EUROPEAN COOPERATION IN FINANCIAL INVESTIGATIONS AN OVERVIEW OF THE LEGAL FRAMEWORK AND FUTURE CHALLENGES *

Johan Boucht **

1. INTRODUCTION

It is a basic point of departure in criminal justice policy in most countries that a perpetrator should not profit from his crime. During the past two or three decades, the confiscation of criminal proceeds has been the object of considerable political attention, and ever broader confiscation schemes are viewed in many countries as a necessary means in combating crime, particularly organized crime and serious economic crime.

Existing confiscation regimes are sometimes criticised, both at EU and national levels, for not being sufficiently efficient.[1] The response is often new legislation conferring ever broader confiscation powers on the courts. Indeed, it is quite clear that legislation awarding courts sufficiently wide confiscation powers are essential in order to facilitate the efficient recovery of criminal gains. It is also very likely that a considerable share of criminal proceeds remain in the hands of perpetrators because confiscation has not been possible. However, the reason for this is not solely, or necessarily, the inadequacy of the powers of the courts to confiscate. It is important to consider the process as a whole. The final confiscation stage is but one part, though important, of a long process potentially resulting in depriving the confiscation subject of his ill-gotten gains.

A crucial part of this process is the financial investigation, which purports to identify and track criminal assets for the purpose of subsequent confiscation (but also for the purpose of investigating a particular offence).[2] Financial investigations may be conducted either in conjunction with the criminal investigation or independently of it. The explanatory notes to the recommendations

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** Dr. Johan Boucht, University of Oslo, Norway.

1 See e.g. 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 COM(2012) 85 final, p. 2.

2 See e.g. Angela V.M. Leong, *Financial investigation: a key element in the fight against organized crime*, Company Lawyer (2006), p. 218-221.

by the Financial Actions Task Force (FATF), describe a financial investigation as an enquiry into the financial affairs related to a criminal activity, with a view to:

- identifying the extent of criminal networks and/or the scale of criminality;
- identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and
- developing evidence which can be used in criminal proceedings (such as money laundering, corruption or fraud).[3]

An important stage closely connected with the investigative phase concerns the (temporary) freezing of suspected assets. Freezing is important in order to prevent the assets in question from being dissipated by the suspect.

The efficacy of asset confiscation regimes is therefore not solely contingent on the legal powers conferred on the courts, but also on the prior financial investigations being thoroughly and efficiently conducted. There are in fact good reasons to believe that many shortcomings in recovering criminal proceeds depend more on assets not having been identified and traced, than on the inadequacy of the legal powers conferred on the courts for the purpose of confiscation.[4]

There are many circumstances which may compromise the efficiency of financial investigations. The mind-set of investigating police officers, even of officers specialising in economic crime, may be focused more on investigating the criminal offence than on the proceeds it has generated. Financial investigations may be limited to certain kinds of offences (for example certain financial offences rather than any offence liable to produce economic gain) and/or even be considered a distraction because they divert time and resources away from the criminal investigation. Financial investigations may also be initiated too late in the process (or not at all), rather than being carried out in parallel with the criminal investigation. Moreover, there may be a lack of resources in investigating units, so that when the money trail is complicated or the benefit involved does not appear considerable, other tasks may have to be prioritised. Lastly, access to crucial information, essential to the success of financial investigations, may be inadequate. The free flow of information from government agencies (such as tax or social welfare authorities) to the

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3 International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations (February 2012; printed in February 2013), p. 97.

4 The need for broader confiscation measures may be reduced by thorough financial investigations. For example, financial investigations may uncover sufficient causal links between the offences to allow regular confiscation powers rather than extended confiscation powers.

investigating authorities may, for example, be hampered by 'watertight bulkheads' between bodies.

