LIGHTENING THE ECONOMICS OF ORGANISED CRIME IN THE EU: NEW SOLUTIONS FOR LONGSTANDING PROBLEMS

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Abstract
Organised crime represents one of the most serious threats to the EU Area of Freedom, Security and Justice, pressing the national authorities, EU institutions and agencies to discover new political, legal and operational solutions for existing and emerging problems. Although it is recognised that one of the best strategies to counter organised crime is to enhance financial investigation and asset recovery mechanisms – it has been reported that merely 1% of the proceeds of crime are confiscated (Europol, 2017). Notwithstanding the EU initiative led by the entry in force of the Directive 2014/42/EU in October 2015, and the subsequent production of dense political and operational packages obliging and encouraging the adoption of measures to enable assets recovery, the actual confiscation and freezing results highlight the increasing impunity and feeling across these criminal groups that crime pays. Aware of the legal and institutional gaps in the EU and national levels and acting as truly multinational enterprises, the organised crime groups are expanding their activities and enhancing their influence in almost all segments of the market. Based on a qualitative methodological approach, this article is the result of an analysis of primary and secondary sources, both from social and legal areas, related to organised crime characteristics in parallel with the legislative acts aimed to recover their illegal profits in the EU, within a highly dynamic and evolving environment - "law in context" research (Vibhute & Anyalem, 2009, p. 22).

Keywords: *Organised crime, organised crime economics, financial investigation, assets recovery*

1 The present article exclusively represents the author perspective and conclusions and should not be taken as the official position of the European Public Prosecutor's Office.

THE ORGANISED CRIME ENTERPRISES

Analysing the organised crime assessments in the EU[2], we are currently experiencing exponential growth, intensification and diversification of activities and effects. Since 2013, the numbers evolved from 3600 organised criminal groups (OCGs) detected to more than 5000 under investigation[3] in 2017, ranging from traditional ones to smaller groups and loose networks supported by individuals hired on an occasional basis (30 to 40% are these flexible structures) (Europol, 2017). The expansion of the activities performed by these groups to grey practices,[4] which are enabled by legal gaps[5], is accompanying the aforementioned trends - symbol of their flexibility, fluidity and permeability.[6] Driven by capitalism and globalisation, they became multinational corporations[7] dedicated to maximising their profits at any cost. Actually, their proceeds are around 110 billion Euros per year in the EU[8] and, according to United Nations Office on Drugs and Crime (UNODC, 2018), its worldwide value reaching up to 3.6% of global GDP.

Their disrespect and abuse of the rules make organised crime highly competitive and flexible comparatively with the legally compliant operators[9]. Therefore, they enhance

2 Notably the last Europol European Union serious and organised crime threat assessment (SOCTA) from 2017 and 2021, the internet organised crime threat assessment (IOCTA) from 2017, 2018, 2019, 2020 and 2021, and the European Union Terrorism Situation and Trend report (TE-SAT), from 2018, 2019 and 2020.

3 Europol's SOCTA 2017 report mentioned that more than 180 nationalities were involved in serious and organised crime in the EU. The majority of OCGs operating on an international level were composed of members of more than one nationality. Nonetheless, the majority of the suspects were nationals of a Member State. (Europol, 2017: 14.)

4 As acts conducted within some specific legal frameworks that delivers to the operators some flexibility into blurring areas – especially tax Law and commercial Law. In such case, the investigation is rather dedicated to place the conduct into a crime than proving the conduct itself.

5 E.g. the transfer pricing, the permanent establishment concepts and the broader tax aggressive planning and avoidance.

6 According to Savona and Riccardi (2015), they are actually profiled as following: traditional mafia-type OCGs, hierarchical OCGs, loose criminal networks, criminal groups formed by ex-military members, former paramilitary and separatist/terrorist groups, current terrorist groups, intermediaries, and brokers.

7 Organised criminal groups are structuring themselves into corporate vehicles spread across the world with the aim to conceal structure and optimize their pluricriminal activities, such as tax crimes, money laundering or corruption. Nevertheless, they maintain their traditional structures, although exploring the new technologies and tactics, to conduct crimes such as drug sales/trafficking, human trafficking, and extortion. According to Europol (2021, p.10), "similar to a business environment, the core of a criminal network is composed of managerial layers and field operators. This core is surrounded by a range of actors linked to the crime infrastructure providing support services, such as brokers, document fraudsters, technical experts, legal and financial advisors, money launderers and other service providers".

8 This value represents the gross revenues generated from the final sale of illicit goods or services, which needs to be subtracted with the criminal costs (buying or producing costs, operational or living expenses), in order to determine the potential amount of money that may be available to OCGs for reinvestment – net profits.

9 A natural or legal person or public entity, which offers to execute works, supply products or provide services. within the context of market operations and in accordance with the Law (EUIPO, 2019). In fact, Europol (2021) found that legal business structures such as companies or other entities are used to

gradually their capacity to diversify and intensify their licit and illicit activities[10], taking advantage of all the available opportunities left by the markets, technology, political and social contexts[11]. The low censurability attributed by Criminal Law[12] and Procedural Law[13] to minor crimes highly profitable, such as excise fraud or illicit gambling[14], is as well explored. The crime demand is sought similarly as it is within the licit economy. Therefore, crime providers entered the market and crime became a service. As part of the aforementioned criminal circuits, business facilitators, gatekeepers and legitimate companies are covering the OCG's trading activities (Europol, 2021, p. 21)

In this context, money laundering turned into the complex and creatives processes[15] ordered to disconnect part of them of their predicated crimes or illicit activities, merging inside licit businesses. Not all the proceeds are laundered: a substantial part remains in the crime economy in order to cover the crime costs, foster the undergoing activities and expand to new niches (Savona & Riccardi, 2015). These, whether legal and illegal, are

facilitate all types of criminal activity. All types of legal businesses are potentially and more than 80 % of the criminal networks active in the EU use legal business structures for their criminal activities (50% of all criminal networks set up their own legal business structures or infiltrate businesses at a high level).

