made as a result or in the course of any such irregularity or fraud, shall be taken, and the provisions of Article 466 of the Code of Organization and Civil Procedure shall apply to any amount recoverable as aforesaid.

(2) Unless otherwise stipulated in a public contract, any bond, bank guarantee or other security given for the proper performance of any contract payable out of public moneys shall also extend to guarantee the recovery of any moneys or administrative penalties in connection with the contract and for which the person supplying the bond, bank guarantee or other security may be liable.

(3) Where the deficiency, loss, or improper payment as a result of the irregularity or fraud, involves funds received by the Government from any international or supranational organization or entity or from any of its institutions or entities or under the terms of any treaty or other agreement between States, any proceedings under this Article shall take place in consultation with the person in Malta, if any, specifically charged with authorising the payment or release of such funds: Provided that the lack of such consultation shall not in any way whatsoever affect the validity of any proceedings taken under this Article.

(4) Where two (2) or more persons are responsible for the irregularity or fraud which resulted in the deficiency, loss, or improper payment those persons shall be held jointly and severally liable therefore together with any other person who, although is duty bound to do so, has not acted in good faith, and failed to take reasonable precautions and to exercise due diligence to prevent the irregularity or fraud.

(5) Nothing in this Article or in this Part shall be construed as precluding any other person interested from taking action, whether jointly with the Head of Department or otherwise, for the recovery of any sum recoverable under the provisions of this Article.

Table 8 Structural funds and national administrative authorities – Cohesion policy acc. to the CFR Regulation in Malta (2021–2027)

The Euro- pean Re- gional De- velopment Fund (ERDF) – includes European Territorial Cooper- ation (In- terreg)	Just Transi- tion fund	Euro-pean Social Fund Plus (ESF+)	European Maritime, Fisheries and Aqua- culture Fund (EMFAF)	Asylum, Migra- tion and Integra- tion Fund (AMIF)	Instru- ment for Finan- cial As- sistance in the Field of Border Manag- ement and Visa (BMVI)	European Rural Develop-ment Fund (EAFRD) * Not part of the CFR Regulation anymore (as of 2023)
EU funds for Malta: 474 mil- lion eu- ros ¹⁶⁷	EU funds for Malta: 23.3 mil- lion eu- ros ¹⁶⁸	EU funds for Malta: 124 mil- lion eu- ros ¹⁶⁹				EU funds for Malta in 2021 and 2022: 8.8 million euros ¹⁷⁰ EU funds for Malta in MFF 2021-2027 pro- gram: 144.3 mil- lion euros ¹⁷¹
Adminis- trative au- thority: Office of the Deputy Prime Minister and Minis-	Adminis- trative au- thority: Measures and Sup- port Divi- sion.	Managing Author- ity: European Union Pro- grammes Agency and Servizzi	Managing Author- ity: Director General (Funds and	Admin- istra- tive au- thority: Ministry for Home Affairs,	Admin- istrative author- ity: Funds and Pro- grammes Division	Managing Au- thority: Funds and Pro- grammes Division as Managing Au- thority for the Eu- ropean Agricul-

¹⁶⁷ Breakdown of Cohesion Policy allocations per Member State by the European Commission (period 2021-2027), see https://commission.europa.eu/system/files/2022-02/cohesion_policy.pdf. Accessed 31 May 2024. And see Strategy and Implementation Division.

¹⁶⁸ Website of the European Commission on the Cohesion policy, see <https://cohesiondata.ec.europa.eu/stories/s/2021-2027-EU-allocations-available-for-programming/2w8s-ci3y/>. Accessed 31 May 2024.

¹⁶⁹ Breakdown of Cohesion Policy allocations per Member State by the European Commission (period 2021-2027), see https://commission.europa.eu/system/files/2022-02/cohesion_policy.pdf. Accessed 31 May 2024.

¹⁷⁰ Breakdown of European Agricultural Fund for Rural Development per Member State (NextGenerationEU), see https://commission.europa.eu/system/files/2022-02/eafrd_-_ngeu_current_0_0.pdf. Accessed 31 May 2024.

¹⁷¹ Breakdown of European Agricultural Fund for Rural Development per Member State (MFF), see https://commission.europa.eu/system/files/2022-02/eafrd_-_mff_current.pdf, last accessed on 15.12.2022.

try for European Funds, Equality, Reforms and Social Dialogue, see Fondi.eu. And the Planning and Priorities Coordination Division (PPCD)		Ewropej f'Malta.	Pro-grammes Division) Head of the EMFF and EM-FAF Managing Authority Parliamentary Secretariat for EU Funds – Office of the Prime Minister Ministry for European Affairs and Implementation of the Electoral Manifesto Triq il-Kuk-kanja Santa Venera SVR 1411 Malta.	Security, Reforms, and Equality and its managing authorities.		tural Fund for Rural Development (EAFRD)
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Source: The authors.

(bb) Internal Policies

- 38**
- Internal Audit and Financial Investigations Act (Chapter 461)
 - Public Finance Management Act (Chapter 601)
 - Public Administration Act (Chapter 595)

(d) Administrative Provisions in the Area of the Common Organization of the Markets = Expenditure

The following codes may be consulted in this area:

39

- Public Administration Act (Chapter 595)
- Fiscal Responsibility Act (Chapter 534)
- Internal Audit and Financial Investigations Act (Chapter 461)
- Public Finance Management Act (Chapter 601)
- Agriculture and Fishing Industries (Financial Assistance) Act (Chapter 146),
e.g.

Financial assistance for the agricultural and fishing industries.

40

3.(1) Subject to the provisions of this Act, the Minister responsible for the Department of Agriculture and the Department of Fisheries, hereinafter referred to as “the Minister”, may, with the approval of the Minister responsible for finance, make arrangements for the provision of financial assistance for persons engaged in the agricultural or fishing industry and persons desiring to engage therein, including in particular persons who have previously been so engaged.

(2) Assistance may be given under this Act to any such persons as aforesaid:

(a) in regard to the agricultural industry, in connection with the acquisition of livestock, machinery, tools, implements, equipment, fodder, seeds, fertilizers, insecticides, fungicides or any other thing which in the opinion of the Minister is useful to the agricultural industry, or in connection with the acquisition or improvement of land or the improvement of animal husbandry;

(b) in regard to the fishing industry, in connection with the acquisition of boats or equipment for use for the purpose of the said industry, or in connection with the improvement or reconditioning of such boats or equipment;

(c) in regard to both the agricultural and the fishing industries, in connection with the repayment of any sum which, before the coming into operation of this Act, may have been borrowed for any of the purposes specified in the two preceding paragraphs of this sub-article or in connection with the payment of any sum which, before that date, was due for or in relation with any of those purposes.

(3) Assistance as aforesaid shall be by way of loan. But, if the Minister is satisfied that the object for which the assistance is sought would affect an appreciable improvement in the industry, he may authorize assistance to be given by way of grant, or partly by way of loan and partly by way of grant, so however that the amount of grant shall not exceed one-half of the price or expense involved.

(4) Any sums required by the Minister for making grants or loans in accordance with arrangements made under this Article shall be paid out of moneys appropriated for the purpose.

(e) Administrative Provisions in the Area of Direct Expenditure

- 41**
- Public Administration Act (Chapter 595)
 - Fiscal Responsibility Act (Chapter 534)
 - Internal Audit and Financial Investigations Act (Chapter 461)
 - Public Finance Management Act (Chapter 601)
 - Public Procurement Regulations (Subsidiary Legislation 601.03), e.g.:

42

SUBSIDIARY LEGISLATION 601.03
PUBLIC PROCUREMENT REGULATIONS
Part VII

Choice of participants and award of contracts

217. (1) Selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) Contracting authorities may only impose criteria referred to under this regulation on economic operators as requirements for participation. Any of the requirements imposed shall be limited to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract.

(3) As to the suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers, as described in Annex XI of Directive 2014/24/EU.

(4) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

(2) Investigative Powers

(a) Investigative Powers in the Area of Customs Duties and VAT (VAT Act, Customs Ordinance, Customs Excise Duty Act, Articles 18 et seq.)

- 43**
- The investigation powers differ from Act to Act but they are unlike in other countries, quite well described and provide many details on the potential actions of the bodies that work either closely together with OLAF officials (or in criminal investigations with the EPPO, see → above Part B On the EPPO's actions in Malta).

Customs Excise Duty Act 18 [Powers of Customs officials.] (1) It shall be lawful for any Customs official to carry out inspections, at reasonable time, at any authorised tax warehouse or place where excisable goods are kept or suspected to be kept.

(2) The person in whose name the authorised tax warehouse is registered, shall provide such Customs officials with the necessary assistance for the execution of their duties.

(3) A person other than the person in whose name a authorised tax warehouse is registered, who is in possession of any books, documents including machine readable material or other records shall likewise be under a duty to produce the same to the Commissioner or a Customs official.

(4) Any person who wilfully or maliciously refrains from giving his assistance, or wilfully obstructs, impedes or delays any Customs official in the execution of his duties or powers under this Act or under regulations made thereunder, shall be guilty of an offence under this Article and shall be liable, on conviction, to a fine (multa) not exceeding twenty-five thousand euro (€25,000).

19 [Power to conduct a search] see below → “A closer look at single measures”.

(b) Investigative Powers Around Structural Funds and Internal Policies

The summary of cases shows which area the heading of this section is related to:

Investigations Measures 1



Case Studies focusing on typical fraud and irregularity awareness cases studied by journalists Representing media as the fourth pillar of democracy

OLAF investigates many cases in the area of structural funds. Some cases come to the knowledge of the general public by e.g. journalists, courts or analysts. Further Reading Suggestions:

Case 1 “Marsa Junction Project”¹⁷²

The Marsa Junction Project in Malta, a €40 million initiative, was investigated for potential corruption. Key figures include Yorgen Fenech, implicated in journalist’s murder, and Frederick Azzopardi, former CEO of Infrastructure Malta. Evidence suggests Fenech acted as a middleman, promising a €2 million fee, while Azzopardi may have sought 45% of an €11 million sum. The EPPO has been actively investigating these claims, particularly focusing on potential bribery, money laundering, and fraud affecting EU funds. Despite the Maltese police being aware of the potential corruption

¹⁷² See <https://timesofmalta.com/articles/view/marsa-junction-project-investigated-potential-corruption.984356>. Accessed 31 July 2024.

since 2019, progress on the investigation has been slow. The EPPO has requested further information from various entities and individuals involved.

Case 2 “Boutique Hotels Everywhere?”¹⁷³

Although surveys suggest the market is saturated, the Maltese government has committed over €7 million in EU money to open 40 new boutique hotels throughout the island. According to a Shift investigation, the majority of EU funding for private investments went to those in positions of authority or connected to them. Officials from the government have voiced worries about misplaced priorities, anomalies in the distribution of funds, and even corruption. The research also reveals the large sums of money that the families of cabinet members, both past and present, have received for hotel projects. The Z[...] family of the F[...] Group, owners of the Village Boutique and Spa in Na[...], was awarded the largest sum of money, totaling €490,500.

Case 3 “Allocation of EU Funds”¹⁷⁴

The studies have questioned the process’s impartiality and transparency, pointing out that some projects appear to benefit a small group of people rather than the whole public. Malta has also come under fire from the European Court of Auditors for routinely giving contracts to the same companies, a move that raises suspicions of financial mismanagement and a lack of competition.

According to the Greens, a comprehensive inquiry is required to guarantee responsibility and appropriate utilization of EU funds meant for the nation’s advancement and enhancement.

This investigation is a part of a larger worry about corruption and governance in Malta, namely with relation to public and EU finances.

Case 4 “ERDF Fund used for hotel renovation?”¹⁷⁵

The investigated person, obtained approximately €270,000 in EU funds to convert a property into a three-star boutique hotel with an emphasis on yoga, meditation, and culinary services. The money was distributed as a result of an application that M[...] submitted on behalf of L-[...] Ltd., the only director of which she is. The eight-bedroom hotel is scheduled to open this year, with 80% of its costs paid for by the European Regional Development Fund (ERDF). The property is mentioned in Minister[-..]’s statement of assets, despite the fact that he is not named as a shareholder of the receiving firm or personally involved in the application. Despite legal

¹⁷³ See The Shift Team, <https://theshiftnews.com/2023/07/01/following-the-shifts-reports-greens-call-for-probe-in-to-allocation-of-eu-funds/>. Accessed 31 July 2024.

¹⁷⁴ See The Shift Team, <https://theshiftnews.com/2023/07/01/millions-of-eu-funds-for-40-new-boutique-hotels-as-market-faces-oversaturation/>. Accessed 31 July 2024.

¹⁷⁵ See The Shift Team, <https://theshiftnews.com/2023/06/17/anton-refalo-and-wife-get-e270000-in-eu-funding-for-their-yoga-meditation-hotel/>. Accessed 31 July 2024.

hurdles, the R[...] purchased the land in the 1990s and gradually turned it into a sizable rural home.

Case 5 “EUAA Case”¹⁷⁶

OLAF is looking into the European Union Asylum Agency (EUAA) for internal problems and possible human rights breaches. Narrowly interpreting requirements and disregarding claims of maltreatment of asylum seekers are among the accusations. The probe was verified by OLAF, which emphasized that it respects the presumption of innocent and does not indicate guilt. Workers have previously complained to the EUAA about mishandled harassment, nepotism, and misappropriation of EU funding. Executive Director Nina Gregori questions the motivations of the complainants and refutes these claims. Similar charges against Frontex, the EU border agency, were the basis for an investigation by OLAF into a hostile work atmosphere and incompetence in “pushbacks.” Systemic governance shortcomings, including potential cover-ups of illegal pushbacks, were exposed by the Frontex OLAF report.

Case 6¹⁷⁷

EU anti-fraud prosecutors have expressed interest in 40 euros million Marsa flyover deal due to possible wrongdoing. Since the phone of Y[...], a murder suspect, was taken in 2019, the project - which is partially sponsored by the EU - has come under investigation. According to data, Fenech served as a middleman and was paid €2 million in “success fees,” of which half were supposed to go to an offshore business connected to 17 Black. A[...], a Turkish contractor, won the tender by a slight margin over a consortium from Malta, as represented by F[...]. An immediate financial crisis beset A[...]. The millionaire R[...] made hints of corruption in email conversations, and Fenech’s involvement suggested bribes. The EPPO has revived the investigation, which was closed by local police despite suspicions. The police’s refusal to divulge important evidence creates barriers for investigations.

Summary:

These cases can only show exemplarily, which cases fall under the scope of OLAF’s competence. All of these cases must be respected under the presumption of innocence and can only be read as purely informational texts about potential scenarios on how an OLAF investigation could function within this particular area. The cases show as well the typical conduct, which stipulates investigators to open a case in the first place.

¹⁷⁶ See De Gatano, <https://theshiftnews.com/2022/11/29/anti-fraud-watchdog-olaf-to-investigate-malta-based-eu-asylum-agency/>. Accessed 31 July 2024.

¹⁷⁷ See <https://timesofmalta.com/articles/view/vitals-deal-hospitals-fraud-occur-comes-next.1017537>.

(d) Investigative Powers in the Area of Common Market Organizations

- 46** The regulatory frameworks and processes that control the production, price, and marketing of agricultural products inside the EU are referred to as common market organizations. These establishments are intended to protect the availability of goods for consumers, assure fair prices for producers, and maintain market stability. In order to ensure sustained rural development, they also want to increase the competitiveness of European agriculture.
- 47** The Common Agricultural Policy (CAP) includes common market organizations that deal with a variety of agricultural products and industries, including grains, dairy, meat, fruits, vegetables, and wine. In addition to laws for producer groups, marketing standards, and trade with non-EU nations, they include methods for intervention, storage, and export refunds. EU rules established these organizations. The investigative powers within the domain of common market organizations are established in the subsequent Maltese legislative frameworks:
- Public Administration Act (Chapter 595)
 - Fiscal Responsibility Act (Chapter 534)
 - Internal Audit and Financial Investigations Act (Chapter 461)
 - Public Finance Management Act (Chapter 601) * Chapter refers to the laws of Malta.

(e) Investigative Powers in the Area of Direct Expenditure

- 48** In the EU, the term “direct expenditure” describes the funds that EU institutions allocate to initiatives and operations. It covers expenses for e.g. infrastructure, education, research if aimed at achieving EU objectives. In a nutshell, it’s *de facto* “the cash” utilized to run and support EU initiatives. In the area of direct expenditure, the direct management i.e., the control and managing by one main authority (mainly the Commission itself) is the main source of money transfer. If it is the European Commission, its agencies and delegations that manage the EU budget in this area, they are competent to supervision the accounting of projects in this area. The EU Commission runs e.g., the Funding and Tenders Portal (SEDIA) for this specific area. The whole direct expenditure area is not immune to fraud. It can be said that it is prone to procurement, or procurement related fraud (causing damage to the expenditure side of the budget).¹⁷⁸

¹⁴⁶ See OECD 2019, online: <https://www.oecd.org/gov/ethics/prevention-fraud-corruption-european-funds.pdf>, p. 7, 14: “The implementation stage of the project cycle brings with it numerous fraud and corruption risks due to the number of actors potentially involved in project implementation and the complexity of some of the processes at this stage. For projects with high investment value, such as large-scale infrastructure projects, this stage becomes even more vulnerable to fraud and corruption. Furthermore, tenders put out either directly by the MA or beneficiary are common during the implementation stage, and procurement processes are notoriously prone to fraud and

OLAF describes and displays investigations in this area as follows: 49

“Direct expenditure” 50

Accounting for 14% of the EU budget, this is expenditure allocated and directly managed by EU institutions, bodies, agencies alone (not jointly with national authorities, as with the structural funds). Beneficiaries are located in EU countries.

It includes expenditure in, among others, the following areas:

- research and innovation (e.g. Horizon Europe programme)
- education, training and mobility of young people (e.g. ERASMUS+ programme)
- supporting the competitiveness of industry and in particular of micro, small and medium-sized enterprises (e.g. Single Market programme)
- environment and climate action (LIFE programme)
- improving the capacity of the EU to face security threats (Internal Security Fund)
- European public administration.

As a rule, national authorities are not involved in investigating fraud affecting direct expenditure.”¹⁷⁹ 51

corruption. As shown in the illustrated schemes in the final part of the guide, there are a number of procurement specific risks that occur at this stage. For example, members of an MA or beneficiary may tailor tender specifications or leak commercially sensitive tender information to favour one particular company or individual. Companies or contractors may also take part in collusive bidding schemes to manipulate competitive procedures. Responses from an OECD survey that was distributed to programme authorities show that procurement-related fraud and corruption risks at the level of beneficiaries are sometimes overlooked in risk analysis activities. In addition, some MAs generally base the identification of fraud risks on their own experience, without any additional input from other knowledgeable actors. Outside of the procurement process, perpetrators employ other tactics to siphon off funds and defraud the EU budget. For example, a beneficiary may fabricate fictitious works, services or activities, or inflate labour costs. In attempt to cover up fraudulent or corrupt behaviour or to justify non-eligible expenditure, perpetrators may manipulate documents and submit fictitious invoices. In some cases, perpetrators may even attempt to bribe officials or staff within programme authorities to conceal the scheme.

¹⁷⁹ OLAF, Information on Investigations related to EU expenditure, https://ec.europa.eu/anti-fraud/investigations/investigations-related-eu-expenditure_hr. Accessed 31 July 2024.

- 52 In the area of direct expenditure beneficiaries subject themselves often under the regime of civil and administrative anti-fraud clauses, which are usually enshrined in the contract between the recipient and the monitoring payment office.



