

A FRAGMENTED APPROACH TO ASSET RECOVERY AND FINANCIAL INVESTIGATIONS: A THREAT TO EFFECTIVE INTERNATIONAL JUDICIAL COOPERATION?

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1. INTRODUCTION

For at least the last three decades criminal justice policies worldwide have been focusing on the fight against criminal money. It is generally uncontested that it is a moral imperative to deprive criminals of illicit gains; that removing the proceeds of crime from their possession is the most effective way to dismantle criminal organisations; and that it is beneficial for the legitimate economy to dispose of dirty money.¹

From the perspective of the European Union (EU) the search for criminal money is particularly relevant when offences are committed against its own financial interests, as when stolen money is part of the EU budget, either on

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¹ On the rationale and the history of policies against dirty money, see among others: P. Alldridge, *Money Laundering Law*, Hart publishing, 2003, p. 89 et seq.; G. Stessens, *Money laundering: A New International Law Enforcement Model*, Cambridge University Press, 2000, p. 3 et seq.; M. Gallant, *Money Laundering and the Proceeds of Crime*, Edward Elgar, 2005, p. 1 et seq.; J. Vervaele, *Economic crimes and money laundering: a new paradigm for the criminal justice system?*, in B. Unger and D. van der Linde, *Research Handbook on Money Laundering*, Edward Elgar, 2013, p. 379 et seq.; P.C. Van Duyn – M.S. Groenhuijsen – A.A.P. Schudelar, *Balancing financial threats and legal interests in money-laundering policy*, in *Crime, Law & Social Change*, Vol. 43, 2005, p. 117 et seq.; V. Mitsilegas, *International regulation of money laundering and terrorist finance*, in I. Bantekas and G. Keramidis (eds.), *International and European Financial Criminal Law*, LexisNexis, Butterworths, 2006, p. 41 et seq.; B. Vettori, *Tough on Criminal Wealth*, Springer, 2006, p. 1 et seq.; R.K. Gordon, *Losing the war against dirty money: rethinking global standards on preventing money laundering and terrorism financing*, Case research Paper Series in Legal Studies no. 2010-20 (May 2010), available at SSRN: <http://ssrn.com/abstract=1600348>; R. Hülsse, *Creating Demand for Global Governance: The Making of a Global Money-laundering Problem*, in *Global Society*, Vol. 21, No. 2, 2007, p. 155 et seq.; H. Nelen, *Hit them where it hurts most?*, in *Crime, Law & Social Change*, Vol. 41, Issue 5, 2004, p. 517 et seq.

the revenue or the expenditure side.² Yet, although the interests at stake are, in these cases, of a supranational nature, enforcement is mainly carried out at national levels.³ In other words, the tasks related to the recovery of gains generated from profit-driven crimes are allocated to national authorities regardless of the ‘victim’ of such crimes, whether national or European.

In this area the EU has been acting in accordance with powers conferred by the Treaties, increasingly in light of the idea that “ensuring that crime does not pay” should be a priority for its Area of Freedom, Security and Justice.⁴ One might note the effects of its action already on a terminological level, since the concept of ‘asset recovery’ – far from being undisputed on the international level⁵ – has become the main objective of every policy touching on economic crime.

However, if we think about asset recovery as a complex legal process, starting with financial investigations and having at its centre confiscation (or forfeiture) laws, but including other phases such as asset management and asset disposal, we can understand how each phase can raise different and difficult questions.

EU instruments cover only some parts of this process, acting on three main fronts: the horizontal exchange of information between authorities involved; the mutual recognition of judicial decisions relating to freezing and confiscation; and the harmonisation of national systems especially as regards confiscation regimes.⁶ The objective of this paper is not to evaluate the success

² See for example J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office*, Europa Law Publishing, 2011, p. 7 et seq.

³ J. Vervaele, *Gathering and use of evidence in the area of freedom, security and justice, with special regard to EU fraud and OLAF investigations*, in C. Nowak (Ed.), *Evidence in EU Fraud Cases*, Lex-Wolters, 2014, p. 21 et seq.; J. Vervaele, *Has the European Union a Criminal Policy for the Enforcement of its Harmonised Policies*, in I. Govaere & D. Hanf (Eds.), *Scrutinizing Internal and External Dimensions of European Law*, Liber Amicorum Paul Demaret, Peter Lang Publishing Group, 2013, p. 533 et seq.; M. de Cock Buning, A. Ottow, J. Vervaele, *Regulation and Enforcement in the EU: Regimes, Strategies and Styles*, in *Utrecht Law Review*, Vol. 10, Issue 5, 2014, p. 1 et seq.

⁴ See in particular the Communication from the EU Commission: Proceeds of organised crime: Ensuring that “crime does not pay”, 20 November 2008, COM(2008) 766 final.

⁵ See R. Ivory, *Corruption, asset recovery and the protection of property in public international law*, Cambridge University Press, 2014, p. 22 et seq.; I. Carr – R. Jago, *Corruption, the United Nations Convention against Corruption (‘UNCAC’) and Asset Recovery*, in C. King and C. Walker (Eds.), *op. cit.*, p. 203 et seq.

⁶ See M.J. Borgers, *Confiscation of the Proceeds of Crime: The European Union Framework*, in C. King and C. Walker (Eds.), *Dirty Assets*, Ashgate, 2014, p. 27 et seq.; M. Simonato, *Directive 2014/42/EU and Non-conviction Based Confiscation: A Step Forward on Asset Recovery?*, in *New Journal of European Criminal Law*, Vol. 6, Issue 2, 2015, p. 215 et seq.

of EU action and the effectiveness of the EU legal framework.⁷ Rather, it aims to shed light on the causes of the problem, highlighting areas that raise issues and present some margin for further intervention at a supranational level.

The starting point of the reflections which follow is the observation of one problem arising during the first phase of asset recovery: financial investigations, which seem to become extremely difficult when assets cross national borders, due primarily to the great differences between national legal systems. Therefore, focusing in particular on financial investigations conducted at a judicial level, this paper intends to highlight some of these crucial differences between national approaches to financial investigations. For this purpose, access to banking information will be used as an example.

