



Dear reader,

I am pleased to present the thirteenth issue of Eurojust News, which addresses asset recovery, including freezing and confiscation of the proceeds of crime.

The European Commission has made confiscation a strategic priority in the EU's fight against organised crime, and has reported that the number of freezing and confiscation procedures in the European Union and the amounts recovered from organised crime seem modest if compared to the estimated revenues of organised criminal groups. Compounding the problem, national legislation and procedural rules in place regarding freezing orders, confiscation and asset recovery vary significantly between Member States, despite the number of Framework Decisions in this area.

These differences can make the successful prosecution of such cases very challenging because, in practice, most Member States are unable to execute requests for mutual legal assistance (MLA) to identify and freeze the proceeds of crime or to recognise confiscation orders issued by courts of other Member States if the rules in force in the other Member States differ significantly.

Eurojust continues to help resolve some of these difficulties, both through its involvement in casework and through awareness-raising activities. In 2013, our casework in this area focused on advising national authorities on the different legal and procedural requirements in place and assisting investigating and prosecuting authorities to act simultaneously in the execution of freezing and confiscation orders.

Eurojust also organises seminars focusing on related topics, bringing experts, practitioners and academics together to exchange information and best practice. For further information on these events, please see pages 4 and 5.

In this issue, we interview or publish articles from leading figures in the field. This issue includes **Francis Cassidy**, National Member for Ireland; **Jill Thomas** of the CARIN Secretariat; **Dr Nicola Selvaggi** of Università di Reggio Calabria; **Leif Görts**, National Member for Sweden and Chair of Eurojust's Financial and Economic Crime Team; **Filippo Spiezia**, Deputy National Antimafia Prosecutor; and **Dr Světlana Kloučková**, Director of International Affairs Department, Supreme Public Prosecutor's Office, Czech Republic.

If you have any comments concerning this issue of Eurojust News, please contact our Press & PR Service at info@eurojust.europa.eu.

Michèle Coninx, President of Eurojust

Asset recovery

Freezing and confiscation of the proceeds of crime - the main issues

Despite the number of legal instruments enacted in this area, judicial cooperation continues to be hampered by major differences between national legal systems and a lack of harmonised rules. Judicial cooperation is particularly difficult with regard to non-conviction-based (NCB) confiscation and extended confiscation, but problems also arise in relation to the rights of *bona fide* third parties and confiscation orders issued following *in absentia* convictions.

The tracing of assets has become more and more challenging due to the nature of instant electronic transactions. The efficiency of asset recovery has been undermined by the problem of decreasing values in property and securities and by the fact that Asset Recovery Offices (AROs) (see page 5 below) are not equally effective in all Member States.

As a result, confiscation procedures remain underutilised and practitioners prefer frequently to resort to 'traditional' instruments of mutual legal assistance (MLA) in criminal matters, such as the Council of Europe

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Convention on Mutual Legal Assistance in Criminal Matters (the 1959 Convention) and the European Convention on Mutual Assistance in Criminal Matters (the 2000 Convention). The reasons behind this underutilisation of existing EU legal instruments range from lack of clarity in the applicable provisions to the cumbersome nature of the procedures involved. Moreover, traditional MLA requests still need to be used in cases involving Member States that have not yet implemented existing EU instruments or when the location and value of assets are unknown at the time the request is drafted.

Bearing in mind the difficulties Member States face in cases of cross-border asset recovery, Eurojust has helped resolve some of those difficulties through its operational work, meetings and seminars. Eurojust has also identified best practice through its casework and strategic work, including how to best manage assets from the outset of an investigation (e.g. by requesting the sale of perishable or rapidly depreciating goods or goods with high management costs at the same time as issuing the freezing order).

Definitions

Let's begin by defining some of the key concepts to be discussed in this edition of *Eurojust News*.

Asset recovery: Legal process whereby proceeds or instrumentalities of crime are identified, secured (through freezing and seizure mechanisms), recovered by means of confiscation orders issued by court proceedings (involving either criminal or non-conviction-based confiscation regimes) and returned to victims, deprived communities or the State.

Seizure/freezing: Temporarily assuming custody or control of assets on the basis of an order issued by a court resulting in the temporary prohibition of the transfer, conversion, disposition, or movement of assets. The term 'seizure' is used interchangeably with 'freezing', 'restraint', 'provisional measures', and 'blocking'.

Confiscation: Permanent deprivation of assets by order of a court or other

competent authority. The term is used interchangeably with 'forfeiture'.

Non-conviction-based (NCB) confiscation: Confiscation for which a criminal conviction is not required (also known as 'civil asset forfeiture', 'civil recovery' or 'preventive confiscation').

Legal framework

The main challenges encountered in judicial cooperation in relation to freezing, confiscating and recovering the proceeds of crime come from the manifold and fragmented legal framework that is in place, in which international and EU legal instruments co-exist with the general framework on MLA.

International conventions

The **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)** is a milestone in the advancement of cooperation in the restraint and forfeiture of proceeds of crime. For the first time, the pursuit of the proceeds of criminal activity was given a 'starring' role in an international instrument intended to combat crime.

The **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)** provides that each State Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate the instrumentalities and proceeds or property, the value of which corresponds to such proceeds.

The **UN Convention against Corruption (2003)** deals specifically with measures for the direct recovery of property through international cooperation in confiscation.

The **UN Convention against Transnational Organized Crime (2000)** provides that States Parties shall adopt the necessary measures to enable the confiscation of proceeds of crime derived from offences covered by that Convention (or property of equivalent value) and property, equipment or other instrumentalities used in offences covered by that Convention.

The **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) (2005)** updates the 1990 Convention to include terrorism financing.

EU legislation

Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime provides that Member States shall allow value confiscation and the tracing and preservation of suspected proceeds of crime at the request of another Member State.

Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (the '2001 Framework Decision') requires Member States to enable confiscation, allow value confiscation and ensure that requests from other Member States are treated with the same priority as domestic requests.

Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (the '2003 Framework Decision') requires mutual recognition of freezing orders for a list of crimes punishable by three years' imprisonment or which satisfy the dual criminality principle.

Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property (the '2005 Framework Decision') ensures that all Member States have effective rules on the confiscation of the proceeds of crime. Ordinary confiscation, including value confiscation, must be available for all crimes punishable by one year's imprisonment. Extended confiscation must be available for certain serious offences when committed by a criminal organisation.

Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation



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orders (the '2006 Framework Decision') mirrors the provisions of the 2003 Framework Decision for the mutual recognition of confiscation orders.

Framework Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices in the field of tracing and identification of proceeds from, or other property related to, crime (the '2007 Framework Decision'), provides for the establishment of and cooperation between national Asset Recovery Offices.

EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime (the 'Directive') was adopted on 3 April 2014. The Directive establishes minimum rules on the freezing of property with a view to its subsequent confiscation for the serious crimes listed in Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), i.e. terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug and arms trafficking, money laundering, corruption, counterfeiting means of payment, computer crime

and organised crime. Member States must comply with the Directive by 4 October 2016.

The Directive advocates conviction-based confiscation as a general rule. The Directive also introduces NCB confiscation in a limited number of cases, i.e. in cases in which criminal proceedings have been initiated regarding an offence that is liable to give rise to economic benefit, but in which a final conviction could not be obtained due to illness or absconding of the suspected or accused person.

