INTERNATIONAL COOPERATION IN THE FIELD OF
CONFISCATION AND RECOVERY OF CRIMINAL ASSETS:
TOOLS AND INSTRUMENTS

EJTN CRIMINAL JUSTICE SEMINAR
ECONOMIC CRIMES: ASSETS RECOVERY AND CONFISCATION IN THE EU
LONDON, 24-25 NOVEMBER 2016
3 MAIN GEOGRAPHICAL AREAS

EUROPEAN UNION  COUNCIL OF EUROPE  UNITED NATIONS
3 DIFFERENT STAGES

INVESTIGATION PHASE: FINDING

PROSECUTION PHASE: FREEZING

ENFORCEMENT PHASE: CONFISCATING
1959 European Convention on MLA

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)


2007 Decision on AROs

2000 Convention on MLA & 2001 Protocol (to be replaced by Directive on EIO)

Framework Decisions on Mutual Recognition (Freezing & Confiscation Orders)

2014 Directive on Freezing & Confiscation
INVESTIGATION PHASE

COUNCIL DECISION 2007/845/JHA of 6 December 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime
Each Member State shall set up or designate a national Asset Recovery Office (ARO), for the purposes of the facilitation of the tracing and identification of proceeds of crime.

A Member State may set up or designate two AROs: law enforcement, judicial or administrative authority.
## AROs in MEMBER STATES

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Each Member State shall set up or designate a national Asset Recovery Office (ARO), for the purposes of the facilitation of the tracing and identification of proceeds of crime.

A Member State may set up or designate two AROs: law enforcement, judicial or administrative authority.

AROs cooperate with each other, both upon request and spontaneously.

Request from an ARO to another ARO shall rely on Framework Decision 2006/960/JHA (Swedish Framework Decision).

There has to be specified: the object of and the reasons for the request, the nature of the proceedings, details on property sought (bank accounts, real estate, cars, yachts and other high value items) and/or the natural or legal persons presumed to be involved.
INVESTIGATION PHASE

2001 Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
1. Request for information on bank accounts

Each Member State shall, under the conditions set out in this Article, take the measures necessary to determine, in answer to a request sent by another Member State, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts.

The information shall also, if requested, include accounts for which the person has powers of attorney.

The requesting authority making shall state why the requested information is of substantial value for the purpose of the investigation and on what grounds it presumes that banks in the requested Member State hold the account.
FISHING EXPEDITION
2. Requests for information on banking transactions

On request by the requesting State, the requested State shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.

The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account (EU Directive on Money Laundering).

The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.
3. Requests for the monitoring of banking transactions

Each Member State shall undertake to ensure that, at the request of another Member State, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.

The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.

The practical details regarding the monitoring shall be agreed between the competent authorities of the requesting and requested Member States.
Confidentiality
Each Member State shall take the necessary measures to ensure that banks do not disclose to the bank customer concerned or to other third persons, or that an investigation is being carried out.

Obligation to inform
If the requested authority in the course of the execution of a request considers that it may be appropriate to undertake investigations not initially foreseen, it shall immediately inform the requesting authority in order to enable it to take further action.

Banking secrecy
A Member State shall not invoke banking secrecy as a reason for refusing any cooperation regarding a request for mutual assistance from another Member State.
Forwarding refusals to the Council and involvement of Eurojust

If a request is refused and the requesting Member State maintains its request, and no solution can be found, the reasoned decision to refuse the request shall be forwarded to the Council for information by the requested Member State, for possible evaluation of the functioning of judicial cooperation between Member States.

The competent authorities of the requesting Member State may report to Eurojust any problem encountered concerning the execution of a request for a possible practical solution in accordance with the provisions laid down in the instrument establishing Eurojust.
THE FUTURE

DIRECTIVE 2014/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 3 April 2014 regarding the European Investigation Order in criminal matters

Deadline for implementation: 22 May 2017

The same investigative measures concerning bank and other financial accounts:

Information on accounts, information on operations and monitoring of operations.