The increase in transnational crime, which is facilitated within the EU by open national borders, has made international cooperation in confiscation matters, including financial investigations, more important. Perpetrators may (and often do) transfer assets abroad, to their home countries, to relatives or to tax havens, in order to make it more difficult for the national authorities to trace them. These attempts to disguise illicit assets may be elaborate and can require considerable efforts by investigators to uncover.[5] In order to prevent the success of attempts to hide assets, it is important to have well-functioning international cooperation at the financial investigation stage as well. In doing so, the availability of information is essential.[6]

This paper will address cooperation in financial investigations and the subsequent freezing of suspected criminal assets within the EU. In section 2, the various paths that cooperation within the EU may follow, as well as their legal bases, will be discussed.[7] In section 3, I will close with a few remarks on how cooperation could be further developed. I will not discuss, other than briefly, international cooperation outside the EU. Nor will the different stages of an actual financial investigation, the management of frozen assets, or the subsequent process of cooperation in executing confiscation orders, be analysed.[8]

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5 John Probert and Brendan T Hewson, *Financial Investigations and the Confiscation of Assets*, Commonwealth Law Bulletin (1993), 1985, mentions one example: 'Should a person who wishes to disguise money unlawfully obtained walk into a bank in London with a holdall full of money; he could pay that money into an established business account, perhaps an account opened specifically to receive large amounts of cash such as a bookmaker or car dealer. That money could then be transferred electronically to an account in the Isle of Man (outside our jurisdiction with its own laws and also outside the European Community). That money could then be transferred to an account in the Channel Islands, again outside our jurisdiction, on to an account in the Caribbean perhaps The British Virgin Islands or Cayman, then be transferred again to an account in Switzerland and back into London into a solicitors client account for the purposes of purchasing property. At each transfer that money could have changed specie or type. The first was in sterling, the transfer to the Channel Islands could be made in US Dollars, the transfer to the Caribbean could be in Yen and the transfer to Switzerland in Deutschmarks and the last transfer would be back to Sterling.'

6 Other stages of this process involve management of frozen and confiscated assets as well as re-use of confiscated assets.

7 It may be mentioned that when preparing this paper, I interviewed financial investigators in Norway, Sweden and the UK, for the purpose of discussing their experiences of this kind of European cooperation.

8 For the latter case, see FD 2006/783/JHA (6.10.2003) on the application of the principle of mutual recognition to confiscation orders.

2. COOPERATION IN FINANCIAL INVESTIGATIONS WITHIN THE EU

2.1. INFORMATION EXCHANGE

When discussing financial investigations it is useful to distinguish between financial intelligence gathering on the one hand, and evidence gathering on the other. In many cases, the exchange of financial intelligence may be an important first stage to the gathering of actual evidence. Information exchange between financial investigators within the EU often follows one of three paths.[9]

1) *CARIN:* A first option for obtaining information is often by way of the Camden Asset Recovery Interagency Network (CARIN), a worldwide informal network of expert practitioners working with asset confiscation. The aim when CARIN was founded in 2004 was to establish an informal network of practitioners and experts for the purpose of improving mutual knowledge on methodologies and techniques in the area of cross-border identification, freezing, seizure and confiscation of the proceeds of crime.[10] CARIN currently has 53 registered member jurisdictions, including 27 EU Member States and nine international organisations (such as Eurojust, the International Criminal Court, UNODC, and Interpol). The permanent secretariat is based in the Europol headquarters at the Hague and the organization is governed by a Steering Committee of nine members and a rotating Presidency. CARIN members meet together regularly at an Annual General Meeting.

In order to fulfil the aim of mutual knowledge exchange, a network of contact points has been established. Each member state is represented by one member from law enforcement (normally a police officer) and one judicial member (normally a prosecutor). Access to the CARIN network and its website is restricted to members of the network only.

The CARIN network has proved very effective and is viewed by practitioners as an important tool when conducting financial investigations with international reach, particularly outside the EU, for example in Asia or South America. The particular benefit of CARIN is perceived as its user friendliness in terms of information exchange, which is based on informal personal contacts all over the world.

