Council of the European Union

Brussels, 23 June 2025
(OR. en)

9682/25

EJN 8
COPEN 153
JAI 723

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Conclusions of Workshop I and II of the 62nd plenary meeting of the European Judicial Network (EJN) (Antwerp, 10-12 June 2024): international cooperation in the execution phase, applying investigative measures when tracing and confiscating assets

Delegations will find attached the above-mentioned conclusions.

62nd PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK

10 - 12 June 2024
Antwerp - Belgium

CONCLUSIONS of Workshops I and II

Introduction

The document before you is the end product of the 62nd Plenary Meeting of the European Judicial Network (EJN) organised under the Belgian Presidency of the Council of the European Union in close cooperation with the EJN Secretariat, from the 10th to 12th of June 2024 in Antwerp.
As is customary, the members of the network exchanged views, knowledge, and expertise on topics of international cooperation in criminal matters through presentations, workshop discussions and networking.

As the main topic of the Plenary Meeting, the Belgian Presidency chose to focus on how we could further improve cross-border cooperation when tracing proceeds of crime in the execution phase. What investigative measures or tools are needed to ensure that confiscation orders and financial penalties are executed more efficiently and effectively? Is the current legal framework sufficient? What can be the role of the EJN? What are the possibilities of using Privacy-Enhancing Technologies (PET).

In order to get an overview of the possibilities in each Member State, a questionnaire was launched among the EJN contact points. The results were used as a starting point for the discussions during the workshops.

Below an overview of the problems that the practitioners are confronted with in day-to-day practice are described as well as findings, observations, and recommendations to further improve the cross-border cooperation in criminal matters.

1. INTERNATIONAL COOPERATION IN THE EXECUTION PHASE - APPLYING INVESTIGATIVE MEASURES WHEN TRACING AND CONFISCATING ASSETS

1.1 INTRODUCTION

Organised crime is and remains an urgent and fundamental threat to our society and the rule of law.
It is no longer about criminals threatening and killing each other in the underworld. They make billions, which they not only use to live a luxurious life or finance future criminal ventures, but also to infiltrate society. Their money laundering schemes hinder competition. As benefactors of sports clubs, good causes and local social initiatives, they try to elevate their standing within the community as respectable citizens. To stay out of reach and keep their criminal activities going they recruit children to do their dirty work. They bribe and threaten public officials, prosecutors, lawyers, and journalists...

In 2023, Europol estimated the criminal proceeds across the EU at 188 billion euros annually, while indicating that this is likely a vast underestimation. Less than 2 % of this amount is actually confiscated[1]. One can only wonder what happens to the other 184 billion euros.

A "follow the money" approach has shown that experienced criminals use and abuse borders to secure their assets and hinder the correct, adequate, and timely prosecution and execution of their sentences. The absence of a swift and clear response, particularly across borders, results in impunity, (a sense of) insecurity and injustice, thus making cross-border cooperation essential in asset tracing and confiscation efforts.
Unfortunately, this is the core of the issue. The possibilities for international cooperation in the execution phase are extremely limited compared to the investigation phase.

For decades, the focus of international cooperation has predominantly been on the investigation and prosecution phases. Cooperation in the cross-border execution of sentences has never really been a central theme. The few instruments covering the execution phase, regulate a specific matter, e.g., Framework Decision 2008/909 or Regulation 2018/1805.
Consequently, the workshops examined the current legal framework, to assess whether it is complete and robust enough to ensure swift and efficient cooperation between Member States.

As became apparent during the 62nd EJN Plenary Meeting, the exchange of information is mainly designed to support and further the investigation and prosecution phases, while there is also a need for adequate and quick information sharing in the execution phase.
The use of investigative measures in the execution phase is non-existent in a cross-border context due to the absence of an international instrument, while experiences show that criminals use malicious third parties to hide their assets. Without the means to investigate, how can we pierce through the veil?

