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Asset Recovery in the European Union: Implementing a 'No Safe Haven' Strategy for Illicit Proceeds

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Abstract

The EU strategies for targeting illicit proceeds must continually be updated to deal with criminals' use of innovative technologies to develop sophisticated methods for concealing illicit proceeds. Effective asset recovery has been hindered by issues such as the complexity of national judicial and mutual legal assistance proceedings, the lack of resources and, sometimes, the lack of cooperation between the competent authorities. This paper explores existing and proposed methods for enhancing asset recovery and targeting the proceeds of illicit trades and other types of criminal activity in the European Union (EU). Consistent and comprehensive implementation is needed at several levels (preventive measures, financial investigations, criminal proceedings and asset freezing and confiscation) to create a European 'no safe haven' strategy for dealing with illicit proceeds.

Keywords:

European Union, money laundering, financial investigations, asset freezing, asset confiscation, international cooperation

1. Targeting the Proceeds of Illicit Trade and Other Types of Criminal Activity in the European Union

The proceeds of illicit trades are not only the financial lifeline of organized crime, but they also inflict further burdens on societies. They support additional forms of criminal activity, contaminate the legal economy and strain government institutions, especially law enforcement. In addition, they harm individuals, families and local communities (European Monitoring Centre for Drugs and Drug Addiction [EMCDDA] and Europol, 2016; Brochu, 2018). According to United Nations Office on Drugs and Crime (UNODC) estimates, annual illicit proceeds range between US$800 billion and US$2 trillion globally. However, quantification has been difficult because of the opacity of criminal activity (UNODC, 2020; Reuter and Truman, 2004; Walker, 1999).

In the European Union (EU), approximately €110 billion in criminal profits is generated each year (Europol, 2016; European Commission, 2016). Drug trafficking alone has an estimated retail value of at least €30 billion per year. It constitutes a major source of income for the criminals and organized crime groups that operate in the region (EMCDDA and Europol, 2019). Human trafficking, in particular the trafficking of 70,000 women and children annually for sexual exploitation in Europe, is another major profit-generating criminal activity. It generates more than €3 billion in illicit proceeds annually (Frontex, 2018; UNODC, 2010). Other types of criminal activity, such as the illicit trade in firearms, constitute supplementary rather than primary sources of income for organized crime (Europol, 2013; Europol, 2017). However, this does not lessen the risks to Europe's security. In practice, illicit proceeds are generated from several types of criminal activity. More than 30% of the criminal groups that are active in the EU qualify as 'poly-crime groups'. They engage in multiple types of profit-generating criminal activity simultaneously or alternately, depending on the circumstances and opportunities (Europol, 2013). For example, transnational migrant smuggling networks, which have emerged and developed to take advantage of the recent migration crisis in Europe, generate an annual turnover of more than €6 billion. Regardless of the underlying criminal activity, the illicit proceeds ultimately have to be laundered in a process that constitutes a major supporting activity for criminal groups. Money laundering techniques have evolved considerably, as the Financial Action Task Force (FATF) typologies and risk assessments demonstrate. However, the scope remains the same. i.e. to allow criminals to enjoy and use illicit proceeds with impunity without being detected by law enforcement and judicial authorities.

Targeting illicit proceeds effectively and intensifying its efforts to take action against money laundering are thus key components of the fight against organized crime and other types of profit-driven crime (Naylor, 2003). Since the 1980s, national jurisdictions and international organizations have been developing increasingly complex, far-reaching anti-money laundering (AML) instruments. The EU has also recognized the importance of the 'crime does not pay' principle [1]. Consequently, it has gradually developed its own AML strategy and legal framework, the building blocks of which have been (i) the strengthening of preventive measures; (ii) the development of common definitions,

incriminations and sanctions; and (iii) the enhancement of judicial cooperation. Despite legislative progress, it has been estimated that law enforcement and judicial authorities have located and confiscated only a fraction (1.1%) of the illicit proceeds generated annually in the EU (Europol, 2016; European Commission, 2016). This record is disappointing and leaves much room for improvement. The EU and its member states will need to develop and to consistently implement reforms in the areas outlined below.

