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EUROJUST

The European Union's Agency for Criminal Justice

International cooperation from the EUROJUST perspective

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International judicial cooperation in environmental crime cases

Working together for a safer Europe



An **EU agency** governed by **national judicial authorities** of the EU Member States



Eurojust is home to 'judicial embassies'

- 28 **National Members**, 1 per EU Member State
- Operational: experienced **prosecutors, judges**

Employed by the home authority

- **24/7** on call
- Additional staff to handle cases
- Together, the National Members form a **College**

Eurojust offers access to expertise and support

- **+220 EU staff: legal expertise and analysis, secure IT systems, meeting facilitation**
- Headed by an **Administrative Director**

Global network

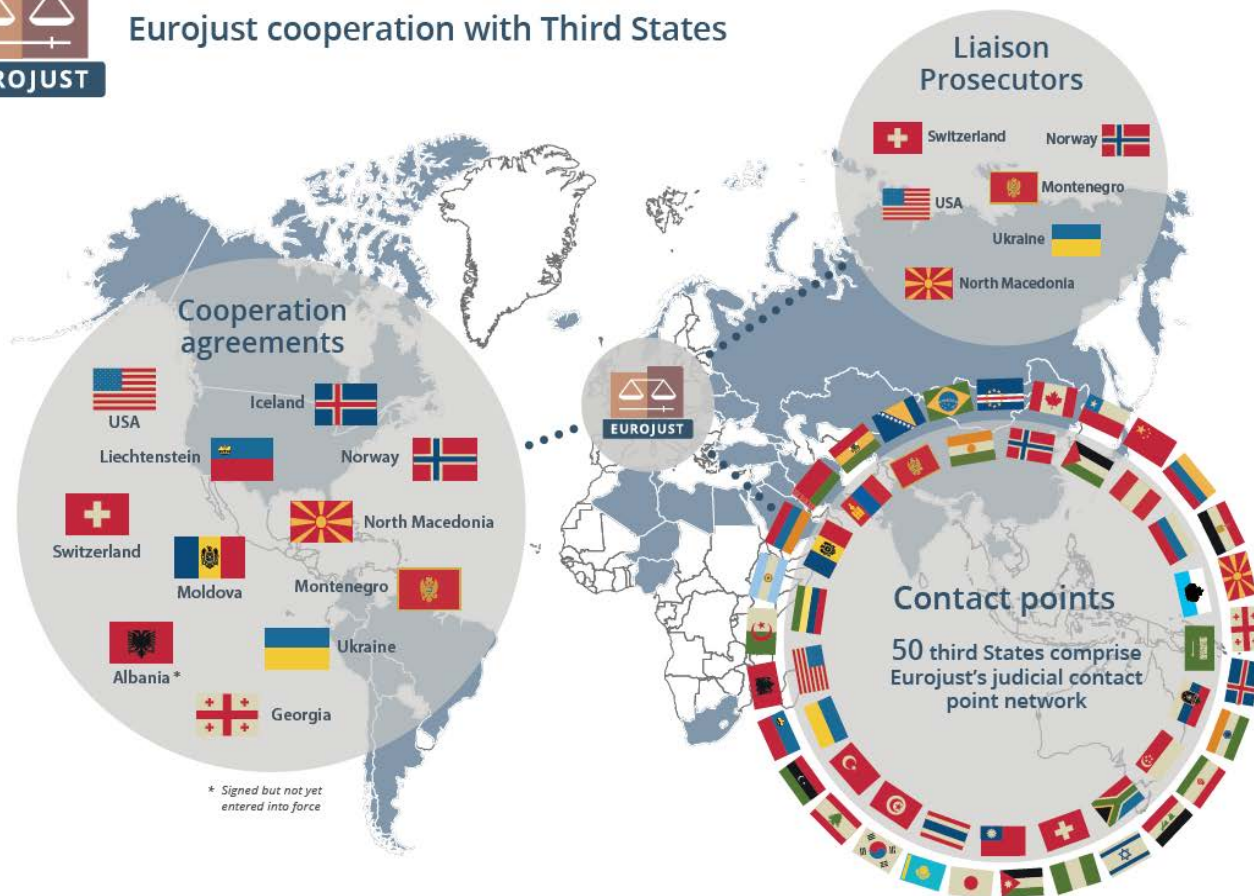
Contact points

Cooperation agreements

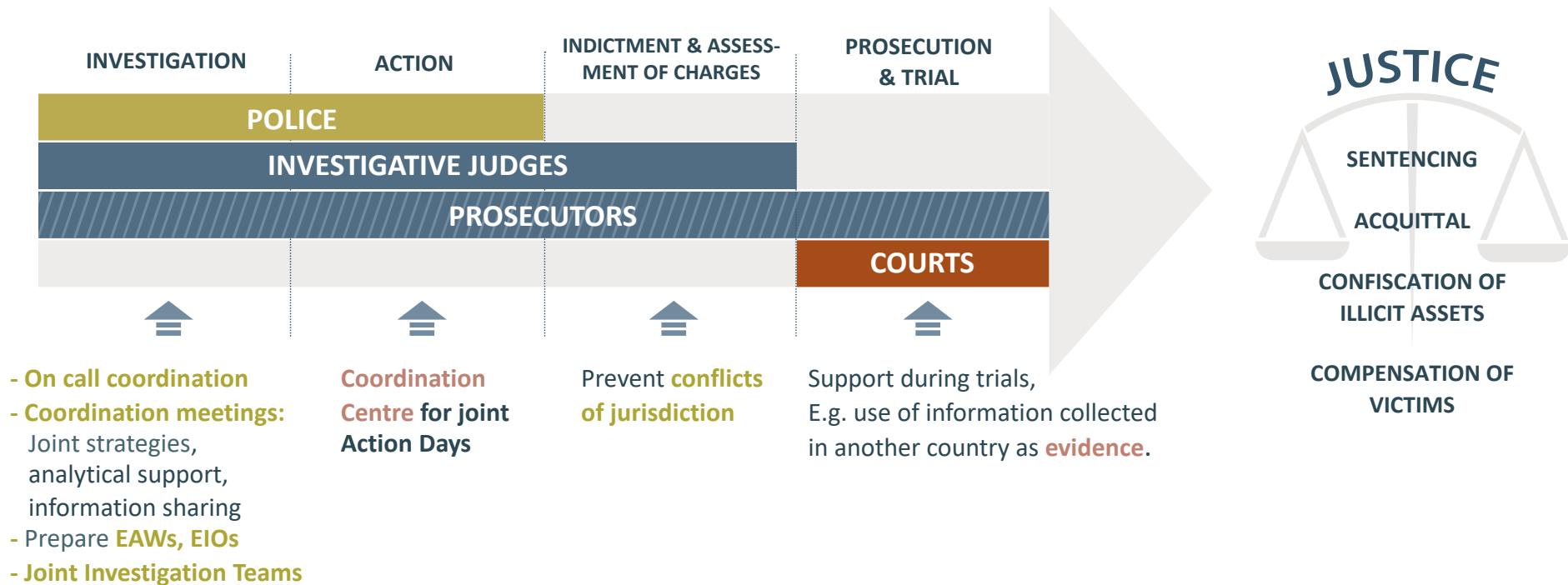
Liaison Prosecutors



Eurojust cooperation with Third States



Eurojust Mission: **Criminal justice across borders** through interaction between judicial authorities



Eurojust's Casework on Environmental Crime

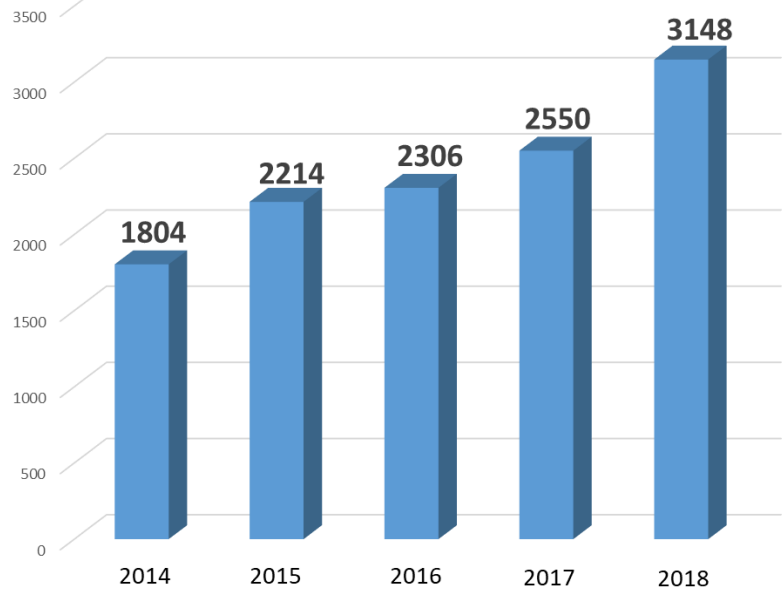
- ▶ Follow-up of 2014 Strategic Report on Environmental Crime
- ▶ **2014-2018 analysis**
- ▶ **57** cases identified at Eurojust
- ▶ Registered by **16** National desks
- ▶ Focus on **international cooperation aspects**

