



Report on Eurojust's Experience in the field of Asset Recovery, including Freezing and Confiscation



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REPORT ON EUROJUST'S EXPERIENCE IN THE FIELD OF ASSET RECOVERY, INCLUDING FREEZING AND CONFISCATION

This report concerns Eurojust's experience in the field of asset recovery, including freezing and confiscation in the period 2010 to 2013. With regard in particular to Eurojust's drug trafficking cases the reference period is September 2008 to August 2012. With regard to Eurojust's trafficking in human being cases the reference period is 2008–2013.

The report is based on Eurojust's casework, projects dedicated to Eurojust's casework in specific crime types, Eurojust's opinions on draft EU legislation, and seminars, meetings or similar events organised or co-organised by Eurojust.

The report is divided into two parts:

- I. Role of Eurojust in the field of asset recovery, including freezing and confiscation
- II. Eurojust's experience in the field of asset recovery, including freezing and confiscation

I. Role of Eurojust in the field of asset recovery, including freezing and confiscation

Pursuant to Article 3(1)(b) and (c) of the Eurojust Council Decision (EJD)¹, *in the context of investigations and prosecutions, concerning two or more Member states, of criminal behaviour referred to in Article 4 of the EJD in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition; [and] to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.* [emphasis added]

Pursuant to Article 13a(1) of the EJD, *Eurojust shall provide competent national authorities with information and feedback on the results of the processing of information, including the existence of links with cases already stored in the Case Management System.* [emphasis added]

Pursuant to Article 32(1) of the EJD, and in the context of its reporting obligations to the Council of the EU on its activities and management, *the College shall prepare an annual report on the activities of Eurojust and on any criminal policy problems within the Union as a result of Eurojust's activities. In that report, Eurojust may also make proposals for the improvement of judicial cooperation in criminal matters.* [emphasis added]

In operational matters, Eurojust:

- advises on practical solutions and encourages common understanding and cooperation among the authorities concerned;

¹ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to facilitating the fight against serious crime as amended by Council Decision 2003/659/JHA of 18 June 2003 and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust.



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- assists in the clarification of legal requirements in the different jurisdictions and facilitates the transmission of requests;
 - assists, including in very urgent cases, in the drafting of freezing/confiscation orders or Letters of Request (LoRs), the identification of competent authorities in the requested Member State, information exchange, and translation of relevant information;
 - assists national authorities in their efforts to confiscate and repatriate the proceeds from crime, and helps resolve the difficulties encountered;
 - deals with freezing, confiscation and, generally, asset recovery matters either through liaison between the National Desks or in coordination meetings with national authorities;
 - plays an important role in ensuring the application of the EU instruments in the field of freezing and confiscation of assets;
 - advises national authorities on the different practices in Member States regarding the priority given to the execution of freezing orders;
 - helps investigating and prosecuting authorities to act simultaneously in the execution of freezing orders;
 - assists Member States in reaching agreements for the disposal of confiscated property and for asset sharing; and
 - assists, with regard to the specific matter of management of frozen assets, in facilitating the exchange of expert opinions from tax authorities between Member States.

In strategic matters, Eurojust:

- has throughout the years helped resolve some of the difficulties encountered in this field, not only through its casework but also through awareness-raising activities;
- participates in discussions of the Asset Recovery Offices (ARO) Platform through its ARO Contact Point;
- has participated as an observer in the fifth round of mutual evaluations on financial crime and financial investigations;
- has provided opinions on draft instruments, namely on the proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, and on the proposal for a Directive regarding the European Investigation Order in Criminal Matters² (see below under 2.5); and
- provides support via the Camden Asset Recovery Inter-Agency Network (CARIN), in which it participates as an observer.

² Council doc. 6814/11.

II. Eurojust's experience in the field of asset recovery, including freezing and confiscation

2.1 Eurojust's casework irrespective of crime type

Generally, Eurojust casework shows that, despite the Framework Decisions in the field of freezing and confiscation and asset recovery, national legislation and procedural rules in place regarding freezing orders, confiscation and asset recovery vary significantly between Member States. 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.

With regard to freezing orders (FD 2003/577/JHA on the execution of orders freezing property or evidence):

- There are few examples of the use of this FD in Eurojust's casework.
- Although most Member States have transposed the provisions into their legislation, judicial authorities continue to use the traditional forms of MLA to make requests for freezing orders.
- Practitioners are more likely to issue a freezing order if the executing State will react immediately upon receipt.
- Matter of freezing (and confiscation) of assets is still not contemplated by all Member States at an early stage of investigation or prosecution of serious cross border crime. Eurojust's relatively small number of requests for facilitation of execution of freezing orders is a reflection of this situation.
- Judicial authorities that use the freezing order and recognise, *inter alia*, the added value of the tight deadlines provided therein are at times confronted with counterparts in other Member States that are not familiar with this instrument or are unable to use it.