Rather than to find solutions, the paper's objective is to demonstrate why EU instruments on cooperation might not be sufficient to ensure the effectiveness of such cooperation, such that greater efforts to elaborate common concepts and policies are required. At this point it is worth emphasizing that the quest for common approaches is not only an academic aim: for example, in 2012 the final report on the fifth round of mutual evaluation on financial crime and financial investigations identified the diversity of approaches as one of the main obstacles to international cooperation, in particular in light of the need to ensure swift and timely cooperation.⁸ By highlighting the areas in which national differences create obstacles to common goals, this paper has the ultimate objective of contributing to elucidating the starting point for the elaboration of a common EU narrative, in a crucial area and one which touches on sensitive aspects of national criminal justice systems.

2. SUPRANATIONAL INTERESTS VS. NATIONAL LEGAL CULTURES: A PATCHWORK OF APPROACHES TO FOLLOW THE MONEY

There is quite a variety of asset recovery systems in the EU. In particular, the confiscation – or forfeiture⁹ – laws may be very different from one country

⁷ For a recent analysis, see E. Savona – M. Riccardi (eds.), *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*. Final Report of Project OCP – Organised Crime Portfolio (www.ocportfolio.eu). Trento: Transcrime – Università degli Studi di Trento, 2015.

⁸ Council of the European Union, Multidisciplinary Group on Organised Crime, Final report on the fifth round of mutual evaluation: Financial crime and financial investigations, 2 August 2012, no. 12657/12, p. 10.

⁹ In UK the term 'confiscation' – which is used by the EU legislature with regard to the final deprivation of property from an offender – refers to "an order for payment of a specified sum of money". See D.J. Dickson, *Towards more effective asset recovery in Member States – the UK example*, in *ERA Forum*, Vol. 10, 2009, p. 436.

to another.¹⁰ Even financial investigations, the first crucial phase, are far from representing a uniform approach. This is clearly reflected in the fact that the term ‘financial criminal investigations’ is, to our knowledge, expressly adopted as such only in the Netherlands, whereas other Member States apply traditional criminal procedural concepts to measures aiming at the identification of dirty money.¹¹

The reasons for such a fragmented scenario can of course be found in the different legal traditions, and different approaches to balancing effective responses to crimes with the protection of fundamental rights. But they can also be found in discrepancies in understanding international norms (i.e. in the manner of implementing international instruments).¹² These differences may be observed from different perspectives, namely: (a) the approach; (b) the structure; (c) the target; (d) the authority; and (e) the specific rules.

(a) *Approach to financial investigations*

From a criminal policy perspective it has often been observed that, at the national level, the ‘follow the money’ approach is not always as high a priority as it is at the EU level. Apparently there are countries where financial investigations are not conducted in all cases,¹³ others where they are started too late. Furthermore, in several Member States it seems that they are conducted only in relation to certain specific financial crimes, and not in every case of offences generating criminal proceeds.

A recurring question is therefore whether financial investigations actually are a priority in all EU countries, and whether attention should consequently be focused on fostering genuine political will, for example “by providing training for the public officials and employees involved in asset recovery, including

¹⁰ See A.M. Maugeri, *The Criminal Sanctions Against the Illicit Proceeds of Criminal Organisations*, in *New Journal of European Criminal Law*, Vol. 3, Issue 3-4, 2012, p. 257 et seq.

¹¹ See K. Ligeti, *Pre-trial procedures in the European Union – Final report of the comparative analysis of the national systems of investigation, prosecution and procedural safeguards in the EU Member States*, in K. Ligeti (ed.), *Toward a prosecutor for the European Union*, Vol. II, Hart Publishing, 2015 (forthcoming).

¹² See P. Faraldo Cabana, *Improving the Recovery of Assets Resulting from Organised Crime*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, 2014, p. 18 et seq.

¹³ See K. Bullock, *The Confiscation Investigation: Investigation the Financial Benefit Made from Crime*, in *Policing*, Vol. 4, Issue. 1, 2009, p. 10 et seq.; M.J. Borgers, *Targeting the Proceeds of Crime: Bottlenecks in International Cooperation*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 15, Issue. 2, 2007, p. 1 et seq.; M. Kilchling, *Tracing, Seizing and Confiscating Proceeds from Corruption (and other Illegal Conduct) Within or Outside the Criminal Justice System*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 9, Issue 4, 2001, p. 264 et seq.

the judiciary, the prosecution service and the members of the financial intelligence unit (FIU) and the asset recovery office, so that everyone understands the importance and relevance of the resources obtained for the State.”¹⁴ Such considerations are of course strictly connected with investment, in terms of resources, that governments are ready to make: the success of strategies on asset recovery relies on some key aspects – e.g. specialisation of personnel, multi-disciplinary expertise, centralisation of data, updated databases, etc. – which all require the allocation of greater human and financial resources.¹⁵

(b) Structure of financial investigations

From a comparative overview of criminal procedural systems one may observe the different structure of financial investigations, in particular in relation to investigations conducted within main criminal proceedings. Financial investigations leading to criminal assets may be conducted together with traditional criminal investigations aiming at gathering evidence against the suspect (*integrated* financial investigations).¹⁶ Alternatively, they can be conducted independently from criminal investigations (*autonomous* financial investigations). In this case, either they are conducted in parallel, i.e. at the same time as criminal investigations (e.g. the Netherlands);¹⁷ or they can be conducted after the issue of a confiscation order in order to identify the recoverable property (e.g. UK and Luxembourg).

Another distinction concerning the starting point of such investigations can be seen between *reactive* and *proactive* investigations, i.e. either they are conducted only after the official initiation of criminal investigations; or they may start before that moment and become useful for future criminal investigations (intelligence-led investigation). In this regard, some countries make a strict distinction between the two phases; others allow more freely the use of information gathered before and outside the context of traditional reactive investigations.¹⁸

¹⁴ P. Faraldo Cabana, *op. cit.*, p. 23.

