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**NOTE**

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From: General Secretariat of the Council  
To: Delegations  
Subject: Report on Eurojust's Casework in Asset Recovery

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Delegations will find attached the report on 'Eurojust's Casework in Asset Recovery', as it was issued by Eurojust on 12 February 2019. The report can also be found on Eurojust's website.

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# Report on Eurojust's Casework in Asset Recovery

12 February 2019

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## Executive summary

The objective of the *Report on Eurojust's Casework in Asset Recovery* is to assist competent judicial authorities in the EU Member States to effectively recover criminal assets and to contribute to the fight against transnational crime. The report is primarily based on the analysis of cases addressing asset recovery issues registered at Eurojust between 1 January 2014 and 31 March 2018, and is complemented by views expressed during dedicated discussions with some Eurojust National Desks.

The report constitutes an overview of the main legal and practical issues encountered by Eurojust in its casework in asset recovery, the support provided by Eurojust at any given stage of the asset recovery process, the main judicial cooperation instruments and tools used, and the best practice identified.

In relation to **asset tracing**, the report identifies the benefit of i) identifying the appropriate corresponding competent national authority; ii) concluding such an enquiry prior to seeking assistance; iii) using specialised forensic accountants to both assist in the investigation of the financial information and serve as potential expert testimony, iv) a multi-disciplinary approach to asset tracing at EU level, especially in larger cases, combining the skills of specialist authorities in the Member States; v) raising awareness among national practitioners on the statutory responsibilities of the Asset Recovery Offices and Financial Intelligence Units; vi) requesting a full investigation by the Asset Recovery Offices; and vii) including a financial enquiry as an objective in all joint investigation team agreements.

In relation to **asset freezing and confiscation**, the report identifies the benefit of i) early consultation between the competent authorities in the Member States to avoid difficulties caused by the differences in national approaches to the implementation of Framework Decision 2003 on freezing orders<sup>1</sup> and Framework Decision 2006 on confiscation orders<sup>2</sup>; ii) a comprehensive understanding of the breadth and limitations of EU and international legal instruments as a necessary guide to the correct choice of instrument, for instance, when seeking recognition of a freezing order or if the assets sought to be frozen are both criminal proceeds and evidence; iii) anticipating questions relative to the rights of third parties; iv) instigating a parallel investigation or setting up a joint investigation team when the information contained in a freezing order or Letter of Request may identify criminality in the executing/requested State; and v) understanding the distinctions in the ultimate confiscation instrument to be applied, e.g. value-based, extended confiscation, non-conviction-based and unexplained wealth orders, which may avoid derogation from mutual recognition if the executing State does not have similar domestic legislation.

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<sup>1</sup> Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence.

<sup>2</sup> Framework Decision 2006/783/JHA of 6 October 2006 on the principle of mutual recognition to confiscation orders.

In relation to **asset disposal**, the report identifies the benefit of *i*) anticipating potential causes for delay to avoid unnecessary loss of value, such as early clarification of whether the assets were confiscated as a proceed of crime, which may be sold, or as evidence, which may not be sold; *ii*) anticipating requirements such as provisions for compensation, compliance with notice provisions and potential appointment of a judicial administrator for a company (liquidator), all of which can be burdensome and create delays; *iii*) considering, if possible, the early sale of assets to avoid both loss in value and high management costs; and *iv*) reassessing the value of a confiscation order to take into account the ultimate realisation value of a sold property, as difficulties often occur due to significant differences between the estimated value and the value realised.

Eurojust's casework shows that its assistance is sought by both issuing or requesting and executing or requested authorities throughout the asset recovery process, from asset tracing to asset freezing, confiscation and disposal. Eurojust's casework also confirms the need for multi-jurisdictional coordination and highlights the multilateral and multi-disciplinary dimensions of asset recovery.

The benefits of **Eurojust's support**, as identified in the report, include *i*) the coordination of a joint investigative strategy and intelligence activities; *ii*) the exchange of relevant information on the extent and limitations of relevant domestic, EU and international remedies; *iii*) clarification of domestic requirements between issuing/requesting and executing/requested authorities; *iv*) the ability to harmonise and resolve contrasting views of the effect and requirements of EU and international legal instruments; *v*) providing a channel of communication between the concerned Member States and third States through Liaison Prosecutors at Eurojust and Eurojust contact points; *vi*) the coordination of the transmission and execution of Letters of Request, freezing and confiscation orders between competent authorities in complex cases and ongoing parallel investigations; *vii*) the assistance in drafting Letters of Request and freezing and confiscation certificates; *viii*) advice on the requirements for official translations; *ix*) the potential for an ongoing case review, including links between parallel investigations; and *x*) the ability to augment mutual trust between investigators and prosecutors.

The casework shows that Eurojust is a privileged forum for the facilitation of dialogue, taking into account the legal traditions, legal systems and diversity of languages across the EU, and for finding acceptable solutions for the countries involved. Since depriving criminals of the proceeds of crime is an essential component in disrupting organised crime, the report demonstrates Eurojust's contribution to this mission.

# Methodology

The report is primarily based on the analysis of cases registered at Eurojust in which asset recovery issues were addressed in the period between 1 January 2014 and 31 March 2018 (the reporting period). The identified cases were selected on the basis of their particular legal or practical issues and best practice in this field, and the analysis was complemented by the views expressed during dedicated discussions with some Eurojust National Desks.

For the purpose of the report, asset freezing encompasses the asset tracing stage and the asset freezing stage as such, as they are interlinked. Similarly, asset confiscation will encompass both asset confiscation and the subsequent asset disposal stage. For this reason, there will be occurrences where the description of a legal or practical issue, or the support provided by Eurojust will include elements of other stages of the asset recovery process.

The legal and practical issues identified in the report do not always necessarily constitute difficulties or obstacles. In some cases, they are more of a descriptive nature and, in that sense, may be considered ‘informative’. In other cases, they may relate to positive or more recent practices in asset tracing, freezing, confiscation and disposal.

While the support provided by Eurojust in the analysed cases addresses the identified legal and practical issues, not always is an identified legal or practical issue addressed in the corresponding section on Eurojust support. This could be explained by the fact that the case was still ongoing at the time it was analysed, that the national authorities did not inform Eurojust of further developments of the case, or simply because such information was not available at the time of writing.

## Introduction

Organised criminal groups collect substantial profits from various criminal activities, and the proceeds of crime are laundered and re-injected into the legal economy. Depriving criminals of the proceeds of crime is an essential component in disrupting organised crime. Against this backdrop, the confiscation and recovery of criminal assets is a very effective way to fight organised crime. Moreover, confiscation has a deterrent effect by strengthening the notion that ‘crime does not pay’.

Eurojust has built up significant institutional knowledge of solutions and best practice, which can significantly improve the effectiveness of the investigations, prosecutions and ultimately the recovery of criminal proceeds.

In the *Final Report of the 5th Round of Mutual Evaluations on Financial Crime and Financial Investigations*<sup>3</sup>, Eurojust is encouraged to promote and explain its potential added value for investigations and prosecutions, including the role of JITs to practitioners, especially law enforcement authorities and prosecutors. In accordance with the recommendations of such *Final Report*, in the *Council Conclusions and Action Plan on the way forward with regard to financial investigation*<sup>4</sup>, Eurojust is encouraged to, within its mandate, further develop as an expertise hub on financial investigations to facilitate financial investigations. In the *Conclusions of the 8th Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, held at Eurojust, The Hague, on 12 December 2014*,<sup>5</sup> Forum members considered, *inter alia*, that in the context of Eurojust's assistance to national authorities, best practice should be collected and shared among practitioners. Also, in its *Conclusions on the Eurojust Annual Report 2015*<sup>6</sup>, the Council appreciated the important role played by Eurojust in improving cooperation between Member States in freezing, confiscation and asset recovery, notably the *Report on Eurojust's Experience in the field of Asset Recovery, including Freezing and Confiscation*<sup>7</sup>, and encouraged Eurojust to continue its efforts to further strengthen judicial cooperation, including by sharing best practice and case law.

It should also be noted that Eurojust's role and expertise in assisting national authorities in this field was emphasized in the *European Agenda on Security*<sup>8</sup>. In the *Implementation of the Council Conclusions setting priorities in the fight against organised crime for 2018-2021 – identification of the relevant actors*<sup>9</sup>, Eurojust is identified as a relevant actor involved in fighting money laundering and in asset recovery, as Eurojust is involved in the respective EMPACT priority<sup>10</sup>.

The report constitutes an overview of the main legal and practical issues encountered by Eurojust in its casework on asset recovery, including the support provided by Eurojust at any given stage of the asset recovery process, the main judicial cooperation instruments and tools used, and the best practice identified.

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<sup>3</sup> Council doc. 12657/2/12 REV 2.

<sup>4</sup> Council doc 10125/16.

<sup>5</sup> Council doc. 8552/15.

<sup>6</sup> Council doc. 10003/16.

<sup>7</sup> [Report on Eurojust's experience in the field of Asset Recovery, including Freezing and Confiscation](#), Council doc. 10179/15.

<sup>8</sup> (COM 2015)185. The EU Internal Security Strategy for the period 2015-2020 (also called 'renewed internal security strategy') is defined in the Council Conclusions of 16 June 2015. The Council Conclusions on the mid-term review of the Renewed European Union Internal Security Strategy 2015-2020 refers to the need for further improving the fight against financial crime and money laundering, and facilitating asset recovery by supporting effective practical cooperation between Member States in close cooperation with the Commission and, where relevant, with JHA Agencies.

<sup>9</sup> Council docs 10011/17 and 15049/1/18 REV 1.

<sup>10</sup> EMPACT Criminal Finances, Money Laundering and Asset Recovery.



The report is divided into four main sections, and tracks each stage of the asset recovery process:

- Section 1 on **Asset Freezing**, subdivided into Asset Tracing and Asset Freezing.
- Section 2 on **Asset Confiscation**, subdivided into Asset Confiscation and Asset Disposal.
- Section 3 on **Best Practice** highlights best practice identified in Eurojust’s casework in the four stages of the asset recovery process.
- Section 4 concludes the report and provides a brief summary of the findings.
- The main issues are in **bold**.
- At the end of each of the four stages of the asset recovery process, ‘**Highlights for Practitioners**’ contains a summary of the main legal and practical issues, Eurojust’s support and best practice identified in **Asset Tracing**, **Asset Freezing**, **Asset Confiscation** and **Asset Disposal**, respectively.
- Eurojust **case examples** populate the report.

The report was prepared during the negotiations of the Proposal for a Regulation on the Mutual Recognition of freezing orders and confiscation orders<sup>11</sup>, which Eurojust followed closely and which addresses some of the issues identified in the report. The support of Eurojust in: *i*) the transmission and execution of freezing and confiscation orders, including its coordinating role in cases of a confiscation order concerning an amount of money that is transmitted to more than one executing State, and *ii*) the facilitation of close communication between national authorities, including the facilitation of consultations in matters related to costs resulting from the execution of a freezing or confiscation order, is foreseen in the Regulation (Recitals 24, 27, 43 and 44 and Article 31) and is reflected in the report. The preparation of the report also saw the deadline for transposing the Directive on the European Investigation Order (hereinafter referred to as EIO DIR)<sup>12</sup> (22 May 2017), which has since become gradually operable in the Member States that are bound by it.

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<sup>11</sup> Regulation (EU) 2018/805 on mutual recognition of freezing orders and confiscation orders replaces FD 2003/577/JHA on freezing orders as regards the freezing of property between the Member States bound by this Regulation as from 19 December 2020, and replaces FD 2006/783/JHA on confiscation orders between the Member States bound by this Regulation as from 19 December 2020.

<sup>12</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Article 36).

# 1. Asset Freezing

## 1.1. Asset Tracing

### 1.1.1. Legal and practical issues

Problems have been encountered in relation to the **identification of assets and use of Asset Recovery Offices (AROs)**<sup>13</sup>. These issues arose in connection with freezing orders issued according to **Framework Decision 2003/577/JHA** of 22 July 2003 on the execution in the EU of orders freezing property or evidence (hereinafter referred to as 'FD 2003 on freezing orders'). In some Member States (MSs), court decisions on freezing are value-based, with no specification of the assets or the location of the assets, while FD 2003 on freezing orders requires delivery of a certificate specifying those assets to be restrained (this may be a problem specific to the use of this FD). Therefore, the authorities of some MSs frequently use the facilities offered by those AROs. In such cases, the first problem is indeed the identification of the actual assets that are proceeds of crime.

Issues concerning **jurisdiction/competence** were also reported. These issues were linked to value-based court orders, as the authorities of those MSs issuing such court orders do not know where to send the freezing orders. Understandably, if their authorities issue a Letter of Request (LoR) for the execution of such order to a MS, not knowing if that MS has any assets to freeze, the requested MS perhaps may not investigate the assets, if any, that are owned or controlled by the person subject to the freezing order in that MS.

With regard to requests for the identification of assets belonging to a person abroad, difficulties have been encountered in **persuading the requested authorities to conduct such enquiries**.

**Insufficient awareness in some MSs of AROs** and their role was reported in some cases. Some judicial authorities are unaware of the presence of AROs in their own MSs.

In some cases, **issues related to Financial Intelligence Units (FIUs)** arose. In these cases, poor contacts between the FIUs of the MSs involved were noted, as the FIU of one of the MSs involved was insufficiently organised and unable to obtain the needed information. In other cases, despite room for improvement, communication between the FIUs of the MSs concerned were helpful in establishing contacts quickly to freeze the assets in question.

Issues also arose in some MSs due to the **absence of central bank registers and public registers for companies and property**.

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<sup>13</sup> 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.

**The transmission of an LoR simultaneously through parallel channels (Ministry of Justice, INTERPOL, and Eurojust)** posed difficulties. In this case, the requested State was a third State, and the requested authorities indicated that because the LoR was transmitted through different channels in parallel, the initiation of execution of the LoR was delayed, and that this transmission through different channels in parallel also caused internal duplication and overlapping of actions in the requested State.

Difficulties arising from the required **channel for transmission of banking information in execution of the LoR, the urgency of its receipt, and the risk of expiration of the statute of limitations** were also encountered. In this case, the requested authorities sent part of the requested banking evidence, fundamental to the investigation in the requesting State, through the ordinary postal service. There was a real risk that this evidence might not have been received by the requesting authorities prior to the the expiration of the statute of limitations in relation to the charges against one of the suspects, resulting in an inability to proceed criminally against that suspect.

**Deficiencies in the LoR led to a request to issue a new LoR.** In this case, *i*) the translation of the LoR was considered extremely poor, *ii*) the description of the facts was insufficiently clear, and *iii*) no reference was made to the legal basis for the issuance of the LoR. This situation resulted in the requested authorities requesting the issuance of a new LoR.

Issues arose with **notification of the owners of the bank accounts and related procedural rights.** According to the legislation of one requested third State, after its authorities, in executing the LoR, identify the owners of the bank accounts, they are obliged to give them the opportunity to block transmission of the identified banking information to the requesting State. Only after all appeals have been refused (in the event that any appeals have been lodged) can the authorities of the requested State transmit the requested banking information.

In one case, a more extensive investigation into the money trail was conducted by the requested State. According to the legislation of this requested State, when a foreign country seeks banking information in respect of bank account A, the authorities of the requested State will obtain the relevant documents and analyse them themselves. If these authorities see that the funds in bank account A originate from bank account B, these authorities will on their own initiative obtain the documents in relation to bank account B. And if, again, these authorities see that bank account B was merely a transit account, and that the funds originated from bank account C, these authorities will obtain the documents pertaining to bank account C. While this process is more time-consuming, it results in the requesting authorities ultimately receiving the full paper trail without the need to send the requested State additional LoRs for bank account B, and subsequently for bank account C.

Another interesting issue identified in Eurojust's casework was the **setting up of a joint investigation team (JIT) solely for the purpose of conducting a financial investigation**. In one case, the head of the OCG was convicted and serving a seven-year sentence. The first **coordination meeting**<sup>14</sup> at Eurojust took place after the conviction. Ten bank accounts in MS A contained funds of unknown origin amounting to approximately **EUR 500 000**, and the authorities believed that the **money was being laundered** out of MS A to MS B, and thereafter to other countries. MS A's authorities were looking at Western Union payments and believed that the convicted head of the OCG had benefitted from approximately **EUR 1 million** derived from criminal activity. **The JIT was set up exclusively for the financial investigation**. The criminal proceedings had already ended. The determination of the criminal 'benefit' for the purpose of a confiscation order usually requires a lower standard of proof than that required to convict. While JITs in which MS A is a member always contain a financial investigation element, this JIT was established **solely for the purpose of a financial investigation** and was being **set up after the conviction**.

A related issue is **whether a financial investigation is possible during the post-conviction or execution phase of the criminal proceedings**. This issue is related to the horizontal approach of the material scope of the European Investigation Order (EIO). In fact, the possibilities for conducting a financial investigation during the last phase of criminal proceedings to ensure the enforcement of a confiscation order vary according to legal system. In some MSs, a **financial investigation in the post-conviction phase** is limited, *e.g.*, in terms of the authority that is competent to conduct such financial investigation and the crime types in relation to which it may be conducted.

In addition, the fact that **a financial investigation was one of the purposes of a JIT** was observed in some cases. In one case, all other objectives of the JIT had been achieved except the financial investigation. For this reason, the involved parties to the JIT agreed on its extension. In this case, the authorities of one MS required further investigation to establish whether two individuals had *i*) unjustified resources (considering their lifestyle, spending habits and actual income) and *ii*) any type of relationship with some of the other suspects, so that the two persons could be linked to the criminal investigation.

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<sup>14</sup> A coordination meeting is one of the tools Eurojust uses to carry out its mission. The purpose of a coordination meeting is to stimulate discussion/exchange of information and reach agreement between national authorities on their cooperation and/or the coordination of investigations and prosecutions at national level. These meetings are attended by the national judicial and law enforcement authorities from the Member States. In addition, representatives from third States, as well as officials from cooperation partners such as Europol and OLAF, and international organisations such as INTERPOL, may be invited. Coordination meetings are used to facilitate the exchange of information, to identify and implement means and methods to support the execution of MLA requests or coercive measures (i.e. search warrants and arrest warrants), to facilitate the possible setting up and functioning of a JIT, to coordinate ongoing investigations and prosecutions, and to detect, prevent or solve conflicts of jurisdiction, *ne bis in idem*-related issues or other legal or evidential problems. One crucial service provided during coordination meetings is simultaneous interpretation, which allows the participants to communicate directly with their counterparts and to present the issues of judicial coordination arising in criminal investigations or prosecutions in their own languages, allowing a more comprehensive understanding of their respective legal regimes.

**Financial investigations targeting persons who are not suspects** may sometimes pose difficulties. Some national legal systems do not permit investigations into assets that have been passed on to third parties. Others do, but require proof of *mala fides* even if the third person is a relative or close associate who has obtained the asset for significantly less than market value, raising the question of whether judicial authorities should investigate the transferred ill-gotten gains when the account holders are not the targets. The main issues are proportionality and due process. Recital 27 of the EIO DIR encourages the broad application of Articles 27 and 28 of the EIO DIR ‘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’.

### **1.1.2. Eurojust's support in asset tracing**

If one considers that Article 12(2) of the 2001 Protocol to the 2000 Mutual Legal Assistance Convention has not been replaced by any corresponding provision of the EIO DIR, Eurojust’s advisory role in facilitating solutions to practical problems is still legally in place.

As an initial step, **Eurojust** often assisted in **identifying and providing the contact details of the competent national authorities** both in the requesting and in the requested States, thus ensuring that requests for assistance and replies thereto were addressed to the appropriate recipient, while also contributing to establishing or strengthening **direct contacts between national authorities**.

Eurojust also often **facilitated the spontaneous exchange of relevant financial information between judicial authorities without the need for an LoR or EIO** within the limits of national legislation of the involved MSs on the basis of Article 7 of the 2000 Mutual Legal Assistance Convention, or with third States on the basis of Article 11 of the **Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg**, Article 10 of the **1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime**, Article 20 of the **2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime and on the Financing of Terrorism**, Article 18(4) of the **United Nations Convention against Transnational Organized Crime**, and Articles 46(4) and 56 of the **United Nations Convention against Corruption** triggering the initiation of pre-trial proceedings or opening lines of financial investigation within ongoing criminal proceedings.

Eurojust National Members' direct or indirect access to national registers or databases allowed for a **swift and secure exchange of financial and property information** during the tracing phase.

**Eurojust also often assisted in the transmission of LoRs and EIOs seeking financial information**; such transmission has been particularly important in very urgent cases.

**Eurojust contact points in third States**<sup>15</sup> facilitated the execution of requests for tracing and identification of assets by, *e.g.*, *i*) confirming that the concerned third State could deal with the execution of the request on the basis of the documentation received by e-mail, and *ii*) advising on the authority competent to deal with the request and on the legal requirements.

In many cases, **Eurojust assisted in obtaining information on the state of play of the execution of urgent LoRs**. For example, in one case, the authorities of the requesting State asked for Eurojust's assistance in obtaining information on the state of play of the execution of urgent LoRs, seeking banking information on given accounts (including, among other measures, the freezing of any available amount in the account to a maximum of EUR 103 000) in the absence of replies from the requested States. **Eurojust opened the channels of communication between the involved MSs by retransmitting the LoRs, facilitating the exchange of additional information, and, in some cases (especially when a ground for refusal occurs), the information that the LoR had been fully executed.**

**Liaising between Eurojust and the contact point of one MS of the network against corruption**<sup>16</sup> also proved fruitful. The contact point brought the matter in question to the attention of Eurojust, as the requesting authorities had not received a reply from the requested authorities in relation to their LoR seeking banking information.

