Establishing EU minimum rules and enhancing effective cross-border cooperation in relation to mutual legal assistance and exchanging information in relation to terrorism

Michaël Fernandez-Bertier, LL.M., esq.
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A Few Figures on the Criminal Economy

– IMF (1998) : 2-5% global GDP

– UNODC (2009) :
  – 3.6% global GDP (USD 2.1 trillions for year 2009)
  – dont 2.7% global GDP (USD 1.6 trillions) = money for laundering

– UNODC (2011): proportion of laundered proceeds actually seized : 0.2% (!)
  – “Globally, it appears that much less than 1% (probably around 0.2%) of the proceeds of crime laundered via the financial system are seized and frozen”

– UE (2013) : 330 billion EUR laundered each year in the EU
  – Underestimation…?: +- 100 billion EUR in Germany alone (Min Fin DE (2016))
The Birth of the Follow-the-Money Approach

American impulse \(\rightarrow\) 1970-80’s: ‘War on Organized Crime’ & ‘War on Drugs’

Influence on international instr.

Integration in supranational law \(\rightarrow\) 1990 - ...

Transposition in national law \(\rightarrow\) 1990 - ...
The Expansion of the Follow-the-Money Approach

– **Birth**: ensuring that ‘crime does not pay’: through
  – depriving criminals from their profits (proceeds);
  – Identifying where the money comes from

– **Momentums:**
  – Birth 1970s: ‘war on drugs’ & ‘war on organized crime’
  – Expansion 1990s: to all forms of acquisitive crime
  – Redefinition 2000s: ‘war on terror’ → new paradigm:
    – Targeting of the money involved in terrorism (instrumentalities)
    – Identifying where the money goes to
  – New evolution 2010s: war (?) on white-collar crime…

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Panorama of EU Instruments for Judicial Cooperation in Criminal Matters
Panorama of EU Instruments for Judicial Cooperation in Criminal Matters


– 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

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– Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.
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– Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

– Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

– Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
Panorama of EU Instruments for Judicial Cooperation in Criminal Matters


– Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

Panorama of EU Instruments for Judicial Cooperation in Criminal Matters


– ...
Panorama of EU Instruments for Judicial Cooperation in Criminal Matters

Conclusion:

– **Piecemeal legislation**; but

– **Increasingly wider powers for MLA and MLR**
Mutual Legal Assistance in Criminal Matters in the EU & The European Investigation Order
On the Menu Today…

– Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

– Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union


… Then, as from 22/05/2017

2000 Convention on Mutual Assistance

– **Aim**: to facilitate mutual judicial assistance between authorities of the MS (police, customs and courts), improve speed and efficiency of judicial cooperation


– **Principle**: requests for MLA are made in writing, transmitted and executed directly by the judicial authorities with territorial competence, but:
  – Certain requests must be sent via central authorities of MS;
  – Emergency: requests may be made via Interpol or any body competent under provisions introduced pursuant to the TEU.
2000 Convention on Mutual Assistance

– Covers all types of evidence

– General provision for MLA

– Detailed provisions on specific requests (see *infra*)

– Requested MS must comply with the formalities and procedures expressly specified by requesting MS, unless otherwise provided; shall execute the request ASAP in accordance with indicated deadlines (to the extent possible)

– Direct system, requests transferred directly to the judicial authorities of MS

– N.B.: Possible spontaneous exchange of information (w/out prior request) in relation to criminal offences and administrative infringements the punishment or handling of which falls within the competence of the receiving authority
Specific Requests of Mutual Assistance

– Interception of telecommunications

– Restitution of property obtained by criminal means to rightful owners

– Temporary transfer of persons held in custody for purpose of investigation

– Hearing of witnesses/experts by videoconference or telephone conference

– Controlled deliveries within the framework of criminal investigations into extraditable offences

– Joint investigation teams (specific purpose and period of time)

– Covert investigations

– See criminal/civil liability regarding officials
2001 Protocol to the Convention

Incorporates additional measures, such as:

– **Rationale**: fighting OC, ML and financial crime in particular

– Requests for information on bank accounts, for information on or monitoring of banking transactions

– Removal of certain grounds for refusal: banking secrecy, fiscal offences, political offences

– Obligation of the Requested MS to inform the Requesting MS on the investigations,

– Forwarding additional requests to Requested MS for MLA

– Forwarding refusals to the Council and involvement of Eurojust
Mutual Recognition of Orders Freezing Property or Evidence
Mutual Recognition of Orders Freezing Property or Evidence

– “The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings” (art. 1).

– Targets property (infra) and evidence

– No verification of double criminality for 32 offences if punishable by at least 3 years of in issuing State
  – E.g. terrorism, money laundering, corruption, but also rape, arson, racism, sabotage...