Further, the Directive introduces a single minimum standard for the order of extended confiscation and minimum standards for third-party confiscation regimes. The Directive also provides measures for enabling the freezing of property without a court order if a high risk of dissipation of assets is present.

Finally, the Directive enables Member States to detect and trace property to be frozen and confiscated even after

criminal proceedings have been concluded, and contains provisions regarding the management of frozen and confiscated property.

While the Directive will replace Joint Action 98/699/JHA and parts of the 2001 and 2005 Framework Decisions, it will not provide a consolidated legal framework for freezing and confiscation orders and it will not remove all of the difficulties related to mutual recognition identified by practitioners.

The European Parliament and the Council have recognised these shortcomings in two joint statements issued upon the adoption of the Directive. They called on the Commission to make new proposals on mutual recognition of freezing and confiscation orders and to address possible difficulties arising from the replacement of the provisions of the 2005 Framework Decision regarding extended confiscation, as well as to analyse the feasibility and possible benefits of further harmonisation of Member States' rules on confiscation, including NCB confiscation.

At the 8th meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union (the Consultative Forum) in December 2014, practitioners identified the need for a consolidated asset recovery legal framework, as well as the need for harmonisation of substantial and procedural criminal provisions with a view to enhancing mutual trust, as two areas for improving mutual recognition.

Eurojust's work in this area

Eurojust's Financial and Economic Crime Team

The College of Eurojust, comprised of 28 National Desks, has a number of teams, each dedicated to a particular topic related to Eurojust's operational and/or strategic work. Each team is chaired by a National Member or Deputy, and supported by a number of experts from the National Desks and the Administration. Eurojust's Financial and Economic Crime (FEC) Team is chaired by Mr Leif Görts, National Member for Sweden.

The mandate of the FEC Team is to give advice to the College of Eurojust on all issues related to financial and economic crimes. The FEC Team works in close cooperation with both the Camden Assets Recovery Inter-agency Network (CARIN) (for further information on CARIN, see below), and the Informal Platform of EU Asset Recovery Offices (AROs) (for further information on AROs, see below). Mr Ladislav Hamran, Vice-President of Eurojust and National Member for the Slovak Republic, is the contact person for CARIN, and Mr Jonas Arvidsson, Assistant to the National Member for Sweden, is the contact person for AROs. Both CARIN and AROs meet regularly to ensure an effective exchange of information on issues related to the identification and tracing of criminal assets as well as coordination and cooperation.

Freezing and confiscation tools

On the initiative of the FEC Team, standard certificates for practitioners, relating to the Council Framework

Decisions of 2003 and 2006, to be completed by the issuing Member State and sent to the competent authority in the executing Member State where the asset is located, are available on [Eurojust's website in Word format for ease of use](#).

The Eurojust teams, often in cooperation with the current EU Presidency, also organise seminars on topics of general interest to practitioners and stakeholders, bringing together prosecutors, experts and academics to share information and best practice. Two seminars on confiscation are described below.

Eurojust seminar, Palermo, May 2012

The Eurojust seminar, *Confiscation and Organised Crime: procedures and perspectives in international judicial cooperation*, organised with the support of the Giovanni and Francesca Falcone Foundation, marked the 20th anniversary of their assassination. Judge Falcone's crucial new approach to fighting organised crime was highlighted: depriving criminals of their profits, stopping the financing of new crimes and protecting the legitimate economy. The President of the Republic of Italy in his speech highlighted the importance of Eurojust in supporting the national authorities in fighting organised crime, including the cross-border execution of freezing and confiscation orders.

Discussions focused on ways to facilitate international tracing, freezing and confiscation of the proceeds of crime. Using case examples, legal and practical solutions were identified concerning obstacles encountered as a result of differences in freezing and confiscation regimes, procedures and languages. Applicable international conventions and EU mutual recognition instruments were also examined. The Council summary report is available [online](#).

Eurojust strategic seminar and meeting of the Consultative Forum, December 2014

One of the most effective methods of deterring and combating organised crime is to freeze and confiscate the instrumentalities and proceeds of crime. The

Italian Presidency of the European Union, in cooperation with Eurojust, committed itself to meeting the EU's goal of depriving criminals and criminal organisations of the proceeds of their illicit activities and to limiting the infiltration of the proceeds of crime into the legal economy. In so doing, between July and December 2014, the Italian Presidency promoted several initiatives to foster the mutual recognition of freezing and confiscation within the European Union.

Together with the Italian Presidency, Eurojust held a strategic seminar, *Towards greater cooperation in freezing and confiscation of the proceeds of crime: A practitioners' approach* on 11 December 2014, to bring together practitioners and to address issues concerning mutual recognition in the area of asset recovery, using an overview of European and national case law prepared by Eurojust for the participants' benefit.

On the following day, conclusions on practical challenges, lessons learned and best practice identified during the seminar were presented during the 8th meeting of the Consultative Forum to prompt discussion and further reflection among Forum members on methods to improve cooperation among the authorities of the Member States, with special attention paid to enhancing mutual recognition in the field of freezing and confiscation of the proceeds of crime.

Among the goals of the strategic seminar, through keynote speeches, presentations and workshops, were the following:

- ▶ to identify difficulties in mutual recognition in the area of asset recovery associated with the current EU legal framework;
- ▶ to identify practical ways to maximise judicial cooperation in this area through existing legal instruments and to overcome obstacles arising from different freezing and confiscation regimes;
- ▶ to foster trust among practitioners and effective cross-border cooperation; and
- ▶ to suggest areas for further practical cooperation and legislative action.



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The report of the strategic seminar, as well as the conclusions reached by the Consultative Forum on this topic, were made public and brought to the attention of the relevant EU institutions in Brussels.

European efforts

The Financial Action Task Force (FATF) and its Recommendations

The FATF defines itself as follows:

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The mandate of the FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system.

The 40 + 9 Recommendations of the International Financial Action Task Force establish the international standard for money laundering and asset recovery. The [original recommendations](#)

were established in 1990 and [revised most recently in 2012](#). The revised Recommendations take into account new technologies and changes in the methods used to launder the proceeds of crime. An important new aspect of the Recommendations is that they also consider terrorist financing. The decision-making body of the FATF, the FATF Plenary, meets three times annually.

Eurojust became an observer in the FATF in [June 2009](#). Within Eurojust, the FATF Contact Point is Mr Olivier Lenert, National Member for Luxembourg. The work of the Contact Point is to relay the information gathered at FATF meetings to the College of Eurojust. The Contact Point also contributes to those FATF projects in which Eurojust's input is required.

The Camden Asset Recovery Inter-Agency Network (CARIN)

CARIN is an informal network of contacts with 44 members and observers, some of which are international organisations. Launched in 2004 and based in Europol's headquarters in The Hague, the objective of the network is to improve cooperation in all aspects of tackling the proceeds of crime, particularly in depriving criminals of their illicit profits.

CARIN provides assistance in a number of areas, including locating bank and investment accounts, real estate, companies, cars, boats, and aircraft, through law enforcement or public information, and discovering where and how assets associated with suspects may be hidden or concealed through the use of corporate structures, nominees or trusts. The assistance of CARIN can be requested only by law enforcement officers, prosecutors, magistrates or judges, or officials from asset recovery or asset management offices.

CARIN itself receives financial support from the European Commission in the form of funding from the AGIS and ISEC programmes.

