

The Cost of Non-Europe in the Area of Organised Crime

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Abstract

This Research Paper examines the costs of non-Europe in the field of organised crime. It provides an interdisciplinary analysis of the main legal/ethical, socio-political and economic costs and benefits of the EU in policies on organised crime. It offers an in-depth examination of the transformative contribution that the EU has made, in terms of investigation, prosecution and efficiency, to transborder operational activities and the protection of its citizens' rights. Finally, it seeks to answer the questions of what are the costs and benefits of European cooperation and what forms of cooperation would bring more European added value.



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Contents

Executive Summary	i
1 Introduction.....	1
1.1 Setting the scene	1
1.1.1 Aims and objectives	1
1.1.2 The development of EU competences in the field of OC	2
1.1.3 The role of the European Parliament.....	2
1.1.4 Conceptual caveats and dilemmas	3
1.1.5 Research questions and case studies	4
1.2 Methodology.....	5
1.2.1 Data collection.....	5
1.2.2 Interpretation of data.....	7
1.2.3 Application of the European added value analysis.....	7
1.2.4 Limitations of the economic analysis in the domain of OC	7
2 The EU's Approach on Organised Crime	10
2.1 The genesis of EU policy on OC.....	11
2.2 Organised crime: Difficulties in definition and scope	12
2.3 From 'organised crime' to 'serious crime': A target in constant transition?	17
2.4 The challenge of robust, knowledge-based EU policies	19
2.5 Law enforcement-driven perspectives and non-criminal justice approaches	19
2.5.1 The prevalence of law enforcement perspectives.....	19
2.5.2 Non-criminal justice approaches: An administrative approach at the EU level	24
3 The Freezing and Confiscation of Criminal Assets	27
3.1 The EU legal framework on the freezing and confiscation of instrumentalities and proceeds of crime.....	30
3.1.1 Harmonisation.....	31
3.1.2 An assessment of EU harmonisation and implementation on confiscation	32
3.1.3 Mutual recognition	34
3.2 EU-coordinated networks on financial crimes	34
3.2.1 Financial Intelligence Units.....	34
3.2.2 Asset Recovery Offices	41
4 Criminal Justice Investigations in the EU	46
4.1 The European Investigation Order	48
4.1.1 Assessing and identifying the EU added value of EIOs	48
4.2 Joint Investigation Teams	49
4.2.1 Assessing and identifying the EU added value of JITs	49
4.2.2 Gaps and barriers in using JITs.....	51
4.2.3 Economic costs and benefits of JITs.....	56

5	EU Policy Cycle for Serious and Organised Crime	58
5.1	The EU policy cycle: SOCTA and setting policy priorities.....	59
5.2	EMPACT: Added value in question and the issue of accountability	61
6	Conclusions and Policy Options.....	65
6.1	Policy options	68
6.1.1	EU legal framework on OC	69
6.1.2	Agencies, networks and operational frameworks	70
6.1.3	Policy and funding framework	73
	Bibliography.....	74
	Annex 1: Intervention Logic for Economic Analysis.....	79
	Annex 2: Building Blocks for Economic Analysis of the Added Value of Europe on Organised Crime	86
	Annex 3: List of Financial Intelligence Units in the EU	111
	Annex 4: List of Asset Recovery Offices in the EU.....	114
	Annex 5: Analysis of Survey Results.....	116
	Annex 6: Networks of Practitioners in the EU and Internationally	136

List of Figures

Figure 1.	Number of respondents by professional category	6
Figure 2.	Types of respondents among the law enforcement community (n=29)	7
Figure 3.	Threat risk model	20
Figure 4.	Conceptual model of the SOCTA methodology	20
Figure 5.	FIUs across the EU according to their affiliation.....	38
Figure 6.	AROs according to their location/affiliation in the EU Member States (35 in total)*.....	43
Figure 7.	Professional composition of the JITs Network (in total 65 members).....	51
Figure 8.	Number of JITs per crime priority	57
Figure 9.	EU agencies and networks in EU OC policy.....	67

List of Tables

Table 1.	FIUs according to their location and affiliation in the EU Member States.....	39
Table 2.	AROs according to their location/affiliation in the EU Member States*	44

List of Abbreviations

AFSJ	Area of freedom, security and justice
AML	Anti-money laundering
AMON	Anti-Money Laundering Operational Network
AROs	Asset Recovery Offices
CARIN	Camden Asset Recovery Inter-Agency Network
CEPOL	European Police College
CFT	Combating the financing of terrorism
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COSI	Standing Committee on Internal Security
CRIM	Special Committee on Organised Crime, Corruption and Money Laundering
CSE	Child sexual exploitation
DG Home	Directorate-General (DG) Migration and Home Affairs (HOME)
DG Justice	Directorate-General (DG) Justice and Consumers (JUST)
DIICOT	Directorate for Investigating Organised Crime and Terrorism
EAW	European Arrest Warrant
EC	The European Commission
EDPS	European Data Protection Supervisor
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
EJTN	European Judicial Training Network
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMPACT	European Multidisciplinary Platform against Criminal Threats
EPE	Europol Platform for Experts
EPPO	European Public Prosecutor Office
EU LISA	European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
FATF	Financial Action Task Force on Money Laundering
FIU.NET	FIUs Network
FIUs	Financial Intelligence Units
FRA	European Union Agency for Fundamental Rights
ILEI	Independent law enforcement investigation

IMF	International Monetary Fund
ISEC	Programme for the Prevention of and Fight against Crime
ISF	Internal Security Fund
JHA	Justice and home affairs
JITs	Joint investigation teams
JITs Network	Network of National Experts on Joint Investigation Teams
JPSG	Joint Parliamentary Scrutiny Group
LIBE Committee	Committee on Citizen's Freedoms and Rights, Justice and Home Affairs (EP)
MAOC-N	The Maritime Analysis and Operations Centre - Narcotics
MASPs	Multi-Annual Strategic Plans
MEP	Member of the European Parliament
MLA	Mutual legal assistance
MOCGs	Mobile organised crime groups
MTIC	Missing trader intra-Community (fraud)
OAPs	Operational action plans
OC	Organised crime
OCGs	Organised criminal groups
OCTA	Organised Crime Threat Assessment
OHIM	The Office for Harmonization in the Internal Market
OLAF	European Anti-Fraud Office
PIF	Protection of the financial interests of the European Union
SAR	Suspicious activity report
SIENA	Secure Information Exchange Network Application
SOC	Serious and organised crime
SOCTA	Serious and Organised Crime Threat Assessment
STR	Suspicious transaction report
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in human beings
TPIMs	Terrorism Investigation and Prevention Measures
UTR	Unusual transaction report

Executive Summary

This study provides a critical assessment of the costs and benefits of non-EU in the field of organised crime (OC). It examines from an interdisciplinary perspective the gaps and challenges in the current 'state of play' in EU police and judicial cooperation in criminal matters in a post-Lisbon Treaty setting.

