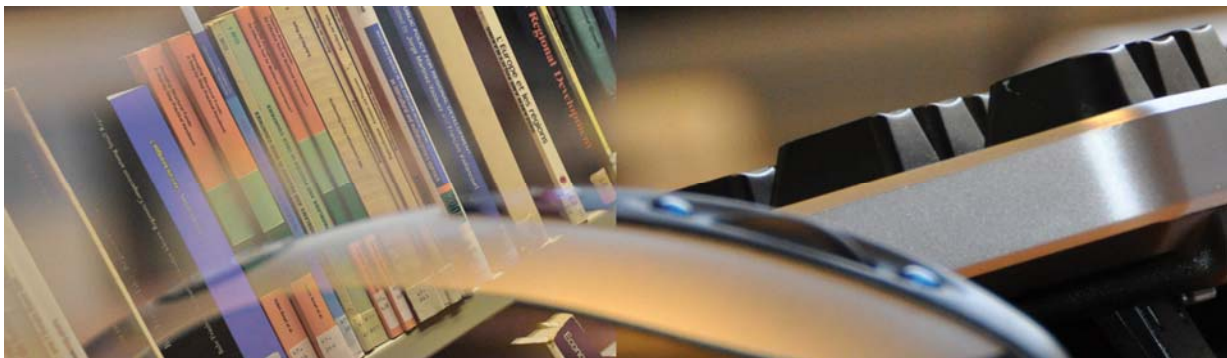


Seminar 5: Asset recovery within the European Union: Council Framework Decisions of 2003, 2005 and 2006 and new developments in this area

Copenhagen (DK), 24-25 October 2012

Specific Grant Agreement JUST/2010/JPEN/AG/FPA/001
Framework Partnership Agreement JLS/2007/JPEN-FPA/017

Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice, Institutional Processes and Topical Areas



Overview of the International and European Legislation relating to Asset Recovery

Presented by

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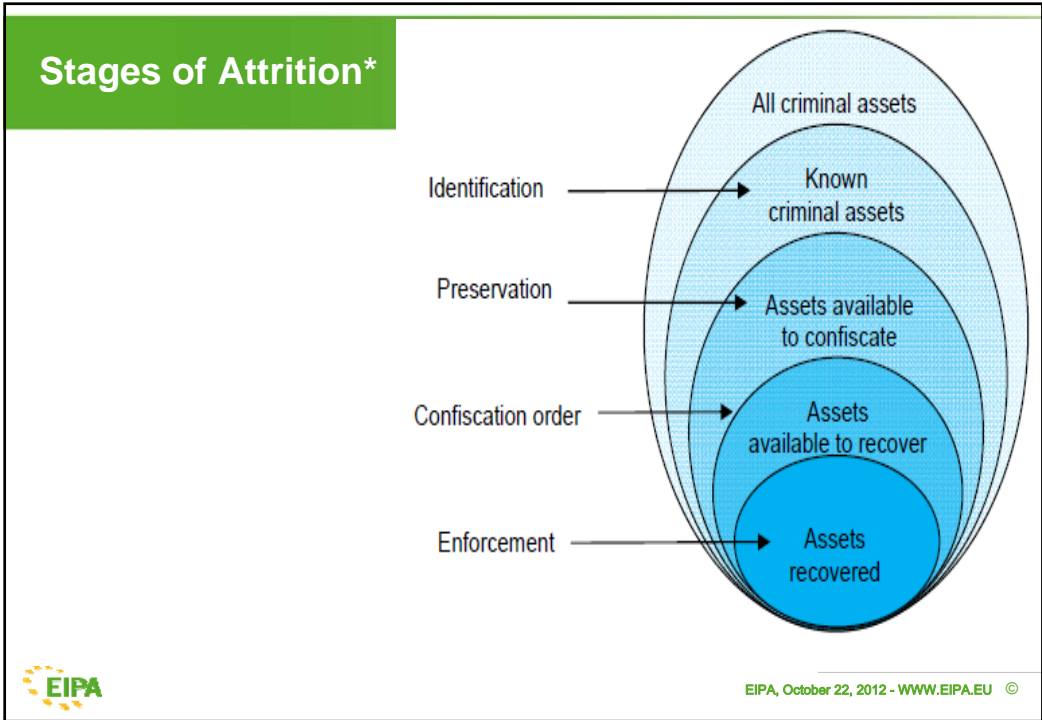
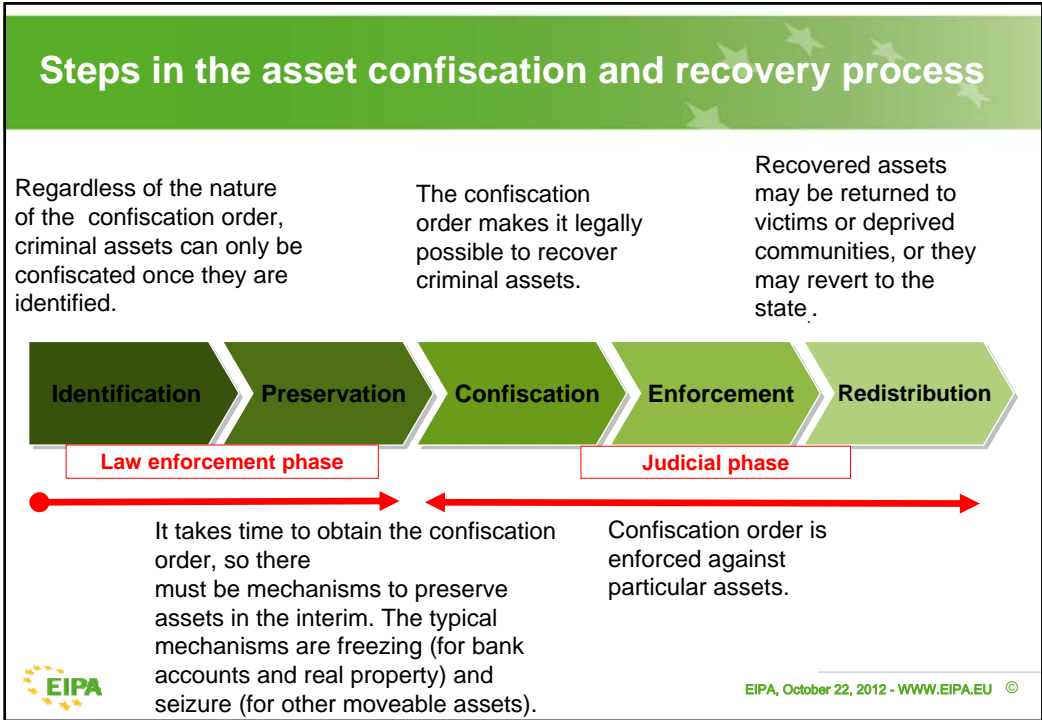