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<sup>15</sup> Eurojust contact points facilitate cooperation between competent authorities of the Member States and third States. At present, 42 third States have Eurojust contact points.

<sup>16</sup> The contact point of the network against corruption can be a member of the Eurojust National Coordination System, *see* Article 12(2)(d) of Eurojust Decision 2002/187/JHA, as amended by Council Decisions 2003/659/JHA and 2009/426/JHA. As of 12 December 2019, the applicable provision is Article 20(3)(e) of the Eurojust Regulation for the MSs bound by this Regulation (Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA).

In other cases, Eurojust served as a **channel for the transmission of financial and banking information for the execution of the LoRs, especially in urgent cases with a very high risk of expiration of the statute of limitations**. In one case, *e.g.*, the authorities of the involved countries considered the possibility that the Eurojust National Member of the requesting State could, in that capacity, produce a document for the competent public prosecutor and the competent court in his/her MS. This possibility would have allowed the transmission of banking information, which had already been transmitted to the Eurojust National Member by the **Liaison Prosecutor at Eurojust**<sup>17</sup>, of the requested third State, in advance of a formal receipt by post from the requested third State. This document, together with the relevant banking documentation, would urgently be introduced into the criminal proceedings of the requesting State. In this case, all urgent measures had been carried out, and the banking information analysed by the requested authorities, for further transmission. This information was fundamental to the investigation in the requesting State, as the authorities would not otherwise have been aware of such information, and the requesting authorities ran the risk they might no longer be able to proceed criminally against one of suspects should the banking information not be received in time. The difficulties in this case were further compounded by the fact that at a later stage the Federal Criminal Court of the requested third State overruled a previous decision adopted by the third State's Ministry of Justice that had authorised the transmission of the banking records. The final authorisation to use the already provided information as evidence in a tax and corruption-related offences investigation in the requesting State had to be re-ordered by Ministry of Justice after the affected persons (account holders) had the right to be heard, in line with the domestic legislation of the third State, resulting from the fact that the initial authorisation to transmit the banking records had been made in the third State without having granted the concerned persons the right to be heard and without an appealable order. This situation resulted in the need for a new procedure in the third State and in the information being unable to be used as evidence in the trial, which was scheduled to start soon in the requesting State. Ultimately, the assessment of the principle of speciality and the authorisation of further utilisation was granted by the competent authority of the requested third State after all procedural requirements had been met. This decision was confirmed by the Federal Criminal Court of the third State in time to be used as evidence in the trial in the requesting State.

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<sup>17</sup> Eurojust has six seconded Liaison Prosecutors: from Norway, the USA, Switzerland, Montenegro, Ukraine, and FYROM. Their presence at Eurojust, and their involvement in cases, is considered beneficial, as they can accelerate and facilitate judicial cooperation between competent authorities of Member States and third States. The legal basis for the secondment of a Liaison Prosecutor is a cooperation agreement.

In other cases, Eurojust assisted in the **coordination of the execution of LoRs seeking financial and banking information** involving several countries by organising **coordination meetings** during which the countries involved exchanged information about the state of play of their investigations and the execution of the LoRs, discussed the legal and practical issues at hand and identified links among targets and countries involved, their organisational structure and financial flows. In some cases, Eurojust also **prepared overviews of the links between the suspects under investigation, including links resulting from the financial investigations**, and additional targets that emerged as a result of the sharing of information.

**Coordination meetings were held to discuss the interim results** of the financial investigation element of a particular JIT when one of the specified purposes of the JIT had been to conduct financial investigations in the MSs involved in the JIT. This discussion often permitted a revision of the initial terms of the financial aspect of the investigation. In such cases, Eurojust assisted in the drafting of amendments to extend JIT agreements for the purpose of allowing the parties to finalise their financial investigations.

Eurojust was also active in **raising awareness of the role of AROs among practitioners**. In specific cases, Eurojust informed the competent national authorities of AROs and recommended their consultation and referral.



### 1.1.3. Asset Tracing – Highlights for Practitioners

#### Asset Tracing

##### Legal and practical issues

Eurojust's casework in the reporting period identifies quite a number of **legal and practical issues** that have arisen in **asset tracing**, including the following:

- **Actual identification of the assets** abroad and the **use of AROs**, including in relation to value-based court orders that raise **jurisdictional concerns**, as the competent authorities do not know to which MS to send the order.
- Difficulties in persuading the requested authorities to conduct such enquiries, and, in some cases, **insufficient awareness of the existence of AROs and their role**.
- Poor contacts via the **FIUs** of the MSs involved or networks of FIUs (*e.g.* the Egmont Group of Financial Intelligence Units<sup>18</sup>), although some networks proved helpful in establishing contacts.
- **The existence of a central bank register and public registers for companies and for property** in the countries involved would have accelerated execution of the LoR.
- **Simultaneous transmission of LoRs for banking and financial information through parallel channels** has occasionally hindered, rather than expedited, the initiation of the process of execution by creating internal confusion as to its reception.
- **Required channel for transmission of banking information, associated with the urgency of its receipt due to the risk of expiration of the statute of limitations**.
- **Delays stemming from deficiencies in the LoRs**, *e.g.* poor description of the facts or poor translation or absence of reference to a legal basis, have led to the **need to issue a new LoR**.
- **Notification of the owners of the bank accounts and the need to take into consideration their related procedural rights** before the identified information can be transmitted to the requesting State have also caused delays.
- **Financial investigations targeted to persons who are not suspects** sometimes posed difficulties, as in some national legal systems financial investigations do not apply to assets that have been passed on to third parties.

##### Eurojust support

With regard to the **support provided by Eurojust** at the stage of **asset tracing**:

- Often assisted in **identifying the competent national authorities**, ensuring that requests for assistance and replies thereto were addressed to the competent recipient, and also contributing to the establishment or strengthening of **direct contacts between national authorities**;

<sup>18</sup> The Egmont Group of Financial Intelligence Units is an informal network of 156 financial intelligence units.

- Often **facilitated the spontaneous exchange of relevant financial information between judicial authorities without the need for an LoR or EIO**;
- Often assisted in the **transmission of LoRs seeking financial and banking information** and in the **transmission of the actual financial and banking information as well as the exchange of additional information**, which was particularly important in urgent cases;
- Advised judicial authorities by **facilitating solutions to practical problems**;
- Assisted in **obtaining information on the state of play of the execution of LoRs**;
- **Eurojust National Members' direct or indirect access to national registers or databases** allowed for a **swift and secure exchange of financial or property information at the tracing phase**;
- **Eurojust contact points in third States** have also proved to be established channels of communication;
- Assisted in the **coordination of the execution of LoRs seeking financial and banking information** involving several countries by organising **coordination meetings**;
- Prepared **overviews of the links between the suspects under investigation, including links resulting from the financial investigations, and additional targets** that emerged as a result of the sharing of information;
- **Assisted in the setting up of JITs, including for the purpose of a financial investigation; and**
- **Raised awareness of the role of the AROs among practitioners**;

### Best practice

- In those countries in which **central bank registers and public registers for companies and property** exist, information on bank accounts, companies and property related to a suspect can be made available more swiftly, thus allowing for a quicker execution of requests for freezing;
- **Establishing a JIT solely for the purpose of conducting a financial investigation**;
- **Thorough investigation by the requested State into the money trail**. This process is time-consuming, but results in the requesting authorities ultimately receiving the full paper trail without the need to send the requested State additional LoRs;
- Some MSs have started to **hire specialised accountants to work on the financial investigations** in the framework of criminal investigations. Their **role is to assist the prosecutors**. The importance of 'going after the money' is becoming increasingly apparent, leading to the need to involve and appropriately remunerate the experts that have the necessary skills to properly assist and inform the prosecutors leading the investigations, who in turn become better equipped to take well-informed decisions;

- **Close cooperation (e.g. exchange of information) between specialised forensic accountants** of the involved countries in which parallel financial investigations are ongoing;
- Having units or departments within the competent authorities **specialised in asset recovery cases**;
- **Multi-disciplinary approach and interaction among different stakeholders**, e.g. FIUs, the Egmont Group, AROs, police and customs officials working alongside prosecutors in cross-border asset recovery cases, supported by **Eurojust** when needed;
- Consideration and discussion among the involved countries of future freezing and confiscation possibilities, taking into account the national, EU or international legal framework, as early as **the stage of cooperation in terms of asset tracing**, and involving **Eurojust**, if appropriate;
- **Presence of the requesting (for an LoR) or issuing State (for an EIO) in the requested/executing State can prove useful in assessing the relevance of the search results**, as further assets other than bank accounts, e.g. investment funds or insurance policies, may exist that had not been foreseen when the LoR/EIO was issued; and
- **Provide specialised training for prosecutors** in the field of asset recovery.

## 1.2. Asset Freezing

### 1.2.1. Legal and practical issues

#### A. Requirements for issuing and considerations for executing a freezing order or an LoR seeking freezing measures

In some cases, **differences in national implementation of FD 2003 on freezing orders** led to delays in the execution of the freezing orders. These differences were linked to the fact that, in some MSs, national legislation requires that the receipt of the Article 9 certificate of FD 2003 on freezing orders (hereinafter referred to as ‘Article 9 certificate’) be accompanied not only by the national freezing order but also by a corresponding LoR. Requesting that a certificate be accompanied by an LoR raises the question **whether the concept of mutual recognition is well understood among some practitioners**. Some MSs require receiving the original of the certificate (*i.e.*, in the language of issuing State) and others require receiving the original of both the national freezing order and the Article 9 certificate. In other MSs, reference in the certificate to the freezing of the entire bank account balance suffices on the basis that the amount of the seizure is limited by the damage caused by the crime, which is stated in the reasoning of the accompanying freezing order, while in other MSs, this reference does not suffice and, instead, the maximum amount to be frozen must be specified in the Article 9 certificate itself. Moreover, in some MSs, an official original letter from the issuing authorities containing the missing or accurate information is required, while in other MSs, a less formal transmission of information or a new amended Article 9 certificate is required. These differences resulted, in some cases, in the need for amendments in both the Article 9 certificate and the freezing order, and, consequently, to **delays in the execution of the freezing order**.

**Incomplete or inaccurate Article 9 certificates** have also led to **requests for additional information, resulting in delays in the execution of the freezing order**. This was the case, *e.g.*, when: *i*) the name of the suspected company was incomplete and/or incorrect (Section G of the Article 9 certificate) and the correct name was needed to establish territorial jurisdiction in the executing State; *ii*) the exact identification of the competent appeals court in the issuing State in the event of an appeal (Section J) was missing; *iii*) the date of issuance of the certificate was missing (Section L); *iv*) the date and the file number of the freezing order were missing (Section E); *v*) the place and date of the facts, and the concrete terms of the participation of the suspects in the criminal activity, *i.e.* their roles, were missing (Section I); or *vi*) the maximum amount for which recovery was sought was not clearly indicated, or more information on certain property, *e.g.* vessels, such as the plate number, date of build, building number, motor number, photographs, or any other available information to identify them properly, was missing (Section F).

**Complexity of formal requirements**, their **divergent interpretation**, and **uncertainty** as to whether use of the standard form (Article 9 certificate) is **mandatory**, and in which circumstances, has been noted.

In one case, the **information provided both in the freezing order and in the Article 9 certificate was considered insufficient and resulted in the executing authorities seeking that both the freezing order and the certificate be amended to contain more specified information**. In this case, the certificate only mentioned the total damage caused by the criminal activity without specifying the precise amount of money that was requested to be frozen. Furthermore, the freezing order only requested that the money in the bank accounts be frozen, without any information on the exact sum that was requested to be frozen. To decide on the **recognition of the freezing order**, the executing authority **requested to know the exact amount of money that was asked to be frozen** in relation to **each bank account mentioned in the Article 9 certificate**. In this case, although at a later stage the Article 9 certificate was amended but the freezing order was not, the executing authorities insisted that both documents be amended and to specify the above terms. In another case, the **absence in the freezing order of the quantification of the ill-obtained gains by the suspect** led to the need for information to be subsequently provided, as required by the executing State.

Eurojust's casework also shows that **requests for additional background information have been made to execute a freezing order**. In a separate case for which an Article 9 certificate was used, additional information was requested in relation to an escrow **bank account in the executing State**. This situation resulted in a prosecutor of the issuing State being required to clarify that the bank in the executing State had acted as an escrow agent, holding hundreds of thousands of euros in its own name but on behalf of the parties, and that the sum in question was the retainer for the purchase of a company. According to the escrow agreement, the bank in the executing State would have been required to pay half of the retainer to the seller on a specified date, and, to prevent that situation, the prosecutor in the issuing State sought to freeze the bank account regardless of whether the official owner of the bank account was in fact the bank in the executing State. In this case, two days before the freezing of the bank account should have taken place (otherwise, the risk of the money being transferred was very high), **requests for additional amendments to the Article 9 certificate** were required by the executing authority before it was in a position to decide on the freezing of the bank account. These amendments were linked to the fact that the freezing order mentioned that the freezing should be executed '*with the exception of company XY*', and, according to FD 2003 on freezing orders and its implementation in the executing State, executing the freezing order with any given exceptions is not possible.

In separate cases in which **LoRs seeking freezing measures were issued, requests for additional information were also made by the requested authorities.** In one case, the requested State sought the following additional information: *i*) the **legal texts containing the criminal offences** of which each of the individuals was suspected (related to the **freezing order**) in the languages of both the requesting and the requested States and *ii*) **clarification as to whether the legal persons in question were being considered as criminally liable** for the offences quoted in the conclusion of the preliminary investigation. In another case, obtaining **supplementary information necessary to execute the freezing measure was hampered due to the early stage of the investigation in the requesting State.** In this case, the requested information was: *i*) date of birth, passport number or foreign ID card number (which is needed to open any bank account in some MSs) of the persons in relation to whom the measures were requested; *ii*) the connection between one of the suspects and one of the companies mentioned in the LoR and how the banking information sought was relevant to the investigation; and *iii*) the maximum amount to be frozen or the amount that constituted the proceeds of crime, which needed to be indicated in the LoR, as, **under the law of the requested State,** the freezing of a bank account is associated with a maximum amount to be frozen. In relation to this last point (*i.e.* a maximum amount to be seized), the investigators were unable to provide this sum as they were not yet in a position to establish the estimated amount of money illegally gained through the criminal activities at the very early stage of the investigation.

In other cases, **an inaccurate version of the Article 9 certificate was used,** *i.e.* the version of the certificate that the issuing authorities used was not exactly the format of the certificate annexed to FD 2003 on freezing orders. This situation resulted in delays, as the executing authorities required the accurate and proper format to be submitted. In another case, the Article 9 certificate was rejected as it only included the fields that corresponded to the details of the particular case, *i.e.* the issuing authority manually typed the Article 9 certificate, and deleted the fields of the certificate that did not apply to the case, rather than simply leaving them blank or filling in the words ‘Not applicable’.

In other cases, **translation-related issues** led to delays, especially when the execution of the freezing order was **urgent.** In one such case, the executing authority was unable to freeze the requested bank account **until both the Article 9 certificate and freezing order were translated into the language of the executing State.** In other cases, parts of the freezing order had been wrongly translated in the Article 9 certificate. In several cases, delays were experienced in obtaining the translation of relevant documents, sometimes unavoidably due to the voluminous nature of such documentation, which subsequently caused delays in determining the recognition or execution of the freezing order or LoR.

In other cases, a **perceived need by the competent issuing authority to issue an LoR, accompanied by an Article 9 certificate to seek the freezing of assets**, was observed, *i.e.* an **insufficient awareness** on the part of the issuing/requesting authority of **the exact formalities surrounding the issuance of an Article 9 certificate accompanied by a freezing order, according to FD 2003 on freezing orders and the implementing legislation in the issuing State.**

*B. Differences in national legislation regarding possibilities for freezing assets*

In one case, **differences in national legislation when applied to the freezing of commercial activities** raised difficulties. In this case, MS A sought the seizure of the revenues/proceeds of commercial activities in MS B. However, in MS B, such seizure would have been **difficult without a detailed explanation of the link between the money and the criminal activity**. MS A's authorities subsequently limited their request to the commercial activities carried out by the suspects to be arrested, and, in MS A, this condition alone, *i.e.* **the link between a person to be arrested in the context of a specified type of OCG foreseen in the law of MS A and the commercial activity**, was sufficient to proceed with the seizure of the revenues/proceeds of the suspects' commercial activity and eventually its confiscation.

Eurojust's casework has also identified difficulties caused due to **different styles of preventive measures utilised in some national legislation** in the pursuit of criminal assets, such as **unexplained wealth, non-conviction-based orders or civil confiscation orders**. The difficulty becomes acute if national legislation in the requesting/issuing State is not reflected in the requested/executing State.

For instance, in some MSs, preventive measures may be put in place based on the concept of unexplained wealth. After the prosecution has established that the suspect, having a criminal past, possesses wealth that appears to be disproportionate when balanced against the suspect's legitimate source of income, the suspect must provide evidence that his/her assets are of legal origin. The prosecution is not required to prove any link to a specific criminal act at the moment the issue of the unexplained wealth is being considered. Some of these MSs have specialised criminal courts and judges, and special legislation for dealing with such measures, and although they are criminal courts, the proceedings in question are not criminal. Some MSs will refuse to recognise this kind of *interim freezing order* as any subsequent confiscation, based on the assessment of unexplained wealth, will be considered as outside the scope of the confiscation options adopted by that State under Article 3(2) of FD 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property.

The **issue of equivalent value or the need to specify assets** became apparent in a specific case involving two freezing orders issued by MS A for execution in MS B on the basis of FD 2003 on freezing orders. Under the legislation of MS A, if the possibility does not exist to: (a) surrender or remove the specific property, or (b) seize funds held in an account, booked securities, or real estate or asset values that are either intended for the commission of a criminal offence or are the proceeds of specific criminal activity, an order can **instead be made** for the seizure of property, funds, securities, assets or real estate of an **equivalent/corresponding value**. Therefore, the issue at hand was whether the law of MS B required any specific information for the freezing order. In this case, under the law of MS B, the execution of the freezing order required **either a judicial order** or - if not provided for by the legislation of MS A - **a declaration that all MS A's national requirements are met. Other MSs may have higher requirements to recognise purely value-based orders.**

### *Eurojust case illustration*

An Italian OCG with links to Portugal, Slovenia and Spain allegedly committed money laundering and criminal acts related to bankruptcy, tax evasion and VAT fraud. An investigation initiated in Italy brought to light an accountant who acted as the representative of several companies and ran a fraudulent scheme involving acquisitions of companies in insolvency or other high-risk assets, including the fraudulent transfer of financial assets to Portugal.

The main suspect worked and lived in Italy, but maintained a domicile in Portugal. He appeared to be directing the OCG and managing financial assets on behalf of others, particularly in Portugal, Slovenia and Spain. He also allegedly led a money laundering network that carried out a variety of other economic crimes, including issuing and using false invoices and financial statements. Through connections with another suspect, this OCG was linked to another large Italian OCG involved in money laundering.

In December 2015, the Italian prosecuting authorities requested Eurojust to facilitate the necessary judicial cooperation from Portugal and Slovenia to map the activities of the OCG abroad and agree on a common strategy. Assistance was further needed from Portugal, Slovenia and Spain to facilitate the financial investigation in Italy. **Cooperation was required to identify accounts, securities or properties linked to the investigated persons, their front men and related companies and to identify income and assets.**

A coordination meeting was held in March 2016 to facilitate the execution of the Italian requests and exchange information on the case with the judicial authorities of Portugal, Slovenia and Spain. The coordination meeting also served to prepare additional MLA requests, such as house searches,



**seizures and freezing** of assets, as well as to coordinate how to proceed without harming any investigative efforts in the other participating States. More information regarding the money laundering activities was needed from Italy to prolong the period for which a suspicious transaction suspended by the Portuguese authorities could be kept frozen. Coordination meeting participants agreed that a date for simultaneous execution of preventive measures could be set after a complete overview of the investigations and the state of execution of the Italian MLA requests was made.

A coordination centre at Eurojust at the end of May 2016 supported the joint actions. Approximately 50 simultaneous searches of homes and premises, **more than 150 seizures of bank accounts related to the suspects and linked companies**, as well as witness hearings were carried out in Italy, Portugal and Slovenia during and after the action day. Six key targets, including one fugitive in Albania, were arrested, and **a seizure order equivalent to approximately EUR 11 million was carried out**. The money represented the illicit profits of the OCG. In the aftermath of the action day, Eurojust facilitated the transmission of an Italian MLA request to Brazil and closely monitored the stage of execution of a request sent to Croatia to ensure swift progress in the case.

### *C. Identification of the national competent authority*

In one case, **clarification of the central authority best placed to receive the freezing order was required**. The executing State had notified the Council of the EU of the two authorities that were considered central for the purpose of the application of Article 4(1) of FD 2003 on freezing orders. Establishing which of the two authorities was best placed to receive the freezing order was needed.