The analysis identifies the costs, contributions and 'areas for improvement' in three specific EU fields of intervention: first, the freezing and confiscation of financial assets; second, criminal justice investigations; and third, the EU policy cycle for serious and organised crime. The study seeks to fill a gap in current knowledge on EU OC policies by bringing together the experiences, views and perceptions of national practitioners regarding the added value and existing barriers in EU cooperation. The following five EU Member States are covered: France, Romania, Spain, the Netherlands and the UK.

The research shows that the innovations brought by the Lisbon Treaty when it comes to more EU rule of law compared with the old EU third pillar (on criminal justice and police cooperation) are still lagging behind in terms of capturing Union policies on OC. Despite the legal constraints on the competences of the Union to intervene, and the democratic and judicial deficits that traditionally characterise security cooperation, the Union has built a dynamic legal and policy framework aimed at responding to criminality. The intergovernmental, secretive, informal and non-transparent modes of EU decision-making have resulted in a *law enforcement practitioners' approach* in the so-called 'fight against crime'. This *preventive (intelligence-led) policing* approach has led to the five main challenges discussed below.

First is the expansionist reach in the material scope of EU action through the use of broad concepts of OC and the emergence of other (non-Treaty based) 'operational and flexible' notions of crime in which the Union and justice and home affairs (JHA) agencies (Europol and Eurojust) intervene. EU law and policy on OC has allowed for an over-criminalisation of certain social phenomena, and the prioritisation of certain crimes at the expense of intervention in others.

Second, EU policy has developed through a wide set of EU-coordinated formal and informal networks of national representatives and experts with a predominantly law enforcement background (police and public prosecutor-like actors). Examples include EU Financial Intelligence Units (FIUs) and Asset Recovery Offices (AROs). These networks foster exchange of information and knowledge between law enforcement and other communities through experimental governance techniques. These consist of exchanges of 'promising practices', informal sharing of information that escapes proper checks, democratic accountability and judicial scrutiny, and financial support through EU funding of national projects.

EU multi-actor and multi-level networks are composed of a non-transparent variety of judicial, police and administrative actors, which blurs who is doing what where and subject to what accountabilities. EU networks co-exist and interact with other transnational groups and networks also involved in information exchange for criminal investigation purposes. A case in point is the so-called *EU administrative approach*, which aims at facilitating 'information exchange' between national law enforcement authorities and 'administrative actors', such as ministries of finance and local and regional authorities. This approach may lead to a law enforcement 'function creep' towards actors with different roles and responsibilities.

Third, priority has not been given to assuring the EU rule of law checks and safeguards applicable to European information exchanges and practices, in particular when it comes to judicial and legal oversight, similar to those provided in domestic arenas. EU policy has not given a voice to the views and experiences of other national practitioners, such as impartial judges and defence lawyers. The compatibility of EU operational and network activities, as well as the funding of projects, with EU law guarantees and the EU Charter of Fundamental Rights remains a key issue. This would be the only way to ensure that transnational networks are not used for 'venue shopping' by national actors to escape domestic checks.

Fourth, the predominance of a *law enforcement practitioners' approach and the focus on preventive (intelligence-led) policing practices* have resulted in the marginalisation of a *criminal justice-based approach* to fighting criminality, as well as insufficient priority being given to alternative *multi-disciplinary (crime-prevention) approaches* when addressing criminality in the EU. Not enough consideration and priority has been given to the effects of policing in the domains of social policy, education, town planning, labour standards, taxation or local authorities' approaches to crime.

Fifth, the logic of national law enforcement actors has resulted in giving priority to strengthening 'mutual trust' in cross-Member State cooperation on information exchange; not enough attention has been given to better ensuring (by regularly monitoring and independently evaluating) the presumption of mutual trust that EU Member States comply with the rule of law and fundamental rights as the foundations for judicial cooperation in criminal matters.

These conceptual, legal and socio-political challenges and impacts, as well as the transparency deficits characterising the current EU framework on OC, make an economic analysis or quantitative analysis of the costs and benefits of Europe in this domain methodologically unsound. The research calls for caution when using quantification methods in this domain.

This study recommends that the Union give priority to improving and further developing EU 'operational cooperation' in crime-fighting policies under a remit guided by a *criminal justice-led approach*, frameworks on fundamental rights and EU rule of law, ensuring a similar level of checks and balances as those in EU Member States' legal systems. In light of the above, this study puts forward the policy options discussed below.

EU legal framework on OC

The current EU legislative framework is still sitting 'in between' the old EU third pillar and the post-Lisbon Treaty. The Commission should elaborate an inventory, comprising all the existing EU instruments, their scope of application, interrelationships and linkages, which should go along with an EU guide for practitioners. Special attention should be given to addressing current gaps in Member States' transposition of existing EU laws and standards, and implementing ways to ensure greater legal certainty. Priority should be given to an in-depth evaluation of the problem areas in effective implementation of Framework Decision 2008/841/JHA on organised crime in terms of harmonisation.

The 'Lisbonisation' of EU criminal justice and police law should better integrate the implications of the legally binding EU Charter of Fundamental Rights in all existing instruments. The European Investigation Order (EIO) now provides for a 'benchmark' that should be incorporated in all the existing and upcoming acts related to 'mutual recognition'. A common EU definition of OC is neither feasible nor desirable. Priority should be given to limiting the use of non-Treaty based and 'operational' crime concepts applied by EU JHA agencies, which have tended to over-expand the material scope of EU actions and focus on activities.