Obligation of confidentiality, but no reference to bank secrecy, forwarding of refusals to the Council or involvement of Eurojust.
PRESERVATION PHASE

Principle of mutual recognition

COUNCIL FRAMEWORK DECISION 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence
MUTUAL RECOGNITION OF FREEZING ORDERS

Rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

2 different purposes: securing evidence, or subsequent confiscation.

List of 32 offences not subject to the verification of dual criminality.

Direct transmission of the freezing order and the certificate (translated) from the issuing authority to the executing authority.
EU Legal Instruments for Judicial Cooperation

- Convention of 29 May 2006 on Mutual Assistance in Criminal Matters between the Member States of the European Union
  - 2002/584/JHA: European Arrest Warrant (EAW) of 13 June 2002
- 2004/783/JHA: Confiscation orders of 6 October 2006
- 2008/909/JHA: Transfer of Prisoners of 27 November 2008
- 2008/347/JHA: Probation of 27 November 2008
- 2009/529/JHA: Supervision measures of 23 October 2009
- 2009/546/JHA: Conflict of jurisdiction of 30 November 2009
- 2014/41/EU: Directive regarding the European Investigation Order in criminal matters of 3 April 2014
Latest press releases

**EUR 320 million VAT fraud: key targets arrested**

26/10/2015 Yesterday, from a coordination centre located at Eurojust, prosecution and law enforcement authorities from Austria, Belgium, Germany, Ireland, Italy, the Netherlands, Norway, Poland, Spain, Sweden, Switzerland and the UK, supported by Eurojust and Europol, delivered a further blow to an organised criminal group responsible for defrauding EU citizens of approximately EUR 320 million in a joint action targeting VAT fraud. ... read more

**Action against an organised criminal group involved in thefts of luxury cars**

11/10/2016 On 11 October, a joint action day run by French and German police authorities, and supported by Eurojust with a coordination centre, succeeded in stopping an international organised criminal group (OCG) involved in thefts of luxury cars. ... read more
MUTUAL RECOGNITION OF FREEZING ORDERS

Rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

2 different purposes: securing evidence, or subsequent confiscation.

List of 32 offences not subject to the verification of dual criminality.

Direct transmission of the freezing order and the certificate (translated) from the issuing authority to the executing authority.

Recognition and immediate execution (within 24 hours).

Limited and expressly provided for grounds for refusal.

Execution and legal remedies according to the executing State law.
ENFORCEMENT PHASE

Principle of mutual recognition

COUNCIL FRAMEWORK DECISION 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders
MUTUAL RECOGNITION OF CONFISCATION ORDERS

Rules under which a Member State shall recognise and execute in its territory a confiscation order issued by a court of another Member State within the framework of criminal proceedings.

Proceeds and Instrumentalities + Value and Extended Confiscation.

List of 32 offences not subject to the verification of dual criminality.

Direct transmission of the confiscation order and the certificate (translated) from the issuing authority to the executing authority.
EU Legal Instruments for Judicial Cooperation

- Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union
- 2002/S84/OJ: European Arrest Warrant (EAW) of 13 June 2002
- 2009/729/OJ: On decisions rendered on 26 February 2009
- 2006/783/OJ: Confiscation orders of 6 October 2006
- Repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters.
- 2009/948/OJ: Conflict of jurisdiction of 30 November 2009
- 2014/41/EU: Directive regarding the European Investigation Order in criminal matters of 3 April 2014
MUTUAL RECOGNITION OF CONFISCATION ORDERS

Rules under which a Member State shall recognise and execute in its territory a confiscation order issued by a court of another Member State within the framework of criminal proceedings.

Proceeds and Instrumentalities + Value and Extended Confiscation.

List of 32 offences not subject to the verification of dual criminality.

Direct transmission of the confiscation order and the certificate (translated) from the issuing authority to the executing authority.

Limited and expressly provided for grounds for refusal.

Execution and legal remedies according to the executing State law.

Disposal of confiscated property: 50 % for each if more than € 10,000.
THE DIRECTIVE OF 2014 ON FREEZING AND CONFISCATION

TRANSPOSITION BY 4th OCTOBER 2015

Obligation to confiscate instrumentalities and proceeds, or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

VALUE CONFISCATION

Obligation to confiscate instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence but a final conviction is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person.