¹⁵ See P. Faraldo Cabana, *op. cit.*, p. 24 ; K.M. Stephenson et al., *Barriers to asset recovery*, World Bank, 2011, p. 31 et seq.

¹⁶ R. Golobinek, *Financial investigations and Confiscation of Proceeds of Crime: Training Manual for Law Enforcement and Judiciary*, Strasbourg: Council of Europe, 2006, p. 7.

¹⁷ See M.S. Groenhuijsen – T. Kooijmans, *Financial investigation and confiscation orders in a broader perspective: developments in Dutch criminal law*, in G. Antonopoulos, M. Groenhuijsen, J. Harvey, T. Kooijmans, A. Maljevic, K. von Lampe (eds.), *Usual and unusual organising criminals in Europe and beyond: Profitable crimes, from underworld to upper world - Liber Amicorum Petrus van Duyne*, Maklu, 2011, p. 55 et seq.

¹⁸ For a distinction between these two kinds of procedure, see M.F.H. Hirsch Ballin, *Anticipative Criminal Investigations. Theory and Counterterrorism Practice in the Netherlands and the United States*, Springer, 2012, p. 3 et seq.

In addition, it must be borne in mind that in some cases financial investigations in the context of asset recovery are conducted outside the framework of criminal procedure *sensu stricto*. Indeed, some EU Member States provide for some forms of ‘civil asset forfeiture’, or – in EU terminology – ‘non-conviction based confiscation’. It is increasingly believed that the success of asset recovery strategies depends on the possibility of recovering criminal money without waiting for a final conviction in the criminal trial; a conviction that might never be obtained, since it must be subject to stricter rules (as regards standard and onus of proof) than those that, in principle, could apply to the assessment of the criminal nature of property.¹⁹

The EU Commission recently made an attempt to lay down a binding provision on non-conviction based confiscation in order to force all Member States to provide for such a possibility. Nevertheless, due to treaty limitations and political resistance, the EU adopted a legislative text²⁰ that does not seem to impose upon the Member States a duty to establish a uniform model in this sense.²¹

Therefore, those countries providing for civil forfeiture regimes need to seek the cooperation from countries which do not conceive of the idea of confiscation – linked as it is with the idea of criminal punishment – without a previous conviction reached following the usual safeguards of criminal procedure. And international cooperation on civil forfeiture proceedings, at the present time, falls outside the scope of the traditional instrument on judicial cooperation in criminal matters.²²

¹⁹ Among others, see C. King, *Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture*, in *The International Journal of Evidence & Proof*, Vol. 16, 2012, p. 337 et seq.; J. Boucht, *Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR*, in *New Journal of European Criminal Law*, Vol. 5, Issue 2, 2014, p. 224 et seq.; T.S. Greenberg, *Stolen Asset Recovery. A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, World Bank, 2009; J.P. Rui, *The Civil Asset Forfeiture Approach to Organised Crime. Exploring the possibilities for an EU Model*, in *Eucrim*, 2011, 4, p. 153 et seq.; J.P. Rui, *Non-conviction based confiscation in the European Union-an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*, in *ERA Forum*, Vol. 13, 2012, p. 349 et seq.; S.N.M. Young, *Introduction*, in S.N.M. Young (ed.), *Civil forfeiture of Criminal Property*, Edward Elgar, 2009, p. 1 et seq.

²⁰ See Art. 4(2) of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29 April 2014, p. 39 et seq.

²¹ See M. Simonato, *op. cit.*, p. 213 et seq.

²² See M. Egan, *Non-conviction Based Sanctions: The Court of Justice v. the European Court of Human Rights, Who Decides?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, 2011, p. 171 et seq.

(c) *Target of financial investigations*

One may also wonder what the exact target of financial investigations is; in other words, what assets can be recovered. In UK, one could say that financial investigations in the context of asset recovery aim “to estimate the financial benefit the defendant has made from crime and the amount (...) available for recovery.”²³ And this might indeed match the EU concept of ‘value confiscation’. Nevertheless, in some cases, maybe less frequent in practice, investigators need to trace specific assets (either the proceeds of crime or instrumentalities) because only those assets that are directly linked with the crime might be confiscated.

In other cases, the scope is much broader, and financial investigations explore the entire ‘criminal lifestyle’ of a target. One may think, for example, of the ‘extended confiscation’ regimes,²⁴ or of the preventative confiscation used by Italian authorities in their fight against the mafia.²⁵ In addition, financial investigations might also extend to properties belonging to other non-convicted persons who acquired the illicit assets from the guilty person (this is the EU concept of ‘third party confiscation’).

(d) *Authority conducting financial investigations*

Fourth, the picture of cross-border financial investigation is complicated by the involvement of authorities of a different nature. Not only, as mentioned above, in the context of non-criminal procedures against dirty assets; but in general, every judicial investigation on criminal assets depends on information gathered at different levels, e.g. by administrative authorities (tax proceedings), or by FIUs established in the context of anti-money laundering (AML) policies.

Such combined efforts involving several authorities are often identified with the concept of ‘multi-agency investigations’. In this context, cooperation might be difficult even within national borders (i.e. between national authorities at different levels); it is even more complicated at the transnational level, because of “a fairly strict international compartmentalisation as regards the exchange of information, potentially leading to a loss of valuable informa-

²³ K. Bullock, *op. cit.*, p. 11.

²⁴ See, among other, I. Blanco Cordero, *Comiso ampliado y presunción de inocencia*, in L.M. Puente Aba, M. Zapico Barbeito, L. Rodríguez Moro (eds.), *Criminalidad organizada, terrorismo e inmigración: retos contemporáneos de la política criminal*, Editorial Comares, 2008, p. 69 et seq.