Based on this successful model, other regional networks include ARIN-SA (Southern Africa); ARIN-AP (Asia Pacific); ARIN-EA (East Africa); ARIN-WA (West Africa); and RRAG (Latin America).

Asset Recovery Offices (AROs)

Criminal profits can be confiscated and recovered more effectively if they are traced quickly. To assist in this process, national AROs were set up by *Council Decision 2007/845/JHA* of

The Criminal Assets Bureau of Ireland - early success in NCB confiscation

The huge profits engendered by the drug epidemic in Dublin in the 1980s and the reaction to the assassination of Veronika Guerin, Irish investigative journalist for the *Sunday Independent*, in June 1996, were the linked motivations for the creation of the Criminal Assets Bureau (CAB) in Dublin just one week later. The mandate of CAB is as follows:

CAB's statutory remit is to carry out investigations into the suspected proceeds of criminal conduct. CAB identifies assets of persons which derive (or are suspected to derive) directly or indirectly from criminal conduct. It then takes appropriate action to deprive or deny those persons of the assets and the proceeds of their criminal conduct. CAB uses a multi-agency, multi-disciplinary partnership approach. It works closely with international crime investigation agencies, and has successfully targeted proceeds of foreign criminality. CAB also works with international bodies such as the European Commission and Camden Assets Recovery Inter-Agency Network (CARIN).

Mr Francis Cassidy, currently National Member for Ireland at Eurojust, was appointed CAB's first Director in January 1997. CAB was the first agency to share information among police, revenue and social welfare authorities; to address the issue of bank secrecy; and to treat the crime of money laundering as an offence. Confiscation and restraint orders were given international recognition.

Traditionally, the prosecutor was required to prove that the asset in question was acquired illegally. The big change in perspective was the targeting of assets rather than people: prove that the asset was the proceeds of crime, and then the asset can be seized. The burden of proof was fundamentally shifted, with the defendant forced to prove that the asset in question was acquired legitimately. NCB confiscation is the civil, not the criminal, model.

CAB in its early years had a 100 per cent success rate in asset confiscation. Nonetheless, due to the clear distinction between civil and criminal matters in Europe, many EU jurisdictions, as well as the Council, have a natural disinclination towards NCB confiscation, based on constitutional concerns. These concerns could be addressed by adding appropriate safeguards and the recognition of the lack of fundamental property rights.

Eurojust established its own Criminal Assets Bureau in 2007, the Camden Asset Recovery Inter-Agency Network (CARIN) (see above and Thomas interview below).

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.

AROs identify assets illegally acquired, participate in confiscation procedures, ensure proper management of seized assets, act as contact point for national confiscation activities and facilitate information exchange at EU level. AROs should cooperate with Financial Intelligence Units (FIUs) (see below) and judicial authorities. AROs are supported by an informal platform to enhance cooperation and exchange information and best practice.

Financial Intelligence Units

National centres have been established to receive, assess and share financial,

judicial, administrative and law enforcement information to be used in the investigation of money laundering and terrorism financing offences. The Egmont Group is an informal network, active for 17 years. It provides a forum for FIUs worldwide, fostering international cooperation among FIUs. In 2013, it had 139 member FIUs.

Reporting statistics

In 2012, a Technical Report prepared by RAND Europe entitled *Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets*, prepared for the European Commission Directorate General Home Affairs, noted that:

Member States are best positioned to gather statistical data of the type

required for the foregoing indicators. As we have already noted, however, there is a reluctance to gather such data. Ultimately, the surest way to overcome this is to impose reporting obligations upon Member States.

The **Final Report** is available online. One of the measures to combat organised crime is legislation relating to the confiscation of the proceeds of crime. As pointed out in this newsletter, national authorities have great difficulty in identifying, freezing and confiscating the proceeds of crime, and also in gathering accurate statistics on asset recovery, as figures are not routinely and consistently collected. Article 11 of the Directive is an attempt to rectify this situation by getting a better picture of freezing and confiscation in the European Union. The full text of Article 11 is as follows:

Statistics

1. Member States shall regularly collect and maintain comprehensive statistics from the relevant authorities. The statistics collected shall be sent to the Commission each year and shall include:
 - a) the number of freezing orders executed;
 - b) the number of confiscation orders executed;
 - c) the *estimated* value of property frozen, **at least of property frozen with a view to possible subsequent confiscation at the time of freezing**;
 - d) the *estimated* value of property recovered **at the time of confiscation**.
2. Member States shall also send each year the following statistics to the Commission, if they are available at a central level in the Member State concerned:
 - a) the number of requests for freezing orders to be executed in another Member State;
 - b) the number of requests for confiscation orders to be executed in another Member State;
 - c) the *value or estimated* value of the property recovered following execution in another Member State.
3. Member States shall endeavour to collect data referred to in paragraph 2 at a central level.

NCB confiscation: If not, why not?*

Mr Francis Cassidy
National Member for Ireland at Eurojust

Francis Cassidy, the National Member for Ireland, joined Eurojust in September 2014. He has had a long and varied career in the Irish Prosecution Service, spanning more than thirty years, serving as Head of the District Court, Judicial Review, Appeals and Superior Court Sections, as well as Acting Chief Prosecution Solicitor, with responsibility for devising the overall policy in Ireland for outgoing EAWs and the mutual recognition of freezing and confiscation orders. He, like Ireland itself, is an active proponent of NCB confiscation. Mr Cassidy was appointed first solicitor to the Criminal Assets Bureau (CAB) on its establishment in Ireland in 1996 and subsequently re-joined as Bureau Legal Officer in 2006, with overall responsibility for legal policy and operations, encouraging the mutual recognition of non-conviction-based orders within the European Union (see page 6 above). Mr Cassidy is a frequent lecturer on criminal law and advocacy as well as in support of the CAB's international policy to, among others, CARIN, the European Commission, the EJTN and the Law Society of Ireland. He is also the author of published works for the World Bank and Oxford University Press.



The Directive

The Directive was adopted on 3 April 2014 with the primary objective of establishing minimum rules on freezing and confiscation for serious cross-border and organised crime, in line with Article 83(1) of the Treaty on the Functioning of the European Union.

The deadline for compliance by the Member States is 4 October 2016.

Negotiations on the Directive were beset with arguments as to whether to include a requirement for Member States to recognise and enforce NCB confiscation forfeiture orders made in other Member States, and, if so, to what extent. The

initial Commission draft had included such a requirement, albeit limited to circumstances in which an accused had either absconded or if death or permanent illness of the suspect or accused person prevented further prosecution.

Ultimately, as agreement could not be reached, such a provision was not

included. Yet the issue does not rest there, as the European Parliament and Council issued a joint statement upon the adoption of the Directive, calling on the Commission to:

- ▶ Make new proposals on mutual recognition of freezing and confiscation orders; and
- ▶ Analyse the feasibility and possible benefits of further harmonisation of Member States' rules on confiscation, including NCB confiscation.

Effectively, the question has been put off to another day.

Judicial cooperation in cross-border asset recovery cases has always been hindered by different national legal systems and lack of harmonised rules, especially when NCB confiscation is involved. While the Directive must be acknowledged as an attempt to address many of the outstanding problems, a significant opportunity may have been missed by not including NCB confiscation provisions.

NCB confiscation: a breach of fundamental rights?

An academic analysis of this question would be quite extensive, but a brief outline of the discussion may be beneficial to the debate.