Current methods for monitoring mutual trust in criminal justice cooperation in the EU need to be further improved. Art. 70 of the Treaty on the Function of the European Union should be used to develop a permanent and regular (objective and impartial) evaluation system. The evaluation method should start by setting up a permanent group of academic experts on criminal law and policing in Europe.

Agencies, networks and operational frameworks

The current institutional status quo on EU policies is a multi-actor and multi-fora scene, which poses fundamental difficulties for democratic accountability, judicial scrutiny and proper checks and balances in line with EU standards on rule of law. A particular issue is the extent to which the

activities of these networks and groups comply with the common standards, legal guarantees and the EU Charter of Fundamental Rights in their activities, as well as in their cooperation with third-country or other (non-EU) transnational networks involving third-country experts.

The European Parliament should make sure that the accountability mechanisms applicable to EU JHA agencies include a proper follow-up and assessment of the added value of the functioning of EU networks, such as AROs and FIUs. A recommendation is to carry out an exhaustive mapping exercise, identifying ‘who is who’ among the EU’s national contact points in criminal justice, police and networks. This would also allow for a proper understanding of who is doing what and under which rules and conditions/checks and balances, and the purpose or domain for which are they actually responsible.

This should go hand in hand with the setting up of a new EU forum of defence lawyers, human rights organisations and civil society, specialised in issues related to criminal justice matters. The European Judicial Network should be developed into a body bringing together a network of representatives from national courts with jurisdiction for the purposes of EU law. Further use of CEPOL (European Police College) training resources should be supported.

The Parliament should be particularly cautious that the new deal on Europol’s mandate allows for the following aspects: first, more scrutiny of Europol’s activities, including the resources mobilised and activities carried out by its ‘informal and formal networks’ functioning without a proper legal basis; second, better oversight of the database developed by Europol; and third, better oversight of data exchanged with non-EU countries. Further efforts should be made to ensure that proper democratic accountability and scrutiny by the European Ombudsman of Europol’s classification and de-classification powers meet the necessity and proportionality principles.

The model of Joint Investigation Teams (JITs) for cross-border operational cooperation should be given a clear priority. This should be done by bringing JITs closer to EU rule of law and common legal standards on criminal investigation as laid down in the EIO. The JITs Model Agreement should be revised and include a set of clearer rules regarding leadership, responsibility, accountability and liability issues (including for EU JHA agencies) as well as proper reporting mechanisms. This could go in tandem with the further simplification and transparency of current procedures for the setup and development of JITs.

Policy and funding framework

The EU policy cycle and the so-called ‘administrative approach’ fail to ensure proper EU democratic, legal and financial scrutiny. Efforts to ensure the European Parliament has better access to information concerning the EU policy cycle should be further pursued. The Parliament’s awareness and follow-up of activities carried out in the context of the policy cycle could be significantly improved. Europol’s reporting on the EMPACT projects¹ should be accessible to the Parliament. The activities of the Standing Committee on Internal Security (COSI) must be subject to a more permanent and higher degree of control and accountability.

The European Parliament should call upon the European Court of Auditors to conduct an in-depth review and audit of all the funding spent in the context of the EU policy cycle and EMPACT projects. Particular attention should be paid here to the actual use and effects of these projects, the extent to which they follow the policy priorities set and their compatibility with ethical and fundamental rights standards in their implementation.

¹ EMPACT refers to the European Multidisciplinary Platform against Criminal Threats.

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1 Introduction

1.1 Setting the scene

1.1.1 Aims and objectives

This study examines the costs of non-Europe in the fight against organised crime (OC). Both OC and the role that the EU has played in this domain during the last 30 years have been subject to wide attention in academic and policy circles. There have been various methodologies and approaches for assessing the costs and benefits of having ‘more’ or ‘less’ Europe in this domain in the wider context of justice and home affairs (JHA) policies.

Particular attention has been paid to the implications of the renewed institutional and decision-making setting that has resulted from the entry into force of the Lisbon Treaty at the end of 2009 for EU internal security policies and the area of freedom, security and justice (AFSJ). The ‘Lisbonisation’ of cooperation under the former EU third pillar, and the transfer of police and judicial cooperation in criminal matters under the Community method was expected to effectively address the deficits in judicial scrutiny, democratic accountability and transparency that used to characterise EU cooperation in these policy areas during the last two decades of European integration.

The study has the following specific objectives:

- identifying and assessing the costs of non-Europe in OC in social, political and economic terms at the EU level;
- highlighting the gaps and obstacles in the fight against OC at the EU level, and gathering evidence to support current and future policy-making; and
- examining possible policy options for future action at the EU level to tackle OC.

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1.1.2 *The development of EU competences in the field of OC*

European cooperation in policing and criminal justice matters has traditionally been characterised by limited EU competences and scrutiny powers by the European institutions. The maintenance of law and order and the safeguarding of internal security are generally perceived as deeply ingrained in EU Member States' exclusive competences. Criminal law and police cooperation measures usually feature components that are rather specific to the different legal systems and traditions of the Member States.

That notwithstanding, this contested legal framework has not represented an impediment for the dynamic development of a diverse matrix of legal instruments or the setting-up of EU security agencies. The constrained framework of cooperation at the EU level in light of the division of EU and national competences has justified a resultant EU policy that has very much concentrated on a secretive, obscure and uncertain legal system, mainly concerned with fostering information exchange and data processing policies, which have in turn led to the blurring of 'what' the focus of EU policy action should be on precisely and 'who' is involved and under whose accountability and judicial scrutiny. An agenda driven by law enforcement and security practitioners, taking the shape of EU-funded (formal and informal) networks of national contacts and experts, is escaping proper EU (rule of law) checks and balances and independent judicial scrutiny when compared with national legal and constitutional systems.

The Lisbon Treaty (and its Title V on the area of freedom, security and justice (AFSJ), chs 4 and 5) has revisited the legal, institutional and decision-making foundations of the European justice and security area. However, it was not until the end of 2014 that the enforcement powers traditionally attributed to the European Commission and the Court of Justice of the European Union (CJEU) were fully operational over EU legal acts covering old EU third-pillar measures. The expiration of the transitional period of five years since the entry into force of the Lisbon Treaty (envisaged in its Protocol 36) has in this way expanded 'who monitors mutual trust', and EU Member States' compliance with their obligations to implement EU law and respect EU general principles in the AFSJ along with corresponding EU criminal justice and police policies (Mitsilegas, Carrera and Eisele, 2014).