²⁵ See, among others, D. Piva, *Anti-Mafia Forfeiture in the Italian System*, in C. King and C. Walker (eds.), *op. cit.*, p. 71 et seq.

tion.”²⁶ In other words, cooperation takes place only between homogenous authorities in the EU.²⁷

In such a multi-disciplinary setting, it is worth noting that FIUs may have different powers and natures in Member States. Depending on their institutional position and investigative capacity, they can be identified as administrative, law enforcement, judicial or hybrid authorities.²⁸

(e) Rules on investigative measures

Finally, regardless of the purpose, nature and structure of the financial investigation, the rules governing specific measures that an authority requires in order to gather relevant information on assets can also be very different in the EU.

Investigative measures concerning banking information and transactions are also essential in investigations of offences against the financial interests of the EU. In the European Anti-Fraud Office (OLAF) annual reports, many cases are reported in which access to bank accounts was the breakthrough in investigations.²⁹ Access to banking information, however, is subject to different conditions in EU territory. This is therefore a good example of the fragmented nature of financial investigations in the EU.

3. DIFFERENT INVESTIGATIVE MEASURES CONCERNING BANKING INFORMATION AND TRANSACTIONS IN THE INTERNATIONAL LEGAL FRAMEWORK

For a long time, the possibility of accessing banking information was not an investigative measure specifically provided for by international instruments on mutual legal assistance. Article 3 of the ‘mother convention’ on mutual assistance of 1959,³⁰ for example, only provided for a legal basis for the exchange

²⁶ Final Report mutual evaluation, *op. cit.*, p. 11.

²⁷ See, among others, K. Ligeti – M. Simonato, *Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept*, in F. Galli and A. Weyembergh, *Do labels still matter? Blurring boundaries between administrative and criminal law*, Editions de l’Université de Bruxelles, 2014, p. 81 et seq.

²⁸ See I. Deleanu, *FIUs in the European Union – facts and figures, functions and facilities*, in B. Unger, J. Ferwerda, M. van den Broek, I. Deleanu, *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy*, Edward Elgar, 2014, p. 97 et seq.

²⁹ See *Ninth Activity Report of the European Anti-Fraud Office*, 1 January to 31 December 2008, OLAF, 2009, p. 52; *Eighth Activity Report of the European Anti-Fraud Office*, 1 January to 31 December 2007, OLAF, 2008, p. 59.

³⁰ Council of Europe Convention on Mutual Assistance in Criminal Matters, 20 April 1959.

of records through letters rogatory, without further specification on the content of such records.³¹

It is only at the end of the last century that some instruments, at different levels, started to address access to banking information, both in cross-border and in domestic cases. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990³² contained the first provision specifically dedicated to bank accounts. Its article 4 provides for the obligation to enable investigative authorities to issue production orders for bank records.³³ Article 4 (2) provides for new special investigative techniques, including monitoring orders.³⁴ The purpose of these provisions is to create equivalent national procedures that may also be used to comply with foreign requests.

More recently, both EU instruments and Council of Europe Conventions have consolidated the different provisions on access to banking information, and have started to adopt a more structured categorization of the different measures that can be taken in order to access such information. ‘Access’ and ‘monitoring’ are, indeed, just umbrella concepts encompassing different investigative measures that can be taken at a national level.

The First Protocol to the 2000 EU Convention on Mutual Legal Assistance³⁵ was the first instrument to enshrine international understanding of the different levels of access to banking information. The systematization therein contained was then adopted by the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the

³¹ Article 3(1): “The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.”

³² Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990 (the ‘Strasbourg Convention’).

³³ “Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 2 and 3. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.”

³⁴ “Each Party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto. Such techniques may include monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents.”

³⁵ Protocol established by the Council in accordance with Article 34 of the Treaty on the European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the “2001 Protocol”, OJ C 326, 21 November 2001, p. 2 et seq.

Financing of Terrorism of 2005.³⁶ More recently, it has been followed by the EU Directive on the European Investigation Order in criminal matters (EIO Directive).³⁷

This systematization distinguishes four measures according to the level of coercion they imply: (1) access to banking information in a strict sense (banking identity); (2) access to past banking transactions; (3) the real-time monitoring of banking operations; (4) the postponement of transactions and freezing of bank accounts.

Access to banking information in a strict sense is a measure clearly defined in Article 1 of the 2001 EU Protocol. The measure aims at establishing “whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory.” In other words, it is the first basic measure necessary to know the identity of a bank account (i.e. to understand whether a person owns – directly or indirectly – any bank account) without further inquiry into transactions conducted by the account’s holder. Article 26 of EIO Directive, as well as Article 7(2) of the Warsaw Convention, also expressly provide for this measure.

The second level of access to banking information aims to discover what transactions the account’s holder has conducted. The tool used to access this information is the production order, which enables a request for records held by a bank in relation to a specific account. These records contain more substantial information about the transactions conducted by an account holder during a specified period.³⁸ This measure is provided for by Article 7(2) b of the Warsaw Convention and Article 27 of the EIO Directive.

It is worth noting that these first two categories regard information on previous activities (opening of a bank account and transactions) and target information that should already be in the banks’ possession, in accordance with existing obligations set forth by international instruments in the context of the fight against money laundering and terrorism financing (e.g. EU Directive,³⁹ Financial Action Task Force (FATF) recommendations,⁴⁰ etc.).

³⁶ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16 May 2005 (the ‘Warsaw Convention’).

³⁷ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1 March 2014, p. 1 et seq.

³⁸ For example, the amount of money transferred, the frequency of the transactions, the identity of the other parties to the transaction.

³⁹ Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission (“The Fourth AML Directive”), JO L 141/73, 5 June 2015, Art. 40.

⁴⁰ Recommendation no. 11 of the last FATF recommendations also requests such an obligation to keep records.

They are traditional techniques which generally are not considered very coercive. Therefore, according to the international and EU legal framework on cooperation, Member States are free to use any domestic procedure to access banking information, and have a duty to comply with all foreign requests to provide such information.⁴¹

Compared to the two first levels, the third and the fourth levels imply a higher level of intrusion upon fundamental rights and require more active cooperation with banks.