10 Such all the legal trade of good and services as a way of cover and give a "legit" appearance to the crimes committed as Missing Trader Intra-Community (MTIC) Fraud, contraband, illegal gambling and betting activities or money laundering.

11 The referred exploitation can be observed in several cases. On the 8th May 2019, Spain dismantled a criminal organisation providing large-scale crypto money laundering services to other criminal organisations - https://www.europol.europa.eu/newsroom/news/cryptocurrency-laundering-service-members-of-criminal-organisation-arrested-in-spain (Europol, 2019). Since the outbreak of the COVID-19, Europol has identified the growth of unlawful sanitary waste treatment and disposal https://www.europol.europa.eu/newsroom/news/world%E2%80%99s-most-dangerous-malware-emotet-disrupted-through-global-action (Europol 2020). On 27th January 2021, Netherlands, Germany, United States, United Kingdom, France, Lithuania, Canada and Ukraine disrupted one of most significant botnets – EMOTET, a malware that evolved into the go-to solution for cybercriminals over the years functioning as a primary door opener for computer systems on a global scale - https://www.europol.europa.eu/newsroom/news/world%E2%80%99s-most-dangerous-malware-emotet-disrupted-through-global-action (Europol, 2021).

12 The low sanctions applied to those crimes compared with other traditionally more censurable, as drug trafficking, robbery or violent crimes, are a motivation for organised crime to place their economic activities into.

13 Beside the absence of dissuasive sanctions, the fact that most of the procedural Laws does not include these crimes for special investigation measures or assets recovery mechanisms allows the organised crime groups to feel comfortable conducting them, without the risk of being deeply investigated.

14 According to Savona and Riccardi (2015), excise fraud generated a total criminal revenue of 9.373 Million Euros, whilst illegal gambling generated 1.1 billion Euro in 1996 in UK, 130 million Euro in 2003 in Netherlands and between 326 and 522 million Euro in 2011 in Italy – the illicit gambling, due to his interdependence with other criminal activities (as money laundering) is not currently and accurately estimated. The Council of the European Union (2017) estimated an annual damage of 10.2 billion Euro into the national and EU budget.

15 In fact, the importance of this activity raised the creation of Professional Money Launderers (PML's) (FATF, 2018). Professional money launderers have established a parallel underground financial system to process transactions and payments isolated from any oversight mechanisms governing the legal financial system, including trade-based money laundering, account management mechanisms and underground banking and alternative banking platforms (Europol 2021).

globally driven by profit, control of the territory, influence on the political sphere, social consensus, personal benefit and concealment of criminal activities.

The geographic areas with a higher degree of infiltration were reported to be southern Italy, Lazio and north-western Italy (in particular Lombardy), Provence-Alpes-Cote d'Azur (France), Andalusia and Madrid (Spain), Amsterdam and Rotterdam (Netherlands), Berlin and Düsseldorf-Köln (Germany), and in Romania the capital Bucharest plus the border area with Moldova. These areas denote as characteristics a historical or well-rooted strong presence of OCGs, their border proximity or the presence of important ports, large urban areas, or places near the maritime coast and with a high touristic potential (Savona & Riccardi, 2015).

THE STOLEN ASSETS FROM ALL EU CITIZENS: NATURE AND FORM

On first-hand, the assets acquired through crime, whenever committed within EU Member States jurisdiction, are in fact owned by their citizens. According to article 2(3) and 4, of the Regulation 2018/1805, crime or any other illegal act does not constitute an acquisition title that offers to its committer, or a third interposed person, its legal ownership or property rights towards the crime proceeds, regardless its form or nature. From a legal perspective, when addressing criminal property or proceeds[16], it concerns properties owned by the State but that unlawfully and fraudulently are under criminals' domain, control and ownership[17]. In this way, financial investigation, together with freezing and confiscation, is nothing less than the activity and measures addressed to discover, preserve and transfer assets from undue criminal ownership to its lawful and legitimate owner.

The assets portfolio of organised crime is considerable and divided into *registered assets*, *movable assets*, *real estate properties*, and *companies* (Savona & Riccardi, 2015).

The first category contains vehicles, vessels, jets, helicopters or other transport commodities, materializing a reinvestment – status-symbol, but also an instrumentality for the commitment of other crimes. Movable assets range from cash and bank accounts to bonds, financial instruments, artworks, valuables, jewels or fur coats. This kind of assets

16 As defined in article 2(3) of the Regulation 2018/1805: property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property, which the issuing authority considers to be: (a) the proceeds of a criminal offence, or its equivalent, whether the full amount of the value or only part of the value of such proceeds; (b) the instrumentalities of a criminal offence, or the value of such instrumentalities; (c) subject to confiscation through the application in the issuing State of any of the powers of confiscation provided for in Directive 2014/42/EU; or (d) subject to confiscation under any other provisions relating to powers of confiscation, including confiscation without a final conviction, under the law of the issuing State, following proceedings in relation to a criminal offence.

