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

Luis Rodríguez Sol
Prosecutor. Spanish Liaison Magistrate to Italy

Malta, 11 June 2018
‘To fight crime effectively means to hit criminals where it hurts them most’

Communication from the Commission to the European Parliament and the Council, of 20 November 2008
CRIME DOESN'T PAY
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.

‘Transcrime’ Research in 2010: 0.9% of EU’s G. D. P.

Transnational Organised Crime:

1.5% of Global G. D. P. (Drug Trafficking: 0.75%)
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<th>Rank</th>
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<tr>
<td>18</td>
<td>Netherlands</td>
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SOME FIGURES

**Proceeds of crime**

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**Transnational Organised Crime:**

1.5 % of Global G. D. P. (Drug Trafficking: 0.75 %)

**Assets recovered:**

UNODC Report in 2011: 0.2 % of laundered assets

Europol Study in 2014: 1.1 % confiscated (2.2 % frozen)
3 DIFFERENT STAGES

A) INVESTIGATION PHASE: TRACING & FINDING

B) PROSECUTION PHASE: FREEZING

C) ENFORCEMENT PHASE: CONFISCATION & RETURN OF ASSETS
3 MAIN GEOGRAPHICAL AREAS

EUROPEAN UNION
A) 2007 Decision on AROs
B) 2003 FD on mutual recognition of freezing orders
C) 2006 FD on mutual recognition of confiscation orders

COUNCIL OF EUROPE
A), B) & C)
Conventions on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990 & 2005)

UNITED NATIONS
A), B) & C)
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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<th>POLICE</th>
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<td>IRELAND</td>
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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
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.
‘The secret to success is to own nothing but control everything’

Nelson Rockefeller,
One of the richest men of all time
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.
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 IN THE E. U.
3 POSSIBLE AIMS OF THE FREEZING:

- Securing evidence (E. I. O.)
- Securing future confiscation
- Guaranteeing the payments due to civil claimants

(E. U. Regulations / art. 49 (d) of the Schengen Agreement)
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
- 2002/584/JHA: European Arrest Warrant (EAW) of 13 June 2002
- 2006/783/JHA: Confiscation orders of 6 October 2006
- 2008/909/JHA: Transfer of Prisoners of 27 November 2008
- 2008/547/JHA: Probation of 27 November 2008
- 2009/529/JHA: Supervision measures of 20 October 2009
- 2009/948/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 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
IN THE E. U.
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/S84/JHA: European Arrest Warrant (EAW) of 13 June 2002
- 2005/224/JHA: Financial Penalties of 24 February 2005
- **2006/789/JHA: Confiscation orders of 5 October 2006**
- 2008/121/JHA: Transfer of Persons of 12 April 2008
- 2008/347/JHA: Probation of 27 November 2008
- 2009/458/JHA: 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 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.
E. U. LEGAL FRAMEWORK ON FREEZING & CONFISCATION

**Mutual recognition instruments**
by Regulations or Directives
(Framework Decisions before the Lisbon Treaty)


Proposal for a Regulation on the mutual recognition of Freezing and Confiscation Orders (2016)

**Harmonisation measures**
(minimum rules)

Only by Directives

2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.
Replaces some provisions of previous Framework Decisions (e. g. regarding extended confiscation)
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.
A PRACTICAL EXAMPLE

Request for bank information and freezing of the account balance

EU

Mutual recognition

2 different instruments:

- E. I. O. (8 page form)
- Freezing order (5 page form)

Total: at least 13 pages

Council of Europe

Traditional MLA

Single Rogatory Letter: based on 2005 Warsaw Convention

Total: 2 pages

Execution time: 20 days
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

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.

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.
DIFFERENT TYPES OF CONFISCATION

AS TO ITS SCOPE

“Traditional” (Instrumentalies and proceeds of crime)
Value confiscation
Extended Confiscation
Third-party confiscation

AS TO ITS BASIS

Based on a conviction
Non-conviction based (N. C. B.)
In criminal proceedings
In other proceedings
Absconding or illness
Any other case (e.g. death)

2014 Directive
2016 Proposal of Regulation
2005 CoE WARSAW CONVENTION

Art. 23.5: 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,

provided that it has been established that the property constitutes proceeds or
- the property into which the proceeds have been transformed or converted;
- property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;
- income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.
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 TRACE, FIND, FREEZE, CONFISCATE AND RECOVER CRIMINAL ASSETS
THANK YOU VERY MUCH

FOR YOUR ATTENTION!