The ‘real time monitoring’ is based on the use of monitoring orders, which are “orders to a financial institution to give information about transactions conducted through an account held by a particular person with the institution. Such an order is usually valid for a specific period.”⁴² This procedure is provided for by Article 28 of the EIO Directive and Article 7(2) of the Warsaw Convention.

Finally, the ‘postponement of transactions and freezing of assets’ can be understood as a two-step procedure, where the first is prodromal to the adoption of the second. On the one hand, the postponement of transactions is mainly used as a tool to allow more time for FIUs to analyse suspicious transactions transmitted by reporting entities. It consists of “withholding consent to a transaction going ahead,”⁴³ “blocking” or “suspending a transaction” during a limited period of time.⁴⁴ Article 14 of the Warsaw Convention allows the parties to restrict this measure to cases where a suspicious transaction report has been submitted. At the EU level, the Fourth AML Directive in its Article 35(1) also provides for such a possibility; however, nothing is provided for to address a situation where postponement appears to be useful during the use of monitoring in real time if no suspicious transaction has previously been reported.

On the other hand, when postponement is not possible because no suspicious transaction has been reported or because the maximum time limit has been reached, the next step is the freezing of assets. This measure – which

⁴¹ According to the Warsaw Convention the executing parties may use the same conditions applicable to search and seizure. In other words the executing countries can “require dual criminality and consistency with its law to the same extent that they may apply these requirements in relation to requests for search and seizure” (Explanatory report of the Warsaw Convention, CETS n 198, § 141) but cannot refuse the execution because their national provisions on search and seizure normally demands a higher threshold (Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union, JO C 257/1, 24 November 2002, p. 4). In other words, domestic procedures specifically protecting financial data cannot be considered as a ground for refusal by the requested country.

⁴² Explanatory report to Strasbourg Convention, ETS no. 141, § 30.

⁴³ Article 14 of the Warsaw Convention.

⁴⁴ K. Stroligo, H. Intscher and S. Davis-Crockwell, *Suspending suspicious transactions*, 2013, World bank study, Washington DC : World Bank.

has the same purpose (i.e. to prevent people from moving money to different accounts in order to make tracing it more difficult) – is defined as a “temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property.”⁴⁵ It is considered as a provisional measure (before a confiscation can take place); however it is normally considered a more coercive measure since its duration is longer than mere postponement, and is therefore adopted or authorised by a judicial authority.⁴⁶

4. DIFFERENT RULES AT NATIONAL LEVEL

The international instruments mentioned above are only meant to improve and facilitate international cooperation in criminal matters. Moreover, the fourfold categorisation is meant to help national authorities in their cooperation with foreign counterparts. They do not say much in relation to domestic regulations, since they require the existence of a specific measure, but they do not specify the procedures according to which the measure should be adopted. A broad margin of interpretation is therefore left to national legislators in terms of implementation, and as a consequence national procedures may be very different.

An example of the great differences in rules on investigative measures is the postponement of financial transactions. One can discern a general trend to equip national FIUs with important powers concerning the postponement of suspicious transactions for some days before a judicial freezing order.⁴⁷ Nevertheless, not only do the institutional natures of the FIUs vary in the EU, but the extent of their powers are also quite different from one Member State to another. For example, the duration of the postponement can vary from 24 hours (Malta), to 90 days (Estonia), up to 6 months (Austria).⁴⁸ In many cases FIUs can postpone the transaction only upon a suspicious transaction report (STR), and not upon the requests of other national authorities. Furthermore, in several countries an FIU is not allowed to request bank information at the request of a foreign counterpart; many FIUs are not entitled to freeze money at

⁴⁵ Article 2 (5) of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ 2014 L 127, 29 April 2014, p. 39 et seq.

⁴⁶ Articles 21 and 22 of the Warsaw Convention and Article 7 of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, *op. cit.*

⁴⁷ P. De Koster – M. Penna, *The case of money laundering. Real administrative procedure used in the detection of fraudulent transactions*, in F. Galli and A. Weyembergh, *op. cit.*, p. 76.

⁴⁸ Moneyval research report, *The postponement of financial transactions and the monitoring of bank accounts*, Council of Europe, April 2013, p. 17.

the request of a counterpart FIU;⁴⁹ and very few have the option to postpone a transaction at the request of foreign authorities other than an FIU.⁵⁰

However, it is on the third level of measures, concerning banking information and transactions (i.e. the real-time monitoring of bank accounts), that the differences between national systems and approaches are even more striking, especially considering the great impact that such a measure can have on a fundamental right, namely privacy.

Comparative research conducted within the framework of the project on the elaboration of the *Model rules for the EPPO*, conducted at the University of Luxembourg, exposed the composite picture of this relatively recent investigative measure in the EU. In reality, the first noticeable aspect of real-time monitoring is that, despite the practical importance and technical complexity of the measure, it is rarely regulated at national level. Where it is regulated, moreover, it is so without any uniformity or idea of harmonisation between national systems.⁵¹ Such dissimilarities reflect different standards relating to fundamental rights in the EU, different approaches to financial privacy, as well as a lack of international instruments which address the content of such a measure, above and beyond cooperation between the national authorities,

In particular, one may note these differences as regards: (a) the target of the measure;⁵² (b) the addressee (i.e. the institution which holds the account);⁵³ (c) the threshold of the measure;⁵⁴ and (d) the duration of the measure.

5. INTERNATIONAL COOPERATION IN A TIME OF DISPARITY: WHAT OBSTACLES?

In the first part of this paper we briefly outlined the difficulties in finding a common European notion of financial investigation leading to the recovery of criminal assets. This might be more or less surprising, but it cannot be considered totally unexpected, given the fact that the EU has not really acted on this specific issue so far; and that the case law of the European Court of Human Rights (ECtHR) cannot ensure the harmonisation of every aspect of criminal procedure.

⁴⁹ P. De Koster – M. Penna, *op. cit.*, 77.

⁵⁰ Moneyval research report, *op. cit.*, p. 32.