For example: The authorities in Norway suspect that John Smith has illicit assets in Hong Kong, both bank holdings and real estate. Access to this information, particularly the bank account information, will require formal Mutual Legal Assistance (MLA). However, as this process may be time consuming, it

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[9] My focus will in the following be on the phase where the financial investigation is on-going. Thus I will not particularly address international cooperation between Financial Investigation Units (FIUs).

[10] CARIN Manual (2012), p. 4.

may be valuable to obtain preliminary intelligence in order to ascertain whether or not the lead is worth pursuing. The investigators may thus decide to utilise the CARIN network in order to seek preliminary intelligence before formal MLA is requested.

2) *Asset Recovery Offices*: Even though CARIN may be used within the EU, the main channel for information exchange within the EU is often through the network of Asset Recovery Offices (AROs) established in member states.[11] The creation of AROs in EU member states, and cooperation between them, was initiated by the Framework Decision (FD) concerning cooperation between AROs of member states in the field of tracing and identifying proceeds from, or other property related to, crime.[12] The purpose was to create national authorities between which information would flow freely and swiftly. Thus, the CARIN network would be supplemented by providing a legal basis for the exchange of information between AROs in EU member states. There are currently 28 AROs in place.

According to Art. 1 of the ARO FD, the purpose of AROs is 'the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal or, as far as possible under the national law of the Member State concerned, civil proceedings.'

The FD sets up two forms of cooperation: exchange of information on request (Art. 3) or spontaneous exchange of information (Art. 4). The procedure when exchanging information on request is set out in FD 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the member states of the EU. Important provisions relate to time limits and data protection. Article 4 distinguishes between urgent and non-urgent cases. For the former, member states are to respond within at most eight hours, provided that the requested information is held in a database directly accessible by a law enforcement authority. For non-urgent cases, the requesting member state should be responded to within one week if the requested information is held in a database directly accessible by a law enforcement authority. Article 8 stipulates that intelligence provided under these provisions may only be used by the requesting law enforcement authorities for the purposes for which it has been supplied or for preventing an immediate and serious threat to public security. Use for other purposes may be permitted

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11 States may also conclude individual treaties with one or more other states for the purpose of exchanging information with regard to financial investigations, for example banking information. This may be the case for example between EEA states (e.g. Switzerland) and EU states.

12 2007/845/JHA (6.12.2007). See also Council Decision (17.10.2000) concerning arrangements for cooperation between financial investigation units of the member states in respect of exchanging information (2000/642/JHA).

solely with the prior authorisation of the requested member state and subject to the national law of the requesting member state. The requested law enforcement authority may also, pursuant to its national legislation, impose binding conditions on the use of the information and intelligence by the receiving law enforcement agency.

The idea is moreover that AROs should exchange best practices concerning ways to improve the effectiveness of member states' efforts in tracing and identifying proceeds from, and other property related to, crime which may become the object of a freezing, seizure or confiscation order by a competent judicial authority (Art. 6).

Information exchange may involve information from land records, company records, vehicle records, convictions records, and social welfare registers. Information from bank records may also in some cases be permitted if the state in question has a national bank register in place (this is the case for example in France, Italy and Croatia).[13]

It was envisaged that AROs should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and other relevant services, and that these representatives should be able to exercise their usual powers and to disclose information within the ARO without being bound by professional secrecy.[14] Thus members of different government bodies could cooperate closely, thereby making the flow of information swifter.[15] The aim was also that AROs should have access to relevant databases, both open and closed, to identify and trace assets, including financial information (ideally to a central bank account registry at national level), and should even have coercive powers to obtain such information. Furthermore, AROs were intended to have powers to provisionally freeze assets (e.g. up to 72 hours) in order to prevent dissipation of the proceeds of crime between the moment when assets are identified and the execution of a court order freezing or confiscating them.

It is, however, somewhat unclear to what extent these aims have materialised. As will be discussed below in section 3, the powers and structure of each ARO vary depending on national legislation. Nonetheless, it seems that

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13 In the Final report on the fifth round of mutual evaluations - "Financial crime and financial investigations" of the Council of the EU (2.8.2012, 12657/12), p.11, it is noted that to that date, six Member States had central bank account registries and another five Member States were considering setting up central bank account registries.