[1] Source: The Other Side of the Coin – An Analysis of Financial and Economic Crime – Europol Crime Threat Assessment 2023.

The investigation, prosecution, and execution phases are equally important aspects of criminal law enforcement. For criminal policy to have a true deterrent effect, the effective execution of judicial decisions is essential.

1.2 Information & exchange – Dual level approach

As any investigation stands or falls on information gathering and exchange, so does the enforcement of a judicial decision. Especially when tracing assets and proceeds of crime, it is understood that a rapid and adequate cross-border exchange of information is crucial. Herein lies the challenge.

Due to a variety of reasons, it is not always possible to identify and/or seize assets in the investigation phase. Court rulings ordering the confiscation of illicit proceeds or imposing financial penalties are therefore at risk of remaining ineffective unless the authorities in charge of the execution phase actively invest in the tracing of criminal assets and are given the proper tools to do so.

Gaps in information exchange can be identified at two levels, i.e., the legal and regulatory level and the case-specific level.

1.2.1 The legal and regulatory level

The legislative framework guides the conduct of the judicial authority. National and international rules determine how to act and which cross border cooperation can be put in place. Legislation should therefore be clear, well defined, and future-proof. In addition, robust tools need to be in place to apply the framework in practice.

A. Scope of EU instruments

Based on the questionnaire and the discussions during the plenary meeting, a gap was identified in cross-border information exchange as the new Directive 2023/977, replacing the Swedish Framework Decision on the exchange of information between the law enforcement authorities, is limited to preventing, detecting or investigating criminal offences only, while there is also a strong need to exchange information in the execution phase. When tracing assets, information between competent authorities needs to be able to flow freely with an absolute minimum of obstacles/requirements, otherwise illegal proceeds may be gone before the (judicial) cooperation with another Member State has even started.

With the production order and preservation order as regulated by Directive 2023/1543, we see a first small shift. This instrument can be used both in the investigation phase and also for the execution of a custodial sentence or a detention order of at least four months. Hence, the door to cooperation during the execution phase has already been opened but it is limited to

locating convicted fugitives. One can imagine that a production order could also be useful when tracing assets of convicted persons. One can even argue that looking for convicted fugitives and their criminal assets goes hand in hand. Yet the tools and means to do so vary depending on whether you are looking for the fugitives or their assets. Why is that?

Participants at the Plenary Meeting would also like to see the field of application of Directive 2023/1543 expanded to include the banking sector!

Recommendation:
The EJN (members) recommends, when reflecting on the scope of (future) instruments and legislation, to have a discussion about the need to enlarge the scope not only to the execution of custodial sentences, but also to tracing assets and the execution of confiscations and financial penalties.

B. Fiches Belges

As in the investigation phase, cross-border actions in the execution phase are also determined – if not limited – by the statutory possibilities in other Member States.

A well-considered decision to execute a judicial decision across borders, taking into account the rights of society, the victim and the convicted, also requires an understanding of the possibilities, limitations, and impossibilities in the various Member States whose cooperation is sought. What enforcement possibilities are there? Which databases can be accessed (land register/real estate register, Beneficial Ownership Registers, Business registers, vehicle registers (cars, planes, boats...), bank account registers)? Are certain investigative measures possible? May assets be frozen, pending the enforcement of a confiscation order? Can a prison sentence serve as a substitute for financial penalties?

The EJN has traditionally played a role in facilitating cross-border cooperation during the investigation phase. However, there is growing recognition that the EJN could and should provide more support during the execution phase, particularly in asset tracing and confiscation.

The **EJN** is seen as having a key role in:

- **Facilitating** the exchange of information between the competent authorities (no need for specialized CPs).
- **Completing and updating the Fiches Belges**: The Fiches Belges should include **post-trial asset tracing** information, as well as **post-conviction confiscation** requirements and clarify the differences between **object** confiscation (seizing specific assets) and **value** confiscation (seizing assets equivalent to a certain value).