⁵¹ See J. Tricot – A. Nieto Martín, *Monitoring of Banking Transactions and Traffic Data*, in K. Ligeti (ed.), *Toward a prosecutor for the European Union*, Vol. II, Hart Publishing, 2015 (forthcoming).

⁵² In some countries they are strictly limited to the suspect; in other countries it is also possible to monitor the accounts of other persons linked to the suspect.

⁵³ Criminal law measures are usually limited to banks, whereas the AML framework on preventive obligations applies widely, beyond banks.

⁵⁴ Some Member States, for example, limit such measures only to some offences.

The real question, therefore, is why such differences represent a problem. In other words, why a natural variety of solutions – all potentially good for the administration of justice at the national level, and in compliance with human rights minimum standards – is a threat to the enforcement of (national and supranational) policies aimed at the recovery of the proceeds of crime. Leaving aside the practical problems which arise in international cooperation, we believe that it is possible to identify some legal limitations caused by such differences, linked to the cooperation between national authorities *sensu stricto*, on the one hand, and to the organisation of national systems, on the other. Furthermore, we believe that the potential danger that such a fragmented framework represents for persons involved in financial investigations should not be underestimated.

As regards the legal obstacles in international cooperation, the first aspect to be stressed is the presence, in all international instruments, of grounds for refusal making it possible for requested authorities not to execute a request for cooperation if such a foreign request is based on a model which is at odds with the approach adopted by the requested country.

An example can better clarify this risk. In Luxembourg article 66 of the *Code d'instruction criminelle* provides for specific and quite restrictive procedures for accessing information about the identity of a bank account holder (i.e. the above-mentioned first level of accessing banking information), and for conducting real-time monitoring (i.e. the third level). The main features of such procedures are that only an investigating judge can authorize these measures, and that they are limited to certain offences.⁵⁵

In this regard, Art. 28 of the Warsaw Convention provides for several grounds for refusal; among them, situations in which “the action sought would be contrary to the fundamental principles of the legal system of the requested Party”⁵⁶ and “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 case” when “the assistance sought involves a coercive action”.⁵⁷ As regards the third level of monitoring, the explanatory memorandum of the Warsaw Convention clarifies that “it is left to the requested Party to decide if in real-time monitoring can be provided or not.”⁵⁸

⁵⁵ Crimes and offences against the security interests of the State, acts of terrorism and terrorist financing, trafficking in human beings, procuring, exploitation of human beings, concealment and money laundering, corruption and trading in influence, money counterfeiting and child abduction. When the offence is committed as part of an organized group or a criminal association: offences related to weapons and ammunition, voluntary manslaughter and assault and battery, theft and extortion, offences related to drugs, facilitation of unauthorised entry and residence.

⁵⁶ Article 28 (1) a.

⁵⁷ Article 28 (2).

⁵⁸ Explanatory memorandum, § 152. The reason for this discretionary power is that this measure is a new one proposed by the Convention (p. 149).

In this case, it might very well occur that an investigating judge in Luxembourg refuses to execute a foreign request – and thereby to provide information on the identity of a bank account holder – on the grounds that the requested measure (a) involves a coercive action; and (b) could not be taken in Luxembourg in a similar case, because, for example, it involves an offence which is not included in the list for which the measure is permitted.

One may have expected a clear step forward with the adoption of the EIO Directive. However, even this recent instrument allows the requested Member State not to execute a foreign order due to different approaches in the regulation of the investigative measure sought. Besides a general ground for non-execution on the basis of respect for fundamental rights,⁵⁹ Article 28(1) EIO provides that orders for real-time monitoring (i.e. the third level) may be refused if the measure would not be authorized in a similar domestic case.⁶⁰ For example, if an EIO is issued for a fiscal offence, a Luxembourgish judge could refuse it on the grounds that such a measure would not be allowed in a domestic case.⁶¹ In other words, the most-advanced EU instrument on judicial cooperation in criminal matters goes no further than the approach followed by the Council of Europe Warsaw Convention.⁶²

In addition to the limitations of the instruments on judicial cooperation, it is worth recalling that the EU legal framework does not regulate the ‘diagonal’ exchange of information between the administrative authorities of one Member State and the judicial authorities of another. This presents a great obstacle, especially in the field of asset recovery, due to the multitude of interconnected levels of authorities gathering and exchanging information.

Furthermore, different ways of organising certain aspects of national systems hinder cooperation between national authorities, at least making it much slower.⁶³ A first example of this is the lack of centralised registers of bank account holders in each country. In 2012, indeed, only 6 Member States

⁵⁹ Article 11(f): “there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing States’s obligation in accordance with Article 6 TUE and the Charter.” See I. Armada, *The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?*, in *New Journal of European Criminal Law*, Vol. 6, Issue 1, 2015, p. 8.

⁶⁰ Article 28 (1) b.

⁶¹ Article 66-3 of the Code foresees a list of offences for which the measure can be applied; tax offences are not on the list, nor are considered predicate offence of money laundering.

⁶² See Article 28 (d).

⁶³ In the EIO directive the ability to access information on accounts for which the person that is the subject of the proceedings has power of attorney is not any longer limited to the situation where the information can “be provided within a reasonable time” (Art. 1 of the 2001 Protocol). In other words, even where there is no central register of bank accounts which make investigations quicker, banks have the duty to cooperate and to provide all the information they have even if the cooperation is time consuming.

had a central bank account register.⁶⁴ On the other hand, neither the Warsaw Convention nor the EIO Directive requires Member States or the parties to implement such registries.⁶⁵ The result is that in many countries access to information on bank account holders is limited to judicial authorities, which need to officially request the information from every bank in their territory, without the possibility of consulting a single database including all the available information collected from all the banks in that territory.