14 See Communication from the Commission to the European Parliament and the Council - Proceeds of organised crime: ensuring that 'crime does not pay' COM(2008) 766 final, p. 8-9.

15 Wide access to information is essential for carrying out thorough financial investigations. Without information, there will be no case.

the AROs have reached a satisfactory degree of cooperation and exchange of best practices.[16]

If an information request goes beyond the powers of an ARO, formal MLA is normally required. This may be the case concerning, for example, bank account information. Legal support for MLA in financial investigations in the EU may be found in a number of international conventions, many of which overlap. The main convention in Europe is the 1959 European Convention on Mutual Legal Assistance in Criminal Matters, as well as its Protocol of 1978. Requests under this convention are to be directed between justice departments. Another important convention is the EU MLA Convention from 2000, which stipulates that exchange of information should occur directly between judicial authorities rather than the justice departments.[17] This makes cooperation considerably easier. An important legal instrument is also the 2001 Bank Protocol to the EU MLA Convention. This Protocol facilitates, for example, information requests for information on bank accounts under certain conditions (Art. 1), for requests for information on banking transactions (Art. 2) and for requests for the monitoring of banking transactions (Art. 3).[18] MLA is moreover facilitated by certain parts of the Schengen Convention (Chapter 2).[19]

In 2014, the Parliament and the Council adopted Directive 2014/41/EU on the European Investigation Order (EIO), which is to be transposed by the member states by 2017.[20] The idea is that when issuing an EIO, the requesting state can have one or more specific investigative measure(s) carried out in the executing state, provided that the investigative measure seems proportionate, adequate and applicable to the case in hand. An EIO is based on a mutual recognition mechanism with the purpose of making the rules on the transfer of evidence between member states more consistent, and thus swifter and more efficient. The EIO applies to all investigative measures aimed at gathering evidence. However, the EIO only applies to requests with a view to gathering

16 See Report from the Commission to the European Parliament and the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, COM(2011) 176 final, p. 5. This was also the opinion of the interviewed investigators.

17 The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01).

18 For more on the banking protocol, see Michele Simonato's contribution in this issue.

19 Worldwide at least the following international conventions may be mentioned: the UN convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the UN convention against Corruption (2000), and the UN convention on Transnational Organized Crime (2000).

20 The European Evidence Warrant (EEW) from 2008 (FD 2008/978/JHA), which applied the principle of mutual recognition for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, only applied to evidence which already exists and was therefore limited in its scope.

evidence of a criminal offence and not for the purpose of confiscation. This will be further discussed below in section 2.2.

With regard to financial investigations, an EIO may thus, for example, be issued in order to obtain evidence concerning the accounts, of whatever nature, held in any bank or any non-banking financial institution by a person subject to criminal proceedings.[21] A member state may therefore request from another member state, by issuing an EIO, information on bank and other financial accounts in order to determine whether any natural or legal person subject to the criminal proceedings concerned holds or controls one or more accounts in any bank located in the territory of the executing state (Art. 26), as well as information on banking and other financial operations, which have been carried out during a defined period through one or more accounts specified therein (Art. 27). To this extent the Directive confers similar powers as the Bank protocol of 2001, with the exception that the conditions for application of the latter are more stringent.

3) A third available path for obtaining information is by way of establishing a Joint Investigation Team (JIT) pursuant to Art. 13 of the EU MLA Convention 2000.[22] This provision specifies two situations when a JIT may be established. First, when a member state's investigations into criminal offences require difficult and demanding investigations having links with other member states. This scenario relates to cases where the criminal investigation is primarily carried out in one state, but cross-border links makes investigations necessary in (a) neighbouring state(s), e. g. due to trafficking in narcotics and human beings, terrorism etc. Second, when a number of member states are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the member states involved. In this case the criminal investigation is carried out simultaneously by several member states. With regard to financial investigations, a JIT may be put together, for example, in connection with excise avoidance involving several EU jurisdictions.