– Optional grounds for non-execution

– Other offences: recognition may be recognized subject to double criminality
2003 FD problems as relates to evidence, in brief

– Inadequate national implementation

– Limited scope to provisional measures “prevent the destruction, transformation, moving, transfer or disposal of evidence”

– Freezing order must be accompanied by separate request for the transfer (!) of evidence to the issuing State → still subject to MLA

– A two-step procedure is actually needed (“detrimental to its efficiency”):
  – 1 MLR for freezing,
  – 1 MLA for transferring the evidence

→ Response: adoption of EIO (as relates to freezing of evidence)
The European Investigation Order
The European Investigation Order (EIO)


– Replaces existing EU MLA instruments:
  – 2000 Mutual Legal Assistance Convention;
  – FD 2003/577/JHA as regards freezing of evidence (not property – see proposal for a Regulation on MR of F&C orders, infra)

– Applies to all EU countries except Denmark and Ireland (opted out).

Source: “Faster, more efficient cross-border criminal investigations in the EU”, www.eur-lex.europa.eu
EIO: Summary

– **Aim**: to simplify and speed up cross-border criminal investigations in the EU

– **Principle**: The European Investigation Order enables judicial authorities in one EU country (“the issuing state”) to request that evidence be **gathered** in **and transferred** [without undue delay] from another EU country (“the executing state”)

– Executing MS is obliged to recognise and execute the investigation order, and treat it as if it was issued by its own authorities

– **Transposition deadline**: 22/05/17
EIO: Summary

– Based on the **mutual recognition** principle: each MS is obliged in principle to recognise and carry out the request; request must be executed swiftly and without any further formality.

– Makes it easier to tackle criminal offences including crimes such as corruption, drug trafficking and organised crime.
  – E.g., Greek police could ask UK authorities to conduct house searches or interview witnesses on their behalf.

– Improves existing EU laws:
  – Strict deadlines for gathering the evidence requested
  – Limitation of the grounds for refusal
  – Reduces paperwork by introducing a single standard form for authorities to request help when seeking evidence
EIO: Key Aspects

– A judicial decision issued or validated by a MS’s judicial authority to carry out one or several investigative measures in another MS in order to obtain evidence in line with this directive

– Can also be issued to get evidence that is already held by the responsible authorities of the country that will carry out the request

– Can be requested by a suspected or accused person, or by their lawyer, in line with applicable defence rights in an EU country
EIO: Key Aspects

– Must not affect human rights or legal principles, e.g. the right of defence in criminal cases

– Covers any investigative measure, apart from setting up a joint investigative team

– Can be issued for offences considered criminal or acts/infringements of law that are punishable under an issuing MS’s national law
EIO: Key Aspects

- **90 days** to act: after receiving an EIO, the executing MS must quickly act on the request.

- Limited grounds for refusal: e.g. if the request is against the MS’s fundamental principles of law or harms national security interests. All costs of acting on a request must be paid by the executing MS.

- The body carrying out the request can choose an alternative investigative measure than an EIO, if it believes this will lead to similar results.

- Specific requests (similar to 2000 Convention): temporary transfer of persons in custody in order to gather evidence; checks on the bank accounts/finances of suspects; covert investigations and intercepting telecommunications; measures to preserve evidence.
Freezing and Confiscation: Substantive Rules & Mutual Recognition
Freezing and Confiscation within the EU

**Asset recovery Chain**
- Financial investigation
- Seizure & management
- Confiscation
- Recovery and re-use of criminal assets

**Focus of the EU Legal Framework until today**
- Harmonization of confiscation instruments (Directive 2014/42/UE)
- Mutual recognition of freezing and confiscation decisions (FDs 2003, 2006 & proposal)
- Horizontal cooperation between MS
On the Menu Today…

– Directive 2014/42/EU

– Framework Decisions 2003/577/JHA and 2006/783/JHA

– Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing and confiscation orders (12/2016)

– Roadmap: Appraisal of an EU framework for administrative terrorist asset freezing measures under Article 75 TFEU (10/2016)
Substantive Rules for Freezing and Confiscation of Criminal Property
Historical Framework

Particular focus of the 2014 Directive
– Harmonization (minimum rules) of confiscation instruments (v. HRs)
  – Extended confiscation; third party confiscation; [non-conviction-based confiscation (NCBC)]

EU legal framework bf 2014 Directive
– Joint Action 98/699/JHA (ML, F&C)
– Council Framework Decision 2001/500/JHA (ML, F&C)
– Council Framework Decision 2003/577/JHA (MLA/MR freezing)
– Council Framework Decision 2005/212/JHA (confiscation)
– Council Framework Decision 2006/783/JHA (MR confiscation)
– Council Framework Decision 2007/845/JHA (AROs)
Current Framework