2.1.1 Legal and practical issues

Below are legal and practical issues in the field of asset recovery, including freezing and confiscation, identified by Eurojust in its casework.

With regard to freezing, including freezing orders under Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence - (2003 FD):

- Absence of uniform implementation and use of the FD exacerbates a situation in which freezing (and confiscation) of assets is still not contemplated by all Member States at an early stage of investigation or prosecution of serious cross border crime;
- The form in the 2003 FD is perceived as unnecessarily complicated as it requires information not always available when the form is to be completed;

- General perception that the FD involves additional cumbersome formalities;
- Using freezing orders can be a challenge when the evidence to be frozen, unknown to the issuing authorities at the time of drafting the request, comes to light at a later stage in the investigation. Thus, where assets are not identified, a LoR must first be issued to identify the assets and only then is a freezing order to be issued;
- With regard to requests for the identification abroad of assets belonging to a person, difficulties have been encountered in persuading the requested authorities to conduct such enquiries;
- Practitioners often rely instead on LoRs in accordance with the 1959 Mutual Legal Assistance (MLA) Convention and 2000 MLA Convention, as well as the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime, which can include requests for identification, freezing and confiscation of assets;
- The freezing order is considered to have a limited scope and therefore practitioners find that a faster and easier option is to include all requests related to a criminal case, such as requests for searches, interceptions of telecommunications and seizures, in a LoR under the 1959 or 2000 MLA Convention;
- Complexity of formal requirements, their divergent interpretation, uncertainty as to whether use of the standard form is mandatory or not;
- Substantial differences in legal systems and procedures;
- Difficulties associated with the principle of dual criminality in relation to tax fraud/fiscal crimes when the requested Member State does not consider that this condition (dual criminality) is met in cases where, despite of the fact that the crime as such (*e.g.* tax fraud, VAT fraud) is considered a crime in the requested Member State, the damage/loss to the public budget is suffered not by the requested Member State but rather the requesting Member State. This matter is linked with the interpretation of Article 2 of the Additional Protocol to the Council of Europe Convention of 1959 on mutual assistance in criminal matters, and may lead to the non-execution of freezing orders (and LoRs seeking freezing);
- Additional difficulties linked with the principle of dual criminality where the conduct object of the freezing order (or LoR) does not constitute a criminal offence in the requested Member State (*e.g.* conduct falling under the scope of employment law);
- Legislative issue associated with the purpose of a request for the freezing of monies where the requested Member State is unable to execute such a request if the purpose of the freezing is the return of the frozen monies to the victims, and not confiscation;
- Difficulties linked with excessive delays in the execution of freezing orders (or LoRs) or in the actual ultimate recovery of the frozen monies, in situations where the Member State to which money has been transferred by criminals initiates their own investigation into money laundering and freezes the money not pursuant to the freezing order (or LoR) but rather in the framework of their own investigation.

Additional difficulties are possible conflicts of jurisdiction, and the issue of which Member State will ultimately recover the monies or how the assets will be shared;

- Difficulties linked with translation requirements, *e.g.*, where the original form was not used for the translated version of the order and the executing authority was not able to recognise the document as a freezing order, and as requiring swift action, with the result that the order was withdrawn when assets could no longer be traced;
- On occasion, the specific internal jurisdictional division of some Member States brings additional difficulties in cases in which freezing orders relate to assets located in different internal jurisdictions;
- Difficulties occasionally arise from the absence of a national central register/database of ongoing proceedings in cases of separate and unconnected freezing orders with respect to the same assets;
- Difficulties associated with the freezing of heritable property particularly where there various land registers in one same country;
- Practitioners do not appear to consider often enough the running of a financial investigation in parallel with the criminal investigation; and
- Insufficient expertise in this field from prosecutors.

With regard to confiscation and asset recovery:

- Framework Decision 2006/783/JHA on the application of mutual recognition to confiscation orders and Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property have not been fully implemented by all Member States, thereby rendering uncertain the common grounds for confiscation and recognition of confiscation orders;
- Differences in both substantial and procedural rules in the Member States continue to constitute major obstacles to the investigation, identification, tracing and recovery of assets stemming from cross-border organised criminal activities;
- Significant differences in terminology and legal concepts, namely regarding specific concepts such as extended confiscation, non-conviction-based confiscation, civil recovery, and value based confiscation;
- The application of the dual criminality principle and the burden of proof of unlawful origin of assets are common legal obstacles to the recognition and execution of confiscation orders;
- Difficulties in relation to the nexus required to show that the assets belong to the suspect (except in extended confiscation cases, in which the burden of proof is lower);
- Very different asset recovery regimes throughout the Member States; while in most, assets can be recovered following a criminal investigation, some Member States provide for civil recovery orders or other means whereby a decision on confiscation is