Examples: The EU Commission supports large infrastructure projects.

- 53 OLAF has a **special unit**, which is competent to investigate and detect irregularities in the area of direct expenditure:

Direct Expenditure - Operations and Investigations (OLAF.A.2) Rue Joseph II 30 / Josef II-straat 30, 1000, (postal office Box: 1049), Bruxelles / Brussel Belgium¹⁸⁰

- 54 These codes may be consulted for investigative provisions:

- Public Administration Act (Chapter 595)
- Public Finance Management Act (Chapter 601)
- Auditor General and National Audit Office Act (Chapter 396)
- Fiscal Responsibility Act (Chapter 534)
- Internal Audit and Financial Investigations Act (Chapter 461)
- Public Procurement Regulations (Subsidiary Legislation 601.03)

(f) Provisions in the Area of External Aid = Expenditure

- 55 In the area of indirect management, the budget is implemented by various actors that have to carry out delegated tasks, which the Commission carries out itself in the area of direct management.¹⁸¹ In France this may be special institutions like intergovernmental organizations that operate from French territory and are subject to French law.
- 56 *Nota bene:* The **EU Aid explorer** can be used to discover beneficiaries and funding schemes.¹⁸²
- 57 A common fraud scheme in this area is the “manipulation of tender processes”.¹⁸³

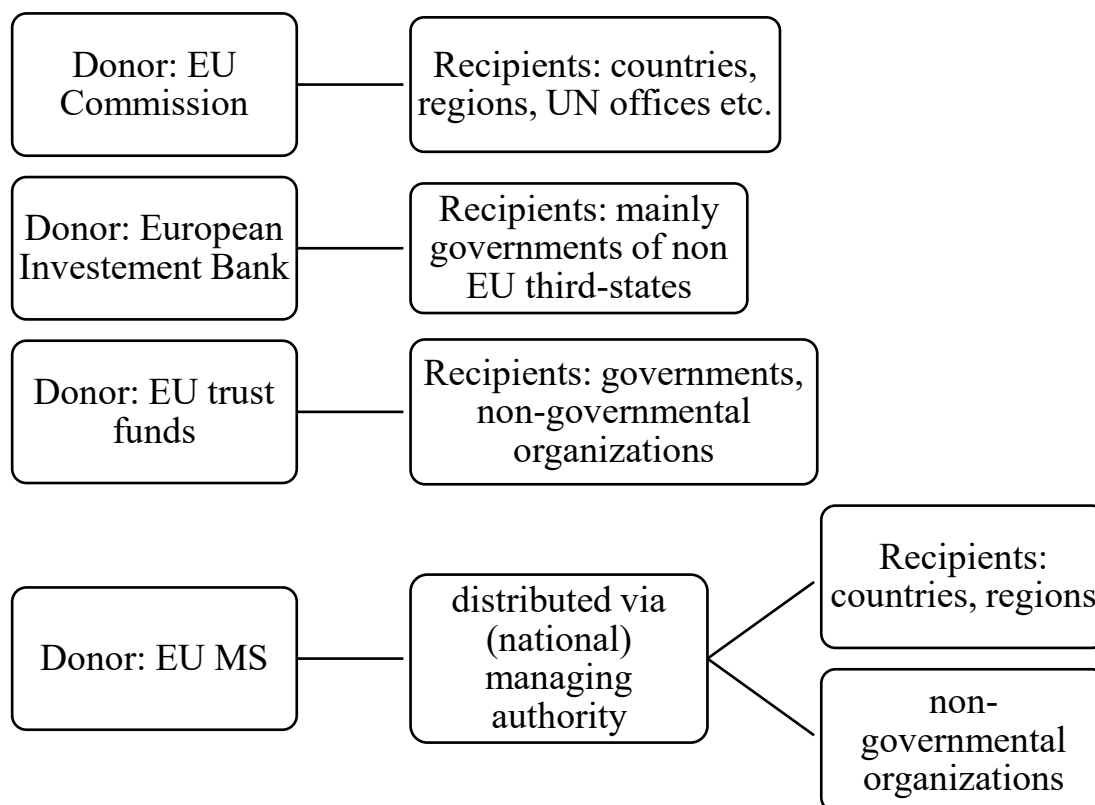
¹⁸⁰ EU, WHOisWHO, https://op.europa.eu/en/web/who-is-who/organization/-/organization/OLAF/COM_CRF_230282. Accessed 31 July 2024.

¹⁸¹ EU Commission, Funding by management mode, https://ec.europa.eu/info/funding-tenders/find-funding/funding-management-mode_en. Accessed 31 July 2024.

¹⁸² EU external aid explorer, https://euaidexplorer.ec.europa.eu/index_en.

¹⁸³ OLAF, Success Stories, May 2022, https://ec.europa.eu/anti-fraud/investigations/success-stories_en#external-aid. Accessed 31 July 2024.

Figure 7 EU external aid/expenditure (indirect management) Article 3 OLAF Regulation on-the-spot inspections to discover EU external aid expenditure-related frauds



For the investigations in the area of external aid OLAF can make use of Administrative Cooperation Agreements (ACAs).¹⁸⁴ **58**

(3) Protection of Information

The protection of information from investigators i.e. by secrecy obligations and the access to such personal information and data to foster an investigation is regulated by several laws, such as the Malta Financial Services Authority (MFSA) Act, the Financial Services Act (FSA) and the Prevention of Money Laundering and Funding of Terrorism Act. If it comes to the protection of fundamental rights of the suspect in administrative or criminal proceedings – especially investigations, the Articles of the constitution of Malta apply. Chapter IV regulates the fundamental rights and freedoms of the individual, Articles 32–47 Constitution of Malta. Besides the Constitution single Acts, like the Data Protection Act or the Customs Ordinance apply. **59**

¹⁸⁴ OLAF, State of Play – June 2021 Administrative Cooperation Arrangements (ACAs) with partner authorities in non-EU countries and territories and counterpart administrative investigative services of International Organisations, https://ec.europa.eu/anti-fraud/system/files/2021-07/list_signed_acas_en_7fd50a9cbe.pdf. Accessed 31 July 2024.

60 Additionally, it should be referred to other principles. Administratively, the Maltese judicial system also has and follows the rules of natural justice, as a way of Administrative Rules and special practices. The principles are as follows:

- *Nemo Judex in causa sua*
- *Audi alteram partem*
- Reasons for decisions

(a) Tax secrecy (General Tax Code)

61 Tax secrecy is highly valued in Malta, which is shown by the International Financial Secrecy Index.¹⁸⁵ In general, the Maltese tax authorities are obliged to protect the confidentiality of the tax information and may only pass them on to third parties in the legally provided cases. If seen from the perspective of investigators this is an obstacle to effective and fruitful investigations into serious irregularities or even tax evasion (which is if criminal suspicion exists, investigated by the Regional Office of the EPPO in Malta → See Part A). The Income Tax Management Act and the Business Promotion Act regulate on privacy and secrecy in tax matters.

62 Business Promotion Act

33. (1) Save as may be otherwise required for the purposes of this Act, or in the course of a prosecution for any offence committed in relation to this Act, or where the Prime Minister otherwise directs –

(a) every person having an official duty or being employed in the administration of this Act shall regard and deal with all documents and information relating to matters contemplated by or pursuant to the provisions of this Act as secret and confidential and shall make and subscribe before a Commissioner for Oaths a declaration on oath to this effect in the form prescribed which shall be deposited with the Attorney General;

(b) no such person shall be required to produce to or before any court, tribunal, Board, committee of enquiry or any other authority, or to divulge to any court, tribunal, Board, committee or other authority, any matter or thing coming to his notice or being in his possession in the performance of his duties under this Act.

(2) Notwithstanding the provisions of sub-article (1), the auditor of the Corporation shall have access to any records and documents as may be necessary for the performance of his duties.

38. Any person who, except as provided for or allowed under this Act or for the purposes thereof, communicates or attempts to communicate to any other person any matter or thing coming to his notice or being in his possession in the performance of his

¹⁸⁵ See Vella, M., in: Malta Today, Malta enters top rank in global tax secrecy league https://www.maltatoday.com.mt/busiess/buness_news/84127/malta_eters_top_rank_in_global_tax_screcy_leagu_e#.Y8gPvHbMJPY. See the Malt Leaks, Springer 2017: <https://www.spiegel.de/international/business/malta-the-european-union-s-very-own-tax-haven-a-1148915.html>. Accessed 31 July 2024.

duties under this Act shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) and not more than four thousand and six hundred and fifty-eight euro and seventy-five cents (4,658.75) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment: Provided that a person shall not be precluded from providing such information and access to the Corporation's records as may be required by the State Aid Monitoring Board in the discharge of its functions and duties under this Act:

Cap. 202. Provided further that a person referred to in Article 33(1)(a) shall have the duty to provide such information and access to the Corporation's records as may be required by the Minister for the execution of the Minister's responsibilities in terms of the provisions of this Act and of the Malta Development Corporation Act.

Chapter 406, the Value Added Tax Act holds that

63

(b) Administrative (Administrative Laws)

The official secrecy is protected by the Professional Secrecy Act. Chapter 377, the Professional Secrecy Act exists to establish general provisions protecting professional secrecy and to make consequential amendments to other laws.

64

Professional secrecy is **defined as follows**:

65

(3) "Professional secret" or "secret" in this Act refers to information which falls under any of the following categories:

66

(a) information which is to be considered secret under specific provision of any law; Cap. 9.

(b) information which is described as secret by the person communicating the information to a person falling within the scope of Article 257 of the Criminal Code;

(c) information which has reasonably to be considered as secret in view of –

(i) the circumstances in which the information has been communicated and received, and

(ii) the nature of the information, and

(iii) the calling, profession or office of the person receiving the information, and of the person giving the information, where applicable [...].

First of all, from the point-of-view of criminal law, it is also important to remember that there are documents which are subject to legal privilege which investigators cannot collect in searches, or look at. Secrecy is established in the following circumstances:

67

- 68** 3. (1) The persons who, by reason of their calling, profession or office, fall within the scope of Article 257 of the Criminal Code include the following: members of a profession regulated by the Medical and Kindred Professions Ordinance, advocates, notaries, legal procurators, social workers, psychologists, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers and insurance sub-agents, officials and employees of the State.
- (2) Subject to Article 10, a person shall still remain subject to the provisions of Article 257 of the Criminal Code after he has ceased to exercise the relevant calling or profession, or to occupy the relevant office.
- (3) References in statutory enactments to “the duty of professional secrecy” or similar expressions shall hence forth be interpreted, unless the context otherwise requires, as references to the duty imposed by Article 257 of the Criminal Code not to disclose a secret covered by that Article.
- 5.** Any person who receives or acquires secret information by virtue of a power of investigation or enquiry conferred by law or by virtue of any enactment which requires information to be communicated shall be deemed to have become the depositary of such information by virtue of his calling, profession or office.

(c) Data Secrecy (Data Protection Laws, Customs Code, General Tax Code, Proceeds of Crime Act)

- 69** Secrecy in relation to data is highly important and may “cost” the investigators their success if these obligations are not strictly obeyed:
- 70** 26. Disclosure of Internal Audit and Financial Investigations Act (Chapter 461)
Information furnished by auditee.
22. (1) [All information]
- (1) The Director and members of the Board, members of the Directorate staff and advisors and contractors of the Bureau shall treat furnished by an auditee during the course of any information acquired through the performance of their duties under this Act as secret and internal audit or financial investigation shall at all times be treated as confidential and shall not disclose the same to any person other than as necessary for the proper performance of their duties:
- Provided that nothing in this sub-article shall be deemed to preclude the Director or any member of the Directorate Staff acting under a general or specific authorisation from the said Board to disclose information to the Attorney General, or any prosecuting authority, that may be required in the prosecution of offences for a relevant offence or to

any fiscal or supervisory authority established by or under any other law for solely used by the Directorate for the purpose of aiding such other authority in the carrying out of its functions the internal audit and, or financial investigation.

(2) The Director and members of the Directorate staff shall keep a record of any disclosure of information made in accordance with sub-article (1) hereof, indicating the person to whom the information has been disclosed and where necessary, the date of the authority to disclose given in writing by the Director: Provided that in urgent cases, authority to disclose may be given verbally in which case it shall be confirmed in writing as soon as may be, and in no case later than two (2) working days of the giving of the verbal authority.

(2) The Director shall treat internal audit reports and reports of financial investigations as strictly confidential and shall, except for the purpose of any criminal investigation or prosecution, only disclose their contents to the Permanent Secretary and, if necessary, to the Board, or to the Auditor General.

(3) Without prejudice to the rights of the Auditor General under any law, no information obtained in any way under this Act shall be disclosed except:

(a) for the purposes of the financial investigation and the prosecution of a criminal offence;

(b) to officers of the Directorate in the course of their duties under this Act; and

In matters which under this Act arise out of Malta's international obligations, to the relevant foreign audit and control authorities.

(d) Official secrecy (Customs Ordinance, VAT Act Code, General Tax Code)

The Maltese VAT Act establishes official secrecy and at the same time presents exceptions and limitations to this principle:

71

55. [Information held by certain licensed persons.]

72

(1) Without prejudice to the provisions relating to the duty of professional secrecy, no information shall be requested by the Commissioner by virtue of this Act from any persons to whom sub-article (2) refers except solely for the purpose of determining the tax payable by and the deductions allowable to such person under this Act or of ensuring compliance by such person with the provisions of this Act.

(2) This sub-article refers to –Cap. 371.

(a) a bank licensed under the Banking Act; Cap. 403.

(b) an insurance company in respect of long-term insurance business which is carried on pursuant to a licence granted under the Insurance Business Act; Cap. 370.

I any person licensed to carry on investment business under the Investment Services Act; Cap. 370.

(d) a collective investment scheme licensed under the Investment Services Act; Cap. 345.

I a stockbroker licensed under the Malta Stock Exchange Act.

56. [Official secrecy] (1) Except as may be necessary for the purposes of this Act, or where the Commissioner otherwise directs, every person having any official duty or being employed in the administration of this Act shall regard and deal with all documents and information relating to this Act as secret and confidential.

(2) No person appointed under or employed in carrying out the provisions of this Act shall be required to produce any document or to divulge any matter coming under his notice in the performance of his duties under this Act except as may be lawfully required for the purpose of carrying into effect the provisions of this Act, or for the purpose or in the course of any appeal made in accordance with this Act or a prosecution for any offence against any of the provisions of this Act, or in the course of an investigation or a prosecution for any relevant offence:

Provided that the provisions of this Article shall not prejudice the international obligations that the Commissioner or any person referred to in this sub-article may have, including confidentiality obligations under arrangements made under Article 76 of the Income Tax Act.

(2A) For the purposes of this Article, “relevant offence” means a criminal offence, not being one of an involuntary nature, consisting of any act or omission which if committed in Malta, or in corresponding circumstances, would constitute an offence liable to the punishment of imprisonment or of detention for a term of one (1) year or more.

(3) Notwithstanding the other provisions of this Article, the Commissioner may permit the Auditor General or any officer authorised by the Auditor General to have access to any records or documents as may be necessary for the performance of his official duties and for this purpose the Auditor General and any such authorised officer shall be deemed to be a person employed in the administration of this Act.

(4) Notwithstanding the provisions of the other sub-articles of this Article or of any other law, the Commissioner shall furnish, to the competent authority designated under the Eco-Contribution Act and to the Comptroller of Customs such information, being information obtained by the Commissioner for any of the purposes of this Act.

(5) Nothing contained in this Article shall, after the accession date, prevent the disclosure by the Commissioner, of any information that is required to be disclosed in terms of Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax or of any such other Council Regulation as may be prescribed.

(6) For the purposes of this Article, any information disclosed to the Commissioner by the fiscal authorities of another Member State in terms of any Council Regulation referred to in sub-article (5) shall be treated as information relating to and obtained for the purposes of this Act.

The Income Tax Act holds an equal provision:

73

4. Official Secrecy

(1) Except as may be necessary for the purposes of the Income Tax Acts, or where the Commissioner otherwise directs, every person having any official duty or being employed in the administration of the Income Tax Acts shall regard and deal with documents, information, returns and assessments relating to the Income Tax Acts, or copies thereof, as secret and confidential and shall make and subscribe before the Court of Appeal a declaration on oath to that effect in the form prescribed.

(2) No person appointed under or employed in carrying out the provisions of the Income Tax Acts shall be required to produce any return, document or assessment or to divulge or communicate any matter or thing coming under his notice in the performance of his duties under the Income Tax Acts except as may be necessary for the purpose of carrying into effect the provisions of the Income Tax Acts, or for the purpose, or in the course, of an investigation or a prosecution for any offence committed against any of the provisions of the Income Tax Acts, or in the course of an investigation or a prosecution for any relevant offence.

(2A) For the purposes of this Article, “relevant offence” means criminal offence, not being one of an involuntary nature, consisting of any act or omission which if committed in Malta, or in corresponding circumstances, would constitute an offence liable to the punishment of imprisonment or of detention for a term of one (1) year or more.

(3) Nothing contained in this Article shall prejudice the international obligations that the Commissioner or any person referred to in sub-article

(2) may have, including confidentiality obligations under arrangements made under Article 76 of the Income Tax Act and regulations implementing EU Directives under Article 52B of the Income Tax Act and shall not prevent the disclosure to any authorized representative of any other Government of such information as is required to be disclosed in terms of -

(a) any arrangement made under Article 76 of the Income Tax Act including the disclosure of such facts as maybe necessary to enable proper relief to be given in Malta or elsewhere under any such arrangement or under Article 89 of the Income Tax Act;

(b) any other arrangement between Malta and other States or their tax authorities providing for the reciprocal exchange of information for tax purposes.

(4) (Deleted by Act XIII. 2015.120). (5) (a) The Commissioner shall submit to the Speaker of the House of Representatives a certified statement showing the details of income declared by each Member of the House for the purpose of the Income Tax Acts from the year of assessment in which such Member first became a Member of the House and for every subsequent year of assessment up to and including the year of assessment following the year in which such Member ceases to be a Member of the House provided that if a Member having ceased to be a Member of the House as aforesaid again becomes

a Member of the House, the Commissioner shall also submit to the Speaker the details of the income in respect of the period covering the years when such member ceased to be a Member until he again becomes a Member of the House.

(b) The Speaker of the House of Representatives shall, upon a request in writing by any Member of the House or by the editor responsible for any newspaper registered under the Media and Defamation Act, furnish such Member or editor with the details of income in respect of any year of assessment declared by any Member of the House for the purposes of the Income Tax Acts, provided that the details of income so requested have been made available to the Speaker under the provisions of paragraph (a) and that prior to giving such information the Speaker shall notify such Member whose details of income are being requested, with a copy of such request and of the reply being given.

(6) Notwithstanding anything contained in this Article, the Commissioner may permit the Auditor General of the Government or any other officer duly authorised in that behalf by the Auditor General to have such access to any records or documents as may be necessary for the performance of his official duties. The Auditor General or any such officer shall be deemed to be a person employed in the administration of this Act for the purpose of this Article.

(7) Notwithstanding anything contained in this Article, the Commissioner may make use of the documents, information and returns relating to the income or items of income of any person for the purpose of the Duty on Documents and Transfers Act, and may produce or cause to be produced in court in any proceedings relating to duties levied or leviable, and for the collection of any penalty inflicted under such Act, a copy of any particulars contained in any document of return as aforesaid, certified by him or by the chairman of the Administrative Review Tribunal constituted under Article 34 or by the Registrar of Courts, as the case may be, to be a correct copy of such particulars: Provided that the Commissioner may produce or cause to be produced the original of any such document or return in any case where it is necessary to prove the handwriting or the signature or the identity of the person who wrote, made, signed or furnished such document or return, but only for the purpose of such proof.