2014 Directive replaces…
– Joint Action 98/699/JHA
– Point (a) of Article 1 and Articles 3 and 4 of FD 2001/500/JHA
– First four indents of Article 1 and Article 3 of FD 2005/212/JHA

– Lays minimum rules (Rec. 22)
– Ireland - **IN**; UK and Denmark - **OUT**
The Rationale of Directive 2014/42/UE

– “The main motive for cross-border organised crime, including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime” (Rec. 1)

– “There is an increasing need for effective international cooperation on asset recovery and mutual legal assistance” (Rec. 2)

– “Among the most effective means of combating organised crime is […] the freezing and confiscation of the instrumentalities and proceeds of crime” (Rec. 3)
Current Framework

“Although existing statistics are limited, the amounts recovered from proceeds of crime in the Union seem insufficient compared to the estimated proceeds. Studies have shown that, although regulated by Union and national law, confiscation procedures remain underused” (Rec. 4)

— “in 2009 confiscated assets amounted to € 185 million in France, £ 154 million in the United Kingdom, € 50 million in the Netherlands and € 281 million in Germany” (Proposal for a Directive COM/2012/085 final)

— “The adoption of minimum rules will approximate the Member States’ freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation” (Rec. 5)
Directive 2014/42/UE per article

- Classic conviction-based confiscation (art. 4(1))
- (Non-)conviction-based confiscation (art. 4(2))
- Extended confiscation (art. 5)
- Third party confiscation (art. 6)
- Freezing (art. 7)
- Safeguards (art. 8)
- Effective freezing/confiscation (art. 9) (post conviction investigation)
- Management of assets (art. 10)
- Statistics (art. 11) / Reporting (art. 13)
Directive 2014/42/UE and ‘NCBC’ (art. 4(2))

– “Where confiscation [on the basis of a final conviction] is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated [...] and [...] could have led to a criminal conviction* if the suspected or accused person had been able to stand trial” (Art. 4(2))

– “However, in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation” (Rec. 15)
NCBC’

- **NOT** a true NCBC (false label):
  - **Hybrid**: ongoing criminal proceedings needed
    - [conviction route $\rightarrow$ conviction impossible $\rightarrow$ Confiscation]
  - Not *in rem* but *in personam*
  - Not akin to civil forfeiture (UK/Ireland – not possible with 83TFUE?)
  - Not even akin to preventive confiscation (Italy)
  - No impact for MS who already provide for proceedings *in absentia* (!)
  - **Very limited value in practice** … What about actual harmonization?
  - *Presumption of guilt? Does art. 4.2 amounts to bringing a criminal charge? Wb respect of PoI (6.2 ECHR)?

Cf. Rui (ERAF, 2012), Boucht (CLCJ, 2013), Simonato (NJECL, 2015), Fernandez-Bertier (ERAF, 2016)
Directive 2014/42/UE and ‘NCBC’

Before the final compromise…

– Original proposal: similar rule applicable where illness, absconding, but also death of the defendant (2012)

– Amendment proposal from Parliament – Committee on Civil Liberties & Home Affairs: a ‘true’ form of NCBC (05/2013):

“Each Member State shall take the necessary measures to enable judicial authorities to confiscate, as a criminal sanction*, proceeds and instrumentalities without a criminal conviction where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature, while fully respecting the provisions of Article 6 of the ECHR and the European Charter of Fundamental Rights”
Directive 2014/42/UE and ‘NCBC’

– **Conclusion**: the EU backed off after the trilogues (11/2013)…

  → no obligation for MS to implement NCBC
  → No common model of NCBC throughout EU
     (cf. UK v. Italy v. Slovenia v. …)
  → A ‘missed’ opportunity?
‘NCBC’ as part of the Future of the EU?

EU already called for discussions on NCBC:


– Parliament’s Special Committee on organised crime, corruption, and money laundering: recommendations on action and initiatives to be taken (draft report – 10/06/13): ‘models of civil law asset forfeiture’; ‘preventive models of confiscation’

– European Agenda on Security (28/04/15) & Impact Assessment on mutual recognition (21/12/16): following experts meetings in 09/16 and 11/16, feasibility study on common rules on NCBC due in 2017
Directive 2014/42/UE and ‘Extended’ confiscation

Prior to 2014 Directive

– Framework Decision 2005/212/JHA provided for three different sets of rules of extended confiscation

– MS chose different options → divergent concepts in national orders

→ NO harmonization; challenges in cross-border cooperation; i.e. Inefficient
Directive 2014/42/UE and ‘Extended’ confiscation

— “Criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. This approach is referred to as extended confiscation […]. It is therefore necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard” (Rec. 19)
‘Extended’ confiscation (art. 5)

— “Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct” (Art. 5(1))
‘Extended’ confiscation (art. 5)

– “[…] This **does not mean that it must be established** that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the **balance of probabilities**, or to **reasonably presume that it is substantially more probable**, that the property in question has been obtained from criminal conduct than from other activities. […] Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct” (Rec. 21)

– Applicable to “euro offences ” (specific, minimum rule) (Art. 5(2) + 3) (+ Rec. 23)
Third Party Confiscation (art. 6)

“1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of bona fide third parties”.