- **Providing** guidance on which legal instruments to use during the execution phase. Participants acknowledged the difficulty of justifying post-trial investigative measures without clear guidelines in current legal instruments.
- Adding a list **of national databases** accessible by judicial authorities for asset tracing purposes, which could enhance cooperation across Member States.
- **Training Contact Points**: The EJN should provide **specialized training** for Contact Points to equip them with the knowledge necessary for post-conviction asset tracing and confiscation.

Recommendation:
The EJN (members) recommends expanding the Fiches Belges to include detailed information on post-conviction asset tracing, including national requirements for confiscations and financial penalties. This enhancement will enable practitioners to act more efficiently and ensure consistency in cross-border enforcement.

1.2.2 The case specific level

This level encompasses the concrete file-specific information that a competent authority needs to actually enforce a judicial decision (confiscation or financial penalty). The main question here is how to get an insight into the convict's whereabouts as well as his/her assets abroad or social, family, and economic ties with another Member State.

Within the current framework, when tracing assets in the execution phase, competent authorities first look at the information present in the case file used to take the suspects to court in order to identify links with other Member States. As this information was gathered during the investigation phase, this information could be outdated. Having the possibility to use Directive 2023/977 would have been helpful, but as stated above it does not necessarily apply. Competent (judicial) authorities therefor take recourse to Open-Source Intelligence (OSINT) in the hope of finding some lead/clue as to the location of illegal assets/proceeds or make use of the EU Asset Recovery Office (ARO) network. However, in order to use the ARO network, reasonable grounds for suspecting that a convicted person might have assets in the requested country need to be provided, as fishing expeditions are not allowed.

As discussions during the Plenary Meeting revealed, it is unclear as to what is to be understood by "reasonable grounds". As there is no definition of what constitutes a reasonable ground, the concept varies significantly across Member States, with some of them requiring strict evidence linking the individual to the asset, while others rely on broader indications or assumptions based on citizenship or residence.

Furthermore, the assessment of what is to be considered a reasonable ground is entrusted to different authorities by the Member States. While in some countries it is the police or the

public prosecutor, in others it is a judge. This makes a uniform application far from obvious as the threshold to be met might vary depending on who makes the assessment.

This discrepancy hinders close cross-border cooperation and the swift and effective exchange of information and execution of confiscation orders. It is difficult to prove a direct link between the convicted person and the asset as the information is often limited to what one already knows from the investigation phase or what can be found in open source databases. Citizenship or residency are also less effective than one might think. Seasoned criminals will more than likely hide their wealth in countries other than their place of residence or nationality.

An ARO request is also far from satisfactory. The information received in answer to an ARO request is a snapshot, a freeze frame in time, of the current financial situation of the convicted person in a certain Member State. The answer contains the information available in the requested Member State at the moment of the request. If the convicted person acquires a house, a horse or a car or opens a bank account a few months after the ARO request was answered, that information is not (readily) available to the requesting Member State. This information can mean the difference between issuing a confiscation order or not.

Within the current framework one could foresee repeating the ARO request every so often, but not only is it time consuming and labour intensive, it is also very inefficient as there is no guarantee that the criminal assets are still in the same Member State. Therefore the exercise may have to start all over again (proof of reasonable grounds).

Possible solutions were suggested during the Plenary meeting. The EJN contact points discussed the possibilities that technologies such as Privacy Enhancing Technologies (or PETs[2]) could bring to the table when exchanging information between Member States.

The answers to the questionnaire revealed that all responding Member States have access to databases such as land register/real estate register, Beneficial Ownership Registers, Business registers, vehicle registers (cars, planes, boats...), bank account registers and official population registers – also in the execution phase. Some Member States suggested that all databases that can be used in a Member State during the investigation and trial phases, should also be accessible in the execution phase, including during the execution of requests for international cooperation. The information in these databases is immediately/directly accessible and could be of significant help when trying to establish 'reasonable grounds', it simply needs to be made available in a cross-border context.