A JIT is to carry out its operations in accordance with the law of the host state, i. e. the state in which it operates.[23] Its investigative powers may thus vary when it operates in several jurisdictions. It is up to the hosting state to confer powers on seconded officers through implementing legislation. EUROJUST may participate in the JIT in a supportive capacity.

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21 This possibility is, according to the preamble of the Directive (s. 27), to be understood broadly as comprising not only suspected or accused persons but also any other person in respect of whom such information is found necessary by the competent authorities in the course of criminal proceedings.

22 For an overview of the setting up and functioning of JITs, see generally e.g. Johan Boucht, *Cross-border Use of Police Powers within the EU – A Finnish, Norwegian and Swedish Perspective*, European Journal of Criminal Law (2012), p. 220-222. See also Claudia Gualtieri, *Joint Investigation Teams*, ERA Forum (2007), p. 233-238.

23 Art. 13(3 b) MLA Convention 2000.

The main benefit of JITs is that MLA may no longer be required as team members may initiate investigative measures in respective home countries directly. Team members may also exchange information freely.[24] Most of the members are likely to be law enforcement officers, but a JIT can also include prosecutors and judges as well as other persons.

2.2. FREEZING OF ASSETS

Having traced and identified the assets in question, there is normally a need to protect them from being dissipated by the suspect. Otherwise there is a risk that they will, for example, be moved to other accounts in other countries, which means that the whole tracing procedure will have to be repeated. Thus the question of provisionally freezing the assets arises. Freezing refers to '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'.[25]

There may, first of all, be a need to provisionally freeze assets (for example up to 72 hours) between the moment when the assets are identified and the execution of a court order to freeze them.[26] In some jurisdictions AROs may assist in provisionally freezing assets in its jurisdiction, although the powers of AROs vary, as mentioned above, from state to state depending on national legislation.[27] For example in Norway, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) may, under s. 19 of the Money Laundering and Financing of Terrorism Act, order a relevant financial agent, such as a financial institution, insurance company, securities firm, real estate agent etc., not to carry out a transaction related to proceeds of crime. This means that the Norwegian agency may, based on a (informal) request from an ARO or CARIN contact point, temporarily freeze certain assets in Norway in order to facilitate the requesting body to obtain a freezing court order.

One traditional problem has been that judicial decisions such as freezing orders need to be judicially approved in the requested state before they can be

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[24] Toine Spapens, *Joint Investigation Teams in the European Union: Article 13 JITS and the Alternatives*, European Journal of Crime, Criminal Law and Criminal Justice (2011), p. 249.

[25] Art. 1 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw 16.5.2005 (Warsaw Convention).

[26] See for example Art. 35(1) of the Fourth Money Laundering Directive of the Parliament and the Council (EU 2015/849) and Art. 14 of the Warsaw Convention.

[27] On the FIU power to provisionally postpone transactions, see Klaudijo Stroligo, Horst Intscher, and Susan Davis-Crockwell, *Suspending Suspicious Transactions*, The World Bank 2013, p. 6-16.

executed. This, again, may be time consuming. In order to make the freezing process in the EU easier, the FD 2003/577/JHA (22.7.2003) on the execution in the EU of orders freezing property or evidence, stipulates that the principle of mutual recognition also applies to pre-trial freezing orders issued for the purposes of either securing evidence or subsequent confiscation of property. The idea is that a member state shall recognise and execute in its territory such an order issued by a judicial authority of another member state in the framework of criminal proceedings without further formality being required. A freezing order should be transmitted by the judicial authority which issued it directly to the competent judicial authority for execution (Art. 4).[28]

The freezing FD has currently been implemented by 24 EU member states.[29] Where the freezing FD has not been implemented by the member state in question, formal MLA will normally have to be required.