“[…] The rules on third party confiscation should extend to both natural and legal persons. […]” (Rec. 24)
Freezing (art. 7)

–“1. Member States shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which shall be ordered by a competent authority, shall include urgent action to be taken when necessary in order to preserve property.

–2. Property in the possession of a third party, as referred to under Article 6, can be subject to freezing measures for the purposes of possible subsequent confiscation” (art. 7)
Freezing (art. 7)

“[…] preservation of property can be a prerequisite to confiscation and can be of importance for the enforcement of a confiscation order. Property is preserved by means of freezing. In order to prevent the dissipation of property before a freezing order can be issued, the competent authorities in the Member States should be empowered to take immediate action in order to secure such property” (Rec. 26)

“In the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence” (Rec. 30)

“Given the limitation of the right to property by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view to possible subsequent confiscation. This may require a review by the court in order to ensure that the purpose of preventing the dissipation of property remains valid” (Rec. 31)
Safeguards (art. 8)

- 10 indents (!) aiming at ensuring the existence of sufficient “safeguards” (freezing, confiscation, …)

HR concerns: right to a fair trial (6(1) ECHR); right to property (P-1(1) ECHR)

- “Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights” (art. 8(1))

- “Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court” (art. 8(6))
Implementation of Directive 2014/42/UE

3 groups of Member States (Impact Assessment 21/12/16):

– + -12 MS: classical conviction-based approach + aligned (or are currently aligning) their regimes along the lines of Dir 2014/42/EU (including extended confiscation and criminal NCBC in cases of illness or absconding only).

– + - 8 MS: go beyond the requirements of the Dir 2014/42/EU & include other forms of criminal NCBC (in case of death of a person or where a criminal court can confiscate an asset in the absence of conviction when the court is convinced that such asset is the proceeds of crime).

– + - 7 MS: have an asset recovery regime (or where a reform is ongoing) which includes also civil or administrative NCBC.
Mutual Recognition of Freezing & Confiscation orders
Current Framework


– Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to **confiscation** orders.

Yet…

– Considered insufficient → Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing and confiscation orders
Issues with current framework

Examples (Impact Assessment 21/12/16):

– “While France is able to execute Italian NCBC orders under mutual legal assistance, Spain would systematically deny the execution of a civil NCBC order taken using in rem proceedings. For example, Ireland may issue a civil NCBC for criminal assets located in Spain when a criminal conviction is not possible. However, as Spain does not recognize such Irish order, the property order could not be confiscated and would remain at the offender's disposal.

– Another example is a case where both jurisdictions have NCBC, namely Ireland and the United Kingdom. In this case, a freezing order was obtained by Ireland. The target brought the assets across the border to Northern Ireland in an attempt to evade the order. The order could not be enforced in the United Kingdom as there exists no such mechanism even between NCBC jurisdictions.”
Prospective Legal Framework

Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing and confiscation orders:

– Introduced in 12/2016 within the scope of the Commission’s 2016 Action Plan to enhance the fight against terrorism
  – I.e. “need to ensure that criminals who fund terrorism are deprived of their assets. In order to disrupt organised crime activities that finance terrorism, it is essential to deprive those criminals of the proceeds of crime” (Rec. 10).

– **Aim**: prevent terrorists from using their funds to commit further attacks

– But goes far beyond terrorism cases (broad material scope)
Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing/confiscation orders:

- “Freezing and confiscation of instrumentalities and proceeds of crime are among the most effective means of combatting crime. The European Union is committed to ensuring more effective identification, confiscation and re-use of criminal assets” (Rec 3 of the proposal).

- “As crime is often transnational in nature, effective cross-border cooperation is essential in order to seize and confiscate the proceeds and instrumentalities of crime” (Rec 4).
Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing/confiscation orders:

– “The Commission's implementation reports on Framework Decisions 2003/577/JHA and 2006/783/JHA show that the existing regime for the mutual recognition of freezing and confiscation orders is not fully effective. The current instruments have not been implemented and applied uniformly in the Member States, leading to insufficient mutual recognition” (Rec 6).