The case law at European Court of Human Rights (ECtHR) level on the right to private property acknowledges that confiscation orders constitute a control on the use of property, but questions whether a fair balance has been struck between the demands of the general interest and the interest of the individual concerned, something for which States do have a wide margin of appreciation. So, laws designed to control importation of gold coins, drug trafficking, money laundering or Mafia racketeering were seen as permissible preventative measures, so long as effective judicial review of orders made thereunder also exists. The Irish Supreme Court

has gone a step further, by concluding that the right to private property cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.

Another argument is that an NCB confiscation order is in fact the determination of a criminal charge and as such the protections that accrue due to the presumption of innocence, such as the right to silence and prosecution bearing the onus of proof, should apply. As NCB confiscation is by definition civil and not criminal, the key question is whether the determination constitutes a sanction/penalty or simply reparation of property obtained illegitimately. The ECtHR's analysis in *Welch v UK*, in which it concluded that an extended confiscation order constituted a penalty as it presumed the commission of other drug-related offences, can be contrasted with *Phillips v UK*, in which the ECtHR was happy to conclude that the determination was not criminal, as it was described in national law 'as part of the sentencing process'. While we cannot identify any ECtHR case that specifically considered NCB confiscation, analysis of extended confiscation may act as a guide. It is arguable that national legislation designed as a preventative measure or focused on the reparation of benefit or profit, as opposed to acting as a punitive measure or a penalty, is unlikely to violate the European Convention on Human Rights and Fundamental Freedoms.

Eurojust's NCB confiscation efforts

Since its introduction in certain Member States (Ireland in 1996; UK in 2002), many lawyers, including practitioners, defence lawyers and academics, have raised fundamental rights concerns. Such concerns have resulted in significant political opposition in certain Member States, a political view that may not necessarily be supported by legal analysis.

Eurojust, rather than reiterating those arguments in favour of the remedy,

sought to consider the problem from the alternative perspective, by applying a critical legal analysis to the question of whether NCB confiscation remedies are inconsistent with fundamental human rights.

Eurojust prepared an overview of European and national case law for the benefit of the participants of the strategic seminar of December 2014 (see page 4 above). The participants then considered the following rights that might potentially be affected by such orders:

- ▶ private property
- ▶ criminal sanction by another name
- ▶ absence of presumption of innocence
- ▶ reversal of the onus of proof
- ▶ silence
- ▶ retroactive penal legislation
- ▶ access to legal aid
- ▶ proportionality

Consultative Forum: a common approach to the NCB confiscation model

General agreement was reached by the Consultative Forum members in the December 2014 meeting on the following points:

- ▶ There are benefits to complementing the existing EU confiscation regime with NCB confiscation systems.
- ▶ A concern was raised that NCB confiscation should not be subject to mutual recognition, as orders may be in breach of fundamental human rights. This issue may need a more nuanced analysis, which might permit definition of a limited NCB confiscation model with minimum safeguards. This model could achieve mutual recognition at EU level.
- ▶ Such a model would need to be based on proven criminality, albeit achieved by a civil test, i.e. on the balance of probability. In addition, any order would need to be focused on reparation/preventative measures,

'Judicial cooperation in cross-border asset recovery cases has always been hindered by different national legal systems and lack of harmonised rules, especially when NCB confiscation is involved.'

rather than punitive measures that might constitute a sanction.

- ▶ Common safeguards would need to be in place, ensuring a right to proper procedures, including a fair and public hearing, the potential to challenge evidence, a right of appeal and access to court /judicial review.
- ▶ Processes that rely on a reversal of the onus of proof must include an initial prosecutor threshold to some degree and be limited to facts specifically within respondent's knowledge or circumstances that merit explanation.
- ▶ Ultimately, an NCB confiscation system may require a mutual assistance

recognition test by the receiving Member State, not unlike some of the requirements in the European Investigation Order Directive.

- ▶ EU legal instruments in this field need to be simplified, e.g. by way of 'codification'.
- ▶ The identification of such a common standard/model, and its introduction within an overall EU legislative framework, would support a recommendation that Eurojust:
 - Continue to provide its considerable expertise and experience in assisting all EU institutions in pursuit of this goal.

- Circulate its report of November 2014 on its experience in the field of asset recovery to those agencies that may benefit from this research.
- Continue with ongoing research on an overview of European and national case law with the ultimate goal of identifying and designing an acceptable common model.

** The opinions expressed in this article are the author's own and do not necessarily reflect the opinion of Eurojust or the Office of the Director of Public Prosecutions of Ireland.*

Interview with Ms Jill Thomas

Founding CARIN Secretariat

Jill Thomas joined the UK Police in 1986, and until 1997 was engaged in policing on a local and regional level within drugs, organised crime and armed robbery units, after which she spent six years as an intelligence officer. She assisted in implementing the UK National Intelligence Model intelligence-led policing process across England and Wales and later trained as a financial investigator. She also developed and delivered the UK national intelligence officers course to law enforcement authorities from the UK and abroad. From 1999, she was attached to the UK National Criminal Intelligence Service in London, during which time she operated as a UK international intelligence officer in several EU jurisdictions and Japan. From 2003, she worked as a Specialist for the Financial Crimes Unit within Europol's Operations Department. She was the first project manager for the Europol Asset Seizure Centre, assisting financial investigators in tracing criminal assets within Europe. She also managed the Permanent Secretariat for the Camden Asset Recovery Inter-Agency Network (CARIN) through its development and launch phases in 2003/2004 and for the following 10 years, until August 2014. She has been instrumental in the establishment of other regional asset recovery networks in Asia, Southern and Western Africa and Latin America since 2009. Ms Thomas has an MSc in International Criminal Justice.

Eurojust News: Our understanding is that CARIN came about as a result of a perceived need to deal with the profits from organised crime, especially the illicit trafficking in narcotics. Is this correct?

Ms Thomas: 'CARIN was established to assist law enforcement and judicial asset recovery practitioners in tracing criminal proceeds that had been transferred outside of the investigative State, and once identified, to freeze and confiscate them using whatever laws and practice were in place at the time. CARIN is an informal network of contacts and a cooperative group in all aspects



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of tackling the proceeds of crime, with the aim of increasing the effectiveness of members' efforts, on a multi-agency basis, in depriving criminals of their illicit profits. It was formed, quite simply, to make the existing formal channels and legislation work through the intervention of an informal human network.

Ireland had adopted new domestic laws in 1997 to target criminal proceeds through a non-conviction-based civil process, and was keen to show the rest of Europe how effective this approach had been on a domestic level in disrupting organised crime. Ireland was not alone in placing greater focus on asset forfeiture and confiscation at that time. Throughout the 1980s and 1990s, recognition that confiscation was as important as prosecution had gathered momentum and a small number of other EU

Case example 1

In a complex transnational fraud investigation in which the suspects and companies in which based in eight Member States as well as Switzerland and the Seychelles, 400 victims were identified through Europe and damages were estimated to be at least EUR 23 million.

Eurojust was requested to facilitate the execution of MLA requests to locate the suspects and criminal proceeds as well as to organise hearings, house searches, seizures and the freezing of assets. A coordination centre was established to support action at judicial level to freeze assets simultaneously in six jurisdictions, including the Seychelles. The coordination centre allowed the French investigating judge to monitor progress with Eurojust's National Desks and to address specific judicial issues in real time. On the action day, 16 persons were arrested, six suspects were identified, and bank accounts worth approximately EUR 700 000, as well as vessels, villas, luxury cars, artwork and jewellery, were seized.