The freezing FD is similar in structure to the European Arrest Warrant (EAW; 2002/584/JHA). Thus its application (Art. 3) is based on a distinction between offences for which there is no dual criminality requirement, and offences for which there may be such a requirement. As with the EAW, there is no dual criminality requirement for so-called euro-crimes.[30] For other offences the executing state may subject the recognition and enforcement of a

[28] It may be noted that one of the objectives with the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union is to adopt minimum rules as regards, inter alia, freezing orders in order to further facilitate mutual trust and effective cross-border cooperation. See the Proposal for the Directive, COM(2012) 85 final, 12.3.2012, p. 3-4. The Commission notes that all confiscation and freezing orders issued by a member state should over time be effectively enforced against assets located in another member state. To this end, the Commission encourages member states to implement the existing EU mutual recognition instruments.

[29] See http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=24. The implementation process is ongoing in Greece, Italy and Luxembourg.

[30] These offences include: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, and sabotage.

freezing order to the condition that the acts for which the order was issued constitute an offence under the laws of that state, whatever the constituent elements or however described under the law of the issuing state. If the dual criminality requirement is not fulfilled, formal MLA is required in order to get the freezing order executed.

The requested state may under Art. 7 refuse to recognise or execute a freezing order in certain situations. The grounds for refusal are that a) the request (i.e. the certificate provided for in Art. 9) has not been not produced, is incomplete or manifestly does not correspond to the freezing order, b) there is an immunity or privilege under the law of the executing state which makes it impossible to execute the freezing order, c) it is instantly clear from the information provided in the certificate that rendering judicial assistance pursuant to Article 10 for the offence in respect of which the freezing order has been made, would infringe the *ne bis in idem* principle, or, d) in cases where a dual criminality requirement exists, the act on which the freezing order is based does not constitute an offence under the law of the executing state.[31] [32]

It appears that the freezing FD has not been utilised by member states to any considerable extent. Partly this may be due to the relatively slow process involved in its application. However, it would seem that the main reason is that the instrument simply is considered complicated and insufficient, and that member states therefore often revert to standard MLA.[33]

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[31] However, in relation to taxes or duties, customs and exchange, the execution of the freezing order may not be refused on the ground that the law of the executing state does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing state. Execution may also be postponed by the requested state where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable, where the property or evidence concerned have already been subjected to a freezing order in criminal proceedings, and until that freezing order is lifted, or where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing state and until that order is lifted.

[32] Michele Simonato and Maxime Lassalle, *A fragmented approach on asset recovery and financial investigations: a threat to effective international judicial cooperation?*, p. NN in this publication, note that grounds of refusal, which provide national authorities to refuse a request for cooperation, may constitute a legal obstacle to international cooperation. This is probably quite right. Nonetheless, in view of the varying procedural safeguards of the Member States, such grounds of refusal probably still represent an important safety valve.

[33] See e.g. COM(2008) 766 final, 4 and Europeiska rådet, *Slutrapport om den femte omgången av ömsesidiga utvärderingar – Ekonomisk brottslighet och finansiella utredningar*, 12657/2/12 (REV2) 3.1.0.2012, p. 14. One of the problems with the freezing FD as regards the freezing of evidence has been the lack of mechanisms for transferring the evidence to the requesting state. This shortcoming, whereby evidence is not sent in the same way as in freezing with the purpose of confiscation, has been addressed in the European Investigation Order (Directive 2014/41/EU).

As mentioned above, the EIO (2014/41/EU), whose purpose is to make the transfer of evidence between member states faster and more efficient, is expected to be transposed into national law by member states probably by 2017. The EIO will thus replace the parts of the current freezing FD, which relate to freezing of evidence. However, the EIO will apparently not apply to information requests and freezing of assets with a view to confiscation rather than for the purpose of gathering evidence. In section 34 of the preamble it is specified that the Directive:

> 'by virtue of its scope, deals with provisional measures only with a view to gathering evidence. In this respect, it should be underlined that any item, including financial assets, may be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence but also with a view to confiscation. The distinction between the two objectives of provisional measures is not always obvious and the objective of the provisional measure may change in the course of the proceedings. For this reason, it is crucial to maintain a smooth relationship between the various instruments applicable in this field. Furthermore, for the same reason, the assessment of whether the item is to be used as evidence and therefore be the object of an EIO should be left to the issuing authority.'

