CENTER FOR THE STUDY OF DEMOCRACY

MODEL APPROACH FOR INVESTIGATING THE FINANCING OF ORGANISED CRIME

The financing of organised crime is a horizontal issue for all criminal markets, although it rarely falls in the focus of law enforcement agencies. The intelligence gathering of law enforcement agencies has traditionally been focused on uncovering the members of crime groups and tracing the illicit goods or services. Financial transactions are traced mainly for the purposes of money laundering investigations, where the focus is on the proceeds and not on the investments related to the criminal activities. The reason for this is that currently criminal prosecution procedures in all Member States are entirely focused on collecting evidence in regards to possession, transporting, manufacturing or sale of illicit products or services. Financing of organised crime is also often passed over in threat assessments and strategic analyses of organised crime.

The EU legal framework requires that all Members States criminalise the financing of organised crime. According to the provisions of Article 2 (a) of the ***Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime*** ''Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences: (a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities,

KEY POINTS

- The finances of organised crime provide both its motivation and its support framework. These finances are, however, of only marginal interest to criminal justice policies at the EU and Member State levels.
- The criminal justice institutions of member states would increase their operational effectiveness against organised crime by making organised crime finances of equal policy importance as tackling predicate crimes.
- A significant barrier to a consistent approach in the EU is the confusion between a 'financial' investigation and a 'money-laundering' investigation, insofar as 'money laundering' is interpreted in a narrow way, fatally inhibiting cooperation between Member States.
- The current paper calls for a different approach for tackling organised crime and sets out a complete conceptual process for financial investigation based on existing law and good practice in the EU. The suggested approach recommends a substantial increase in the number of money laundering investigations in order to tackle serious and organised crime in the EU.

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including the provision of information or material means, the recruitment of new members and **all forms of financing of its activities,** knowing that such participation will contribute to the achievement of the organisation's criminal activities." Nevertheless, criminal justice authorities in Members States rarely make use of these provisions.

This paper calls for a different approach for tackling organised crime and sets out a model approach for financial investigation based on existing law and practice in the EU. The suggested approach builds on the key findings from a recent EU-wide report of the financing of organised crime.[1] The report identified a series of vulnerabilities that can be exploited by coordinated action. Against this background, this paper suggests ways to increase the capacity of law enforcement agencies to tackle organised crime groups by targeting their weakest point.

Policy issues and the need for a new approach to financial investigation

The first policy issue arising from the report[2] is that the criminal justice process appears to have made no discernible difference to the finances of organised crime in the EU. The finances of organised crime have, however, been materially enhanced by the introduction of free movement of capital and labour. Some crime areas depend on exploiting different Member State policies relating to, for example, tobacco and VAT.

The analysis shows that the finances of organised crime form both the motivation and the supporting framework for organised crime; it is currently unimpeded by EU criminal justice policy and only marginally affected by national criminal justice policies. Organised crime does not recognise internal frontiers but criminal law and practice do. The result is that any effective policy to counter organised crime needs to consider both national and cross-border dimensions.

The key policy proposal is that **criminal justice agencies in the EU should begin to target organised criminal finances.**

Such an approach would be a major departure from existing criminal justice policy towards organised crime, which is focused on achieving convictions for predicate crimes[3] with a view to incarceration. The criminal justice institutions of member states would increase their operational effectiveness against organised crime by making organised crime finances of equal policy importance as tackling predicate crimes. In implementing this policy criminal justice agencies need to give equal status to the predicate crime and the finance that motivated and paid for it.

The analysis has also confirmed that the use of cash for organised and cross-border crime is a major enabling factor. The existence of such a single factor in the financing of all organised and cross-border crime suggests that its control would have beneficial policy and practical implications across the EU. This factor is already recognised by Member States through frontier declarations, prohibitions on purchasing above certain thresholds and powers to seize and confiscate suspicious cash. The approaches of Member States are, however, inconsistent and uncoordinated, while the analysis suggests the need for a harmonised approach, based on Member States' good practice.

A policy focus on organised crime finances should be supported by harmonising cash controls across the EU.

Discussions with practitioners also suggest that a significant barrier to a consistent approach in the EU is the confusion between a 'financial' investigation and a 'money-laundering' investigation. Prosecutors in Member States interpret 'money laundering' in a narrow way, fatally inhibiting cooperation between

1 Center for the Study of Democracy (2015) *Financing of Organised Crime*. Sofia: CSD.

2 Ibid.

3 A crime from which a monetary gain is derived.

Member States at the pre-MLA[4] stage. EU policy makers addressing investigation need to **make 'money laundering' synonymous with 'financial'** in order to facilitate asset tracing, the prerequisite of any successful operational effectiveness. This should not inhibit prosecutorial independence in deciding what is prosecuted in court. The prosecution of money laundering is merely a vehicle to confiscate criminal assets more easily; it has no value as a policy objective in itself.