NON CONVICTION BASED CONFISCATION
Obligation to confiscate property belonging to a person convicted of certain criminal offences (specified in the Directive), where a court, on the basis of the circumstances of the case, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

EXTENDED CONFISCATION

Obligation to confiscate property (or its value) transferred by a suspected or accused person to third parties, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including the price.

CONFISCATION FROM A THIRD PARTY
Obligation to take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation.

Obligation to take that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights. In particular:

- Ensuring that the freezing order is communicated to the affected person as soon as possible after its execution, providing for the effective possibility for the person whose property is affected to challenge the freezing order before a court, and immediately returning frozen property which is not subsequently confiscated.

- Ensuring that the confiscation order is communicated to the person affected, who has the right of access to a lawyer throughout the confiscation proceedings.
Obligation to take the necessary measures to enable the detection and tracing of property to be frozen and confiscated even in the case of extended confiscation, and to ensure the effective execution of a confiscation order.

Obligation to take the necessary measures to ensure the adequate management of property frozen with a view to possible subsequent confiscation, including the possibility to sell or transfer property where necessary, and considering the possibility of confiscated property to be used for public interest or social purposes.

Obligation to collect and maintaining comprehensive statistics on freezing and confiscation orders, which shall be sent to the Commission each year.
REASONS FOR THE UNDERUTILISATION OF EU INSTRUMENTS

The forms of the Framework Decisions are perceived as unnecessarily complicated as they require information not always available when the form is to be completed.

General perception that the Framework Decisions involve additional cumbersome formalities.

Traditional MLA requests still need to be used:
- in cases involving Member States that have not yet implemented EU instruments
- or when the location and value of assets are unknown at the time the request is drafted.
- or when the judicial authority also wants to include all requests related to a criminal case, such as requests for searches, interceptions of telecommunications and seizures.
OTHER PROBLEMS IN FREEZING ORDERS

Sometimes the requested Member State is unable to execute a freezing order if the purpose of the freezing is the return of the frozen assets to the victims, and not confiscation.

Possible conflict of jurisdictions when the Member State to which money has been transferred by criminals initiates their own investigation into money laundering and freezes the money.

Difficulties in translation.

Assets located in different jurisdictions.

Strict bank secrecy regulations in some jurisdictions.

Absence of a central land registry or a central database of bank accounts.

Insufficient expertise of prosecutors in this field.
OTHER PROBLEMS IN CONFISCATION ORDERS

Different substantial and procedural rules in the Member States.

Significant differences in terminology and legal concepts, namely extended confiscation, non-conviction-based confiscation, civil recovery, and value confiscation.

In particular, non-execution of civil confiscation.

Difficulties in relation to the excessive length of proceedings concerning the sale of confiscated assets, aggravated by the participation of administrative authorities and perceived unnecessary bureaucracy.

Difficulties in reaching agreement on asset sharing.
THE MAIN REASON FOR DIFFICULTIES

The lack of trust and willingness to cooperate among domestic bodies, despite an underlying assumption of confidence in each others’ justice systems on the legal plane.
COUNCIL OF EUROPE

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
(8 November 1990)

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and on the Financing of Terrorism
(16 May 2005)
1990 & 2005 CoE CONVENTIONS

1990 EXPLANATORY REPORT

The Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions.

Purely administrative confiscation is not included in the scope of application of the Convention.

The fact that confiscation in some States is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity.

It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge.
1990 & 2005 CoE CONVENTIONS

1990 EXPLANATORY REPORT

Any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds.

ART. 23.5 OF THE 2005 CONVENTION

The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence.
Cooperation may be refused if the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought.

NCB CONFISCATION IS JUST AN OPTIONAL GROUND FOR REFUSAL
UNITED NATIONS

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988


- United Nations Convention against Corruption of 2003 (Merida Convention)
THANK YOU VERY MUCH
FOR YOUR ATTENTION!