(8) Nothing in this Article shall prevent the delivery of documents by the Commissioner in accordance with Article 57.

(9) Deleted by Act VIII.2021.8.

(4) Investigation Reports (Customs Code, General Tax Code)

- 74 At least the Internal Audit and Financial Investigation Act requires an investigation report after the investigation was closed so that it might be guessed that investigation reports in general are common in Maltese administrative law as well as criminal procedure related aspects:

Internal Audit and Financial Investigations Act (Chapter 461)**PART V****FUNCTIONS OF THE OFFICERS OF THE DIRECTORATE**

[...]

Report.

14.(1) The Director shall, as soon as may be, after concluding a financial investigation or an internal audit, transmit a report thereof to the Permanent Secretary under whose supervision the auditee supervision the auditee falls. The Director may also transmit a copy of such report to the auditee.

(2) Within one month of receipt of such report, the Permanent Secretary Permanent Secretary shall give such instructions to the auditee as may be necessary to remedy any shortcomings, and shall inform the Director accordingly. The Director accordingly.

(3) Notwithstanding sub-Articles (1) and (2), where the auditee is the Central Bank of Malta, any report of a financial investigation carried out at the Bank shall be presented to the Chairman of the Audit Committee of the Bank who shall, within one month of the receipt of such report, give instructions to the Governor of the Bank as may be necessary to remedy any shortcomings, and shall inform the Director accordingly.

Follow-up reviews.

15. The Director shall conduct such follow-up reviews as maybe necessary after an internal audit and financial investigation.

h) A Closer Look at Single Measures

aa. The Taking of Statements from Economic Operators in Investigation Actions

- 76** Taking statements may be a fruitful measure in any stage of the investigation. The Customs Ordinance e.g. provides for the possibilities to question Economic operators:

77 **[Excerpt Chapter 37, Customs Ordinance]**

70A. A Customs official may require any person whom such official has reasonable cause to believe to be guilty of an offence under this Ordinance to furnish to such official –

- (a) his or her name and surname, address and other details,
- (b) a document of identification, and

I all such information in relation to the goods subject to duty as may be reasonably required by such Customs official and which goods are in the possession or procurement of such person.

[Excerpt Chapter 382 Customs Excise Duty Act]

23.A [Obligation to give information.] Customs official may require any person whom such officer has reasonable cause to believe to be guilty of an offence under Article 16(1) or Article 17, to furnish to such officer –(a) his or her name and surname, address and other details, (b) a document of identification; and(c) all such information in relation to the goods subject to excise duty as may be reasonably required by such Customs official or member, which goods are in the possession or procurement of such person.

bb. Interviewing/Questioning of Witnesses

- 78** Interviewing and questioning the witnesses in a measure under the Audit Act, the Administrative Justice Act, the VAT Act and Customs Act.

cc. Inspections

- 79** The main Act, which applies is the Internal Audit and Financial Investigations Act (Chapter 461).

- 80** The following pages present the relevant sections regarding inspection in customs excise duty matters as well as VAT (refund) or duty matters:

81 **VAT Act**

53. [Inspections] The Commissioner shall, for the purpose of ensuring compliance with the provisions of **entry**

20.(1) Except as may be expressly provided by any law, the Director shall, for the purpose of carrying out his functions under this Act, have the power –

(a) to *enter and inspect any premises* whereof an economic activity is carried on or suspected auditee in order to be carried on or where *any goods, assets, books, records or documents relating* conduct an internal audit and, where he has reason *to such activity are kept or suspected to be kept*, and to stop, suspect that irregularities and, or fraud, have occurred or are occurring, to enter and inspect any means which is transporting goods or any means for the transport of goods, to direct the delivery of the said means to another location and to open the said goods to verify the quantity and value premises of goods with invoices, books, records or documents relating to such goods to determine whether or not value added tax has been accounted for under the provisions of this Act;

(b) to inspect and to require the production of any books, records or documents, including machine readable information, or a copy or extract thereof relating to the economic activity of any person;

I subject to the provisions of Article 55, to require any person to give such information as may be requested an auditee for the purpose of determining whether any taxable or exempt with credit supplies have been made by or to that person or whether any intra-community acquisitions or importations have been made by that person or the value of any such supplies, acquisitions or importations and to request the attendance of any person at the office of the Commissioner for the purpose of providing such information;

(d) to request the particulars including the name, surname, address and the production of a legally valid identification document of any person suspected to be in breach of any of the provisions of this Act or of any regulations made under this Act; and

I when a taxable person established in Malta stores invoices which he issues or receives by an electronic means guaranteeing on-line conducting a financial investigation: Provided that, if access to the data and when the place of storage is required to any premises occupied in whole or in a Member State other than that in which he is established, the Commissioner shall have the right to access by electronic means, download, and use such invoices part for the purpose of ensuring compliance with the provisions of this Act. Of habitation, such access shall require the prior issue of a warrant signed by a Magistrate: Provided further that entry shall take place during daytime;

See as well s. 54 VAT Act for formal requirements (time & place of inspection).

Customs Excise Duty Act [...]

20. [Power to stop vehicles, aircrafts and vessels]

(1) A Customs official in uniform may stop any vehicle, aircraft or vessel in order –(a) that such Customs official, or any Customs official accompanying such Customs official, may exercise any power conferred on them by Article 19 in relation to excise products or any other products chargeable with excise duty under any other law, where there

are reasonable grounds to believe that such products are being transported in or on such vehicle, or (b) to examine and take samples of mineral oil under Article 21(1)(c).

(2) Any person in charge of a moving vehicle, aircraft or vessel shall, at the request of a Customs official in uniform or a Police officer, stop such vehicle, aircraft or vessel.

(3) Any person in charge of a vehicle, aircraft or vessel shall, whether such vehicle, aircraft or vessel has been stopped by a Customs official under this Article or Article 20(1), or is already stationary, at the request of a Customs official –(a) keep such vehicle, aircraft or vessel stationary for such period as is reasonably required to enable a Customs official to exercise any power conferred on such Customs official by Article 19 or by Article 20(1), or (b) where such vehicle, aircraft or vessel is, in the opinion of such Customs official, situated in a place unsuitable for the exercise of any power conferred on such officer by the said Articles, take such vehicle, aircraft or vessel or cause it to be taken to such place as such Customs official may consider suitable for the exercise of such power.

21. [Power to examine and search vehicles and to take samples.] (1) A Customs official, on production of his authorisation if so requested by any person affected, or any Customs official accompanying such officer, may –

(a) examine a vehicle, or aircraft or vessel, (b) carry out such searches of a vehicle, aircraft or vessels may appear to the Customs official to be necessary to establish whether –

(i) anything on or in the vehicle, aircraft or vessel or in any manner attached to the vehicle, aircraft or vessel, is liable to forfeiture under this Act or any other law relating to excise, or

(ii) any excisable goods being transported in or on, or in any manner attached to, the vehicle, aircraft or vessel correspond in every material respect with the description of any such products in a document referred to in paragraph (d)(iii); I take samples, without payment, of any product subject to excise duty in or on, or in any manner attached to the vehicle, aircraft or vessel, and (d) question the person in charge of the vehicle, aircraft or vessel in relation to the vehicle, aircraft or vessel or anything on or in any manner attached to the vehicle, aircraft or vessel, and require such person –

(i) to give, within such time and in such form and manner as may be specified by the Customs official, all such information in relation to the vehicle, aircraft or vessel as may reasonably be required by such Customs official and is in the possession or procurement of such person,

(ii) within such time and in such manner as may be specified by the Customs official, to produce and permit the inspection of, and the taking of copies of, or of extracts from, all such records relating to the vehicle, aircraft or vessel and any products being so transported, as are reasonably required by such Customs official and are in the possession or procurement of the person, and

(iii) to produce to the Customs official any accompanying document, duty document or exemption certificate accompanying any products subject to excise duty being transported in or on, or in any manner attached to, the vehicle or aircraft or vessel.

(2) A Customs official, on production of his authorisation, if so requested by any person affected, may –(a) examine and take samples of any mineral oil in any fuel tank or otherwise present on or in any vehicle, aircraft or vessel, or anything attached to any vehicle, aircraft or vessel, for use or capable of being used for combustion in the engine of the vehicle, aircraft or vessel, whether or not the vehicle, aircraft or vessel is attended,(b) examine or inspect any vehicle, aircraft or vessel or anything attached to any vehicle, aircraft or vessel for the purposes of paragraph (a),

I question –

(i) the owner of any vehicle, aircraft or vessel,

(ii) any person who for the time being stands registered as the owner of any vehicle, aircraft or vessel,

(iii) any director, manager or principal officer of such owner where the registered owner is not one or more individuals, or

(iv) the person in charge of any vehicle, aircraft or vessel, in relation to such mineral oil, and require such owner, person, director, manager or principal officer to give to such Customs official any information in relation to such mineral oil as may reasonably be required and which is in the possession or procurement of such owner, person, director, manager or principal officer, as the case may be.

dd. Searches

It should be stated that, the power to entry in Malta is given to special administrative authorities and the executive police¹⁸⁶, unless specified otherwise in special laws. As a rule, it needs first of all to be assessed whether the administrative authority needs a judicial warrant or order to search a house. This *order* must typically be issued by a court at the request of the authority and must clearly state the reasons for the search and the exact scope of the premises and objects to be searched. Like to Customs officers in customs issues, where they allowed to open the package. However even in those cases, once an illicit substance is traced, the executive police are called on site and a report is lodged with them. Maltese laws often refer to search measures as “**power to entry**”. This power to entry often encompasses premises, buildings, houses etc. and relates to beneficiaries, auditees and government officials as well as administrative staff. In general the relevant Acts and Ordinances allow access to premises and buildings of natural and legal persons suspected of an irregularity or even fraud.

82

¹⁸⁶ See below that e.g. customs officials may be given powers of executive police.

(1) Malta

(2) The System of the Measure in the Customs Ordinance

83 The following sections from the Maltese Acts and Ordinances might apply:

84 Customs Ordinance

Article 69A

(1) The Commissioner may, upon reasonable suspicion, direct that any packages lying under customs control be opened and their contents examined for the purpose of ascertaining that the provisions of this Ordinance and of any other law relating to customs are being complied with.

(2) A reasonable notice of the opening and examination of the goods shall be given to the consignee, if known, so that he or his agent may attend.

(3) If the circumstances do not permit that such notice be given it shall be dispensed with.

(4) The Commissioner shall not, on account of any such opening or examination, be liable to any action whatsoever.

70. [Search in Customs Procedure: “Officers may stop carts, etc., and search for goods”]

(1) Any Customs official or Police officer may, upon reasonable suspicion, stop and examine any cart or other conveyance, to ascertain whether any smuggled goods are contained therein; and if no smuggled goods are found, such official or officer shall not, on account of such stoppage and examination, be liable to any action or prosecution.

(2) Any person driving or conducting such cart or other conveyance who refuses to stop or allow such examination on being so required shall be liable to a fine (multa) not exceeding two hundred and thirty-two 252illfull ninety-four cents (€232.94)

Customs Excise Duty Act

19. [Issue of a search warrant].

(1) Without prejudice to the provisions of the foregoing Article, the Attorney General or a magistrate may, if satisfied on the sworn information by a Customs official Customs official that there are reasonable grounds for suspecting that –

(a) anything liable to forfeiture under this or any other law relating to excise, or

(b) any records relating to transactions in contravention of this or any other law relating to excise, are kept or concealed in a dwelling, issue a search warrant.

(2) A search warrant issued under this Article shall be sufficient authority for the Customs official named therein, alone or accompanied by such other Customs officials or such other persons as the Customs official considers necessary, at any time or times

within one month of the date of issue of the warrant, to enter (if need be by force) accompanied or alone in a dwelling named or specified in the warrant to search such dwelling, to examine every item held therein, to inspect anything found therein or thereat, to inspect any record found therein or thereat and, if there are reasonable grounds for suspecting that anything found therein or there at is liable to forfeiture under this Act or any other law relating to excise, or that a record found there may be required as evidence in proceedings under this Act or such other law, to detain or seize the thing as liable to forfeiture or, in the case of a record, to detain it for so long as it is reasonably required for such purpose.

22. [Entry and search of premises]

(1) A Customs official may, at all reasonable times, on production of his authorisation, if so requested by any person affected, enter any premises or other place (other than a dwelling) in which –

(a) the production, processing, holding, storage, keeping importation, purchase, packaging, offering for sale, sale or disposal of any excisable goods is being or is reasonably believed by the Customs official to be carried on,

(b) the manufacture, distribution, storage, repair, modification, importation, dealing, delivery or disposal of mechanically propelled vehicles is being, or is reasonably believed by the Customs official to be carried on, or

I any records relating to, or reasonably believed by the Customs official to relate to, the products or activities referred to in paragraphs (a) and (b) are being kept or are reasonably believed by the Customs official to be kept.

(2) A Customs official, on production of his authorisation, if so requested by any person affected, may –

(a) enter and inspect any premises or other place (other than a dwelling) for the purposes of this Article and bring onto those premises any vehicle being used in the course of his or her duties,

(b) make such search and investigation of such premises or place as such Customs official may consider to be proper.

(3) A Customs official in or on any premises or place pursuant to sub-article (1) may there –

(a) carry out such search and investigation as such Customs official may consider to be proper,

(b) take account of, and without payment, take samples of any product subject to excise duty and of any materials, ingredients and substances used or likely to be used in the manufacture of such product,

(c) in relation to any records referred to in sub-article(1)(c) –

(i) search for, inspect and take copies of or extracts from any such records (including, in the case of any information in a non-legible form, a copy of, or an extract from, such information in a permanent legible form),
(ii) remove and retain such records for such period as may reasonably be required for their further examination, and
(iii) require any person to produce any such records which are in that person's possession, custody or procurement and in the case of information in a non-legible form, to produce it in a legible form or to reproduce it in a permanent legible form, (d) question any person present in relation to –
(i) any product referred to in sub-article (1)(a) or any materials, ingredients or other substances used or intended to be used in the manufacture of such product,
(ii) any vehicle, aircraft or vessel,
(iii) any records referred to in sub-article (1)I, produced or found in or on such premises or place, and such person shall give to such Customs official all information required of such person which is in such person's possession, custody or procurement.
(4) A Customs official in or on any premises or place pursuant to Article 21, or any person accompanying a Customs official pursuant to Article 20, may require any person present to give to such Customs official or such other person his or her name and address.

22A. In Article 21 and 22, the word “authorisation” means an identity card of the Department or means of identification issued by the respective Department according to the applicable law.

(3) General Remarks

- 85** Irregularities can make it necessary, in order to prove them, to enter or search a foreign private premise. Private premises are protected and therefore entering them with state powers is only justified if the relevant law is strictly lawful and applied. The requisites that s. 19 Customs and Excise Duty Act establishes are relevant in this area.

(4) Formal Requirements

- 86** The notification of the relevant authorities, which is mentioned in s. 19 Customs Excise Act needs to be presented and kept by the customs official. From a timely manner the relevant authorities must obey that the warrant is only issued for “any time *or* times within one month of the date of issue of the warrant”.
- 87** The same or equal requirements apply while conducting a VAT Act based inspection or search. S. 54 establishes special time corridors – a very common solution to ensure proportionality of a measure, which is also applied in Germany, France and Italy.

54. [Access to places of habitation] If access is required for the purposes of Article 53(a) to any premises occupied in whole or in part for the purpose of habitation, such access shall require the prior warrant signed by a Magistrate and shall not take place between seven o'clock in the evening and seven o'clock in the morning.

88

(5) Substantive Requirements

The most important requirement is the obtainment of the search warrant under the Customs Excise Act if it becomes necessary to enter a premise of an Economic operator or conduct a search in a warehouse. The scope of the search is described by s. 19 para 2 and may include any item or anything found within the building or on the premise. Entering might be done "if need be by force" and the law allows it "accompanied or alone in a dwelling named or specified in the warrant to search such dwelling".

89

(6) Further Relevant Acts

The Internal Audit and Investigations Act offers an equal power to the Director of the relevant Audit Board:

90

20. [Internal Audit and Financial investigations Act of Malta]

(1) Except as may be expressly provided by any law, the Director shall, for the purpose of carrying out his functions under this Act, have the power –

(a) to enter and inspect any premises of an auditee in order to conduct an internal audit and, where he has reason to suspect that irregularities and, or fraud, have occurred or are occurring, to enter any premises of an auditee for the purpose of conducting a financial investigation

Provided that, if access is required to any premises occupied in whole or in part for the purpose of habitation, such access shall require the prior issue of a warrant signed by a Magistrate: Provided further that entry shall take place during day time;

(b) to require the auditee to produce any books, records, files, accounts, documents or information including any computer data in any form and or part thereof, including contracts, bills, vouchers and receipts relating to them, and if deemed necessary by the Director, for the latter to retain such documents in the original, and to ensure that copies or extracts are made thereof without paying any fee therefor notwithstanding any law or regulations to the contrary.

(2) Without prejudice to sub-Article (1)(b), and for the purpose of his functions under this Act, the Director may rely on any of the records kept or made by any audit or investigative unit of any entity including the person or unit discharging the compliance and assurance functions within the Government department or ministry concerned.

91

ee. Seizure of Other Evidence (VAT Act, Customs Ordinance, Customs Excise Act) / Tax (Procedures) Code

92 The seizure is a powerful tool to gather evidence:

93 **Internal Audit and Financial Investigations Act** (Chapter 461)

20. (1) Except as may be expressly provided by any law, the essential key Director shall, for fruitful proceedings in court at a later stage if the purpose of carrying out his functions under this Act, have the power –

(a) to enter and inspect any premises of an auditee in order to conduct an internal audit and, where he has reason to suspect that irregularities and, or fraud, have occurred or are occurring, to enter any premises of an auditee for the purpose of conducting a financial investigation is closed:: Provided that, if access is required to any premises occupied in whole or in part for the purpose of habitation, such access shall require the prior issue of a warrant signed by a Magistrate: Provided further that entry shall take place during daytime.

Customs Excise Act

26. [Seizure of goods or vehicles] (1) Any goods or vehicle, aircraft or vessel that are liable to forfeiture under the Act shall be seized by a Customs official.

(2) Any Police officer who has detained any goods or vehicle, aircraft or vessel that are liable to forfeiture under the Act shall deliver the same to a Customs official as soon as is practically possible and in no case later than forty-eight hours after such detention.

27.(1) A Customs official shall give notice of any seizure and of the grounds therefor to any person who to the officer's knowledge was at the time of the seizure the owner or one of the owners of the thing seized if known, and the offender.

(2) Notice under sub-article (1) shall be given in writing and the notice shall include a copy of Article 28 and shall be deemed to have been duly given to the person concerned

–

(a) if it is delivered to the person personally, or

(b) if it is addressed to the person and left or forwarded by registered post to the person at the usual or last known place of abode or business of the person or, in the case of a body corporate, at its registered or principal office, or

I if the person has no known address in Malta or Gozo, by publication of notice of the seizure concerned in the Gazette.

28. [Notice of claim] (1) A person who claims that anything seized is not liable to seizure (such person hereinafter in this Article and in Article 29 referred to as “the claimant”) shall, within thirty days of the date of the notice of seizure give notice in writing of such claim to the Commissioner.