A new EU approach for financial investigation is necessary and should build on the following policy steps:

1) Each Member State should have a national strategy to tackle the finances of organised and cross-border crime. The EU (through its agencies Europol and Eurojust) should have a complementary strategy to tackle organised and cross-border crime within the EU.
2) The strategy should recognise that the investigation of the finances is the basis for tackling organised and cross border crime. The term 'financial investigation' should be used in its widest sense including the purposes of Article 6(1a) and 6(1b)[5] of the United Nations Convention against Transnational Organized Crime.
3) Each national strategy should accept that dedicated trained financial investigators should be assigned to tackle organised and cross-border crime in parallel with ordinary criminal investigators.
4) Each national strategy should ensure that the Asset Recovery Office is the only mechanism to trace and freeze assets cross-border within the EU. The EU agencies Europol, Eurojust and CEPOL agree and promote a single methodology to conduct pre-MLA and MLA requests.
5) National strategies should recognise and control cash used as the currency of organised and cross-border crime.

Consistent implementation of these actions across the EU should frustrate and reduce organised crime. Inconsistent implementation, however, would attract organised criminals to the weakest Member States. The EU, through a specific mandate included in the Europol Financial Investigation Strategy, should therefore monitor local implementation.

Tackling organised crime finance – towards a more effective investigation methodology

The current approach of criminal justice agencies across the EU to intelligence gathering, investigation and prosecution tends to focus on the specific activities of criminals where this contravenes national law. This ignores the purpose of the activities, which is "to retain benefit from the criminal activities",[6] i.e. money laundering as defined in the SOCTA.[7] Money laundering is the handling of the proceeds of predicate criminality in a way that contravenes national law; any predicate crime creates a money laundering crime that can also be subject to intelligence gathering, investigation and prosecution. Thus, in law, any predicate crime can be addressed by investigating the money laundering or by investigating the predicate crime itself.

The methodology for investigating predicate crimes differs from crime to crime, whereas the methodology for investigating money laundering is the same, irrespective of the predicate crime. This means that skilled money laundering investigators or prosecutors can tackle any crime area, potentially saving on training, deployment and administration costs across the EU and worldwide. In addition money laundering investigations, when conducted by experienced staff, are generally cheaper, quicker and more effective than those conducted by similarly experienced predicate crime investigators.[8] Finally, money laundering investigations offer confiscation opportunities rather than the traditional approach of incarceration as a deterrent.

4 MLA – Mutual legal assistance.

5 Article 6 of the *United Nations Convention against Transnational Organized Crime* criminalizes the laundering of proceeds of crime.

6 Europol (2013) *EU Serious and Organised Crime Threat Assessment (SOCTA)*, European Police Office, p. 29.

7 SOCTA – Serious and Organised Crime Threat Assessment.

8 Brown, R. et al. (2012) The contribution of financial investigation to tackling organised crime: A Qualitative Study. UK Home Office.

The analysis of the financing of organised crime repeatedly suggests that incarceration is irrelevant as a deterrent and may even contribute to crime.

Evidence Box 1.[9] Crime and punishment

"Estonian criminals …. were convicted in Germany or Holland and they have been in prison there, they created criminal links and now they just use these links. Thanks to those links they get access to drugs abroad."

Head, Department of Serious and Organised Crime, Estonia.

"In the eighties, the members of Parliament were worried of homicides linked to the 'war of slot machines', caused by *huge guaranteed income without much effort.* This criminal activity is very lucrative and the sentences are not so deterrent (less than 2 years)."

Head of Research at the National Institute for Advanced Study of Security and Justice (INHESJ)

"They re-invest the money (or a part of the money) in the repetition of the smuggling operation. When the profit becomes of high level, the following smuggling operation gets on higher level and in this way the criminal organizations get stronger and stronger."

Deputy Prosecutor, Court of Appeals, Greece

"The Police believes that the head of this criminal organization was (and he still is) incarcerated in Greek prison and he was giving orders and instructions to the other members from distance."

Officer, Economic & Financial Crime Unit, Greek Ministry of Finance

"Serving three years in prison was his making. Contacts established there, together with serendipitous timing (the emergence of the rave scene and astonishing demand for 'party' drugs) meant he now had regular suppliers willing to trade."

Academic expert, Teesside University, UK

The current paper proposes a **substantial increase in the number of money laundering investigations** in order to tackle serious and organised crime (SOC) in the EU. This paper brings together good practice in the conduct of such investigations.

The purpose of money laundering legislation is to allow the court to hear evidence of the full objective factual circumstances[10] of criminality (rather than merely one or more predicate crimes). This evidence allows the court to: a) deliver better justice through effective, proportionate and dissuasive sanctions[11] and b) to restore the proceeds of such criminality to the lawful owner.

Only the state can lawfully possess the proceeds of criminal activity; and only for the purpose of determining who the lawful owner is.[12]

The Europol SOCTA, as adopted by the Council of the EU in July 2012, identifies priority areas in order to develop the most appropriate strategy to tackle serious and organised crime in the Member States. The methodology triangulates three sources of information: organised crime groups, serious and organised crime areas and the environment within which crime occurs. The model approach suggested in this paper is in harmony with the SOCTA methodology of Europol but pays particular attention to a cross-cutting theme, which features in all three sources of information: criminal finance.

[9] All opinions cited in the evidence boxes in this paper are taken from in-depth interviews conducted for the *Financing of Organised Crime* report.