In the same vein, similar problems are caused by the lack of company registers allowing for the identification of hidden beneficiaries of opaque structures, benefiting from anonymity.⁶⁶ Some countries have policies to increase transparency, but they are not coordinated at international level.⁶⁷ The issue is not the definition of who should be considered as a beneficiary, since the definition of “true economic beneficiary”⁶⁸ or “beneficial owner” of a financial transaction is quite clear: according to Article 3(6) of Directive 2005/60/EC it “means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted.”⁶⁹ In practice, however, financial institutions do not always prop-

⁶⁴ Final report fifth mutual evaluation, *op. cit.*, p. 11.

⁶⁵ See explanatory report of the Warsaw Convention, § 136; Explanatory memorandum of the initiative for a Directive regarding the European Investigation Order in criminal matters, Council of the European Union, 9288/10 ADD 1, 3 June 2010, p. 24

⁶⁶ See E. van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, World Bank, 2011, p. 17 et seq.; M.G. Findley – D.L. Nielson – J.C. Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism*, Cambridge University Press, 2014, p. 29 et seq.; M.E. Schulz, *Beneficial ownership: The private sector perspective*, in G. Fenner Zinkernagel – C. Monteith – P. Gomes Pereira, *Emerging Trends in Asset Recovery*, Peter Lang, 2013, p. 75 et seq.

⁶⁷ P. de Koster – M. Penna, *op. cit.*, 77.

⁶⁸ Explanatory memorandum Warsaw Convention, § 136.

⁶⁹ “The beneficial owner shall at least include: (a) in the case of corporate entities: (i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards; a percentage of 25 % plus one share shall be deemed sufficient to meet this criterion; (ii) the natural person(s) who otherwise exercises control over the management of a legal entity: (b) in the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds: (i) where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25 % or more of the property of a legal arrangement or entity; (ii) where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (iii) the natural person(s) who exercises control over 25 % or more of the property of a legal arrangement or entity.” Article 3(6) Directive 2005/60/EC of 26 October 2005 on the prevention of the

erly identify such a beneficiary.⁷⁰ As a consequence, the situation is far from that envisaged by EU instruments and FATF Recommendations 24 and 25.⁷¹ In many EU Member States it is still extremely difficult to identify the beneficial owner of complex legal persons and ‘arrangements’, due to the lack of transparency of information relating to legal ownership.⁷² For this reason, the recently adopted fourth EU Anti-money laundering Directive provides for the establishment of European public registries of legal structures such as trust and companies.⁷³

6. NOT ONLY A MATTER OF EFFICIENCY: FUNDAMENTAL RIGHTS AT RISK?

As mentioned above, the differences between national procedures are also a consequence of the divergent understanding of the right to ‘financial privacy’ among European countries. At the same time, such divergences may also result in a further problem of fundamental rights, especially as long as international cooperation in criminal matters is based on the principle of mutual recognition. This principle – which has stimulated endless academic literature⁷⁴

use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25 November 2005, p. 15 et seq.

⁷⁰ *Banks’ Management of high money-laundering risk situations. How banks deal with high-risk customers (including politically exposed persons), correspondent banking relationships and wire transfers*, Financial Services Authority, 2011, p. 25; See OECD (2014), *Illicit financial flows from developing countries: measuring OECD responses*, available at: http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf, p. 37.

⁷¹ *International Standards on combating money laundering and the financing of terrorism and proliferation, The FATF Recommendations - adopted on 16 February 2012*, FATF/OECD, p. 22.

⁷² *Feedback Statement. Summary of Comments on the Report from the Commission to the European Parliament and the Council on the application of Directive 2005/60/EC*, European Commission, July 2012, p. 8.

⁷³ See the fourth AML directive, article 30 (3) : “Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State, for example a commercial register, companies register as referred to in Article 3 of Directive 2009/101/EC of the European Parliament and of the Council, or a public register. Member States shall notify the Commission of the characteristics of those national mechanisms. The information on beneficial ownership contained in that database may be collected in accordance with national systems.”

⁷⁴ See, among others, S. Allegrezza, *Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, no 9, 2010, p. 569 et seq.; B. Hecker, *Mutual Recognition and Transfer of Evidence. The European Evidence Warrant*, in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Springer-Verlag Berlin Heidelberg, 2013, p. 269 et seq.; A. Mangiaracina, *A New and Controversial Scenario in the Gathering of Evidence at the*

– requires that competent authorities in principle comply with requests for cooperation without applying all the procedural guarantees and limitations that would be applied in a domestic case.

Access to banking data consists of access to confidential personal data,⁷⁵ which can entail the interference with the right to private life.⁷⁶ Admittedly banking transactions are not the core element of the right to privacy; however, according to the ECtHR there is no reason to exclude business activities from the notion of private life,⁷⁷ since they are part of the right to establish and develop relationships with other human beings.⁷⁸ In other words, all the four levels of access to banking information touch upon the right to privacy provided for by article 8 of the European Convention on Human Rights (ECHR) as well as by articles 7 and 8 of the Charter of Fundamental Rights of the European Union (CFREU).

Such interference with the right to privacy must be conducted “in accordance with the law” (Art. 8 ECHR). According to the case law of the ECtHR, such interference must be based on a law that is accessible and foreseeable, since all citizens must be able to understand in which circumstances these measures can be adopted.⁷⁹ Moreover, this interference should afford adequate safeguards against possible abuses. For these reasons, applying, by analogy, the rules provided for measures to other intrusive measures might not be satisfactory,⁸⁰ since it would amount to a method that “lacks the necessary regulatory control in the absence of legislation or case-law.”⁸¹

The case law of the ECtHR did not regard the monitoring of bank accounts in particular, but the interception of communications. Nevertheless, some important indications can be drawn in relation to monitoring, given the similarly

European Level: The Proposal for a Directive on the European Investigation Order, in *Utrecht Law Review*, Vol. 10, Issue 1, 2014, p. 113 et seq.; M. Daniele, *Evidence gathering in the realm of the European investigation order. From national rules to global principles*, in *New Journal of European Criminal Law*, Vol. 6, Issue 2, 2015, p. 179 et seq.; L. Bachmaier Winter, *European investigation order for obtaining evidence in criminal proceedings. Study of a proposal for a European directive*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, no. 9, 2010, p. 580 et seq.