In other cases, **issues arose linked to identification of the competent authority for the execution of freezing measures if the assets were situated in different locations in the executing/requested State**. In one case, *e.g.* while property was situated in one town and the bank accounts in another, the requesting authorities sent the LoR to the Ministry of Justice of the requested State, which was not the competent authority to deal with either aspect of the request. The Ministry of Justice was asked to channel the request to the competent authorities. The principle of *prior in tempore prior in iure* was found to apply in the requested State. When various measures concern property/bank accounts in different locations, the investigative judge competent to deal with the execution of **all measures in the different locations** is the investigating judge **who first receives the request** (if the investigating judge of town A first receives the request, he/she will then be competent to deal with the request in relation to the bank accounts in town A and also the property located in town B).

Difficulties arose in relation to the **freezing of immovable assets** in situations in which **various land registers were located in the same country**.

*D. Choice of legal instrument*

In one case, difficulties arose regarding the **choice of legal instrument related to the issue of ensuring freezing pending the appeal of a confiscation order**. In this case, the request for the execution of the freezing order arrived at the same time, as the request for the execution of the confiscation order itself. The executing State did not freeze the assets immediately due to insufficient information. A separate issue arose as to whether the confiscation order made in the issuing State (albeit not final, as an appeal was pending) was sufficient to seize the assets if part of the judgement (concerning the confiscation of the assets) was translated into the language of the executing State; or, alternatively, whether the executing State required a new LoR concerning only the specific assets in question (together with a partly translated judgement). Under the law of the executing State in question, until a confiscation order is final, their authorities, from an issuing State perspective, must issue a freezing order. The executing State's view was that the issuing State should decide **whether the judgement pending appeal constituted a freezing order or a confiscation order and which legal instrument to use: e.g. FD 2003 on freezing orders** or FD 2006/783/JHA of 6 October 2006 on the principle of mutual recognition to confiscation orders (hereinafter referred to as '**FD 2006 on confiscation orders**'), making use of the Article 9 certificate or the Article 4 certificate of FD 2006 on confiscation orders, respectively; or, alternatively, an LoR on the basis, e.g., of the **1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime** or the **2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime and on the Financing of Terrorism**, accompanied by the judicial decision of the requesting State. In this case, the issuing State opted to use FD 2003 on freezing orders accompanied by the relevant part of the judgement ordering the confiscation of the assets (which was pending appeal), and translated both the Article 9 certificate and that part of the judgement.

Practitioners experienced uncertainty in some cases in relation to **which legal instrument should be used: FD 2003 on freezing orders or the EIO**. This uncertainty occurred in situations in which the assets were sought both as evidence and for future confiscation and might, at a later stage, be considered either only as evidence or as proceeds of crime. This uncertainty was also noted in situations in which the assets were initially sought for one purpose, and at a later stage this purpose either changed or an additional purpose was added. Eurojust's assistance was requested in this situation, especially in relation to MSs with very little experience in the application of the EIO.

*E. Simultaneous transmission of LoRs concerning the seizure of money to more than one requested State*

In one case, **MS A issued two LoRs seeking the seizure of money in MSs B and C.** Upon the receipt of MS A's LoR for the seizure of approximately EUR 12 million, MS B's authorities enquired whether the other LoRs concerned the same value. MS A's authorities clarified that: *i) the total amount of the seizable assets (equivalent to the proceeds of the alleged offences) was approximately EUR 25 million, and that under MS A's law and case law, **each suspect was jointly liable**, and in this sense the freezing order could affect his/her assets up to the entire seizable amount; *ii) the two freezing orders had already been executed in MS A covering the amount of approximately EUR 13 million (out of the global amount of seizable profit per equivalent), and that approximately EUR 12 million (the amount that had not yet been frozen) was now the objective of the LoRs issued by MS A to MSs B and C; and iii) MS A's authorities would inform MSs B and C of any reduction of the seizable amount as a result of seizures carried out in the other countries.**

*F. Restitution of assets to victims or compensation of victims*

The issue of **freezing for the purpose of restitution** of assets to victims together with the necessary consideration **of alternative legal routes** emerged in some cases. Freezing for the purpose of returning the assets to the victim is not possible under FD 2003 on freezing orders. Examples of this limitation have occurred, *inter alia*, in CEO (Chief Executing Officer) fraud cases investigated by MS A in which, typically, money is stolen from a victim in MS A and transferred to a bank account of a suspect in MS B. On the basis of a suspicious transaction report, MS B initiates its own domestic investigation into the fraudulent transfer, after establishing beyond any doubt that the money belongs to the victim (located in MS A). As a result, MS B freezes the bank account in the framework of its domestic investigation to prevent the suspect from transferring the money further or withdrawing it. The problem was that the account was always controlled by the suspect, and despite the obvious fact that the money did not belong to this person, MS B could do nothing. The only person who could manage the bank account was its owner, despite the fact that he did not possess the money. MS B had no legal tool to force this person to transfer the money back to the victim, even though the account was frozen. Moreover, the bank in MS B would only accept a transfer order from the owner of the account. This problem was further compounded by the fact that any freezing order issued by MS A for the **purpose of returning the money to the victim could not be recognised and executed in MS B under FD 2003 on freezing orders.** As a result of this recurring problem, MS B amended its law and adopted new legislation that allows a judge to issue an order for a bank to transfer money back to the victim, thus resolving this limitation of the scope of FD 2003 on freezing orders whereby, within the framework of its own investigation triggered by the suspicious transaction, MS B is able to return the money to the victim in MS A without recourse to judicial cooperation in criminal matters mechanisms.

In one case, MS A issued a freezing order accompanied by an Article 9 certificate as well as a separate LoR which also sought, *inter alia*, the freezing of assets. The purpose of the freezing order was the return of money to victims. In this case, MS B froze the bank account in question on the basis of the LoR, and not FD 2003 on freezing orders, thus indicating that the recovery of the victims' money for the victims is outside its scope.

In another case, assets had been frozen in MS B in execution of MS A's freezing orders under FD 2003 on freezing orders. MS A authorities' expectation was that the normal criminal procedure to confiscate such assets might take several years. MS B's authorities, however, were unable to maintain the assets frozen for such an extended period of time, and the difficulties were compounded by the fact that the assets had been frozen for the purpose of confiscation and **not restitution to/compensation of victims**. Therefore, other solutions were sought via an alternative civil route. The facts subject to the criminal and financial investigations in MS A were linked to liquidation proceedings in a third State. The liquidation judgement passed in the third State had been recognised in MS A, and MS A's liquidator (representing the liquidator of the third State) and prosecutor liaised with a view to ascertaining the extent to which the **third State liquidation judgement** could serve as a **legal basis to recover assets** owned by the suspects in MS A's investigation for the **benefit of the victims (who were at the same time the 'creditors' in the liquidation proceedings)**. The authorities of both MSs agreed that MS A's authorities would continue liaising with the third State liquidator so that the latter could explore the possibility of requesting the recognition of the third State liquidation judgement to MS B's authorities **with a view to having the criminal freezing order 'replaced' by an equivalent civil one, to ensure that the victims' interests were protected**. One of the objectives of the discussions was to ensure that the interests of MS B's authorities would be taken into account, notably costs incurred by MS B's authorities in the execution of MS A's freezing orders. MS B's authorities agreed to liaise with their competent authorities to identify **which civil route** would be possible.

### ***Eurojust case illustration***

The case concerns bribery of high-ranking officials in Uzbekistan. Non-Uzbek companies were using bribes to acquire state-owned licences needed to access the Uzbek telecommunications market. Large sums of money were transferred to bank accounts of off-shore companies owned and controlled by Uzbek citizens. The off-shore companies were controlled by the main high-ranking suspect in Uzbekistan. The money was subsequently transferred to different foreign bank accounts controlled by the main suspect and used to purchase real estate and luxury items.

Investigations were taking place in a number of countries, including Sweden, the Netherlands, Switzerland and the USA, into bribery of companies and/or related offences, such as money laundering and forgery of documents. Other countries, including Belgium, France, Norway and the UK, were also cooperating with the investigations.

A Eurojust case was opened by the Swedish National Desk in January 2013. Since then, four coordination meetings were held at Eurojust. First, the focus was on the sharing of information on the state of play of the ongoing investigations and on the legal issues in obtaining evidence abroad. At the fourth coordination meeting in May 2017, parties discussed the charges that were brought against the companies in some countries, issues related to the confiscation and restitution of assets, and a possible *ne bis in idem* situation. During the meeting in May, eight countries participated; most of them had opened their own investigations. This meeting provided the first opportunity to meet with representatives from Uzbekistan and, together with them and all other countries involved, asset sharing was discussed. Progress would not have been possible without the coordination of the different investigations by Eurojust.

Eurojust, through the organisation of these coordination meetings, established a platform for exchange of information, enhancing trust and mutual understanding, which resulted in more effective bilateral contacts outside Eurojust. Approximately EUR 1 billion 250 million in assets from 12 countries was frozen.

### G. Freezing measures in ongoing parallel investigations

Eurojust's casework shows that it plays a significant role in the coordination of investigations and prosecutions involving freezing measures. In one case, **ongoing parallel investigations were taking place in two MSs** with regard to the commission of an extensive fraud and the laundering of the proceeds of such fraud. The **implications of the national legal parameters** for both freezing and **confiscation orders as well as the exercise of the EU legal tools for their execution** were extensively discussed and considered. MS A was investigating theft-related offences amounting to tens of thousands of euro, while MS B was investigating money laundering and participation in an OCG in respect of the proceeds of the criminal activity primarily carried out in MS A. MS B **froze bank accounts and property** in MS B in the framework of its domestic investigation, following a very thorough financial investigation. Reciprocal LoRs were exchanged with a view, among other measures, to **sharing that financial information** and **giving formal notice of the execution of the freezing orders** in MS B to the **persons residing in MS A against whom those orders had been made**. MS A's investigators were focusing on the **money trail** of the main suspect's proceeds of crime with a view to issuing a freezing order under **FD 2003 on freezing orders** concerning funds/property belonging to the main suspect located in MS B, which might ultimately be available to satisfy any confiscation order made in MS A (in the event that the main suspect was convicted), even if in MS B such funds/property had already been frozen by MS B's authorities under their own pending investigation. Under the legislation of MS A, a freezing order can restrain all the defendant's assets, regardless of whether or not such assets are the proceeds of crime. The order **did not require that it be asset-specific, but simply limited to the defendant's assets**. In legal theory, such an order would also require that it be limited to the maximum possible amount of a confiscation order, but due to the size of the alleged overall fraud, this issue was not relevant in this case. Also, under the legislation of MS A, a confiscation order is assessed as value for the accused's benefit from the offences for which he has been convicted. Such a confiscation order constitutes a judgement debt in MS A, enforceable against all his property. For this reason, specification of the property in a confiscation order is generally not necessary, but such an order is **only enforceable against property that is his/hers**. However, MS A's authorities acknowledged that for either a freezing order or confiscation order to be recognised abroad, **specifying the assets** was necessary (as it is a requirement under **FD 2003 on freezing orders** and **FD 2006 on confiscation orders**). MS A sought a copy of MS B's freezing order **and the supporting documents upon which that order had been made**. The authorities of both MSs **exchanged information on the freezing orders** already in place in MS B, including: *i*) **details** of the assets frozen; *ii*) their **ownership**; *iii*) the **rights of third parties** under the law of MS B, and whether these had been exercised so far; *iv*) the **priority of the creditors in relation to the assets**; and *v*) measures put in place regarding the **management of frozen** assets to avoid loss of value. MS B's authorities informed MS A's authorities that a dedicated public body in MS B was dealing with the **management of frozen assets**, and that the assets were not losing value. In the **freezing-related** aspects of this case, both MSs agreed that: *i*) MS B's authorities would provide all documents that were necessary for MS A to prepare a freezing order; *ii*) direct contacts between both MSs' authorities, notably their respective **financial investigators**, would continue for the purpose of exchanging information on the assets, which was **fundamental for**

establishing the link between the property to be seized and the real person controlling companies that own the property; and *iii*) cooperation from MS B's authorities was vital in identifying the assets, allowing MS A's authorities to be in a position to issue a freezing order that complied with the terms of **FD 2003 on freezing orders**.

In another case of **parallel investigations**, issues linked to *i*) **reciprocal LoRs seeking, *inter alia*, banking and financial information and freezing and confiscation measures, ii) choice of legal instrument, and iii) extended confiscation** were encountered. This case clearly illustrates the added value of **discussing the legal possibilities of future freezing and confiscation measures in both MSs at the stage of asset tracing**. MS A was investigating money laundering, while MS B was investigating participation in an OCG and fraud. The MSs assessed the legal potential for **freezing and confiscation measures, including extended confiscation**. The concept of **extended confiscation** in criminal proceedings existed and applied in the legal systems of both MSs. MS B invited MS A to **carefully and substantially justify**, including by outlining the **evidence gathered, all future requests for freezing/confiscation** to be executed in MS B. According to the law of MS B, such requests **must indicate all individual assets to be seized or confiscated, and their value** to both facilitate their swift execution and enable a more effective subsequent preservation of the measures executed. For this purpose, MS A's authorities highlighted the importance of receiving precise information from MS B's authorities (*e.g.* a **report of MS B's financial expert** on the illicit activities of one of the main suspects) **to try to identify the assets to be seized in MS B before the execution of the measures**. The **EIO was the judicial cooperation instrument** used by MS A to seek **very detailed financial information from MS B** to prepare accurate requests for freezing/confiscation to be executed in MS B in accordance with its requirements. The EIO Directive was in force in both MSs. With regard to the **choice of judicial cooperation instrument** to be used **for the freezing/confiscation requests** from MS A to MS B, although both MSs had implemented the relevant mutual recognition instruments, consideration had initially been given to issuing an **LoR requesting freezing for the purpose of extended confiscation**, using the **1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation** as a legal basis. The reason for this choice had initially been that the law that implemented FD 2003 on freezing orders in MS A **did not allow freezing for the purpose of extended confiscation**. At a later stage, however, no need for extended confiscation was found, and, therefore, MS A's request to MS B for the freezing of assets would only be for the **direct confiscation** of the assets in MS B, because all the assets to be seized were proceeds of the investigated offence or constituted the direct instrumentalities of the offence. Consequently, **FD 2003 on freezing orders** was used, and MS A issued a freezing order accompanied by the Article 9 certificate. In the Article 9 certificate, MS A's authorities indicated all the assets they sought to be frozen in MS B. If some of the assets indicated by MS A's authorities coincided with those that MS B's authorities wanted to freeze in the context of their own investigation (for an amount equivalent to up to EUR 1.5 million), these assets would then be deducted and frozen on the basis of MS B's decision. MSs A and B also discussed the **differences in their legal systems regarding the freezing of activities of a company/assets owned by a company**. In MS A, seizing of the majority of the shares of a company sufficed for the judicial authorities to be able to have full control of the company. In MS B, seizing the individual assets owned by the

company was required to stop its activities. This information was important in helping MS A's authorities prepare future requests for freezing/confiscation to be executed in MS B. The investigative measures, including the **seizing measures, were determined, planned and executed in close cooperation and coordination between both MSs** with the support of **Eurojust**.

The **legal basis for freezing assets** was also discussed in another case of **parallel investigations**. In this case, MS A was investigating an offence of fraud in relation to a transfer of funds from a bank account in MS A to a bank account in MS B. MS A issued an LoR to MS B seeking, *inter alia*, the freezing of the funds in the given bank account. The fraudulent origin of the money in the bank account in MS B was reported by MS A, **and criminal proceedings were also initiated in MS B**. The alleged owner of the bank account in MS B was arrested when he attempted to withdraw the money from the bank account, and the money was (as a preliminary measure only) **frozen for a period of 72 hours in the framework of MS B's investigation**. A **possible conflict arose between the domestic freezing order and the request for freezing contained in the LoR from MS A's authorities**. No formal charges had been brought against a person in MS A at that time, a situation that hindered the freezing of the bank account on the basis of MS A's LoR, according to MS B's legislation. However, the use of FD 2003 on freezing orders was possible, as this instrument had been implemented in MS B, and, according to its implementing law, criminal proceedings did not need to have been brought against a specific person. In this case, however, from the moment formal charges were brought in MS A against a suspect, the bank account could be frozen on the basis of the LoR and subsequently on the basis of MS B's legislation.

In another case involving **parallel investigations**, the **execution of domestic and foreign freezing orders** and **possible *ne bis in idem* issues** were considered. This case involved five MSs, with parallel investigations ongoing in MSs A and E. Different types of evidence were sought by MS A from the four other MSs. Concerning **asset recovery measures**, MS A *i*) asked MSs B, C and D for the analysis of the **financial and asset situation of the potential suspects**, and *ii*) issued a **freezing order for a bank account** (approximately **EUR 1.8 million**) in MS E. In turn, MS E issued an urgent LoR to MS A, **seeking clarification of the facts under investigation** in MS A and the transmission of a copy of the final court decision in the proceedings in MS A, should there be one. The bank account in question in MS E had already been frozen by MS E's authorities in the framework of their own domestic criminal investigation into money laundering in connection with an offence of VAT fraud (predicate offence) under investigation by MS A (on the basis of suspicious transaction reports by the competent MS E's FIU). The freezing of the bank account in MS E's proceedings was a **provisional anti-money laundering measure** foreseen in their national law. Accordingly, before executing MS A's freezing order, MS E's authorities raised the issue of a **possible *ne bis in idem*** and sought clarification from MS A's authorities, by way of an LoR. The money was already frozen in the framework of MS E's domestic proceedings, so it could not disappear. After the reply from MS A, MS E's authorities were satisfied that the facts under investigation in MSs A and E were the same. MS E's authorities, in the absence of a final decision from MS A: *i*) **decided to discontinue the criminal proceedings** in MS E until **the investigation in MS A was concluded**



**and**, in the event of a final decision in MS A, **determine the exact facts**, to avoid a situation in which the person(s) found guilty in MS A would be found criminally responsible twice (*i.e.* also in MS E), and *ii*) **ordered approximately EUR 1.8 million in the bank account to be frozen in the framework of MS A's proceedings** (*i.e.* in execution of MS A's freezing order). According to MS E's criminal procedural rules, in the absence of a decision from MS A, technically 'suspending' its investigation would have been difficult. Therefore, MS E's authorities decided to discontinue the investigation with the possibility to review such decision (and possibly reopen the investigation, *e.g.* should MS A decide not to prosecute) after a final decision in MS A's proceedings became available to MS E's authorities.

In another case, issues linked to **a possible breach of the *ne bis in idem* principle, due to the opening of a money laundering investigation by the executing State following a cash seizure made in the execution of an LoR while the issuing State was also investigating money laundering**, were discussed between the MSs involved. Due to the amount of money seized (EUR 4 million in cash) in execution of an LoR, and the fact that **'cash seizure'** could be considered a measure to take out of circulation **money that was presumed to be linked to international drug trafficking**, the requested authorities **decided to open domestic criminal proceedings to investigate a money laundering offence**, which could have raised a possible *ne bis in idem* issue under **Article 54 of the 1990 Convention Implementing the Schengen Agreement of 1985 (CISA)**. From the perspective of the requested State, this case was primarily an investigation by the requesting State, which incidentally and as a result of the execution of an LoR had led to the start of a criminal investigation for money laundering in the requested State. Although the commencement of the investigation on the basis of the *notitia criminis* as a result of the execution of an LoR was appropriate, the legislation of the requested State foresaw an offence of money laundering even if the proceeds of crime (the assets) were proceeds of a predicate offence committed abroad (**criteria of extraterritorial application of domestic criminal law**). In light of the above, and despite the fact that the opening of criminal proceedings in the requested State was appropriate, **Eurojust** proposed that the requested authorities consider issuing an LoR to the requesting State, outlining the possibility of **transferring the criminal proceedings** in the requested State to the requesting State. Irrespective of the matter of transfer of criminal proceedings, the issue of the **disposal of the seized cash remained**. The executing authorities decided to propose to the issuing authorities the **transfer of the criminal proceedings for money laundering** that originated from the cash seizure; and with regard to the cash seized, the requested authorities decided to confiscate that money in the framework of a separate and previously unconnected conviction of the same individual in the requested State. The reasoning of the requested authorities was that since: *i*) this conviction in the requested State preceded the execution of the LoR; *ii*) the money had been found in the requested State; *iii*) strong reasons were present that the money constituted proceeds of crime; and *iv*) the money belonged to the same individual, keeping the cash seized for the purpose of a future confiscation in the requesting State would not be in the interest of the requested authorities.

In another case, the **identification of a linked case in the requested State led to the freezing of a bank account there in the framework of a newly opened money laundering investigation.** After receiving an LoR, the requested authorities (MS B) identified a suspicious transaction of hundreds of thousands of euro connected to persons under investigation in the requesting State and that were mentioned in the LoR from MS A. As a result, MS B opened its own money laundering investigation and **froze hundreds of thousands of euro.** More information about the possible money laundering activity, however, was needed to keep the bank account frozen. MS A's authorities provided a more complete picture in a second LoR, with the caveat that this information could not be used in MS B's investigation until action was taken to avoid a premature disclosure of MS A's investigation.

*H. Communication of the execution of an LoR seeking freezing measures*

**Delay in communicating the execution of freezing measures** was observed in one case in which the assets had been frozen but this information was only communicated to the requesting State, via Eurojust, five months later. This delay was a cause of concern for the requesting State, as this request was urgent.