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possible without a criminal conviction. Cross-border recognition of civil seizure and confiscation is thus problematic in the EU;

- Legal issues associated with whether civil confiscation orders fall under Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, whether civil non-confiscation models can be considered “civil and commercial matters” as defined in that Council Regulation, and whether a private entity could bring non-conviction based confiscation proceedings against an accused;
- Non execution of LoRs issued in the framework of civil confiscation proceedings seeking banking information, information on ownership of property and, in other cases, confiscation of assets, on the basis that the law of the requested Member State does not contemplate the legal concept of civil confiscation, and that legal assistance can only be provided in the framework of criminal proceedings;
- In the context of LoRs issued by a non-judicial authority in the framework of civil confiscation proceedings, issues linked with the need for other measures to be taken (*e.g.*, signing by a judge) in the requesting Member State in order for these LoRs to be dealt with in the requested Member State;
- 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;
- Delays and other obstacles in the recovery of assets;
- Difficulties arising from the absence of in some Member States of a central land registry, which would allow for an easier and faster check of property owned by suspects; and
- Difficulties in reaching agreement on asset sharing.

2.1.2 Best practices and proposals for improvement

Below are best practices in the field of asset recovery, including freezing and confiscation, identified by Eurojust in its casework.

- Inclusion, within the initial request for freezing, of a request for early sale of frozen assets (when they are perishable, lose value with the passage of time or involve high management costs) in advance of confiscation;
- Early sale of certain types of frozen assets can speed up the confiscation process;
- Early consideration of administration of funds pending a final decision;
- In those countries where central bank registers exist, information on bank accounts related to a suspect can be made available more swiftly, thus allowing for a quicker execution of requests for freezing;

- Executing freezing orders in one Member State at the same time as arrests and searches are carried out in another can also help to prevent assets being dissipated;
- Legal possibility of executing a freezing order in a VAT fraud case when the defrauded budget is that of the issuing Member State;
- Consent of suspect (in jurisdictions where the possibility of plea bargaining is foreseen) can speed up the confiscation process;
- It is important to receive feedback at regular intervals from the requesting authority in order to avoid exposing the requested country to possible proceedings;
- Organization of a coordination centre at Eurojust with the purpose of simultaneously freezing the assets of crime;
- Form provided for in Article 9 of 2003 FD (certificate); it allows for information to be provided by the requesting Member States in a uniform manner, avoiding the need for long LoRs and associated translation costs;
- Deadline provided for in Article 5(3) 2003 FD (within 24 hours of receipt of the freezing order);
- Possibility for a Member State to prosecute for VAT crimes in cases where monies have been transferred to it although the defrauded budget is not that of the prosecuting Member State, but rather other Member States; in such cases, Eurojust assisted in *i*) the identification of a competent authority in the Member State that suffered the loss for the purposes of representation in the trial in the prosecuting Member State, and in *ii*) the identification of a domestic legal basis in the Member State that suffered the loss for the purpose the receiving the recovered monies from the prosecuting Member State;
- Discussion of asset recovery precautionary measures in the framework of a joint investigation team (JIT) and organisation of a coordination centre at Eurojust to coordinate a common action day relating mainly to the simultaneous freezing of bank accounts in different countries;
- Having units or departments within the competent authorities specialised in asset recovery cases;
- The posting of liaison magistrates/prosecutors specialised in asset recovery to other countries and dealing merely with cases where such issues arise;
- Construction of a specific “Atlas”, similar to that already provided for the European Arrest Warrant, could facilitate the use of freezing orders;
- More training available for prosecutors in this field;
- Listing specific requirements for the execution of freezing orders in the various Member States could provide practical assistance in its use; and
- Reminding national authorities of their reporting obligations under the 2003 FD.

Below are also national good practices developed in some Member States regarding freezing and confiscation identified from Eurojust's casework and from the Eurojust Seminar on "*Confiscation and Organised Crime: procedures and perspectives in international judicial cooperation*" held in Palermo on 21-22 May 2012 (see also below under 2.4):