Main aspects researched

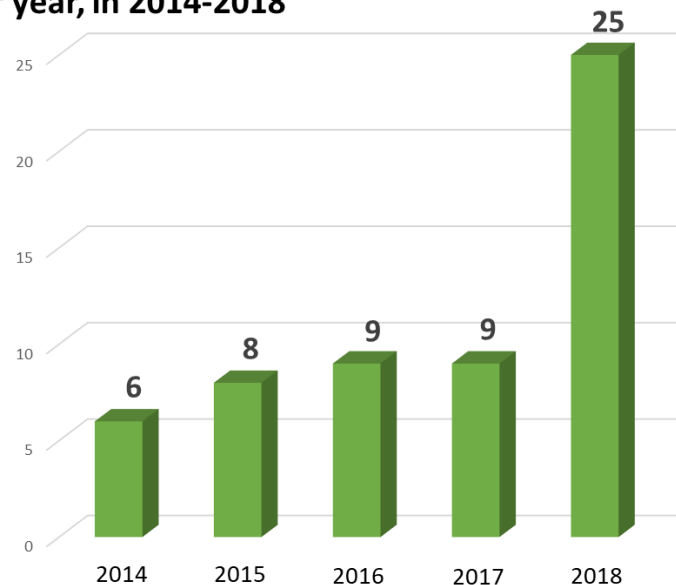
- ▶ Use of judicial cooperation instruments
- ▶ Legal & practical issues
- ▶ Best practices identified
- ▶ Role of Eurojust
- ▶ Involvement of other crime types
- ▶ Financial investigation/asset recovery