17 Logically, if the referred assets are subject to confiscation from all the EU Member States, therefore, they materially belong to them but are still remaining illegally under criminals ownership.

are fundamental for OCGs, as it is for multinational corporations: the availability and the capacity to manage liquidity (Savona & Riccardi, 2015)

Real estate properties are the preferred for investment by many OCGs as they consist in a safe investment, high returns potential, continuous 'white profits' through rents, facilitating other illicit activities as an instrumentality and allowing close control of the territory as well as a status symbol of prestige in power in these regions. Finally, we highlight the legal persons as an expeditious form to store the illicit proceeds. These entities can integrate proceeds of crime into their structures, circulate them and help financing their operations.

The main sectors where the criminal proceeds are reinvested consist in bars and restaurants, construction, wholesale and retail trade, transportation, real estate activities and hotels. These sectors offer ideal characteristics: cash-intensive, territorial-specific, low-tech and labour-intensive, protected sectors,[18] high involvement of the public administration or public resources,[19] small firms, sectors functional to illicit activities and with weak or developing regulation. Savona and Riccardi (2015) concluded that profitability is not correlated with OCGs investments in legitimate businesses.

There is a real estate predominance for the reinvestment of criminal proceeds (Remeur, 2019), based on price stability and the likely trend to appreciate over time. On the other hand, such assets assume a functional dimension, allowing the owners to use them as second home, a place where conduct criminal activities[20] or rented out, generating income. The economics used in this investment mainly relying on the use of complex loans or credit finance, non-financial professionals, corporate vehicles or investment schemes and financial institutions.

Assets recovery

Depriving the criminals of their proceeds is the key to transpose the aphorism '*crime does not pay*' to reality[21]. In this context, the asset recovery activity contains financial investigation as its core: the dismantling of complex financial flows aimed at hiding the illicit origin of assets and ownership structures with the view to disguise the true beneficiary of

18 Inelasticity of demand and low openness to international competition.

19 Beneficiating from infiltration and corruption in the political and administrative system.

20 Cybercrime and managing/coordination/planning activities regarding other crimes can be conducted from any kind of space/local.

21 A priority set by EU Commission on several policy documents and communications, *inter alia*, the Commission 2021 work programme launched 19 October 2020, the Commission report named *Asset recovery and confiscation: Ensuring that crime does not pay*, in June 2020, its Staff Working Document that provides an *analysis of non-conviction-based confiscation measures in the European Union*, or the *Inception Impact Assessment: Fighting organised crime – freezing and confiscating the proceeds of crime*, launched in March 2021.

them[22]. According to the European Commission (2020, p. 2), the assets recovery process is constituted by the following phases:

— Identification and tracing of illegal assets;
— Freezing and seizing the assets to guarantee their future confiscation;
— Management of frozen and seized assets to preserve their value;
— Confiscation of the referred illicit assets;
— Disposal of the confiscated assets in order to satisfy the victims or affected persons; and
— Rights, as well as their public or social use.

In that sense, the first crucial step is nothing more than the financial investigation by competent law enforcement or judiciary authorities. At EU Level, through Council Decision 2007/845/JHA, of 6 December, the Member States created specialised units to that end: the nationals Asset Recovery Offices (ARO). ARO and the previously created network of Financial Intelligence Unit (FIU) are fed by intelligence and information[23] in order to draw up the financial profile of the OCG, reconstitute its financial flows, as well as establishing the factual and real ownership of these assets, through domain and control criteria.

To perform these activities, EU, in 2014 and through the Directive 2014/42/EU, introduced minimal rules and harmonised the EU Member States legislation regarding the detection, tracing, freezing, management and confiscation of criminal assets. We highlight the provisions on *non-conviction-based confiscation*, *extended confiscation* for a specific list of criminal offences, *third-party confiscation*, *freezing of property* with a view to subsequent confiscation, including urgent freezing, *safeguards and rights* concerning the affected persons, the *detection and tracing of property*, and, finally, the *management of frozen and confiscated assets*.

In fact, according to the European Commission (2020), the conviction-based confiscation of Article 4(1) of the Directive is in force in all Member States, with smooth nuances regarding the possibility of confiscating other assets[24] or obliging to pay an amount

22 Even though article 30 of the 5th Anti-Money Laundering (Directive 2015/849) establishes the obligation to the corporate and other legal entities incorporated within their territory of obtaining and holding adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held. Nevertheless, this information depends on the statements of the assets holders, therefore, highly susceptible to intentional manipulation.

23 With the aim to fuel financial investigation, through Directive 2019/1153, of 20th June, the EU Member States fostered and simplified the use of financial information by law enforcement authorities and ARO by their direct access to bank account information for the purposes of fighting serious crime.

24 Belgium, Bulgaria, Czechia, Greece, Spain, Cyprus, France, Italy, Latvia, Luxembourg, Malta, Hungary, Austria, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden apply this method.

corresponding of the value of the criminal proceeds subject to confiscation.[25] In its turn, the freezing institute (Article 7(1)), whether urgent/without previous judicial authorisation and the judicial one, and regardless of its possession by a third party, is transposed in all MS.[26] In the area of the safeguards and remedies oriented to protect the fundamental rights of the affected persons, despite the utilisation of different legal venues, the Article 8 clauses are also entirely transposed.

Not everything is that positive in this harmonisation process. Notwithstanding the defined transposition deadline[27], some EU Member States have not fully introduced those mechanisms.[28] On the other hand, the flexibility given still allows a high rate of discrepancies that jeopardize cooperation to face organised crime, namely regarding legal concepts,[29] the scope of its application,[30] the non-conviction-based confiscation,[31] and the extended confiscation mechanism.[32]

25 Germany, Estonia, Ireland, Croatia, Lithuania and Netherlands are currently using this legal solution on their national legal order.