(2) The claimant shall, within thirty days from the date upon which such notice was given, institute proceedings to declare such Articles as not being subject to seizure in the competent civil court, in default of which the claim shall be deemed to have been abandoned.

(3) A notice under sub-article (1) shall specify the name and address of the claimant and, in the case of a claimant who is outside Malta, the name and address of a person in Malta who is authorised by him to act as his attorney and to accept service of any document required to be served on the claimant and to act on behalf of the claimant.

29. (1) The Commissioner may, in his discretion, and if so ordered on writing by the Minister responsible for finance restore anything seized under the Act.

(2) Without prejudice to sub-article (1), where a notice of claim relating to the thing seized has been duly given under Article 28, the Commissioner may as he thinks fit and notwithstanding the pendency of the proceedings wherein the seizure is contested –

(a) deliver it up to the claimant on payment to the Commissioner of such sum as the Commissioner thinks proper, being a sum not exceeding that which in the opinion of the Commissioner represents the value of the thing, including any duty or tax chargeable on it which has not been paid, or

(b) if the thing seized is in the opinion of the Commissioner of a perishable nature, sell or destroy it.

(3) If, where anything is delivered up, sold or destroyed under this Article, it is held by the court in proceedings under Article 28 that the thing was not liable to forfeiture at the time of its seizure, the Commissioner shall, on demand tender to such claimant –

(a) an amount equal to any sum paid by the claimant under sub-article (2), (b) if he has sold the thing, an amount equal to the proceeds of sale, or

I if he has destroyed the thing, an amount equal to the market value of the thing at the time of its seizure, together with the reasonable costs of any court proceedings to challenge the seizure where the Commissioner is of the opinion that the claim was justified.

(4) If the claimant accepts the amount tendered under sub-article (3), such claimant shall not be entitled to maintain proceedings in any court on account of the seizure, detention, sale or destruction of the thing concerned.

(5) (a) The Commissioner shall have the right to dispose according to law of all objects seized in accordance with any customs law, when the seizure becomes final, as well as when the objects are abandoned.

(b) The right provided in paragraph (a) is without prejudice to the right of the Commissioner to dispose of the objects seized before the seizure becomes final, in the circumstances and for the reasons provided in the law.

I The objects seized according to customs legislation, except for objects of food or drink items for humans, shall either be put to use by a public entity, or be placed for sale by call for tenders or be destroyed or otherwise the Commissioner may dispose of them in

any other way as he deems appropriate with the approval of the Minister responsible for Customs:

Provided that objects of food or drink items for humans shall be placed for sale by call for tenders.

(6) Notwithstanding any other provision of this Act relating to goods seized as liable to forfeiture, a Customs official who seizes as liable to forfeiture any spirits or any stills, receptacles, utensils, wort or other material for manufacturing, distilling or preparing spirits may at his discretion spill, break up or destroy any of those goods.

35. [Customs officials may be given powers of Executive Police]

(1) It shall be lawful for the President of Malta, by a notice published in the Gazette, to authorise any Customs official or any officer of customs to exercise, within such limits as shall be published as aforesaid be prescribed by the President of Malta, such functions as by any law or regulations made thereunder, are vested in the officers of the Executive Police. (2) Before any such officer or person shall exercise any of the functions referred to in sub-article (1), he shall take the oaths here following: “I do swear/solemnly affirm that I will bear true faith and allegiance to the people and the Republic of Malta and its Constitution. (So help me God).” “I do swear/solemnly affirm that while holding the office of (insert description of office) I will do the best of my knowledge and ability discharge the functions of an officer the Executive Police faithfully and according to law. (So help me God).”

(b) to require the auditee to produce any books, records, files, accounts, documents or information including any computer data in any form and or part thereof, including contracts, bills, vouchers and receipts relating to them, and if deemed necessary by the Director, for the latter to retain such documents in the original, and to ensure that copies or extracts are made thereof without paying any fee therefor notwithstanding any law or regulations to the contrary.

(2) Without prejudice to sub-Article (1)(b), and for the purpose of his functions under this Act, the Director may rely on any of the records kept or made by any audit or investigative unit of any entity including the person or unit discharging the compliance and assurance functions within the Government department or ministry concerned.

ff. Seizure of Digital Forensic Evidence Including Bank Account Information

- 94 The seizure of digital forensic evidence including bank account information becomes increasingly important. The recent changes of the OLAF Regulation No 883/2013 (as amended 2020/2223) codified that OLAF shall under the same conditions that apply to national competent authorities have access to bank account information. As a rule, the following laws should be checked and searched for authorization bases for the action of

the administration. An administrative sanction procedure is regularly a procedure that is strictly distinguished by criminal law and its investigation, whereby it must also always be clarified whether it is a repressive measure or a risk of danger: Internal Audit and Financial Investigations Act, the Money laundering custody law (Prevention of Money Laundering and Fining of Terrorism Act). In the event of fraud, the bank can conduct its own *internal investigations* and, if necessary, cooperate with authorities.

The relevant national law shall be displayed by the manual on the following pages:

95

Internal Audit and Financial Investigations Act (Chapter 461)

96

Power of entry

20. (1) Except as may be expressly provided by any law, the Director shall, for the purpose of carrying out his functions under this Act, have the power –

[...]

(b) to require the auditee to **produce any** books, records, files, accounts, documents or **information including any computer data in any form and or part thereof**, including contracts, bills, vouchers and receipts relating to them, and if deemed necessary by the Director, for the latter to retain such documents in the original, and to ensure that copies or extracts are made thereof without paying any fee therefor notwithstanding any law or regulations to the contrary.

(2) Without prejudice to sub-article (1)(b), and for the purpose of his functions under this Act, the Director may rely on any of the records kept or made by any audit or investigative unit of any entity including the person or unit discharging the compliance and assurance functions within the Government department or ministry concerned.

Since Malta has completed information exchange agreements (TIEA) with numerous other countries, which enable the exchange of financial information between the tax authorities, this is also an option.

97

gg. Acquisition of Digital Evidence

Bulgaria, which has included a special paragraph in the State Investigations Office Act, Article 31a (see → Bulgarian Chapter in this volume series) makes a direct reference to Article 7 of the applicable provision of Regulation 2185/96 and is therefore a role model regarding Digital forensic operations within inspections or on-the-spot checks of OLAF.

98

Malta has at least for customs procedures equal provisions. From the law itself it remains unclear if the provisions in Chapter 37 Laws of Malta (Customs Ordinance) apply in investigations but as they are an annex to the penalties sections it would seem logic to conclude that they even give access for these cases.

99

hh. Digital Forensic Operations Within Inspections or On-the-Spot Checks

100 Digital forensic operations within inspections or on-the-spot checks became increasingly important in the last decade already:

101 ART XII POWERS AND PROCEDURE Access to systems and records. Added

by: VII.2019.11. Amended by: VIII.2020.10.65. Customs Ordinance

65. (1) Every economic operator shall give access to his computer systems and all his records to the Commissioner so that a systems-based audit can be carried out as and when requested by the Commissioner.

(2) For the purposes of sub-article (1), the Commissioner may delegate to any person any right, duty, power and other function vested in him, conferred to him or imposed upon him by this Ordinance as the Minister may direct in writing: Provided that the Commissioner may not delegate those rights, duties, powers and other functions vested in him to any person, if that person is not considered by the Commissioner as a fit and proper person to exercise those rights, duties, powers and other functions.

(3) Every person having been so delegated together with all his employees, shall be bound by the duty of secrecy and confidentiality of public officers as provided in the relevant laws, and the person and all his employees shall also be subject to the rules of protection of data according to the relevant laws.

(4) For the purposes of this Article, the term “system-based audit” means “an audit procedure including auditing of electronic systems, designed to obtain audit evidence as to whether key controls are operating continuously, consistently and effectively as planned in preventing, or detecting and correcting, material misstatements or instances of non-compliance throughout the period being audited. This audit is also conducted through different types of tests of controls, such as documentation review, enquiry and confirmation, inspection, observation, recalculation and re-performance”.

(1) General Remarks

102 Every economic operator is requested to cooperate with the customs officials.

(2) Formal Requirements

103 The data protection needs to be ensured, whereby s. 65 refers to the relevant laws (see above → data protection for external action).

(3) Substantive Requirements

104 The Commissioner as vested with powers by the Minister may delegate with all the rights he inherits, the task of electronic auditing to a customs official, who has to respect the requisites of s. 65.

ii. Investigative Missions in Third Countries

Investigations in third countries might be necessary to obtain evidence. Especially in customs cases that lead to irregularities and potential frauds, it might be necessary to carry out external investigations together with Maltese officials in European, African or Asian Countries – depending on the origin of products imported to the EU at Maltese ports. Case Studies and examples of these missions are presented in other volumes, see → e.g. the Bulgarian, French or German one for missions carried out e.g. on Thai territory. **105**

i) National Procedural Rules for “Checks and Inspections” by the Assisting National Authority

The procedural rules for “checks and inspections” are stipulated by the various provisions cited above. Each area of potential frauds has a different Act or Ordinance, that established different rules of procedure e.g. a case in the area of customs matters is different to a suspected irregularity in the area of structural funds. **106**

j) Cooperation and Mutual Assistance Agreements

The Maltese Government and the relevant authorities in the various sectors of potential frauds to the expenses of the EU cooperated with foreign countries and EU partners in order to achieve better results in the investigation phase. **107**

5. Article 4 Internal investigations

1. Investigations within the institutions, bodies, offices and agencies in the areas referred to in Article 1 shall be conducted *in accordance with this Regulation and with the decisions adopted by the relevant institution, body, office or agency* ('internal investigations').

8. Without prejudice to Article 12c(1), where, before a decision has been taken whether or not to open an internal investigation, the Office handles information which suggests that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union, it may inform the institution, body, office or agency concerned. Upon request, the institution, body, office or agency concerned shall inform the Office of any action taken and of its findings on the basis of such information.


Where necessary, the Office shall also inform the *competent authorities of the Member State concerned*. In this case, the procedural requirements laid down in the second and third subparagraphs of Article 9(4) shall apply. If the competent authorities decide to *take any action on the basis of the information transmitted to them, in accordance with national law*, they shall, upon request, inform the Office thereof.

- 1 Numerous informational requirements are listed in Article 4 (i.e., mutual information), which states that OLAF, the EU IBOAS, and the national authorities must all be informed of decisions, cases, etc. at all times. It is based on the idea of **efficient law enforcement** (see → **Article 2, Article 4 para 3, TEU Article 325, Article 352 TFEU**).¹⁸⁷ At different points during an OLAF investigation, the following information must be reported to the national authorities:
- 2 Prior to the commencement of an investigation: If OLAF plans to begin an investigation within its borders, it must **notify** the appropriate national authorities.
Throughout the investigation: OLAF is required to provide the national authorities with regular updates on the status of the investigation and the findings of its earlier inquiries. Following the investigation's conclusion, OLAF provides a report with its findings and recommendations to the national authorities.
- 3 Internal investigations of OLAF can lead to **repercussions at national level** i.e. the level of the authorities that cooperate with OLAF and which e.g. employed the economic operator, managed his funds etc. or who are responsible for **disciplinary actions** for officials that work at Union level or as a national expert for OLAF (corruption cases). The relationship of national disciplinary, union disciplinary proceedings and national

¹⁸⁷ See Wagner 2014, pp. 211 (212 on the notion "*Rechtskraft*") and the roman-law maxim "*res judicata pro veritate accipitur or. Habetur*". And see OLAF 2021, Guidelines on Investigation Procedures for OLAF Staff, p. 7 "8.5": "8.5 Investigations shall be conducted continuously and without undue delay in order to enhance their efficiency and the effectiveness of Recommendations."

criminal proceedings is incredibly important.¹⁸⁸ To summarize, Article 4 of the OLAF Regulation’s **notification obligation** to national authorities serves as a **valuable tool** in the fight against fraud, corruption, and other unlawful activities that jeopardize the EU’s financial interests. It safeguards the EU’s financial interests and encourages collaboration and coordination between the OLAF and national authorities in order to effectively implement the legislation.

Figure 8 Example for national follow-up and the importance of efficient cooperation between OLAF and national authorities

	An example for national follow-up and the importance of efficient cooperation
	<p>In 2019, OLAF initiated an investigation against the then Maltese Prime Minister. The investigation resulted in the suspicion that M[...] and other Maltese politicians were involved in the Panama papers scandal and had illegally pulled advantages from the awarding of citizenships and licenses to foreign investors.</p> <p>National follow-up: After completing OLAF investigations, the Maltese public prosecutor initiated criminal proceedings against the person and others.</p> <p>Competent authority: Maltese Prosecution Office</p> <p>“any action”: initiation of national criminal proceedings</p> <p>Current status: The procedure against the person has not yet been completed.¹⁸⁹</p>

a) References to National Law, Para 8

Revenue Authority, VAT Tax Department, Payment Agency and Body (see above → Article 3 “Competent authority” for a first overview of the national authorities that may need to be informed by OLAF. The Prosecution Service must normally only be informed in cases of criminal suspicion. The EPPO must be informed under the requisites of Article 12e OLAF. 4

b) Competent Authorities

In the national law scenery, the Public Service Commission acting on the basis of the Disciplinary Procedure in the Public Service Commission Regulations (Subsidiary Legislation Const. 03) may be the competent authority meant by Article 4 para 8 OLAF Regulation. 5

¹⁸⁸ See ECJ, Research note, Impact of ongoing criminal proceedings on the conduct of disciplinary proceedings, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/ndr_2020_001_neutralisee_en.pdf.

¹⁸⁹ See Taylor/Schöneweiß 2024, Maltas Ex-Premierminister wird der Geldwäsche beschuldigt. Euractiv.com. <https://www.euractiv.de/section/europa-kompakt/news/maltas-ex-premierminister-wird-der-geldwaesche-beschuldigt/>. Accessed 31 May 2024.

6. Article 5 Opening of Investigations

[...] 5. If the Director-General decides not to open an investigation, he or she may without delay send any relevant information, as appropriate, to the *competent authorities of the Member State concerned* for appropriate *action to be taken in accordance with Union and national law* or to the institution, body, office or agency concerned for appropriate action to be taken in accordance with the rules applicable to that institution, body, office or agency. The Office shall agree with that institution, body, office or agency, if appropriate, on suitable measures to protect the confidentiality of the source of that information and shall, if necessary, ask to be informed of the action taken.

a) Competent Authorities

- 6 - Internal Audit and Financial Investigations Unit, especially:
- Financial Investigation Directorate
 - EU-Funds Audit Directorate
 - Revenue authority
 - Compliance and Investigations Directorate → Tax Compliance Unit
 - National Audit Office
 - Customs

b) National Rules

- 7 **Internal Audit and Financial Investigations Act (Chapter 461)**
PART II GENERAL PROVISIONS
Financial investigation.
5. A financial investigation may be carried out in terms of the provisions of this 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.

PART V FUNCTIONS OF THE OFFICERS OF THE DIRECTORATE

[...]

Suspicion of irregularity.

16. If an entity has reason to suspect any irregularity and, or a suspected case of fraud of public funds, it shall refer the matter forthwith to the Director, and shall supply to the Director all information in his possession relating thereto.

Public Finance Management Act (Chapter 601)**PART VII FINANCIAL CONTROL****Financial control.**

44. Save as otherwise provided under any law, financial control of public funds shall be managed and exercised as prescribed by or under this Act.

47. (1) Save as otherwise specifically provided for by any other law, the Permanent Secretary shall, upon acquiring or having any knowledge of an infringement, inform forthwith the persons as mentioned in Article 45, and shall carry out the necessary investigation and draw up a report indicating:

- (a) the infringement;
- (b) the financial loss or deficiency, if any, and its extent, to the Government or to any multinational or international entity or fund of or in which Malta, under any agreement, forms or takes part;
- (c) responsibility for such loss or deficiency; and
- (d) any sum or amount whereby any person or persons has or have unduly gained or benefited consequent to that infringement.

(2) The Permanent Secretary shall notify the person who was informed of the infringement under sub-article (1), of the report.

(3) Where responsibility for such loss or deficiency as may be established under sub-Article (1) is ascribed to two (2) or more persons, they shall become liable jointly and severally.

PART VIII AUDIT AND ASSURANCE

[...]

Measures against fraud and irregularities

57. (1) Where, on the detection of any irregularity or fraud against public moneys, a report made in terms of the provisions of the Auditor General and National Audit Office Act or the Internal Audit and Financial Investigations Act is sent or referred to a Head of Department, all necessary measures for the protection of such public moneys, including the levying of administrative penalties in accordance with regulations made under Article 55 and legal action for the recovery of the amount of any deficiency, loss, improper payment caused or made as a result or in the course of any such irregularity or

fraud, shall be taken, and the provisions of Article 466 of the Code of Organization and Civil Procedure shall apply to any amount recoverable as aforesaid.

(2) Unless otherwise stipulated in a public contract, any bond, bank guarantee or other security given for the proper performance of any contract payable out of public moneys shall also extend to guarantee the recovery of any moneys or administrative penalties in connection with the contract and for which the person supplying the bond, bank guarantee or other security may be liable.

(3) Where the deficiency, loss, or improper payment as a result of the irregularity or fraud, involves funds received by the Government from any international or supranational organization or entity or from any of its institutions or entities or under the terms of any treaty or other agreement between States, any proceedings under this Article shall take place in consultation with the person in Malta, if any, specifically charged with authorising the payment or release of such funds: Provided that the lack of such consultation shall not in any way whatsoever affect the validity of any proceedings taken under this Article.

(4) Where two (2) or more persons are responsible for the irregularity or fraud which resulted in the deficiency, loss, or improper payment those persons shall be held jointly and severally liable therefore together with any other person who, although is duty bound to do so, has not acted in good faith, and failed to take reasonable precautions and to exercise due diligence to prevent the irregularity or fraud.

(5) Nothing in this Article or in this Part shall be construed as precluding any other person interested from taking action, whether jointly with the Head of Department or otherwise, for the recovery of any sum recoverable under the provisions of this Article.

Excise Duty Act

18. (1) It shall be lawful for any excise officer to carry out inspections, at reasonable time, at any tax warehouse or place where excise goods are kept or suspected to be kept.

(2) The person in whose name the tax warehouse is registered, shall provide such excise officers with the necessary assistance for the execution of their duties.

(3) A person other than the person in whose name a tax warehouse is registered, who is in possession of any books, documents including machine readable material or other records shall likewise be under a duty to produce the same to the Comptroller or an excise officer.

(4) Any person who wilfully or maliciously refrains from giving his assistance, or wilfully obstructs, impedes or delays any excise officer in the execution of his duties or powers under this Act or under regulations made thereunder, shall be guilty of an offence under this Article and shall be liable, on conviction, to a fine (multa) not exceeding five thousand liri.

Further rules may be found in the following codes:

Malta Public Administration Act (Chapter 595)

Auditor General and National Audit Office Act (Chapter 396)

Fiscal Responsibility Act (Chapter 534)

[Article 6 Access to information in databases prior to the opening of an investigation]

7. Article 7 Investigations Procedure

[...] 3. The **competent authorities of Member States** shall give the **necessary assistance** to enable the staff of the Office to fulfil their tasks in accordance with this Regulation effectively and without undue delay. When providing such assistance, the competent authorities of Member States shall **act in accordance with any national procedural rules applicable to them**.