'Eurojust plays a key role in CARIN, advising practitioners on global judicial aspects relevant to freezing and seizure, confiscation, asset sharing and victim compensation.'

jurisdictions had already structured their domestic laws and agencies to focus more on criminal proceeds. Italy had introduced confiscation and forfeiture regimes to tackle mafia-type organisations as early as the 1980s. The Netherlands and Belgium had established specialised asset forfeiture units and were continually developing legislation specifically for the purpose of confiscation. The UK had just adopted its 2002 Proceeds of Crime Act. However, international cooperation in this field was poor. It seemed a good time to bring law enforcement and judicial specialists together to exchange experience on these new approaches.

In October 2002, an international seminar on the topic of confiscation and forfeiture of the proceeds of crime was convened in Dublin, organised by Europol and hosted by the Irish Criminal Assets Bureau. Specialists from 13 of the then 15 EU Member States came together at the Camden Court Hotel in Dublin for the event and discussed best practice and barriers to cooperation. It was clear that it was no longer sufficient to incorporate articles on asset forfeiture and confiscation into existing domestic predicate offence legislation, and that specific asset recovery legislation needed to be introduced. However, more obvious was the realisation that, although international legislation had been introduced to increase international judicial asset recovery cooperation between Member States, it was not working very well. Law enforcement officers, prosecutors, magistrates and judges could not engage quickly enough to identify, seize or confiscate assets using the legislation in place at the time without prompt communication on individual cases. The assets were simply moved before authorities got to them.

At the event in Dublin, an informal multi-agency group was established. In 2004, the Camden Asset Recovery Inter-Agency Network (CARIN) was launched and became the specialist network that could quickly intervene to trace, freeze, seize, confiscate and share criminal proceeds. With 54 member jurisdictions (a full list of all CARIN member countries, jurisdictions and principalities, as well as members of the five other CARIN-style networks worldwide, can be obtained by contacting the CARIN Secretariat, carin@europol.europa.eu), CARIN has grown to become globally recognised as a leading tool in targeting organised crime groups, with a particular reference to financial deprivation.'

Can you tell us something about your specific role in the foundation of CARIN leading up to the establishment congress in September 2004 in The Hague?

'Following the seminar in 2002, Europol took the coordination lead in creating the network. As a UK-accredited financial investigator recently seconded to the Europol Financial and Property Crime Unit, I was tasked with organising the interested Member States into a network Steering Group. I brought together a small group of law enforcement and judicial specialists from Austria, Belgium, Germany, Ireland, the Netherlands and the UK. Together with Europol and Eurojust, we formed the first CARIN Steering Group. Europol volunteered to hold the Secretariat, a role I have performed for the past 11 years. The Dutch Public Prosecution Service Criminal Assets Deprivation Bureau held the first CARIN Presidency through its development phase in 2003 and 2004, and hosted the inaugural CARIN meeting. I worked closely with the Dutch authorities to carefully identify specialist law enforcement authorities, prosecutors, magistrates and judges to attend the launch congress and serve

as the designated contacts in the network. Our goal remains that network contacts should be practitioners; this is vitally important and is the basis of CARIN's success.'

Eurojust's status is as a Permanent Observer in the Steering Group. What does this role entail in practical terms?

'During its formation and in the early days of CARIN, Ms Michèle Coninx, current President of Eurojust, was instrumental in advising CARIN on its use of existing legal provisions in the area of asset recovery. Ms Coninx also ensured that Eurojust was effective in its involvement with EU practitioners within this particular field. Eurojust plays a key role in CARIN, advising practitioners on global judicial aspects relevant to freezing and seizure, confiscation, asset sharing and victim compensation. However, CARIN is primarily an operational network and therefore Eurojust is ideally placed to intervene in specific cross-border asset recovery action when requested.'

Could you describe what the process of CARIN assistance looks like in practice?

'A typical case requiring CARIN engagement may involve an investigation team receiving information that its main suspects own assets in a foreign jurisdiction. When information reveals that assets will be moved within 24 hours, immediate law enforcement intervention is vital. The case may be such that it is not clear whether or not the jurisdiction holding the assets needs an international letter of request to search for the assets, or whether specific databases exist to search for the assets and, if so, which agency holds the relevant databases.'

Once assets are identified, the legal conditions vary to such an extent between jurisdictions that a number of factors need to be quickly clarified before any

freezing or confiscation order can be enforced:

- ▶ Will the requested jurisdiction freeze an asset to enforce a value-based confiscation order?
- ▶ What if the suspect suddenly dies?
- ▶ What if the asset has been transferred to the suspect's wife?
- ▶ What if the order to freeze criminal proceeds is based on non-conviction-based civil forfeiture legislation?

In order to act quickly, a conversation between network contacts is often needed. In this case, the local investigation team would contact its own CARIN contact, who would in turn contact the foreign CARIN contact, either by e-mail or by telephone. This is very easy to do, as CARIN contacts are known to each other, having built an informal relationship through their day-to-day work. Each CARIN member jurisdiction generally has two contacts, one drawn from law enforcement (police or Customs) and one from the judiciary (prosecutor, magistrate or judge). If the enquiry is to trace assets, the law enforcement CARIN contact assists. If the enquiry is to enforce a freezing or confiscation order, then the judicial contact is used. CARIN contacts will clarify (a) the assistance that can be given, (b) the legal basis for that assistance, and (c) the channel that should be used to transmit the data. This strategy will vary depending on the stage of the investigation, the jurisdictions involved and the asset that is sought.

Since the establishment of other regional asset recovery networks across the globe, CARIN contacts in the European Union can quickly and easily make contact with asset recovery specialists in jurisdictions around the world on behalf of their own investigators and prosecutors.'

CARIN helps to facilitate the confiscation and forfeiture of criminal assets located in a jurisdiction other than that of the investigating Member State. What is the procedure when the Member States in question have divergent confiscation legislation?

'When divergent confiscation legislation exists, the only way to proceed to achieve effective confiscation and forfeiture is to discuss that case and find a solution suitable to both jurisdictions. This is the role of the CARIN contact.'

How will confiscated assets be shared between the different jurisdictions that provided legal assistance resulting in confiscation and forfeiture?

'Issues concerning the disposal and sharing of assets related to international asset recovery actions can easily hinder effective cooperation during the investigation, freezing, seizure and confiscation phases. Regional standards do exist within the EU Council Framework Decision on the Mutual Recognition of Confiscation Orders - 2006/783/JHA - stating that if the amount obtained from the execution of the confiscation order is below EUR 10 000, or its equivalent, the amount shall accrue to the executing Member State. In all other cases, 50 per cent of the amount obtained from the execution of the confiscation order shall be transferred by the executing Member State to the issuing Member State. However, in reality, a discussion usually takes place between Member States to reach agreement on the disposal and sharing of assets. An early discussion on this subject is always advisable.'

Many jurisdictions have concluded generic asset-sharing agreements for this purpose. Considerations in favour of victims should always take precedence over confiscation by the Member State. This is currently a key strategic topic on the CARIN agenda 2015. Work is ongoing, led by the Czech Republic, to clarify CARIN members' approaches in relation to victim compensation.'

'I believe that a lack of political motivation still exists to change national confiscation legislation, largely due to a lack of recognition that removing criminal wealth is of equal importance to prosecution in the fight against crime.'