26 Despite the fact that the national legal orders are not so explicit in the case of urgent freezing in Belgium, Bulgaria, Greece, Spain, Hungary, Cyprus, Lithuania, Malta, Netherlands, Austria, Slovenia and Romania.

27 According to article 12(1) of the Directive, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 October 2015. They shall forthwith transmit to the Commission the text of those provisions.

28 Beside Denmark and Ireland, that chose to not take part in the adoption of the Directive, only 8 EU MS notified the EU Commission of complete transposition o the referred Directive in their national legal order and, after notification, 15 of the 18 missing MS subsequently informed the transposition conclusion. Actually, just Bulgaria, Luxembourg and Romania are facing infringement procedures for non-communication.

29 Starting from the definitions of proceeds, property, instrumentalities, confiscation and criminal offence, just Greece and Cyprus established definitions of all these concepts while the others Member States defined part of them as proceeds (Bulgaria, Czechia, Estonia, Ireland, Croatia, Malta, Portugal, Finland and Sweden), property (Bulgaria, Czechia, Estonia, Ireland, Croatia, Latvia, Hungary, Malta, Portugal, Romania, Slovenia and Slovakia), instrumentalities (Czechia, Malta and Portugal), confiscation (Bulgaria, Latvia and Lithuania), and freezing (Austria, Hungary and the Netherlands).

30 The majority of the MS includes all crimes specified on Article 3, of the Directive 2014/42/EU (Belgium, Czechia, Germany, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Finland and Sweden), other for all offences sanctioned by imprisonment for at least 1 year (France and Malta), for all intentional crimes (Bulgaria, Estonia, Greece and Spain), for all offences (Slovakia), and for a different set of them (Ireland).

31 Belgium, Estonia, Netherlands and Slovakia have in its national legal order the proceedings *in absentia* and Malta and Austria are limiting its existence to cases of illness and absconding. All the other EU MS overpass the referred requirements with specific mechanisms to confiscate assets without a criminal conviction.

32 In that field, the Member States presents a high diversity of different evidence requirements to allow this legal hook. Several countries have defined clear legal criteria in order to determine the illegality of the properties and the allow their extended confiscation (Belgium, Bulgaria, Cyprus, Czechia, Germany, Estonia, Spain, Croatia, Hungary, Ireland, Italy, Luxembourg, Poland and Portugal). These criteria stand as the disproportion between declared and owned assets, value thresholds and certain time limits. In others, this procedure is more ambiguous. For example, it can be needed to demonstrate a reasonable assumption of a illegal conduct as origin (Austria), a presumption (Estonia, Cyprus and Netherlands), that part of the property derived from illegal activities (Czechia), strong and objective evidences that highlight the illegality of the assets (Spain), that the court reasonably believe (Malta, Latvia and Lithuania), the existence of serious and concrete

Due to its importance, non-conviction-based confiscation is now subject to a deeper analysis. These regimes were created to bridge the confiscation gap when the conviction of the criminals is not possible[33], in spite of the existence of clear proceeds generated by the illicit activity. Under these circumstances and through separate judicial proceedings (criminal, administrative or civil nature), these criminal assets can be seized and confiscated independently of the proceeding against the persons and the link between a specific offence and the assets subject to confiscation. They can be divided to two civil or administrative categories: the actions *in rem*[34] or the unexplained wealth procedures;[35] and two criminal categories: the classic non-conviction-based confiscation[36] and the extended confiscation.[37] Member States, based on historically very different national confiscation systems, chose different and sometimes incompatible legal venues to achieve such confiscations, jeopardising the cooperation on asset recovery.[38]

Included in this Directive (Article 6), another discrepant legal procedure is the confiscation of proceeds[39] from a third party, protecting the rights of the *bona fide* entities. Only Belgium, Hungary and Slovakia[40] address/govern/regulate this issue through general rules of confiscation regardless of the ownership thereof as long as the illicit origin of the asset is proved. On the other hand, France, Latvia and Luxembourg[41] demand that the assets

indications (Belgium), that the court consider more likely that it constitutes proceeds from a criminal activity (Sweden) or the court conviction that the property were originated by a criminal conduct (Romania).

33 Absconding, death, illness, immunity, or even the simple possibility to insufficient evidences of the criminal conduct or of the link between the assets and the criminal conduct.

34 Proceedings against the assets themselves that have been identified as proceeds of crime without being linked to any action taken against an individual.

35 Based on the disproportion between the assets acquired by a person and his/her declared income.

36 In this case, the proceeds have been connected to an offender, however this person cannot be brought to justice due to his death, absconding, immunity, mental state or age. Then, the proceeding is conducted separately in order to effectively confiscate that illegal proceeds.

37 On the base of several criteria, as the criminal conduct committed and the assets origin evidences, the link between the assets, criminal conducts and the individual or legal person are presumed, without necessity to demonstrate it in trial. Usually, that mechanisms reverse the prove burden to the criminal regarding the unexplained owned assets.

38 25 Member States rely primarily on classic non-conviction based confiscation proceedings (except Bulgaria, Ireland and United-Kingdom, which are relying primarily on *in rem*/unexplained wealth proceedings), 26 EU Member States have extended confiscation mechanisms (except Ireland and Greece), and 13 EU Member States have some form of in rem/unexplained wealth procedures or have draft law in order to implement such regimes (Estonia, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Slovenia and Spain). Regarding the way they cover the different situations (death, absconding or illness), we can observe a higher discrepancy between regimes.