3a. At the request of the Office, which shall be explained in writing, in relation to matters under investigation, the relevant competent authorities of the Member States shall, **under the same conditions as those that apply to the national competent authorities**, provide the Office with the following:

- (a) information available in the centralised automated mechanisms referred to in Article 32a(3) of Directive (EU) 2015/849 of the European Parliament and of the Council (4);
- (b) where strictly necessary for the purposes of the investigation, the record of transactions.

The request of the Office shall include a justification of the appropriateness and proportionality of the measure with regard to the nature and gravity of the matters under investigation. Such request shall refer only to information referred to in points (a) and (b) of the first subparagraph.

Member States shall notify to the Commission the relevant competent authorities for the purposes of points (a) and (b) of the first subparagraph.

6. Where investigations show that it might be appropriate to take precautionary administrative measures to protect the financial interests of the Union, the Office shall without delay inform the institution, body, office or agency concerned of the investigation in progress. The information supplied shall include the following:

- (a) the identity of the official, other servant, member of an institution or body, head of office or agency, or staff member concerned and a summary of the facts in question;
- (b) any information that could assist the institution, body, office or agency concerned in deciding on the appropriate precautionary administrative measures to be taken in order to protect the financial interests of the Union;

Any special measures of confidentiality recommended, in particular in cases entailing the use of investigative measures falling within the competence of a national judicial

authority or, in the case of an external investigation, within the competence of a national authority, **in accordance with the national rules applicable to investigations**.

The institution, body, office or agency concerned may at any time consult the Office with a view to taking, in close cooperation with the Office, any appropriate precautionary measures, including measures for the safeguarding of evidence. The institution, body, office or agency concerned shall inform the Office without delay about any precautionary measures taken.

7. Where necessary, it shall be for the competent authorities of the Member States, at the Office's request, to take the **appropriate precautionary measures under their national law**, in particular measures for the safeguarding of evidence.

- 1 The *telos* of the references to national authorities in Article 7 OLAF Regulation is it to ensure the **assistance of OLAF** with the powers and information of national authorities. The national authorities will assist OLAF in conducting independent investigations.
- 2 This may include, for example, conducting searches, seizing evidence, or interrogating witnesses (see above → Article 3 OLAF Regulation). The **terms of the support** that national authorities may provide to the OLAF are governed by Article 7 of the OLAF Regulation. By actions taken by the relevant authorities, Article 7 contravenes the rights of persons who are the subject of and are suspected of being involved in the administrative sanction procedure or national administrative procedure.
- 3 The types of **precautionary measures** that the competent authorities of Malta might take under their national law – especially in the domains of administrative, EU funds, budget, and finance law – can include the following safeguarding measures:
- 4 the authorities might conduct **searches and seize documents, digital records**, and other materials relevant to the investigation (see above → Art. 3 OLAF Regulation). This could involve **securing computer systems, email archives, and financial records**. It is important to **preserve digital evidence**, such as emails, databases, and financial software, to ensure that critical data is not deleted, modified, or tampered with.
- 5 The **suspension of EU-funds** is possible as Maltese authorities might suspend the disbursement of EU funds, especially in cases where there are signs of irregularities or fraud, to prevent further misuse.
- 6 Another precautionary measure is the **temporary interruption of projects**. Herewith it is possible to stop ongoing projects financed by the EU temporarily to enable investigations and the protection of public funds.
- 7 Last but not least, the Maltese authorities can **assist OLAF** in conducting **joint inspections**, audits, and checks, ensuring that **evidence is properly preserved** and investigations are **not obstructed** (see above → Art. 3 OLAF Regulation).

b) References to National Law*Sources & national sections 1 Overview Art. 7 OLAF Regulation***8**

Para 3	<p>Customs Ordinance PART XII POWERS AND PROCEDURE Access to systems and records, 65 et seq.</p> <p>Internal Audit and Financial Investigations Act (Chapter 461) “Suspicion of irregularity. 16. If an entity has reason to suspect any irregularity and, or a suspected case of fraud of public funds, it shall refer the matter forthwith to the Director, and shall supply to the Director all information in his possession relating thereto.”</p>
Para 3a	<p>Customs Ordinance 70C. (1) For the purposes of investigation related to crimes of contraband, fraud, evasion of tax or duty, money laundering or financing of terrorism, in order to fulfil his obligations under customs laws, the Commissioner may, without prejudice to any obligation of professional secrecy imposed by an explicit provision of the law, demand and collect details of transactions that have taken place, are taking place or which still have to take place, both if involving the person or entity to which the demand is made and if the said transactions are between third parties, from any person or entity, and every said person or entity shall give to the Commissioner the requested details within the time frame established by him. The said obtained details may be used by the Commissioner as evidence in proceedings before any court. (2) When the Commissioner suspects that the details of transactions collected could amount to proof of the crimes of money laundering or financing of terrorism, the Commissioner shall pass on the said details to the Financial Intelligence Analysis Unit.</p>
Para 3b	See above → Article 3 enumerates a lot of national rules applicable to investigations.
Para 6	<p>Customs Ordinance PART XII POWERS AND PROCEDURE Access to systems and records, 65 et seq.</p>
Para 7	<p>Customs Ordinance PART XII POWERS AND PROCEDURE Access to systems and records, 65 et seq.</p>

Excise Duty Act

See → Articles 17 et seq.

Public Procurement Regulations¹⁹⁰

Art. 67 Removal and termination from office.

(2) A person shall be disqualified from being appointed to and from remaining a member of the General Contracts Committee if he: (a) is a member of the House of Representatives, or of the European Parliament or of a Local Council; (b) has such a financial or other interest that is likely to prejudice the discharge of his functions as a member of the General Contracts Committee; (c) is legally incapacitated or interdicted; (d) has been adjudged bankrupt or has made a composition or arrangement with his creditors; or (e) *has been convicted of a crime affecting public trust or of theft or of fraud or of knowingly receiving property obtained by theft or fraud.*

192. (1) The authority responsible for the tendering process shall exclude an economic operator from participation in a procurement procedure where it has established or is otherwise made aware that such an economic operator has been the subject of a conviction by final judgment having the nature of a *res judicata* for one of the following reasons: (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA or an equivalent offence under Maltese law or as defined in the national law of the economic operator; (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA or an equivalent offence under Maltese law or as defined in the national law of the economic operator; **(c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests or an equivalent offence under Maltese law or as defined in the national law of the economic operator;** (d [...]) ; (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council or an equivalent offence under Maltese law or as defined in the national law of the economic operator; (f) child labour and other forms of trafficking in human beings as

¹⁹⁰ See Link tal-ELI: eli/sl/601.3.

	<p>defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council or an equivalent offence under Maltese law or as defined in the national law of the economic operator.(2) The exclusion of the economic operator shall also operate and apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.(3) Without prejudice to the possibility mentioned in regulation 195, the period of exclusion for the grounds identified under this regulation shall be of five years starting from the date when the judgment has become final.</p> <p>193 and 194 contain further grounds such as “shall likewise be excluded from participation in a procurement procedure where the authority responsible for the tendering process is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a local or foreign judicial or administrative decision having final and binding effect” or “a contract shall also not be awarded to an economic operator who, during the procurement procedure for that contract: (a) is bankrupt or is the subject of insolvency or winding-up proceeding, (b) is subject to a conflict of interests, (c) as been involved in the preparation of the procurement procedure.</p> <p>An exclusion can be removed, see 195 et seq.</p> <p>Internal Audit and Financial Investigations Act (Chapter 461)</p>
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Source: The authors.

c) References to National Authorities

- Customs
- Internal Audit and Financial Investigations Unit, especially:
- Financial Investigation Directorate
- EU Funds Audit Directorate
- Revenue authority
- Compliance and Investigations Directorate → Tax Compliance Unit
- National Audit Office

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8. Article 8 Duty to Inform the Office

[...] 2. The institutions, bodies, offices and agencies and, unless *prevented by national law*, the *competent authorities of the Member States* shall, at the request of the Office or on their own initiative, transmit without delay to the Office any document or information they hold which relates to an ongoing investigation by the Office. [...]

3. The institutions, bodies, offices and agencies and, unless *prevented by national law*, the *competent authorities of Member States* shall transmit without delay to the Office, at the request of the Office or on their own initiative, any other information, documents or data considered pertinent which they hold, relating to the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union.

- 1 A report obligation can at least be determined from the **principle of sincere cooperation with Union bodies**, cf. Article 4 para 3 TEU. This principle applies in all areas of potential irregularities and frauds (for the typology of EU frauds see above Article 26 EPPO Regulation, where the material scope of the EPPO is determined).
- 2 Additionally, Article 12a in combination with Article 8 para 2 and 3 OLAF Regulation 883/2013 obliges the AFCOS of the present Member State to report to OLAF any of the requested material. The obligations exist throughout the different areas of irregularities (tax revenue related, customs revenue related; tax expenditure related i.e. structural funds area, direct grants etc.) and are therefore enshrined in different national laws. The competent authorities of the Member States are either the same that can conduct external investigations (in cases of resistance, *Sigma Orionis*¹⁹¹) or those that must be informed by the Director General if he/she decides not open a case according to Article 5 para 5 OLAF Regulation No 883/2013 as amended 2020/2223.
- 3 In Proceeds of Crime Requests or requests for information by OLAF officials or national officials Chapter 621, s. 26 may apply with regard to Article 5 OLAF Regulation. National authorities might be hindered to disclose relevant information due to national restrictions (restrictions established by the law of the Member State i.e. here Maltese restrictions):

4 Chapter 621 Laws of Malta

26. [Disclosure of information]

(1) The Director and members of the Board, members of the Directorate staff and advisors and contractors of the Bureau shall treat any information acquired through the performance of their duties under this Act as secret and confidential and shall not disclose the same to any person other than as necessary for the proper performance of their duties:

¹⁹¹ See Article 3 OLAF Regulation above in this Chapter.

Provided that nothing in this sub-article shall be deemed to preclude the Director or any member of the Directorate Staff acting under a general or specific authorisation from the said Board to disclose information to the Attorney General, or any prosecuting authority, that may be required in the prosecution of offences for a relevant offence or to any fiscal or supervisory authority established by or under any other law for the purpose of aiding such other authority in the carrying out of its functions.

(2) The Director and members of the Directorate staff shall keep a record of any disclosure of information made in accordance with sub-article (1) hereof, indicating the person to whom the information has been disclosed and where necessary, the date of the authority to disclose given in writing by the Director: Provided that in urgent cases, authority to disclose may be given verbally in which case it shall be confirmed in writing as soon as may be, and in no case later than two (2) working days of the giving of the verbal authority.

Before providing information to OLAF the competent authorities of the Member States will need to assess for themselves if they risk being criminal liable for disclosure of secrets that shall not be released by law. The criminalization of the disclosure without exception is foreseen by Article 257 of the Criminal Code. Next, the Professional Secrecy Act applies in this regard as it allows the disclosure of certain information in certain circumstances:

5

PART III

EXCEPTIONS

Authorisation to disclose.

6. (1) It shall be a defence to a charge of disclosing secret information contrary to Article 257 of the Criminal Code to show that the secret information was revealed by the person charged, only when authorised to do so by the person who entrusted him with the information.

(2) For the purposes of sub-Article (1), a person who has received secret information from another shall not be able to give avail authorisation for the disclosure of that information by a third-party.

6A. No offence shall be committed against section 257 of the Criminal Code or this Act by –

(a) a person disclosing in good faith secret information in the course of and for the purpose of obtaining advice or directions from the body regulating his profession;

(b) a person disclosing in good faith secret information to a public authority or before a court or tribunal to the extent that is proportionate and reasonably required for the specific purpose of:

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(i) defending himself against any claim with regard to professional work in connection with which the secret information has been obtained by him; or (ii) initiating and maintaining judicial proceedings seeking the recovery of fees or other sums due to him or the enforcement of other lawful claims or interests; Cap. 9.Cap. 12.(c) saving the provisions of Article 642(1) of the Criminal Code or Article 588(1) of the Code of Organization and Civil Procedure, a person, who in good faith discloses secret information to a competent public authority in Malta in the reasonable belief that such disclosure is reasonably necessary for the purpose of preventing, revealing, detecting or prosecuting the commission of acts that amount or are likely to amount to a criminal offence, or to prevent a miscarriage of justice.

6B. Saving the provisions of Article 642(1) of the Criminal Code and of Article 588(1) of the Code of Organization and Civil Procedure, a person shall disclose information otherwise covered by professional secrecy when required to do so:

(a) by a competent law enforcement or regulatory authority investigating a criminal offence or a breach of duty, or by the Security Service established by the Security Service Act;

(b) by a magistrate in the cause and for the purposes of in general proceedings; and

c) by a court of criminal jurisdiction in the course of a prosecution for a criminal offence. Necessary communication to employees, etc.

7. (1) Unless the person who entrusted the secret information stipulates to the contrary, he shall be deemed to have authorised the communication of the secret information to employees, partners and assistants of the person to whom the information was entrusted, or to any other person falling within the scope of Article 257 of the Criminal Code, where such communication is necessary for the performance of services requested by the person who entrusted the information.

(2) Two or more persons falling within the scope of Article 257 of the Criminal Code who exercise power of effective management and control in a limited liability company set up for the purpose of exercising their profession shall for the purpose of this Article be considered as partners.

8. For the purposes of Article 257 of the Criminal Code, a person shall not be deemed to be compelled by law to give information to the public authority unless there is a statutory requirement to that effect.

9. Saving the provisions of Article 642(1) of the Criminal Code and of Article 588(1) of the Code of Organization and Civil Procedure, a court may authorise or make an order requiring the disclosure of secret information pursuant to an express provision of law

for the specific purposes for which that provision was enacted, or for the specific purpose of preventing, disclosing or detecting the commission of acts that amount or are likely to amount to a criminal offence:

Provided that in the absence of any specific provision in relation to any particular calling, profession or office, nothing in this Article shall be construed as modifying the existing rules of law in relation to the courts' power to release a witness in court belonging to any such calling, profession or office from the duty of professional secrecy:

Provided further where the court authorises or requires such disclosure such evidence shall be held in camera and shall only be accessible to the court and to the parties:

Provided further that nothing in this Act shall be construed as affecting the provisions of the Code of Organization and Civil Procedure in relation to garnishee orders.

10. It shall be a defence to a charge of disclosing secret information contrary to Article 257 of the Criminal Code to show that, at the time the information was revealed, the information had entered the public domain and had done so legitimately.

11. (1) It shall not be a breach of Article 257 of the Criminal Code for a person employed by the State to communicate secret information to another person employed by the same entity or to the Minister responsible for that entity, where such communication is directly necessary for the carrying out of their respective functions.

(2) For the purposes of this Article, the following are separate entities:

- (a) any body corporate established by law;
- (b) the Department of Inland Revenue;
- (c) all departments or divisions of the State, to the exclusion of the entities in paragraphs (a) and (b) above.

In the area of VAT frauds, the VAT Act holds the following exception:

7

56. [Official secrecy]

[...]

(5) Nothing contained in this Article shall, after the accession date, prevent the disclosure by the Commissioner, *of any information that is required to be disclosed in terms of Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax or of any such other Council Regulation* as may be prescribed.

(6) For the purposes of this Article, any information disclosed to the Commissioner by the fiscal authorities of another Member State in terms of any Council Regulation referred to in sub-article (5) shall be treated as information relating to and obtained for the purposes of this Act.

8

II. References to National Law in the OLAF Regulation (Articles 9–17 OLAF Regulation)

1. Article 9 Procedural Guarantees

[...] 3. As soon as an investigation reveals that an official, other servant, member of an institution or body, head of office or agency, or staff member may be a person concerned, that official, other servant, member of an institution or body, head of office or agency, or staff member ***shall be informed*** to that effect, provided that this does not prejudice the conduct of the investigation or of any investigative proceedings ***falling within the remit of a national judicial authority***.

4. [...] In duly justified cases where necessary to preserve the confidentiality of the investigation or an ongoing or future criminal investigation by the EPPO or a national judicial authority, the Director-General may, where appropriate after consulting the EPPO or ***the national judicial authority concerned***, decide to defer the fulfilment of the obligation to invite the person concerned to comment. [...]

- 1 Protecting **personal information** during OLAF inspections is a **key objective** of the Regulation. The Maltese police officers are included in the definition of “national authorities” in Article 9 of that Article. They support OLAF in its investigations, preserve evidence, and defend the rights of those who participate in OLAF’s checks.
- 2 In addition to being regarded as a national authority, the Maltese tax authority protects the **privacy of tax data** while offering information on bank accounts and financial transactions. The Maltese customs authority supports OLAF in its efforts to **prevent customs fraud** and guarantee that customs laws are followed.
- 3 Other Maltese authorities, such as the financial market supervisory authority, the anti-corruption authority, or the data protection authority, may also **be considered national authorities**, contingent on the specifics of the OLAF review. It is important for OLAF to coordinate with these authorities to **enforce national legal provisions** effectively.

a) Article 9 Para 3 – Remit of a National Judicial Authority

- 4 The exact type of “national judicial authority” can vary from country to country. In some countries it can be a court, in other countries a special judge or control organ or another authority. In Malta, for example, a magistrate court within the meaning of Article 9 of the OLAF regulation will usually be the responsible “national judicial authority” if it comes to measures which are not possible without a warrant (see above → Article 3 OLAF). The Magistrates as inquiring magistrates are judicial authorities¹⁹², which have

¹⁹² See European Justice, Information on Malta, https://ejustice.europa.eu/content_judicial_systems_in_member_states-16-mt-en.do?member=1. Accessed 31 July 2024.

the power to conduct investigative proceedings (see above → Part A On the EPPO acting in Malta). This may as well include the accompanying bodies acting on behalf of the prosecutors in an investigating proceeding, such as the judicial assistants and police bodies. The actions of the investigative authorities are controlled by the Magistrate, not necessarily the Court of Magistrates. The magistrate will be involved at different phases of the police investigation into specific offenses, e.g. search and arrest warrants are now issued by magistrates. Magistrates must also be present for specific processes, such identification parades, and must approve the prolonged custody of a suspect in certain circumstances for investigative purposes.

Superior¹⁹³ and Inferior¹⁹⁴ Courts are judicial authorities but they do not conduct investigative proceedings.

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b) Article 9 Para 4 – National Judicial Authorities

The national judicial authorities have been mentioned above in the commentary and presentation on the laws in relation to Article 3 OLAF Regulation. The authorities competent to judge regarding investigation measures are concerned by Article 9 para 4 OLAF Regulation. The interpretation is not legally binding and may involve even other authorities, which were not mentioned.

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2. Article 10 Confidentiality and Data Protection

[...] 3. The institutions, bodies, offices or agencies concerned shall ensure that the confidentiality of the investigations conducted by the Office is respected, together with the legitimate rights of the persons concerned, and, where judicial proceedings have been initiated, that *all national rules applicable to such proceedings* have been adhered to. [...]

a) National Rules Applicable to Judicial Proceedings in the MS

Administrative judicial proceedings are regulated by Chapter 490 Laws of Malta. The situation is highly divergent. Malta has no single Administrative Code, which regulates the Administrative Procedure in one single statute or law code.¹⁹⁵ Instead the judicial proceedings, the general proceedings and appeals are summarized in Chapter 490.

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b) Specifications

All national rules applicable to such proceedings are nowhere specified clearly in Maltese law but they can be taken from every law, which is applicable if OLAF investigates

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¹⁹³ Constitutional Court, Court of Appeal, Court of Criminal Appeal, the Criminal Court and the Civil Court.

¹⁹⁴ Court of Magistrates and the Court of Magistrates (Gozo), which has both inferior and superior jurisdiction.