- Italy has developed broad possibilities for investigating assets and carrying out an economic assessment of suspects, close relationships and family.
- In the Netherlands the examining judge can, under certain conditions, order a Criminal Financial Investigation which focuses on illegally obtained advantages and on tracing capital assets.
- In the United Kingdom restraint orders are made against a person and not against an asset, *i.e.* it is not the asset that is "frozen" but rather the person who is not allowed to dissipate the asset. Freezing in the pre-trial stage is possible. In the Netherlands freezing is also possible at a pre-trial stage as a precautionary measure.
- France distinguishes between:
 - "simple confiscations" where, for instance, the direct or indirect proceeds of the offence would be confiscated;
 - "extended confiscations" that would include confiscation of unjustified assets;
 - "global confiscation" where all assets belonging to the person sentenced (even those not related to the offence) are confiscated. This "global confiscation" is only possible for the most serious offences.
- On a similar pattern, the Dutch legislation provides for two different types of confiscation: the ordinary one (where a direct link between the offence and the asset is needed and where the asset is confiscated), and the special one where a link between the offence and the asset is not always necessary and where value-based confiscation can be applied.
- France also allows for value confiscation. Even if proceeds of crime have been mixed with lawful assets to acquire property, confiscation in value can be made on the estimated value of the asset. The Netherlands has opted more generally for a value confiscation regime rather than an "object" confiscation system.
- A reverse or lowered burden of proof can be found in Belgium, Denmark, Estonia, Ireland (for interim order), Hungary, the Netherlands, Finland, and the United Kingdom.
- In the United Kingdom, after the defendant is convicted, the court must determine the amount of the offender's benefit and the recoverable amount. There is a rule for calculating the benefit derived from the offence and a number of criteria are taken into consideration, in particular the "criminal lifestyle" (or not) of the offender. As such, if the offender has a criminal lifestyle, the court would assume that any property transferred to him within 6 years of the criminal proceedings commencing against him was the result of his criminal activities. If the offender cannot pay the sum, then he

must pay what is available to him. The law in the United Kingdom imposes strict limitations on the release of funds and the defendant is only allowed to spend reasonable amounts on general living expenses. The prosecutor would not be liable to compensate the defendant for loss suffered as a consequence of the restraint, receivership or confiscation proceedings, except in the case of serious default. In the Netherlands, the judge also estimates the amount of assets that have been obtained illegally.

- In Italy, confiscation can take place regardless of any proof of causal link with previous criminal activities and any specific timeframe between acquisition of an asset and the commission of the main crime. It is up to the defendant to demonstrate the licit origin of the assets. Furthermore, the measure can be applied also to spouses, children and cohabiters, plus linked legal entities.

2.2. General issues related to asset recovery, including freezing and confiscation

The College of Eurojust has also dealt with more general issues related to asset recovery, including freezing and confiscation. The general issues identified below have been dealt with by the College between 2010 and 2013:

- Non-conviction-based confiscation or civil recovery in the Member States (2010). Summary of the results:
 - Mainly due to constitutional restraints, the legislation of only a few Member States provided for such measures. Execution of confiscation orders appeared to be simpler in those Member States that have transposed the provisions of the Framework Decision 2006/783/JHA on mutual recognition of confiscation orders.
- The gathering of information from Member States on whether *a*) tax evasion is a predicate offence for money laundering; *b*) if so, whether the competent authorities are able to proceed to the freezing of bank accounts and assets in general; *c*) if tax evasion is not a predicate offence whether the competent authorities can proceed to the freezing of bank accounts and assets in general, due to tax evasion, and under which relevant procedures (criminal, civil, etc.). (2011)
- The gathering of information from Member States on non-conviction based confiscation. (2012) This matter resulted in the preparation of a Report in March 2013. Its findings can be summarised as follows:
 - There are four confiscation systems allowing for the confiscation of proceeds of crime without a criminal conviction, two belonging to criminal non-conviction based confiscation and two to civil non-conviction based confiscation. As a majority of Member States do not, however, have in place such system(s), most of them would not be able to execute a MLA request from a State applying the

civil system, and would also encounter difficulties in executing MLA requests as early as at the stage of identifying and freezing the property concerned, before even considering the difficulties in recognising confiscation orders issued by foreign courts.

2.3. Eurojust's Projects

2.3.1. Strategic Project "*Enhancing the work of Eurojust in drug trafficking cases*"

- Final results of the Strategic Project on "*Enhancing the work of Eurojust in Drug Trafficking Cases*" (January 2012³)

The results of the project cover the analysis of Eurojust drug trafficking cases from 1 September 2008 to 30 August 2010. They cover a number of matters, including that of freezing and confiscation.

The results show that there is very limited use in drug trafficking cases of freezing and confiscation orders based on the FD 2003 and FD 2006/783/JHA.

Differences in both substantive and procedural rules in the Member States constitute a major obstacle in the investigation, identification, tracing and recovery of assets stemming from cross-border organised criminal activities.

Further, the identification and tracing of assets require the execution of MLA requests that often touch upon sensitive issues (*e.g.* access to banking data, interception of communications).

Moreover, assets are often hidden in countries outside the EU that might not share the same level of focus and commitment to retrieving such assets and might not be responsive to requests for legal assistance.

By involving Eurojust in cases requiring international cooperation for the identification, tracing, freezing, seizure and confiscation of proceeds from crime, many problems in making sure that crime does not pay could be resolved.