In another case, **the very formalistic and protective legal system of the requested State in relation to the freezing of assets** resulted in the requested State, in practice, being unable to disclose to the requesting State either details as to the status of the execution of their LoR or the outcome of the LoR until the authorities of the requested State had taken the necessary formal decisions.

### ***Eurojust case illustration***

A large-scale operation carried out by the Italian authorities revealed a sophisticated OCG involved in carousel fraud of excise duties regarding the importation of oil products to Italy. This fraud resulted in losses to Italy of more than EUR 15 million. The oil was purchased in Germany and mixed with additives to disguise the real nature of the product and supposedly sent to Malta and Greece, where no similar tax was imposed due to the creation of false transportation documents that indicated a different buyer than the genuine buyer. The oil travelled free of tax, after which it was stockpiled and then sold on the black market in Italy through a network of buyers.

Aware of the cross-border nature and potential impact of the ongoing excise fraud, the Italian authorities recognised that successful investigation and prosecution required a coordinated and multi-disciplinary approach, and therefore requested the support of Eurojust. The need to facilitate the execution of Italian MLA requests to the UK, Malta, Romania, the Czech Republic, Germany and Greece was immediate, as was support in the coordination of judicial activities. A coordination meeting was held in March 2014, which allowed for the fine-tuning of various investigative activities and an assessment of the progress made and any obstacles encountered in the execution of the MLA requests. The meeting also served to identify parallel investigations to avoid *ne bis in idem* and allow a transfer of proceedings, if necessary.

At the beginning of 2015, new MLA requests were issued by Italy with a view to initiating a joint action day in the participating States. During the action day in March 2015, the representatives of the national authorities of Italy, the UK, Romania, Germany, Malta and the Czech Republic, as well as OLAF and Europol, worked closely together through Eurojust's coordination centre. As a result, eight suspects were arrested, 61 searches and seizures were carried out and 43 freezing orders were executed, covering 21 properties valued at EUR 1 654 000, company shares with a value of EUR 757 000, along with large quantities of jewellery, bank deposits and life insurance estimated at EUR 458 000.

The coordination centre played a vital role in producing these positive results, as analytical and operational assistance was given in real time and any challenges presented by the legal systems in the Member States were overcome through the immediate sharing of information. The results of the coordination centre were significant for Eurojust in the fight against carousel fraud, not only for the positive operational results of the coordinated action day across the Member States, but also because the criminals were deprived of their assets, compensating Italy for the economic losses suffered due to the illegal activities of this OCG.

## *I. Asset management*

Some cases identified issues linked to the **management of the seized assets, including related costs, value of the assets, and possibility of early sale of the seized assets.**

In one case, the court in the executing State ordered its **ARO** to ensure the adequate maintenance of a seized vessel. Mooring costs were being claimed and the vessel was in very poor condition.

In another case, the executing authority advised that **maintaining the storage of a yacht that was frozen was too costly**, and asked the issuing authority **if an order for the sale of the seized yacht by the issuing authority would be possible**. The issuing authority agreed, and an order for sale under this condition was transmitted to the executing State for enforcement.

In another case, the executing authorities informed the issuing authorities that **conducting an official expert evaluation of the asset was too costly**, and that even allowing an official expert to gain access to the property to conduct the evaluation was unlikely. The executing authorities, nevertheless, indicated that they themselves would enquire about the value of the property among local real estate agencies.

In another case, under the legislation of the executing State, the sale of the seized assets was possible in an **urgent situation**, such as a potential substantial loss in value or if the management costs of the assets (*e.g.* storage costs) were no longer feasible when considered against the value of the assets. If so, its authorities could task an expert to estimate the value of the seized assets. In this case, the issuing State issued a request to the executing State, accompanied by an Article 9 certificate, **to sell the assets** in question (cars, motorbikes) **as soon as possible to avoid a loss in value of the assets and high management costs** (in this case, storage costs), especially if a final judicial decision on the confiscation would not be taken quickly. While this approach offers clear financial incentives, authorities may be subject to a claim for compensation in some MSs if a confiscation order is not subsequently made.

In another case, issues arose regarding the **assessment of the value** of immovable assets (land, buildings) and moveable assets (yacht), as well as their **management**. The assets had been frozen by MS B in execution of MS A's LoR. MS B's authorities assessed the frozen assets to be worth over EUR 400 000 (**expert opinions from tax authorities** were obtained) and proceeded to manage them, notably the yacht (to be kept in a secure place pending a final decision in MS A's proceedings), as agreed during a Eurojust coordination meeting. MS B's authorities also assessed the possibility of an **early sale** to be carried out by its ARO, in accordance with MS B's implementing legislation of **Council Decision 2007/845 on AROs**<sup>19</sup>. The MSs discussed an **early sale** as well as an **agreement on asset sharing pending a final decision on confiscation**. MS B's authorities informed MS A that asset sharing was legally possible. It advised MS A that it would require a **supplementary LoR** from MS A formally requesting MS B's authorities to sell the assets pending trial, **accompanied by MS A's court decision to this effect, including confirmation that all parties involved had been notified**. Under MS B's legislation, before the property could be sold, the registered owner of the yacht (one of the suspects) had to be notified of the expert opinion on the estimated value of the property and given the opportunity to dispute this value (in this case, a delay occurred, as MS B's authorities needed to ask MS A for the address of the suspect so that he could be notified). If the suspect decided not to dispute the valuation, then the property could be sold (reference was made to Article 10 of **Directive 2014/42/JHA** on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union). Under MS B's legislation, the **assets** (once a final decision on the case in MS A was taken) were to be shared equally (reference was made to **Article 16 FD 2006 on confiscation orders**). The suspect could, however, dispute the value and request that the property be returned to him/her in return for payment of a deposit. A further complication arose due to **insufficient clarity in MS A's LoR regarding the extent of the assets that were to be frozen for the purpose of confiscation and those to be frozen for the purpose of securing evidence**. MS B's authorities needed to clarify these two points because, according to its legislation, **if the asset was frozen for the purpose of securing evidence, then MS B's authorities could not consider its early sale to avoid a possible decrease in its value**. If, on the other hand, the asset was frozen for the purpose of confiscation, an early sale could be possible. MS A's authorities later confirmed that the assets were frozen for the purpose of confiscation. **This delay in clarification caused misunderstandings and delays in the management of the yacht**. Clarification was only obtained through correspondence **facilitated by Eurojust**. Delays in obtaining the necessary information from MS A led to **increased mooring costs for the yacht**.

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<sup>19</sup> Council Decision 2007/845 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, and establishing the rules for the administration, management and possible increase of value of a seized property.

In another case, the issue of the **absence of judicial administrators<sup>20</sup> for companies subject to a freezing order** arose. The executing State's law did not foresee the appointment of a judicial administrator for companies subject to a freezing order, which could potentially render the competent authorities' confiscation efforts very weak and ineffective. This perceived legislative gap was considered as having the potential to make the management of assets of the seized companies particularly cumbersome. Moreover, according to the executing MS's legislation, a judicial administrator could only be appointed if the creditors initiated insolvency proceedings. According to the legislation of the executing MS, a 'custodian' could be appointed to avoid depreciation of an asset's value, but only in relation to moveable assets.

**Issues linked with the execution of freezing orders** arose mainly when the executing authority opened a national money laundering investigation as a result of the *notitia criminis* contained in the freezing certificate of the LoR.

Another issue that often hindered assistance is the **lack of an EU register of freezing orders**. A European database of freezing orders could help coordinate the execution of this mutual recognition instrument by the EU competent authorities.

#### *J. Challenges and legal remedies*

One case involved an **alleged breach of Article 6 of the European Convention on Human Rights** (ECHR) (Right to a fair trial; issue of reasonable time). The legal issue was whether the duration of a (renewed) freezing order could constitute a **breach of the 'reasonable time'** as mentioned in Article 6 ECHR. The main defence argument was that the freezing order, which was effectively in place and continually in force for a period of seven years as a temporary measure pending trial, was unduly long and in blatant violation of Article 6(1) ECHR. Reference was made to the European Court of Human Rights' (ECtHR) judgement in *Juan v Belgium* (application number 5950/05 of 12.02.2008), in which the ECtHR had considered that the three-year period during which the applicant's bank account had been blocked exceeded a 'reasonable time' and had held unanimously that a violation of Article 6(1) ECHR had occurred. The issuing authority's position, however, was that the case at hand was different from the ECHR judgement, particularly in view of the following three criteria, which were considered relevant by the ECtHR: (i) the case was extremely complex (required expertise, geographical spread of witnesses, number of essential documents, international aspect); (ii) behaviour of the judicial authorities (from the very beginning, the investigation was continuously progressing; the involved parties were repeatedly interrogated and had the status of suspects); (iii) behaviour of the suspects (from the very beginning, they did not cooperate and used all possible means to slow down the process). Freezing orders are only temporary or precautionary measures, necessary to ensure the subsequent application of confiscation orders and justified because of public interest. Despite criminal liability having yet to be established, the consequences of freezing orders concern not only the right to property, but also the right to private and family life (Article 7 of the Charter of Fundamental Rights of the European Union). Therefore, such

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<sup>20</sup> While a wide range of different terms are used for such traditional administrators, including receivers, official assignees, trustees and bankruptcies, etc., we find judicial administrators to be a useful generic term.

provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view to possible later confiscation. This situation may require regular review by the court to ensure that the purpose of preventing the dissipation of property remains valid. Moreover, freezing orders must be applied in a manner that ensures that the basic means of survival of the person concerned are guaranteed.

In another case, the issues concerned the **moment the decision to recognise the freezing order becomes final**. Under the **law of the executing State**, such decision could not become final until it was served on the owner of the property and he/she was given the opportunity to lodge a complaint within three days. The court decision to recognise the freezing order was translated by the executing State into the language of the issuing State as a requirement ‘to **notify the person against whom it was made and inform the person of the possibility to appeal**’. A further issue was linked to the **uncertainty as to whether the concerned person had actually been served with such court decision in the issuing State** (unreadable signature but no further information). The executing State needed to know whether that person had been personally served with the decision to recognise the freezing order and on which day that service took place. The issuing State’s authorities informed the executing State’s authorities that the person’s lawyer had informed the issuing State’s authorities that he had received the court decision of the executing State to recognise the freezing order. The executing State’s authorities confirmed that sufficient evidence had been supplied that he had been notified of the decision.

In several cases, **legal challenges were brought by the defence** in relation to the **alleged need for a freezing order and accompanying Article 9 certificate**. In these cases, an LoR had been issued seeking: *i*) banking information held by a specified bank in the requested State in respect of a company (the information was to be used as evidence and also to assist in establishing the money trail), and *ii*) the **freezing of bank accounts** and the contents of **safes** held at that bank by that company or controlled by it for the purpose of subsequent **confiscation and to safeguard any possible future claims by interested third parties in the context of the criminal proceedings**. Further to the freezing of the tens of thousands of euro and the automatic freezing of any new deposits on the basis of the LoR, the defence brought forward legal challenges in the court of the requested State. As a result, the authorities of the requested State asked the requesting authorities to submit a freezing order accompanied by an Article 9 certificate. This Article 9 certificate was issued and **included** the information previously contained in the LoR, notably the **description of the facts and the bank accounts in question, as well as i) the provisions under the law of the issuing State** that regulate the issuance of a freezing order and that pertain to the offence of fraud, and *ii*) the **legal remedy** against the freezing order available to interested parties, including **bona fide parties**, in the issuing State (Section J of the Article 9 certificate). This information proved sufficient, but an anomaly was noted in relation to time limits to appeal. The legal remedy consisted of an appeal against a freezing order by the parties and any other person in relation to whom the order referred, *e.g.*, a third party owner of the property to be lodged within 14 days; however, if the freezing order was executed abroad, the 14-day period for appeal did not apply, as, *e.g.*, the concerned person might not have known of the execution of the order outside the issuing State, in which case no time limit was set for lodging the appeal.

In another case involving **multiple LoRs seeking freezing measures** in two MSs, the **banking association of one of the requested States (MS B) challenged before the court in the requested State the court order of the requesting State to freeze the bank accounts, which led to the need for a decision from a higher regional court in the requested State as to whether or not the freezing order met the legal requirements.** The Higher Regional Court of MS B ruled in favour of the appellant and annulled the challenged decision of the court of first instance. The reason cited was **insufficient grounds for the decision** with respect to two of the suspects and one company, as those entities **were not considered suspects according to the law of the requested State.** The case was referred back to the court of first instance, which was then required to take a new decision for which further additional information from the requesting State was required. This situation was problematic, as the **LoR was urgent.** The following information was required by the legislation of the requested State: *i)* on which information or findings did the investigating authorities assume that persons A, B, C and D and the other legal entities mentioned in the original LoR were related to bank accounts in the requested State? A mere reference to findings according to which the bank accounts in the requested State were involved in the criminal activities was not sufficient, especially as the bank accounts were in the names of companies registered in the requested State and not in the names of the entities mentioned in the LoR; *ii)* how could the information requested in the LoR be of substantial added value for the purpose of the investigation into the offence? and *iii)* were any proceedings pending against persons A, B, C or D and the other legal entities mentioned in the original LoR? According to the legislation of the requested State, **disclosure of bank accounts was only possible against suspects.** After receipt of such requested information, the court in the requested State ordered the disclosure of the requested bank accounts, and the LoR was partly executed, with **approximately EUR 84 000 frozen.** In the other requested MS (MS C), **approximately EUR 140 000 was frozen.** In this case of multiple LoRs, the same information initially contained in the LoRs issued to both MSs was **considered sufficient by one of the MSs to order the freezing,** but not sufficient for the other MS.

The **lack of harmonised interpretation of the provisions of FD 2003 on freezing orders** was the main issue in another case. MS A issued a freezing order totalling approximately EUR 10 000, which was executed in MS B. Thereafter, MS A issued an LoR to MS B, seeking a **house search** in the residence of one of the suspects, during which **approximately EUR 6 700 in banknotes was found.** This money was deposited in the account of the competent authority in MS B. At a later stage, the accused were convicted in MS A. In its judgement, the court in MS A **did not proceed to decide on the confiscation or on other property sanctions, on the basis that no injured party had claimed for damages, i.e. under the legislation of MS A, the rights of the injured party must be applied first, before the Court is in a position to decide on the issue of confiscation.** Furthermore, according to the court of MS A, that judgement **contained a decision confirming that the freezing order (referred to above) was still valid** and that **it would remain valid for up to three years after the judgement became final** to allow victims of the crime to come forward and claim compensation. However, this kind of procedure was unknown in MS B, which led to **uncertainty on the part of MS B (as executing State) regarding whether the seizure was still valid** and how MS B should proceed in relation to the **money seized during the house search, i.e. whether this money was to be understood as part of**



the entire amount, **covered by the judgement** of the court in MS A. MS A requested MS B to maintain the validity of the seizure, and informed MS B that after three years the court in MS A would decide on the confiscation of the assets that were seized and remained valid after the judgement. The executing authority in MS B that executed the freezing order was different from the requested authority that executed the LoR seeking the house search. Until **Eurojust's involvement** in the case, the authority in MS B that executed the house search was not aware that freezing orders had been executed by another executing authority in MS B. One other issue was that the legislation in the executing MS (MS B) did not contain any provision that would allow **the seizure to remain valid for a period of time, irrespective of whether or not injured persons claimed damages**. Thus, the authorities in the executing State (MS B) found the procedure followed by the court in the issuing State (MS A) unusual. A further issue encountered was that, according to the legislation of the executing State, **after property is seized on the basis of a freezing order, it cannot be used as compensation for the injured parties**. Therefore, even if the injured party would seek compensation for damages, **the executing State would not be able to compensate them from the seized assets on the basis of the freezing order**. However, the **assets obtained and seized during the house search** were seized as proceeds of crime, and as such they could be used for compensating the victims. According to the legislation of the issuing State (MS A), however, the final court decision was required for the **individual protection of the victims, since waiting for the final decision enabled an easier recovery of the damages**. After the period of three years had elapsed, the State would acquire the assets.

In another case, issues related to **a frozen bank account, appropriate legal remedies, and lack of communication from the requesting State** were addressed. **Tens of thousands of euro in a bank account were frozen** in MS B in execution of an LoR. The suspect claimed in the courts in the requested State (MS B) that such freezing measure should be lifted on the basis of an alleged court order made in the requesting State (MS A) that had ruled that such freezing should never have been ordered, and that the proceedings in the requesting State had concluded. The difficulty arose because, despite numerous attempts from the requested State to obtain a reply from the requesting State in relation to these allegations, the authorities in the requesting State had not yet provided such reply.

### ***Eurojust case illustration***

In early 2013, the UK health authorities informed their Spanish counterparts about six illegal shipments containing 25 600 tablets of counterfeit medicines originating from India that were about to be transported to a person in Spain. A controlled delivery was set up, and the recipient was arrested by the Spanish authorities.

The UK investigation indicated that approximately 50 websites hosted on servers located in the Czech Republic and the Netherlands were advertising medicines for sale without medical prescription, mainly products used to combat erectile dysfunction. The drugs that were produced in India were sent to the UK to be distributed to other retail sellers within the European Union for further distribution. The orders were placed either via the Internet or by telephone. The payments were made by credit card to bank accounts in several Member States, which channelled those funds through a layer of bridge accounts to bank accounts in Cyprus.

Links with another investigation in Austria targeting a criminal group of Ukrainian origin with connections to Israel and the Russian Federation were identified by Europol. Two operational meetings at Europol, in April 2013 and February 2014, allowed the various police services to exchange information, which detected possible links with a French investigation concerning a group of websites, managed from Israel, that also offered medicines without medical prescription.

The Spanish authorities submitted MLA requests to Austria, Belgium, Cyprus, Germany, India and the USA to identify the beneficiaries of the illegal activity and to try to locate and seize the criminal proceeds, the value of which was estimated at approximately EUR 1 800 000. As a result of the meetings at Europol concerning potential connections with investigations in other countries, the Spanish authorities approached Eurojust to coordinate the judicial aspects of the cases. A coordination meeting was held in March 2014, attended by Spain, Austria, Belgium, Cyprus, Germany, France, the UK, the USA and Europol.

The meeting resulted in close links being identified between the cases in several States, and a JIT, in which Eurojust and Europol participated, was set up between Austria, Spain and France. The JIT was funded through Eurojust and was later extended to the UK. The coordination meeting also allowed discussion about the offences under investigation in each State to avoid a conflict of jurisdiction or *ne bis in idem*. Finally, supported by Eurojust's analysis of the MLA requests, the

participants were able to identify overlapping requests, coordinate their execution, agree on the terms and conditions for sharing the evidence obtained and identify a bank account that appeared in proceedings in Austria, Spain and France.

In June 2014, the Spanish authorities carried out a new arrest and seizure of 25 000 tablets, and new evidence was gathered in Austria, France and the UK that demonstrated the need to discuss possible actions in the short term. To this end, a coordination meeting with Austria, Spain, France, Eurojust and Europol was held in Vienna. The ongoing proceedings were discussed and a common strategy was agreed. Austria, Spain and France focused on fraud and public health-related offences, while the UK applied an innovative approach by investigating only money laundering activities, with an emphasis on asset tracing for further freezing. The UK investigation benefited from the investigations in the other States to prove that predicate offences were committed elsewhere in the European Union. During the meeting, a decision was made to conduct coordinated actions during a common action day to gather additional evidence. As most of the planned actions had a judicial component, for example the execution of MLA requests, a coordination centre was held at Eurojust in September 2014 with the participation of all JIT members.

During the action day, at least 12 suspects were arrested and 16 people were interviewed as either suspects or witnesses. Austria, Hungary and the UK carried out 23 searches, and 91 bank accounts were frozen or seized in the participating States, along with 1 million tablets. Assets with an estimated value of approximately **EUR 7.8 million were seized.**

A final coordination meeting was held at Eurojust in March 2015 to exchange information on the proceedings in the participating States and evaluate the JIT cooperation.

In another case, various issues linked to the exercise of the following legal remedies also arose: *i) service of the executing State's (MS B) court decision recognising the freezing order issued by MS A to the suspect residing in the issuing State (MS A).* After the court in MS B recognised and executed the freezing order issued by MS A, to satisfy a procedural requirement under the legislation of MS B, the suspect must be notified of this provisional measure. As a result, when MS B informed MS A of its court decision, MS B's authorities also requested that the suspect be served with such court decision, and that he sign the relevant form, in this way formally acknowledging its receipt; *ii) translation of MS B's court decision to recognise the freezing order and accompanying document regarding acknowledgement of receipt into the language of the suspect (MS A).* MS B sent its court decision (untranslated), and MS A undertook to translate it into the language of MS A because the suspect was a national of MS A and was located in MS A; and *iii) the original version of MS B's court decision to recognise the freezing order was required.* Notwithstanding MS B having sent, via Eurojust, a copy of that court decision to MS A, the latter required, under its legislation, **three originals** of the court decision that executed their freezing order **sent directly to the competent authorities in MS A.**

In another case, **the defence made a request to the court in the requesting State to lift a portion of the freezing order in respect of some of the monies that had been ordered by that court.** The basis for this request was that EUR 40 000 was necessary to cover the cost of the education of the investigated person's son abroad. The court in the requesting State ordered the lifting of that part of the freezing order, and this information was communicated to the requested State.

