

PROJECT NO.JUST/2010/KPEN/AG/1546 “POSSIBILITIES OF
SOLUTION OF TOPICAL PROBLEMS OF RESTORATIVE JUSTICE IN
THE EUROPEAN UNION”

**TRAINING COURSE “LEGAL REGULATION
ON CONFISCATION OF PROPERTY IN
LATVIA AND EUROPEAN UNION; ENSURING
EFFECTIVE EXECUTION MECHANISM”**

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Tieslietu ministrija 



Legal Regulation on Confiscation of Property in European Union Member States (identifying, tracing and confiscation of assets)

**David J Dickson,
Solicitor Advocate, Prosecutor, Edinburgh**

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THE ISSUE

- Free movement of people
- Increased cross border criminality
- The purpose of OCG is to generate financial profit
- That profit can be dissipated across a number of jurisdictions
- Can fund further criminality
- It can be converted into various types of property moveable and immoveable, corporeal and incorporeal
- On a large scale can harm the economy



OVERVIEW

International legal framework

Council of Europe framework:

- Search and seizure:
 - Evidence
 - Confiscation including money laundering

European Union framework:

- Search and seizure:
 - Evidence
 - Confiscation including money laundering



INTERNATIONAL FRAMEWORK

**1988 United Nations Convention against Illicit Traffic in
Narcotic Drugs and Psychotropic Substances, the United
Nations Convention against Transnational Organised Crime**

**1999 United Nations International Convention for the
Suppression of the Financing of Terrorism**



FINANCIAL ACTION TASK FORCE

“... is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.”

•40 recommendations of 1996

www.fatf-gafi.org



CARIN

“ all aspects of tackling the proceeds of crime. Specifically, CARIN aims to increase the effectiveness of members’ efforts in depriving criminals of their illicit profits through cooperative inter-agency cooperation and information sharing. “

www.assetrecovery.org



SEARCH AND SEIZURE: EVIDENCE (COUNCIL OF EUROPE)

1959: European Convention on Mutual Assistance in Criminal Matters

- Art 3.1 letter of request “purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents”
- Art 5: Dual criminality
- Art 6: Delay in transmission pending conclusion of domestic proceedings
- Art 15: diplomatic transmission unless urgent



SEARCH AND SEIZURE: EVIDENCE (COUNCIL OF EUROPE)

1978: Protocol:

- Art 2: dual criminality modified to the extent :
«condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party”



SEARCH AND SEIZURE: EVIDENCE (COUNCIL OF EUROPE)

2001: Second Additional Protocol

- Art 4 amended to allow officials of the requesting state to be present where their “presence is likely to render the execution of the request for assistance more responsive to the needs of the requesting Party and, therefore, likely to avoid the need for supplementary requests for assistance.”
- Art 15: permitted direct transmissions of requests
- Art 7: may permit partial transmission
- Art 8: “specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law”



ASSET SEIZURE & CONFISCATION: (COUNCIL OF EUROPE)

1990: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime: “is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof”

2005: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism: “first international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The text addresses the fact that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures”



2005 CONVENTION: AIMS

2005: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism:

fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale;

Believing that one of these methods consists in depriving criminals of the proceeds from crime and instrumentalities;

Considering that for the attainment of this aim a well-functioning system of international co-operation also must be established



2005 CONVENTION: ACHIEVEMENT OF AIMS

a “proceeds” means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property;

b “property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;

c “instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

d “confiscation” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;



2005 CONVENTION: ACHIEVEMENT OF AIMS

e "predicate offence" means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 9 of the Convention.

f "financial intelligence unit" means a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information

i concerning suspected proceeds and potential financing of terrorism, or

ii required by national legislation or regulation,

in order to combat money laundering and financing of terrorism;

g "freezing" or "seizure" means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;



MONEYVAL (COUNCIL OF EUROPE)

MS which are not part of FATF

Aim “to ensure that its member states have in place effective systems to counter money laundering and terrorist financing and comply with the relevant international standards in these fields.”

peer review process of mutual evaluations

regular typologies exercise focused on the methods and trends of money laundering activity.