2. Closing the Loopholes in the European Union's Financial System

The EU's AML framework serves two preventive functions. It prevents financial institutions from doing business with dubious clients, and it ensures the traceability of financial information. This ultimately facilitates the tracking and confiscation of criminal proceeds. The framework imposes a series of obligations on financial institutions and an ever-expanding range of obliged entities (e.g. auditors, accountants, tax advisers, legal professionals, estate agents, trust service providers and the gambling industry) that function as gatekeepers of the European financial system. Obliged entities have to identify and to verify their clients' identities ('Know-Your-Customer') and to report suspicious transactions to the competent authorities. The requirements for customer due diligence have been revised and improved several times since the adoption of the first AML Directive in 1991 [2]. The EU has thus gradually built its experience and expertise in harmonizing the AML provisions, thereby leading to the adoption of the latest AML Directive [3].

This instrument, the features of which have been the object of extensive academic discussion (e.g. Koster, 2020; Rose, 2019; Yeoh, 2019), has had a significant effect on cross-border asset recovery. It introduced four important elements to facilitate financial investigations and asset tracing: (i) the establishment of publicly available national registers for corporate entities, trusts and other legal arrangements; (ii) the establishment of central bank account registries; (iii) broader information access for FIUs; and (iv) the transparency of beneficial ownership with regard to virtual assets. These provisions ensure the traceability of assets and prevent money laundering. They close the loopholes for criminals to introduce illicit proceeds into the financial system for conversion, transfer or concealment and, ultimately, re-introduction into the legitimate EU economy.

Additional reforms are needed, as has been clearly illustrated by the EU's Action Plan for a comprehensive EU policy to prevent money laundering and terrorist financing (European Commission, 2020b). The EU has identified 'substantial incidents of failures by credit institutions to comply with core requirements of the [AML] Directive, such as risk assessment, customer due diligence, and reporting of suspicious transactions and activities to Financial Intelligence Units' (European Commission, 2019c). It has also identified problems in the functioning of FIUs. They include the lack of quality feedback on suspicious transaction reports, FIUs' lack of cooperation and the technical difficulties in using electronic platforms for information exchange (FIU.net). In addition to addressing these shortcomings, the EU must accelerate the implementation of new

initiatives, in particular the interconnection of member states' centralised registries or electronic data retrieval systems on bank accounts, to facilitate cross-border cooperation and access to financial information (European Commission, 2019b).

Other interesting proposals have been tabled, such as the establishment of a European AML supervisory body, an EU FIU akin to Europol, to coordinate and to support the processing and analysis of financial data (Kirschenbaum and Véron, 2020) [4]. This proposal goes beyond the concept of 'the supervisor of national supervisors'. It would allow the new central AML body to directly supervise problematic market segments and to impose sanctions on noncompliant firms even as the national AML supervisors remain in place. The advantage of such reforms would be to avoid gaps in member states' implementation and supervision of the EU's AML rules. The European Commission's proposal to establish a pan-European supervisor is expected in the first quarter of 2021. To accelerate the process, the EU should entrust this task to the European Banking Authority, an institution that has already had success in several areas, including the improvement of EU banks' asset quality.

3. Enhancing the Role of Asset Recovery Offices in Financial Investigations

In cross-border cases, the success of financial investigations depends entirely on international cooperation. Nevertheless, legal and practical obstacles could delay and complicate information exchange (Brown and Gillespie, 2015), ultimately hindering asset freezing and confiscation. Therefore, closer cooperation between FIUs and other competent national authorities, in particular the accurate and systematic collection and exchange of financial information, would enhance the efficiency of financial investigations and lead to the confiscation of more illicit proceeds (Kennedy, 2007).

The EU has already set the standards for cooperation between asset recovery offices (AROs) [5], the national competent agencies that facilitate the tracing and, ultimately, freezing and confiscation of illicit proceeds during judicial proceedings. In addition, the EU introduced Directive 2019/1153 [6], which has given law enforcement agencies and AROs broader access to financial and other information (Pavlidis, 2020). This Directive and other EU initiatives, such as the launch of an informal platform for coordination between AROs, are positive developments. They have led to a gradual increase in the number of information exchange-related contacts between AROs: from 539 in 2012 to more than 7,659 in 2019 (European Commission, 2020a). This process is vital; however, the volume of cross-border money laundering cases indicates that the progress thus far is insufficient. Therefore, there is a need (i) to expand and accelerate AROs' access to data; (ii) to enhance their power, specifically regarding asset freezing; and (iii) to set and respect strict time limits for their responses to requests from counterparts (European Commission, 2017, 2020a). Moreover, the increase in the number of asset tracing requests that the AROs have to manage has to be mirrored by increases in staff, financial resources and technological capabilities. For example, AROs should be able to rely on the swift and secure exchange of information via the Secure Information Exchange Network

Application (SIENA), an information hub that Europol plans to expand and roll-out as part of its 2020+ Strategy (Europol, 2018) [7].