CARIN makes recommendations relating to the confiscation of the proceeds of crime to EU bodies such as the European Commission and the Council of the European Union. From the perspective of CARIN, what are some of the obstacles to harmonising confiscation-related policy at EU level?

‘Over the past 10 years, CARIN has studied the obstacles to effective international asset recovery cooperation, including harmonising confiscation-related policy, during workshops at its annual general meetings. Not surprisingly, I believe that the greatest obstacles within the European Union are the divergent legal systems.

In addition to different legal systems, a clear lack of understanding still exists among law enforcement and judicial authorities as to the different

components of foreign confiscation regimes. This is one of the main reasons for CARIN to inform EU bodies of its recommendations. The 2015 CARIN meeting takes place in Guernsey in October. Topics to be debated include non-conviction-based confiscation, third-party confiscation and victim compensation, as well as enhancing international cooperation among onshore and offshore jurisdictions in pursuit of asset recovery. CARIN looks forward to informing the global asset recovery community of the outcomes of these discussions.

Finally, I believe that a lack of political motivation still exists to change national confiscation legislation, largely due to a lack of recognition that removing criminal wealth is of equal importance to prosecution in the fight against

crime. CARIN has been at the forefront of this battle to change domestic opinions since its creation, but in many jurisdictions change is desperately needed and work is still to be done.’

Related to the previous question, do you think that the 2014 Directive will affect the work of CARIN in a positive way?

‘CARIN welcomed the proposal for a new EU Directive, contributing via its annual recommendations to DG Home, DG Justice and the European Commission. However, domestic implementation of the Directive will be crucial and requires continued support and advice from specialist national practitioners, such as those within CARIN, to avoid further confusion caused by newly introduced and divergent domestic laws.’

Interview with Dr Nicola Selvaggi

Professor, University Mediterranea of Reggio Calabria, Italy

Dr Nicola Selvaggi is Professor of Criminal Law at the University Mediterranea of Reggio Calabria, Italy. He has a PhD in Criminal Law and Economics. He was a lawyer in private practice in Rome since 2002. He has also taught Administrative Criminal Law at the University L.U.M.S.A. in Rome since 2007. Professor Selvaggi is in demand as a speaker at conferences on criminal law throughout Europe. He has participated in research projects of the European Commission, UNODC, University Roma TRE, Waseda University of Tokyo, Japan, and the Max Planck Institut, Germany. Dr Selvaggi is a guest researcher at the Max Planck Institut, the Institut für Kriminologie und Wirtschaftsstrafrecht of the Albert-Ludwigs Universität, Germany, and a visiting scholar at Centre de droit pénal comparé of the University Paris 1 and the London School of Economics. He also edits legal publications. Professor Selvaggi is a Member of the Italian Minister of Justice Committee for Decriminalisation.



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'Judicial cooperation amongst the national authorities and Eurojust symbolises a "hidden channel", offering practical solutions and *de facto* harmonisation of legal systems.'

Eurojust News: *Could you briefly describe your professional experiences in the field of freezing and confiscation of criminal assets?*

Dr Selvaggi: 'I teach Criminal Law at the University Mediterranea of Reggio Calabria; the freezing and confiscation of criminal assets, and in general the analysis of instruments aimed at tackling "profit-driven" crimes, have long represented one of my research interests. I also practice law, particularly in white-collar crime cases.'

Could you please briefly outline the general process for criminal asset recovery, domestically and internationally?

'Generally, there are four phases that characterise asset recovery at domestic and international level. First is the identification of assets, which is often one of the most difficult steps. Very sophisticated methods are used by criminals to hide their income (in this respect, I think that added value might be represented by the Directive of the present year on the European Investigation Order). The second phase is, of course, preservation, which should

be ensured by judicial authorities by freezing or seizure orders. The third phase is enforcement. The fourth phase is redistribution of the criminal assets for social purposes.'

Who should profit from criminal asset forfeiture?

'The philosophy behind the adage, "Crime does not pay", is well known. Organised crime, in particular, is profit-oriented crime. The easiest and, at the same time, most efficient way to tackle it is to confiscate the profits. Equally important, confiscated assets should be redistributed to benefit the local population, as has been the experience in local communities in Sicily, Calabria and Campania.'

The work of national courts often benefits from extraterritorial jurisdiction when proceeds of crime have been acquired abroad. How do you see Eurojust's role in mutual assistance and the granting of extraterritorial jurisdiction with regards to criminal asset forfeiture?

'Eurojust plays a crucial role in dealing with differences among the legal regimes of Member States. In fact, differences

Case example 2

In a VAT carousel in the trading of carbon emissions rights involving France and the Netherlands, a JIT was established by Eurojust in 2011, facilitating the execution of the majority of MLA requests in Spain, Germany, Portugal and Hong Kong. A coordination meeting was later held to agree on how to proceed with prosecutions in France and the Netherlands. By 2013, the investigation had resulted in the freezing of approximately USD 7 million. France and the Netherlands agreed that assets eventually confiscated would be shared equally.

in domestic legislation are sometimes overcome through interpretation of legislation and efforts that lead to mutual recognition of the confiscation powers and their results. Judicial cooperation amongst the national authorities and Eurojust symbolises a "hidden channel", offering practical solutions and *de facto* harmonisation of legal systems.'



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Interview with Mr Leif Görts

@ Eurojust

National Member for Sweden and Chair of Eurojust's Financial and Economic Crime Team

Leif Görts is the National Member for Sweden. He began his career as a prosecutor in Stockholm in 1990 and has since played various prosecutorial roles. For many years, he worked on cases of economic crime at the Economic Crimes Agency, where he became Deputy Chief Prosecutor in 2004. He has been dealing with cases involving forms of organised crime, both at this prosecutorial authority and within the Public Prosecution Office in Stockholm. For the last seven years, he has been involved in international cooperation in criminal matters, particularly as an advisor on issues of international cooperation at the

International Public Prosecutor's Office in Stockholm and at Eurojust. Prior to his appointment as National Member for Sweden in June 2012, Mr Görts had been seconded to Eurojust in 2008 as a National Expert and in 2010 was appointed Deputy National Member. He was elected Chair of the Financial and Economic Crime Team in July 2014.

Eurojust News: Can you mention some obstacles related to the lack of harmonisation of legislation concerning execution of freezing orders, disposal of confiscated property and asset sharing?

Mr Görts: 'Member States face numerous obstacles in the execution of

requests for MLA, in the identification and freezing of the proceeds of crime and in the recognition of Member States' confiscation orders. These obstacles are, to a large extent, a consequence of the lack of uniform implementation of the Framework Decision of 2003 on freezing orders and the Framework Decision of 2006 on recognition of confiscation orders.

Eurojust held a strategic seminar on 11 December, entitled *Towards greater cooperation in freezing and confiscation of the proceeds of crime: a practitioners' approach*, to address these challenges. Eurojust has

identified both operational and judicial obstacles in its casework.