Another case is a good example of the variety of issues that can arise, over and above mere defence challenges and legal remedies. **The difficulties started with the extreme urgency of the request for freezing, its degree of formality, and the unavailability of the specialised competent authority in the requested State.** The LoR for freezing was extremely urgent as, on the basis of intelligence, approximately EUR 26 million could, if not frozen quickly, have been transferred from the bank account in question in MS B. The authorities in MS A did not have time to issue a formal request seeking the urgent and temporary freezing. Fortunately, under the legislation of the requested State (MS B), for their intelligence authorities to be able to proceed with such freezing, a letter to that effect issued by the competent authorities of MS A would suffice. Thus, the requesting authorities in MS A transmitted the letter to the requested authorities in MS B. An additional difficulty arose when **the specialised prosecutor in the requested State competent to deal with the request was not available 24/7.** This situation was resolved when MS A sent the request to a non-specialised prosecutor in MS B who was on duty at the time, who was only competent to deal with the urgent preliminary request (in the absence of the competent specialised public prosecutor), and **who allowed the immediate freezing of the bank account in MS B.** This immediate freezing was important, as the suspect who was the holder of the bank account had in the meantime attempted to transfer the money. Had the freezing been delayed even for a few hours, the money would have been transferred out of the account. As a result, **the bank account was frozen in less than 24 hours,** and the LoR for the freezing was subsequently sent to the competent central public prosecutor in the requested MS B.

Additional issues linked to the **choice of the legal instrument, legal remedy and alternative forum for challenging the freezing, and possible breach of Article 6 ECHR**, also emerged. After the freezing, the suspect applied for its annulment, claiming that the money in the frozen account (**EUR 26 million**) was owned by a company, and that the company, *strictu sensu*, was not a suspect in the case. From a legal point of view, what made this case very interesting was that MS A issued an LoR (not a mutual recognition instrument) to MS B, and MS B froze the money in the account on the basis of such LoR. The court in MS B ruled that only the courts in MS A were competent to deal with the substantive review of the case. However, **a freezing order was never made in MS A**. The only order issued in this case was made by the court in MS B, *i.e.*, a court order to freeze the bank account in execution of the LoR issued by MS A. The prosecutor in MS A issued only an LoR seeking the freezing. This situation led to a **complaint lodged with the Constitutional Court in MS A**. The suspect complained about the **choice of legal instrument used to seek the freezing** of the bank account, claiming that the prosecutor in MS A should have issued a European freezing order (based on FD 2003 on freezing orders) and not an LoR. He claimed that the company's rights had been breached on the basis that, had the prosecutor in MS A used **FD 2003 on freezing orders** to seek the freezing of the bank account, he would have been able to legally challenge the issuance of a freezing order. However, as the issuance of an LoR did not require a preceding domestic freezing order, the challenging of any substantive grounds in relation thereto was not available to him as a remedy in MS A. In response to this claim, the Constitutional Court in MS A ruled that the choice of legal instrument is at the discretion of the competent national authorities, *i.e.*, the decision whether to issue a European freezing order or an LoR. The Constitutional Court decided that, had the prosecutor opted to use FD 2003 on freezing orders, the company would have had the right to challenge the freezing order (under **Article 11 of FD 2003 on freezing orders**). However, in this case, the prosecutor opted to issue an LoR, which the prosecutor was competent to issue. The Constitutional Court further concluded that because the prosecutor chose to issue an LoR to seek the freezing of the bank account, the claimant had no right to challenge the freezing measure in MS A. The Constitutional Court further concluded that any interference in the rights of the claimant would have occurred only in MS B (*i.e.* the freezing of the bank account), as the only order issued to this effect was in MS B (in execution of MS A's LoR). For these reasons, the Constitutional Court in MS A dismissed the claim. The Constitutional Court also considered a legal remedy for the claimant available in MS A in relation to the LoR: a supervision mechanism in the Public Prosecution Service, whereby the concerned person may request supervision by the superior Public Prosecutor. This remedy was requested. The superior Public Prosecutor stated that the actions taken by the lower-ranked prosecutor had been lawful. Subsequently, the suspect claimed a **breach of Article 6 ECHR** (right to a fair trial) in the requested State (MS B). Another issue was the **link between the suspect and the property subject to freezing (whether the company in question and its property were indeed attributed to the suspect)**. The suspect appealed the decision of the first instance court in MS B that ordered the requested freezing order, which appeal was refused. In the meantime, when MS A sought an **extension of the freezing measure**, MS B's authorities advised those of MS A that an explanation as to why the proceedings were ongoing and a continuation of the freezing was still required.

*K. Grounds for refusing the execution of a freezing order or LoR seeking freezing measures*

In one case, **the information provided/available was held to be insufficient to allow freezing.** The executing State did not seize the assets, as the information provided at its request and the supporting documents subsequently provided were not sufficient to ask the competent court in the executing State for such precautionary measure. Execution was refused.

In some cases, execution was refused on the basis of **discrepancies identified between the Article 9 certificate and the freezing order (Article 7(1)(a) FD 2003 on freezing orders).** In one case, the Article 9 certificate referred to ‘confiscation’ of the property as the action to be taken after executing the freezing order. However, the national court order for the freezing of the bank account mentioned both the purpose of ‘confiscation’ and ‘forfeiture’ as well as ‘securing of civil law claims’. Due to this discrepancy, the freezing order was not in line with the certificate. In the executing State, this situation was a ground for refusal of the recognition and execution of a freezing order. The difficulties were compounded because freezing of a bank account to secure civil law claims was not admissible according to the legislation of the executing State.

In another case, **discrepancies were found between the Article 9 certificate and the freezing order,** as well as a **lack of clarity as to the legal status of company A in the criminal proceedings.** The appeals court in the executing State refused the execution of a freezing order, and therefore annulled the first instance court decision to execute it, on two grounds: *i*) **discrepancies were found between the Article 9 certificate and the freezing order (Article 7(1)(a) FD 2003 on freezing orders).** Under Section G of the Article 9 certificate, company A is named as a suspect, while, in the freezing order, the members of the management board of company A are named as suspects, rather than company A itself; and *ii*) the freezing order (and subsequent additional information provided) is **unclear as to the exact legal/procedural status of company A** in the criminal proceedings. Clarity in this matter was considered essential by the Court because under the legislation of the executing State, a person’s assets can only be seized in criminal proceedings when the person is a suspect, accused, a convicted offender, a civil defendant or a third party in the same criminal matter. The only exception to this rule is when the owner of the proceeds of money laundering cannot be established, in which case seizure is possible. This rule ensures that the owner of the seized assets is involved in the criminal proceedings upon which his/her rights may be decided.

In another case, MS B refused the execution of the freezing order on the basis that said order was **not accompanied by the required Article 9 certificate.** Instead, MS B opened its own investigation into fraud and money laundering, and, within the framework of its domestic proceedings, froze the bank account in question.

#### *L. Other issues*

Difficulties were encountered when a request for an **extension of the duration of a foreign freezing order** exceeded the **maximum time limit for such duration, within the terms of the law of the requested State**. This **legal constraint** led the requested State, on appeal, to lift the freezing order and release the assets, despite the transmission of a supplementary LoR from the requesting State seeking such extension, which confirmed that their investigation was ongoing and that the release of the assets would ultimately lead to their loss for subsequent potential confiscation. The impact was further compounded by the fact that the freezing order had been issued in a case in which the estimated loss was approximately **EUR 8 million**.

In one case, an issue arose regarding the **impact of the matrimonial regime between the suspect and his spouse, as a determining factor, according to the law of the executing State, to take into account when registering the execution of the freezing order in the land register**. The information on the matrimonial regime was not contained in the freezing order and was subsequently requested by the executing State as the spouse of the suspect was a co-owner of one of the properties for which the freezing was sought.

The separate issue of **extraordinary costs** also arose in one case in relation to the executing State's land register fees. As an exception to the general rule on costs incurred during the execution of freezing orders, the involved States agreed that such costs would be borne by the issuing State.

### **1.2.2. Eurojust's support in asset freezing**

#### *A. Issuing stage of a freezing order or LoR seeking the freezing measures*

Eurojust provided assistance as early as the drafting stage of a freezing order or LoR seeking freezing measures. Eurojust **provided advice and clarification in relation to practical, legal and formal requirements** in relation to the freezing of assets, and served as a **channel for transmission of freezing orders and LoRs and related documentation**.

In one case, Eurojust: *i*) **identified the competent executing authority** by providing the contact details of the correct authority in the executing State dealing with freezing requests, as the EJN Atlas contained an incorrect authority in the executing State competent for dealing with such requests; *ii*) facilitated the **timely transmission** between national competent authorities of copies of the freezing order and necessary accompanying documentation, as well as the additional information requested, which included a **revised Article 9 certificate** (the term ‘*Forfeiture*’ was added, and the maximum amount for which the freezing was sought was indicated) and a **revised freezing order** (‘*securing of civil claims*’ was deleted from the national court order), and an accompanying letter highlighting that the freezing of the bank account should take place before a specified date, as from that date onwards the suspect would have access to the bank account. The FIU of the executing State ensured a preliminary freezing of the bank account for 48 hours, while the originals of the revised documents with a certified translation into the language of the executing State were being submitted via express courier to the competent authority in the executing State (Eurojust provided the delivery address and a contact person). The executing authority executed the freezing order and **EUR 394 500 was frozen**. Subsequently, a new freezing order seeking the freezing of two other bank accounts was also executed, with similar issues and similar support provided by Eurojust, **leading to the freezing of approximately EUR 62 000**. At a later stage, an additional freezing order was executed and **EUR 600 000 was frozen** by the executing State, although shortly after the issuing State notified the executing State (by way of an LoR) that the freezing order had been lifted (Article 6(3) FD 2003 on freezing orders).

In another case, **in advance** of the issuance of the freezing order accompanied by the Article 9 certificate seeking the **freezing of a bank account**, Eurojust’s assistance was sought and provided in relation to **information** on: *i*) whether FD 2003 on freezing orders had been implemented in the executing State; *ii*) if so, to which competent authority the freezing order and Article 9 certificate should be sent; and *iii*) the contents of the Article 9 certificate, *i.e.* whether the information under **Section F** (information regarding the property in the executing State covered by the freezing order) was sufficient. Eurojust replied that the information provided was insufficient and advised on the additional information required. **Eurojust facilitated this exchange of information**, which led to the **freezing order being recognised and executed efficiently**.



In other cases, Eurojust assisted in: *i*) the **swift identification of competent authorities** in the executing State, which, in one case, depended on the legal instrument used, and **clarified the national criteria** for the allocation of the execution of requests for the freezing of assets, *e.g.* the competent authority was the Prosecution Office located in the area in which the bank accounts were registered, although the headquarters of the bank were located in another city in the executing State; *ii*) **transmission** of freezing orders and accompanying certificate and additional supplementary documentation; *iii*) **swift exchange of information and documentation**, *e.g.* confirmed that the necessary documentation in relation to the freezing order had been well received in the executing State, or that the LoR had been executed, or the freezing order executed or its recognition refused, or any feedback on the state of play of the execution of the freezing order or LoR; *iv*) **giving advice** on whether a **legal basis** was present for maintaining the frozen assets; and *v*) **translation of relevant information and documentation** (*e.g.* translation of the Article 9 certificate into the language of the executing State, translation of relevant factual information or legislation into the languages of the involved MSs, translation of information in relation to the execution of the urgent freezing order or LoR to speed up the availability of the information to the relevant authorities).

In other cases, Eurojust assisted in the **clarification of legal requirements** in the **different jurisdictions involved**, *e.g.* *i*) in cases involving **third States**, whether an LoR sufficed or whether enclosing the freezing order, which might include detailed relevant facts, was also necessary; *ii*) whether a general search was possible; *iii*) whether a specific bank account number was needed; *iv*) whether precautionary measures were possible, even before an LoR was submitted, to prevent assets from being dissipated; and *v*) whether the LoR should be sufficiently specific to include the required description of the facts to allow the requested State to scrutinise whether the **dual criminality** requirement was met.

In cases of freezing orders concerning **multiple assets in multiple locations in the executing State**, Eurojust provided advice on which authority should receive the **transmission** of the freezing order and Article 9 certificate, who, in turn, would be in the best position to ascertain which court of the executing State was **competent**, and who at the same time would decide on the admissibility of the Article 9 certificate (*i.e.* if in compliance with the law). In one specific case of **damages of approximately EUR 660 000, both the property and the bank accounts were frozen**.

In an **extremely urgent case** in which the **freezing of approximately EUR 26 million** was at stake, **Eurojust** facilitated its execution by *i) clarifying the legal and practical requirements* in this urgent situation under the law of requesting and requested States, *ii) serving as an urgent channel of transmission* of a letter from the requesting authorities to the requested authorities seeking such preliminary urgent freezing and the subsequent LoR and other relevant documentation in advance of the receipt of the originals via post, *iii) urgently translating* the initial letter into the language of the requested authorities, *iv) clarifying the legal procedures* in the requesting and requested States in relation to the **available legal remedies** and the **extension of the freezing order**, and *v) organising a coordination meeting* in one of the involved MSs, bringing together the prosecutors involved in both MSs and Eurojust representatives. These fast actions were crucial, and with assistance from Eurojust, the **bank account was frozen in less than 24 hours**. Eurojust continued to support the national authorities of both MSs involved after the freezing was challenged both in the requesting and the requested States.

Eurojust often **facilitated the establishment of direct contacts** between the involved countries, and **mediated the communication** between them.

In some cases, **Eurojust confirmed that multiple LoRs were not being sent in parallel through other channels**.

In another case, Eurojust provided **advice on the choice of legal instrument**, *e.g.* when freezing was sought pending an appeal of the confiscation order, taking into account the particular circumstances of the case, including the law of the two MSs involved and the time by which the confiscation order was expected to become final and enforceable. The **freezing order was ultimately executed**.

In another case, **Eurojust advised on the choice of legal instrument in a case of multiple freezing orders**. When consulted on the draft LoRs, Eurojust advised the national competent authority of MS A that in relation to the draft LoRs to MS B and MS C, an LoR did not need to be issued, as, together with those LoRs, the national authorities of MS A were also attaching an Article 9 certificate and the accompanying freezing order. In relation to MS D, Eurojust advised that an LoR issued by the authorities of MS A (accompanied by a freezing order) would be adequate, as the request to MS D included a full financial investigation.

With regard to the use of FD 2003 on freezing orders, **Eurojust** has, in several cases: *i*) provided national authorities with the **template of the Article 9 certificate** (national authorities admitted they ‘got lost in EU legislation’, or were using an inaccurate version of the Article 9 certificate); *ii*) **advised that the Article 9 certificate needed to be translated** into the language of the executing State and accompanied by the freezing order; *iii*) facilitated the clarification of the **type of information that was needed by the executing State to execute the freezing order, and on the competent authority** in the executing State for the freezing (territorial jurisdiction depending, *e.g.*, on the location of the office of the bank or property or place of registration of a company); and *iv*) **assisted in the filling in of the Article 9 certificate**.

**Eurojust contact points in third States**, as established channels of communication, provided information on the **legal requirements** regarding the execution of a foreign freezing order, and referred cases to Eurojust.

In some cases, **Eurojust contributed to raising awareness about FD 2003 on freezing orders**. In MSs in which FD 2003 on freezing orders had only recently been implemented and was insufficiently known among practitioners, Eurojust was active in raising awareness of this legal instrument.

When **uncertainty arose on the part of practitioners in relation to which legal instrument should be used, *i.e.* FD 2003 on freezing orders or the EIO**, Eurojust clarified that, *e.g.*, from a practical point of view, if the assets are considered as evidence, provisional measures could immediately be adopted under Article 32 of the EIO DIR, and the assets could be transferred during the pre-trial phase on the basis of Article 13 of the EIO DIR, unless the transfer could jeopardise an ongoing investigation in the executing State. However, the assets should be returned to the executing State after being used in the trial phase as evidence when requested, without any disposal. Furthermore, if assets have been seized, with the requested person to be surrendered, Article 29 of the FD on the European Arrest Warrant gives the judicial authorities a powerful and very efficient possibility for the immediate handover of objects of a hybrid nature (both evidence and proceeds of crime).

#### *B. Execution stage of a freezing order or LoR seeking freezing measures*

During the execution phase of the freezing order, Eurojust’s support is varied in extent, depending, *inter alia*, on the number of countries involved, the complexity of the case, and the need to support **cooperation and coordination of the execution of freezing measures** and other measures when, *e.g.*, parallel investigations are being carried out in the countries involved.

Eurojust assisted in the **speedy clarification of the legal requirements** of the requested State associated with the **extension of the duration of freezing orders**, the **drafting of the LoR**, the **mutual consultation** of the involved national authorities, and the **transmission of the supplementary LoR**, which has proved vital in cases in which the extension of the duration of the freezing orders was fast approaching.

Eurojust also **facilitated the clarification of the legal basis and legal consequences** of a decision of the issuing State to **maintain the validity of the seizure**, including the money obtained during a **house search**. In one case, *e.g.*, as a result of the assistance provided by Eurojust, **both seizures** (as a result of the execution of the freezing order and as a result of the house search) were declared valid and in line with the law of the issuing State. The **assets obtained and seized during the house search** were thus **included within the measures up to the amount identified by the court**.

In another case, national authorities of the issuing State sought **urgent assistance from Eurojust** after failed attempts via the EJM contact point to obtain/transmit information with regard to the **possible cancellation of the freezing order** from/to the executing authority. In view of a very tight deadline of one week for the issuing authority to provide information, Eurojust **facilitated this urgent mutual consultation**, which resulted in the issuing authority being able to timely **transmit** to the executing authority, **via Eurojust, their position** with regard to an invoked **breach of Article 6 ECHR**.

The **liaison between Eurojust and the contact point of the network against corruption<sup>21</sup> of one MS** also proved very fruitful. The contact point brought the matter to the attention of Eurojust, as the requesting authorities had not received a reply from the requested authorities in relation to their LoR seeking, *inter alia*, the freezing of assets.

Eurojust's casework also shows that the role of **Liaison Prosecutors from third States posted at Eurojust** is vital in speeding up the execution of LoRs seeking freezing measures. Within their remit, they facilitate the clarification of the formal, legal and practical requirements for the execution of these LoRs. They facilitate the transmission of information and contribute to the strengthening of the cooperation and coordination of cases, and propose and participate in coordination meetings and coordination centres.

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<sup>21</sup> Article 12(2)(d) of the Eurojust Decision.

### ***Eurojust case illustration***

An OCG involved in gold laundering was active in Italy, Hungary and Slovenia. The *modus operandi* of the OCG was to first steal gold items in Italy, melt them down in a foundry in Italy, and subsequently transform them into gold bars. The bars were then placed on the official gold market by a Hungarian company, which issued fictitious sales invoices to a second Italian enterprise. The fictitious invoices, estimated at approximately EUR 300 000 weekly, were paid by legitimate companies via international bank transfers, with the cash then withdrawn in Hungary and returned to Turin to pay the thieves. Cash was concealed and transported across national borders.

During the period under investigation, the criminal network is estimated to have laundered approximately 750 kg of pure gold, with an estimated value of EUR 25 million. In the framework of one complex cross-border investigation, the crimes from which the proceeds were derived, the nature and extent of the money laundering activities, and the investment of the proceeds of crime were uncovered simultaneously.

Eurojust followed the case since 2016, and dealt with all the judicial aspects within its competence since the beginning. In this way, Eurojust also played a proactive role in providing information to home authorities in real time to progress the case. Eurojust organised a coordination meeting in February 2017 and a subsequent coordination centre during the action day, which took place in the same month.

The action was led by the Italian *Guardia di Finanza* and the State Prosecutor's Office of Turin, Italy, with the support of Hungarian and Slovenian authorities, and with the overall coordination of Eurojust.

At the conclusion of the joint operations, 10 individuals were arrested, and one suspect remained at large. Sixty house and company searches were simultaneously carried out in Italy, Hungary and Slovenia. **The equivalent of EUR 9 million was seized, including 20 kg of gold, EUR 200 000 in cash** from one of the arrested individuals, along with high-value cars. In addition, important evidence, including evidence found in a safe and in the accountancy books of the involved companies in the various countries, was found and seized. Eurojust facilitated the exchange of information along with the execution of MLA requests between the participating States. Furthermore, Eurojust guaranteed the simultaneous execution of all measures.

### B.1. Coordination of the execution of freezing orders in complex cases

In a case in which an **urgent coordinated action day** needed to be planned, Eurojust assisted by holding an earlier **coordination meeting with the involved countries**. The coordinated action needed to take place promptly to avoid an imminent risk that the OCG would suspect that the police were investigating them and transfer the criminal assets to locations outside Europe. A coordinated action involving eight countries was agreed and planned the simultaneous **freezing of bank accounts and other assets, among other measures** (e.g. arrests on the basis of on foot of domestic and European Arrest Warrants (EAWs), house searches, hearing of suspects). **Prior** to the day of the **coordination centre**<sup>22</sup> Eurojust was asked to enquire whether the requesting authorities could be present in one of the requested States during the actions. Eurojust liaised with the competent authorities, advised that a supplementary LoR would be necessary, and provided contact details of the competent authority in the requested State with whom the requesting authorities should liaise. In addition, on **the day before the coordination centre**, Eurojust **provided translation** into English of an extremely long document containing the questions to be used in the interviews of the suspects. In relation to the **freezing of bank accounts**, taking into account the importance of this measure, the competent authorities of the countries involved in the coordination centre were requested to share, if possible in real time, any information about **additional bank accounts/assets that might arise from the house searches, to allow further seizures/freezing in different countries**. Among other requested measures (house searches, interviews of suspects and witnesses, interceptions, records and company documents, etc.), **various bank accounts were frozen (millions of euro)** in various MSs as a **result of the coordinated action**. Other assets were also seized (**yacht, jewellery, cash, cars, immovable property**). Subsequently, the issue under discussion was how to effectively proceed with the **early sale of the frozen property**.

