The Institute of Judicial Administration

The Challenges of Transnational Investigations

23rd March 2013
10.30am

INTERNATIONAL CO-OPERATION AND MUTUAL ASSISTANCE - LAW ENFORCEMENT CO-OPERATION

Michael Hopmeier
Fig 2: Breakdown of fraud losses by victim group

Fraud loss £73 billion

Private sector £45.5 billion
- Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles £16.1 billion
- Manufacturing £7.4 billion
- Financial and Insurance Activities £3.5 billion
- Construction £3.0 billion
- Professional, Scientific and Technical Activities £2.8 billion
- Other sectors £12.7 billion

Public sector £20.3 billion
- Tax £14.0 billion
- Central Government £2.5 billion
- Local Government £2.2 billion
- Benefits & Tax credits £1.6 billion

Not-for-profit sector £1.1 billion

Individuals £6.1 billion
- Mass marketing fraud £3.5 billion
- Identity fraud £1.2 billion
- Other £1.4 billion

Note: Illustrative: Not to scale
According to UN estimates the total amount of criminal profits is about 3.6% of GDP—USD 2.1 trillion.

In 2011 organised crime revenues in Italy were estimated at 150 billion Euros and in the UK in 2006 organised crime revenues were estimated at £15 billion.

Bribery was costing the world US$1 trillion a year during the last decade, according to figures from the World Bank.
International Co-operation and Mutual Assistance – Law Enforcement Co-operation

- European Convention on the Suppression of Terrorism No. 17828 (Strasbourg Convention, 1979)
- UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention, 1988)
- Criminal Law Convention on Corruption (Strasbourg) 27.1.99 ETS 173 (Additional Protocol 2003 ETS 191)
- Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000)
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention, May 16, 2005)
- Council of the EU Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
- The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005
- Mutual Legal Assistance Guidelines for the United Kingdom (9th Edition) April 2011
- FATF 40 Recommendations
European Convention on the Suppression of Terrorism No. 17828
(Strasbourg Convention, 1979)

Article 8. 1. Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in article 1 or 2. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases. Nevertheless this assistance may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Convention shall be interpreted as imposing an obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance in respect of an offence mentioned in article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.

3. The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention.
Article 7

Mutual Legal Assistance

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
   
a) Taking evidence or statements from persons;
b) Effecting service of judicial documents;
c) Executing searches and seizures;
d) Examining objects and sites;
e) Providing information and evidentiary items;
f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;
g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.
Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention, 1988)

Article 10

INTERNATIONAL CO-OPERATION AND ASSISTANCE FOR TRANSIT STATES

1. The Parties shall co-operate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities.

2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.
Convention against Transnational Organized Crime
(Palermo Convention, 2000, entered into force on
29.09.2003, supplemented by 3 protocols)

Article 13. International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party
having jurisdiction over an offence covered by this Convention for confiscation
of proceeds of crime, property, equipment or other instrumentalities referred to
in article 12, paragraph 1, of this Convention situated in its territory shall, to
the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of
obtaining an order of confiscation and, if such an order is granted, give effect
to it; or

(b) Submit to its competent authorities, with a view to giving effect to it
to the extent requested, an order of confiscation issued by a court in the terri-
tory of the requesting State Party in accordance with article 12, paragraph 1, of
this Convention insofar as it relates to proceeds of crime, property, equipment
or other instrumentalities referred to in article 12, paragraph 1, situated in the
territory of the requested State Party.
Convention against Transnational Organized Crime
(Palermo Convention, 2000, entered into force on 29.09.2003, supplemented by 3 protocols)

Article 18. Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.
Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000)

Article 3

- Proceedings in connection with which mutual assistance is also to be afforded
- 1. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.
- 2. Mutual assistance shall also be afforded in connection with criminal proceedings and proceedings as referred to in paragraph 1 which relate to offences or infringements for which a legal person may be held liable in the requesting Member State.