Environmental crime cases in the context of total Eurojust casework

Total number of Eurojust cases, per year, in 2014-2018

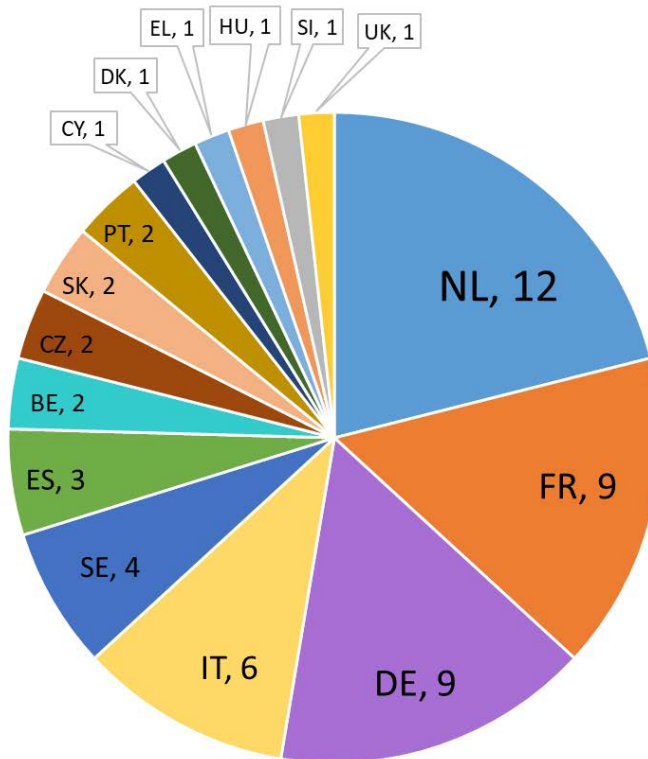


Environmental Crime cases, per year, in 2014-2018



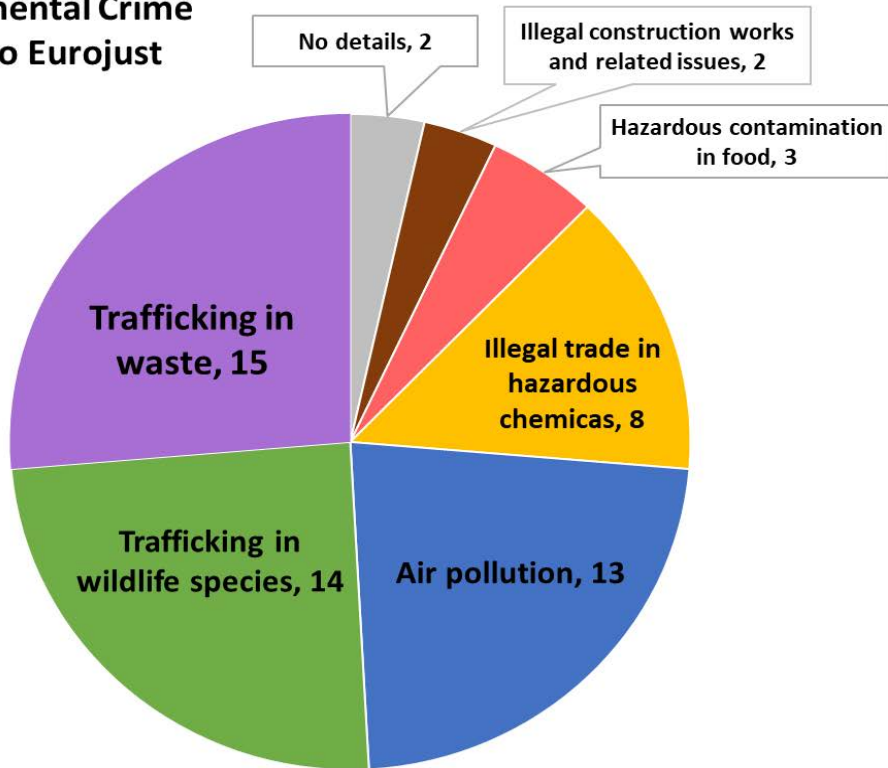
Environmental crime cases per MS

**Environmental Crime cases,
per Member State,
referred to Eurojust
in 2014-2018**



Cases per type of environmental crime

**Types of Environmental Crime
in cases referred to Eurojust
in 2014-2018**



Judicial cooperation instruments

- ▶ MLA: **50%** of cases
- ▶ EIO (into force from 2017): **25%** of cases
- ▶ Spontaneous exchange of information (**7**)
- ▶ JIT (**5**)
- ▶ EAW (**3**), freezing order (**3**), transfer of proceedings (**2**), transfer of sentenced person (**1**), extradition (**1**)

Legal & practical issues (1) - general

- ▶ Choice of appropriate legal instrument
- ▶ Identification of competent national authority
- ▶ Execution issues -> delays, obstacles
- ▶ Parallel criminal proceedings

Legal & practical issues (2) - general

- ▶ Transfer of proceedings/sentenced person
- ▶ Seizures and asset recovery
- ▶ JIT related issues

Legal & practical issues (1) - environmental

- ▶ Lack of incentive to get involved in cross-border investigation
- ▶ Lack of specialized knowledge/practical experience
- ▶ Different perceptions of legal qualifications

Legal & practical issues (2) - environmental

- ▶ Lack of investigative and coercive powers of environmental authorities
- ▶ Prompt coordination in wildlife cases

Best practices identified (1)

- ▶ First discuss extensive/complex MLA/EIO, before issuing
- ▶ Share available information as intelligence, before requesting as evidence
- ▶ Ensure appropriate competent authority for executing requested measures

Best practices identified (2)

- ▶ In delay/refusal of execution, contact Eurojust
- ▶ For information on national criminal law provisions, contact Eurojust
- ▶ Enhance close cooperation and mutual trust
- ▶ Ensure common understanding of cross-border case

Best practices identified (3)

- ▶ Keep direct contacts during investigation
- ▶ In multilateral cases:
 - issue coordinated MLA/EIO requests and
 - decide on best place to prosecute in coordinated manner
- ▶ Consider establishing a JIT

Best practices identified (4)

- ▶ Consider requesting support from Europol
- ▶ Strive to identify parallel proceedings in other jurisdictions

Role of Eurojust (1)

- ▶ Facilitation of communication to ensure exchange of information/coordination
- ▶ Providing legal advice and practical facilitation of judicial cooperation instruments
- ▶ Assistance in identifying cross-border links

Role of Eurojust (2)

- ▶ Organising bilateral/multilateral Coordination Meetings (CM)
- ▶ In **8** environmental cases CM's organised in 2014-2018
- ▶ Frequency **from 1 to 7** within one case
- ▶ Proposals for CM not always successful (!)

Role of Eurojust (3)

- ▶ Assistance in preparing & conducting international action days (in **4** cases)
- ▶ Including setting up of Coordination Centre at Eurojust (in **2** cases)
- ▶ Assisting in all stages of JIT life cycle (in **5** cases)
- ▶ Providing information on national law provisions
- ▶ Issuing written legal opinions

Joint investigation team (JIT)