[10] As specified in Article 6 (2)(f) of the United Nations Convention against Transnational Organized Crime.

[11] See Immediate Outcome 7 on p. 109 of FATF (2013) *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems.* FATF/OECD.

[12] The lawful owner, in the absence of an identified victim of crime, may be the state itself. This may be shared with another Member State according to Article 16 of EU Framework Decision 2006/783/JHA; or with any State that is party to the United Nations Convention against Transnational Organized Crime according to Article 14(3)(b) of that Convention.

A model approach for financial investigations

Key definitions

Predicate Crimes (as designated by the Financial Action Task Force)

The FATF, housed in the Organisation for Economic Cooperation and Development, sets the worldwide standards for anti-money laundering. Member States are required to pass legislation that makes the following list of crimes predicate for the purpose of a money laundering offence. Thus the commission of any of the crimes listed below should create a separate offence of money laundering in the Member States and may generate further money laundering offences in other Member States or worldwide. All these offences are opportunities to intervene, investigate and prosecute serious and organised criminals and recover the proceeds of crime.

1) Participation in an organized criminal group and racketeering;
2) Terrorism, including terrorist financing;
3) Trafficking in human beings and migrant smuggling;
4) Sexual exploitation, including sexual exploitation of children;
5) Trafficking in narcotic drugs and psychotropic substances;
6) Arms trafficking;
7) Trafficking in stolen and other goods;
8) Corruption and bribery;
9) Fraud;
10) Counterfeiting currency;
11) Counterfeiting and piracy of products;
12) Environmental crime;
13) Murder, grievous bodily injury;
14) Kidnapping, illegal restraint and hostage-taking
15) Robbery or theft;
16) Smuggling; (including in relation to customs and excise duties and taxes);
17) Tax crimes (related to direct taxes and indirect taxes);
18) Extortion;
19) Forgery;
20) Piracy;
21) Insider trading and market manipulation.

Types of investigation

A "predicate crime" investigation is confined to solving a particular sort of crime and may involve specific skills and techniques applicable to the crime being addressed.

"Financial" investigation describes a technique that connects people to other people, places and events through financial facts. It can be applied to *any* crime and has been used to solve crimes of murder, rape, public disorder and domestic violence. Its wider applicability makes it an attractive option for law enforcement agencies in terms of value for money, efficiency and effectiveness.

A "money laundering" investigation is slightly narrower as it can only relate to the predicate offences listed above. It has, however, the major advantage, over the term "financial investigation", of being understood transnationally. Financial Intelligence Units can *only* provide information in relation to money laundering investigations; additionally many national and international institutions have internal policies that facilitate cooperation with other agencies conducting money-laundering investigations (above other types of enquiry). For this reason the term money-laundering investigation has been adopted in this paper to describe the **status** of an investigation and the term financial investigation has been used to describe the **techniques** used.

Since all organised crime involves money laundering, the proposed methodology aims to have universal applicability.

"Fraud" investigations have been described as 'financial' investigations, but they have a far narrower field of enquiry, being confined to a small subset of the predicate crimes listed in the section above.

Authorising a money laundering investigation

Authorising law enforcement officers or prosecutors should consider a parallel money laundering investigation whenever a predicate crime is being investigated. The routine omission of investigation into the motive for predicate offences should be reversed so that money-laundering investigation becomes routine.

The aim of a money laundering investigation is to:

1) Present best evidence to a court so that money laundering can be inferred from the objective factual circumstances.[13] This enables offenders – who may include those who facilitate the predicate crimes of others – to be subject to effective, proportionate and dissuasive sanctions.[14]
2) Find out the extent and whereabouts of the proceeds of criminal activity so that they can be restored to the lawful owner (if known) or the State. The lawful owner is the victim of the predicate criminal activity. The State can be either the State where the criminal activity took place or the State where the proceeds were recovered.
3) Identify the predicate crime so this can be added to the prosecution.

All money laundering investigations should be conducted with adequate resources and urgency to ensure that assets are frozen or seized before criminals have a chance to dissipate them.

If criminals are alerted to an investigation, through an unplanned arrest, a corrupt leak of information or by other mistake, extra resources may be required to rescue the situation so that their assets can be frozen.

Initiating a financial investigation

An investigation begins when: 1) information held by law enforcement is brought to the attention of an authorising officer or prosecutor, **and** 2) that person decides to authorise an investigation and appoint a financial investigator to investigate it, **and** 3) the information suggests that the proceeds of criminal activity are in the possession of someone who is not the lawful owner.

Setting thresholds for initiation of an investigation

There should be no minimum threshold for commencing a financial investigation. It is a temptation to 'save resources' by setting minimums of a monetary, "organised crime", or gravity of offence nature, before assigning a financial investigator. Until a financial investigator has completed a review of the information it is not possible to make a properly reasoned assessment of such a threshold. It is a key role of a financial investigator to assess what the initial information suggests. Their skills and tools are designed to assess if the proceeds of criminal activity are in the wrong hands. Delegating this function to someone not qualified or capable of making this decision is poor practice.