39 Only Czechia, Germany, Estonia, Ireland, Greece, France, Cyprus, Lithuania, Luxembourg, Netherlands, Austria and Portugal extended these measures to the instrumentalities transferred or acquired by a third party.

40 Articles 42 and 42 of the Belgian Criminal Code; Sections 72 to 76, of the Hungarian Criminal Code, and Articles 32, 33, 58 to 60, and 83 to 83b, of Slovakia Criminal Code.

41 Articles 131-6, 131-14, 131-16, 131-21, 213-1, 213-13, 215-1, 215-3, 222-49 of the French Criminal Code, Sections 36 and 42 of the Latvian Criminal Code, and Articles 31 to 33 of Luxembourgish Criminal Code.

are at the disposal of a convicted person to be confiscated. Italian legislation defines the interposed person figure (a physical or legal person(s) between the real owner and the asset). Croatian legal regime stipulates the concept of transfer or acquisition in good faith as the criteria to disable confiscation[42]. According to the European Commission (2020), all other Member States transposed the requirement related to the consciousness of that third party: one *must know or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation*.

Finally, concerning the management of frozen and confiscated property, according to Article 10 of the Directive,[43] although all the Member States adopted legal provisions pertaining to that aim, only 13 of them[44] have set up, or are in the process of setting up, the Asset Management Offices, and 19[45] related to the use of confiscated property for public interest or social purposes (European Commission, 2020).

Directive 2014/42/EU is complemented by the Regulation (EU) 2018/1805[46] that institutes the mutual recognition of freezing and confiscation orders, with application to all freezing and confiscation orders issued within the framework of proceedings in criminal matters, including classic, extended and non-conviction-based confiscation mechanisms. However, such regulation does not cover the freezing or confiscation orders issued within the framework of proceedings in civil or administrative matters, all of which cover a considerable part of the non-conviction-based confiscation mechanisms.

Asset recovery results

Understanding and assessing the practical application of the aforementioned freezing and confiscation legal mechanisms are challenging. This is because the statistical studies are few, not current (the most recent issued in 2016) and even if they exist they lack the necessary rigour and details including, decentralisation of data; no or low data systematisation; and storage and non-cooperation/no-response to information requests. Nevertheless, we will present the results of the main studies realized in this matter by *Transcrime OCP*, *Europol* and the Organisation for Economic Cooperation and Development (OECD).

In 2015, the OCP Transcrime report, on a very conservative estimate, established the EU illicit markets annual revenue to be 110 billion Euro (1% of the EU GDP). On this EU-wide

42 Articles 5 and 77 to 79 of the Croatian Criminal Code.

43 More specifically, the adequate management of property that is frozen with a view to subsequent confiscation (Article 10(1), the sale or transfer of frozen or seized property where necessary (Article 10(2)), and the reusing of confiscated property for the public interest or social purposes (Article 10(3)).

44 Belgium, Bulgaria, Czechia, Ireland, Greece, Spain, France, Croatia, Italy, Luxembourg, Netherlands, Portugal and Romania.

45 Belgium, Bulgaria, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Romania and Slovenia.

46 Originated from the European Commission proposal, issued in 21 December 2016 COM(2016) 810 final.

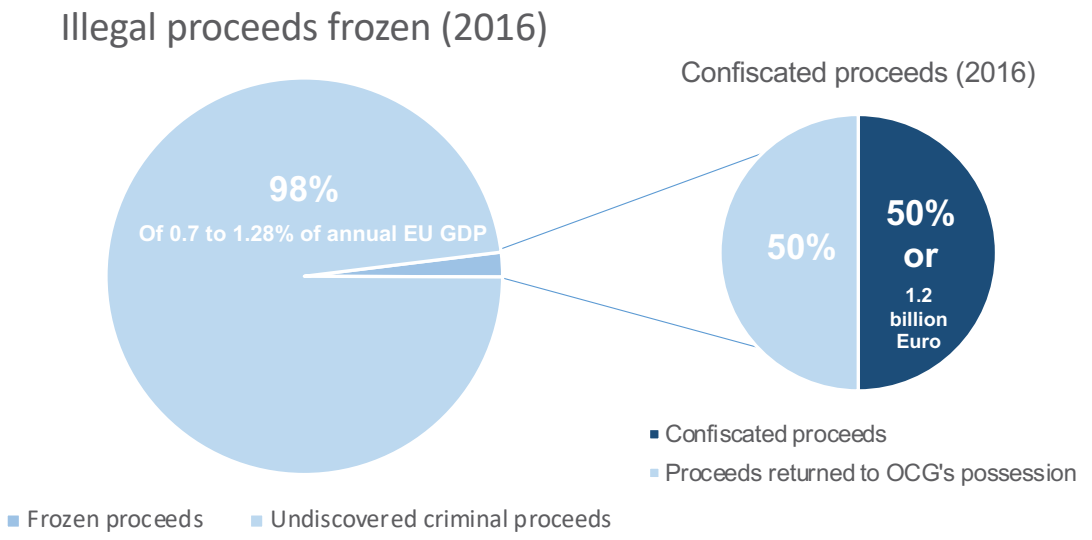
value, the MTIC VAT fraud revenues[47] alone overpassed the ones originated through the trade of illicit drugs – 29 billion Euro per year against 28 billion Euro. Still counterfeiting remains the most profitable illicit activity with estimated revenues around 42 billion Euro per year. More concretely and regarding confiscation results, notwithstanding limited to 5 EU Member States, the following results are presented:

— Italy leads the confiscation and seizure statistics with 113.753 assets seized and confiscated related to organised crime between 2009 and 2013, 47.7% were real estate, 6.7% companies, 20.1% registered assets and 25.5% movable assets;
— Spain confiscated 27.541 assets related to drug offences between 1996 and 2012: 1% real estate, 49.1% registered assets and 49.9% movable assets.
— France registered between 2008 and 2012 the seizure of 18.373 assets (0.7% real estate, 3.1% registered assets and 96.2% movable assets), which 56 (87.5% real estate, 5.4% registered assets and 7.1% movable assets) were confiscated. The value gradually increased from 212.8 in 2011 to 1148.5 million of Euros in 2013.
— Finland confiscated 302 assets between 2003 and 2013, through seizure mechanisms (3% of real state, 34.1% of registered assets and 62.9% of movable assets).
— Ireland confiscated between 2005 and 2015, through confiscation mechanisms (16.8% of real state, 1% of companies, 9.8% of registered assets and 72.4% of movable assets), and an assessed value of 9.090.445 Euros between 1997 and 2013.
— Netherlands confiscated between 2003 and 2014 approximately 25.733.754,45 Euros of criminal proceeds;

In parallel, confiscation results demonstrate that many EU Member States do not confiscate the assets of legal entities.[48] Savona and Ricciardi (2015) verified in their study that the confiscated value and numbers were increasing in the last 10 years.

47 Crime considered in Article 3(2)(d) of the Directive 2017/1371, on the fight against fraud to the Union's financial interests by means of criminal law, as affecting EU financial interests - any act or omission committed in cross-border fraudulent schemes in relation to: *(i)* the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; *(ii)* non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or *(iii)* the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

48 Even in the cases or legal entities confiscation is established, their practical application is jeopardized by the difficulty to trace and identify legitimate businesses (increasingly complex money laundering and concealment techniques), the gaps in the regulation of EU countries (extended confiscation just allow companies confiscation in a few countries), and the problems in the disposal/management phase (confiscated companies are difficult to manage leading prosecutors to avoid the seizure of companies unless strictly necessary).



In 2016,[49] Europol stated that only 2% of criminal proceeds are frozen and just 1% are finally confiscated in EU, as well as that between 0.7 to 1.28% of annual EU GDP is associated with suspect financial activities.[50] This means that around 50% of all provisionally seized/frozen assets, around 2.4 billion Euros, are ultimately confiscated – 1.2 billion Euro. It seems that an average 96.3 million Euro are seized/frozen in each EU MS per year[51] (0.018% of the average GDP of the respondent countries in the period of analysis), and 38.8 million Euro are confiscated as a result (0.009% of the average GDP). [52] The report's conclusion is clear: *Crime still pays in the EU, as 98.9% of the estimated criminal profits are not confiscated*.

Finally, analysing the OECD report named "*Few and Far – The Hard Facts on Stolen Asset Recovery*"[53], published in 2014, a total of 1.398 billion US dollars were frozen between 2010 and 2012 in the OECD countries and most of them through the recognised best legal avenue – non-conviction-based confiscations, court-ordered reparations and restitution,

49 At EU level, there is not an updated assessment of the results. The referred statistics were the results of a survey realized between 2010 and 2014.

50 It has to be referred that this study includes responses from 25 out of 28 EU MS at the time, 21 provided statistical figures and 20 answered the questionnaire. These collection problems are due to the decentralization of the requested data as well as the absence of answers from the courts that issued those final decisions.

51 This value range between a minimum of 62.9 million Euro and a maximum of 129.6 million Euro, which represents, per EU citizen, a value between 4.8 to 7.6 Euros per year.

52 This value range between a minimum of 16.3 and 61.4 million Euro, which represents, per EU citizen, a value between 1.2 to 2.1 Euros per year.

53 Taking into account that it extends the EU reality, nevertheless, due to the lack of assessment data, the obtained results are delivering a partial picture of assets recovery in EU, merged with its counterparts.

based on civil law provisions. During the same period, only 147.2 million US dollars were returned by OECD members, and 276.3 million US dollars between 2006 and 2009, a fraction of the 20 to 40 billion US dollars estimated to have been generated each year by OCGs.

More countries are pursuing asset recovery cases in foreign jurisdictions; still the overall number of OECD members doing so remains small – Belgium, Canada, Luxembourg, Netherlands, Portugal, Switzerland, UK and US[54] - with 29 freezing cases involving a total of 1.398 billion US dollars. When it comes to return of stolen assets (effectively confiscated), only Switzerland, UK and the US had related 12 cases involving 147.2 million US dollars. So, despite some countries (Belgium, Canada, Netherlands, and Portugal) reported stolen asset freezing, they could not effectively confiscate them[55] (OECD, 2014).

After their confiscation, OECD members return more assets to developing countries that had collaborated with them in this process. In fact, between 2010 and June 2012, 80% of the referred returned amount were directed to 15 developing countries: Algeria, Bangladesh, Brazil, Costa Rica, Cote d'Ivoire, Arab Republic of Egypt, Equatorial Guinea, Iraq, Kazakhstan, Libya, Malaysia, Nigeria, Tanzania, Tunisia and Zimbabwe (OECD, 2014).

In conclusion, the freezing and confiscations of criminal assets statistics are disappointing especially in this last field, whereby an average of just 15% of the frozen criminal assets are effectively confiscated, and confiscations encompass only 1% of the annual revenue generated by organised crime in the EU.

As an encouraging signal of recovery, we can observe an increasing trend in their effective utilisation, as well as the best performance of non-conviction-based confiscation mechanisms (OECD, 2014).