A key contribution of the 'Lisbonisation' of JHA policies has been the enhanced role of the European Parliament in internal security policies during the last five years. The Parliament has become a co-legislator through the application of the ordinary legislative procedure in EU policies aimed at addressing criminality in the Union. It has also progressively become an agenda-setter in internal security policy and an actor in the EU's AFSJ policy and inter-institutional landscape (Carrera, Hernanz and Parkin, 2013). When it comes to 'organised crime', the Parliament has played the role of co-legislator in important EU legal acts that have been adopted, such as Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime,² and Directive 2014/41/EU regarding the European Investigation Order in criminal matters.³

1.1.3 *The role of the European Parliament*

The Parliament also ran the Special Committee on Organised Crime, Corruption and Money Laundering (CRIM)⁴ between March 2012 and September 2013. It was asked "to investigate the

² See 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 127/39, 29.04.2014.

³ See Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1.5.2014.

⁴ European Parliament, *Draft Report on organised crime, corruption and money laundering: Recommendations on action and initiatives to be taken (final report) (2013/2107(INI))*, Special Committee on Organised Crime, Corruption and Money Laundering, Rapporteur: Salvatore Iacolino, 10 June 2013.

extent of organised crime, corruption and money laundering supported by the best available threat assessments and to propose appropriate measures for the EU to prevent and address these threats and to counter them, including at the international, European and national level".⁵ In 2015, in an own-initiative report, MEP Laura Ferrara expressed her intention to take up the recommendations of the CRIM committee, to focus on a few aspects that are a priority and to draw up proposals to strengthen measures to combat corruption and organised crime.⁶

These contributions by the European Parliament arrived during a phase in which the current European Commission adopted the European Agenda on Security, which sets out how the EU can bring 'added value' to support the Member States in ensuring security by establishing a 'shared agenda' between the EU and its Member States. The Agenda states that "[t]he result should be an EU area of internal security where individuals are protected in full compliance with fundamental rights".⁷ It has laid down policy priorities related to "serious and organised cross-border crime".⁸ The Agenda states that "[t]here are huge human, social and economic costs - from crimes such as trafficking in human beings, trade in firearms, drug smuggling, and financial, economic and environmental crime".⁹ The European Parliament has also contributed in this regard through the adoption of resolutions on the fight against organised crime and corruption,¹⁰ as well as on the European Security Agenda,¹¹ showing the increasing role of the EU in combating crime.

Still, despite the innovations in the new Treaty framework in EU internal security domains such as OC, and the contributions of the European Parliament towards a more democratically accountable Union policy, there are concurrent aspects and developments that, even after the Lisbon Treaty entering into force, call for closer examination and critical reflection in ascertaining the actual added value of EU action in OC. In which ways can EU policy interventions bring optimal inputs and benefits in light of the current state of play in EU OC policies?

1.1.4 Conceptual caveats and dilemmas

A first issue when addressing the dilemmas in existing and future EU policies in the domain of organised crime relates to concepts and definitions. What are we talking about precisely? One key caveat pertaining to past EU actions in this policy area is the controversy surrounding and lack of common understanding of *what* 'organised crime' actually is or entails. Existing knowledge and experience shows that the evolving EU notion of OC presents a number of methodological concerns, of both a legal and a sociological nature, which do not permit a consistent and comprehensive

⁵ See European Parliament, Resolution of 23 October 2013 on organised crime, corruption and money laundering: Recommendations on action and initiatives to be taken (final report) (2013/2107(INI)); European Parliament, "18 months of CRIM in a nutshell", Special Committee on Organised Crime, Corruption and Money Laundering; European Parliament, *Final Report on organised crime, corruption and money laundering: Recommendations on action and initiatives to be taken (final report)* (2013/2107(INI)), Special Committee on Organised Crime, Corruption and Money Laundering, Rapporteur: Salvatore Iacolino, 26 September 2013.

⁶ See European Parliament, Working Document on organised crime and corruption, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Laura Ferrara, 17 November 2015 (<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARI&reference=PE-571.740&format=PDF&language=EN&secondRef=01>).

⁷ See European Commission, European Agenda on Security, COM(2015) 185 final, Strasbourg, 28.4.2015.

⁸ The European Agenda on Security (ibid., p. 19) envisages the following remit:

Actions: - Extending the work of the EU policy cycle to neighbouring countries; - Reviewing possible measures for non-conviction based confiscation; - Reviewing legislation on firearms with proposals in 2016; - Adopting a post-2016 strategy on human trafficking; - Launching joint actions and cooperation strategies with key third countries to combat smuggling of migrants; - Reviewing existing policy and legislation on environmental crime, for proposals in 2016.

⁹ Ibid.

¹⁰ See Resolution 2015/2510(RSP) of the European Parliament on European measures to fight against organised crime and corruption.

¹¹ See Resolution 2015/2697(RSP) of the European Parliament on the European agenda on security.

supranational harmonisation of this concept across the Union.¹² This notion comprises an overly extensive array of criminal activities and phenomena, which become even more heterogeneous when travelling through the various domestic legal systems and traditions in the EU (Bigo, Sheptycki and Ben Jafel, 2011). Similar conceptual challenges have been identified when it comes to the notion of ‘serious crime’, which has been progressively developed in EU discourses and policy agendas.

Irrespective of these conceptual caveats, the EU has moved forward and expanded its remit in this area through the enactment of European law (e.g. the adoption of EU Framework Decision 2008/841/JHA on the fight against organised crime,¹³ and the above-mentioned Directive 2014/42/EU on the freezing and confiscation of assets). It has set up and expanded the legal mandates of EU JHA agencies, such as Europol (European Law Enforcement Agency) or Eurojust (the EU Judicial Cooperation Unit), which have the mandate to steer and coordinate joint operations of national investigatory teams (Joint Investigation Teams, JITs). It has also established EU-coordinated (formal and informal) networks of national law enforcement practitioners and experts, like the Financial Intelligence Units (FIUs) and Asset Recovery Offices (AROs).