Article 4

- Formalities and procedures in the execution of requests for mutual assistance
- 1. Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State.
UN Convention against Corruption

Article 43. International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.
UN Convention against Corruption

Article 46. Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
Article 15 – General principles and measures for international co-operation

1. The Parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2. Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

   A. for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

   B. for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.
Article 21 – Obligation to take provisional measures

• 1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

• 2. A Party which has received a request for confiscation pursuant to Article 23 shall, if so requested, take the measures mentioned in paragraph 1 of this article in respect of any property which is the subject of the request or which might be such as to satisfy the request.
Article 22 – Execution of provisional measures

1. After the execution of the provisional measures requested in conformity with paragraph 1 of Article 21, the requesting Party shall provide spontaneously and as soon as possible to the requested Party all information which may question or modify the extent of these measures. The requesting Party shall also provide without delays all complementary information requested by the requested Party and which is necessary for the implementation of and the follow up to the provisional measures.

2. Before lifting any provisional measure taken pursuant to this article, the requested Party shall, wherever possible, give the requesting Party an opportunity to present its reasons in favour of continuing the measure.
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Proceeds of organised crime

Ensuring that "crime does not pay"
EUROPEAN COMMISSION

Brussels, 12.4.2011
COM(2011) 176 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND TO THE COUNCIL

based on Article 8 of the 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
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the freezing and confiscation of proceeds of crime in the European Union

{SWD(2012) 31 final}
{SWD(2012) 32 final}
COMMISSION STAFF WORKING PAPER

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the
Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL
on the freezing and confiscation of proceeds of crime in the European Union

{COM(2012) 85 final}
{SWD(2012) 31 final}
What is the Commission proposing to do now?

Today's proposal for a Directive aims to set up a more comprehensive and coherent EU legal framework for the confiscation of profit (assets) from serious and organised criminality. It will simplify existing rules and fill gaps which have benefitted criminals until now. It will, in particular:

- Lay down clearer and more efficient rules on the confiscation of assets which are not directly linked to a specific crime, but which clearly result from similar criminal activities committed by the convicted person (extended confiscation).
- Strengthen rules on confiscation where assets have been transferred from the suspect to a third party who should have realised that they were illegal or the fact that they were transferred in order to avoid confiscation (third-party confiscation).
- Allow confiscation of criminal assets where a criminal conviction is not possible because the suspect is deceased, permanently ill or has fled (limited nonconviction based confiscation).
- Ensure that competent authorities, such as prosecutors, can temporarily freeze assets that risk disappearing if no action is taken, subject to confirmation by a court as soon as possible (precautionary freezing).
- Allow financial investigations on a person's assets to be continued for years after a criminal conviction in order to fully execute a previously issued confiscation order (effective execution).
- Require Member States to manage frozen or confiscated assets so that they do not lose economic value (asset management).
- Require Member States to regularly collect data on confiscation and asset recovery (statistics).
The freezing and confiscation of proceeds of crime in the European Union


The Government welcomes the overall aims of the Directive and recognises the benefits of increased international cooperation to recover assets held overseas. However having analysed the contents of the Directive, and consulted with policy and operational partners, the Government identified a number of issues with the Directive, including a serious problem with Article 5 of the Directive which introduces provisions on non-conviction based confiscation in limited circumstances. 

The UK has strong powers which are successfully used to tackle criminal finances. Our powers are already compliant with or stronger than many of those contained in the Directive. As the Directive offers no direct benefit and the risk to our domestic regime posed by Article 5 is sufficiently serious, we decided that the best course of action is not to opt in at this stage.

We will take a full part in the negotiations on the Directive and will seek to shape it in the national interest before carefully considering the case for a post-adoption opt-in.
UK Crime (International Co-operation) Act 2003

- CICA: Scope, application and procedure
- S.7(5) authorises a designated prosecuting authority to issue a letter of request for mutual assistance (evidence) from another State
- S.13-19 – deals with incoming requests for evidence – use in overseas jurisdictions
- Role of UK Central Authority
The Proceeds of Crime Act 2002
(External Requests and Orders)
Order 2005

Parts 2, 3, 4 and 5 of this Order make provision in respect of external requests, within the meaning of section 447(1) of the Proceeds of Crime Act 2002 ("the 2002 Act"), and external orders, within the meaning of section 447(2) of that Act, which broadly corresponds with Parts 2, 3, 4 and 5 of that Act, respectively.