– “The Union legal framework on mutual recognition of freezing and confiscation orders has not kept up with recent legislative developments at Union and national levels. In particular, Directive 2014/42/EU sets out common minimum rules on freezing and confiscation of property” (Rec 7).
Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing/confiscation orders:

Improvements brought by the Regulation (proposal):

– **One single** legal **instrument** for the recognition of both freezing and confiscation orders in other EU countries:

  – Simplification of the current legal framework;

– Directly applicable in all Member States (no transposition or delay):
  – “This will ensure uniformity in the application of this instrument and avoid problems due to late or incorrect transposition by Member States. This will be the first Regulation proposed by the Commission in the field of mutual recognition in criminal matters since the entry into force of the Lisbon Treaty”.

Proposal for a Regulation to strengthen the mutual recognition of criminal asset freezing/confiscation orders:

– **Widened scope** of cross-border recognition:
  – inclusion of classic, extended and third party confiscation as well as non-conviction based confiscation decided by a criminal court;

– Increased **speed and efficiency** of freezing or confiscation orders:
  – standard document and obligation on the part of competent authorities to communicate with each other;
  – Clear deadlines, including shorter deadlines for freezing orders

– **Ensured respect of victims' rights** to compensation and restitution:
  – In cases of cross-border execution of confiscation orders, the victim's right has priority over the executing and issuing States' interest.
Subject-matter (Art. 1)

– “1. This Regulation lays down the rules under which a Member State shall recognise and execute in its territory a freezing or a confiscation order issued by another Member State within the framework of criminal proceedings.

– 2. This Regulation shall not have the effect of amending the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 TEU”.
Subject-matter

“This Regulation should (…) cover all types of orders covered by Directive 2014/42/EU, as well as other types of orders issued without final conviction within the framework of criminal proceedings. This Regulation should not apply to freezing and confiscation orders issued within the framework of civil or administrative proceedings” (Rec 13).
Subject-matter

– *In concreto*, applies to:
  – classic CB confiscation;
  – extended CB confiscation;
  – third-party CB confiscation;
  – non-conviction-based confiscation WITHIN criminal proceedings:
    → “death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified, or other cases where a criminal court can confiscate an asset without conviction when the court has decided that such asset is the proceeds of crime”
  – Admin/civil NCBC (e.g. civil recovery, anti-mafia preventive conf)
  → Hence does not respond to the ‘traditional’ NCBC issue
Offences (Art. 3)

– “A freezing order or confiscation order shall give rise to execution without verification of the double criminality of the acts if the acts giving rise to the freezing or confiscation order constitute one or more of the following offences, as defined by the law of the issuing State, and are punishable in the issuing State by a custodial sentence of a maximum of at least three years: (…)

– For offences other than those covered by paragraph 1, the executing State may make the recognition and execution of a freezing order or confiscation order subject to the condition that the acts giving rise to the freezing order or confiscation order constitute an offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State.”
Offences

“This Regulation should cover confiscation and freezing orders related to offences covered by Directive 2014/42/EU, as well as orders related to other offences. The offences should therefore not be limited to the areas of particularly serious crime with a cross-border dimension” (Rec. 14)

“This Regulation covers all criminal offences. It is not limited to the areas of particularly serious crime with a cross-border dimension so-called ‘Eurocrimes’ (unlike Directive 2014/42/EU which is based on 83 TFEU) as Article 82 TFEU (on which this proposal is based on) does not require such a limitation for mutual recognition of judgments in criminal matters. Therefore, the proposal covers mutual recognition of freezing and confiscation orders related to offences covered by Directive 2014/42/EU, as well as orders related to other offences which are not covered by that Directive” (Expl. of art. 1)
Offences

– Offences NOT limited to terrorism (or even serious and organised crime):

– **Systematic** recognition for list of 33 offences (!) if punishable by a maximum of at least 3 years in issuing State
  – E.g. terrorism, money laundering, corruption, but also rape, arson, racism, sabotage…

– For other offences: recognition **may** be recognized subject to double criminality
Transmission of orders

- **Confiscation** (art. 5): together with a standard “certificate” (art. 7)
  - The order must be accompanied by a standard certificate annexed to the proposal. The certificate must be translated into an official language of the executing State

- **Freezing** (art. 14): through a standard form (art. 17)
  - Simplified procedure (as compared to FD 2003); no certificate needed but “standard form” annexed to the proposal (similar approach to Dir. 2014/42/UE)
Deadlines for freezing and confiscation orders

– Clear deadlines for freezing and confiscation orders!