¹⁹⁵ See <https://www.parlament.mt/media/72386/10006.pdf>. Accessed 31 May 2024.

a case in relation to a Maltese national, a Maltese Economic Operator or a case in the area of fraud mentioned in Article 3 OLAF Regulation above. National rules to proceedings are enshrined in the Laws on Procedures, e.g. Book 2 of Chapter 9, Criminal Laws of Malta (Rules on Criminal Procedure). This would be the case if OLAF recommended national financial or criminal investigations (but they would as well need to inform the EPPO eventually)

3. Article 11 Investigation Report and Action to Be Taken Following Investigations

[...] 2. In drawing up the reports and recommendations referred to in paragraph 1, account shall be taken of the relevant provisions of Union law and, in so far as it is applicable, *of the national law of the Member State concerned*.

Reports drawn up on the basis of the first subparagraph, together with all evidence in support and annexed thereto, shall constitute admissible evidence:

(a) in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States;

(b) in criminal proceedings of the Member State in which their use proves necessary in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors and shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports;

(c) in judicial proceedings before the CJEU and in administrative proceedings in the institutions, bodies, offices and agencies.

Member States shall notify to the Office *any rules of national law relevant* for the purposes of point (b) of the second subparagraph.

With regard to point (b) of the second subparagraph, Member States shall, upon request of the Office, send to the Office the *final decision of the national courts* once the *relevant judicial proceedings* have been finally *determined* and the final court decision has become *public*.

The power of the CJEU and national courts and competent bodies *in administrative and criminal proceedings to freely assess the evidential value* of the reports drawn up by the Office shall not be affected by this Regulation. [...]

3. Reports and recommendations drawn up following an external investigation and any relevant related documents shall be sent to the *competent authorities of the Member States* concerned in accordance with the rules relating to external investigations and, if necessary, to the institution, body, office or agency concerned. The *competent authorities of the Member State* concerned and, if applicable, the institution, body, office or agency shall *take such action as the results of the external investigation*

warrant and shall report thereon to the Office within a time limit laid down in the recommendations accompanying the report and, in addition, at the request of the Office. Member States may notify to the Office the relevant national authorities competent to deal with such reports, recommendations and documents.

Art. 11 OLAF Regulation should be of high interest to any national inspector, administrative or managing authority, police officer, judge or seconded national expert to OLAF. But why is this particular Article of such a **high importance** for OLAF’s work in general? Looking back to a comment of a supervisory committee member from 2012, it becomes vivid why investigators and staff in the member states should pay attention to the conditions of Art. 11 OLAF Regulation and its thighs with national law (procedures):

“Mr Marek Kaduczak: I want to make a comment concerning national judicial follow-up to OLAF investigations. **It is a crucial point because while you may have the best-conducted investigation, if there is no follow-up, such an investigation is of no use.** In fact, one of the main tasks of the supervisory committee is to monitor the proper conduct of the investigation and to look at the proper follow-up that is done at the national level. The committee looked into two elements. The first is the question of time-barring or prescription, and the second is the conduct of investigations in accordance with national rules so that the results of such investigations can be used properly as evidence in national proceedings.”¹⁹⁶

In relation to Article 11, national authorities are obligated to fulfil a number of tasks. All pertinent information on suspected incidents of fraud, corruption, and other criminal activities must be given to OLAF inspectors.¹⁹⁷ They **must assist OLAF** in conducting its cases and they are **required to protect the privacy of the data** that the OLAF replaces. The following table presents a **non-exhaustive overview** of the provisions applicable in relation to Article 11 OLAF Regulation in Malta:

a) References to National Law

Sources & national sections 2 Article 11 OLAF Regulation Maltese Laws

Para 2 (a)	In Malta, “judicial proceedings of a non-criminal nature before national courts” refer to legal actions brought before courts that deal with disputes that are not criminal offenses. These proceedings can involve
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¹⁹⁶ See OLAF’s Supervisory Committee—Oral evidence (QQ 36-47), Evidence Session No. 2. Heard in Public. Questions 36–47, WEDNESDAY 7 NOVEMBER 2012, p. 136. Nota bene: Mr. Kaduczak was a member oft he Supervisory Committee with his colleagues Mr Johan Denolf, Mrs Rita Schembri and Mr Herbert Bösch. <https://www.parliament.uk/globalassets/documents/lords-committees/eu-sub-com-e/combatingfraud/FRAUDVoloralandwrittenevidenceFINAL.pdf>. Accessed 31 July 2024.

¹⁹⁷ Salzano 2022.

	<p>a wide range of issues and can be broadly categorized as: Administrative Proceedings: These proceedings involve disputes between individuals and a public authority (e.g., government agency, payment agency, fund agency). They may challenge the legality of a decision made by the public authority or OLAF or seek compensation for damages caused by the authority's actions.</p> <p>CHAPTER 37 CUSTOMS ORDINANCE To make better provision for the management and regulation of customs. 16th September, 1909.</p> <p>CHAPTER 123 INCOME TAX ACT To impose a Tax upon Incomes. Amended by: XVII. 1994.35. 1st January, 1949.</p> <p>CHAPTER 337 IMPORT DUTIES ACT To make provision, in place of the Import Duties Act, 1976, for import duties and for matters incidental thereto or connected therewith. 1st January, 1990</p> <p>CHAPTER 382 EXCISE DUTY ACT</p> <p>CHAPTER 406 VALUE ADDED TAX ACT To make provision for the imposition of a value added tax in place of an excise tax system on imports, products and services. 1st January, 1999.</p> <p>CHAPTER CUSTOMS ORDINANCE</p>
Para 2 (b)	<p>Maltese Law knows provisions that establish duties to provide external, international partners with a final judgement obtained in Maltese Courts, see e.g. s. 16 CHAPTER 330</p> <p>16A. (1) The Authority shall, on an annual basis, contact the office of the Attorney General and the Commissioner of Police and seek information about any criminal sanctions imposed for any breaches of any provisions of any Act or regulations transposing MiFID. The office of the Attorney General and the Commissioner of Police shall co-operate with the Authority and shall, where relevant, send the Authority a copy of the final judgement in relation to any criminal sanctions imposed. The Authority shall submit such copy of the final judgement to the European Securities and Markets Authority (ESMA).</p> <p>There is no special rule like this obliging national authorities to send information to OLAF, but national appeal boards (in Administrative Procedure) and criminal courts will pay attention to it.</p>

Para 2 (c)	The rules are e.g. enshrined in Book 2 of Chapter 9 Laws of Malta. More rules can be found in the Customs Code, the VAT Act, the Tax Procedures Act.
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Source: The authors.

b) National Authority and Such Action as the Results of the External Investigation Warrant, Para 3

a. Customs Area

It could be e.g. that the customs investigation in combination with OLAF officials leads to the conclusion that an irregularity exists but the threshold for a criminal suspicion could not be proved, so that the relevant natural or legal person is addressed via administrative sanctions. These might result from Chapter 37 of the Laws of Malta, the Customs Ordinance:

S. 63 (1) Notwithstanding any other provision of this Ordinance, and without prejudice to any other proceedings to which the offender may be liable under any other law, in the case of any irregularity in any of the circumstances referred to in the following paragraphs of this sub-article, the Commissioner may, with the concurrence of the person committing the irregularity, impose the penalty hereunder as an alternative to proceedings in court:

(a) where the endangered duty does not exceed four thousand euro (€4,000), the Commissioner may collect the endangered duty and impose a penalty equivalent to the endangered duty;

(b) in the case where there is no endangered duty but there exist endangered taxes, the Commissioner may collect the endangered taxes and impose a penalty equivalent to five per cent (5%) of the difference in the value of the goods or, if there is no difference in the value, a penalty equivalent to one per cent (1%) of the value of the goods, together with a penalty equivalent to the endangered taxes; Cap. 406.

(c) in the case where there is no endangered duty but there exist endangered taxes in relation to goods entered in Malta by a person who is registered with the VAT Department under Article 10 of the Value Added Tax Act, and the irregularity consists of a breach of Article 62(m) of this Ordinance, the Commissioner may collect from the offender the endangered taxes and impose a penalty equivalent to 50% of the endangered value added tax up to a maximum of ten thousand euro (€10,000), together with a penalty equivalent to the other endangered taxes;

(d) in the case where both duty, of not more than four thousand euro (€4,000), as well as taxes on the goods are endangered, the Commissioner may collect the endangered duty as well as the endangered taxes and impose a penalty equivalent to the endangered duty and the endangered taxes; Cap. 406.

(e) in the case where there are endangered duty

of not more than four thousand euro (€ 4,000) as well as endangered taxes in relation to goods entered in Malta by a person who is registered with the VAT Department under Article 10 of the Value Added Tax Act, and the irregularity consists of a breach of Article 62(m) of this Ordinance, the Commissioner may collect from the offender the endangered duty as well as the endangered taxes and impose a penalty equivalent to the endangered duty together with a penalty equivalent to 50% of the endangered value added tax up to a maximum of ten thousand euro (€10,000), together with a penalty equivalent to the other endangered taxes;

(f) in the case where no other duty or tax on the goods is due or endangered, and there exists no restriction or prohibition on the importation of the goods, or limitation or condition on their exportation, the Commissioner may impose a penalty of one hundred euro (€100);

(g) in the case where no other duty or tax on the goods is due or endangered, but there exists a restriction or prohibition on the importation of the goods, or there exists a limitation or condition on their exportation, the Commissioner may impose a penalty of two hundred euro (€200) or 10% of the value of the goods, up to a maximum of six hundred euro (€600), whichever is the higher. Where the value of the goods cannot be established, the Commissioner may impose a penalty of two hundred euro (€200).

(2) (a) In the case where one (1) of the irregularities referred to in the Second Schedule is committed, which irregularity is committed after the 30th April 2013, and the agreement relating to the irregularity referred to in sub-article (1) is entered into, or where the irregularity was committed before the 30th April 2013 but the agreement relating to such irregularity referred to in sub-article (1) was entered into after the 30th April 2013, the penalty on the person committing the irregularity:

(i) for the first time over the twelve (12) months immediately before the date on which the irregularity is committed, shall be equivalent to twenty-five per cent (25%) of the endangered duty and taxes, as the case may be, or fifty euro (€50) whichever is the higher; and

(ii) for the second time over the twelve (12) months immediately before the date on which the irregularity is committed, shall be equivalent to fifty per-cent (50%) of the endangered duty and taxes, as the case may be, or seventy-five euro (€75) whichever is the higher; and

(iii) for the third time or more over the twelve (12) months immediately before the date on which the irregularity is committed, shall be equivalent to hundred per cent (100%) of the endangered duty and taxes, as the case may be, or one hundred euro (€100) whichever is the higher.

(b) Without prejudice to sub-article (6), an agreement in lieu of criminal proceedings with regard to the irregularities mentioned in the Second Schedule shall only be regulated by this sub-article.

(3) For the purposes of this Article, when any irregularity leads to loss of duties and the Commissioner would have imposed an excise duty penalty under the Excise Duty Act, with the concurrence of the person committing the irregularity, the Commissioner shall not impose another excise duty penalty under this Ordinance.

(4) For the purposes of this Article, the signing of this agreement shall also mean that the person is renouncing to any claim he may have against the Commissioner, the State Advocate or the Attorney General resulting from the case.

(5) Where in one (1) declaration there is more than one (1) item about which an irregularity was committed, and the agreement referred to in this Article takes place instead of criminal proceedings, the penalty that the person shall pay is that applicable for every separate item, except where there is more than one (1) irregularity in the same declaration which falls under paragraph (f) of sub-article (1), in which case the penalty is of one hundred euro (€100) for all those irregularities in that declaration which fall under paragraph (f) of sub-article (1).

66. All proceedings for the *recovery of any pecuniary penalty or otherwise under this Ordinance* shall be taken before the Court of Magistrates, and shall be *in accordance with the provisions of the Criminal Code* regulating the procedure before the said court as a court of criminal judicature and the award and execution of the punishments thereby imposed, and shall be subject to appeal as provided in Article 88 and, as regards procedure, as provided by the said Code for appeal from the decisions of the said court.

b. VAT Act Area

37. [Administrative penalty for incorrect tax return.]

(1) Saving the provisions of sub-article (2), when a tax return furnished by a person registered under Article 10 for a tax period contains an understatement of the output tax or an overstatement of the deductions for that period, that person becomes liable to an administrative penalty in an amount equivalent to twenty per cent of the total of -(a) the excess, if any, of the correct amount of output tax over the output tax as declared in the return; and (b) the excess, if any, of the deductions as declared in there turn over the correct amount of the deductions.

(2) Where a person corrects an understatement or overstatement as is referred to in sub-Article (1) in accordance with the provisions of Article 28(1) before he is served with a provisional assessment for that period, that person becomes liable to an administrative penalty in an amount equivalent to ten per cent of the total of -(a) the excess, if any, of the correct amount of output tax over the output tax as declared in the return; and (b) the excess, if any, of the deductions as declared in there turn over the correct amount of the deductions.

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(3) Where a tax return for a tax period furnished to the Commissioner by a person registered under Article 10 who only supplies goods or services listed under Part One of the Fifth Schedule to this Act, does not contain a full and correct statement of the matters required to be declared by that person in that return and to the extent that that person does not correct such an understatement or overstatement in accordance with the provisions of Article 28 before he is served with an assessment for that period he shall, unless that person has in virtue of that default become liable to a higher administrative penalty under the other provisions of this Article, be liable to an administrative penalty of one hundred and fifty euro (€150).

(4) Where, during the course of an investigation, a person co-operates with the Commissioner, accepts an agreement and within one month from the signing of the agreement pays the amount of tax due, the agreed administrative penalty and the interest due, that person shall be liable to an administrative penalty in an amount equivalent to 10 per cent of the amount of tax due.

37A. Where a notice of payment furnished by a person registered under Article 12 contains an understatement of the tax payable in accordance with Articles 21(2) and 21(3) or where the Commissioner makes an assessment of the tax payable by that person in terms of Article 33(2), that person shall become liable to an administrative penalty in an amount equivalent to twenty percent of the understated tax payable or the assessed tax.

38.(1) Any person registered under Article 10 who, being required to furnish a tax return for a tax period, does not furnish that return within the time laid down in the relevant provisions of this Act shall be liable to an administrative penalty in an amount equivalent to the higher of –

(a) one per cent of the excess, if any, of the output tax over the deductions, disregarding any excess credit brought forward from a previous tax period, as declared in the return; and

(b) twenty euro (€20), for every month or part thereof that elapses from the date by which the tax return should have been furnished in accordance with this Act and the date when it is furnished to the Commissioner: Provided that where the tax payable is less than two hundred and fifty euro (€250), such administrative penalty shall not exceed the equivalent of the tax payable to the nearest euro or fifty euro (€50), whichever is the greater, and it shall not exceed two hundred and fifty euro (€250) in all other cases.

(2) Any person who, being required to furnish a declaration or statement in terms of Article 30, does not furnish that declaration or statement within the time laid down in the relevant provisions of this Act shall be liable to an administrative penalty of ten euro (€10) for every month or part thereof that elapses from the date by which the declaration or statement should have been furnished in accordance with this Act and the date when it is furnished to the Commissioner: Provided that such administrative penalty shall in

no case exceed one hundred and twenty euro (€120) for each such declaration or statement oo, being required to apply for registration under Article 10, does not make such an application within the time laid down in the relevant provisions of this Act shall be liable to an administrative penalty in an amount equivalent to the higher of (a) one per cent of the excess, if any, of the output tax over the deductions for the first tax period following the registration; and

(b) twenty euro (€20), for every month or part thereof that elapses from the date on which the application should have been made and the earlier of the date on which the application registration is furnished to the Commissioner and the date when that person is registered by the Commissioner: Provided that where the excess, if any, of the output tax over the deductions for the first tax period following registration is two thousand euro (€2,000) or less, such administrative penalty shall not exceed two hundred and fifty euro (€250), and where the excess of the output tax over the deductions for the first tax period following registration is more than two thousand euro (€2,000) such administrative penalty shall not exceed twenty per cent of such excess.(2) Any person who, being required to apply for registration under Article 12, does not make such an application within the time laid down in the relevant provisions of this Act shall be liable to an administrative penalty of the higher of –

(a) one per cent of the tax chargeable on the intra-community acquisitions or the services received or both such intra-community acquisitions and services received, in respect of which he is required to make such application; and

(b) twenty euro (€20), for every month or part thereof that elapses from the date on which the application should have been made and the earlier of the date on which the application is furnished to the Commissioner and the date when that person is registered by the Commissioner: Provided that where the tax chargeable on the intra-community acquisitions or the services received or both such intra-community acquisitions and services received, in respect of which that person is required to make such application is two thousand euro (€2,000) or less, such administrative penalty shall not exceed two hundred and fifty euro (€250), and where the tax chargeable on the intra-community acquisitions or the services received or both such intra-community acquisitions and services received, in respect of which that person is required to make such application is more than two thousand euro (€2,000) such administrative penalty shall not exceed twenty per cent of such tax chargeable.

(3) Any person who, being required to give a notice under Article 15, does not give that notice within the time laid down in the relevant provisions of this Act shall be liable to an administrative penalty of twenty euro (€20)f or every month or part thereof that elapses from the date on which the notice should have been given and the date when that notice is given to the Commissioner: Provided that such administrative penalty shall in no case exceed two hundred and fifty euro (€250) for each such notice.

41. [Liability to administrative penalties.] Any administrative penalty to which a person becomes liable in terms of this Act shall be due and payable by that person without the need of any assessment to be made with respect thereof, and any amount of any administrative penalty due by a person shall not relieve that person from a higher or from a further penalty to which he may have become or may become liable in terms of the relevant provisions of this Act.

42. [Reasonable excuse]

(1) Notwithstanding the provisions of Articles 37 to 41, both inclusive –

(a) no administrative penalty shall be due by a person for any default if that person proves that there is a reasonable excuse for the default;

(b) if a person does not prove that there is a reasonable excuse for a default, but the Commissioner is of the view that the default resulted from particular circumstances that merit a mitigation of the administrative penalty, he may, in his discretion, remit part of the administrative penalty for that default;

(c) if the Commissioner is of the view that the default resulted from a genuine mistake he may remit in whole or in part the administrative penalty for that default; (d) no administrative penalty under Article 38 shall be due where a return required to be made in terms of Article 27 or a declaration required to be made in terms of Article 30(1) is furnished in an electronic format through the established web portal designated for the purpose by the Commissioner, not later than seven days from the date on which the said return or declaration should have been submitted under the provisions of this Act.

(2) For the purposes of sub-article (1)(a) and (b) –

(a) an insufficiency of funds to pay any tax due; or

(b) when reliance is placed on any other person to perform any task, the fact of that reliance or any dilatoriness or inaccuracies on the part of the person relied upon, shall not constitute a reasonable excuse.

(3) Notwithstanding the provisions of Articles 43 and 44, the use of the Commissioner's discretion for the purpose of sub-article(1)(b) and (c) shall not be questioned in any appeal or in any reference made to the Tribunal. Cap. 395.

(4) The Minister may by regulations prescribe other conditions under which part of, or all, the administrative penalty incurred under Articles 37 to 41 may be remitted. Such regulations may also make provision for the remission of any administrative penalties due under the Value Added Tax Act, 1994, and under the Customs Ordinance.

c. Public Finance and Management Act

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57. (1) Where, on the detection of any irregularity or fraud against public moneys, a report made in terms of the provisions of the Auditor General and National Audit Office Act or the Internal Audit and Financial Investigations Act is sent or referred to a Head

of Department, all necessary measures for the protection of such public moneys, including the levying of administrative penalties in accordance with regulations made under Article 55 and legal action for the recovery of the amount of any deficiency, loss, improper payment caused or made as a result or in the course of any such irregularity or fraud, shall be taken, and the provisions of Article 466 of the Code of Organization and Civil Procedure shall apply to any amount recoverable as aforesaid.