SEARCH AND SEIZURE: EVIDENCE (EUROPEAN UNION)

**2002: EAW FD Article 29 & Box G of the
EAW Form**

**2003: FD 2003/577/JHA: MR of Freezing
Orders**

**2008: FD 2008/978/JHA: European Evidence
Warrant**

2010: European Investigation Order



ASSET SEIZURE & CONFISCATION EUROPEAN UNION LEGAL INSTRUMENTS

1998: Joint Action 98/699/JHA

2001: FD 2001/500/JHA: enables confiscation

2005: FD 2005/212/JHA: Confiscation of Crime-Related Proceeds: harmonises laws

2005: Directive 2005/60/EC

2003: FD 2003/577/JHA: MR of Freezing Orders

2006: FD 2006/783/JHA: MR of Confiscation Orders

2007: CD 2007/845/JHA: exchange of information between Asset Recovery Offices

2012: proposal for Directive on freezing and confiscation of proceeds of crime



MUTUAL RECOGNITION

European Council of Tampere (1999)

§ 33: Mutual recognition should become cornerstone of judicial cooperation in civil and criminal matters within EU

- Recognising / executing judgments or judicial decisions taken in other Member States (MS) as if they were your own

§ 36: Mutual recognition also applies to pre-trial orders, in particular to those which would enable competent judicial authorities to quickly secure evidence and easily seize movable property



EAW FRAMEWORK DECISION

Sets out essential elements of MR

- **Recital 6: “first concrete measure ...implementing the principle of mutual recognition ...the cornerstone of judicial co-operation.”**
- **Recital 7: “replacing the system of multilateral extradition...”**
- **Recital 10: “based on a high level of confidence between Member States”**
- **Recital 12: “respects fundamental rights...”**
- **Implemented in terms of national law**



ADVANTAGES OF THE EAW

- Judicial determination
- Limited grounds of refusal
- Surrender of own nationals
- Quicker execution of the request
- Mutual recognition
- Human rights protection Mutual recognition of judicial decisions central
- Cannot look behind that domestic judicial decision upon which the EAW is based
- Mutual trust



PURPOSIVE INTERPRETATION

ECJ in 'Pupino' (C-105/93, 16 June 2005):

(43) "... the principle of conforming interpretation is binding in relation to framework decisions When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."



SEARCH & SEIZURE

- EAW FD Article 29
- Box G of the EAW Form
- Varied application in national law



EUROPEAN EVIDENCE WARRANT: LEGAL BASE

- **Framework Decision 18 December 2008**
- **Implementation by 19 January 2011**
- **National legislation**
- **Framework list**
- **Dual criminality: review in 5 years**
- **Territoriality exception**
- **may result in divergent approaches in Member States**



WHEN MAY AN EEW BE ISSUED?

Objects and documents sought are:

- Necessary and proportionate for the domestic investigation
- Could be recovered under the law of the issuing State



ISSUING AN EEW

- Issued by a judge, Court, investigating magistrate, public prosecutor or judicial authority
- Issued to a designated central authority (in which case the EEW may need to be validated by one of the above)
- Transmission via the European Judicial Network



MUTUAL RECOGNITION

- **Executing CA to mutually recognise the EEW without further formality**
- **Execute the EEW as it would under national law;**
- **Manner of execution a decision for the executing MS (contrast)**
- **But any measures available domestically to be available for execution of EEW**
- **Where Framework list applies domestic search and seizure provisions ought to be available**



WHAT MAY BE REQUESTED?

- To be used in conjunction with existing MLA provisions
- Limited in scope:
- Objects, documents and data that *already exist*
- these may be in the control of the requested authorities (e.g. parallel enquiry)



WHAT MAY NOT BE REQUESTED

- Conduct interviews
- Take statements
- Initiate other types of hearings of witnesses, suspects, experts
- Examinations of the person for DNA samples or fingerprints;
- real time evidence e.g. intercept, covert surveillance or monitoring bank accounts
- Analysis of existing objects, documents or data
- Communication data retained by ISP/public communication network