Final remarks: the development of a more dynamic and effective assets recovery in the EU

The primary conclusion of this study is that there is a dramatic discrepancy between what criminals earn, invest and what is confiscated by EU and national authorities, making OCGs gradually more comfortable and profitable. In this context and based on the

54 Australia, Denmark, France, Germany, Israel, Italy, Japan, New Zealand, Norway, Slovak Republic, Spain and Sweden didn't reported pursuits of stolen asset recovery cases involving foreign proceeds, and the rest of the countries didn't reply to the survey.

55 Luxembourg is the most paradigmatic case with 535.4 billion Dollars in assets frozen, however without any confiscation order issued.

before-drawn obstacles, we highlight the following paths, sequentially organised, to optimise the assets recovery in the EU:

- *Effective transposition, implementation and impacts assessment of the Directive 2014/42/EU*

According to article 12(1) of the Directive, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this EU Law from 4 October 2015. Nevertheless, in 2020, the Commission concluded that only 8 EU MS notified the complete transposition of the Directive in their national legal order and, after notification, Bulgaria, Luxembourg and Romania are still facing infringement procedures for non-communication. This slow pace and the infringement procedures highlight the lack of prioritisation towards the main legal solution against organised crime in the EU.

As exposed, being organised crime transnational *per* nature[56], the reluctance to harmonise and create a common legal basis for assets recovery in EU jeopardise the capacity of each MS to trace, freeze, manage and confiscate criminal assets. On the other hand, there is as well a lack of data collection, treatment and communication to the Commission[57] allowing a clear assessment of the impact of the created or adapted laws regarding assets recovery in each legal order and globally in EU. Therefore, the first step needs to encompass the effective application of the Directive and the reliable assessment of the impacts that will, in turn, enable the decision-making procedure by the European Parliament and the Council.

- *Non-conviction-based confiscation and rebuttable presumptions*

Through the Council doc. 7329/1/14 REV 1 ADD1, Article 54(1)(c) of the UNCAC, Article 24(5) of the Warsaw Convention, and FATF Recommendations 4 and 38, different international organisations alerted their members to the urgent need to consider non-conviction-based confiscation mechanisms inside their National systems (European Commission, 2019).

The first development line presented consists of the strengthening of the non-conviction-based confiscation common rules in the EU with the specific aim to enable the recovery of unexplained wealth or assets regardless of any criminal responsibility of their owners, satisfying simultaneously the fundamental rights requirements set out by national courts and the EU Chart of Human Rights (EUCHR). The main legislative developments needed are related to the use of circumstantial evidences in order to overcome the impossibility to obtain direct evidences. This indirect evidence standard is based on a defined set of circumstances considered sufficient to raise a presumption, and the party against whom the presumption exists has the burden to overcome it by presenting

56 As stated by recital one of the Directive: "organised criminal groups operate without borders and increasingly acquire assets in Member States other than those in which they are based and in third countries."

57 According with Article 13, of the Directive.

proof – inextricably linked with the burden of proof reversion. These rebuttable presumptions are commonly used in extended confiscation, criminal lifestyle mechanisms, unexplained wealth provisions[58], or illicit or in just enrichment laws, activated with an offense conviction, raising an inference of the illicit nature of all assets. The differences, despite their specific scope, methodology and functioning, are the evidence standards used according to their integration in criminal or civil law: the beyond any reasonable doubt principle (*in dubio pro reo*) against the maximum probabilities principle.

The main challenge is to make those regimes respecting the innocence presumption principle in the extent that there is not a criminal conviction, and, on the other hand, to enforce this patrimonial sanction outside the criminal umbrella. The rights to a fair trial, effective judicial remedy, the presumption of innocence and the right of property[59] are strongly affected. However, ECtHR[60] has recognised that if granted the same procedural safeguards that are offered by criminal law, as also stated in Article 6 of the European Convention on Human Rights and Article 1 of its Protocol 1, there are no objections on the freezing or confiscation orders under administrative or civil law.

Therefore, there is a clear green light for establishing a common non-conviction-based confiscation mechanism throughout the EU MS. Where the mutual recognition principle in criminal matters is still the predominant mechanism, the harmonisation and settlement of minimum rules is the key to recover assets within any EU jurisdiction disabling, therefore, the rational legal exploitation strategies of organised crime.

- *Legal persons confiscation*

As explained earlier, organised crime organisations systematically use legal persons in order to allocate, transfer and disguise the actual ownership and origin of the crime originated assets; however none or very few of those are confiscated. On this assumption, as for the needed minimal rules as regarding confiscation mechanisms, it is paramount for the EU to define a standard basis for confiscating companies in order to duly cooperate and apply the same or equivalent regimes. Although, this step alone is ineffective. The

58 According to the European Commission (2019), 13 MS (Estonia, Germany, Greece, Italy, Latvia, Luxembourg, Netherlands, Poland, Romania, Slovakia, Slovenia and Spain) have some form of unexplained wealth procedures in addition to the classic one or have draft law envisaging such regime, whilst 2 MS (Bulgaria and Ireland) primarily rely on this provisions.

59 According with, respectively, Articles 47, 48 and 17 of the EUCHR.

60 By *Engel* criteria, the distinction between a criminal or a civil or preventive sanction depends on: the classification of the measure in national law; the nature of the offence; and the degree of severity of the penalty risked. On this basis, ECHR had taken different decisions, varying on considering it a preventive sanction (ECtHR, Butler v. UK, No 41661/98; ECtHR Webb v. UK, No 56054/00) to a criminal one (ECtHR, Welch v. UK, No 17440/900).

success of these mechanisms depends on the EU's ability to manage the confiscated companies, maintaining their intrinsic value, assets and the related jobs[61].