Evidence Box 2. Financially identifying organised crime

Derbyshire Police, UK

"A crime report was made to a rural police station that a motorist had filled up with petrol at a petrol station and driven away without paying. A financial investigator responsible for predicate crime in the area made routine financial checks and commenced a financial investigation. Police intelligence showed that the driver was a drug dealer with multiple accounts and wealth. An asset tracing exercise ensured that his wealth was frozen before his arrest; the stolen petrol provided crucial justification of dishonesty which could be added to intelligence on drug dealing to allow a covert

[13] Article 3(3) of the *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and Article 6(f) of the *United Nations Convention against Transnational Organized Crime*.

[14] *See Immediate Outcome 7 on p. 109 of FATF (2013) Methodology for Assessing technical compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems. FATF/OECD.*

investigation into his activities. After conviction over €1.5m euros was confiscated."

Source: *'Payback Time, 2004', a joint review of the Proceeds of Crime Act.*

This information will originate from at least one of the following sources:

1) Generated by analysis of information already held by law enforcement ;
2) Given by an informant (i.e. a registered person who provides information to law enforcement)
3) Given by a member of the public and recorded as a crime report;
4) Given by a member of the public and recorded as a non-crime incident;
5) A Suspicious Activity Report from the Financial Intelligence Unit;
6) Given by another agency;
7) A result of a spontaneous arrest;
8) Found during a search.

The role of the Financial Investigator

A financial investigator is a person employed by a public agency to investigate the proceeds of criminal activity (although they can be deployed against any crime as well). They should be trained for this purpose. The proceeds of criminal activity means activity related to a predicate crime. A financial investigator is the person appointed by an authorised person to run a money laundering investigation. They will also normally be the person who brought the information to the attention of the authorising person. They have two roles: intelligence handling and investigating.

The organisational position

Financial investigation is not difficult; any competent criminal investigator can be trained to be a financial investigator. This training, however, needs to be embedded by regular deployment in parallel investigations.[15] Experience shows that operational effectiveness against organised crime is best achieved by financial investigators:

1) Being dedicated to the task, so that their duties reinforce the training they receive through regular application in the workplace;
2) Who view themselves as professional financial investigators and have a specific career path, including management roles;
3) Being organised in teams of no less than four people to provide resilience to their operational effectiveness;
4) Having operational capacity to deploy swiftly at the outset of an investigation. The entire financial investigation team may be needed at the outset of some enquiries;
5) Who are directed by police managers or prosecutors, trained and experienced in financial investigation and other covert and intrusive techniques.

Intelligence handling

The primary task of the financial investigator is to ensure that money-laundering investigations are started at the earliest opportunity. This is achieved by information handling in the following categories:

Generated by analysis of information already held by law enforcement

Financial investigators need to be part of the establishment of any intelligence unit. They may be known as Financial Intelligence Officers to distinguish the fact that they are not investigators generating evidence for court but intelligence personnel converting information into intelligence. Financial intelligence is 'information for action'. The action might be, for example, the authorisation of a money-laundering investigation, a search of premises, or the use of additional covert techniques.

A Financial Intelligence Officer in an Intelligence Unit should be providing the researchers and analysts with financial information. This will include information about how subjects pay for utilities, rent, local

[15] As set out in the FATF (2012) *Operational Issues – Financial Investigation Guidance*, p. 29.

travel, local tax, local goods and services. It will also include how subjects are paid local welfare benefits (if any) and financial institutions that they may use. In particular they should have the ability to trace a subject's bank account. They should know about financial accessories like loyalty point schemes and their associated cards, mobile banking accessories and similar non-cash payment methods. This local skill should extend across national frontiers, in the same categories, where the subject or organisation under investigation conducts cross-border activity.

An Intelligence Unit without a Financial Intelligence Officer is fundamentally weakened and managers should take steps to access this skill.

Some agencies attempting to tackle SOC do not have dedicated intelligence personnel working together in a designated intelligence unit, but instead the intelligence function is incorporated in the duties of investigators spread across the organisation. In this environment some skills are developed by individuals who have a personal interest and aptitude for intelligence work. But this organisational approach to intelligence means that such skills are less well developed, less promulgated and more vulnerable to loss through retirement, promotion and transfer to other duties. Financial intelligence skills are particularly vulnerable to this organisational approach because of the sheer size, dynamism and diversity of the financial intelligence that is relevant to organised crime.

An agency without Financial Intelligence Officers should not be involved in tackling serious and organised crime.

Given by an informant (i.e. a registered person who provides information to law enforcement)

Informant handling is a high-risk activity and some agencies ensure that it is only done by highly skilled personnel who work independently from other units. For this reason it is important that they are directed by managers to seek out financial information about crimes and offenders from their informants. Financial Investigators should directly and regularly brief informant handlers about the latest financial information relevant to their crime area. Trained SOC managers should ensure that this takes place.

Given by a member of the public and recorded as a crime report or a non-crime incident

Crime reports and non-crime incident reports may be the starting point of a money-laundering investigation, but only if they are identified as such. For this reason Financial Investigators at local police stations should establish systems that pick up predicate crimes and get them authorised for financial investigation as soon as possible. In the absence of Financial Investigators at local police stations, the crime recording managers should establish a review process with the same objective. The absence of financial investigators at local police stations necessarily means that unqualified crime managers will make decisions that result in an unknown number of criminals, who are being investigated by the police, being allowed to retain their proceeds of crime.