To this we may add the progressive development of the EU policy cycle for organised and serious international crime,¹⁴ which since 2010 has set EU policy priorities and key concepts. It has developed threat and risk assessment methodologies, and ensured financial support for Member State and law enforcement authorities’ cooperation, mainly in the area of information exchange to address ‘priority threats’. Europol and the Standing Committee on Internal Security (COSI)¹⁵ play a particularly central role in the functioning and setting of priorities driving the cycle. This multi-actor setting raises the question of ‘who’ is involved in supranational cooperation fora and transnational law enforcement practices, and under which democratic and judicial accountabilities.

1.1.5 *Research questions and case studies*

Our research examines the following questions: What are the main challenges characterising the current EU legal and policy landscape on OC? How to combine efficient EU policy interventions aimed at addressing criminality while ensuring mutual trust, democratic rule of law and individual fundamental rights? This study focuses on three key areas of European cooperation on OC:

- first, the freezing and confiscation of criminal assets and instrumentalities, with particular attention given to Directive 2014/42/EU and two examples of EU-coordinated networks of law enforcement authorities, the FIUs and AROs;
- second, the investigation of crimes, with a special focus on EU agency coordination of Joint Investigation Teams (JITs) and Directive 2014/41/EU on the European Investigation Order (EIO); and
- third, the EU policy cycle, in particular the use of the Serious and Organised Crime Threat Assessment (SOCTA) developed by Europol and the funding of operational law enforcement projects through EMPACT (European Multidisciplinary Platform against Criminal Threats).

These three case studies have been chosen for the following reasons:

¹² See Scherrer, Mégie & Mitsilegas (2009) and Scherrer, Jeandesboz & Guittet (2011).

¹³ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:300:0042:0045:EN:PDF>.

¹⁴ Council of the European Union, Conclusions on Setting the EU’s Priorities for the Fight against Serious and Organised Crime between 2014-2017, 12095/13, Brussels, 26.07.2013.

¹⁵ See the official website of the Council of the European Union, “Standing Committee on Operational Cooperation on Internal Security (COSI)” (<http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/standing-committee-operational-cooperation-internal-security/>).

- ‘Follow the money trail’ has often been recognised as an efficient way of tackling and addressing criminality. The fight against money laundering has been a priority of the EU since the 1990s, and there have been many improvements in this field at both legal and operational levels, concerning the freezing and confiscation of the assets and instrumentalities of crime. Important issues remain in European cooperation. Section 3 of this study explores them, particularly in relation to the phases of intelligence gathering (FIUs), financial investigation and asset recovery (AROs).
- JITs constitute an innovative instrument in EU cooperation with the aim of improving cross-border operational collaboration among national authorities – in many ways JITs have the potential of developing a *European professional culture of cooperation*. Section 4 assesses the scope of JITs and identifies existing weaknesses in their operation.
- The political direction and steering given to the fight against OC at the EU level by EU JHA agencies is another central component when examining EU policy on crime. The above-mentioned EU policy cycle has been a key ‘experimental governance’ tool for streamlining EU efforts and Member State actions in this field. Section 5 examines the policy cycle from the perspective of its efficiency and identifies new aspects for improvement and optimisation.

1.2 Methodology

To address the above-mentioned objectives, this study has adopted a multidisciplinary methodology. It assesses the EU’s added value in the area of OC from a three-fold disciplinary approach: legal, socio-political and economic. The analysis builds upon existing knowledge in the latest discussions in the domain of OC and EU policies. The analysis takes stock and it benefits from previous EU-level studies and academic debates among legal scholars, political scientists, economists and sociologists. The multidisciplinary analysis has been enabled by the diverse backgrounds of the research group, composed of legal scholars, socio-political scientists and economists with academic and scientific expertise in security policies in the EU. The study takes a practitioners-based approach when assessing the added value of European cooperation in this domain. Special focus is given to national practitioners’ experiences, views and perceptions in the following five EU Member States: France, Romania, Spain, the Netherlands and the UK. The research was conducted between the end of November 2015 and the beginning of February 2016.

1.2.1 Data collection

The methodology comprised desk research and fieldwork (data collection) methods.

Desk research

Desk research was one of the methods of data collection and analysis. This included a systematic, qualitative examination of available literature and secondary sources of information (including web sources). The research group identified the main outstanding issues and major developments as regards EU policy on OC. The research located, reviewed and extracted all the relevant information and data from legal documents, studies, previous evaluations, policy documents, scientific and other relevant publications on the state of the art.¹⁶

Interviews

¹⁶ See the RAND Europe (2015) study on “Paving the Way for Future Policy Initiatives in the Field of Fight against Organised Crime: The effectiveness of specific criminal law measures targeting organised crime”; see also the study by Levi, Innes, Reuter & Gundur (2013), on “The Economic, Financial and Social Impacts of Organised Crime in the EU”.

A total of 29 semi-structured interviews were conducted with relevant stakeholders at the national and EU levels. Among them were interviews with 15 national practitioners involved in OC matters. The majority of the practitioners were involved in AROs, FIUs and JITs. Among them, 2 legal professionals with practical and academic expertise in OC, criminal justice and extradition issues were interviewed to complement the study.

The interviews covered the five countries as follows: France (2 respondents), Romania (5 respondents), Spain (1 respondent), the Netherlands (2 respondents) and the UK (5 respondents). Additionally, 14 interviews were organised with EU-level practitioners representing the main European institutions, agencies and networks working on OC. Among them were officials from the European Commission (Directorate-General for Migration and Home Affairs, DG HOME) (3 respondents), Eurojust (2 respondents), the European Judicial Network (1 respondent) and Europol (8 respondents). Out of 29, 18 interviews were face-to-face, taking place in Brussels, Bucharest, The Hague, London and Paris. The remaining 11 interviews were conducted by telephone.