- *Expansion of the scope for traditional and extended confiscation*

Consulting the list of criminal offences to which confiscation measures can be applied, both traditional or extended, we can conclude that several highly profitable criminal conducts were forgotten, e.g. illicit gambling and betting, MTIC Fraud, or excise fraud. Therefore, it is of outmost importance to dedicate efforts to assessing the generated revenues of the most profitable crimes, with accurate and updated data, to dedicate the most agile tracing, freezing and confiscation mechanisms to them.

- *Cooperation across EU borders*

The EU asset recovery activity is not confined to the EU borders. As previously highlighted, most of the economic and financial investigations are crossing the EU borders to gather information and pieces of evidence, as well as to enforce freezing and confiscation orders in these territories. The success of asset recovery requires coordinated action by all stakeholders in both requested and requesting jurisdictions, including those responsible for setting policies, law enforcement and justice officials, banks, private companies and their intermediaries, development cooperation actors, civil society, and the media (OECD, 2014). Several conventions[62] are in force to *enable the tracing, freezing and confiscation of illicit assets in their state parties*, and to exchange information and cooperate in the asset recovery process.

Apart from these multilateral mechanisms, informal networks of asset recovery practitioners are potentiating the economic and financial investigations activities all around the world through mainly the identification and tracing of assets, and the preparation of MLA requests – as CARIN (Camden Asset Recovery Inter-Agency Network)[63], ARINSA (Southern Africa)[64], RRAG (Latin America)[65], ARIN-AP (Asia Pacific)[66], ARIN-EA (Eastern Af-

61 One of the most favourable solution is to implement a clear support to judicial administrators, assigning to them stronger managerial skills.

62 The 2000 United Nations Conventions on Transnational Organised Crime, the 2003 United Nations Convention Against Corruption (both ratified by more than 185 countries) and the 2005 Council of Europe Convention on Money Laundering and Confiscation (Warsaw Convention) (21 EU MS and all third countries part of Council of Europe)

63 More details in https://www.carin.network/.

64 More details in https://new.arinsa.org/.

65 More details in https://www.gafilat.org/index.php/es/espanol/18-inicio/gafilat/49-red-de-recuperacion-de-activos-del-gafilat-rrag.

66 More details in http://www.arin-ap.org/main.do.

rica)[67], ARIN-WA (Western Africa)[68] and ARIN-CARIB (Caribbean)[69]. The Global Focal Point Network[70], supported by StAR and Interpol, constitutes also a network of practitioners from 99 jurisdictions. They also foster trust, informal assistance and fast cooperation/information sharing.

Therefore, there is a strong need to establish across the EU the same bilateral or multilateral cooperation, mutual recognition, conviction-based, extended or non-conviction-based confiscation with the aim to enable asset recovery with the same rules and dynamism as inside EU borders. Nevertheless, this legal step needs to be taken altogether with the EU active participation fostering within those intelligence and informal cooperation mechanisms, generating the grounds to activate these tools, as well as highlighting their absolute necessity.

- *Identification and tracing illegally acquired assets combined with an opportunity reduction approach*

The discussed ARO has been working through Europol SIENA, as the preferred secure information-exchange system, on the past 7 years with an impressive communication intensification – 539 information exchanges in 2012 to 7.659 in 2019 (European Comission, 2020, p. 15). However, some development lines are still pending, namely the:

— Swift access to a minimum set of data by ARO;
— SIENA use to enable the swift and secure communication of crime-related information;
— Enhancement of ARO powers, as urgent freezing powers and ability to trace assets following a final criminal conviction, and;
— Fixation of a strict deadline for ARO answer to its counterparts.

The ARO network represents the principal EU agency mechanism throughout all the Member States, enhanced by information sharing informal networks across the world, which can actively be the gatekeepers of the Directive 2014/42/EU implementation and assessment in EU.

- *Building capacity in developing countries and returning the proceeds of corruption and crime to the origin countries*

It is paramount to build an effective EU capacity that can support asset recovery efforts of the rest of the community, especially neighbour jurisdictions, with the aim to prioritize and initiate cases, build trust with foreign counterparts, and eventually generate evidence

67 More details in https://eaaaca.com/about-arinea.

68 More details in http://www.arinwa.org/en/arinwa/accueil/.

69 More details in https://arin-carib.org/.

70 More details in https://www.interpol.int/Crimes/Corruption/Anti-corruption-and-asset-recovery.

or a court order to support asset recovery. These countries need technical assistance and development of their agencies through training, mentoring, and finally stable joint work over time towards priority cases (OECD, 2014).

As an example, countries with well-established asset recovery policies and solid legal and institutional frameworks, as Switzerland,[71] USA and UK[72], have repatriated corruption and crime proceeds. This practice motivated developing countries to enhance their cooperation with some EU MS and allowing their own asset recovery capacity building through joint training programmes as well as joint investigations.

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71 In 2004 and 2012, Angola and Switzerland worked together to channel recovered assets worth 64 million US? Dollar to priority development needs (clearance land mines, support agriculture development, establishment of a hospital structure, water supply, and local capacity building for reintegration of displaced persons), money recovered in the last country originated through corruption crimes in the first one (OECD, 2014).

72 In 2010, following a settlement agreement, 29.5 million GDP ex-gratia payment was made for education needs (primary school enabling through teaching materials and school desks, classrooms rehabilitation, and building teacher accommodations in rural, remote, and hard-to-reach areas) in Tanzania by UK authorities, value generated by asset recovery in a case of briberies involving a 40 million Dollar contract to supply radar control systems to Tanzania (OECD, 2014).

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