A Suspicious Transaction Report from the Financial Intelligence Unit

The primary purpose of a money launderer is to ensure that information about the proceeds of crime is kept separate from information about the criminals who committed it. The method of separating the information may be complex or very simple. An example of money laundering would include, for example, depositing an amount of stolen cash into a bank and not mentioning its origins.

The richest source of information about the friends and relatives of wealthy criminals, crime couriers and even criminals themselves is contained in each Member State's STR[16] database, held at the Financial Intelligence Unit. The information on the STR database should be about possible proceeds of crime, whilst police and other law enforcement databases

[16] Suspicious Transaction Report.

should include information on the criminals who have generated it.

It follows that the primary purpose of an Anti-Money Laundering Regime is to compare the information on the two datasets. Financial investigators and the FIU[17] staff are the custodians of the national regime and should be in constant communication with each other, so far as is permitted within the law. To maximise the utility of the datasets, the STR database and the law enforcement database should be compared or merged.

Evidence Box 3. Suspicious Transaction Reports

"A bank Suspicious [Transaction] Report identified a transaction about which they had concerns. The matter was brought to the attention of HMRC [UK Customs & Revenue] and consent was subsequently declined by the National Crime Agency. The case concerned two of a group of companies and the consent to transact related to inter-company money transfers. Enquiries established that the monies being transferred were the proceeds of illegitimate trading carried out by the company and others as part of a multi-million VAT Missing Trader Intra Community fraud. The STR played a pivotal role and was the reason why the criminal investigation was taken on. An extended verification exercise into the VAT repayment claim by the company was conducted resulting in confiscation orders totalling several hundred thousand pounds".

Officer, UK Customs & Revenue/ National Crime Agency.

Given by another agency

Financial Intelligence should be shared using the 4 x 4 Europol methodology[18] or a similar evaluation and dissemination process. Intelligence managers should regularly check that financial intelligence is being passed between Intelligence Offices. To ensure consistent handling of financial intelligence, Financial Investigators in different agencies should be trained to the same standard. This is best achieved by joint training conducted by a single agency. Experience in the UK, which is cited by the Council of the EU for its good practice in this area, suggests that classroom training should be followed by Continuous Professional Development monitoring. Statutory accreditation in the UK has created the idea of a career as a Financial Investigator.

Agencies in other Member States should use the ARO[19] network to pass financial intelligence. Europol and national AROs should ensure that the passage of financial intelligence within a Member State is proportionate to that passed to other Member States and should conduct quality audits to ensure that this is so.

A result of a spontaneous arrest

A financial investigation should **never** be commenced after an arrest unless this has been properly considered and authorised. The exceptional circumstances that justify not having a financial investigation should be recorded. In this way the decision can be reviewed and future decision-making improved. The exception to this rule is where an arrest has taken place spontaneously. Where the arrest is for a predicate crime, a financial investigator or a team of financial investigators should be appointed to review the circumstances and take any urgent action necessary.

Found during a search

Generally a pre-planned search of premises in relation to a predicate offence should have a financial investigator present. Exceptionally, if the search is spontaneous, it may be necessary to call a financial investigator to the scene. The scene should be preserved as long as possible until a financial investigator can be found and if that is not practicable, the scene should be vid-

[17] Financial Intelligence Office.

[18] Serious and Organised Crime Threat Assessment (SOCTA) – Methodology. Council of The European Union, Brussels, 4 July 2012, 12159/12, LIMITE, COSI 59, ENFOPOL 219, CRIMORG 88, ENFOCUSTOM 72. Pp.19.

[19] Asset Recovery Office.

eoed so that evidence of money laundering can be preserved for review by a financial investigator.

Investigating

The money laundering investigation starts when an authorising person has appointed a financial investigator to do it. There are no circumstances in which a person other than a financial investigator can investigate money laundering. The first action of the financial investigator is to review the information that caused the investigation to be authorised. The following circumstances may exist:

A predicate crime has been committed

If a predicate crime has been identified an ordinary criminal investigator should be appointed to investigate it. This good practice is identified in the FATF Guidance on Financial Investigation and is called 'parallel investigation'.[20] This good practice derives from the fact that no investigator is humanly capable of investigating both a predicate and a money laundering crime.

A named suspect does not yet exist

If the information does not reveal the identity of a real or legal person in possession of the proceeds of crime, then the first task of the financial investigator is to establish such an identity.

A named suspect exists

If a named real or legal person is a suspect, the financial investigator should identify the person's bank account. In the case of a legal person the financial investigator should also identify the beneficial owner(s), i.e. the person who really controls the funds or on whose behalf the funds are being kept, and treat them as a suspect.

Finding the bank account

In any investigation of organised crime, the greatest opportunity for the investigator is a suspect's bank account. Finding this information at the earliest opportunity is absolutely critical to success against organised crime. Whilst it is theoretically possible to run an organised crime group without a bank account, it is extremely difficult. The bank account and associated Customer Due Diligence reveals personal identification information (obviously) but also addresses of second homes, storage, commercial property and real estate investments, etc. Spending will reveal locations frequented at particular times, associates, use of cash at particular times, travel habits, vehicles used, shopping habits and all the many opportunities for intervention that an investigator is looking for. The bank account will also link to other bank accounts and financial products, revealing associates, assets and other activity.