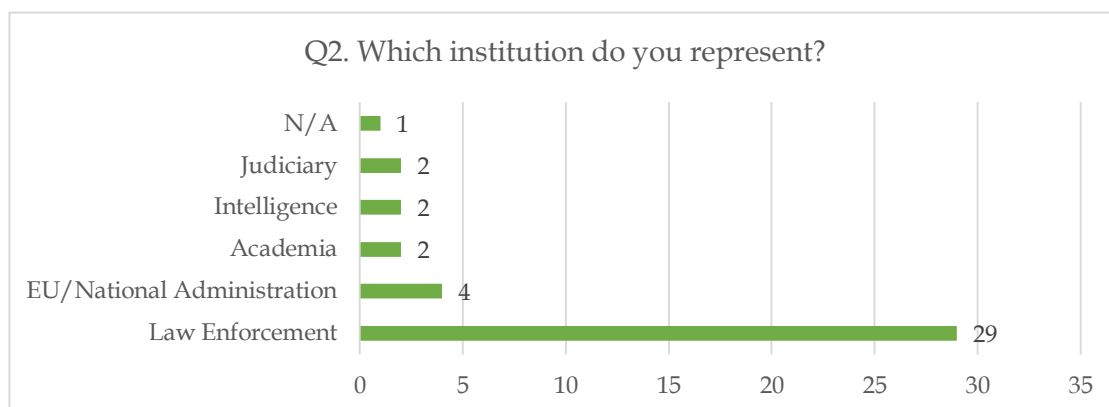
Online survey

The interviews were complemented by an online survey developed by the research group. The survey had multiple-choice questions and some questions that were open or required additional comments and examples.

It was aimed at two groups of respondents: i) the interview respondents who had been asked to fill in the survey prior to the interviews, so as to go deeper into the substance during the actual conversation; and ii) other respondents who are connected with EU cooperation in the area of OC to provide a broader picture of the stakeholders involved.

A total of 40 respondents completed or partially completed the survey. Annex 5 of this study provides a detailed account of the survey results. More than a third of responses came from Romania. The second highest group of responses came from the Netherlands. Of the respondents, 72.5% represented the law enforcement community (see Figure 1).

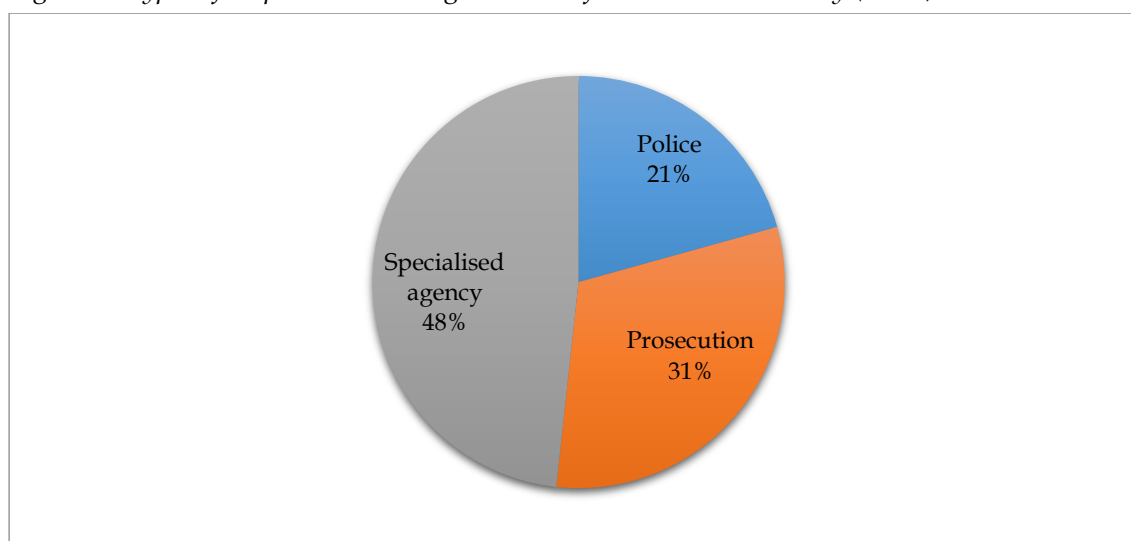
Figure 1. Number of respondents by professional category



Source: Authors.

Among the law enforcement community, the majority of respondents represented specialised Member State agencies with law enforcement powers, prosecutors and finally, police officers (see Figure 2). National practitioners (31 respondents) made up 77.5%. This indicates that the survey largely reflects the views of national law enforcement practitioners. Eurojust, Europol and the European Judicial Network (EJN) kindly agreed to distribute the electronic survey among their national correspondents in the EU Member States under analysis for the purposes of this study.

Figure 2. Types of respondents among the law enforcement community (n=29)



Source: Authors.

1.2.2 Interpretation of data

The study aims at addressing the knowledge gap in how national practitioners experience, perceive and value European cooperation in the area of OC. In this vein, the results from the interviews and the e-survey complemented the desk research and provided concrete examples of EU added value as well as the difficulties encountered in European cooperation in the fight against OC. The results of the fieldwork were critically examined from the perspective of the legal, socio-political and economic challenges characterising EU OC policy.

The results from the interviews and survey respondents call for cautious use and interpretation, owing to the following methodological considerations: i) the limited sample size of 40 respondents to the survey and 29 who were interviewed; and ii) the potential for self-selection bias – a majority of the participants had already taken part in European cooperation, mainly through Eurojust and Europol's national members and networks.

1.2.3 Application of the European added value analysis

The study takes as its basis the European added value methodology, drawing on the well-used approach of an intervention logic provided by the 2015 Better Regulation Guidelines.¹⁷ It moves beyond the state of the art by carrying out a critical examination of the dilemmas related to measuring the EU's intervention in the specific domain of OC and the methodological caveats inherent to any purely 'quantitative account' of the 'costs and benefits' of more or less EU in this area.

The economic assessment in this study takes into account elements of ex ante and ex post analyses. Alongside trying to report the impacts of EU action using quantitative and qualitative means (i.e. the ex post approach), the economic analysis examines existing barriers and gaps that any quantitative assessment may face (see Annex 1, Intervention Logic for Economic Analysis).