Overview of the International and European Legislation relating to Asset Recovery

Petra Jeney

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- 2 Difficulties of cooperation
- 3 International treaties on seizure and confiscation of proceeds of crime
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Terminology

- **asset recovery**
- **seizure**
- **freezing**
- **confiscation**
- **restitution**
- **asset sharing**

Challenges of the asset recovery process

- **How to identify criminal assets?**
- **How to preserve these pending a confiscation order?**
- **How to obtain a confiscation order so that they can be recovered?**
- **How to enforce these orders?**

Regulatory issues

- value confiscation,
- third party confiscation
- mutual recognition of confiscation orders
- extended confiscation
- non-conviction based confiscation
- extended criminalisation



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Difficulties of co-operation

- Different conditions for seizure of proceeds and property of offender in different States
- Lack of rules in domestic legislation
- Unclear terminology in international treaties
- Different approaches to the right of victim to claim damages
- No possibility of confiscation *in rem* in criminal proceedings in many States



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Difficulties of co-operation

- **Low intensity co-ordination between FIU, specialised police units and judicial authorities**
- **Difficulties in finding the bank account numbers of offenders**
- **Difficulties in the management of seized assets**
- **Very limited possibilities in relation to assets shared between different states**



Low man power, a lack of specialization

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International Treaties concerning seizure of assets

- **European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 1959, including additional protocols from 1978 and 2001 (MLA)**
- **Art. 51 of Convention Implementing the Schengen Agreement, 1990 (CIS)**
- **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 1990 (CETS No. 141)**
- **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005 (CETS No. 198)**



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International Treaties concerning seizure of assets

- **International Convention for the Suppression of Counterfeiting Currency, 1929**
- **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997**
- **Criminal Law Convention on Corruption, Strasbourg, 1999**
- **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**
- **UN Convention against Transnational Organised Crime, 2000**
- **UN Convention against Corruption, 2003**



Provisions related to the Seizure of Assets

- **International Convention for the Suppression of Counterfeiting Currency, 1929 – Art. 11**
 - a) **counterfeited currency**
 - b) **instrumentalities**



Provisions related to the Seizure of Assets - MLA

- **European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 1959, (MLA) – Art. 5**
 - **seizure of property**
 - **additional protocols from 1978 and 2001**

Provisions related to the Seizure of Assets – CETS 141

- **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 1990 (CETS No. 141)**
 - **it is obligation to seize under Art. 2(1)**
 - a) **instrumentalities**
 - b) **proceeds or**
 - c) **property the value of which corresponds to such proceeds (equivalent value)**