Evidence Box 4. Multiple payment methods

> "Online I trade solely in Bitcoin, it can be a bit of a chew on but generally OK. I don't send product until the Bitcoin is in my account. Some private and personalised sites are now appearing that are for those who are trusted online sellers and buyers".
>
> *Cocaine dealer, UK.*

There are four ways for an investigator to find a bank account: from a Credit Reference Agency; from a central database of bank accounts; via a broadcast (a message to all banks, or major banks, in a jurisdiction) by the Financial Intelligence Agency; or by discovering how an offender's goods or services are purchased.

Credit reference agencies

Before opening a new bank account (credit card or other credit product), the issuing bank wants to take up references to avoid lending to a risky person. In some countries this function is done by a third party credit reference agency. The applicant submits an application to a bank to open an account, and the bank refers this to a credit reference agency which

[20] FATF (2012) *Operational Issues – Financial Investigation Guidance.* FATF/OECD.

assesses the risk on behalf of the bank and gives the applicant a credit score. In effect, information about risk is pooled by financial institutions, thereby saving them the cost of taking up references themselves. In some countries these application forms are available to law enforcement. In this way bank secrecy is not affected, the application form does not reveal any financial secret, not even whether or not the application was successful. For the investigator, the application forms offer a mass of useful information: current and previous addresses, phone numbers, associates and personal details for cross-referencing. The forms also provide the basis to apply for orders to access and monitor bank accounts, credit cards and other credit products. The credit reference agencies may also analyse the data themselves to identify multiple financial offenders. In some countries the credit reference agency may provide instant secure access, online, to its data. If law enforcement does not have access to credit reference agency information, it is reliant on other, far less useful or accessible information.

Central databases

In the absence of credit reference agencies, several EU countries have established central bank databases. These have one advantage over credit reference agencies because they have records of savings accounts. This information will not be available to an investigator using a credit reference agency until that investigator has identified the person's current account which may or may not have transfers to a savings account. The central bank database will have different levels of access which may be quick or cumbersome to access by the investigator of a particular case. Any access that is less than instant, online and secure is clearly going to reduce the effectiveness of an investigation and asset recovery.

Financial Intelligence Unit broadcast

Most Member States have to rely on this method of finding a bank account. The investigator applies in writing to the FIU which in turn writes to all the banks in a country to enquire, if they have had any financial dealings with the suspected person. This method has many disadvantages; it is inherently insecure, involving a broadcast of sensitive information which may leak. It is cumbersome, relying on third party responses from the banks, which may or may not prioritise the request. Like any third party enquiry it is vulnerable to spelling mistakes, numerical transposition errors, ambiguity and lack of personal interest by untrained clerical staff. Exclusive reliance on this method creates a significant risk of operational ineffectiveness, although success can be achieved, as shown in the analysis on the organised crime finances evidence below.

Evidence Box 5. FIU analysis

A specialised prosecutor, suspecting a criminal offence of abuse of powers, sent a request to the Anti-Money Laundering Office (Croatia's FIU). The AMLO sent requests for financial intelligence to a number of foreign FIUs and received high quality information. The FIUs provided all the necessary bank records and forwarded bank data for an offshore company with substantial funds.

The AMLO sent requests to Croatian banks for bank data and received and analysed additional information.

During its financial intelligence analysis, the AMLO issued a monitoring order to 6 banks concerning 5 natural persons. The following features of the case were identified:

- Frequent international transfers;
- Payments to non-resident foreign accounts;
- Companies in the offshore financial centres;
- The purpose of payment – services;
- Appointees for foreign accounts were Croatian citizens;
- Case was initiated by prosecutor;
- In the course of this case AMLO intensively cooperated with competent authorities on inter-institutional and international level.

After the financial intelligence analysis was complete, the AMLO sent a case referral to the

prosecutor. The prosecutor conducted the investigation and the court issued an order for the seizure of assets. The total value of seized assets was approximately €3,600,000 (shares, 2 apartments, 2 houses, land).

Source: *MONEYVAL Typologies Research.*[21]

Offender purchasing

Once an offender's physical address has been found, it may be possible to make enquiries about how goods and services have been purchased. This will normally be time-consuming and carries an inherent risk that the supplier of the goods or services may alert their customer to the enquiry by law enforcement. The risk can be mitigated by using financial investigators to make these enquiries by established routes and by focusing on large corporate suppliers less likely to have a personal interest in any individual customer.

Tracing and freezing assets

Before the proceeds of crime can be restored they must first be traced and frozen. Financial investigators should refer to the EU Financial Investigation handbook[22] for details of how to trace assets. The financial investigator needs to establish the beneficial owner of the asset so that it can be seized or frozen.

Evidence Box 6. Confiscation

OPERATION "FILÓSOFOS", SPAIN: The investigation started as a consequence of information exchanges with Drug Department of The United States of America Drug Enforcement Agency and the Spanish Guardia Civil, Central Operational Unit of Criminal Investigation. International cooperation with law enforcement agencies in the Netherlands, Portugal, Colombia and the Military Counter-Intelligence Agency of Venezuela ensured that information about assets was exchanged.