(2) Unless otherwise stipulated in a public contract, any bond, bank guarantee or other security given for the proper performance of any contract payable out of public moneys shall also extend to guarantee the recovery of any moneys or administrative penalties in connection with the contract and for which the person supplying the bond, bank guarantee or other security may be liable.

(3) Where the deficiency, loss, or improper payment as a result of the irregularity or fraud, involves funds received by the Government from any international or supranational organization or entity or from any of its institutions or entities or under the terms of any treaty or other agreement between States, any proceedings under this Article shall take place in consultation with the person in Malta, if any, specifically charged with authorising the payment or release of such funds: Provided that the lack of such consultation shall not in any way whatsoever affect the validity of any proceedings taken under this Article.

(4) Where two (2) or more persons are responsible for the irregularity or fraud which resulted in the deficiency, loss, or improper payment those persons shall be held jointly and severally liable therefore together with any other person who, although is duty bound to do so, has not acted in good faith, and failed to take reasonable precautions and to exercise due diligence to prevent the irregularity or fraud.

(5) Nothing in this Article or in this Part shall be construed as precluding any other person interested from taking action, whether jointly with the Head of Department or otherwise, for the recovery of any sum recoverable under the provisions of this Article.

71. (1) To safeguard the ministry, department and public entity against theft, fraud, irregularity, misuse, loss, and wastage, the control system shall include:

- (a) preventive mechanisms;
- (b) detective mechanisms; and
- (c) corrective mechanisms.

4. Article 12 Exchange of Information Between the Office and the Competent Authorities of the Member States

1. Without prejudice to Articles 10 and 11 of this Regulation and to the provisions of Regulation (Euratom, EC) No 2185/96, the Office may transmit to the competent authorities of the Member States concerned information obtained in the course of external investigations in due time to enable them to take appropriate action *in accordance with their national law*. It may also transmit such information to the institution, body, office or agency concerned.

2. Without prejudice to Articles 10 and 11, the Director-General shall transmit to the *judicial authorities of the Member State concerned* information obtained by the Office, in the course of internal investigations, concerning facts which fall within the *jurisdiction of a national judicial authority*. [...]

3. The *competent authorities of the Member State concerned* shall, unless *prevented by national law*, inform the Office without delay, and in any event within 12 months of receipt of the information transmitted to them in accordance with this Article, of the action taken on the basis of that information.

4. The Office may *provide evidence* in proceedings before national courts and tribunals *in conformity with national law* and the Staff Regulations. [...]

a) Article 12 Para 1 OLAF Regulation (Competent Authorities & Appropriate Action in Accordance with Their National Law)

1 Competent authorities

- Office of the Attorney General
- Customs Agency and officials
- Police Force(s)
- Revenue authority and CfR
- Internal Audit and Investigations Department

2 Appropriate action acc. to national law

- National follow-up acc. to the Administrative Justice Act
- National follow-up acc. to the special administrative laws e.g. Customs Ordinance, VAT Act, Excise Duty Act, Public Finance Management Act, Internal Audit and Financial Investigations Act

b) Article 12 Para 2 OLAF Regulation (Judicial Authorities of the Member State Concerned)

3 Which are these national authorities?

For all offences:

- Office of the Attorney General
- Customs

- Police Force
- Revenue authority
- Internal Audit and Investigations Department (Financial Offences)

Especially for corruption offences:

- Internal Audit and Investigations Department

c) Article 12 Para 3 OLAF Regulation (Information to the Office by Competent Authorities of the Member State Concerned)

These are the authorities, which were presented under a) and b) above. They are obliged to fulfil the time-limit by virtue of Article 12 para 3 OLAF Regulation.

Prevention by national law

The right to withhold information (for a certain time) may result from provisions, which ensure the secrecy of an action under national law.

d) Article 12 Para 4 OLAF Regulation (Providing Evidence in Court Proceedings Before National Courts and Tribunals in Conformity with National Law)

The Administrative Justice Act applies when providing evidence in court proceedings before national administrative courts and tribunals. And the Criminal Code, book 2 on Criminal Procedure applies when providing evidence in national court proceedings before criminal courts and tribunals.¹⁹⁸

Administrative Justice Act

PART II Administrative Tribunals

General provision applicable to administrative tribunals.

3. (1) In their relations with the public, administrative tribunals shall respect and apply the principles of good administrative behaviour laid down in this Part of this Act.

(2) The principles of good administrative behaviour include the following:

(a) an administrative tribunal shall respect the parties' right to a fair hearing, including the principles of natural justice, namely:

(i) *nemo judex in causa sua*, and

(ii) *audi et alteram partem*;

(b) the time within which an administrative tribunal shall take its decision shall be reasonable in the light of the circumstances of each case. The decision shall be delivered as soon as possible and for this purpose the tribunal shall deliver one decision about all matters involved in the cause whether they are of a preliminary, procedural or of a substantive nature;

¹⁹⁸ See above → Article 11 OLAF Regulation, which refers to this situation.

- (c) an administrative tribunal shall ensure that there shall be procedural equality between the parties to the proceedings. Each party shall be given an opportunity to present its case, whether in writing or orally or both, without being placed at a disadvantage;
- (d) an administrative tribunal shall ensure that the public administration makes available the documents and information relevant to the case and that the other party or parties to the proceedings have access to these documents and information;
- (e) proceedings before an administrative tribunal shall be adversarial in nature. All evidence admitted by such a tribunal shall, in principle, be made available to the parties with a view to adversarial argument;
- (f) an administrative tribunal shall be in a position to examine all of the factual and legal issues relevant to the case presented by the parties in terms of the applicable law;
- (g) save as otherwise provided by law, the proceedings before an administrative tribunal shall be conducted in public;
- (h) reasons shall be given for the judgment. An administrative tribunal shall indicate, with sufficient clarity, the grounds on which it bases its decisions. Although it shall not be necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case, shall require a specific and express response.

Powers of the Administrative Review Tribunal

- 20.** (1) The Administrative Review Tribunal shall have all such powers as are, by the Code of Organization and Civil Procedure, vested in the First Hall of the Civil Court.
- (2) The enforcement of the decisions of the Administrative Review Tribunal in the manner provided for in the Code of Organization and Civil Procedure, shall vest in the Administrative Review Tribunal itself.
- (3) The Administrative Review Tribunal may, through its Chairperson, summon any person to appear before it and give evidence and produce documents, and the Chairperson shall have the power to administer the oath.

Criminal Code, Book 2

Laws of Criminal Procedure

- 355S.** (1) Anything which has been lawfully seized by the Police may be retained so long as is necessary in all the circumstances.
- (2) Without prejudice to the generality of the aforesaid, anything lawfully seized by the Police under this Code may be retained for use as evidence at the trial or for forensic examination or any other aspect of the investigation, or in order to establish the thing's lawful owner.
- (3) The Commissioner shall provide for the proper custody of anything seized

Sub-title XI**POWERS AND DUTIES OF THE POLICE IN RESPECT OF COURT PROCEEDINGS****Production of evidence before court.**

356. (1) It is the duty of the Executive Police to bring as soon as possible before the court, and, where practicable, together with the offender, all the evidence that may have been collected in respect of the offence.

(2) It is the duty of police prosecuting officers to disclose to the defence such evidence which may appear to favour the person charged and which the police, for any reason, might not have the intention to produce before the court as evidence for the prosecution. Collection of further evidence and its production before court.

(3) The Executive Police shall, even after the accused has been brought before the court, continue to collect and furnish to the Court of Magistrates or, after his committal for trial, to the Attorney General, any further information that can be obtained in respect of the offence.

Preservation of articles connected with the offence.

357. Where an officer of the Executive Police discovers any weapon, document, trace or vestige or any other thing relating to an offence, he shall take steps to establish and ensure the existence and the preservation thereof in the state in which it was found until he shall have reported the matter to the Court of Magistrates, and, if unable to establish and ensure such existence or preservation, he shall observe the same procedure provided for the drawing up of a "*repertus*".

Duties of the Police in respect of criminal proceedings.

358. (1) It is the duty of the Police to issue and to serve citations summoning persons to appear before the Court of Magistrates, in matters within the jurisdiction of such court.

(2) In summary proceedings for offences within the jurisdiction of the Court of Criminal Judicature, it shall not be the duty of the Police to serve on the person charged notice of the date of hearing apart from the first sitting of the proceedings.

Further rules may be found in the following Subsidiary Legislation:

Subsidiary legislation 12.09 Court practice and Procedure and Good Order Rules.

5. Article 12a Anti-Fraud Coordination Services

1. Each Member State shall, for the purposes of this Regulation, designate a service (the ‘anti-fraud coordination service’) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office. Where appropriate, *in accordance with national law*, the anti-fraud coordination service may be regarded as a competent authority for the purposes of this Regulation. [...]

a) General Remarks

a. Definition and History

- 1 Cooperation, coordination and facilitation are **buzz words** in anti-fraud literature.¹⁹⁹ Anti-fraud coordination services are known worldwide and exist in many international organizations and cooperate with nation states.²⁰⁰ In the EU the term “AFCOS” has a *very special meaning* as it means the *Anti-fraud coordination services created on behalf of the European Anti-fraud Office* for the facilitation of interactions with the national Member States of the EU (see recitals below).²⁰¹ The **obligation to designate** these services runs and derives from primary Union law. Article 325 TFEU (ex-Article 280 TEC) requests the Union *and* the Member States to fight fraud (together). The history of these services, adapted to the financial and budgetary law sector and set-up in the Member States’ internal justice and financial systems dates to the early 2000s.²⁰² Historically, the coordinating bodies emerged primarily in the new Member States that were awaiting accession.
- 2 The European Parliament has already in 2010 called for the **AFCOS** to be set up as independent bodies in the MS. Today one could not be further from this idea than ever, since the AFCOS are **mostly subordinated** deep in the structure of a Financial or Treasury Department/Ministry, Financial Inspections Services of the Treasury Department/Ministry or the Department of Commerce, or the Ministry/Department of the Interior:

“Friday 24 April 2009 Protection of the Communities’ financial interests and the fight against fraud - Annual Report 2007 P6_TA(2009)0315 European Par-

¹⁹⁹ Kuhl 2019, 135 (160 et seq.); Wells 2014; Spink 2019; Saporta and Maraney 2022, FCPA, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act, 2012; ECA 2022, online: https://www.eca.europa.eu/Lists/ECADocuments/JOURNAL22_01/JOURNAL22_01.pdf; Malan 2022, 135–139; focusing on the customs area Van der Paal and Nurk, De Vlieger et al. 2019; de Vries 2022, 401–463; House of Lords 2012-13, 32 et seq.

²⁰⁰ Bartsiotas and Achamkulangare 2016; See World Customs Organization, http://www.wcoomd.org/en/about-us/partners/international_organizations.aspx; see UNDOC, <https://www.unodc.org/unodc/en/corruption/COSP/session9-resolutions.html>, focusing on the designation of anti-corruption bodies. Accessed 31 July 2024.

²⁰¹ Kuhl 2019, 135 (164).

²⁰² Quirke 2015, 232 (236 et seq.).

liament resolution of 24 April 2009 on the protection of the Communities' financial interests and the fight against fraud - Annual Report 2007 (2008/2242(INI)) 2010/C 184 E/14 The European Parliament”

68. points out that the Anti-Fraud Coordination Units (AFCOS) set up for OLAF in the Member States that joined the European Union after 2004 are very important sources of information and contact points for OLAF; points out, however, ***that the functional added value of these offices (in particular in terms of reporting irregularities to the Commission) is minimal as long as they are not independent from national administrations***; therefore calls on the Commission to submit a proposal to Parliament's competent committee on how the work of these offices could be made more useful and considers it necessary to improve cooperation with the candidate countries.”²⁰³

At least there is legal and technical oversight of the areas of administration in most states and nowadays the AFCOS are implemented at the highest level.²⁰⁴ **3**

However, the existing Member States are also aware of weaknesses in the fight against fraud. Only since 2010 and in the last decade has more attention been paid to these coordination points. They have become a *sine qua non* in the EU's fight against fraud and they are becoming more and more the “eyes and ears” of OLAF in the Member States. They only have their own investigative skills, which would make them an “extended arm” of OLAF in the member states, if at all, e.g. in Bulgaria or Italy. On the other hand, in Malta and France, they are more **active in the background** and do not appear too clearly. **Activity reports** may also have to be requested by the Commission, i.e. the responsible departments of OLAF. **4**

²⁰³ See OJ, 8.7.2010, Freitag, 24. April 2009 Schutz der finanziellen Interessen der Gemeinschaften und Betrugsbekämpfung - Jahresbericht 2007 P6_TA(2009)0315 Entschließung des Europäischen Parlaments vom 24. April 2009 zu dem Schutz der finanziellen Interessen der Gemeinschaften und der Betrugsbekämpfung – Jahresbericht 2007 (2008/2242(INI)) 2010/C 184 E/14 Das Europäische Parlament, “68. weist darauf hin, dass die Stellen zur Koordinierung der Betrugsbekämpfung (AFCOS), die für OLAF in den Mitgliedstaaten eingerichtet wurden, die der Europäischen Union nach 2004 beigetreten sind, für OLAF sehr wichtige Informationsquellen und Kontaktpunkte sind; verweist jedoch darauf, dass der funktionale Mehrwert dieser Büros (insbesondere hinsichtlich der Meldung von Unregelmäßigkeiten an die Kommission) minimal ist, solange sie nicht von den nationalen Verwaltungen unabhängig sind; fordert die Kommission daher auf, dem zuständigen Ausschuss des Parlaments einen Vorschlag dahingehend vorzulegen, wie die Arbeit dieser Büros nutzbringender gestaltet werden könnte, und hält es für notwendig, die Zusammenarbeit mit den Kandidatenländern zu verbessern; [...]“

²⁰⁴ Byrne 2018, p. 13, online: https://ec.europa.eu/regional_policy/sources/docgener/informat/expert_training/2019/module6_role_ms_auditor.pdf. Accessed 31 July 2024.

c. Legislative Developments

- 5 The Commission has evaluated the impact of the AFCOS in the past decade.²⁰⁵ Recent changes at the beginning of the 2020s have **enlarged the competences** of the AFCOS. These are now even allowed to cooperate with each other and not only with OLAF in Luxembourg alone, which was the case prior to the amendments of the Regulation (EU) 2020/2223.
- 6 The recent changes describe the role of the AFCOS in the recitals. Thus, by reading them the task and role of these bodies becomes vivid:
- 7

<p>(23) The Office is able, under Regulation (EU, Euratom) No 883/2013, to enter into administrative arrangements with <i>competent authorities of Member States</i>, such as anti-fraud coordination services, and institutions, bodies, offices and agencies, in order to specify the arrangements for their cooperation under that Regulation, in particular <i>concerning the transmission of information, the conduct of investigations and any follow-up action</i>.</p>
<p>(30) Due to the large diversity of national institutional frameworks, Member States should, on the basis of the principle of sincere cooperation, <i>have the possibility to notify to the Office the authorities that are competent to take actions upon recommendations of the Office</i>, as well as the authorities that need to be informed, such as for financial, statistical or monitoring purposes, for the performance of their relevant duties. Such authorities <i>may include national anti-fraud coordination services</i>. In accordance with the settled case-law of the CJEU, the Office recommendations included in its reports have no binding legal effects on such authorities of Member States or on institutions, bodies, offices and agencies.</p>
<p>(37) The anti-fraud coordination services of Member States were introduced by Regulation (EU, Euratom) No 883/2013 to facilitate an effective cooperation and exchange of information, including information of an operational nature, between the Office and Member States. The Commission evaluation report concluded that they have contributed positively to the work of the Office. The Commission evaluation report also identified the <i>need to further clarify the role of those anti-fraud coordination services</i> in order</p>

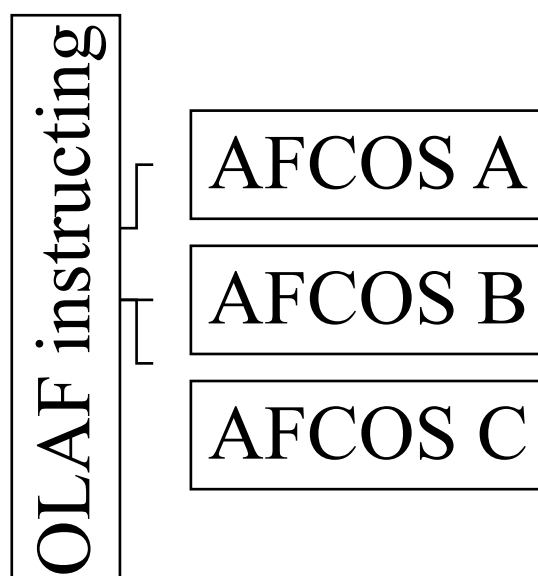
²⁰⁵ COMMISSION STAFF WORKING DOCUMENT EVALUATION of the application of Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 Accompanying the document Commission report to the European Parliament and the Council., p. 3, 12, 72. The Commission document was accompanied by a Report (called ICF Report 2017), which resulted from an external study: European Commission, European Anti-Fraud Office, Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF): final report, Publications Office, 2017, <https://data.europa.eu/doi/10.2784/281658>. Accessed 31 July 2024.

to ensure that the Office is provided with the necessary assistance to ensure that its investigations are effective, while leaving the organisation and powers of the anti-fraud coordination services to each Member State. In that regard, the anti-fraud coordination services should be able to provide or coordinate the *necessary assistance* to the Office *to carry out its tasks effectively, before, during or at the end of an external or internal investigation*.

(40) It should be possible for the anti-fraud coordination services in the context of coordination activities to provide assistance to the Office, as well as for the anti-fraud coordination services *to cooperate among themselves*, in order to further reinforce the available mechanisms for cooperation in the fight against fraud.

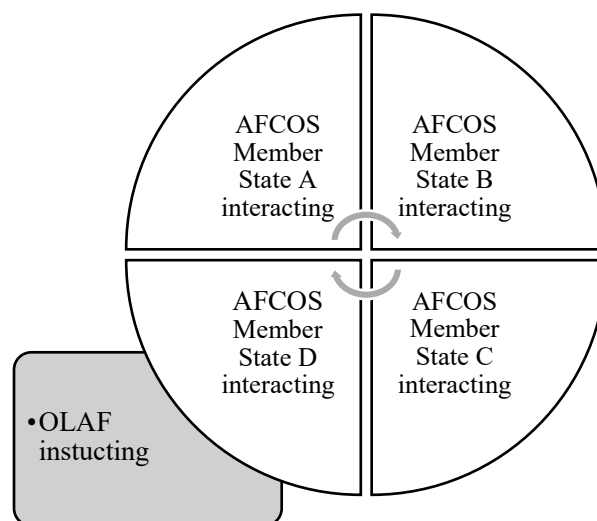
d. Visualization of Old (Prior to 2020) vs. New (Since 2020) Cooperation and Role of the AFCOS

Figure 9 Visualization of the old cooperation by virtue of Regulation No. 883/2013



Source: The authors.