EXCEPTIONS TO THESE GENERAL RULES

- ***Statements:*** except where the person is present during execution of the EEW and requested by the issuing State and national law of the executing State allows that
- ***DNA or telecommunications:*** where these are already in the possession of the executing authority before issue of the EEW
- **Spontaneous recovery of evidence during the search and seizure**



DEADLINES

- **30 days to decline execution/recognition;**
- **60 days from receipt to execute/ if executing authority has the items sought, unless postponed:**
 - Where prejudice to domestic investigations/proceedings;
 - Items sought already being used
 - Decision to postpone to be taken by the executing judicial authority
- **Transmission without undue delay**



GROUNDS FOR NON RECOGNITION/ EXECUTION

**May decline where to execute the EEW
would:**

- Infringe *ne bis in idem*
- Not FLO and requires search and seizure and absence of dual criminality
- No domestic power to allow execution
- Domestic immunity/privilege applies
- EEW not validated where required;
- Territoriality
- Extra territoriality jurisdiction not recognised
- National security interests
- Form incorrectly completed
- All to be decided by the executing judicial authority



OBLIGATION TO INFORM

- Where further enquiries by executing authority necessary;
- EEW not executed in accordance with national legal provisions;
- Confirm EEW issued by CA to executing authority;
- Decision to refuse to recognise/execute the EEW;
- Reasons for any postponement on execution;
- Impossibility: items cannot be traced/destroyed/disappeared/ insufficient information to let the executing authority trace them



FREEZING ORDER: OBJECTIVE

- Establish rules under which one MS will recognise and execute in its territory freezing order issued by judicial authority of another MS in framework of criminal proceedings
- Applies to orders issued for
 - Securing evidence
 - Confiscating property

... which could be produced as evidence in criminal proceedings in context of series of offences



OFFENCES

List of offences *without* verification of double criminality

- Listed at article 3(2)
- Participation in criminal organisation, terrorism, sexual exploitation of children and child pornography, human trafficking, corruption, cybercrime, fraud, environmental crime, illicit drug trafficking, ...
- List can be expanded

Other offences *with* verification of double criminality



TRANSMISSION

Freezing order and standard certificate directly transmitted by competent issuing judicial authority from to competent executing judicial authority

- By any means capable of producing written record under conditions allowing executing MS to establish authenticity
- Cannot find competent judicial authority in executing MS? → European Judicial Network can assist
- Standard certificate
 - Signed and contents certified as accurate
 - Translated into official language(s) of executing MS or other language(s) accepted by it
- Instructions on subsequent treatment of frozen property or evidence



RECOGNITION & EXECUTION

Freezing order is recognised and executed by competent judicial authority in executing MS without further formalities unless...

- Grounds for non-recognition / non-execution
- Grounds for postponement of execution

Competent judicial authority in executing MS decides and communicates decision on freezing order

- As soon as possible
- When possible, within 24 hours of freezing order receipt

Report on execution of freezing order given to competent judicial authority in issuing MS



GROUNDINGS FOR NON-RECOGNITION OR NON-EXECUTION

Non-recognition related to

- Standard certificate
 - But...competent executing competent judicial authority may
 - Specify deadline for its presentation, completion or correction
 - Accept equivalent document
 - Exempt issuing judicial authority from requirement if information provided considered sufficient
- Immunity or privilege under law of executing MS
- Infringement to ne bis in idem principle
- Article 3(4) and double criminality not respected



GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION (CONT'D)

Non-execution: property or evidence

- Has disappeared
- Has been destroyed
- Cannot be found in location indicated in certificate
- Location of property or evidence not indicated in sufficiently precise way

Decision to refuse recognition of execution is notified to competent judicial authorities of issuing MS



GROUNDS FOR POSTPONEMENT OF EXECUTION

Execution can be postponed if

- Would damage ongoing criminal investigation
- Property or evidence already subjected to freezing order in criminal proceedings

Limited duration!