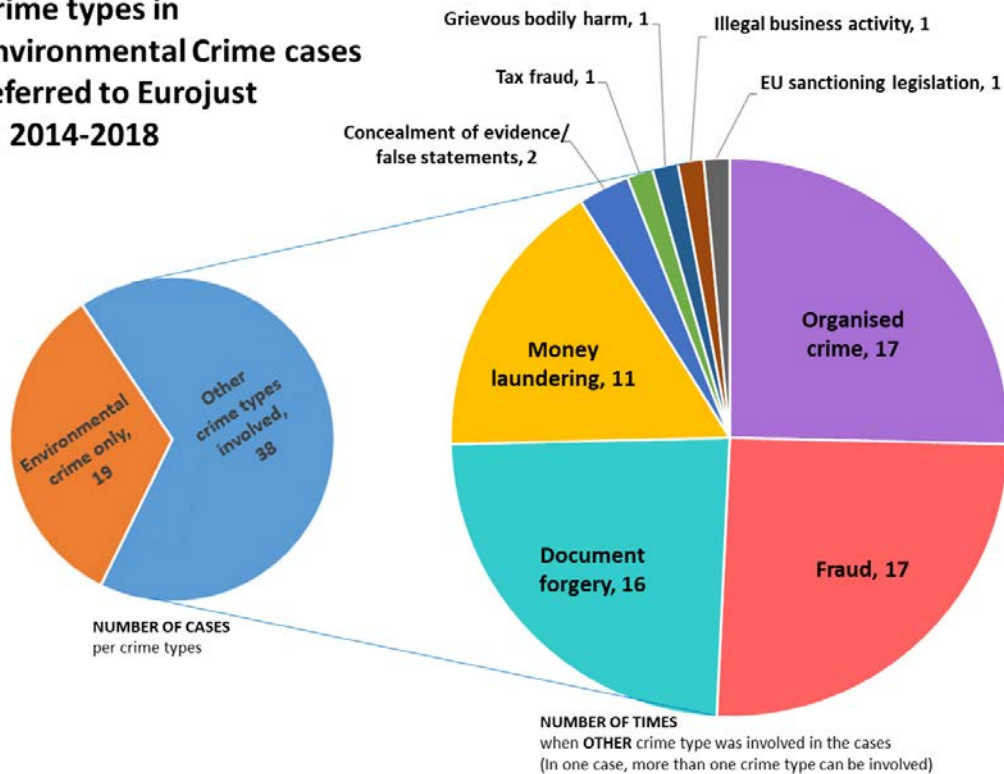
- ▶ In general, more frequently used instrument
- ▶ **5 out of 57** cases in period 2014-2018

Recurring reasons for:

- ▶ Not considering
- ▶ Considering, but eventually not setting up

Involvement of other crimes

**Crime types in
Environmental Crime cases
referred to Eurojust
in 2014-2018**



Financial investigations/asset recovery

- ▶ In **16** cases: some form of financial investigation
- ▶ In **4 JITs**: financial aspect one of the aims of the JIT.
- ▶ Damages amount to high figures
- ▶ Illegal profits: > 1 million euros no exception

Involvement of Europol

- ▶ Before end 2017: no separate Analytical Project for Environmental crime at EP
- ▶ Since **AP Envicrime**:
- ▶ Involvement of Europol in environmental criminal cases increased and improved
- ▶ More visible & active participation of Europol
- ▶ Involvement of Europol at early stage of investigation

Working together for a safer Europe

Thank you!



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Recovery of proceeds of crime

Criminal deterrent

- ▶ Crime against the state.
 - **Sanction.**
 - Moral reprehensibility of the offence
- ▶ Confiscation.
 - Identifiable **benefit** of the offence.
 - not sanction,
 - Disgorgement of **criminally obtained assets**
 - **no valid title.**
 - Preventative action.

Environmental crime

- ▶ Unauthorised waste management
- ▶ Illegal rebranding.
- ▶ Breaking of Seals
- ▶ Deception.
- ▶ Fraud.
- ▶ Forgery.
- ▶ Corruption
- ▶ Money laundering.

Proceeds: Different Definitions

- ▶ Object
- ▶ Value based
- ▶ Benefit/Profit
- ▶ Enhanced:
 - Criminal: non conviction based
 - Civil: non conviction based
- ▶ Unexplained wealth orders
- ▶ Unjust enrichment
- ▶ Third party rights/gifts/restirution

Barriers to International Cooperation

- ▶ Complexity and variety of international instruments
- ▶ Civil –v- Common Law Jurisdictions
- ▶ Civil –v- Criminal Model
- ▶ Limitations on Disclosure
- ▶ Admissibility of Evidence
- ▶ Security and Data Protection
- ▶ Concerns relating to civil rights

Practical Difficulties

- ▶ Concern about Exchange of Information for Civil Enquiry
- ▶ Recognition and Enforcement of Receivership Orders
- ▶ Recognition and Enforcement of Civil Forfeiture Orders
- ▶ Questions re Asset Sharing
- ▶ Varying Views of Interpretation on International Instruments

United Nations

- ▶ Convention against illicit traffic in narcotic drugs and psychotropic substances (**Vienna 1988**)
- ▶ Convention against Corruption 2004.
- ▶ Convention against Transnational organised crime 2004

Europe

- ▶ CoE Convention on **Mutual Assistance in criminal matters** 1959 (plus protocols)
- ▶ CoE Convention on laundering, search and seizure and confiscation of the proceeds of crime (**Strasbourg** 1990)
 - Money Laundering Offence
 - Confiscation of profit following conviction International Co-operation
 - Restraint orders pending trial
 - Recognition of Foreign Orders
 - Spontaneous exchange of information
- ▶ CoE Convention on laundering, search, seizure, confiscation of the proceeds of crime and an financing of terrorism (**Warsaw** 2005)
- ▶ EU Convention on **Mutual assistance in criminal matters** 2000