– **Confiscation** (art. 10):
  – Recognition: within 30 days of receipt
  – Execution: within 30 days of decision to recognise

– **Freezing** (art. 19):
  – Recognition: within 24 hours of receipt
  – Execution: within 24 hours of receipt
  – Report to the issuing state: within 3 days
  – N.B.: Possibility to postpone (art. 11 and 20)
October 2016’s Roadmap for administrative terrorist asset freezing measures
Roadmap – Appraisal of an EU framework for administrative terrorist asset freezing measures under Article 75 TFEU

– **Aim:** Identify the options for cutting off terrorists and terrorist organisations from their financial resources, undermining their ability to carry out terrorist activities in the EU

– As announced in the Action Plan, the Commission will explore as well an alternative option of a ‘European Asset Freezing Order’ (compare EIO).

– Will present different options for EU action that could contribute to more specific objectives such as enhancing the effectiveness of freezing measures while strengthening fundamental rights safeguards, reducing compliance costs for industry and improving compliance of EU Member States and the EU itself with international obligations and standards.
Roadmap – Appraisal of an EU framework for administrative terrorist asset freezing

– **Background:**
  – New attempt after the failure of the Roadmap of 10/2012
  – Action Plan 2016

– Terrorists are able to move funds quickly within the EU and to move assets to safe havens. Measures to freeze assets must therefore be fast, effective and have a wide coverage

– Current lists limited to international terrorists (‘EU external terrorists’); no EU regime for freezing assets of persons who aim of causing harm to the EU or a specific MS (‘EU internal terrorists’)

– ‘The absence in a number of MS of asset freezing regimes as well as – where such regimes exist – the lack of complete and effective systems for freezing the assets of so-called “EU internal terrorists” raise issues of non-compliance with UNSCR 1373 and FATF Recommendation 6’.
Fighting Money Laundering, Terrorism and its Financing
On the Menu Today…

– 4AMLD (06/2015)

– Action Plan to Strengthen the Fight against Terrorist Financing (02/2016)

– Proposal for a 5AMLD (07/2016)

– Package to Fight Terrorism Financing (12/2016)

– Proposal for a Directive on Combatting Terrorism (12/2015)
4th AML/CTF Directive of 2015
4th AML/CTF Directive


+ Regulation (EU) 2015/847 on information on the payer accompanying transfers of funds

Background:
- Updated FATF Recommendations 2012

Transposition deadline: 26/06/2017 (01/01/2017)
4th AML/CTF Directive in brief

  - “Holistic” approach
  - Use of evidence-based decision-making in order to target ML/TF risks
  - “Cascade” process of identifying and evaluating risks by the EC, the MS, and the obliged entities
  - Enhanced/Simplified customer due diligence
  - Definition/Identification of **high-risk third countries**

– **Extensions of scope to**:
  - gambling sector
  - persons trading in goods for payments of 10,000 EUR or more
4th AML/CTF Directive in brief

– Expansion/clarification of definitions: PEPs & Beneficial owners

– Inclusion of tax crimes (punishable of >1y) as a predicate offence of ML

– Beneficial ownership information:
  – legal entities must hold adequate, accurate and current information on their beneficial ownership; inclusion of trusts
  – creation of a national central register (access to authorities, obliged entities and persons with legitimate interest)

– Clarification of role, responsibilities and functions of FIUs

– Enhanced cooperation between FIUs

– Data protection

– Sanctions
Identification of High Risk Third Countries

  – I.e.: Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, Laos, Syria, Uganda, Vanuatu, Yemen, Iran, North Korea

– Amending of Delegated Regulation (EU) 2016/1675:
  – **Aim**: match the HRTC identified by FATF at 28th plenary meeting (19-21/10/16) – in concreto: deletion of Guyana
  – Adopted by EC on 24/11/16 **but** REJECTED by EP on 17/01/17
  – **Rationale**: list is too limited and should be expanded, e.g. to include territories that facilitate tax crimes
    → back to EC
Action Plan of 2016 to fight terrorism
Commission’s Action Plan 2016

Action Plan to Strengthen the Fight against Terrorist Financing (02/16)

Background: following the 13/11/15 terrorist attacks in Paris

How? Improve current legislation (e.g. 4AMLD) & speed up other initiatives

– How to further detect and prevent terrorist organisations and their backers to move funds and other assets; and to ensure that financial movements can wherever possible help law enforcement to trace terrorists and stop them from committing crimes;

– How to further disrupt the sources of revenue of terrorist organisations, by targeting their capacity to raise funds in the first place.
Action Plan 2016

Two Objectives

– Prevent the **movement** of funds and identify terrorist funding

– Disrupt **sources** of revenue for terrorist organisations
Prevent the movement of funds and identify terrorist funding: Key Actions

– Ensure **virtual currency** exchange platforms are covered by the Anti-Money Laundering Directive;

– Tackle terrorist financing through **anonymous pre-paid instruments** such as pre-paid cards;

– Improve access to **information and cooperation** between EU FIUs;

– Ensure a high level of safeguards for financial flows from **high risk third countries**;

– Give EU Financial Intelligence Units access to **centralised** bank and payment account **registers** and central **data retrieval** systems.
Disrupt sources of revenue for terrorist organisations:
Key Actions

– **Tackle terrorist financing sources** such as the illicit trade in goods, cultural goods and wildlife.