- Executing competent judicial authority informs issuing competent judicial authority of expected duration
 - Reasonableness, lifting of prior freezing order, ...
- As soon as ground for postponement ceases → freezing order must be executed



DURATION OF FREEZING

Property or evidence remains frozen in executing MS until

- Transfer of evidence to issuing MS
- Confiscation

But... executing MS can limit period for freezing property / evidence

- Issuing MS informed of possibility and can give comments
- Issuing MS informed when limited period ends



IMPLEMENTATION BY MS

MS had until 2 August 2005 to implement framework decision into national legislation

Implementation report from Commission in December 2008

- Not satisfied with implementation
- Not yet received implementing legislation from several MS
- Criticises other MS, which have only implemented portions of framework decision
- Criticises errors of interpretation of some provisions implemented by MS (e.g. facultative grounds for non-recognition of freezing order often interpreted as mandatory)
- But ... execution of freezing orders appears to be ensured



COUNCIL FRAMEWORK DECISION 2006/783/JHA OF 6 OCTOBER 2006 ON THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION TO CONFISCATION ORDERS

- To facilitate the direct execution of confiscation orders for proceeds of crime
- Simplifying procedures and rules for dividing confiscated property
- List of crimes where dual criminality is not verified (art 6)
- Limited grounds of non recognition/execution (art 8)
- Certificate is not produced, incomplete or manifestly does not correspond to the freezing order
- Immunity or privilege in executing state
- If further actions would infringe the ne bis in idem principle
- If for acts that do not constitute an offence under law of executing state
- Rights of interested party make it impossible to execute under law of executing state
- For acts having been committed in executing state or outside the territory of the issuing state, if contrary to law of executing state
- Statute barred by law of executing state and falls under its jurisdiction



GROUND FOR POSTPONEMENT

- **Possible damage an ongoing criminal investigation**
- **Property or evidence already subjected of confiscation proceedings in the executing state**
- **Enforcement of legal remedies**
- **Translation is still necessary**
- **Might exceed confiscation order**



NECESSARY DOCUMENTS

- **Certificate according to the form annexed to the framework decision with a translation into the language of the executing state**
- **Confiscation Order by national Court**



Enforcement of the freezing order:

- According to law of the executing state
- May be against a legal person even if law of the executing state does not recognise the principle of criminal liability of legal persons
- Other measures such as limiting a persons freedom is only available with consent of issuing state



Legal Remedies

- Substantive reasons can only be challenged in issuing state
- Authority in issuing state is to be informed of action in executing state
- The issuing state should reimburse the executing state if it needs to pay damages to parties injured by the confiscation order



Disposal of confiscated proper:

- Below 10.000,- EUR -> accrues to executing state
- 10.000,- EUR or more -> division 50 – 50 between executing and issuing state
- Special rules for property other than money
- Special rules for objects of national heritage
- states may agree a different solution



THE EUROPEAN INVESTIGATION ORDER

- Single regime based upon MR for recovery of evidence in almost all investigative measures
- Instruments too fragmented and will replace EEWFD, FOFD
- Evidence sought should be necessary and proportionate and execution proportionate, adequate and applicable
- Executing authority has discretion to use less intrusive instrument for recovery of evidence
- Execution in conformity with the formalities and procedures requested by the issuing state



PROCEDURE

- EIO to be examined for conformity by judge, examining magistrate, court or public prosecutor prior to transmission
- Direct transmission but role for central authority and EJN
- MR without any further formality
- Dual criminality will apply, unless one of the 32 FLO, where search, seizure and freezing of evidence and “information on bank accounts and transactions”
- 30 day deadline for recognition of the EIO & 90 days for execution of the EIO with possible extension of 30 days
- Challenge to issue of EIO in issuing state alone



PROCEDURE II

- May delay execution where it may prejudice an ongoing investigation or being used in other proceedings
- Challenge to issue of EIO in issuing state alone



PROPOSAL FOR DIRECTIVE ON FREEZING AND CONFISCATION OF PROCEEDS OF CRIME: 12.3.12

- Commission Communication “EU Internal Security in Action” Objective 1, action 3 : “legislation to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation and to facilitate mutual recognition of non-conviction based confiscation orders between Member States”
- No reference to MR
- Minimal rules on the freezing and confiscation of the proceeds of crime
- Art 5: non conviction based confiscation would be new to EU law
- Repeal 1998 Joint Action 98/699/JHA but only partially FD 2005/212/JHA and 2001/500/JHA