Other EU-wide mechanisms can complement the AROs and support financial investigations. For example, Europol's creation of the European Financial and Economic Crime Centre will provide additional operational and analytical support for financial investigations. It will also enhance the use of financial intelligence in cross-border cases involving threats and financial crimes, such as fraud, corruption and money laundering. In this context, there is a need for a comprehensive EU-wide cross-border financial investigation strategy focused on high-value targets, the development of standard operating procedures, the mobilization of multidisciplinary joint investigation teams and the application of advanced information technology and forensic capabilities (Europol, 2018).

4. Beyond Directive 2014/42: Introducing Common Rules on Non-Conviction-Based Confiscation

In confiscation proceedings, the main challenge is establishing or inferring the illicit origin of assets (Basel Institute on Governance, 2015), i.e. reconstructing a paper trail that leads from the assets to the commission of the crime. Legal obstacles, such as stringent laws on mutual legal assistance, and practical considerations, such as the complexity of money laundering schemes, hinder financial investigations and prevent the establishment of beneficial ownership (Kroeker, 2014). The introduction of non-conviction-based (NCB) confiscation in exceptional cases has already been explored in several jurisdictions as a way to strengthen asset recovery. However, such proceedings are still linked to criminal proceedings (Simonato, 2017; Eurojust, 2013). The FATF has also clearly favoured the adoption of provisions allowing for NCB confiscation (FATF, 2012).

The adoption of Directive 2014/42 has been a milestone in the EU's fight against money laundering (Boucht, 2019). In addition to including common rules, this instrument has introduced measures, such as minimum provisions for third-party confiscation, safeguards for the protection of the rights of those affected by confiscation, and provisions for the management of frozen and confiscated assets. Nevertheless, the 2014 Directive contains only minimum standards for NCB confiscation, in cases of "illness or absconding of the suspected or accused person" (Article 4 par. 2). It can be argued that the time is right for the EU to develop additional common rules on NCB confiscation. The Commission has found that member states have applied various models with sweeping measures, such as (i) in rem proceedings directed against the illicit assets and (ii) unexplained wealth orders (European Commission, 2019a). As the NCB regimes in EU member states gradually converge (European Commission, 2019a), the remaining differences in scope and design can and should be addressed. The Commission should intensify its efforts to introduce additional measures and common rules on NCB confiscation. The EU could also explore other innovative options, such as the

establishment of unexplained wealth regimes, a relatively new idea that has already been successfully implemented in some jurisdictions, such as the United Kingdom and Australia (Boucht, 2019).

5. From Mutual Legal Assistance to the Mutual Recognition of Confiscation Orders

A recent EU initiative, Regulation 2018/1805 [8], represents an interesting paradigm shift in cross-border asset freezing and confiscation. Having learned from previous failed initiatives (Pavlidis, 2019) the EU has decided to implement the mutual recognition of freezing and confiscation orders. This constitutes a shift from the mutual legal assistance approach under international law to the 'direct enforcement' model, which is simpler and faster (UNODC, 2016). The new rules have replaced the inefficient fragmented EU legal instruments (e.g. Framework Decisions 2006/783/JHA, 2003/577/JHA) for recognizing freezing and confiscation orders in the pre-Lisbon era.

Based on Regulation 2018/1805, the new direct enforcement model is a valuable addition to the existing EU mutual recognition instruments (e.g. European Arrest Warrant, European Investigation Order) that ensure the 'free circulation' of judgments in criminal matters and their enforcement across all member states (Klimek, 2016). It provides for freezing and confiscation orders to be automatically upheld and enforced throughout the EU, provided that standardized certificates and procedures are used. Regulation 2018/1805 therefore goes beyond the traditional mutual legal assistance model under international law. We can mention the example of the Council of Europe conventions, in particular Convention No 141 and Convention No 198, the implementation of which suffered from delays and broad grounds for refusal. The EU regulation covers a variety of freezing and confiscation orders, limits the grounds for refusing to recognize and to execute judgements, introduces strict deadlines for implementation and addresses the protection of victim and bona fide third party rights (Pavlidis, 2019).