Chapter 1 of Part 2 makes provisions for prohibitions ("restraint orders") on dealing with property, situated in England and Wales, which is specified in a request by an overseas authority ("an external request"). In order to exercise the powers in article 8 to make a restraint order in respect of relevant property (within the meaning of section 447(7) of the 2002 Act) that is so specified, the Crown Court must be satisfied that either of the conditions set out in article 7 is satisfied. The first condition includes the requirement that a criminal investigation has been started in the country from which the external request was made with regard to an offence. The second condition includes the requirement that proceedings for an offence have been started in the country from which the external request was made and not concluded. The organisations responsible for applying to the Crown Court are those set out in article 6(1) and (3).

Articles 9 to 14 make supplementary provision about the making of restraint orders, including provision for appeals relating to them. Articles 15 and 16 provide for the appointment and powers of receivers in respect of property subject to restraint orders.
IN THE MATTER OF FOUAD AL ZAYAT & ORS (2008)
Central Crim Ct (Gross J) 7/3/2008
An investigating judge of the Judicial Organisation First Branch of Investigation of Iran had authority to issue a letter of request seeking the assistance of the United Kingdom in order to secure the restraint of the applicant's assets within the UK. The fact that the external request came from the Military Branch of the Judicial Organisation was unimportant as no military offence was involved and the case would come before the Iranian court as an ordinary criminal court rather than a military court.

The applicant (Z) applied to discharge a restraint order made against him. It was alleged that Z had taken part in a large-scale fraud on an Iranian government agency as well as bribery and corruption of its officers. By a letter of request an investigating judge of the Judicial Organisation First Branch of Investigation of Iran sought the assistance of the United Kingdom authorities in order to secure the restraint of Z's assets within the UK to the value of US$120 million. The application for assistance from Iran was dealt with by the Secretary of State for the Home Department as an external request governed by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005. The request was referred to the Director of the Serious Fraud Office (SFO) who made the application for the restraint order.

HELD: (1) On the evidence, as a matter of Iranian law, the external request had emanated from a competent overseas authority, the Judicial Organisation, which had responsibility for the matters set out in s.447(11) of the 2002 Act. The Judicial Organisation was acting through the Iranian judge who was properly authorised to issue the letter of request. Further, the Iranian judge was a professional judge and not a military officer. The case in Iran had been allocated to the Military Branch as a consequence of the status of the principal defendant who was a serving military officer. No military offence was involved and the case would come before the Iranian court as an ordinary criminal court rather than a military court. (2) The SFO had satisfied the court that the conditions for the making of the restraint order had been satisfied. (3) Article 9(7) of the 2005 Order did not oblige the court to discharge the restraint order as it could not realistically be said that proceedings had not been started within a reasonable time. There was a need for realism: the case involved a complex and major fraud investigation extending to eight countries. (4) The restraint order would not be discharged in the exercise of the court's discretion. Human rights jurisprudence on extradition, deportation and confiscation should not be applied to restraint orders. A restraint order was an interim order and human rights issues concerning the legal system in the requesting state should be concentrated on the confiscation stage. (5) When dealing with an external request, the central consideration was whether the conduct complained of constituted an offence in the foreign country at the time in question, punishable by, inter alia, a confiscation order. (6) The grant or continuation of the restraint order disclosed no breach of the Iran (Financial Sanctions) Order 2007 art.6 or art.7. All of Z's challenges to the continuation of the restraint order failed.
INTERNATIONAL STANDARDS
ON COMBATING MONEY LAUNDERING
AND THE FINANCING OF
TERRORISM & PROLIFERATION