Accordingly, the project recommended that *(i)* more asset recovery cases should be referred to Eurojust by Member States and, equally importantly for the effectiveness of cross-border action to be evaluated, *(ii)* more information on the outcome of the cases registered at Eurojust, including whether a confiscation and a return of assets occur should be provided.

- Draft Implementation Report of the Action Plan on Drug Trafficking. Strategic Project: "*Enhancing the work of Eurojust in drug trafficking cases*" (publication envisioned in the near future)

This report covers the analysis of Eurojust drug trafficking cases from 1 September 2010 to 31 August 2012.

³ Council doc. 11483/12.

During the reporting period there has been an increase in the number of drug trafficking coordination meetings in which asset recovery matters were addressed by national authorities. In view of implementing the recommendations of the Action Plan, Eurojust has also worked to increase awareness of national authorities with regard to the role of Eurojust in coordinating asset recovery cases.

In this respect, the importance of tracing, freezing and confiscating the proceeds of crime has been addressed in several meetings and seminars organised by Eurojust in 2012 and 2013 (e.g. the Strategic Meeting on Trafficking in Human Beings (April 2012), the Seminar on Confiscation and Organised Crime: procedures and perspectives in international judicial cooperation (May 2012), the Workshop on the Application of the Mutual Legal Assistance and Extradition Agreements between the European Union and the United States of America (October 2012) and the Strategic Seminar on Cross-border Excise Fraud (November 2013))(see below under 2.4).

Furthermore, a project on Non-conviction Based Confiscation was launched at Eurojust in May 2012 to identify differences between the legal provisions of Member States with respect to non-conviction based confiscation and, consequently, any problems preventing mutual cooperation between Member States in the fight against transnational organised crime. A report containing the results of the project was released in March 2013 and distributed to national authorities (see above under 2.2.).

Despite the increase in the number of cases where asset recovery matters were discussed during coordination meetings in drug trafficking cases, the role of Eurojust appears to remain limited.

Therefore, the draft report contains the following recommendations, in this field, to Eurojust:

- continues to encourage national authorities to refer drug trafficking cases where matters related to asset recovery need to be resolved. In this respect, Eurojust shall raise awareness of the advantages of requesting support from Eurojust in asset recovery matters, such as:
 - speeding up and facilitating MLA requests for tracing, freezing and confiscating assets;
 - clarification of the conditions for freezing, confiscating, sharing and returning confiscated assets in the Member States;
 - legal advice in drafting freezing and confiscation orders; and
 - advising on practical solutions to overcome possible legal obstacles for the execution of freezing and confiscation orders.
- conducts an analysis (not limited to drug trafficking cases) of cases which discussed asset recovery matters at coordination meetings. Such analysis is likely to reveal best practice and obstacles encountered by national authorities in asset recovery cases.

2.3.2. Strategic Project on “Eurojust’s action against trafficking in human beings”

- ✓ Final report of the strategic project on “Eurojust’s action against trafficking in human beings”⁴ (October 2012)

The project relates to the analysis of Eurojust THB cases from 1 January 2008 to 31 December 2011.

The project findings show that asset recovery processes in THB cases are widely recognised as important. However, structural problems, difficulties and deficiencies were highlighted, including:

- the lack of capacity in terms of time, resources and expertise to properly run asset recovery or financial investigations;
 - the lack of specialised training resulting in significantly less use of the asset recovery tool;
 - difficulties encountered in tracing assets, due to lack of centralised bank registers in some countries, to strict bank secrecy regulations in some jurisdictions, to the use of third persons, especially family members, to conceal ownership of assets and to the fact that THB is a cash-intensive business where criminals rarely use bank services;
 - high standards of evidence required in some of the Member States, which call for unambiguous proof that the assets in question are generated from a specific criminal act;
 - proceeds of THB are to a large extent used to sustain a high standard of living and the remaining benefit is often not invested in movable or immovable assets in the destination country, where the investigation and prosecution often take place;
 - differences in substantive and procedural law may raise issues such as admissibility of evidence or fulfilment of the principle of double criminality in relation to asset freezing and confiscation;
 - the execution of MLA requests is expensive and often lengthy because they entail supplementary workload for administrations (in particular for THB transit countries, as they are not affected by this phenomenon to the same extent as destination countries and, thus, give it a lower priority).
- ✓ Draft Implementation of the Eurojust Action Plan against Traffic in Human Beings 2012-2016, mid-term Report, (publication envisioned in the near future)

The mid-term evaluation of the implementation of the Eurojust action plan against THB 2012-2016, covers the analysis of Eurojust THB cases in the years 2012-2013.

The results show that financial investigations and asset recovery procedures in Eurojust THB cases have been used to a large extent during the reporting period. This is very much in

⁴ Published as Council doc. 16947/12.



accordance with the strategic targets of the action plan. Eurojust is committed to continue promoting the use of financial investigations and confiscation procedures in THB cases and encourage national authorities to refer more asset recovery cases to Eurojust.