Provisions related to the Seizure of Assets - UN

- **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 – it is obligation to seize under Art. 5 :**
 - **UN Convention against Transnational Organised Crime, 2000 – it is obligation to seize under Art. 12 :**
 - **UN Convention against Corruption, 2003 – it is obligation to seize under Art. 31:**
- a) **instrumentalities**
 - b) **proceeds or**
 - c) **property the value of which corresponds to such proceeds (equivalent value)**
 - d) **property into which proceeds have been transformed or converted**
 - e) **property with which proceeds have been intermingled**
- income or other benefits derived from b), d) and e)**



Conditions for Seizure

- **Declarations of Parties to Art. 5 of the 1959 MLA (modified by Art. 51 of the CIS):**
- a) **condition of dual criminality**
 - b) **condition of an extraditable offence in the requested country (CIS - max. penalty at least 6 months + administrative criminal law);**
 - c) **that execution of the letters rogatory is consistent with the law of the requested Party**

CETS No. 141 contains also conditions a) and c).



Further Possibilities to Refuse Request for Seizure - CETS No. 141

Art. 18 CETS No. 141 – a request can be refused if:

- a) the action sought would be contrary to *the fundamental principles* of the legal system of the requested Party; or
- b) the execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested Party; or
- c) in the opinion of the requested Party, *the importance* of the case to which the request relates *does not justify* the taking of the action sought; or
- d) the offence to which the request relates is *a political* or fiscal* *offence*; or



Further Possibilities to Refuse Request for Seizure - CETS No. 141

- e) the requested Party considers that compliance with the action sought would be contrary to the principle of *ne bis in idem*; or
- f) *no dual criminality*
- f) request is *not signed by judicial authority*
- g) in so far as the assistance sought involves *coercive action*, the measures sought *could not be taken* under the domestic law of the requested Party *for the purposes of investigations or proceedings*, had it been a similar domestic case



Execution of the Requests for Seizure and Confiscation of Assets - CETS No. 141

- **The procedures** for obtaining and enforcing the seizure and confiscation **shall be governed by the law of the requested state.**
- A state, which has received **a request** made by another state **for confiscation** assets situated in its territory, shall:
 - a) enforce a confiscation order made by a court of a requesting state; or
 - b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

Content of the MLA Request concerning Seizure of Assets – 1959 MLA

The request shall contain:

1. the authority making the request
2. a summary of the relevant facts
3. stating of the offence
4. quotation of provisions concerning offence and statutory limitations
5. quotation of provisions concerning possibility of requesting authority to seize assets in given criminal matter (or to annex its own decision on seizure)

Content of the MLA Request concerning Seizure of Assets

6. **the object of and the reason for the request – a need to seize described property (banking information, bank account) - description of relationship between prosecuted crime and the given property (for a eq. value – a relationship between property and offender)**
 - **translation into language of requested state**
 - **sending the request by fax and after that by post**

Freezing of Bank Account - cooperation between different authorities

- **FIU – a possibility to freeze bank account transactions for limited period under a money laundering legislation**
- **Police authority can open criminal proceeding**
- **Public prosecutor (an investigative judge, a judge) can decide about seizure of bank account under criminal law**

This procedure can be used in favour of MLA.

Freezing of Bank Account - cooperation between different authorities

Problems:

- not every FIU in EU has the power to freeze a bank account transaction (not possible in NL, FR, ES)
- some FIU cannot apply this power from their own initiative (i.e. UK)
- a list of predicative offence in certain states
- a lacks in national legislation concerning a seizure
- a lack of knowledge of this possibility
- a lack cooperation between judicial authorities, police and FIU (Egmont, CARIN, EP, EJM, EJ)

Content of the announcement to FIU

Information about:

- the criminal proceeding has been opened (it is not necessary to charge a person with crime in certain states)
- there is a suspicion that an offender gained proceeds from this crime
- there is a suspicion that this proceeds is laundered because it has been found that money was sent to particular bank account to the requested state
- a judicial authority writes a MLA request consisting in seizure of this bank account (or providing of bank information concerning of transfers of the sum of money)

Victim's Rights

Victim can ask for damages in different states within:

- criminal proceedings
- civil proceedings

- Return the particular item to a victim (Art 8 of the 2000 Convention)
- Decision of damages (sometimes it can be a part of criminal court's judgement)

Victim's Rights

- Art. 49 (d) of CIS – mutual assistance shall also be afforded in civil proceedings joined to criminal proceedings, as long as the criminal court has not yet given a final ruling in the criminal proceedings.
- Several multilateral ITs have detailed provisions that states shall adopt legislative and another measures enable to return property in favour of victims abroad (i.e. Art. 57 of the UN Convention against Corruption).