The FATF Recommendations

February 2012
36. International instruments

Countries should take immediate steps to become party to and implement fully the Vienna Convention, 1988; the Palermo Convention, 2000; the United Nations Convention against Corruption, 2003; and the Terrorist Financing Convention, 1999. Where applicable, countries are also encouraged to ratify and implement other relevant international conventions, such as the Council of Europe Convention on Cybercrime, 2001; the Inter-American Convention against Terrorism, 2002; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.
• **37 Mutual legal assistance**
  • Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings. Countries should have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation. In particular, countries should:
  • (a) Not prohibit, or place unreasonable or unduly restrictive conditions on, the provision of mutual legal assistance.
  • (b) Ensure that they have clear and efficient processes for the timely prioritisation and execution of mutual legal assistance requests. Countries should use a central authority, or another established official mechanism, for effective transmission and execution of requests. To monitor progress on requests, a case management system should be maintained.
  • (c) Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
  • (d) Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions or DNFBPs to maintain secrecy or confidentiality (except where the relevant information that is sought is held in circumstances where legal professional privilege or legal professional secrecy applies).
  • (e) Maintain the confidentiality of mutual legal assistance requests they receive and the information contained in them, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry. If the requested country cannot comply with the requirement of confidentiality, it should promptly inform the requesting country.
Countries should render mutual legal assistance, notwithstanding the absence of dual criminality, if the assistance does not involve coercive actions. Countries should consider adopting such measures as may be necessary to enable them to provide a wide scope of assistance in the absence of dual criminality.

Where dual criminality is required for mutual legal assistance, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category of offence, or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

Countries should ensure that, of the powers and investigative techniques required under Recommendation 31, and any other powers and investigative techniques available to their competent authorities:

(a) all those relating to the production, search and seizure of information, documents or evidence (including financial records) from financial institutions or other persons, and the taking of witness statements; and
(b) a broad range of other powers and investigative techniques;
are also available for use in response to requests for mutual legal assistance, and, if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

Countries should, when making mutual legal assistance requests, make best efforts to provide complete factual and legal information that will allow for timely and efficient execution of requests, including any need for urgency, and should send requests using expeditious means.

Countries should, before sending requests, make best efforts to ascertain the legal requirements and formalities to obtain assistance.

The authorities responsible for mutual legal assistance (e.g. a Central Authority) should be provided with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of such authorities maintain high professional standards, including standards concerning confidentiality, and should be of high integrity and be appropriately skilled.
38. Mutual legal assistance: freezing and confiscation *

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.
BEST PRACTICES PAPER

BEST PRACTICES ON CONFISCATION (RECOMMENDATIONS 4 AND 38) AND A FRAMEWORK FOR ONGOING WORK ON ASSET RECOVERY

October 2012
U.S. Asset Recovery
Tools & Procedures:
A Practical Guide for
International Cooperation
Requests for Mutual Legal Assistance in Criminal Matters
Guidelines for authorities outside of the United Kingdom

• Mutual Legal Assistance (MLA) is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country. Due to the increasingly global nature of crime MLA is critical to criminal proceedings and ensuring justice for victims of crime. The UK is committed to assisting investigative, prosecuting and judicial authorities in combating international crime and is able to provide a wide range of MLA.

• These guidelines are to ensure that requests for MLA received by the UK can be executed quickly and efficiently. The guidelines include:
  • Guidance to authorities who wish to make a formal request for MLA to the UK ("requesting authorities");
  • Guidance to authorities on what can be requested from the UK without making a formal request for MLA;
  • Guidance on which authorities in the UK can send a formal request for MLA abroad

• Guidance for authorities within the UK, who wish to make a request for MLA to a foreign state, can be found on the Crown Prosecution Service ("CPS") website: International Enquiries

• The role of central authorities in the UK
  • Central authorities have the function of receiving, acceding to and ensuring the execution of MLA requests. All formal requests for assistance must be sent to a UK central authority for processing. The UK has three central authorities:
    • UK Central Authority ("UKCA"), for MLA requests in England, Wales and Northern Ireland
    • Crown Office, for MLA requests in Scotland
    • Her Majesty’s Revenue and Customs ("HMRC")