Council Framework Decisions (proceeds)

- ▶ On money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the **proceeds of crime** (2001-500-JHA)
- ▶ On the **execution** in the European Union of **orders** freezing property or evidence (2003-577-JHA)
- ▶ On **confiscation** of crime related proceeds, instrumentalities and property (2005-212-JHA)
- ▶ On the application of the principle of **mutual recognition** to confiscation orders (2006-783-JHA)

Council Framework Decisions (Data)

- ▶ On simplifying the **exchange of information** and intelligence between law enforcement authorities of the Member States of the European Union (2006-960-JHA).
- ▶ Concerning co-operation between **asset recovery offices** of the Member States in the field of tracing and identification of proceeds from, or other properties related to, crime (2007-845-JHA).
- ▶ On the **protection** of personal **data** processed in criminal matters “law enforcement directive”(2016-680-JHA).

Treaty functioning of the European Union

- ▶ **Title five: Area of freedom, security and justice.**
- ▶ **Chapter 4: Judicial co-operation in Criminal matters.**
- ▶ Article 82.
 - based on principle of **mutual recognition** of judgements:
 - lay down rules and procedures
 - For ensuring recognition throughout the union of all forms of judgement and judicial decisions.
 - Settle conflicts of jurisdiction.
 - Support training.
 - Establish **minimum rules**.
 - Concerning mutual admissibility of evidence.
 - Rights of individuals in criminal matters.
 - Rights of victims of crimes.
- ▶ Article 83.
 - May establish minimum rules concerning **definition of criminal offences** in areas of serious crimes with cross border dimensions.
 - Including trafficking in human beings, sexual exploitation, drug trafficking, arms trafficking, money laundering, corruption, organised
- ▶ Article 84.
 - **Harmonisation of laws.**

Treaty functioning of the European Union

- ▶ Article 85.
 - **Eurojust:**
 - Its mission shall be to support and strengthen coordination between investigating and prosecuting authorities.
 - Regulation shall determine Eurojust structure, operation field of action and tasks.
 - to include initiation of criminal investigations,
 - Proposing initiation of prosecutions.
 - Resolution of conflicts of jurisdiction.
- ▶ Article 86:
 - **European public prosecutor's office,**
 - From Eurojust
 - PIF offences
 - Enhanced cooperation.
 - Shall exercise functions of prosecutor.
 - Potential responsibility to include serious crime having cross-border dimension.

Directive 2014/42/EU: Overview

- ▶ Directive on the Freezing and Confiscation of Proceeds of Crime in the European Union (adopted 3 April 2014)
- ▶ **Aim** to establish minimum rules on freezing and confiscation for serious cross-border and organised crime.
- ▶ **Does not replace the existing EU legal framework**
- ▶ Legal basis of Article 83(1) TFEU so scope limited to 9 serious crime types:
 - Terrorism
 - Trafficking in human beings and sexual exploitation of women and children
 - Illicit drug trafficking
 - Illicit arms trafficking
 - Money laundering
 - Corruption
 - Counterfeiting of means of payment
 - Computer crime and
 - Organised crime.
- ▶ Deadline for transposition: 4 October 2016.

Directive 2014/42/EU: Key provisions

- ▶ **Article 4:** introduction of limited non-conviction based confiscation where conviction impossible due to illness or absconding.
- ▶ **Article 5:** common minimum standard for extended confiscation where court satisfied that property is derived from criminal conduct.
- ▶ **Article 6:** minimum harmonisation of third party confiscation rules.
- ▶ **Article 7:** adoption of freezing measures by competent authorities in urgent cases.
- ▶ **Article 9:** allows freezing and confiscation orders to be issued and executed even after a trial has been concluded.
- ▶ **Article 10:** encourages use of confiscated property for social purposes.

Joint Statement

- ▶ European Parliament and Council **joint statement** issued upon the adoption of the Directive calling on the Commission to:
 - Make new proposals on mutual recognition of freezing and confiscation orders;
 - Analyse the feasibility and possible benefits of further harmonisation of Member States' rules on confiscation, including NCBC.