Eurojust's coordination meetings, coordination centres and/or JITs supported by Eurojust constitute important tools in the hands of the national authorities for addressing altogether the use of financial investigations and asset recovery procedures in THB cases.

The coordination meetings at Eurojust in the analysed THB cases have facilitated discussions and, where appropriate, actions related to: (i) identification, seizure and confiscation of suspects' properties and the return of proceeds of crime from one Member State to another; (ii) exchange of information regarding relevant legislation and requirements in the Member States; (iii) sharing of information regarding the results of monitoring money transfers across borders as THB is a cash intensive crime; and (iv) investigation of money laundering offences.

In a THB case, a coordination centre was facilitated by Eurojust to coordinate simultaneous searches and seizures in several Member States during a common action day. The coordination centre supported the seizure of large quantities of illegal assets.

JITs have been also used by national authorities to assist their common efforts to seize and confiscate the proceeds of THB. The analysis of casework shows that five JIT agreements contain objectives related not only to the investigation of THB, but also to financial investigations and the confiscation of assets. For example, one JIT agreement was signed with the specific objectives *"to locate and trace the money flows which are proceeds from crime, to identify the profits gained by the organised criminal group and to proceed with their seizure and confiscation"*. Another JIT agreement went further and set as a specific objective *"the financial compensation of the victims as a result of the freezing, seizure and confiscation of the illegally obtained assets"*.

2.4. Seminars, meetings, similar events

Below are summaries of the issues concerning asset recovery, including freezing and confiscation discussed at seminars, meetings or similar events organised or co-organised by Eurojust.

✓ Report on the *Strategic Meeting on VAT Fraud*⁵, The Hague, March 2011

The Seminar was organised jointly by Eurojust and Europol. It was emphasised that substantial profits result from VAT fraud and that their confiscation is an effective deterrent. However, still, not all Member States have adopted measures to allow a more widespread confiscation of proceeds from crime. The advantages of the system of confiscation without a criminal conviction (civil confiscation) and of the system of extended confiscation powers were highlighted. As such systems have been introduced only in very few Member States issues relating to the mutual recognition of confiscation orders based on civil confiscation procedures

⁵ Council doc. 11570/11.



or on the extended confiscation powers exist. The Seminar stressed that a common approach to confiscation is needed and it recommended that the relevant EU and international legal instruments are implemented in practice in all the Member States and applied efficiently, in particular the instruments required for the tracing, freezing, confiscating and sharing of proceeds from VAT fraud.

- ✓ Report of the Eurojust's Seminar on "Confiscation and Organised Crime: procedures and perspectives in international judicial cooperation"⁶, Palermo, May 2012

The Seminar organised by Eurojust focused the use of confiscation in the fight against organised crime, with special attention on international judicial cooperation. Expert practitioners from different Member States exchanged information on their national systems and experiences with mutual legal assistance in the field of confiscation and how it is possible to overcome obstacles arising from different freezing and confiscation regimes and procedures and different languages. It was generally agreed that EU instruments of mutual recognition are underutilised or poorly implemented or not appropriate to all cases. In addition, the presence or the lack of a system for non-conviction-based confiscation was pointed at as a major obstacle to cross-border cooperation between Member States.

- ✓ Report of Eurojust's Strategic Meeting on Trafficking in Human Beings⁷, April 2012

This Meeting was organised in the framework of the Eurojust strategic project entitled "Eurojust Action against Trafficking in Human Beings". It was particularly pointed out that "*international cooperation is not an option but an obligation*" in combating THB and in preventing the reinvestment of criminal proceeds in legal businesses. In this respect, transnational cooperation should be improved by encouraging the tracing and sharing of assets confiscated from the traffickers. Making available portions of the confiscated assets to the investigative unit that secured the confiscation and also securing civil compensation claims for victims when suspects' illegally obtained assets have been confiscated were suggested as incentives. The conclusions of the seminar also stressed that a very efficient way to fight THB is to conduct financial investigations in each case and follow the money trail. The leaders of the criminal networks could then be identified and their illegally acquired assets confiscated.

- ✓ Report of the Workshop on the Application of the Mutual Legal Assistance and Extradition Agreements between the European Union and the United States of America, Eurojust, October 2012

The Workshop, organised by Eurojust, touched upon various aspects of the application of the Mutual Legal Assistance and Extradition Agreements between the EU and the US. One specific session dealt with the cooperation between the Member States and the US in the areas of confiscation, asset recovery and sharing of assets. The US provides for two types of

⁶ Council doc. 16695/12.