Figure 10 Visualization of the new cooperation by virtue of Regulation No. 883/2013 (as amended 2020/2223)



Source: The authors.

b) A Closer Look at the Relevant AFCOS in the Present Member State

- 8 The Maltese AFCOS is part of the Government of Malta and unlike in other countries it is not part of the Ministry of Interior, Economy or Justice, but a single structure within the **Internal Audit and Investigations Department (IAID)**.²⁰⁶ The IAID operates by virtue of the Internal Audit and Financial Investigations Act, Chapter 461 of the Laws of Malta, which is frequently cited above in Article 3 OLAF Regulation. The Webpage of the Maltese AFOCS says the following:

“The Financial Investigations Directorate 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.

A financial investigation means the in-depth examination of all circumstances relative to irregularities and cases of suspected fraud, including the corruption of public officers, and, in that regard, the acquiring of records and, or information and

²⁰⁶ Times of Malt, 2003: “Times of Malta Malta geared to counter fraud Malta is well prepared to keep track of European Union monies it receives and to ensure there is no fraud, according to the director general of the European Commission's anti-fraud office, Franz-Hermann Breuener. Dr Breuener was in Malta to attend a.”

the carrying out of related assessments, analysis and recommendations. Investigations relate to inquiries aimed at uncovering the hidden facts and establishing the truth. They imply a systematic track-down of information and include probing.

The IAID is the designated interlocutor of OLAF in Malta and is the Anti-Fraud Co-ordinating Service (AFCOS) for Malta; this implies that this IAID Unit can conduct joint investigations with OLAF, the European Ant-Fraud Office, with respect to EU funds availed of by Malta.

The Unit reports irregularities to 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 substantial contributions, including feedback, to various sub-units within OLAF all in charge of protecting the EU financial interests under different facets.”²⁰⁷

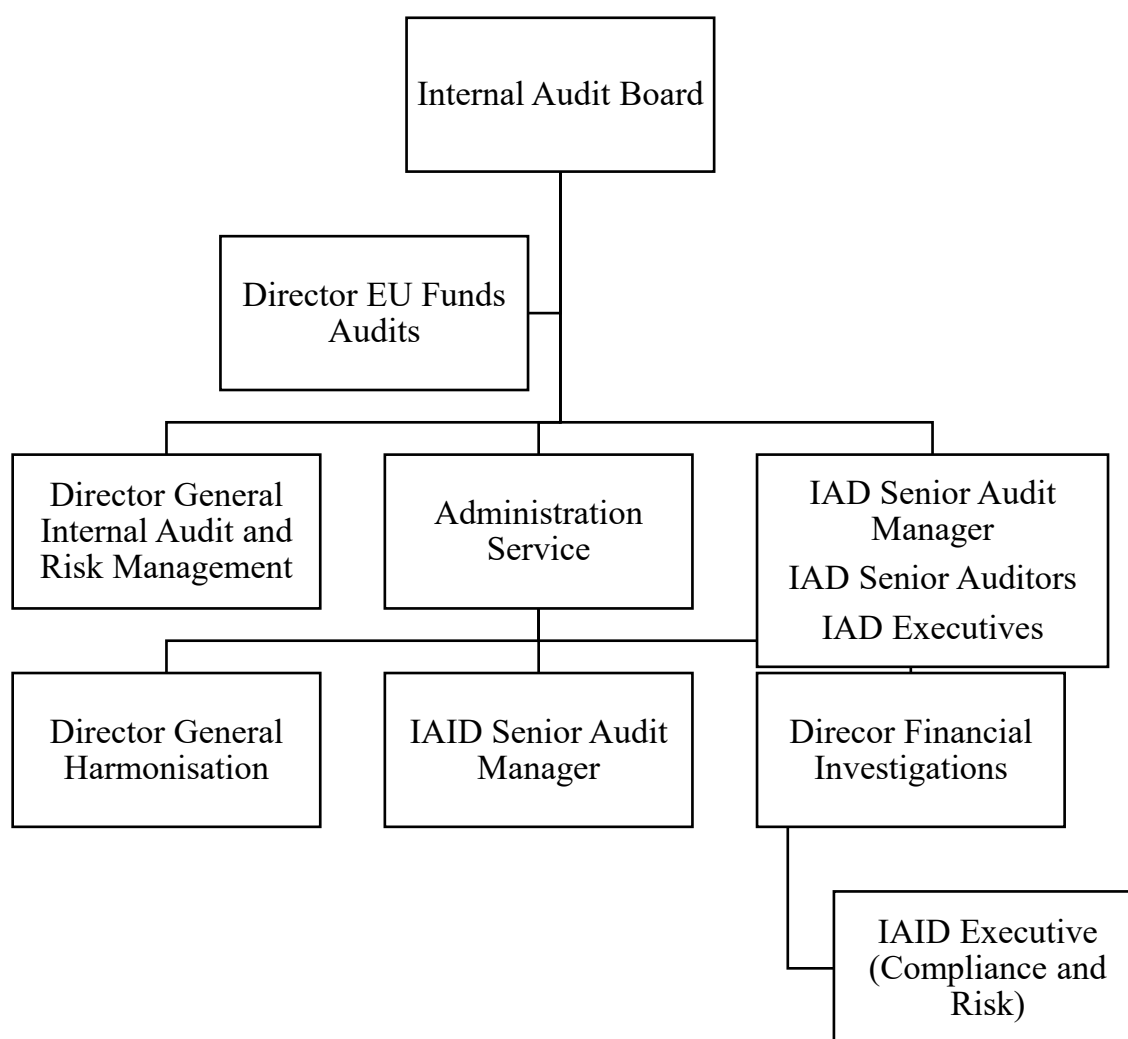
To contact Malta’s AFCOS, any investigator can reach out to it via the Internal Audit and Investigations Department (IAID), which hosts the AFCOS office. The IAID operates, as explained above under the Ministry for Finance and Employment and will remain the national body responsible for combating fraud and financial irregularities involving EU funds.

9

²⁰⁷ See <https://iaid.gov.mt/en/Pages/IAID-Directorates/Financial-Investigations-Directorate.aspx>. Accessed 31 July 2024.

- 10** The Office of the Prime Minister published in 2021 the Maltese National Anti-fraud and Corruption Strategy. The paper was released in May 2021 during the worldwide COVID-19 pandemic and not taken to notice by too many states at this time. Afterwards it was analysed for the PIF Report 2021 and 2022. The paper explains the **administrative scenario** on how to combat fraud in Malta even more analytic.²⁰⁸ The structure of the Office is as follows:

Table 9 Maltese AFCOS within the Internal Audit Office of Malta



[Article 12b–12d omitted]

²⁰⁸ Office of the Prime Minister, NAFS, Malta, May 2021, https://parlament.mt/media/112436/national-anti-fraud-and-corruption-strategy_en.pdf, p. 33.

6. Article 12e The Office's support to the EPPO

1. In the course of an investigation by the EPPO, and at the request of the EPPO in accordance with Article 101(3) of Regulation (EU) 2017/1939, the Office shall, in accordance with its mandate, support or complement the EPPO's activity, in particular by:

- (a) providing information, analyses (including forensic analyses), expertise and operational support;
- (b) facilitating coordination of specific actions of *the competent national administrative authorities* and bodies of the Union; [...]

The competent national administrative authorities might be contacted via the established AFCOS and OAFCN network (see above → Art. 12a and 3 OLAF Regulation, Mn. 7), which OLAF can contact (with the help of its internal systems and data communication systems) on behalf of the EPPO (see above → Part B) for the EPPO to fulfil its requests.
[Article 12f–g omitted]

7. Article 13 Cooperation of the Office with Eurojust and Europol

1. [...] Where this may support and strengthen coordination and cooperation between *national investigating and prosecuting authorities*, or where the Office has forwarded to the **competent authorities of the Member States** information giving grounds for suspecting the existence of fraud, corruption or any other illegal activity affecting the financial interests of the Union in the form of serious crime, it shall transmit relevant information to Eurojust, within the mandate of Eurojust.²⁰⁹ [...]

The following national bodies can be mentioned:

- Office of the Attorney General
- Police Force
- Customs and Tax Offices, IAID. * All authorities should be contacted and asked for a contact person in urgent cases. The interpretation is not legally binding and may involve even other authorities, which were not mentioned. The competent authority depends, like in Art. 3 OLAF Regulation on the relevant area, in which the fraud happened.

[Article 14–16 omitted]

8. Article 17 Director-General

4. The Director-General shall report regularly, and at least annually, to the European Parliament, to the Council, to the Commission and to the Court of Auditors on the findings of investigations carried out by the Office, the action taken and the problems

²⁰⁹ Regulation (EU) 2018/1727 of the European Parliament and the Council will apply.

encountered, whilst respecting the confidentiality of the investigations, the legitimate rights of the persons concerned and of informants, and, where appropriate, ***national law applicable to judicial proceedings***. Those reports shall also include an assessment of the actions taken by the ***competent authorities of Member States*** and the institutions, bodies, offices and agencies, following reports and recommendations drawn up by the Office.

7. The Director-General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned and ***of the national law of the Member States concerned***, with particular reference to Article 11(2). The legality check shall be carried out by Office staff who are experts in law and investigative procedures. Their opinion shall be annexed to the final investigation report.

The Supervisory Committee noted that OLAF's country mini-profiles provided some information on national laws but were insufficient for compensating occasional expertise issues.²¹⁰ They also reviewed **OLAF's legality check procedures**, recognizing the importance of expertise in all EU Member States' legal systems. Good relations between investigators and reviewers were seen to positively impact the quality of checks and reviews. OLAF's legality check ensures compliance with legal rules and addresses any breaches swiftly. The check focuses on procedural aspects and may lead to modifications or abandonment of actions if it fails. The committee emphasized the importance of compliance with rights and procedural rules in promoting the rights of those affected.

a) National Law Applicable to Judicial Proceedings

1 The following codes can be consulted:

- Administrative Justice Act
- Criminal Code, Book 2 Laws on Criminal Procedure
- Subsidiary legislation 12.09 Court practice and Procedure and Good Order Rules
- Subsidiary legislation 9.11 Court Practice and Procedure and Good Order (Criminal code) Rules of Court

2 **43. VAT Act** Any person aggrieved by an assessment served upon him may appeal against that assessment to the Tribunal

45. VAT Act There shall be an Administrative Review Tribunal for the purpose of hearing and determining appeals and references made in accordance with Articles 43 and 47. (1) Any of the parties to an appeal or a reference to the Tribunal who feels aggrieved by the decision of that Tribunal may, by means of an application to be filed within thirty days from the date on which the decision appealed from is notified to him, appeal against that decision on a question of law only –

²¹⁰ Supervisory Committee, Opinion No 2/2015, Legality check and review in OLAF, p. 6 et seq.

(i) where the total amount of tax, administrative penalty, and interest for the tax period or periods under appeal up to the date of receipt of the appeal by the Tribunal is less than one million and one hundred and fifty thousand euro (€1,150,000), to the Court of Appeal (Inferior Jurisdiction); and

(ii) where the total amount of tax, administrative penalty, and interest for the tax period or periods under appeal up to the date of receipt of the appeal by the Tribunal is of one million and one hundred and fifty thousand euro (€1,150,000) or more, to the Court of Appeal. Cap. 12.

(2) The board established under Article 29 of the Code of Organization and Civil Procedure may make regulations governing appeals under this Article.

(3) The Minister responsible for justice may by regulations under this sub-article establish the fees payable in the registry of the court in relation to the filing of judicial acts in connection with appeals to the Court of Appeal or to the Court of Appeal (Inferior Jurisdiction), as the case may be, under this Act: Cap. 12.

Provided that until fees are so established by the Minister, the fees contained in Schedule A to the Code of Organization and Civil Procedure shall apply.

b) Internal Advisory and Control Procedure: Legality Check

For the **legality check** conducted by OLAF general rules on the investigation procedure as copied in the above-mentioned Articles may be of relevance. 3

Country-specific **rules on fundamental rights** such as on *nemo tenetur se ipsum accusare* or *nullum crimen sine lege* may also prove to be relevant in such a legality check (for more rights of an investigated person see above → Introduction, Art. 3, 9, 9a OLAF Regulation). In general, the provisions relating to the gathering of evidence during investigations or rules on confidentiality may play an important role (see above → Art. 3 OLAF Regulation). Major laws, which need to be respected are the right to be heard, the right to legal assistance and the right to data protection regulated by the Data Protection Act (Chapter 586 of the Laws of Malta). The rules of Book 2 of the Criminal Code apply, if OLAF sends a report to a national authority (see → Art. 11 above). The Code of Ethics of the Public Administration Act may apply. Especially in the area of administrative penalties the right to a fair trial is essential – it has been discussed more often in the past years.²¹¹ 4

[Article 18–21]

²¹¹ See *Insignia Cards Limited* (“Plaintiff”) vs. *il-Korp għall-Analizi ta’ Informazzjoni Finanzjarja u L-Avukat Tal-Istat* (“Defendant”, the “FIAU”) con. Art. 39 para 6 a of the Maltese Constitution. See with further analysis Gatt, Administrative penalties: the right to a fair hearing, <https://bit.ly/4dXYQyM>. Accessed 31 July 2024.

D. Concluding Remarks

- An EPPO or OLAF **investigation will begin with** the „simplest” conceivable probability of an offence/irregularity, via a complaint with an EPPO/OLAF template²¹², an information from a whistle-blower²¹³ or an observation of fraud in a data system, such as a customs goods system etc. aiming at a **sufficient suspicion** of an offence, will proceed via the potential initiation of proceedings according to Art. 26, 27 EPPO Regulation or Art. 7 OLAF Regulation (customs, tax, subsidy fraud, bribery proceedings or, in the case of OLAF, investigations into a failure to keep proper accounts, failure to report the use of funds for possible prosecution (in the case of the EPPO) and will result in the opening (or rejection) of proceedings. **1**
- The **facts of the case** are clarified using the investigative powers available (see above → Art. 30 EPPO, Art. 3 OLAF), although this is in conflict with the rights of the suspected person. The Maltese principles on the **appointment of a public defender** or legal assistance in proceedings apply at the same time as the opening of proceedings. **2**
- There are differences between EPPO proceedings under criminal law and administrative OLAF proceedings, but what they have in common is the determination of the material truth while **safeguarding the rights of the individual(s)** (see above → Art. 29 EPPO, Art. 9 OLAF e.g. right to refuse to testify, immunities, etc.). **3**
- The **proceedings** will come to a **conclusion**, which may end in court proceedings or, in OLAF recommendations (see above → Art. 11 OLAF), national financial or disciplinary proceedings²¹⁴, administrative disqualification proceedings or enforcement proceedings. **4**
- In general, Malta’s **laws facing the national procedures** used to combat fraud, corruption and illegal conduct to the detriment of the financial interests of the EU as well as the administrative fight against irregularities in customs and tax matters are robust national laws – despite the fact, that Maltese legislation often tends to transpose EU Directives in a verbatim manner.²¹⁵ **5**
- The **collaboration of Maltese authorities** with EU institutions like OLAF and EPPO is essential and a factual expression of Art. 325 TFEU. Malta focuses on institutional **6**

²¹² Nota bene: Public awareness and secure reporting channels are essential for early detection and prevention of fraud affecting EU finances. The EPPO has a „Report a Crime web form“ and an EPPO template for national authorities.

²¹³ See Whistleblower Act (Chapter 527) and the Public Procurement Regulations (Subsidiary Legislation 601.03) are essential for ensuring transparency in the public sector, reducing the risk of fraud and corruption in EU projects.

²¹⁴ The Public Finance Management Act (Chapter 601) regulates the management and accountability of public funds, crucial for protecting EU and national financial interests.

²¹⁵ Filletti 2020, p. 277 sees „sporadic legislative amendments“.

transparency to safeguard both national and EU financial interests as well as the rights of accused and suspected persons (see above → Part B. III).²¹⁶

- 7 **Maltese authorities** can be made even more popular amongst the EU fraud bodies, IBOAs and internal fraud units from our point-of-view. Firstly, this was outlined in the **Maltese National Anti-Fraud and Corruption Strategy** from 2021.²¹⁷ The strategy focused on strengthening institutional cooperation and aligning national laws with EU frameworks to address fraud, corruption, and financial irregularities, which is needed to master the possible frauds in the area of the national resilience plan.
- 8 Secondly, we have seen that the **coordination between national authorities**, like the Internal Audit and Financial Investigations Department (IAID), and EU bodies like OLAF and EPPO is done mostly via the AFCOS (see above → Art. 12a OLAF Regulation) as this is a local institution, which is critical for facilitating collaboration with EU authorities.
- 9 The most important **legislative instruments** for OLAF and the EPPO staff and lawyers in an EPPO or OLAF case, include Chapter 461 (Internal Audit and Financial Investigations Act), which lays the foundation for national anti-fraud coordination.
- 10 The offences, which are investigated by Maltese EDPs are stipulated by the Criminal Code Amendments (Act XVII of 2020), which transposed provisions of the PIF Directive (2017/1371) into Maltese law, ensuring criminal liability for offenses that harm EU financial interests.²¹⁸
- 11 Thirdly, **investigative powers** of Maltese EDPs and national staff were presented and researched above, whereby the EPPO Adoption Act was analysed and supplemented with the national procedures (see above → Art. 28, 30 EPPO Regulation) and the *critique* of EP Mrs. Faruggia concerning the wire-tapping warrants was emphasized, too.²¹⁹
- 12 The investigation and **enforcement authorities** in Malta strengthen the enforcement through the collaboration of multiple agencies, including the Customs Department, which oversees compliance with EU customs regulations and the Attorney General's Office, which prosecutes major financial crimes, including those involving EU funds.

²¹⁶ Office of the Prime Minister of Malta (2021).

²¹⁷ Ibid.

²¹⁸ See above → B. III. 1. bb. (1) PIF offences in Malta.

²¹⁹ See above for the laws on the Economic Crime Unit (ECU) called Financial Crimes Investigations Department (FCID) nowadays, which is tasked with investigating financial crimes like corruption, fraud, and money laundering, all of which can affect the EU's financial interests.

For the future, it is important that every party involved in an EPPO or OLAF – be it criminal proceedings or administrative proceedings (see above → Art. 7, 11 OLAF Regulation) – **complies with national procedures** in order to enable the best possible prosecution of organised EU crime, EU PIF offences and improper handling of EU funds, bribery and influences by public officials on the one hand and to **avoid disproportionate investigations** and prosecution that may give rise to claims by prosecuted persons and to safeguard the rights of the persons concerned on the other. **13**

The maximisation of EU and international cooperation in cross-border cooperation should be a priority of legislators, aiming to enhance Malta's responses to complex fraud and corruption cases that transcend national borders. This is crucial for cases prosecuted under the EPPO zone framework or OLAF's investigations in the upcoming years – there is always enough **room for optimisation through Maltese legislation *de lege ferenda***.²²⁰ **14**

²²⁰ See Borg, Times of Malta, EPPO chief wants Malta police to do more to support major fraud probes, 14 October 2023.

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This **Maltese EPPO/OLAF volume** provides practitioners in the justice sector and the general public with an overview of the Maltese law implementing the EPPO Regulation and the Maltese laws relevant to the EPPO's activities in Malta. It also explains the legal framework governing the investigative functions of OLAF and its national partners in external investigations. OLAF's investigations have already led to important national decisions over the past twenty years. Advocate Dr Veronica-Anne Spiteri acted as national expert for the publication.

While the volume is written in English, its footnotes reproduce the original Maltese legislation in the local language. Easily navigable with the help of visual symbols, it is designed as a quick reference tool for academics, students, practitioners and other interested readers.

Logos Verlag Berlin

ISBN 978-3-8325-5869-7