– Work with **third countries** to ensure a global response to tackling terrorist financing sources.
## Action Plan 2016 Factsheet

<table>
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Latest ‘emerging’ instruments following AP2016?

– 05/07/16: Proposal for 5th AML/CTF Directive

– 25/10/16: Roadmap – Appraisal of an EU framework for administrative terrorist asset freezing measures under Article 75 TFEU (see supra)

– 19/12/16: Adoption by the EU of a « package » of measures to fight terrorism financing (and organised crime) through:

  – Proposal for a Directive on countering money laundering by criminal law
  – Proposal of Regulation to put tighter controls on large cash flows
  – Proposal of Regulation for the mutual recognition of freezing and confiscation of (terrorists’ financial resources and) property (supra)
5th AML/CTF Directive of 2017 (coming)
Proposal for a 5th AML/CTF Directive


Background:
- 13/11/15 terrorist attacks in Paris;
- Action Plan 2016 of the Commission against terrorism
- Panama Papers scandal

Where we stand: vote of the EP ECON Committee on 09/02/17; adoption in early 2017

Transposition delay: 12 months
Proposal for a 5th AML/CTF Directive

— “Recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations. Certain modern technology services are becoming more and more popular as alternative financial systems and remain outside the scope of Union legislation or benefit from exemptions that may no longer be justified. In order to keep pace with evolving trends, further measures to improve the existing preventive framework should be taken” (Rec. 2)
Proposal for a 5th AML/CTF Directive

Two Objectives

– Preventing the financial system being used for the funding of criminal activities (Cf. Paris attacks);

– Strengthening transparency rules to prevent the large-scale concealment of funds (Cf. Panama papers).
Preventing the financial system being used for the funding of criminal activities

– Ensuring a high level of safeguards for financial flows from **high risk third countries** (see harmonised black list – deleg. Reg. – of non-EU countries):

  – Enhanced due diligence: “different approaches between Member States create weak spots on the management of business relationships involving high risk third countries identified by the Commission. It is important to improve the effectiveness of the list of high-risk third countries established by the Commission by providing for a harmonised treatment of those countries at Union level” (Rec. 9)

  – Requirement of additional due diligence for financial flows from these countries): “additional mitigating measures” to enhanced CDD (Rec. 9)

  – Enhancing the **powers of EU FIUs** and facilitating their cooperation; access to access to information in centralised bank and payment account registers in all Member States
Preventing the financial system being used for the funding of criminal activities

– Tackling terrorist financing risks linked to **virtual currencies**:
  – “The anonymity of virtual currencies allows their potential misuse for criminal purposes” (Rec. 7)
  – Exchange platforms and custodian wallet providers will have to apply CDD, ending the anonymity associated with such exchanges, e.g. bitcoins

– Tackling risks linked to **anonymous pre-paid instruments** (e.g. pre-paid cards):
  – “General purpose prepaid cards have legitimate uses and constitute an instrument contributing to financial inclusion. However, anonymous prepaid cards are easy to use in financing terrorist attacks” (Rec. 11)
  – Lowering of the threshold for identification from 250 to 150 EUR +
  – Extension of customer verification requirements
Strengthening transparency rules to prevent the large-scale concealment of funds (Cf. Panama papers).

– Enhanced access to **beneficial ownership** register (improve transparency about ownership of companies and trusts).

– “The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure. The globally interconnected financial system makes it possible to hide and move funds around the world, and money launderers and terrorist financiers as well as other criminals have increasingly made use of that possibility” (Rec. 20)

– Interconnection of registers to facilitate cooperation between MS.

– Public access to register on the basis of a legitimate interest for all types of companies and trusts (improvement on the current rules as concerns trusts that do not have a business purpose)
Strengthening transparency rules to prevent the large-scale concealment of funds (Cf. Panama papers).