Consequently freezing orders were obtained in Spain against 4 vehicles, valued at **€50,000,** 25 bank accounts with a total balance of €**1,160,000**, 16 machinery and electronic devices – Personal Computers, cameras and video cameras, mobile phones valued at €**13,840.** In the Netherlands **€3m** in cash was seized and confiscated.

Officer, Guardia Civil, Central Operational Unit of Criminal Investigation (OCU)

The law permitting the seizure or freezing of criminal assets varies across Member States.

Freezing method (most effective)

In some Member States the prosecutor has to show that: 1) a person is under investigation for a predicate offence, 2) that they own or have an interest in an asset, and 3) it is necessary to seize or freeze the asset to preserve it for the court's determination.

Freezing method (rarely effective)

In other Member States the prosecutor has to show that: 1) a person is under investigation for a predicate offence, 2) that they own an asset, and 3) it is necessary to seize or freeze the asset to preserve it for the court's determination.

Showing that a person owns an asset, but that it is not in his or her own name is extremely difficult[23] and the Member State should amend this requirement

[21] MONEYVAL (2013) The postponement of financial transactions and the monitoring of bank accounts.

[22] *EU Financial Investigation Handbook. 2011, Jefatura de Policía Judicial de la Guardia Civil D.L.* Available from Europol in English, German, French, Spanish and Italian, distributed in electronic form to all EU police forces.

[23] This specific issue is addresses in Article 6, *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.* OJ L 127, 29.4.2014, p. 39-50.

in its law, if it is to have any real prospect of tackling serious and organised crime effectively or assist other Member States in doing so.

Freezing method (not effective)

In other Member States the prosecutor has to show that: 1) a person is under investigation for a predicate offence, 2) that they own an asset and 3) that the asset is linked to the predicate crime and 4) it is necessary to seize or freeze the asset to preserve it for the court's determination.

Showing that an asset is linked to predicate crime could be as difficult as proving that a person owns or controls an asset.[24] This legal standard makes it impossible, in reality, for a Member State to have any real prospect of tackling serious and organised crime effectively or assist other Member States in doing so.

Freezing method (not effective)

In other Member States the investigator has to show that: a) a person is under investigation for a predicate offence, and b) a prosecution has commenced.

It is almost impossible, in practice, to commence a prosecution without giving the suspect time to dissipate assets. This legal requirement makes effective tackling of serious and organised crime impossible. The Member State should amend this law if it is to have any real prospect of tackling serious and organised crime effectively or assist other Member States in doing so.

Evidence Box 7. Ineffective laws

"Even if we base our operations on the legislation against the drug trafficking that allows to seize capitals not linked to legal working activities, we can seize only the profits that we find and no other goods because the accused have no profits. In the best case scenario, we can confiscate only cars.

So we often have relevant investigations on properties leading to no concrete results, consequently traffickers can keep huge amounts of money that they can reuse also to re-join criminal activities."

Prosecutor, Trento, Italy.

Once an asset has been traced then it should be frozen by an authorising prosecutor or other person given that power. In all Member States the Financial Intelligence Unit can freeze a bank account quickly but only temporarily. After a short period, that varies across Member States from a few days, but no longer than a month, only a prosecutor or court can freeze an account.

International freezing

If the money laundering investigation is in one Member State and there is information that the asset is in another, the prosecutor (or senior police officer) should authorise pre-MLA enquiries to formally trace the asset.

In exceptional circumstances it may be appropriate to send an MLA request without doing pre-MLA enquiries. These exceptional circumstances are when: 1) the asset needs to be frozen or it will be lost *and* 2) no other legal option is available *and* 3) full details, sufficient to freeze the asset, are known *and* 4) the prosecutor is confident that no other substantial assets exist elsewhere.

In all other circumstances pre-MLA enquiries should be made to ensure that confiscation powers are maximised.

Pre-MLA enquiries:

Internet open source enquiries

Trained officers can lawfully obtain extensive information about assets in another Member State from

[24] Article 7 of *Directive 2014/42/EU* refers to freezing but does not address this specific issue.

open sources. Authorising officers should be aware that criminals use internet counter surveillance and should take action to prevent: untrained officers using this resource; the use of terminals connected to police networks or purchased by police agencies; the use of police or personal credit cards to purchase internet information. In some Member States members of the public have a legal right to know that an enquiry has been made about them or their property. Untrained officers may compromise an investigation and place themselves at personal risk if, for example, they purchase information using a personal credit card.

The Camden Asset Recovery Interagency Network (CARIN)

All Member States are members of CARIN. A prosecutor or investigator who is not familiar with the asset tracing and freezing procedure of another Member State can find out how to make a pre-MLA enquiry from CARIN.

Asset Recovery Offices

In effect "police to police" enquiries have been formalised by Council Decision 2007/845/JHA[25] which established Asset Recovery Offices in each Member State. The function of an ARO is to be the Single Point of Contact for all asset tracing enquires between Member States. Unlike FIUs these are law enforcement units with direct access to law enforcement intelligence. They are composed of law enforcement personnel and have access to specialist prosecutors for freezing purposes.