⁷ Council doc. 17004/12.



confiscation, both based on criminal activity, but requiring different standards of proof, and can assist foreign authorities with the confiscation of assets located in the US under certain specific conditions. The Member States' confiscation systems differ both from each other's, and from the US's. Cooperation between Member States and the US in this field is based on multilateral conventions (e.g. UNCAC, UNTOC) and bilateral treaties. A number of bilateral treaties signed by the US include asset sharing provisions. The 2007 EU Council Decision on Asset Recovery Offices (ARO), coupled with the 2006 Framework Decision on the principle of availability of information (the "Swedish initiative") facilitates effective cooperation in the EU in the field of asset recovery. Consideration could be given to the legal possibilities of exchanging information between Member States' AROs and US AROs.

- ✓ Report of the Eurojust Strategic Seminar on Cross-border Excise Fraud: "Emerging threats in the European Union"⁸, The Hague, November 2013

The Seminar was organised jointly by Eurojust and the Lithuanian Presidency of the Council of the EU. Amongst various matters, it also focused on the topic of "Targeting the proceeds of crime: how to locate, seize, confiscate and recover them more effectively." The participants discussed the circumstances in which the freezing and confiscation of the proceeds of cross-border excise fraud are possible in the Member States, examined common difficulties and considered best practices. The use of non-conviction based procedures can overcome difficulties such as the standard of proof and the link to criminal proceedings. It was also agreed that the real barrier to asset recovery in cross-border excised fraud is identifying and tracing the proceeds to be frozen and confiscated. These two critical steps in the process prove to be extremely challenging, especially when the proceeds are located outside the requesting Member State. The valuable assistance that Eurojust can offer in asset recovery cases was also highlighted. This included speeding up and facilitating LoRs for asset freezing and confiscation, establishing, supporting the running of and providing finance to JITs, facilitating cooperation with third States in asset recovery cases.

2.5. Eurojust opinions on draft EU instruments

- ✓ Eurojust's Opinion on the Proposal for a Directive on the European Investigative Order (EIO)⁹, March 2011

With regard to the issue of freezing orders and their relation with the proposed EIO, Eurojust's Opinion was that the consolidation of mutual legal assistance measures in a single mutual recognition instrument should be achieved by way of a "stand-alone" instrument, covering all types of investigative measures that may be requested by way of mutual legal assistance. In light of this, the exclusion of freezing of assets, as provided in the draft at the time the Opinion was given, would require further reflection. In considering Article 3 of the draft (Scope of the EIO), Eurojust's view was that the freezing of instruments and proceeds of crime appeared to

⁸ Council doc. 8616/14.

⁹ Council doc. 6814/11.

be excluded from its scope and that this exclusion of the freezing of assets could entail the following consequences: (i) bank information (e.g. information on the amount of money on a bank account) would be covered by the Directive; and (ii) freezing of the amount of money on that bank account would be exclusively covered by FD 2003/577/JHA. As far freezing orders are concerned, Eurojust's opinion was that the new instrument would offer an opportunity to replace FD 2003/577/JHA and to set up a unique, coherent and comprehensive legal regime in this field which would apply to both evidence and assets.

✓ Eurojust's opinion on the Proposal of the European Commission for a Directive on the Freezing and Confiscation of Proceeds of Crime in the European Union, October 2012

In this opinion, EUROJUST stressed, in general, that it might be useful to consider that asset recovery is a tool aimed at fighting all kinds of serious crime. More specifically, EUROJUST suggested that Article 8(2)(g) of the 2006 Council Framework Decision, which lists "extended powers of confiscation" of the issuing authority as a possible ground for non-recognition or non-execution of the mutual recognition orders, is hampering extended confiscation's use and that a possible deletion of this ground for refusal from the 2006 Framework decision could enhance the situation. EUROJUST also pointed at a possible amendment to Article 5 of the Proposal (non-conviction based confiscation), suggesting to keeping its wording quite broad ("the suspected person is not available for prosecution"), while, at the same time, introducing the principle of mutual recognition in this area to enable Member States, in spite of the legislative differences, to recognise and execute requests initiated by other Member States.

2.6. Case examples

Below are examples of Eurojust's cases involving matters of asset recovery, including freezing and confiscation.

Case example:¹⁰

The beneficial owner of a major Spanish holding company with interests in many different business areas was investigated, with eight others, in Spain and Belgium for tax fraud, money laundering and participation in a criminal organisation. Lawyers from a well-known firm were indicted for allegedly setting up a network of companies and financial transactions in Panama, the Netherlands Antilles, the Netherlands and Switzerland to hide the ownership of the assets. The principal suspect was suspected to have evaded an estimated €2 billion in tax. Eurojust held two coordination meetings with national authorities from Spain, Belgium and the UK, which led to the agreement on the prosecution strategy and the legal actions to be adopted in this complex case. As at 2011, assets of €112 million in Belgium and €10 million in the UK had been restrained.

¹⁰ Eurojust Annual Report 2011.