1.2.4 Limitations of the economic analysis in the domain of OC

Previous attempts to financially assess the value of OC have raised a number of methodological issues (Halliday, Levi and Reuter, 2014). The main limitations that need to be taken into account when undertaking an assessment in the area of organised crime are i) weak internal logic on what

¹⁷ See European Commission, Better Regulation Guidelines, SWD (2015) 111 final, Strasbourg, 19.5.2015.

the links are between the inputs and outputs; ii) high levels of uncertainty about external factors; iii) a high likelihood of unintended effects; and iv) difficulty in quantifying the non-economic impacts. This study calls for caution about ‘over-monetarisation’ and ‘over-quantification’ methods when thinking ahead to future EU policy options, as well as the role of the European Parliament in EU anti-crime and criminal justice policies.

As Bard (2016) has rightly pointed out, in the fields of security and criminal justice the assumption that one can express the pros and cons of integration by figures or by listing and quantifying the advantages and disadvantages and then draw a conclusion make little sense. Any attempt to count the costs of non-Europe in OC faces the difficulty that there is not a clear baseline or comparable situation in the Member State arenas (see Annex 2 of this study). It seems very unlikely that EU Member States would not cooperate at all because of non-EU intervention in this field. Therefore, some more quantitative analysis could be foreseen, such as costs for more cooperation at the bilateral or more international levels. Most of the differences in cooperation would arise not in terms of direct costs, but in terms of quality or other indirect costs (Halliday, Levi and Reuter, 2014).

Therefore, this study has employed a multidisciplinary approach using socio-political and legal methods in order to shed light on the caveats and limitations inherent to any economic quantification of the costs and benefits of non-Europe in OC policies. The assessment identifies outstanding challenges that emerge in any attempt at quantifying the costs and benefits of the EU in OC. There are a number of issues entailed in any added value assessment of EU policies on OC. These relate to dependency on the points of departure, lack of internal logic and uncertainty due to external factors.

- The first issue is the **point of departure**. ‘Whose’ costs and benefits would be considered? Upon whom does the cost of non-Europe fall? From whose perspective can added value be measured? How to take account of all the actors involved and how much each of them contributes or pays? From whose perspective should this value be determined: law enforcement authorities, independent/impartial judges, administrative authorities, etc.? The costs and benefits of non-EU in OC policies heavily depends on a clear and succinct answer to all these questions.
- Figures showing rising or decreasing numbers of investigations, prosecutions, convictions or the number of assets frozen or confiscated tell us little about **the actual drivers or triggers behind them**.¹⁸
- Any European cooperation on AFSJ-related policies and therefore all of it related to OC must fully comply with the EU Charter of Fundamental Rights and be based on a high degree of ‘mutual trust’ that EU Member States ensure EU constitutional values (Art. 2 of the Treaty on European Union, TEU) in their domestic legal and institutional arenas. How then to determine the ‘added value’ of OC policies without taking into account their effects on civil liberties, rule of law and fundamental rights?
- How to economically measure the costs and benefits of EU OC policy when looking at the profound **ethical implications or social effects** these policies have on the rights and liberties

¹⁸ As Bard (2016) rightly argues,

[r]ising figures may be explained by multiple factors including the growing tendency of criminality, the strengthening of criminal policy, the lowering of the age of criminal culpability. The cause of decreasing figures might lie in decriminalisation of certain types of human behaviour, or their classification as petty or non-recordable offences instead of crimes. The same can be said for the number of perpetrators registered: the cause of decreasing numbers may be lesser crimes; or the willingness of parties to turn to restorative justice methods, VOM, or other forms of out-of-court dispute settlement; an emphasis on the principle of opportunity instead of the principle of legality; but even the defect or failure of investigation might be the reason behind decreasing numbers. And vice versa.

of individuals as enshrined in the EU Charter of Fundamental Rights, and considerations of socio-economic inclusion?

- There is also the matter of **unintended consequences**. If we focus on the economic consequences of criminal investigations, the actual number of cases and prosecutions may tell us little about the degree of compliance with the rule of law and fundamental rights in the fight against OC. There are other costs that EU citizens and residents bear, especially those suspected, accused or convicted of committing crimes.
- There are **high levels of uncertainty** related to the impact or external effects of OC policies, particularly those solely focused on a law enforcement or policing approach to addressing criminality. These relate, for example, to questions about the improvement of socio-economic situations and contexts.

The question of ‘from whose perspective’ the added value is examined is of particular relevance. This study shows that the answers will vary depending on the different departure points among practitioners and depending on the professional area they represent – judges, prosecutors or law enforcement authorities. Our assessment reveals that law enforcement actors tend to value European cooperation more when the latter ensures faster, quicker and more information sharing-based models of cooperation. These modes of OC policies, however, raise fundamental questions when it comes to judicial scrutiny, compliance with the legal traditions and constitutional safeguards of the national jurisdictions involved and respect of the rights of defence, fair trial, presumption of innocence and privacy.

The ‘added value’ of EU cooperation will have a different reading when impartial judicial authorities/courts or defence lawyers are asked the same question. Whereas law enforcement is institutionalised and well represented in various EU arenas, impartial judges and defence lawyers are not. Therefore, various impact assessments and consultations become a circular argument with law enforcement practitioners. This study takes these considerations into account and explores the limitations in assessing European added value in policies designed to tackle organised crime.

2 The EU's Approach on Organised Crime

Key findings

- OC has continually been prioritised among EU concerns and security agendas. The concept of OC remains contested and is difficult to ascertain from a legal and sociological point of view. Similar uncertainty surrounds the concept of 'serious crime'.
- The Framework Decision 2008/841/JHA on the fight against organised crime still allows OC to be treated very differently across Member State legal systems. The national implementation of this Framework Decision reveals profound limitations and areas for improvement. One problem area relates to broad notions of OC and harsher penalties.
- The Lisbon Treaty recognises EU competence to criminalise specific areas of crime that are particularly serious and which may present a cross-border component or a special need to combat them on a common basis. This has led to an overstretch of EU criminal law competence beyond transnational or cross-border criminalities.
- EU JHA agencies have played a key role in the proliferation of 'operational and flexible' concepts of crime, which have expanded from OC towards 'serious crimes' and other broad notions of criminality covering phenomena with no organizational or seriousness factor, which relate to social and poverty issues. It has marginalized other sorts of crimes like environmental crimes, corruption and white-collar crimes.
- Europol's threat and risks assessments on OC still present methodological limitations. A uniform and scientifically accurate data collection and analysis remains challenging.
- OC is an area where law enforcement practitioners perspectives and intelligence led policing adopting a preventing and threat assessment logic have prevailed. Criminal justice and other preventive approaches to criminality have been less present.