New Regulation; Aspirational parameters

- ▶ Effecting the joint declaration by making new proposals on mutual recognition of freezing and confiscation orders.
- ▶ To design a single, **coherent** instrument.
- ▶ Incorporate safeguards for fundamental rights.
- ▶ Enhance the potential for mutual recognition of confiscation orders
- ▶ Extended to include criminal non-conviction based confiscation

Areas of debate

- ▶ Regulation or Directive
- ▶ Time limits
 - Restraint orders
 - Confiscation orders
- ▶ Civil and administrative
 - “Within the framework of criminal proceedings”
 - “following proceedings in relation to a criminal offence”

Irish/Austrian case

- ▶ 800,000 sterling, in Austrian bank account.
- ▶ Proceeds of Irish criminality.
- ▶ Irish Non-conviction “disposal” order.
- ▶ Receivership order.
- ▶ Recognition/non-recognition?
- ▶ Definition:
 - Confiscation order; shall mean a final penalty or measure imposed by a court **following** proceedings in relation to a criminal offence resulting in the definitive deprivation of property
 - Disposal; 50% shall be transferred to the requesting state
- ▶ 1 million Euro each.

New Regulation

- ▶ Article 82: judicial cooperation **in criminal matters** shall be based on the principle of mutual recognition of judgements and judicial decisions.
- ▶ Recital 13. This regulation should not apply to freezing and confiscation orders issued within the **framework of civil** or administrative proceedings
- ▶ Article 1. within the **framework of criminal proceedings**
- ▶ Article 2: following proceedings **in relation to a criminal offence**

Legal interpretation

- ▶ “Framework of criminal proceedings”
 - What constitutes “proceedings”
- ▶ “Framework of civil or administrative proceedings”
 - What constitutes “civil”
- ▶ “In relation to a criminal offence”
 - Wider domestic interpretation.
 - Acknowledges principle of diversity

Italian/French CASE

- ▶ A non-conviction based forfeiture order made in Mafia case in Italy in relation to real property held in France was recognised, primarily by the French courts considering the facts of the case **within their own legal perspective and framework.**
- ▶ In short, if it would have been possible to make a confiscation order in France on the basis of the facts which supported the Italian order, then this order **would be recognised, regardless of the diversity of process.**
- ▶ It was more a question of substance than form.

Eurojust Report; Tracing

- ▶ Contradiction whereby mutual recognition requires assets to be specified, while value-based domestic orders do not. Consider:
 - Prior **cross border enquiry**
 - requesting a full investigation by the **ARO** of the executing State,
 - including a paragraph devoted to a **financial enquiry in all (JITs)**,
 - identifying the corresponding **competent** national authority, and
 - concluding such an enquiry **prior** to seeking mutual recognition.

- ▶ In addition, the following difficulties should be anticipated:
 - **FIUs with limited powers** to exchange information,
 - **absence of central** banking, company and property **registers** in the executing State, and
 - the right of bank account holders to **challenge** requests for information.

Eurojust Report; Tracing

- ▶ The use of specialised **forensic accountants** should be considered to both assist in the investigation of the financial information and serve as potential expert testimony.
- ▶ The benefits of a **multi-disciplinary approach** to asset tracing at EU level should be utilised, especially in larger cases, combining the skills of specialist authorities in the Member States.
- ▶ National practitioners should be educated and advised on the statutory responsibilities of the AROs and FIUs in the executing State to research, investigate and provide relevant information.
- ▶ Experience has shown that the above can be best coordinated using the facilities of **Eurojust**.

Freezing/Confiscation

- ▶ The competent authorities in the Member States should be consulted early and directly to avoid difficulties caused by the **differences in national implementation** of FD 2003 on freezing and FD 2006 on confiscation orders.
- ▶ The comprehensive completion of relevant **certificates**. Such certificate should include:
 - **specification** of the assets sought to be restrained or confiscated, including the provision of sufficient information for clear and comprehensive identification;
 - the **maximum amount** that may be frozen, which may be difficult to determine in cases in which liability is 'joint and several' among a number of defendants;
 - a certified copy of the **domestic confiscation/restraint order** based on the final enforceable decision, not subject to outstanding appeals;
 - proof of effective **service**/notification; and
 - the availability and utilisation of **effective legal** representation.
- ▶ Divergent views exist as to whether compliance with the 'standard form' Article 9 certificate is mandatory, or even whether a separate mutual legal assistance (MLA) request is required.

Freezing/Confiscation

- ▶ Identification of the appropriate competent authority with the necessary jurisdiction can also be problematic. In one case, we have noted effective use of the legal principle *prior in tempore prior in iure*, but this is not always the case .
- ▶ To avoid delays, the participating authorities should anticipate questions relative to the **rights of third parties**. These matters may include:
 - an obligation to inform the respondent/third-party of the remedies available, such as the **right to attend, the right to be heard and have legal representation in the executing State, and the right of appeal**;
 - some Member States require **a clear link** between the criminal activities of the suspect and the property, while others simply require a proof of ownership; and
 - other Member States require evidence demonstrating a suspect's or property owner's **level of participation** in the criminal activity or evidence demonstrating a connection between the holder of the property and suspect/company.
- ▶ Such rights come to the fore especially when seeking to restrain ongoing commercial activities or enforce an unexplained wealth order.
- ▶ A comprehensive **understanding of the breadth and limitations of an international legal instrument** is a necessary guide to the correct choice of instrument, for instance, when seeking recognition of a restitution order or if the assets sought to be frozen are both criminal proceeds and evidence.