[2] PETs are tools that uphold fundamental data protection principles by minimising personal data use (privacy by design) and maximising data security (security by design). PETs use methods like pseudonymization and anonymization to enable data exchange and have already been implemented in areas like money laundering and tax fraud investigations.

PET could be used when tracing assets in order to execute confiscations or financial penalties. It can provide more insight into where relevant information might be stored in another Member State, whilst always ensuring the fundamental rights of the suspect/convicted person. It will give practitioners the possibility to establish links with other Member States and subsequently draft and send confiscation orders or certificates for 'financial penalties' in an expeditious manner.

Some Member States also suggested looking at the way confiscation orders and certificates for financial penalties are exchanged. The suggestion was made that rather than trying to prove reasonable grounds, we should look at the European Arrest Warrant for inspiration, where the possibility exists to issue a SIS II alert.

A similar approach for confiscation orders or financial penalties would make it possible for Member States to look for assets in their country and fill out a hit form when assets are located. The issuing/requesting Member State can then draft and send the necessary certificates. The suggestion merits further research. In conclusion:

- Although **reasonable grounds** are a key requirement for cross-border asset tracing, the interpretation of what constitutes "reasonable grounds" varies significantly between Member States. Some require strict evidence, while others accept broader indications. This hinders effective asset tracing, seizure, and confiscation across Member States, to the benefit of the convicted person.

- **PET** could help in this regard. Among the participants there was cautious optimism for the use of PETs, with several Member States stressing the need for further clarification on how PETs would function in practice. Exploring PETs as a future tool for cross-border cooperation in asset tracing is worthwhile, but more research is needed.

Recommendation:
It is the recommendation of the EJN that the European Commission takes the initiative to form an expert working group tasked with improving the exchange of information in the execution phase and the tracing of assets, taking into account the possibilities of PET and the use of SIS II.

While information exchange is crucial, it also has its limits. Perfecting the framework for exchanging information alone will not resolve the problem as not all information necessary to trace assets is readily available in national databases. Sometimes investigative measures are necessary to get an insight into a convicted person's assets.

1.3 Gap: Investigative measures in the execution phase for the purpose of asset tracing are necessary, not accessory.

As mentioned above, criminals do whatever they can to keep their illegal profits/assets out of the authorities' reach. They will set up companies and use (malicious) third parties to hide their wealth and ask to be declared insolvent. In the meantime they live a luxurious life.

When conducting their investigation, police and public prosecutors will therefore not only focus on investigating crimes and gathering evidence, but also pay attention to the seizure of assets, that can be forfeited/confiscated by the court at a later stage.

Practice shows however, that it is not always possible to identify and/or seize assets in the investigation phase, forcing the competent enforcement authorities to look for assets after a confiscation or financial penalty has been imposed. Unfortunately, once a judgement is pronounced, getting an insight into someone's assets becomes increasingly difficult, as the means of international cooperation in the execution phase are nowhere near as available as during the investigation phase.

In these circumstances, an ARO request for the purpose of executing a confiscation order will reveal that the convicted person has zero assets in the requested state, as all his assets will be in the name of companies or third parties with no visible link (at first glance) to the convicted person. If we want to pierce through the layers of companies and third parties or want to trace assets (for instance art, Rolex watches, gold bars...) that aren't registered in any national databases, the need arises to have the option to apply investigative measures in the execution phase.

In twelve out of eighteen responding Member States, the legal framework allows for the confiscation of assets held by third parties (such as family members or business partners) who knowingly assist convicted individuals by hiding illicit assets (malicious third parties). But in order to see through that deception, information exchange based on databases will not suffice. Investigative measures (such as interrogations, financial investigations, house searches ...) are necessary to pierce through the veil of deceit created by the convicted person.