Case example:¹¹

A complex transnational fraud investigation into an alleged “Ponzi” scheme started in France in February 2012. The suspects and companies involved were based in eight Member States as well as in Switzerland and the Seychelles. Approximately 400 victims were identified throughout Europe. Damages were estimated at minimum 23 million. The proceeds were placed in bank accounts in the Seychelles, Malta and Cyprus and invested in real estate, boats and yachts. Eurojust was requested to facilitate the execution of MLA requests to locate the suspects and criminal proceeds as well as request hearings, house searches, seizures and freezing of assets. A coordination centre was set up at Eurojust to support simultaneous actions at judicial level in all 10 countries involved, the first time so many countries took part in a coordination centre and the first time that the operations focused on freezing of assets simultaneously in six different jurisdictions, including the Seychelles. The coordination centre, provided with dedicated telephone lines, e-mail addresses and videoconference facilities, allowed the French investigating judge to monitor the state of play with Eurojust National Desks and to address specific judicial issues raised during the action day in real time. More than 200 law enforcement officers were deployed for this operation, resulting in the arrest of 16 persons, the interviewing of six suspects, the freezing of approximately Euros 700000 in bank accounts and significant seizures of vessels, villas, luxury cars, artwork and jewellery.

Case example:¹²

In 2011 investigations were initiated in France and in Netherlands regarding a VAT carousel in the trading of carbon emissions rights. Both cases appeared to be interlinked. The support of Eurojust was requested and a JIT was established between France and the Netherlands in 2011. In October 2013 the case was at a very advanced stage and a coordination meeting was held to agree on how to proceed with prosecutions in both Member States. At the time of the coordination meeting, almost all of the MLA requests had been executed in Spain, Germany, Portugal and Hong Kong. The French authorities considered issuing MLAs towards the UAE to interview suspects and seize assets that were believed to be located there. Both France and Netherlands had sufficient evidence to prosecute the main suspect. By 2013, the investigation had resulted in the freezing of approximately USD 7 million. Seizure of further assets was anticipated. Both Member States agreed that assets eventually confiscated would be shared equally.

Case example:¹³

Hungarian authorities discovered an organised criminal group (OCG) carrying out illicit trading in counterfeit medication and the illicit distribution of non-registered pharmaceutical drugs. The pharmaceuticals were imported from India and China and distributed by the OCG to 76

¹¹ Eurojust Annual Report 2013.

¹² Eurojust Annual Report 2013.

¹³ Eurojust Annual Report 2013.



countries through the internet, including all Member States, Norway and Switzerland. The counterfeit products had a total value of EUR 3.7 million. As a result of Eurojust's assistance, the case was interlinked to ongoing investigations in Estonia through one of the suspects. Further links to procedures in the Czech Republic, France, Poland and Croatia were made. The Estonian authorities searched a site identified in an expert opinion file of the Hungarian police, located and seized thousands of fake pills and apprehended the re-redistributor. The freezing of bank accounts in Cyprus was made possible as a result of Eurojust's assistance in the case.

Case example:

Setting up of a JIT between three Member States in a complex VAT fraud case where two of them had not been aware that their States' budgets had been defrauded. In this case the amount of evidence sought by the all involved Member States was extremely high, their criminal substantive and procedural laws, and rules on admissibility of evidence were very different. In this case, the setting up of the JIT took significant time, but once it was running the gathering of evidence was a much swifter process. One of the Member States was able to freeze millions of Euros when the defrauded budget was that of the other two Member States involved, and the transfer of criminal proceedings from the other two Member States was discussed and agreed in relation to one of the Member States. The matter of the legal representation of the two defrauded Member States in civil proceedings running adjacently to the criminal proceedings in the other Member State and dealing with the issue of the frozen monies and ultimately their return to the defrauded Member States was also discussed.

Case example:

Upon an Interpol alert related to an Italian decree of seizure for equivalent value (more than 145 million EUR) issued in criminal proceedings for tax fraud, an aircraft Falcon (valued 31 million EUR), object of this decree, was traced in Slovenia in March 2013. Slovenian authorities asked for Eurojust assistance in obtaining the decree on the seizure and the Italian MLA request for its execution since without these documents there were no grounds for a court decision on the seizure. With the assistance of Eurojust the letter of request and the decree on the seizure issued by the competent Italian Authority were obtained on the same day. Due to the urgent nature of the case and since the Slovenian authorities were not able to provide translation of the two comprehensive documents in due time, Eurojust supported the case by providing the translation in two days and in this way enabled the seizure. Eurojust supported the case until the recovery of the aircraft by the Italian authorities the same year in September: communication between the issuing and executing authorities was facilitated, both legal systems explained, advice on the way forward given and, at the final stage, the exchange of documents was facilitated and differences in procedural requirements clarified.



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