Among the operational obstacles encountered:

- ▶ Resources and new forms of competence, such as forensic accountancy, are needed, but fully staffed operational units still do not exist in many Member States. Even in Member States in which units are present, they are often not fully utilised. Fortunately, the concept of forensic accountancy is gaining credence, and the formation of such a network is under discussion.
- ▶ Some Member States have not yet established Asset Recovery Offices (AROs). In addition, not all AROs have access to relevant databases for tracing and identifying assets and sharing vital bank information securely.
- ▶ Europol's Secure Information Exchange Network Application (SIENA), a secure platform for exchange of operational and strategic information and intelligence with Member States and third parties, is an important tool, but some AROs cannot access it.
- ▶ Central property and central bank registers for the identification of assets are lacking.
- ▶ Problems arise in respect of bank secrecy regulations.

- ▶ Expertise in international cooperation among prosecutors is to some extent inadequate.
- ▶ Focus on asset recovery is still often lacking.

Among the judicial obstacles encountered:

- ▶ As already mentioned, differences in both substantive and procedural rules in the Member States hamper the investigation, identification, tracing and recovery of assets of cross-border organised crime.
- ▶ Difficulties related to the principle of dual criminality; the conduct underlying the freezing order or letter of request may not be a criminal offence in the requested Member State.
- ▶ Burden of proof of illegal possession of assets.
- ▶ Conviction-based versus non-conviction-based confiscation: some Member States cannot recognise or execute non-conviction-based confiscation orders due to differences in legal regimes.
- ▶ Possible conflicts of jurisdiction.
- ▶ The point at which assistance can be provided in criminal investigations and proceedings varies. Not all jurisdictions can provide assistance during an investigation, but are obliged to wait until provisional seizure of assets has taken place.

- ▶ Difficulties in determining which Member State will recover the monies and how the assets will be shared.'

Do you have any examples of best practice?

'AROs are very effective, but are underused and not as well-known as they deserve to be. To succeed in this relatively new field, practitioners must be aware of the correct channel to utilise. Liaison magistrates or prosecutors posted in other countries have proven to be of assistance in the execution of freezing or confiscation orders. In addition, coordination centres can be valuable tools in support of joint actions. To prevent assets from disappearing, freezing orders should be executed in one Member State at the same time as searches and arrests are carried out in another Member State. Last, but not least, a regulation on perishable assets must be included before confiscation.'

What, in your opinion, is the way forward?

'Change takes time. A first step is acknowledging the need to tackle the issue. The presence of such high-level participants at the Eurojust strategic seminar on freezing and confiscation demonstrates the desire to move ahead and learn from other practitioners. I am optimistic that we will arrive at a recognition process that is both formal and speedy.'

'To succeed in this relatively new field, practitioners must be aware of the correct channel to utilise.'

Case example 3

In March 2013, the Dutch Desk requested the assistance of Eurojust in a case concerning a lengthy investigation into money laundering of the proceeds of crime, including drug trafficking. In the mid-1990s, the Dutch authorities sent an MLA request to the authorities in Andorra concerning the illegal activities of a number of Dutch suspects. Since that request, investigations into these persons have been carried out in the Netherlands and Andorra. In 2013, MLA requests were sent to the Spanish authorities in Alicante and Málaga, requesting information on the owners of certain properties in Spain and the places of residence of several suspects. The activities of the main suspects were linked to other suspects and companies through various monetary transactions.

Several suspects were also believed to have invested in real estate development projects in Andorra. The centre of the money laundering operation was a construction company in Andorra that invested in large-scale construction projects and deposited EUR 16 million in bank accounts in Andorra. A coordination meeting was held at Eurojust in September 2013 to exchange information on action that was urgently needed for the execution of existing MLA requests.

Prosecution needed to be initiated quickly, as the crimes were subject to prescription (time-barred) as of 1 January 2014. During the coordination meeting, a common action day was agreed, supported by a coordination centre at Eurojust. The common action day took place in November 2013. From the coordination centre, the Spanish and Dutch Desks assisted the actions of the judicial and law enforcement authorities that were carried out in Andorra, Spain and the Netherlands. An excellent basis for cooperation with the authorities in Andorra, a third State, had been established during the coordination meeting.

On the common action day itself, positive cooperation between Andorra and Eurojust continued. During the action day, three suspects were arrested and several searches were carried out. EUR 60 000 in cash and a number of luxury vehicles and houses – including a villa valued at more than EUR 6 million – were seized and bank accounts frozen. The suspects were to be tried in the Netherlands.

Interview with Mr Filippo Spiezia

Deputy National Antimafia Prosecutor

Filippo Spiezia has been a Deputy National Antimafia Prosecutor at the National Prosecution Office of the National Antimafia Directorate in Rome, Italy, since May 2012. He has also served as Legal Advisor to the European Commission in the Group of Experts on THB since 2011, and was an advisor to the Council of Europe on organised crime. From 2008 to 2012, Mr Spiezia was Deputy National Member for Italy at Eurojust. He began his legal career with the Public Prosecutor's Office of Salerno, Italy, in 1990. As well as being a frequent speaker at international conferences, Mr Spiezia has written extensively on criminal law, and has been visiting professor at seven Italian universities.

***Eurojust News:** During your time at Eurojust, did you work in the area of freezing and confiscation of criminal assets? What other professional experiences do you have in this field?*

Mr Spiezia: 'As Deputy National Member for Italy at Eurojust, the majority of cases we handled concerned overcoming the legal and practical obstacles to freezing and confiscation of criminal assets.'

Italian judicial authorities have long been concerned with freezing and confiscation of criminal assets, and have targeted organised criminal groups. Italy has had in place an effective legal regime in the fight against organised crime, and introduced several innovative provisions that have significantly



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assisted in this fight. With the introduction of the Law of 1982 into the criminal code, the crime of “Mafia-type unlawful association” was defined, and prosecution of its main actors (leaders and supporters), as well as attacking the assets (i.e. via seizure and confiscation) obtained through illicit or criminal acts, was introduced.’

The work of national courts often benefits from extraterritorial jurisdiction when proceeds of crime have been acquired abroad. How do you see Eurojust’s role in mutual legal assistance and the granting of extraterritorial jurisdiction with regards to criminal asset forfeiture?

‘Combating organised crime becomes especially difficult as those engaged in criminal activity increasingly operate across jurisdictions. In this context, judicial cooperation in criminal matters is the key to successfully recovering the proceedings and instrumentalities of crime.

Due to the operational relationships it has developed over the years, Eurojust plays a pivotal role in assisting national judicial authorities, both in proceedings where crimes have been committed abroad, and in cases where illicit money is hidden (in the so-called fiscal/penal and tax havens). Eurojust’s contact points and ability to enter into cooperation agreements with third States facilitate prosecutions in this field. If Eurojust liaison magistrates were placed in strategic areas, much more could be achieved. In my experience as public prosecutor and as Deputy National Member for Italy at Eurojust, I can say that the best results in this field have

been achieved by resorting to different available and specialised tools. In other words, the appropriate combination of actions that might be provided by Financial Intelligence Units (FIUs), Eurojust, Europol, INTERPOL, liaison magistrates and liaison police officers is the key to a successful investigation to trace and seize the proceeds of crime located abroad.’

Please elaborate on the necessity for the forfeiture and freezing of proceeds and instrumentalities of crime in combating cross-border organised crime.

‘The need has been recognised in many EU documents, policies and legal instruments. In Italy, for a considerable time, a military response was used to tackle the Mafia issue and organised crime. The mechanisms of illicit asset accumulation evolved steadily and ensured the growth of criminal organisations, which could swiftly substitute imprisoned members and subsidise their families, thereby obtaining their gratitude and loyalty.