Answers to the questionnaire have shown that seven out of eighteen Member States have the legal possibility to apply investigative measures (to some extent) in the execution phase in order to trace assets. Most could order the hearing of convicted persons, witnesses and third parties or execute home searches or initiate bank investigations even for malicious third parties. Others could even request the interception of telecommunications and other forms of electronic communications or the identification and tracing of telecommunications with the approval of a judge/court. While eleven others reported that once a sentence is rendered, investigations typically stop. In most Member States, there is no active pursuit of additional assets post-trial if those assets were not already identified and frozen during the investigation.

Unfortunately, the Member States that do have a legal possibility in their national law to apply investigative measures in the execution phase, are hindered by the absence of an international (treaty) basis for the cross-border application of national investigative measures. This constitutes a substantial gap in the existing legal framework to the benefit of the convicted person.
Several participants highlighted the lack of an international legal framework, restricting the application of investigative measures in the execution phase to their own territory and limiting the effectiveness of post-conviction asset tracing.

In light of these challenges, it is imperative to explore potential solutions to improve active asset tracing possibilities post-conviction.

Some participants raised the possibility of using the European Investigation Order (EIO) Directive (Directive 2014/41) to request asset tracing investigations in other Member States post-conviction. However, the general consensus was that the EIO is primarily designed for evidence gathering in the pre-trial and trial phase, making its use for sentence enforcement potentially problematic.

During the plenary meeting, participants discussed the possibilities for a new legal instrument or amendment to the existing EIO and/or mutual legal assistance treaties in more detail, concluding that a new legal instrument similar to the EIO, but different, is preferred. The current legal framework of the EIO or a Mutual Legal Assistance (MLA) request is not suited to the task, as they focus on the investigation and prosecution phases which are based on confidentiality, presumption of innocence and rights of defence. During the execution phase however there is a final and enforceable conviction, making the execution adversarial.

So what should this new instrument look like? Mutual recognition of judicial decisions is the cornerstone of judicial cooperation in criminal matters within the Union. Without the means to apply investigative measures in the execution phase to trace and seize assets, it is very difficult to effectively and efficiently execute confiscation orders or financial penalties. These gaps that have been identified not only hinder the efforts of judicial authorities and law enforcement to disrupt organised crime activities and deprive criminals of the proceeds of their crime but also undermines the swift and coherent application of the existing instruments and (international) legal framework.

Any new instrument should first and foremost allow Member States to order investigative measures in the execution phase beyond their borders, such as interrogations of (malicious) third parties, bank investigations, house searches and other invasive measures. This would make it possible to execute a measure in another country and seize an asset pending the issuing of a confiscation order or equivalent. Having a new instrument would also address the current lack of clarity (EIO or not? MLA?...) and gaps in existing laws, as practice shows that certain Member States issue and/or execute EIO's in the execution phase.

Secondly, having one instrument to trace assets post-trial, immediately seize/freeze them once they have been identified and consequently confiscate them would be greatly beneficial, for:

- the issuing authority: one instrument reduces the administrative burden and mitigates errors;
- the executing authority: one instruments allows them to trace, seize and confiscate in one go, limiting the administrative burden and the back and forth between Member States;
- the rule of law (sentences need to be executed) and society as a whole (increased security, safeguard freedom of competition and democracy).

It is imperative that competent authorities can take action quickly to prevent the disappearance of criminal assets. To do so they need to have the right instruments at their disposal.

Recommendation:
The EJN recommends that the European Commission considers creating a new instrument that will allow for the application of investigative measures in the execution phase in order to effectively identify and trace criminal assets. In order to reduce the administrative burden and to ensure the swift cross-border execution of confiscation orders and financial penalties, it should be possible to use one instrument for identifying, tracing, seizing, and confiscating, rather than two.

To address the identified gaps in investigative measures the existing legal frameworks, such as Framework Decision 2005/214 which governs financial penalties, should also be considered.