The European legislator has thus recognised a distinction between freezing orders for the purpose of gathering evidence of an offense, and freezing orders for the purpose of facilitating subsequent confiscation. Nonetheless, the Council pragmatically recognises that the distinction between the two objectives is not always obvious and may change in the course of proceedings, and, thus, that it is crucial 'to maintain a smooth relationship between the various instruments applicable in this field'. Specification of the purpose is to be left for the issuing state, and the requested state is expected to respect this decision.

What this seems to mean is that the EIO will only replace the freezing FD to the extent that it involves the gathering of evidence for an offence, such as money laundering or fraud. If, on the other hand, the request is made with a view to facilitating subsequent asset confiscation, the EIO will not, in principle, be applicable. Thus the request would still have to be made under the freezing FD of 2003.[34] In order to apply the EIO, therefore, the requesting authority should formulate the purpose of an EIO to be the gathering of evidence rather than confiscation.[35]

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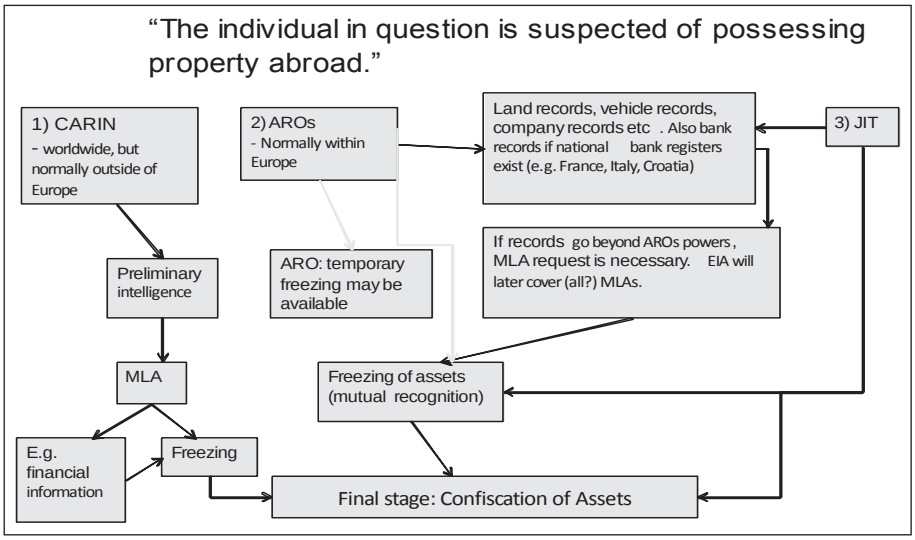
[34] It may be noted that in spite of the EIO being adopted, Greece, Italy and Luxembourg are at the time of writing in the process of implementing the FD 2003/577/JHA on freezing orders.

[35] Instead of having FD 2003/577/JHA in force in parallel with the EIO as concerns freezing for the purpose of confiscation, it might be more convenient to issue a Directive which combines the 2003 FD on freezing of assets with a view to confiscation and FD 2006/783/JHA on mutual recognition of confiscation orders. Thus, the entire freezing process as regards evidence would be regulated in one instrument (the EIO), whilst freezing with a view

2.3. SUMMARY

The discussion above shows that there are a number of ways to obtain information from abroad for the purpose of conducting financial investigations. The various paths may be summarised graphically as follows.