In another case, Eurojust also assisted in the coordination of an action day in the countries involved through its **coordination centre at Eurojust**, during which various freezing orders in different countries, among many other investigative measures, were simultaneously executed, and during which requests/orders were promptly supplemented, as needed.

Eurojust's support with regard to the freezing of assets **during a coordination centre at Eurojust**, in one case, included:

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<sup>22</sup> Coordination centres are another Eurojust tool. When complex cases require real-time exchange of information and large-scale multilateral actions (e.g. the execution of several freezing orders, searches and arrest warrants in different countries), Eurojust may support the concerned national authorities by setting up coordination centre at its premises. Coordination centres are designed to serve as a central hub for real-time exchange of information, as well as for coordinating the joint execution of judicial and law enforcement measures in different countries (i.e. seizures, arrests, house/company searches, freezing orders and witness interviews). During coordination centres, participating authorities are linked to each other at (footnote 22 continues on following page)  
(footnote 22 continued from preceding page)  
all times, via dedicated telephone lines and computers, and information is quickly passed from one authority to another via Eurojust. The joint execution of measures is constantly monitored and coordinated with a view to anticipating and resolving any operational or judicial obstacles that may impact the operation's success. In addition, prior to a coordination centre, Eurojust typically provides participating authorities with an overview of relevant information concerning all targets subject to the joint actions, including their telephone numbers, locations and bank accounts, if applicable.

- In the course of the searches, bank transfers appeared to have been made to two other MSs and a third State in amounts totalling approximately **EUR 3 million**;
- This situation led to a new LoR being issued by one of the involved MSs **during the coordination centre by the prosecutor of that MS (MS A) attending the coordination centre** to the third State seeking the freezing of the money, and Article 9 certificates being issued to MS B and MS C in relation to the identified bank accounts;
- Eurojust also confirmed to the prosecutor of MS A attending the coordination centre the **language requirements** for MS B and MS C as executing MSs **in the framework of the execution of freezing orders**, *i.e.* the languages accepted in these MSs;
- Eurojust assisted with the **translation** of the Article 9 certificates into the languages of the executing States;
- The translated Article 9 certificates and the respective national freezing order (not translated due to urgency) were **transmitted via Eurojust** (also via FIUs) to the executing MSs;
- **Subsequent transmission of additional information by the prosecutor of MS A attending the coordination centre** to MS B, **via Eurojust**, regarding the role of one of the main suspects in the OCG, his link to the bank accounts in question, and confirmation that a freezing order from MS A had been issued;
- Eurojust further assisted with the **translation of this additional information** into the language of MS B. However, MS B requested that such information be contained in the Article 9 certificate itself, which led to a **new Article 9 certificate being issued by the prosecutor of MS A attending the coordination centre**;
- Authorities from MS B informed the relevant parties, via Eurojust, that the freezing order from MS A **would be executed the next day** and that the translated freezing order accompanying the already translated Article 9 certificate **was required without delay**; and
- A total of approximately **EUR 3 million was frozen** in execution of two freezing orders accompanied by the Article 9 certificates, and of an LoR to a third State **issued during the coordination centre by the prosecutor attending the coordination centre**.

Eurojust also plays a role in the **follow-up to coordinated action days if further coordination is required as investigation(s) develop, leading to further coordination meetings and coordination centres taking place at Eurojust.**

## B.2. Coordination in cases of parallel investigations

In a case of **parallel investigations and related freezing measures** involving two MSs, **Eurojust provided continuous support in coordinating the investigations. Eurojust facilitated the execution of reciprocal LoRs** that sought, among other measures, obtaining financial information for the purpose of issuing a freezing order by: *i) holding several coordination meetings* both at Eurojust and in one of the MSs involved; *ii) clarifying the legal tools* in both MSs for issuing and executing a freezing order and the terms of the cooperation needed to ensure that a freezing order potentially issued in MS A was compatible with FD 2003 on freezing orders and could be executable in MS B; *iii) allowing for the smooth exchange of information* in respect of details of the freezing orders already executed in one of the MSs in the framework of their own proceedings; and *iv) advising on the drafting of a freezing order* from MS A to ensure it complied with the terms of **FD 2003 on freezing orders**, and accordingly had the highest likely probability of being executed under the legislation of MS B.

In another case of **parallel investigations** in two MSs, **Eurojust** also provided **continuous support in coordinating the investigations in the two MSs**. Eurojust organised **five coordination meetings during which information was exchanged** and authorities **planned a coordinated action day** in both MSs to carry out **seizures**, among other measures. **Eurojust** also prepared **crucial advice on the application of judicial cooperation instruments** and the **choice of the most suitable legal instrument**, taking into account the specificities of the case and the involved MSs' national legislation implementing FD 2003 on freezing orders. The **coordinated common action resulted in a huge amount of illegal assets being seized in MS B for possible future confiscation**.

In another case of **parallel investigations** arising from a suspicious transaction from MS A to MS B, **Eurojust** facilitated: *i) execution of two LoRs*, seeking, *inter alia*, the **freezing of funds** in a bank account, *ii) identification of the relevant national authority* to execute the LoRs, and *iii) coordination of both investigations* especially in relation to a **possible conflict between the domestic freezing order (MS B) and the requested freezing order from MS A**. This situation resulted in **both LoRs being fully executed**, which allowed MS A's authorities to continue with their criminal proceedings. MS B's related criminal proceedings were concluded and the judgement became final. Transfer of funds to MS A was not possible, as the judgement passed in MS B was founded upon an earlier decision in favour of the State (MS B).



In another case, Eurojust advised that police information be exchanged in parallel, and assisted in the coordination of the work of police and judicial authorities. Given: *i*) the extreme urgency of the execution of a house search in the requested State in which a vast amount of money was thought to be kept, *ii*) the very strong suspicion that the money would be removed from the house, and *iii*) that despite various attempts on the part of Eurojust to reach the competent judicial authorities in the requested State, ascertaining with certainty whether the latter would be contacted in time was not possible. Thus, Eurojust: *i*) advised the **Liaison Prosecutor of the concerned third State at Eurojust** to also exchange the relevant information via police channels, and *ii*) also directly contacted the dedicated law enforcement agency in the requested MS to deal with the investigation of money laundering and corruption crimes. In total, EUR 4 million in cash was seized.

In other cases of parallel investigations in which freezing measures were sought, Eurojust raised the issue of a possible breach of the *ne bis in idem* principle to the attention of the concerned national authorities, which led to steps being taken to transfer criminal proceedings.

### 1.2.3. Asset Freezing – Highlights for Practitioners

#### Asset Freezing

##### Legal and practical issues

Eurojust's casework in the reporting period identifies a large number of legal and practical issues that have arisen in asset freezing, including the following:

- In some cases, these issues were linked to the requirements for issuing a freezing order or an LoR seeking freezing measures and with consideration for their execution, *e.g.* as a result of differences in the national implementation of FD 2003 on freezing orders.
- In other cases, issues linked to differences in national legislation regarding possibilities for freezing assets required discussion, *e.g.* freezing of commercial activities or preventive measures linked to the concept of unexplained wealth.
- In other cases, issues arising from the identification of the competent national authority required consideration when, *e.g.*, the assets were situated in different locations in the executing/requested State.
- In other cases, the choice of legal instrument was discussed *e.g.* in relation to ensuring that assets were frozen pending an appeal of the confiscation order.
- In some cases, the matter of the transmission of LoRs concerning the seizure of money to more than one requested State at the same time needed to be addressed.
- In other cases, issues related to the restitution of assets to victims or compensation of victims were also encountered, *e.g.* arising from the fact that such restitution and compensation are not possible under FD 2003 on freezing orders, which led, *e.g.*, to the need to seek alternative civil routes.
- Issues linked to freezing measures in parallel investigations also arose in some cases, *e.g.*

in connection with differences in national legal parameters for the issuance of freezing orders and the need to coordinate the transmission of financial information.

- Issues arising from the **communication of the execution of an LoR seeking a freezing measure** sometimes caused delays.
- Issues related to **asset management** needed to be addressed in some cases, *e.g.* in relation to costs, the value of assets, the possibility of early sale, the manner in which the assessment of the value was conducted, or the absence of judicial administrators of companies subject to a freezing order.
- Matters stemming from **challenges and legal remedies** were also addressed in some cases related, *e.g.*, to alleged breaches of Article 6 ECHR or to the choice of legal instrument by the requesting authorities and related impact on available legal remedies.
- In some cases, issues linked to **grounds for refusing the execution of a freezing order or an LoR seeking the freezing of assets** also arose, *e.g.* discrepancies between the Article 9 certificate and the freezing order or insufficient information to allow the freezing.

### Eurojust support

With regard to the **support provided by Eurojust** at the stage of **asset freezing**:

- Eurojust often provided support in the **issuing stage** of a freezing order or LoR seeking freezing measures, *e.g.* when Eurojust provided **advice and clarification regarding the practical, legal and formal requirements** in relation to the freezing of assets, **advice on the choice of legal instrument**, and served as a **channel for transmission of freezing orders and LoRs, and related information and documentation**.
- Eurojust also provided support in the **execution stage** of a freezing order or LoR seeking freezing measures. This support was varied and its extent depended, *inter alia*, on the number of countries involved, the complexity of the case, the need to support **cooperation** as well as **coordination of the execution of freezing measures** and other measures when, *e.g.*, parallel investigations are being carried out in the countries involved.
- Eurojust also assisted, *e.g.*, in the speedy **clarification of the legal requirements** for the extension of the duration of the freezing order, or the legal requirements and consequences of maintaining the validity of a given seizure.
- In other instances, Eurojust supported the **coordination of the execution of the freezing order in complex cases**. This support often required holding **coordination meetings at Eurojust** to prepare a coordinated action day in the involved countries and the setting up of a **coordination centre organised and supported by Eurojust**.
- Eurojust provided **support in coordination in cases of parallel investigations** in which freezing measures were involved, *e.g.* Eurojust facilitated the execution of reciprocal LoRs and freezing orders, advised on possible conflicts between a domestic freezing order and the requested freezing measure, and on possible *ne bis in idem* issues.

### Best practice

- Discussion of asset recovery precautionary measures in the framework of a **JIT**;

- 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**;
- **Multi-disciplinary approach and interaction among different stakeholders**, e.g. FIUs, AROs, police and customs officials working alongside prosecutors in cross-border asset recovery cases, supported by **Eurojust** when needed;
- **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, provided such sale is legal in the involved countries;
- The **management of frozen and confiscated assets** is a crucial stage of the asset recovery process. In this regard, Centralised Asset Management Offices, specialised offices or equivalent mechanisms are very important;
- **Early consideration of administration of funds** pending a final decision;
- **Executing freezing orders in one MS 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;
- **Receiving feedback at regular intervals** from the issuing authority **to avoid exposing the executing country to possible proceedings**;
- The **posting of liaison magistrates/prosecutors specialised in asset recovery** from MSs to other countries dealing merely or primarily with cases in which such issues arise; and
- **Specialised training for prosecutors** in the field of asset recovery.

### 1.3. Judicial cooperation instruments and tools in asset tracing and freezing

Eurojust's casework in **asset tracing** in the reporting period shows that several judicial cooperation instruments and tools were used. The choice of legal instrument or tool in a given case depends on a number of factors, such as the countries involved, whether these were MSs or third States, the crime type, other measures sought, the implementation of existing EU or international legal instruments and their scope of application. In some cases, Eurojust assisted in the choice of legal instrument or tool; in others, the case was referred to Eurojust for assistance after the LoR was sent to the requested State.

In Eurojust cases for which financial and/or banking information (only or together with other measures) was requested in the reporting period, the legal instrument that was used more frequently was the 2001 Protocol to the **2000 Mutual Legal Assistance Convention**, followed by the **1959 Mutual Legal Assistance Convention** (at times including its additional protocols) and the **1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds of crime**, followed by the **1990 Convention Implementing the Schengen Agreement of 1985** and **bilateral agreements** between the involved countries, followed by the **United Nations Convention against Corruption (UNCAC)** and the **United Nations Convention against Transnational Organized Crime (UNTOC)** and the **principle of reciprocity**.

In the majority of cases, the LoRs make reference to several of the above referred legal bases. The use of the **Directive on the European Investigation Order** was discussed and used in several cases. In some cases, the LoR contained reference to the requesting State being a member of a **JIT** set up between four MSs, and contained a request for any banking information provided by the requested State to be shared with the other JIT members.

In the vast majority of the cases for which financial and/or banking information was requested, the **freezing of assets** (and in some cases, other measures as well) **was also requested**. Eurojust casework shows that the practice is very diverse. While in some cases, the LoR alone included all such measures, in others the LoR included the financial and/or banking information and the freezing measures, **but was also accompanied by the freezing order** and the **Article 9 certificate**, either from the moment the LoR was issued or as a result of a request by the requesting/executing State that these two additional documents also be transmitted.

In the reporting period, Eurojust casework in **asset freezing** shows that the judicial cooperation instruments and tools used were also varied. Here, too, the choice of legal instrument or tool in a given case will depend on a number of factors, such as whether other measures were sought, the countries involved and whether these were MSs or third States, the crime type, the implementation of existing EU or international legal instruments and their scope of application. Similarly, in some cases, Eurojust assisted in the choice of legal instrument or tool, while in others the case was referred to Eurojust for assistance after the LoR or the freezing order accompanied by the Article 9 certificate had been sent to the executing State.

In **most of the cases** for which the freezing of assets was sought, **LoRs were used**, and the majority of cases also sought other measures. The legal bases for these LoRs are those referred to above (asset tracing). In some of these cases for which, beyond the freezing of assets, the LoRs also seek other measures, the Article 9 certificate constituted an annex to the LoR, and the national freezing order did not accompany the certificate. In other cases, however, the only measure required was the freezing of assets, and an LoR was nevertheless issued, accompanied by the Article 9 certificate and the freezing order. This situation could be explained by reasons such as: *i*) the requested State has not implemented FD 2003 on freezing orders while the issuing State has implemented it; *ii*) requirements under the national law of the issuing State implementing FD 2003 on freezing orders that the Article 9 certificate be accompanied by the national freezing order as well as a corresponding LoR; or *iii*) lack of awareness on the part of the issuing State that has implemented FD 2003 on freezing orders that the certificate accompanied by the freezing order (if its national legislation does not provide otherwise) suffices.

In fewer than half of the **asset freezing** cases, the freezing of assets was **the only measure sought** and **FD 2003 on freezing orders was the only legal instrument used**. In these cases, as previously referred to under subsection 1.2.1(A), the differences in national implementation of this legal instrument are evident. Some MSs' national legislation requires that the receipt of the Article 9 certificate be accompanied by the national freezing order as well as by a corresponding LoR. Some MSs require receiving the original of the certificate (*i.e.*, in the language of issuing State) and others require receiving the original of both the national freezing order and the Article 9 certificate. In some MSs, reference in the Article 9 certificate to the freezing of the entire bank account balance suffices on the basis that the amount of the seizure is limited by the damage of the crime as stated in the reasoning of the accompanying freezing order, while in other MSs, this reference does not suffice and, instead, the maximum amount to be frozen must be specified in the Article 9 certificate itself. In some MSs, an official original letter from the issuing authorities containing the missing or the accurate information is required, while in other MSs, a less formal transmission of information, or a new rectified Article 9 certificate, is required.

## 2. Asset Confiscation

### 2.1. Asset Confiscation

#### 2.1.1. Legal and practical issues

*A. Requirements for issuing and executing a confiscation order or an LoR seeking confiscation measures*

In various cases, requests for **additional documentation or information** were made. In one case, upon receipt of both the Article 4 certificate of FD 2006 on confiscation orders (hereinafter referred to as ‘Article 4 certificate’) and the accompanying confiscation order in the language of the executing State, the executing authority requested: *i*) a **copy of the original confiscation order in the language of the issuing State**, and *ii*) **information on whether all convicted persons had been legally represented by a lawyer in the criminal proceedings and whether they had been informed of the date of the court hearing**. The issuing authorities provided the requested confiscation order in the language of the issuing State and confirmed that the convicted persons had participated in the trial, during which they had been represented by their lawyers, who had made extensive arguments on their behalf, and that they had been duly notified that the confiscation order had become final. However, the executing authorities further requested copies of the three first instance judgements in relation to the three convicted persons (these three judgements were mentioned in the appeal court decision). The executing authorities clarified that these judgements did not need to be translated into the language of the executing State.

In another case, involving the execution of a confiscation order within the framework of **non-conviction-based confiscation**, the requested State sought answers to the following questions: *i*) whether **any outstanding appeal** was made in relation to the confiscation order; *ii*) **whether the respondent herself had been present at a formal court hearing**, and *iii*) **whether the respondent herself had been involved in any criminal conduct**. According to the legislation of the requested State, the confiscation order could not be executed until confirmation was received that the order to be executed was in force in the requesting State and **not subject to appeal**.

In several other cases, the executing/requested authorities requested confirmation that the confiscation order had been **based on a final and enforceable decision**.

In another case, the **summoning of the person against whom the confiscation order had been made** also led to a **request for additional information**. According to the legislation of the requested State, the person in question needed to be summoned. Therefore, to notify him, the requested State's court needed to know if he was in custody, and, if so, the court needed the contact details of the prison in which he was incarcerated. If he was not in custody, the requested State's court required confirmation that the address indicated in the LoR for confiscation was still accurate. This information was quite urgent, because the summoning procedure needed to be conducted before the hearing. The requesting State's authorities confirmed he was not in custody and confirmed his address.

In another case, clarification of the national rules determining **the appropriate competent authority with jurisdiction to execute a foreign confiscation order or LoR served to avoid delays caused by orders/requests being incorrectly directed**. The MS clarified the difference in terms of competent authority under its legislation to execute a confiscation order depending on whether the order originated from another MS (mutual recognition on the basis of FD 2006 on confiscation orders), in which case the criminal court in which the property was located was competent, or a third State (mutual legal assistance), in which case a centralised court at national level was competent.

In another case, the question of the potential beneficial **ownership of the property by a third party** required, **under the legislation of the requested State**, that any available **information on the relationship between the registered owner/formal owner (natural or legal persons) and the convicted person be included in the LoR**. A major difficulty in the execution of the LoR was encountered, as the formal owner according to the information in the Land Registry in the requested State was a company that was not mentioned in the request for confiscation or in any of the additional documents provided. Under the legislation of the requested State, as a general rule, if the registered owner in the Land Registry and the person identified in the LoR as a convicted person are not the same, a confiscation order cannot be registered. The confiscation order could be registered **as an exception** when the incriminating evidence against the suspect as the real owner of the property had been pointed out in the relevant judicial orders. For this reason, the requesting authority needed to include in the body of the LoR all available information on the relationship between the registered or formal owner (natural or legal persons) and the convicted person. The legal consequences in the requested State might be different depending on the type of relationship involved (front-person, straw-man, close relatives).

### B. Interested parties and legal remedies

In one case, the **obligation to inform the interested party, and the legal remedies available in the executing State**, were considered. The executing authorities informed the issuing authorities of their decision to recognise and execute the confiscation order and, furthermore, prior to transmission and for the benefit of the issuing authorities (and the convicted person), translated that court decision into English (not the language of the issuing State). That court decision also determined that the **convicted person be notified** *i)* of **such decision** (via the Ministry of Justice of the issuing State), that *ii)* if he/she so wished, he/she **could appeal** such decision to recognise and execute the confiscation order in 30 days, and that *iii)* such **appeal would have suspensive effect**. The convicted person subsequently informed the executing authorities that he intended to appeal.

In another case, **the rights of bona fide third parties** protected by **domestic legislation (on the execution of foreign orders affecting property) led to the refusal to recognise and execute the confiscation order (Article 8(2)(d) FD 2006 on confiscation orders)**. The property in question in the executing State (MS B) was, at the time the recognition of the confiscation order was being considered by MS B's authority, held in the name of two third parties (*i.e.* no longer in the name of the convicted person, ownership having been transferred one month after MS A's court decision became final). **The executing authority could not recognise and execute the confiscation order**, as it had no legal jurisdiction to direct the attendance of either the convicted person or the current owners of the property **for the purpose of being heard in MS B**, a requirement under the law of MS B. The court in MS B considered that the recognition and execution could not be permitted under its law if **the rights of bona fide third parties could be guaranteed**. The court went on to say that the wording of the relevant provision in MS B's legislation was sufficiently open to interpretation as to which law would apply to decide whether or not the rights of the third parties were in conflict with the recognition and execution of the order. However, according to an interpretation that was compliant with FD 2006 on confiscation orders, the law of the executing MS (in this case, MS B) was, according to the court, applicable in this case.

### C. Costs

In one case, the requested State required **the translation of both the first instance decision and high court decisions** in the requesting State before considering execution of the confiscated order. As a concern was raised that compliance with this condition would prove **too costly**, the requesting State first requested details as to how much money had already been seized in the requested State before deciding whether the translation was worthwhile.