1.4 Framework Decision 2005/214 on the principle of mutual recognition to financial penalties

Framework Decision 2005/214 establishes a system of mutual recognition of financial penalties, compensations imposed in the same decision for the benefit of victims, court costs and costs for administrative procedures as well as a sum of money to a public fund or a victim support organisation.

However, despite its intentions, this framework has become outdated and requires modernization to meet the evolving landscape of organized crime.

The increase in organised crime and related profits has resulted in a parallel increase in the volume of financial penalties imposed by the courts. Where the instrument in the beginning was predominantly used for traffic violations and small fines, it is now being used for financial penalties that far exceed the threshold for asset sharing under Regulation 2018/1805. Yet asset sharing is not possible for certificates based on Framework Decision 2005/214.

Furthermore the legal framework under Regulation 2018/1805 differs from the Framework Decision 2005/214 when it comes to compensating victims and the right to continue to execute the court decision. Under the Regulation the issuing state can -under certain conditions- continue to execute the order, while under the framework decision, the issuing state is prohibited from proceeding with the execution, once the certificate has been issued. That difference in treatment between a financial penalty and a confiscation is not justifiable. It hinders efficient and effective cross-border cooperation to the benefit of the convicted person, as due to limited capacity, preference will be given to drafting a confiscation order.

In addition, the effort to tackle serious organised crime leads to increased court costs, which cannot be recovered in an international context. When court costs are transferred using a Framework Decision 2005/214 certificate, the recovered court costs remain in the executing state, while the vast majority of costs are incurred in the issuing state.
The rationale of Framework Decision 2005/214 is based on small financial penalties for small crimes and traffic offences, for which court costs are low and therefore there is no need to transfer money between Member States to cover court costs, but this has been superseded.

Recommendation:
The EJN (members) urges the Commission to review Framework Decision 2005/214, specifically focusing on asset-sharing, court costs, and the need to bring the instrument more in line with the principles of Regulation 2018/1805.

In addition to modernizing existing frameworks, it is essential to recognize the complexities involved in cross-border cooperation, particularly concerning the execution of sentences.

1.5 An exercise in filling in the blanks

As a final observation, members of the EJN widely regarded cross-border cooperation in the execution phase in general to be quite labour intensive and fragmented.

A criminal sentence generally includes one or more of the following components.

- Imprisonment: For which Framework Decision 2002/584/JHA (European Arrest Warrant) or Framework Decision 2008/909 (Mutual recognition of custodial sentences) can be used.
- Fines or payment of court costs: For which Framework Decision 2005/214/JHA (mutual recognition of financial penalties) applies.
- Confiscation: Governed by Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders.
- Probation decisions and/or alternative sanctions: For which Framework Decision 2008/947 (mutual recognition of probation decisions and alternative sanctions) can be used.

Each of these components presents unique challenges that contribute to the overall complexity of executing sentences across borders.

This implies that often two or more certificates need to be filled in, each with its own set of rules, requirements and layout. The slight differences between the different instruments makes completing the certificates labour intensive and time-consuming, which can lead to delays and an increased risk of errors.

The basis for the certificates is always the same conviction, yet the certificates differ.
EJN practitioners plead for a more streamlined approach to certificates. Some suggested the possibility of creating one comprehensive instrument to cover all aspects of sentence execution -imprisonment, fines, and confiscation- thereby reducing the administrative burden.

Maybe with the digitalisation and implementation of the e-EDES[3] platform opportunities to implement such an instrument or streamline the existing certificates can become a reality.

In conclusion, as the EJN members are aware that this is not an easy feat to accomplish, further research and discussion is required to get a complete overview from all angles so as to select the best way forward. Given the challenges outlined, it is recommended that the EU Commission takes proactive steps to enhance cooperation and streamline processes in the execution of sentences. The EJN hopes that the European Commission takes up this gauntlet and that, with the help and support of the relevant stakeholders, the cross-border execution of sentences can be taken to the next level.

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[3] Now JUDEX