Financial Intelligence Units

All Member States have an FIU that can make secure enquiries of an FIU in another Member State. As a minimum, FIUs have immediate access to the national database of Suspicious Transaction Reports from banks and other obligated institutions. In addition they may have access to Currency Threshold Reports (transfers of money above a nationally set threshold). Many FIUs have ready access to open and closed sources of data and dedicated staff with analytical capability. Prosecutors and investigators need to be aware that most FIUs can **only** respond to an enquiry that is formally described as a money-laundering enquiry.

Interpol

Interpol is appropriate for non-financial enquiries between EU Member States.

Europol (SIENA)

This secure system is used by Asset Recovery Offices across Member States. In addition there is a Focal Point at Europol providing operational support and analytical reports on the subject of asset tracing.

Informal "police to police" enquiries

This model approach does not recognise this concept; legal frameworks governing Data Protection cover all such enquiries. Readers are referred to the processes shown above.

Mutual Legal Assistance

Once the responses to the pre-MLA enquiry have been received, the prosecutor can make an MLA request to freeze the assets in the other Member State. A request for MLA to trace and freeze assets in the same request is likely to fail. This is because it mixes two independent procedures governed by different laws and conducted by different agencies.

Prosecutors or investigators involved in tracing assets in another Member State should consult their local Asset Recovery Office in every case. This will inform the Europol SOCTA and support strategic decision-making.

[25] *Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.* OJ L 332, 18.12.2007, p. 103-105.

The MLA process is not included in this paper, readers are referred to Eurojust for practical advice and tools to complete an MLA in order to obtain financial evidence for court purposes or to freeze assets.[26]

Seizing cash

The report on organised crime finances suggests that cash is a very important enabler of organised crime. The laws attempting to control cash vary across Member States from traditional frontier controls to requirements to report cash purchases or even prohibit cash purchases above national thresholds.[27]

In some Member States – the UK, Ireland and some German Lander – law enforcement personnel have the power to seize cash, if they suspect that it is the proceeds of a predicate crime. The power to seize cash in other Member States exists only where the cash is evidence of a crime.

Seized cash in the UK, Ireland and Germany can be litigated and if it is found to probably be the proceeds of a predicate crime, it can be confiscated. The burden of proof still rests with the State, but it is at a lower level, the balance of probabilities, not the criminal standard applied to a prosecuted person. This power also exists at most internal and external frontiers in the EU, if the person crossing the frontier has not declared the cash according to the requirements of the local law.

Evidence Box 8. Cash

"As for the settlement of payment, the typical method is cash up-front. They asked for Euros, not dollars. They use "ant's tactics" (i.e. many persons send little money). The specific actors who are used mainly to facilitate the payment process are reliable persons, who act as a link between the different organizations. They receive 5-10% of each transaction."

Officer, Economic & Financial Crime Unit, Greek Ministry of Finance

"Cash has obviously become much harder since the introduction of regulations against money laundering."

Swedish tobacco smuggler

"A bank Suspicious [Transaction] Report highlighted large amounts of cash accumulated by an individual and a multi-agency investigation was initiated. A joint operation investigating the individual's failure to declare income, possible benefit fraud, money laundering and pension credit fraud was conducted by UK Customs & Revenue, police and other agencies. The Suspicious Report directly contributed to the police's money laundering investigation with the individual likely to have remained unnoticed, had it not been for this intelligence. Following his arrest, several hundred thousand pounds in cash was found and seized during a search of his residence and he admitted benefit fraud. The individual was eventually prosecuted and received a custodial sentence. Confiscation proceedings are currently in progress."

Officer, UK Customs & Revenue

The difficulty of placing cash in bank accounts may explain the large quantities of cash being recovered in some countries. In 2013 France €100m in cash[28] was seized per year; in the UK €50m.[29] This power has been extremely efficacious in the UK, where a third of the value of confiscated assets is cash. More significantly the seizure of cash is the starting point

[26] For more information, please see: http://www.ejn-crimjust.europa.eu/ejn/

[27] Italy, France and Spain have prohibitions on cash purchases above national thresholds.

[28] Source: *AGRASC Annual Report 2013*.

[29] Source: *Communities deserve to keep all assets and cash seized from criminals.* Local Government Association (LGA) press release 4 October 2014.

for many money-laundering investigations in the UK. The Council of the EU recommends that the powers of UK financial investigators be presented to all Member States, institutions and agencies.[30]

Conclusion

No manual or guidelines can set out a procedure applicable to every Member State, because each Member State has unique laws and procedures. The model approach suggested here therefore sets out a conceptual process based on current good practices in the EU. It attempts to provide guidance on the initiation and early stages of an investigation, a period sometimes known as the "golden hour".[31] This period frequently determines whether an investigation will succeed or fail.

[30] Recommendations of *Council of the EU (2010) Evaluation report on the 5th round of mutual evaluations, 'Financial crime and financial investigations'. Report on the UK*.

[31] For the 'golden hour' principle, please check *National Centre for Policing Excellence (2006) Murder Investigation Manual. Association of Chief Police Officers*.

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