For these reasons, the issue of addressing the economic profit accumulated by criminal organisations has become the cornerstone of a new course of action carried out by magistrates and law enforcement authorities. The battle now takes the form of preventive action, fighting organised crime on three fronts: economic, social and cultural.

At the same time, an effective and efficient disposal of assets confiscated from criminal organisations is crucial to ensure that confiscation policies achieve their stated objectives. If any problems arise in the management of the final

phase of confiscation proceedings, the efforts made by the criminal justice system in tracing, seizing and confiscating criminal assets can amount to nothing. Notwithstanding its importance, only limited attention has been given to this topic.

More recently, the EU institutions have scrutinised the issue more closely, and have demonstrated interest in an innovative form of disposal of assets: the concept of social reuse. Giving the criminal proceeds back to the communities affected by organised crime is a social rebalance mechanism, and clearly spreads the message that “crime does not pay” (i.e. what was previously illicit becomes a benefit to the community).’

With regard to criminal asset forfeiture and freezing, what are some of the obstacles to harmonising policies at EU level?

‘Police and judicial cooperation are crucial in this area, but judicial cooperation proceedings are still hampered by discrepancies in national legislation. Certainly, the 2014 Directive is a big step forward, but it alone is not sufficient. Non-conviction-based confiscation regimes are in place and working efficiently in at least six Member States, but limited when dealing with assets located in Member States that do not recognise the enforcement of such measures. The fight against organised crime, especially when it is cross-border, requires common efforts and a common approach. Of course, procedural rights and guarantees for *bona fide* third parties should never be neglected, but the possibility to attain a good balance in this matter is within the grasp of the EU legislator. We must not lose this important opportunity.’

‘I can say that the best results in this field have been achieved by resorting to different available and specialised tools.’



Interview with Dr Světlana Kloučková

Director of International Affairs Department
Supreme Public Prosecutor's Office, Czech Republic

Dr Světlana Kloučková has worked as a prosecutor for over 20 years. Between 1997 and 2001, she specialised in cases of serious economic and financial crime. In the past 13 years, she specialised in international judicial cooperation in criminal matters, including cases involving seizure of assets. Dr Kloučková is currently Director of the International Affairs Department of the Supreme Public Prosecutor's Office in Brno, Czech Republic. This body is the central authority for MLA in pre-trial criminal proceedings in the Czech Republic. She is also the Czech contact point for the EJM, JTs and CARIN.

Eurojust News: Could you please outline the general process for criminal asset recovery in the Czech Republic?

Dr Kloučková: 'Criminal proceedings include search and seizure of assets

connected with crime. The burden of proof lies solely with the prosecutor and the court must decide in the criminal matters "beyond a reasonable doubt". In other words, in the presence of doubt, the court must acquit the suspect and no confiscation is possible. The possibility of assets being forfeited without a conviction is quite limited. The criminal standard of proof is applied also in non-conviction-based forfeiture.

Items and assets can be seized for the following purposes: gathering of evidence, return to the legitimate owner, further confiscation or forfeiture, or compensation of a victim. The Czech Republic provides MLA in all of these areas either based on a freezing order (seizure for further confiscation or evidence gathering) or based on an MLA request.'

Some Member States advocate admission of circumstantial evidence in non-conviction-based cases. Can you see the benefit in such a system?

'An increasing number of Member States are considering establishing a system of NCB confiscation, i.e. confiscation not based on the criminal burden of proof. Financial profit is the driving force of crime. The large proceeds from certain forms of criminality go towards personal gain and can also serve as a resource for committing other crimes.

Member States are considering the broader possibilities of legitimately removing assets of illegal origin while at the same time guaranteeing the protection of the rights of legitimate owners. Several Member States have developed NCB confiscation systems that seem to be very promising, and in line with the

standards of the European Court of Human Rights, and as such they represent good material for study.'

You called for an implementing meeting, organised either by the European Commission or by Eurojust, to discuss the 2014 Directive. You also emphasized the importance of at least a minimum level of harmonisation. Are you optimistic about the chances for NCB confiscation throughout the European Union?

'The principle of mutual recognition is the so-called "cornerstone" of cooperation among the Member States. However, the experience of the last 10 years demonstrates that many differences persist, both in understanding and implementing framework decisions and in basic conditions for approving certain investigative measures.

For example, Articles 10(1) and 11(1) (h) of Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters refer to the conditions set up by the national law of the executing Member State. Such references are understandable and clearly show the limits of the principle of mutual recognition. All Member States apply the constitutional rule of equality before law. It would hardly be justified to exercise, for instance, two house searches in one jurisdiction, one based on domestic

law and the other based on the law of another Member State that provides substantially different conditions for approving a home search.

On the other hand, a reasonable question raised here might be why so many differences exist, e.g. in approving interception in telecommunications, when all Member States are bound by the same European Convention on Human Rights.

Another example is NCB confiscation. In 2012, Eurojust made a report on EU legislation in the Member States, showing substantial differences even between Member States applying so-called civil recovery measures. As a result, sometimes even Member States applying NCB confiscation provisions cannot provide assistance to each other.

In other words, if we want to enhance the effectiveness of mutual recognition, there is no other way than to try to find a level of minimum harmonisation of certain minimum conditions for approving at least some investigative measures. One of these attempts was the 2014 Directive. We can read in the preamble that the goal of the Directive is the adoption of minimum rules to approximate the Member States' freezing and confiscation regimes to facilitate mutual trust and effective cross-border cooperation. The success of mutual recognition in the

area of freezing and confiscation of assets in criminal matters will, however, depend on the same understanding and implementation of the Directive in the Member States.

Article 5 of the Directive concerns extended confiscation and sets up the standards of proof in criminal proceedings. This concept is entirely new for many Member States. For these reasons, implementing meetings, organised either by the European Commission or by Eurojust, will be welcome.'

How do you see Eurojust's role in the freezing and confiscation of the proceeds and instrumentalities of cross-border crime in the European Union?

'One of Eurojust's major contributions is organising coordination meetings. Another important Eurojust activity is organising expert meetings and seminars on different topics. The freezing and confiscation of the instrumentalities, proceeds and other assets in criminal proceedings, including compensation of victims of crime, is one of the most complicated areas of international cooperation. It would be very welcome if Eurojust continues in this activity. Eurojust's role in organising seminars with third States is also vital.'

'The freezing and confiscation of the instrumentalities, proceeds and other assets in criminal proceedings, including compensation of victims of crime, is one of the most complicated areas of international cooperation.'

Eurojust is a European Union body established in 2002 to stimulate and improve the coordination of investigations and prosecutions among the competent judicial authorities of Member States when they deal with serious cross-border crime. Each Member State second a judge, prosecutor or police officer of equivalent competence to Eurojust, which is supported by its Administration. In certain circumstances, Eurojust can also assist investigations and prosecutions involving a Member State and a State outside the European Union, or involving a Member State and the Community.

Eurojust supports Member States by:

- coordinating cross-border investigations and prosecutions in partnership with judges, prosecutors and investigators from Member States, and helping resolve conflicts of jurisdiction;*
- facilitating the execution of EU legal instruments designed to improve cross-border criminal justice, such as the European Arrest Warrant;*
- requesting Member States to take certain actions, such as setting up joint investigation teams, or accepting that one is better placed than another to investigate or prosecute; and*
- exercising certain powers through the national representatives at Eurojust, such as the authorisation of controlled deliveries.*



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