Freezing/Confiscation

- ▶ The participating authorities should recognise **distinctions** in the **ultimate confiscation instrument** to be applied, e.g. value-based, extended conversation, non-conviction-based or unexplained wealth orders, to avoid derogation from mutual recognition, where the executing State does not have similar domestic legislation.
- ▶ As information contained in the request may identify criminality in the executing State, involved authorities should anticipate the potential of that **State to initiate a separate domestic investigation**, requiring MLA in return. In such cases, benefits of instigating a parallel investigation or JIT include:
 - ensuring an overarching coordinated investigative strategy;
 - avoiding potential breaches of the *ne bis in idem* principle;
 - more effective tracking of the money trail;
 - consistent expert testimony by forensic accountants;
 - coordinating the service of necessary notices in both States; and
 - harmonising and resolving conflicting requests/domestic requirements.
- ▶ While both issuing and executing States may seek to balance the potential financial return with the cost of execution (translation costs can be expensive), some value should be placed on the **ultimate deterrent effect**.

Disposal; Instrument utilised

- ▶ The disposal of assets may be treated differently in the executing State, **depending on the international instrument utilised**. Contrast, for instance, Article 57 of UNCAC 2003 on the proceeds of corruption, the 1995 Convention on stolen or illegally exported goods as it applies to cultural objects, and the general approach of the Vienna/Strasbourg Conventions governing the proceeds of crime.
- ▶ Note also the distinction between mutual recognition of confiscation orders and enforcement of domestic restitution/compensation orders in favour of victims.
- ▶ Note also that Article 16.1(b) of 2006/783/JHA provides that disposal of property, other than money, is entirely a **matter for the executing State**.

Disposal; Asset management

- ▶ The report also makes recommendations on asset management. For instance, the participating authorities should:
 - anticipate potential causes of **delay to avoid unnecessary loss of value**, such as early clarification of whether the assets were confiscated as a proceed of crime, which may be sold, or as evidence, which may not be sold;
 - anticipate requirements such as provisions for compensation, compliance with notice provisions and potential appointment of a judicial administrator for a company (liquidator), all of which can be burdensome and create delays; and
 - consider, if possible, **the early sale of assets** to avoid both loss in value and high management costs.
- ▶ The issuing Member State may also need to reassess the value of a confiscation order to take into account the ultimate realisation value of a sold property, as difficulties often occur due to significant **differences** between **the estimated value and the value realised**.

Disposal; Assets Sharing

- ▶ The report also identifies conflicts between the rights of an **executing State to a 50-50 share** under Article 16.1(b) and the **victims' rights to compensation/restitution**.
- ▶ The primary instruments under review have no application in the recognition of compensation/restitution orders.
- ▶ Yet, as criminal actions may involve **civil liability**, victims may have the possibility to resort to domestic civil remedies. These remedies may in turn be recognised under international legal instruments, such as the Brussels Convention .
- ▶ Finally, the report acknowledges a benefit to **formalising asset-sharing agreements** at ministerial level.

Eurojust's Support

- ▶ The report also identifies a number of recurring administrative issues present in all four stages of asset recovery. These problems include:
 - confusion created by **simultaneous transmission** of requests through a number of parallel communication channels;
 - delays caused by **poor translations** or inaccurate description of either the law or the facts requiring further explanation; and
 - **insufficient training** at both national and EU levels, considering the complexity and ongoing development in the area.
- ▶ Experience has shown that the above can be best addressed through coordination and exchange of information facilitated by Eurojust.

Eurojust's Support

- ▶ The benefits of Eurojust support, as identified in the report, include:
 - the coordination of a **joint investigative strategy** and intelligence activities;
 - the exchange of relevant **information on the extent and limitations** of relevant domestic and international remedies;
 - clarification of **domestic requirements** between issuing and executing Member States;
 - the ability to **harmonise and resolve contrasting views** of the effect and requirements of international legal instruments;
 - providing a **channel of communication** between participating Member States and third States through Eurojust Contact Points and Liaison Prosecutors;
 - **coordinated transmission** of requests, orders and certificates between competent authorities;
 - **assistance on drafting** requests and advice on the requirements for official translations;
 - the potential for an **ongoing case review**, including links between parallel investigations;
 - the ability to augment **mutual trust** between investigators and prosecutors; and
 - the possibility to include an analysis of asset recovery remedies in the provision of a Eurojust justified opinion as to why one Member State might be better placed to prosecute in a particular case.

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