In another case, balancing **the costs anticipated in the translation of an extensive judgement (both of the court of first instance and subsequent Supreme Court judgement) against the realisable value of the assets amenable to recovery was necessary**, as these documents were **prerequisites for the consideration of the LoR by the requested State (a third State)**. The requested authorities asked for a copy of this judgement and the formal document that attested that said judgement was final. These documents were mentioned in the LoR, but were not initially attached. As the judgement was extremely long, the countries involved explored the possibility of sending **translated excerpts of the relevant parts of the judgement only (abbreviated version)**. The requested authorities, however, concluded that, for them to be in a position to verify if the conditions for a restitution of assets were fulfilled, they required: *i*) a **certified copy of the complete first instance court judgement**, which concerned the confiscation of the assets deposited in the bank account, and *ii*) a **certified copy of the complete Supreme Court decision**, which declared the first instance court judgement final and enforceable. This requirement was acceptable to the requesting State. However, given the length of these judgements, their translation would be extremely expensive, and potentially more expensive than the assets to be recovered. Following further consideration, the concerned countries ultimately agreed that the following would be provided to the requested State: *i*) a certified copy of the confiscation judgement obtained in the requesting State, *ii*) confirmation from the requesting authority that this confiscation judgement was final and enforceable and could not be appealed, and *iii*) a **translation of the motivation for the confiscation and a translation of the summary of the sentence**. In the final analysis, a complete translation of all the court judgements issued by the requesting State was ultimately not needed, and **translation of only the relevant parts in relation to the confiscation proved sufficient**.

#### *D. Other issues*

In some cases, **delays on the part of the executing authorities in formally confirming that the confiscation measures had been executed** were observed. Under the legislation of some MSs, formal documentation confirming the execution of the confiscation measures is required.

In another case, **a continuing misunderstanding as to whether what was being requested was either a freezing or confiscation measure, and the related impact on the competent authority to execute**, led to delays. The LoR needed to be transmitted repeatedly back and forth between the respective competent authorities in the executing State. The authorities ultimately clarified that confiscation was the requested measure.

In another case, the issue was that **the assets sought to be confiscated were also subject to other freezing orders**. In the course of the execution of MS A's confiscation order, MS B's authorities informed MS A's authorities, via Eurojust, that both the real estate property and the bank accounts in question had been seized with a view to confiscation in connection with other proceedings. Furthermore, MS B was also a creditor and in that capacity had preference over common creditors.

**Consideration of whether the location of a potential prosecution will have an impact on the economic enforcement measures, such as confiscation**, arose in a case involving several MSs and third States. The rules applicable to confiscation in one of the third States involved were wider in domestic proceedings than when seeking to enforce a foreign request for confiscation (from a MS), the latter requiring proof that the assets were derived from the commission of a crime, whereas the former proceedings used a value-based measure (thus avoiding the need to trace the money back to the involved bank accounts).

### 2.1.2. Eurojust's support in asset confiscation

Eurojust provided support as early as the drafting stage of the confiscation order or LoR seeking confiscation measures. Eurojust **provided advice and clarification in relation to the practical, legal and formal requirements** in relation to the confiscation of assets, and served as a **channel for transmission of confiscation orders or LoRs and supplemental documentation**.

Eurojust assisted in the **identification of the competent authority in the executing/requested State and in transmission of the confiscation order and Article 4 certificate or LoR** to the competent authorities in the executing/requested State. This assistance proved to be particularly important in very urgent cases or in cases in which other channels proved ineffective. In some of the very urgent cases, the transmission via Eurojust sought that the execution could be initiated or progressed in advance of receipt of the originals by post, when the latter was required.

In some cases, **Eurojust assisted in the drafting of the LoR seeking confiscation** to ensure that the **requirements necessary to consider the execution of the confiscation order or LoR** in the executing/requested State were met. **Eurojust facilitated the translation into English of the executing State's law on judicial cooperation in criminal matters**.

In some cases, **Eurojust was the sole channel of communication between the involved countries. On the part of the third State involved, its Liaison Prosecutor at Eurojust was the single point of contact**.

In other cases, **Eurojust contact points in third States** provided information on the **legal requirements** regarding the execution of a foreign confiscation order, and referred cases to Eurojust.

**Eurojust also provided advice on the choice of legal instrument and on the necessary documentation.** In one case, Eurojust clarified that both MSs involved had implemented FD 2006 on confiscation orders, and that a certificate on the basis of this legal instrument, rather than an LoR, would be the appropriate legal instrument for seeking recognition of MS A's confiscation order in MS B. **Eurojust** also advised that the Article 4 certificate should be accompanied by a translation into the language of the executing State in question, and that according to the law of the executing State, the issuing State's final and enforceable confiscation order should also be translated.

In another case, **Eurojust provided advice on the legal requirements concerning translation of the confiscation order.** The executing authorities consulted Eurojust in relation to **whether the translation of the confiscation order accompanying the Article 4 certificate was necessary.** Eurojust clarified that, under FD 2006 on confiscation orders, the issuing authority is under **no legal obligation to provide a translation of the judgement that ordered the confiscation, but only a translation of the certificate** (Article 19(1) FD 2006 on confiscation orders). Furthermore, the law of the executing State in question implementing said FD foresaw only the translation of the Article 4 certificate into the language of the executing State. In light of the legislation and the principle of reciprocity, the executing authorities had no legal basis to expect translation of the confiscation order into the language of the executing State. When compared to the case example directly above, this case illustrates the differences in national implementation of FD 2006 on confiscation orders in relation to the need to translate the confiscation order.

In some cases, **Eurojust facilitated the exchange of information on the state of play of recognition of the confiscation order, and the exchange of relevant documentation,** following earlier delays in direct communication between the competent authorities in the issuing and executing States. In one case, *e.g.*, Eurojust obtained the information that the confiscation order had been recognised and that its execution was ongoing. In another case, Eurojust facilitated the information, confirming that the confiscation order had been recognised, and that the court order recognising it had been forwarded to the executing authority competent to execute it (*e.g.* to sell the property). In another case, Eurojust facilitated the **transmission of a copy of the court order refusing recognition of the confiscation order, and provided a brief translation into English of the main grounds for refusal,** for the benefit of the countries involved.

In some cases, **Eurojust also served as mediator in relation to the issue of translation costs, and assisted in clarifying the legal and practical possibilities in the countries involved** with a view to reaching a position that was both possible and agreeable to the countries involved.

In other cases, Eurojust facilitated the transmission of information on the time limits, under the law of the executing State, for appealing the court decision recognising and ordering the execution of the confiscation order. In one case, no such appeal had been lodged within the time limit and, therefore, the decision was final and enforceable. In this case, the court in the executing State determined the execution of the confiscation order (approximately EUR 34 000).

### 2.1.3. Asset Confiscation – Highlights for Practitioners

#### Asset Confiscation

##### Legal and practical issues

Eurojust’s casework in the reporting period identifies a large number of **legal and practical issues** that have arisen in **asset confiscation**, including:

- In some cases, these issues were related to the **requirements for issuing a confiscation order or an LoR seeking confiscation measures, or to the consideration of their execution.**
- In other cases, *e.g.*, these issues led to several requests for additional documentation or information, or confirmation that the confiscation order had been based on a final and enforceable decision.
- In other cases, *e.g.*, the issues were linked to the matter of ownership of the property by a third party.
- In other cases, issues arose in relation to **interested parties and legal remedies**, *e.g.*, with the obligation to inform an interested party and to the legal remedies available in the executing State.
- **Cost-related issues** also emerged in some cases, such as when the requested State required the translation of both the first instance and the high court decisions in the requesting State before considering execution of the confiscation measure.
- Other issues have included **delays on the part of the executing authorities in officially confirming that the confiscation measures had been executed** when under the law of the issuing MS such formal confirmation constituted a requirement.
- In other cases, delays resulted from **continued misunderstandings between requesting and requested authorities in relation to the requested measure and their related impact on the competent authority to execute.**
- Consideration of the issue of **whether the place of prosecution would have an impact on the asset-related enforcement measures, such as confiscation**, also arose in one case.

##### Eurojust support

- The need for Eurojust’s **support** at the **asset confiscation** stage often emerged at the issuing stage of the confiscation order or LoR seeking confiscation measures.

- In this regard, Eurojust provided **advice and clarification in relation to the practical, legal and formal requirements** in relation to the confiscation of assets.
- In some cases, **Eurojust assisted in filling in the Article 4 certificate or drafting the LoR seeking confiscation** to ensure that the **requirements for considering the execution of a confiscation order or LoR** in the executing/requested State were met.
- Eurojust often also assisted in the **identification of the competent authority in the executing/requested State and in the transmission of the confiscation order and Article 4 certificate or LoR** to the competent authorities in the executing/requested State.
- Eurojust's support proved particularly important in very urgent cases or in cases in which other channels had proved insufficient.
- In some cases, **Eurojust facilitated the translation of the executing State's relevant provisions of the legislation on judicial cooperation in criminal matters.**
- In some cases, **Eurojust was the sole channel of communication between the involved countries.**
- In other cases, **Eurojust's Liaison Prosecutors acted as single points of contact with the involved third States.**
- In some cases, **Eurojust contact points in third States** provided information on the **legal requirements** regarding the execution of a foreign confiscation order and referred cases to Eurojust.
- In other cases, **Eurojust provided advice on the choice of legal instrument and on the necessary documentation, including the legal requirements concerning the translation of the confiscation order.**
- Beyond the initial preparatory stage of the drafting of the confiscation order or LoR, **Eurojust further assisted towards its recognition and/or execution.**
- **Eurojust often also facilitated the exchange of information on the state of play of the recognition of the confiscation order or execution of the LoR, and the exchange of relevant documentation.**
- In other cases, **Eurojust also served as mediator in relation to the issue of translation costs, and assisted in clarifying the legal and practical possibilities in the countries involved** with a view to reaching a position that was both possible and agreeable to them.
- In other cases, **Eurojust facilitated the transmission of information on time limits, under the law of the executing State, for appealing the court decision, recognising and ordering the execution of the confiscation order.**

### **Best practice**

- **Multi-disciplinary approach and interaction among different stakeholders, e.g. FIUs, AROs, police and customs authorities working alongside prosecutors in cross-border asset recovery cases, supported by Eurojust when needed;**
- The **management of frozen and confiscated assets** is a crucial stage of the asset recovery process. In this regard, Centralised Asset Management Offices, specialised offices or equivalent mechanisms are very important;
- Consent of suspects (in jurisdictions in which the possibility of plea bargaining is foreseen) can speed up the confiscation process;

- **Receiving feedback at regular intervals** from the requesting authority **to avoid exposing the requested country to possible proceedings;**
- **Posting of liaison magistrates/prosecutors specialised in asset recovery** from MSs to other countries dealing merely or primarily with cases in which such issues arise; and
- **Providing specialised training for prosecutors** in the field of asset recovery.

## 2.2. Asset Disposal

### 2.2.1. Legal and practical issues

#### *A. Sale of confiscated assets*

In one case, after the executing State **recognised the confiscation order** (ruling of the competent court granting the confiscation of the property), **the convicted person made a court application in the issuing State seeking that the property in question be sold in the free market to one of his acquaintances for EUR 400 000.** The issuing authority's position was that this sale was not possible at such a late stage in the proceedings, **that the executing authorities should sell the property in the manner they found appropriate, and that any such argument should be brought before the court in the executing State (Article 16(2) FD 2006 on confiscation orders).** The executing authorities agreed with such assessment on the basis that this interpretation supported the legal principle of **mutual recognition** of a foreign court decision. In another case, issues associated with the **sale of the asset and related maintenance costs** arose. Some time after the freezing of the asset was initially requested, the vessel was **sold for approximately EUR 39 000 via a public auction.** However, although the sale was a good result in terms of the value of the vessel, mooring costs, which proved expensive due to the length of time the vessel had been frozen, needed to be deducted from this amount before the involved MSs could proceed with asset sharing under **FD 2006 on confiscation orders.**

In some cases, **uncertainty regarding which communication channels were used caused delays.** In one case, the executing authorities asked the issuing authorities for the **estimated value of the confiscated property.** The executing authorities were uncertain whether this written communication had been sent to the Ministry of Justice of the issuing State or to the Prosecutor General's Office. **Problems arise when various communication channels are used simultaneously in the same case and authorities concerned are not involved in all communications.**

Further delays **linked to the issue of the estimated value of property** have also been observed. In one case, although invited by the executing authorities to indicate the estimated value of a flat, the issuing authorities in turn sought advice from the executing authorities on the basis that they did not have sufficient knowledge of the price range and price fluctuation in the region in which the property was located.

In another case, **the estimated value of the property, the likely final bid, and the expectation of the requesting authorities** were matters that were discussed. The court in the requested State determined the value of the seized property, ordered the Land Register to register the confiscation order and to issue the certificate of ownership and charges with the intention of putting it up for public auction as soon as possible. Despite this court determination, in the public auction itself, the property was believed likely to realise 20 per cent or 30 per cent below this estimated value. This was an important factor to be considered in advance between the requesting (a third State) and requested authorities. For this reason, the requesting State needed to indicate its expectation in relation to the value of the property, because the court in the executing State needed to decide whether to approve the final award.

#### *B. Asset sharing*

Issues linked to **asset sharing** also arose in some cases. In one case, *e.g.*, **the requesting State's (a third State) regime on asset sharing and the temporal scope of the application of the changes in legislation of the requested State** needed to be factored in. The requested authorities proposed a discussion with the requesting authorities to reach agreement on the terms of the asset sharing (the sale was for **EUR 390 000**). The requesting authorities indicated that they did not wish to reach an asset sharing agreement, as they maintained that the proceeds from the sale should be transferred to the requesting State because that was the location of the crime, and the money should be returned there to compensate the victims. However, in the meantime, the legislation in the requested State changed, and the 50/50 rule<sup>23</sup>, with proceeds to be shared between issuing and executing MSs, now also applied to requests from third States (as in this case). As this change in legislation was of a procedural (not substantive) nature, it became applicable at the moment the public auction took place. Subsequently, the requesting authorities confirmed their legal provisions in relation to asset sharing, and also confirmed their agreement to a 50/50 arrangement, rather than restitution of the entire amount to the victim (in fact, a court in the requesting State had refused an application by the victim for restitution of the entire amount). As this was a case of disposal of the assets by way of confiscation of the proceeds of crime, a legal requirement existed to share all realised funds on a 50/50 basis (after deduction of the costs of execution borne by the requested State) between the public revenue services of both countries, without the need to compensate a victim. In the same case, the involved countries discussed the issue of the **formalisation of the asset-sharing agreement**. Given the novelties in the law of the requested State, and the fact that a very large sum of money was at stake, the involved authorities explored the steps required to formalise an asset-sharing agreement. The requesting authorities required an **official communication** from the competent requested

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<sup>23</sup> Similar to Article 16 FD 2006 on confiscation orders.

authority, according to which this case was **considered to be an asset-sharing case by the requested authorities**, *i.e.* an official document that indicated that the requested authorities had initiated the process of negotiation with regard to the sharing of the proceeds of the sale obtained by the requested authorities as a result of the execution of the confiscation order. This document constituted an exchange of communication between competent judicial authorities of both the requesting and requested States. Thereafter, the requesting authority (Public Prosecutor) informed its Ministry of Justice (competent for dealing with matters of seizure and disposal of assets), and the requested authority (centralised court at national level) informed its Ministry of Justice (Asset Management and Recovery Office), **paving the way for an agreement to be formalised at the level of their respective Ministries of Justice**. Agreement on the actual sharing agreement was delayed. The requesting authorities sent a draft asset-sharing agreement to the requested authorities for their comments, and, despite support from Eurojust, the requested State had not yet responded to the draft.

### *C. Restitution of confiscated assets to the victims*

In one case, issues were raised relating to **restitution of assets to the victims**. **Cultural objects** were stolen from MS A, in which an investigation into aggravated theft, illegal association and illegal export of goods was ongoing. These cultural objects were found in MS B, and an investigation also took place there. A final judgement had been passed in MS B, determining that those objects had been **frozen and confiscated, and their return to MS A was ordered**. MS B, in which the objects were found, and not MS A, in which the goods were cultural objects, ordered their restitution to the victims. Simultaneously, MS A issued an LoR to MS B seeking restitution. The LoR took more than three and one-half years to be fully executed. The difficulties were linked, *inter alia*, to legal and practical problems: *i*) **items were too large** to be carried in one trip back to MS A by MS A's law enforcement authorities, so a second trip to MS B had been agreed to transport the remainder of the objects; *ii*) **not all objects** ordered to be returned by MS B's court **were made available to MS A's authorities**, and no explanation was given of the location of the missing objects (reference was made to their being located in another museum in MS B); *iii*) when MS A's authorities returned to transport the objects that were too big to be transported in the first trip, **MS A's authorities denied permission on the ground that the defence had appealed the decision of MS B's court to order the restitution to the victims**; *iv*) delays occurred as a result of these appeal proceedings in MS B; *v*) MS B's appeals court ordered that the objects that had been transported to MS A be returned to MS B, as they were not sufficiently described in the judgement of the court of first instance; and *vi*) on that basis, MS B issued an LoR to MS A for the return of these objects to MS B. MS B's LoR was refused by MS A's authorities because: *i*) it was not formulated by the authority in MS B who, according to the declaration made by MS B in relation to **Article 16 (1)(b) of the UNIDROIT Convention on Stolen or Illegally Exported Goods of 1995**, was competent to make such requests for restitution of objects; *ii*) the request was not addressed to the authority in MS A competent to deal with requests under the same Convention; *iii*) the UNIDROIT Convention, as such, **was not an instrument of judicial cooperation in criminal matters**; and *iv*) the same Convention was not the appropriate legal basis for MS B to ask MS A for the restitution of the objects in question.



In a separate case involving several MSs and third States with a number of parallel ongoing investigations, one of the main issues at stake was the **legal bases for the confiscation and possible transfer of assets to the third State in question**. Another issue involved the interpretation of the terms ‘**victims of crime**’, e.g. Article 57(3)(c) UNCAC, i.e. **discretionary disposal**, consideration of the people who have lived under a corrupt regime as ‘**victims of crime**’, or Article 57(3)(a) and (b) UNCAC, i.e. **mandatory restitution** in cases in which a party, pursuing its own final judgement, requests the return of embezzled or previously owned proceeds.

### *Eurojust case illustration*

With assistance provided by Eurojust, a complex criminal network involved in VAT fraud and money laundering, responsible for a total loss of revenue of approximately EUR 57 million, was dismantled. Investigations revealed that various criminal structures were involved throughout Europe in VAT fraud through the use of companies selling electronic devices, hardware and software. Some of these companies were linked on various levels to defrauding Member States through a complex ‘missing trader’/carousel fraud scheme in violation of VAT rules on intra-EU trade. More precisely, the fraud was realised through intra-EU tax-free large-scale deliveries of goods – some fictitious – to companies in the European Union. Through this scheme, certain parties failed to declare intra-EU purchases and to submit turnover tax advance returns. The complexity of the case also involved disentangling the companies’ legitimate operations from the fraudulent ones.

With the support of Eurojust, the ongoing investigations in Germany and France were identified and linked. Three Eurojust coordination meetings were held, pursuant to which the Member States involved were able to agree on a joint action day and exchange MLA requests, contributing in this way to a quick and positive resolution of the case.

Additionally, the cooperation among Member States allowed MLA requests to be executed at the most suitable time, taking into account all relevant investigative priorities. The execution of a Czech MLA request to Germany was postponed until the joint action day so as not to jeopardise an ongoing covert investigation in Germany.

Some objects for which searches were requested by the German MLA requests to France appeared to be identical to objects that the French colleagues wanted to search. To make the joint actions effective, Germany and France agreed that some of the MLA requests from Germany would be carried out after the joint action day. Most MLA requests focused on the search of business premises of companies involved in the fraudulent chain as well as on the seizure of relevant evidence or interrogation of suspects and witnesses. MLA requests were also sent to and executed

by third States, including Israel. The success of the joint action day depended upon law enforcement officers from Germany and France being present during the searches in the other countries.

On the joint action day, Eurojust set up a coordination centre in which Germany, France, Cyprus, Italy, Latvia, Luxembourg, Poland and the UK participated. Eurojust was able to assist the prosecution offices in their coordination efforts and to subsequently resolve communication issues in the period up to and during the joint action day. Europol also participated by deploying a mobile office at the coordination centre.

The coordination efforts led to seven arrests and 57 searches; 21 hearings of witnesses and suspects were carried out by the relevant authorities. Additionally, **27 freezing orders were issued, and more than EUR 4.5 million and IT equipment were seized.**

## 2.2.2. Eurojust's support in asset disposal

### A. Sale of confiscated assets

In some cases, Eurojust provided **advice on the legal possibilities available in the executing State for assessing the value of the confiscated asset.** In one case, two options were possible: *i*) that the issuing authorities accept the taxation value of the given year (which was usually not sufficiently updated and was frequently lower than the market value); or *ii*) that the issuing authorities seek a judicial evaluation (expert opinion) of the value of the property. **Eurojust** also proposed that, if the issuing State had a diplomatic agent (*e.g.* consul) in the region in the executing State in which the property was located, that he/she be consulted. In another case, **Eurojust transmitted information on how the value of the property would be assessed,** which, in the given case, would be by an expert appointed by the court of the executing State.