Council Framework Decisions

- 2001/500/JHA FD on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
- 2002/584/JHA Art. 29 of FD on EAW and the surrender procedures between MS
- 2003/577/JHA FD on the execution of orders freezing property or evidence
- 2005/212/JHA FD on confiscation of crime-related proceeds, instrumentalities and property
- 2005/214/JHA FD on the application of the principle of mutual recognition to financial penalties
- 2006/783/JHA FD on the application of the principle of mutual recognition to confiscation orders

Art. 29 of FD on EAW

Handing over of property

At the request of the issuing judicial authority or on its own initiative, the executing judicial authority **shall, in accordance with its national law, seize and hand over property** which:

- a) may be required as evidence, or
- b) **has been acquired by the requested person as a result of the offence.**

This property shall be handed over even if the EAW cannot be carried out owing to the death or escape of the requested person.

2003/577/JHA FD on the execution of orders freezing property or evidence

- Implementation limit till **August 2, 2005**
- It concerns freezing orders issued by a judicial authority for purpose of:
 - a) securing evidence, or
 - b) subsequent confiscation of property
- Executing MS **shall recognise** this order without any further formality being required and immediately **execute** it.

2003/577/JHA FD on the execution of orders freezing property or evidence

- **Grounds for refusing:**
 - the certificate under Art. 9 FD is not produced
 - there are an immunity and privilege under the law of executing MS
 - the ne bis in idem principle is infringed
 - no dual criminality regarding crime not listed in Art. 3 (2) FD

The fundamental rights and fundamental legal principles in Art. 6 of the Treaty on EU must be respected.

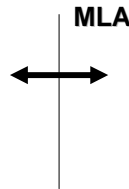
2003/577/JHA FD on the execution of orders freezing property or evidence

advantages of FO:

- no dual criminality for listed categories of crime
- no dual examination of the substantive reasons of issuing of a FO

disadvantages of FO:

- only 20 MSs have already implemented it (BE, BG, CZ, DE, DK, DE, EE, FI, SE, ES, FR, LT, LV, HU, ML, NL, AT, RO, SI, SK)
- Too complex
 - freezing order
 - certificate
 - MLA request (transfer evidence – house search?)



2005/212/JHA FD on confiscation of crime-related proceeds, instrumentalities and property

- Implementation limit till **March 15, 2007**
- Stipulate rules for „**extended powers of confiscation**“ - each MS shall take these measures:
 - 1) a national court can order a confiscation if it is fully convinced that the property in question has been derived from:
 - criminal activities or
 - similar criminal activitiesof the convicted person during **a period prior to conviction** for offence referred in Art 3(1).

2005/212/JHA FD on confiscation of crime-related proceeds, instrumentalities and property

- 2) a national court can order a confiscation if:
- it is established that the value of the property is disproportionate to the lawful income of the convicted person and
 - it is fully convinced that the property in question has been derived the criminal activity of the convicted person

2005/214/JHA FD on the application of the principle of mutual recognition to financial penalties

- Financial penalty means a sum of money :
 - as financial penalty imposed for an offence
 - compensation imposed for the benefit of victims
 - as the costs of court or administrative proceedings
 - imposed for the benefit of a public fund or a victim support organisation

2005/214/JHA FD on the application of the principle of mutual recognition to financial penalties

- The decision must be made by:
 - a) a court in respect of a criminal offence
 - b) an authority other than court in respect of a criminal offence or acts punishable under the national law of the issuing MS provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters
 - c) a court having jurisdiction in particular in criminal matters in proceeding in b)

2006/783/JHA FD on recognition of confiscation orders

- Confiscation order means a final penalty or measure imposed by a court following proceeding in relation to a criminal offence or offences, resulting in the definitive deprivation of property
- The competent executing authorities shall without further formality **recognise** a confiscation order, and shall take all the necessary measures for its **execution**, unless there are the grounds for non-recognition or non-execution or postponement of execution.

2006/783/JHA FD on recognition of confiscation orders

FD stipulates the rules for:

- grounds for non-recognition, non-execution and postponement
- legal remedies
- rules for execution of multiple orders
- rules for disposal of confiscated property – asset sharing

Specialised units for assets tracing in MSs

- Council Decision concerning cooperation between **AROs** of MSs in the field of tracing and identification of proceeds from, and other property related to, crime (2007/845/JHA, OJ L 332, from 18/12/2008, p. 103)

European Investigation Order - draft

Article 27e EIO on Provisional measures

- EIO provisionally issued with a view to preventing the destruction, transformation, moving, transfer or disposal of item that may be used as evidence
- The executing authority shall decide and communicate the decision on the provisional measure as soon as possible and, whenever practicable, within 24 hours of receipt of the EIO

Draft Directive

- Commission Proposal on the freezing and confiscation of proceeds of crime in the European Union

Who can help you ?

- **EUROJUST**

<http://eurojust.europa.eu/>

- **European Judicial Network**

<http://www.ejn-crimjust.europa.eu/>

- **CARIN** – the network of specialist for tracing and seizure of proceeds of crime



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Do You Have Any Questions?

We would be happy to help.



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