⁷⁵ Opinion 10/2006 of the “Article 29 Data Protection Working Party” on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), 22 November 2006. The names of the beneficiary and the ordering customer are personal data that are transferred in the information communicated to conduct an international transaction.

⁷⁶ ECtHR, *M.S. v. Sweden*, 27 August 1997, no. 20837/92, § 35.

⁷⁷ ECtHR, *Rotaru v. Roumania*, 4 Mai 2000, no. 28341/95, § 43.

⁷⁸ ECtHR, *Niemitz v. Germany*, 16 December 1992, no. 13710/88, § 29.

⁷⁹ ECtHR, *Malone v. The United Kingdom*, 2 August 1984, no. 8691/79, § 67.

⁸⁰ ECtHR, *Kruslin v. France*, 24 April 1990, no. 11801/85, § 34. See also ECtHR, *Huvig v. France*, 24 April 1990, no. 11105/84.

⁸¹ ECtHR, *Kruslin v. France*, cit., § 35.

high degree of intrusiveness of both measures, and their common nature as ‘special investigative techniques’.⁸²

The main features of special investigative techniques are their clandestine nature (i.e. they are conducted without informing the target),⁸³ on the one hand, and the continuing development of the technology used in their execution, on the other. Both require specific conditions and procedures to prevent the risk of being used in an arbitrary way by law enforcement authorities.⁸⁴ For example, the legal framework should specify the potential targets of the measure and its duration, as well as the treatment of the persons accidentally monitored⁸⁵ and any means of judicial control.⁸⁶

Such a specific and detailed regulation, however, is missing in many jurisdictions. Furthermore, when investigations have a transnational dimension, the target of a measure may be subject to different standards of interference with her/his right to private life. For this reason, in the context of international cooperation in the EU, vague and fragmented rules on such investigative measures might compromise the accessibility and foreseeability of their legal bases as required by the ECtHR.

7. CONCLUSIONS

Monitoring bank accounts is just one example of what we call a ‘fragmented approach’ and cannot give an exhaustive overview of the problems of cooperation during financial investigations. It must be borne in mind, indeed, that most ‘modern’ criminals “have abandoned the traditional banking system in favour of new payments methods, offshore financial centres and opaque offshore structures.”⁸⁷ In the relevant literature it has been noted that attention should be directed towards any form of financial transaction. Indeed:

⁸² The main characteristic of these measures is that they are more intrusive than classical criminal procedures, and they have been recently provided for by several legal instruments in the fight against organized crime. Their scope tends to be broadening. See J. A. E. Vervaele, *Special Procedural Measures and the Protection of Human Rights. General Report*, in *Utrecht Law Review*, Vol. 5, Issue 2, 2009, p. 66 et seq.

⁸³ Recommendation Rec (2005) 10 of the Committee of Ministers, 20 April 2005. Special investigative techniques are described in chapter 1 as “techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons”. See also the Moneyval research report, *op. cit.*, p.40, § 23. In most of the countries of the Council of Europe banks do not inform their clients about the procedure; not all of them provide for sanctions in case of disclosure.

⁸⁴ ECtHR, *Klass and others v. Germany*, 6 September 1978, no. 5029/71, § 43; ECtHR, *Malone v. The United Kingdom*, *cit.*, § 63, ECtHR, *Rotaru v. Roumania*, *cit.*, § 55

⁸⁵ See in that regard ECtHR, *Amann v. Switzerland*, 16 February 2000, no. 27798/95, § 61.

⁸⁶ ECtHR, *DumitruPopescu v. Roumania*, 26 April 2007, no. 71525/01, § 77.

⁸⁷ P. de Koster – M. Penna, *op. cit.*, p. 70.

“One of the perceived trends in laundering is away from using the services of banks (...) toward the increasing use of non-banking financial institutions and non-financial businesses for money laundering. If laundering could be done through banks and trust companies, building societies, savings and loan companies and credit unions, then it could also occur via brokers or securities dealers, currency dealers, cheque cashers, issuers of travellers cheques and money orders and transmitters of funds. (...) Any market – especially any international market – is a means by which laundering can take place, and so there will be increasing pressure to regulate more markets.”⁸⁸

Nevertheless, the monitoring of bank transactions is a good example of the difficulties encountered in international cooperation. Some practitioners may say that if there is goodwill, a practical solution can be found. This is not, however, what emerges from several studies;⁸⁹ and even when a solution is found there is still a risk of violation of fundamental rights.

Advocating further harmonisation of national criminal justice systems might sound like an academic and utopian ambition, especially in times of financial crisis and greater national resistance towards any idea of ‘Europeanization’. Nevertheless, recovering criminal assets is a task bestowed on national authorities (to protect national or EU budgets), and national practitioners themselves call for more efforts in the quest for common EU concepts and narratives in the field of asset recovery and financial investigations.⁹⁰

As acknowledged in the conclusions of the recent Eurojust Strategic Seminar of 11 December 2014, “a certain level of harmonisation at EU level is needed to cooperate more efficiently in this complex area.”⁹¹ What a “certain level” consists of still remains open to question.

⁸⁸ P. Alldridge, *op. cit.*, p. 3.

⁸⁹ See the Conclusion of the 8th Meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union, The Hague, 12 December 2014, Council doc. 8552/15, 5 May 2015, p. 3.

⁹⁰ See, for example Statement by the European Parliament and the Council on an analysis to be carried out by the Commission, 31 March 2014, 7329/1/14; or the Final report on the fifth round of mutual evaluations, Financial crime and financial investigations, Council doc. 12657/12, 2 August 2012, particularly rec. 4 and 5.

⁹¹ See the Report of the Strategic Seminar: *Towards Greater Cooperation in the Freezing and Confiscation of the Proceeds of Crime: A Practitioners' Approach*, The Hague, 11 December 2014, available on the Eurojust web site, p. 5.