In another case, Eurojust facilitated *i*) the **clarification of the legal requirements** of the executing State to allow the return of the assets, *ii*) the **exchange of information**, and *iii*) the **transmission** of the supplementary LoR.

### *B. Process leading to the asset-sharing agreement*

**Eurojust** also provided **advice regarding the legal basis, procedural steps and channel of communication for potential asset-sharing agreements** between the involved countries.

In some cases, **Eurojust provided advice to the requested authorities on how to draft the required formal communication of the centralised court at national level to the requesting authority (public prosecutor) with a view to initiating the asset-sharing agreement**, notably: *i*) that despite the requesting State being a third State, the 50/50 rule applied on the basis of recent changes in the domestic law of the requested State; *ii*) that said 50/50 sharing was possible on the basis that no claim for compensation from the victims was made; *iii*) that, in this way, any possible doubt as to the nature and purpose of the money obtained was set aside, given that it constituted solely the proceeds of crime liable to being confiscated in its entirety for the benefit of the public revenue of both countries and not the victims; *iv*) that the agreement should clearly indicate that this case is a **‘sharing case’** (and not a ‘sharing agreement’), **given that the ‘agreement’ as such would be signed at a later stage at governmental rather than judicial level** between the central authorities (Ministries of Justice of both countries); *v*) that said formal communication should clearly indicate that the negotiation procedure had been initiated in relation to the sharing of the proceeds from the sale of the asset obtained by the requested authorities, with the **sale of the asset as a result of the execution of the confiscation order**; and *vi*) that thereafter, all the relevant documentation would be transmitted to the ministries of justice for subsequent drafting and signing of the sharing agreement.

In some cases, **Eurojust liaised with the competent authority in the requesting State to deal with the recovery of assets (Asset Management and Recovery Office)**. Although the judicial involvement had effectively concluded with the formal communication issued by the requested authority to the requesting authority, **Eurojust maintained the liaison with the Ministry of Justice** of the requested State with a view to following the process until the end to **ensure that any issues that might arise with the actual asset-sharing agreement at the level of the Ministries of Justice might be facilitated through Eurojust**, as a well-established channel of communication. This liaison was important because the **money remained in a bank account managed by the judicial executing authority** until its 50 per cent [after deduction of the costs borne by the requested State with the execution of the sale (land register-related costs)] were finally transferred to the requesting State after the asset-sharing agreement was reached. In these cases, **with the support provided by Eurojust, the involved countries finalised the asset-sharing agreement**.

In a separate case of parallel investigations with links to four MSs and four third States, among other issues, the matter of **restitution of the confiscated assets to the victims in a third State** was discussed. **Eurojust organised several coordination meetings**. These meetings established a **platform for exchange of information, enhancing trust and mutual understanding, which resulted in more effective bilateral contacts outside Eurojust**, notably in relation to the authorities in the countries involved that were competent to deal with the disposal of assets. Eurojust also prepared a **legal note** addressing, among other legal matters, the **possible legal bases for the restitution of assets to the third State**, and a **matrix for information-gathering with updated information on the state of play of the investigations**, which was further completed after the coordination meeting. Assets amounting to **EUR 1 billion 250 million from 12 countries** were frozen.

### 2.2.3. Asset Disposal – Highlights for Practitioners

#### Asset Disposal

##### Legal and practical issues

Eurojust's casework in the reporting period identifies quite a number of **legal and practical issues** that have arisen in the field of **asset disposal**, including the following:

- In some cases, these issues were linked to the **sale of the confiscated assets**, *e.g.* when the convicted person challenged the manner in which the executing authority chose to assess the estimated value of the property.
- Issues linked to **asset sharing** also arose in other cases.
- These touched upon, *e.g.*, **the requested State's (a third State) regime on asset sharing and the temporal scope of the application of the changes in the legislation of the executing State**, the issue of the **formalisation of the asset-sharing agreement**, and **delays in reaching the actual asset-sharing agreement**.
- In some cases, issues linked to the **restitution of confiscated assets to the victims** also emerged. For example, in a case involving several MSs and several third States, with a number of parallel ongoing investigations, one of the main issues was the possible **legal bases for the confiscation and possible transfer of assets to the third State in question**, and the issue of '**victims of crime**'.

##### Eurojust support

- The **support** provided by Eurojust at the **asset disposal stage** depended on the issue at stake. With regard to support in relation to the **sale of the assets**, Eurojust provided, *e.g.*, **advice on the legal possibilities available in the executing State for assessing the value of the confiscated assets**.
- In one case, Eurojust also facilitated the **clarification of the legal requirements** of the requested State to allow the return of the assets, the **exchange of information**, and the **transmission** of a supplementary LoR.
- In **support of the process leading to the sharing agreement**, Eurojust provided **advice on the legal basis, procedural steps and appropriate channel of communication for potential**

**asset-sharing agreements** between the involved countries.

- In other cases, **Eurojust provided advice to the requested authority on how to draft the required formal communication to the competent requesting authority to initiate the asset-sharing agreement, and liaised with the authority in the requested State competent to deal with the recovery of assets.**
- In another case in which the matter of **restitution of the confiscated assets to the victims in a third State** was discussed, **Eurojust organised several coordination meetings, which served as a platform for exchange of information, enhancing trust and mutual understanding, and resulting in more effective bilateral contacts outside Eurojust, notably in relation to which authorities in the countries involved were competent to deal with the disposal of assets.**

### **Best practice**

- **Multi-disciplinary approach and interaction among different stakeholders, e.g. FIUs, AROs, police and customs working alongside prosecutors in cross-border asset recovery cases, supported by Eurojust, if needed.**
- **Importance of judicial authorities discussing the sharing and return of confiscated assets, as soon as assets located abroad need to be frozen, in view of their eventual confiscation.**
- If appropriate, **Eurojust's assistance in clarifying the legal requirements in MSs for the disposal, sharing and repatriation of assets.**
- If appropriate, **Eurojust's assistance in facilitating the process leading to the conclusion of agreements on sharing and return of assets between the competent national authorities.**
- The posting of **liaison magistrates/prosecutors specialised in asset recovery** from MSs to other countries dealing merely or primarily with cases in which such assets arise.
- Specialised training **for prosecutors** in the field of asset recovery.

## 2.3. Judicial cooperation instruments and tools in asset confiscation

Eurojust's casework in the area of **asset confiscation** in the reporting period shows that **FD 2006 on confiscation orders**<sup>24</sup> was used in all analysed cases in which all the countries involved were MSs, except for one case that may be explained by the fact that the requesting State had implemented FD 2006 on confiscation orders, but the requested State had not. In this case, an LoR was issued. With regard to confiscation orders sought in or by third States, LoRs were issued by the MS concerned and the legal bases used were the **1959 Mutual Legal Assistance Convention**, the **1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime** and the **1990 Convention Implementing the Schengen Agreement of 1985**.

The casework showed **differences in the interpretation and application of FD 2006 on confiscation orders**. In some cases, only the Article 4 certificate was translated, accompanied by the confiscation order, and at other times by the appeal court judgement confirming such order, in the language of the issuing State alone. In other cases, both the Article 4 certificate and the confiscation order were transmitted, both in the language of the issuing State and also translated into the language of the executing State.

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<sup>24</sup> During the preparation of the report, the Court of Justice of the European Union passed a judgment on the application of this legal instrument in Case [C-97/18](#).

The questions referred to the Court were:

1. Can Article 12(1) of Framework Decision 2006/783/JHA be interpreted as meaning that, when a confiscation order transferred by an issuing State is executed in the Netherlands, a term of imprisonment pending payment as referred to in Article 577c of the Netherlands Code of Criminal Procedure may be applied, having regard to, *inter alia*, the decision of the Hoge Raad of 20 December 2011 to the effect that a term of imprisonment pending payment must be deemed to be a penalty within the meaning of Article 7(1) of the ECHR?
2. Does it make any difference to the possibility of applying a term of imprisonment pending payment whether the law of the issuing State also makes a provision for the possibility of applying a term of imprisonment pending payment?

The Court ruled that:

1. Article 12(1) and (4) of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders must be interpreted as not precluding the application of the legislation of an executing State, such as that at issue in the main proceedings, which, for the purpose of enforcing a confiscation order adopted in an issuing State, authorises, where necessary, a term of imprisonment to be imposed.
2. The fact that the legislation of the issuing State also authorises possible recourse to a term of imprisonment has no bearing on the application of such a measure in the executing State.

### 3. Best practice

Below are examples of best practice in the field of asset recovery identified in Eurojust's casework in the reporting period. They cover asset tracing, asset freezing, asset confiscation and asset disposal.

1. In those countries in which **central bank registers** and **public registers for companies and property** exist, information on bank accounts, companies and property related to a suspect can be made available more swiftly, thus allowing for a quicker execution of requests for freezing;
2. Benefit in including consideration of asset recovery precautionary measures within the framework of a **JIT**;
3. **Establishing a JIT solely for the purpose of conducting a financial investigation**, if such is possible, under the law of the involved countries;
4. 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;
5. **A prior and thorough investigation by the requested State into the money trail**. While this process may be time-consuming, it often results in the requesting authorities ultimately receiving the full paper trail without the need to send additional LoRs to the requested State;
6. Some MSs have started to **hire specialised accountants to work on financial investigations** in the framework of criminal investigations **to assist the prosecutors**. This is an interesting development in some MSs. The importance of 'going after the money' is becoming increasingly apparent, leading to the need to involve and appropriately remunerate experts that have the necessary skills, so that these experts can properly assist and inform prosecutors leading the investigations and help them to take well-informed decisions;
7. **Close cooperation (e.g. exchange of information) between specialised forensic accountants** of the involved countries in which parallel financial investigations are ongoing;
8. Having units or departments within the competent authorities **specialised in asset recovery cases**;
9. Utilising a **multi-disciplinary approach and interaction among different stakeholders**, e.g. FIUs, the Egmont Group of Financial Intelligence Units, AROs, police and customs authorities, working alongside prosecutors in cross-border asset recovery cases, supported by **Eurojust** if needed;

10. Early engagement **in terms of asset tracing** with the authorities of countries with the potential for future freezing and confiscation measures, taking into account the national, EU or international legal framework, , and involving **Eurojust**, if appropriate;
11. In the context of asset tracing, **the presence of the authorities of the requesting State (in case of an LoR) or issuing State (in the event of an EIO) in the requested/executing State can prove useful in assessing the relevance of the search results**, as further assets, other than bank accounts, may exist, *e.g.* investment funds or insurance policies, that had not been foreseen when the LoR/EIO was issued.
12. When possible under the legislation of the involved countries, **inclusion**, within the initial request for freezing, **of a request for early sale of frozen assets** (if they are perishable, lose value with the passage of time or involve high management costs) in advance of confiscation;
13. The management of frozen and confiscated assets is a crucial stage of the asset recovery process. In this regard, Centralised Asset Management Offices, specialised offices or equivalent mechanisms are very important;
14. **Early sale** of certain types of frozen assets can speed up the confiscation process;
15. **Early consideration of administration of funds** pending a final decision;
16. **Executing freezing orders in one MS at the same time as arrests and searches** are carried out in another can also help to prevent assets being dissipated;
17. **Legal possibility** of executing a freezing order in a VAT fraud case when the defrauded budget is that of the issuing Member State;
18. Consent of suspect (in jurisdictions in which the possibility of plea bargaining is foreseen) can speed up the confiscation process;
19. **Receiving feedback at regular intervals** from the requesting authority **to avoid exposing the requested State to possible proceedings**;
20. Organisation of a **coordination centre at Eurojust for the purpose of simultaneously freezing the assets of crime**;
21. Importance of early engagement and agreement between **judicial authorities on the subject of sharing and return of confiscated assets**;
22. If appropriate, seeking **Eurojust's assistance in clarifying the legal requirements and best practice in MSs for the disposal, sharing and repatriation of assets**;
23. If appropriate, seeking **Eurojust's assistance in facilitating the process leading to the conclusion of agreements on sharing and return of assets** between the competent national authorities;



24. The **posting of liaison magistrates/prosecutors specialised in asset recovery** from MSs to other countries, and dealing merely or primarily with cases in which such issues arise; and
25. **Specialised training for prosecutors** in the field of asset recovery.

## 4. Conclusions

1. **Eurojust** is a privileged forum for the facilitation of dialogue, taking into account the legal traditions, legal systems and diversity of languages across the European Union, and for finding an acceptable solution for the countries involved.
2. National competent authorities seek the assistance of Eurojust with a view to simplifying and speeding up, to the maximum extent possible, the **cross-border execution of asset recovery measures**, which can range from the stage of the financial investigation to the disposal of confiscated assets.
3. Eurojust's casework in the field of asset recovery in the reporting period shows that Eurojust continues to play an important role in **improving cooperation in criminal matters between Member States** (Article 3(1)(b) of the Eurojust Council Decision), particularly by: *i*) facilitating the recognition and execution of freezing and confiscation orders and the execution of requests for judicial cooperation; *ii*) assisting in the drafting of freezing and confiscation orders or LoRs, the identification of competent authorities in the executing or requested Member States, information exchange, and translation of relevant information; *iii*) enabling the coordination of investigations and helping investigating and prosecuting authorities to act simultaneously in the execution of freezing orders; *iv*) clarifying the legal requirements of both issuing and executing authorities, and solving practical problems arising from the diverse legal and procedural requirements in different legal systems; *v*) assisting Member States in reaching agreements for the disposal of confiscated property and asset sharing; and *vi*) identifying best practice to manage assets from the outset of an investigation.
4. The presence of the **Liaison Prosecutors at Eurojust** and their involvement in cases has been considered very useful, as they can accelerate and facilitate judicial cooperation between competent authorities of the Member States and third States involved.
5. Despite the number of legal instruments enacted in the field of asset recovery, judicial cooperation continues to **be hampered by major differences between national legal systems and a lack of harmonised rules**. Member States still face obstacles in the execution of LoRs, in the identification and freezing of the proceeds of crime and in the recognition of MSs' confiscation orders. **Eurojust** continued to identify practical ways to maximise judicial cooperation in this area and to overcome obstacles arising from different freezing and confiscation regimes.

6. Some Eurojust cases concern only one or two stages of the asset recovery process (e.g. asset tracing and asset freezing, or the confiscation of the assets and their disposal). Other Eurojust cases, however, concern the **entire asset recovery process**.
7. While **asset recovery** matters are at times the only issue of the case in relation to which the assistance of Eurojust is sought, on many other occasions, such matters are only one of the many aspects of the same case with which Eurojust is requested to assist, e.g. EAWs, searches, surveillance, interviews of suspects or witnesses, possible *ne bis in idem* issues and jurisdictional issues, and the setting up of a JIT.
8. Much of the judicial cooperation in the field of asset freezing is still done on the basis of instruments other than FD 2003 on freezing orders. Some Eurojust cases show that the purpose of the freezing is **compensation or restitution of assets to the victims**. In some cases, **the concept of mutual recognition may not be well understood by some practitioners**.
9. When the **EIO** became operable in most Member States towards the end of the reporting period, a few Eurojust cases showed the use of the EIO for seeking information on bank and other financial accounts or information on banking and other financial operations, either to seek this evidence for the first time, or to supplement a previous LoR.
10. Cross-border criminal and asset (financial) investigations may occur in parallel in various countries, and national authorities need to take into consideration, also in parallel, other legal issues that, as a result, may arise and are intertwined, such as *ne bis in idem*, transfer of criminal proceedings, and the speciality rule. Effective cooperation is as important as effective coordination, as demonstrated by Eurojust's casework.

# Annex Legal Framework

## 1. The EU legal framework

The current most important instruments are the following:

- i) **Council Framework Decision 2003/577/JHA** of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>25</sup>; and
- ii) **Council Framework Decision 2006/783/JHA of 6 October 2006** on the application of the principle of mutual recognition to confiscation orders are aimed at facilitating the recovery of assets in cross-border cases.

Both Framework Decisions are based on the principle of mutual recognition and work in a similar way. Both instruments require freezing or confiscation orders issued in one Member State to be recognised and executed in another Member State. The orders are transmitted alongside a certificate to the competent authorities in the executing State which must recognise them without further formalities and take the measures necessary for their execution.

Mutual recognition is mandatory for a list of offences punishable by at least three years of imprisonment in the issuing State. In other cases, dual criminality is necessary, which means that recognition can be refused if the crime to which the freezing or confiscation order relates is not a criminal offence under the laws of the executing Member State. The Framework Decisions allow for further grounds for refusal in certain situations.

The **Regulation (EU) 2018/1805 of 14 November 2018 on mutual recognition of freezing orders and confiscation orders** will replace the provisions of the Framework Decision 2003/577/JHA as regards the freezing of property between Member States bound by the Regulation as from 19 December 2020. The Regulation will also replace Framework Decision 2006/783/JHA between the Member States bound by it as from 19 December 2020. Therefore, the provisions of the Framework Decision 2003/577/JHA as regards the freezing of property, as well as the provisions of the Framework Decision 2006/783/JHA, should continue to apply not only between the Member States that are not bound by the Regulation but also between any Member State that is not bound by the Regulation and any Member State that is bound by the Regulation.

The main features of the Regulation are:

- A single regulation covering freezing and confiscation orders, directly applicable in the EU. It is intended to resolve the issues linked to the implementation of the existing instruments.
- The general principle of mutual recognition, *i.e.*, that all judicial decisions in criminal matters taken in one EU country will normally be directly recognised and enforced by another member state. The regulation only sets out a limited number of grounds for non-recognition and non-execution.

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<sup>25</sup> As regards freezing for the purpose of safeguarding evidence, Framework Decision 2003/577/JHA has been replaced by Directive 2014/41/EU on the European Investigation Order.

- A wide scope of types of confiscation in criminal matters, such as value based confiscation, non-conviction based confiscation, including certain systems of preventive confiscation provided that there is a link to a criminal offence.
  - Standard certificates and procedures.
  - A deadline of 45 days for the recognition of a confiscation order and in urgent case a deadline of 48 hours for the recognition and a further 48 hours for the execution of freezing orders. Those limits can be postponed under strict conditions detailed in the regulation.
  - Provisions to ensure that victims' rights to compensation and restitution are respected in cross-border cases.
- iii) **Council Framework Decision 2005/212/JHA of 24 February 2005** on confiscation of crime-related proceeds, instrumentalities and property is a harmonising measure. It replaced in 2005 the Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. It requires all Member States to put in place effective measures to enable the ordinary confiscation of criminal instrumentalities and proceeds for all criminal offences punishable by detention of at least one year. It also introduced provisions on extended confiscation.
- iv) **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. Member States have the obligation to set up or designate a national Asset Recovery Office for the purpose of facilitation of the tracing and identification of proceeds of crime and other crime related property concerns the close cooperation between the relevant authorities which may become the object of a freezing, seizure or confiscation order.
- v) **Directive 2014/42/EU of 3 April 2014** on the freezing and confiscation of instrumentalities and proceeds of crime in the EU had to be implemented by Member States until October 2016. It replaces certain provisions of Council Framework Decision 2005/212/JHA. Whereas Framework Decision 2005/212/JHA applies to all criminal offences punishable by detention of at least one year, the Directive could only cover the so-called Eurocrimes<sup>26</sup>. Directive 2014/42/EU sets minimum rules for national freezing and confiscation regimes: it requires ordinary and value confiscation for Eurocrimes, including where the conviction results from proceedings in absentia. It provides rules for extended confiscation subject to certain conditions. It also enables confiscation where a conviction is not possible because the suspect or accused person is ill or has absconded. The Directive also enables for the first time the confiscation of assets in the possession of third parties. The Directive also introduces a number of procedural safeguards, such as the right to be informed of the execution of the freezing order including, at least briefly, on the reason or reasons; the effective possibility to challenge the freezing order before a court; the right of access to a lawyer throughout the confiscation proceedings; the effective possibility to claim title of ownership or other property rights; the right to be informed of the reasons for a confiscation order and to challenge it before a court.

<sup>26</sup>

According to Art. 83 TFEU, Eurocrimes are particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offenses or from a special need to combat them on a common basis. They are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Because of the legal base of Article 83(1) TFEU, the scope of Directive 2014/42/EU is limited to Eurocrimes, and does not cover other criminal offences which generate proceeds.

- vi) **Directive 2014/41/EU of 3 April 2014** on the European Investigation Order. For the Member States bound by this Directive, this is the applicable instrument for seeking financial information, including information on bank and other financial accounts (Article 26), and information on banking and other financial operations (Article 27).

## 2. The international legal framework

The most important international conventions and agreements are the following:

- i) The **1959 Council of Europe Mutual Legal Assistance Convention** and its protocols.
- ii) The **1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime**;
- iii) The **2000 UN Convention against Transnational organised Crime**;
- iv) The **2003 UN Convention against Corruption** (Articles 52-59) which has been ratified by the EU;
- v) The **2005 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism**, so-called "Warsaw Convention";
- vi) The **Financial Action Task Force (FATF) Recommendations/standards** on combating money laundering and the financing of terrorism and proliferation (including confiscation and asset recovery) adopted on 16 February 2012, and updated regularly since.

The international conventions are important tools in the fight against organised crime and the efforts to enhance asset recovery. They provide alternative, more traditional means of judicial cooperation compared to mutual recognition. However, not all of them are binding and several have not been ratified by a considerable number of EU Member States.