3. CONCLUDING OBSERVATIONS

At a general level it seems that EU cooperation for the purpose of conducting financial investigations is functioning fairly well. There is a decent level of standardisation, which makes cooperation easier and swifter. The time limits set for information exchange between AROs, which do not apply to MLA, also assist in increasing efficiency. Nonetheless, various obstacles still exist and there is room for improvement. I will below close with a few observations on possible obstacles to swift and effective cooperation in financial investigations between EU member states. Addressing these points could potentially further improve possibilities for successful cooperation in this area. However, when considering expansions in information sharing

to confiscation as well as mutual recognition of subsequent confiscation orders, would be regulated in another. It may be noted that the Commission stated in its communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Agenda on Security (COM(2015) 185 final, 28.4.2015, p. 17) that the mutual recognition of freezing and confiscation orders should be further improved within the EU. It also notes that cross-border cooperation between national Financial Intelligence Units (FIUs) and AROs helps to combat money laundering and to access the illicit proceeds of crime. It also finds it necessary to align and reinforce the powers of FIUs, as differences in their roles hinders cooperation and information exchange.

mechanisms, it is always important to take account of possible human rights implications as well.[36]

Firstly, the powers of AROs in different member states seem to be somewhat unclear, because the extent of AROs' powers varies from jurisdiction to jurisdiction. These differences relate to, for example, access to and availability of various registers. In order to facilitate effective cooperation, it is important that all AROs have access to all relevant databases.[37] Differences also exist as regards the existence of temporary freezing powers in order to facilitate the processing of a court order either freezing or confiscating assets. The general availability of temporary freezing powers might constitute a valuable addition.

Secondly, not every member state has national bank registers today (e.g. Italy, France and Croatia have registers in place). In states that do not have national bank registries in place, access to banking information would be limited to judicial authorities. It may in addition prove difficult and time consuming to get hold of account information if the authority (or requesting state) does not have access to specified information, such as a bank account number, as this would require the national judicial authority to separately approach and officially request the information from financial institution in their jurisdiction. The availability of, and access for AROs to, national bank registers would therefore probably be a useful addition to the existing toolbox.

Similar problems may be linked to the lack of company registers in order to identify, for example, hidden beneficiaries.[38]

Thirdly, there may be a lack of resources. The fact that AROs often seem to be understaffed may affect the efficiency of cooperation.[39] In the Commission report on the cooperation between AROs it was noted that the majority of AROs have relatively few staff and only 6 out of 28 designated offices have 10 or more staff members. It is also unclear to what extent the intended multi-disciplinary structure has materialised.

Fourthly, cooperation may be inhibited by confidentiality rules between government bodies. As a consequence, such information does not float freely

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36 Access to, for example, banking data may potentially constitute an interference with the right to private life under Art. 8 of the ECHR. See Simonato and Lassalle in this publication, p. 14-16.

37 See also COM(2008) 766 final, p. 8-9.

38 In Art. 3(6) of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing 'beneficiaries' are defined as 'the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted'. Art. 30(3) of the Fourth AML Directive (EU/2015/849) specifies that 'Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State'.

39 COM(2011) 176 final, p. 8.

within the jurisdiction. When an information request thus arrives, it may be that for example the ARO cannot get hold of relevant information from other state bodies. Improving cooperation between government bodies, as well as adjusting confidentiality rules, would therefore be important. The creation of national multi-agency asset recovery bodies (of the kind envisaged for AROs; see above) might also be an important improvement.

Lastly, language and/or cultural barriers may represent generic bottlenecks in international and EU cooperation.[40] Cooperation may be delayed, for example, due to inadequate legal translations of requests from other member states. Informal cooperation may also be affected by a lack of proficiency in spoken English either on the side of the requesting (or inquiring) or requested state. Cultural barriers may also present obstacles. *Borgers* and *Moors* note that their research, for example, indicated that one bottleneck may derive from not enough account being taken of the expectations that foreign cooperating parties may have of each other regarding the way they are treated, particularly if such cooperation takes place between individuals at hierarchically different levels.

[40] See Matthias J. Borgers and Johannes A. Moors, *Targeting the Proceeds of Crime: Bottlenecks in International Cooperation*, European Journal of Crime, Criminal Law and Criminal Justice (2007), p. 9-10.