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

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Prosecutor. Spanish Liaison Magistrate to Italy

Leipzig, 29 November 2017
SOME FIGURES

Proceeds of crime
I. M. F. Report in 1998: 2 % - 5 % of Global G. D. P.
UNODC Report in 2009: 3.6 % of Global G. D. P.

Transnational Organised Crime:
1.5 % of Global G. D. P.

Drug Trafficking:
0.75 % of Global G. D. P.

Assets recovered:
UNODC Report in 2011: 0.2 % of laundered assets
Communication from the Commission to the European Parliament and the Council – Proceeds of organised crime: ensuring that “crime does not pay”.


‘To fight crime effectively means to hit criminals where it hurts them most.’
CRIME
DOES NOT PAY
3 DIFFERENT STAGES

INVESTIGATION PHASE: FINDING

PROSECUTION PHASE: FREEZING

ENFORCEMENT PHASE: CONFISCATING
3 MAIN GEOGRAPHICAL AREAS

EUROPEAN UNION

COUNCIL OF EUROPE

UNITED NATIONS
FINDING ASSETS

EUROPEAN UNION

Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of crime

COUNCIL OF EUROPE

Conventions on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990 & 2005)

UNITED NATIONS

Convention against Transnational Organised Crime (Palermo, 2000), Convention against Corruption (Mérida, 2003), etc.
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 Initiative).

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 the natural or legal persons presumed to be involved.
MEASURES OF INVESTIGATION ON BANK ACCOUNTS
OBTAINING EVIDENCE ABROAD

EUROPEAN UNION

MUTUAL RECOGNITION Directive on the European Investigation Order (EIO)
Replaces the EU 2000 Convention and 2001 Protocol on MLA in Criminal Matters

COUNCIL OF EUROPE

European Convention on Mutual Legal Assistance in Criminal Matters (1959) and its Additional Protocols

UNITED NATIONS

Convention against Transnational Organised Crime (Palermo, 2000), Convention against Corruption (Mérida, 2003), etc.
MEASURES OF INVESTIGATION ON BANK ACCOUNTS

EUROPEAN UNION

Directive on the European Investigation Order (EIO)
Replaces the 2001 Protocol to the EU 2000 Convention on MLA in Criminal Matters

COUNCIL OF EUROPE

Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism
(Warsaw, 2005)
EUROPEAN INVESTIGATION ORDER (EIO)

- Direct transmission between judicial authorities
- Limited grounds for refusal
- Execution according to the issuing State law
- Possibility of executing other measures
EUROPEAN INVESTIGATION ORDER (EIO)

INFORMATION ON BANK & FINANCIAL ACCOUNTS

An EIO may be issued in order to determine whether any natural or legal person subject to the criminal proceedings concerned holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State,

and if so, to obtain all the details of the identified accounts,

including, if requested, accounts for which the person subject to the criminal proceedings concerned has powers of attorney.

Each Member State shall take the measures necessary to enable it to provide that information.
EUROPEAN INVESTIGATION ORDER (EIO)

INFORMATION ON BANKING & FINANCIAL OPERATIONS

An EIO may be issued in order to obtain the details of specified bank accounts and of banking operations, including the details of any sending or recipient account.

Each Member State shall take the measures necessary to enable it to provide that information.
EUROPEAN INVESTIGATION ORDER (EIO)

RULES APPLICABLE TO BOTH MEASURES

The obligation shall apply only to the extent that the information is in the possession of the bank keeping the account.

In the EIO the issuing authority shall indicate the reasons why it considers that the requested information is likely to be of substantial value for the purpose of the criminal proceedings concerned and, in the case of information on accounts, on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved.

It shall also include in the EIO any information available which may facilitate its execution.
EUROPEAN INVESTIGATION ORDER (EIO)

CONTROL ON BANKING & FINANCIAL OPERATIONS

A EIO may be issued for the purpose of executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time, such as the monitoring of banking or other financial operations that are being carried out through one or more specified accounts.

Its execution may be refused if the measure would not be authorised in a similar domestic case.
EUROPEAN INVESTIGATION ORDER (EIO)

CONTROL ON BANKING & FINANCIAL OPERATIONS

The practical arrangements shall be agreed between the issuing State and the executing State.

The issuing authority shall indicate in the EIO why it considers the information requested relevant for the purpose of the criminal proceedings concerned.

The right to act, to direct and to control operations shall lie with the competent authorities of the executing State.
FREEZING ASSETS ABROAD
3 POSSIBLE AIMS OF THE FREEZING:

- Securing evidence
- Securing future confiscation
- Guaranteeing the payments due to civil claimants
FREEZING AIMED AT SECURING EVIDENCE

EUROPEAN UNION

MUTUAL RECOGNITION
Directive on the European Investigation Order (EIO)
Replaces the 2003 FD

COUNCIL OF EUROPE

European Convention on Mutual Legal Assistance in Criminal Matters (1959)

UNITED NATIONS

Convention against Transnational Organised Crime (Palermo, 2000), Convention against Corruption (Mérida, 2003), etc.
FREEZING AIMED AT FUTURE CONFISCATION

EUROPEAN UNION

MUTUAL RECOGNITION

2003 FRAMEWORK DECISION

COUNCIL OF EUROPE

Conventions on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990 & 2005)

UNITED NATIONS

Convention against Transnational Organised Crime (Palermo, 2000), Convention against Corruption (Mérida, 2003), etc.
FREEZING ORDERS

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.

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/S84/III: European Arrest Warrant (EAW) of 13 June 2002
- 2006/783/III: Confiscation orders of 6 October 2006
- 2008/90/III: Transfer of Prisoners of 27 November 2008
- 2009/529/III: Supervision measures of 23 October 2009
- 2009/94/SIII: Conflicts 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 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.

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.
CONFISCATING
ASSETS
ABROAD
EXECUTING CONFISCATION ABROAD

EUROPEAN UNION

MUTUAL RECOGNITION
2006 FRAMEWORK DECISION

COUNCIL OF EUROPE

Conventions on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990 & 2005)

UNITED NATIONS

Convention against Transnational Organised Crime (Palermo, 2000), Convention against Corruption (Mérida, 2003), etc.
CONFISCATION ORDERS

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**
- **2002/584/JHA: European Arrest Warrant (EAW) of 13 June 2002**
- **2009/209/JHA: On decisions rendered in absentia of 26 February 2009**
- **2003/577/JHA: Freezing Orders of 22 July 2003**
- **2006/789/JHA: Confiscation orders of 6 October 2006**
- **2008/547/JHA: Probation of 27 November 2008**

Status of implementation in the Member States of EU legal instruments:

- **2009/350/JHA: ECRIS of 26 February 2009**
- **2009/529/JHA: Supervision measures of 23 October 2009**
- **2009/94/JHA: 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.
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.
THE MAIN DIFFICULTY

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.
THE MOST USEFUL TOOLS TO FIGHT AGAINST TRANSNATIONAL ORGANISED CRIME
THANK YOU VERY MUCH
FOR YOUR ATTENTION!