—“Currently, corporate and other legal entities active in the Union are under an obligation to register their beneficial ownership information, whereas the same obligation does not apply to all trusts and legal arrangements which present similar characteristics. It should be taken into account that these legal arrangements, such as Treuhand, fiducies or fideicomiso set up in the Union, may have different legal characteristics throughout the Union. Member States should require that all legal arrangements governed under their law when having a structure and functions similar to trusts are treated as legal arrangements similar to trusts” (Rec. 33)
December 2016’s Package against Terrorism Financing
(1) Proposal for a Regulation on cash controls

= Improvement of the 2005 Cash Control Regulation. **Features:**

– **Tighten cash controls** on people entering or leaving the EU with €10,000 or more in cash;

– Enable authorities to **act on amounts lower than the customs declaration threshold** of €10,000, where there are suspicions of criminal activity, and

– **Improve the exchange of information** between authorities and Member States;

– **Extend customs checks to cash sent in postal parcels or freight shipments and to precious commodities** such as gold, and to prepaid payment cards which are currently not covered by the standard customs declaration.
(2) Proposal for a Directive on countering money laundering by criminal law

– **Background:**
  – New attempt after the failure of the Roadmap of 10/2012
  – Action Plan 2016

– **Aim:** to harmonise the *criminalisation of money laundering* and ‘to provide competent authorities with adequate criminal law provisions to prosecute criminals and terrorists and put them behind bars’
(2) Proposal for a Directive on countering money laundering by criminal law

Features:

– Establish **minimum rules** concerning the definition of criminal offences and sanctions related to money laundering, closing gaps to prevent criminals from exploiting differences between different national rules.

– **Remove obstacles** to cross-border judicial and police cooperation by setting common provisions to improve the investigation of offences related to money laundering;

– Bring the EU norms in line with the **international obligations** in this area, as set out in the Council of Europe Warsaw Convention and FATF 2012 Recommendations.
(3) Proposal for a Regulation on the mutual recognition of freezing and confiscation orders

– See Supra
Proposal for a Directive on Combatting Terrorism
Proposal for a directive on combating terrorism


– **Background**: sped up following the Paris attacks of 13 November 2015; influenced by the requirements of:
  – UN Security Council Resolution 2178 (2014) and the Additional Protocol to the Council of Europe (CoE) Convention on the Prevention of Terrorism, aimed at countering the phenomenon of foreign terrorist fighters
  – Standards of the Financial Action task Force (FATF) regarding the financing of terrorism

Proposal for a directive on combatting terrorism

– Complements the preventive measures related to terrorist financing of Directive 2015/849/EU.

– **Art. 11: Criminalisation of terrorist financing**: “given the cross-border nature of the terrorist threats, the scope of the offences, including those not required by international obligations and standards, needs to be sufficiently aligned to be truly effective”.

– “This provision requires Member States to criminalise the provision of funds that are used to commit terrorist offences and offences related to terrorist groups or terrorist activities. The definition is in line with the definition of terrorist financing in Directive 2015/849/EU, which covers the financing of all offences as defined in Article 1 to 4 of the Framework Decision 2002/475/JHA, as amended by Framework Decision 2008/919/JHA”.
Proposal for a directive on combatting terrorism

– “Member States shall take the necessary measures to ensure that providing or collecting funds, by any means, directly or indirectly, with the intent that they should be used, or knowing that they are to be used, in full or in part, to commit any of the offence(s) referred to in Articles 3 to 10 and 12 to 14 or 16 is punishable as a criminal offence when committed intentionally” (art. 11)

– “Terrorist financing should be punishable in the Member States and cover the financing of terrorist acts, the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for terrorist purposes, with a view to disrupting the support structures facilitating the commission of terrorist offences. Aiding and abetting or attempting terrorist financing should also be punishable” (Rec. 10)
Proposal for a directive on combating terrorism

– Financing of travelling abroad for terrorism (an offence not previously contained in the Framework Decision 2002/475/JHA) implements Article 5 of the Additional Protocol as well as Recommendation No 5 of FATF (as this was clarified by the recently adopted amendment to the Interpretative Note to Recommendation No 5)

– Criminalising the attempt as well as the aiding and abetting of terrorist financing, in line with FATF Recommendation No. 5 and the definition of terrorist financing in Directive 2015/48/EU

– Even in the absence of a link to a specific terrorist act or acts (art. 15): ‘it is sufficient that there is knowledge about the use of the funds for purposes furthering the terrorist activities in general without there being a need to be linked to for instance a specific already envisaged travel abroad’.
To Conclude

– Evident link between chasing criminal money and terrorist financing. Yet, dealt within two different Units within DG Home. It is too early for a completely comprehensive instrument that fully encompasses both of these aspects.

– In relation to CT measures, there is a need to move towards judicial freezing measures, apart from purely administrative ones.
Questions?

Michaël Fernandez-Bertier
Attorney-at-Law Allen & Overy LLP, Member of the Brussels and New York Bars
Lecturer at Solvay Brussels School of Economics and Management
Lecturer at Louvain School of Management
Scientific Collaborator and PhD Candidate at Université catholique de Louvain
Member of the board of directors of Transparency International Belgium

Tel. +32 2 780 2935
Michael.fernandez-bertier@allenobery.com

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