Mutual trust between the judicial authorities of member states is a prerequisite for the implementation of mutual recognition at the EU level. The fate of previous EU initiatives has demonstrated that its importance should not be underestimated (Nilsson, 2006). Another issue is member states' more serious breaches of fundamental rights, as was demonstrated in the LM case regarding the right to a fair trial and the independence of the judiciary in Poland [9]. Therefore, the first challenge is to overcome the hesitation and inertia of the competent national authorities (Nanopoulos and Fazekas, 2016), which will have to familiarize themselves with the mutual recognition of freezing and confiscation orders to maximize the efficiency of cross-border confiscation in the EU. The second challenge is to ensure that serious breaches of the founding values of Article 2 or the Treaty on European Union result in the suspension of mutual recognition instruments and that no member state acts as a free rider in this cooperative system. Such safeguards should be defined and implemented at the EU rather than the national level. In addition,

the European Council should have the power to declare a member state ineligible for certain or all mutual recognition instruments.

6. Concluding Remarks: Implementing a Successful 'No Safe Haven' Strategy for Illicit Proceeds in the European Union

An effective response to illicit trade and money laundering requires the development, implementation and evaluation of carefully designed policies (EMCDDA, 2019). AML measures and criminal law tools, particularly criminal investigations, prosecutions and sanctions, must be integrated and used in a complementary manner to stop organized crime. The EU strategies for targeting illicit proceeds must continually be updated to deal with criminals' use of innovative technologies to develop sophisticated methods for concealing illicit proceeds (FATF, 2020). Effective asset recovery has been hindered by issues such as the complexity of national judicial and mutual legal assistance proceedings, the lack of resources and, sometimes, the lack of cooperation between the competent authorities.

An effective strategy for targeting illicit proceeds in the EU is needed to mitigate these issues. As indicated in the EU's AML Action Plan (European Commission, 2020b), the focus should be: (i) the effective implementation of the EU rules under the close monitoring of the Commission; (ii) the development of an EU rulebook to address member states' divergent interpretations of the existing AML rules; (iii) enhanced EU supervision; (iv) the improved coordination of national FIUs and AROs; (v) the facilitation of information exchange through mechanisms such as public–private partnerships; and (vi) the EU's continued role as a global actor working closely with the FATF to exert influence on third countries with AML deficiencies.

The EU needs to reinforce its legal arsenal for the cross-border tracing and freezing of assets and the confiscation of illicit proceeds on its path towards becoming a genuine security union. The EU should consider the existing international standards, specifically the FATF's work. However, it should enhance these standards by adopting bold and innovative policies and harmonization initiatives. The success of the post-Lisbon instruments (e.g. Directive 2019/1153, Regulation 2018/1805, Directive 2014/42) indicates that assigning more competences to the EU in the areas of AFJS is an idea worth pursuing. It is a practical, effective approach that can reverse the situation in the fight against illicit trade, transnational criminality and cross-border money laundering cases.

Notes

1. See the Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999 ("Tampere Programme"); Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1; Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting the citizens [2010] OJ C115/1
2. Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L166/77, 28.06.1991.
3. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156/43, 19.6.2018.
4. European Parliament resolution of 19 September 2019 on the state of implementation of the Union's anti-money laundering legislation (2019/2820(RSP).
5. 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, OJ L 332/103, 18.12.2007.
6. Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA, OJ L 186/122, 11.7.2019.
7. The Secure Information Exchange Network Application (SIENA), launched in 2009, is operated by Europol and enables exchange of crime-related information among Europol, EU law enforcement agencies, cooperating partners (e.g. Interpol, Eurojust, Frontex, OLAF) and cooperating states (e.g. United States, Switzerland, Liechtenstein) under the terms of cooperation agreements.
8. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303/1, 28.11.2018.
9. Judgment of the Court of Justice of the European Union (Grand Chamber) of 25 July 2018 in the case LM (C-216/18 PPU).

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