The domain of criminality in the EU has received much academic attention during the last 30 years. It has also been a key priority in EU JHA policy. EU internal security constitutes one of the most dynamic domains of EU policy-making in the AFSJ. Irrespective of the constraints and limitations as regards the legal competences for the EU to intervene in this domain until the entry into force of the Lisbon Treaty at the end of 2009, the EU has adopted a plethora of legislative measures and policy initiatives aimed at countering organised crime. This has come alongside the emergence of an increasing number of EU JHA agencies dedicated to security and justice (section 2.1).

The evolution of EU policies on OC, however, raises a number of issues. One of the most far-reaching in relation to EU public policy responses is the persistent difficulty of finding shared definitions of 'what' is the actual material scope for Union action. This section illustrates the dilemma of finding and setting a common understanding of OC characteristics, scope and scale across EU Member States (section 2.2). The concept of OC remains a contested one, sociologically and legally. There are also interpretative discrepancies in the current knowledge surrounding OC (section 2.3), which often constitute a significant challenge for robust, knowledge-based policies in the EU (section 2.4). The latter aspect requires particular attention, as various policy paths have been developed to tackle OC in the last two decades at the EU level that often escape proper levels of scrutiny, accountability and transparency (section 2.5).

2.1 The genesis of EU policy on OC

The genesis of European cooperation in criminal justice and police matters is now well documented and studied (Anderson et al., 1995; Bigo 1996). Intergovernmental cooperation against crime at the EU level can be traced back to the TREVI group. Set up in 1976 by the then 12 members of the European Community, the group's work was based on cooperation that excluded the main Community institutions – the European Commission and the European Parliament (Bunyan, 1993). The TREVI group gradually reorganised its role and remit, and at the beginning of the 1990s, the work of TREVI officials was redistributed across ad hoc groups: one on Europol, one on OC and one on terrorism. These changes occurred alongside those induced by intergovernmental relations under the Schengen Agreement.

If OC is not directly mentioned in the 1992 Maastricht Treaty, the Treaty nonetheless introduces significant changes in JHA matters. The creation of the third pillar indeed had lasting consequences for the EU fight against OC (Carrapiço, 2010). In 1997, the EU adopted an action plan against organised crime. To fulfil recommendation 21 of the action plan, the European Judicial Network in criminal matters was created. It consisted of a network of national contact points for the facilitation of judicial cooperation in criminal matters. In December 2008, a new legal basis entered into force (the 'EJN Decision'), which reinforced the legal status of the EJN.

OC has remained a top priority of the EU ever since the middle of the 1990s, as shown in the Tampere Programme (that launched the first multi-annual strategic objectives of the EU in the field of JHA) and the subsequent multi-annual programmes on JHA, such as the 2004 Hague Programme, the 2009 Stockholm Programme and the recently adopted 2015 EU Agenda on Security. In 2008, the Framework Decision 2008/841/JHA on the fight against organised crime provided a sophisticated framework on the criminalisation of participation in a criminal organisation (Mitsilegas, 2011).

Law enforcement cooperation was meanwhile strengthened by the creation of three EU agencies: Europol, Eurojust and CEPOL.¹⁹ Europol was set up in 1993 (in the form of the Europol Drugs Unit) and established its headquarters in The Hague. The Convention establishing Europol under Art. K3 of the Maastricht Treaty was agreed in 1995 and came into force on 1 October 1998. In 2009, the Council adopted the Europol Decision, which transformed Europol into an EU agency – thus aligning it with other bodies and agencies in the JHA pillar of the EU.

Eurojust, also based in The Hague, was set up in 2002 in order to improve judicial cooperation across the EU. In July 2008, the Council approved the new Council Decision (2009/426/JHA) on the strengthening of Eurojust,²⁰ which was ratified in December 2008 and published on 4 June 2009. The purpose of the new Decision was to enhance the operational capabilities of Eurojust, increase the exchange of information among the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and strengthen and establish relationships with partners and third countries. Chapter 4, Arts. 85 and 86 of the Lisbon Treaty furthermore address Eurojust's mission: "to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States" (Art. 85). Art. 86 states that "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust".

¹⁹ For a visualisation of EU agencies, bodies and services in charge of internal security, see Figure 5 in Scherrer et al. (2011) (http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462423/IPOL-LIBE_ET%282011%29462423_EN.pdf).

²⁰ See Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA, OJ L 138/14, 4.6.2009.

As an addition to these cooperation bodies, the EU developed law enforcement training capabilities in the form of CEPOL, set up in 2005. CEPOL's headquarters have been located in Budapest since 1 October 2014.

In 2009, with the adoption of the Lisbon Treaty, the fight against OC became a shared legal competence of the EU and Member States (Fijnaut, 2014a). The subsequent developments in EU internal security led to significant changes in the EU's role in combating OC, including a notable increase in the European Parliament's say on the matter (Scherrer, Jeandesboz and Guittet, 2011; Carrera, Hernanz and Parkin, 2013). Whereas until the Lisbon Treaty, the European Parliament was merely consulted, since 2009 it has played a very active role in the development of the EU's agenda on 'the fight against OC' as a 'security actor'.

In 2011, the European Parliament adopted a resolution that called for a revision of the 2008/841/JHA Framework Decision,²¹ deemed inefficient and of "extremely limited impact" on the legislative systems of the Member States. Most importantly, in 2012 the Parliament set up a special committee to investigate the extent of cross-border organised crime in the EU, its social and economic impacts, as well as to identify legislative measures to address this issue. The work of what has been referred to as the CRIM committee resulted in a report that was adopted by the Parliament in October 2013.²² As already mentioned, in 2015, in an own-initiative report²³ MEP Laura Ferrara expressed her intention to take up the recommendations of the CRIM committee. The MEP intends to focus on a few priority aspects and to draw up proposals to strengthen measures to combat corruption and organised crime.

This brief genealogy suggests that OC has been a continual issue of EU concern and security-related agendas. However, despite many achievements and the setting-up of a very dynamic field of criminal justice and police cooperation, OC remains a contested concept that is difficult to ascertain from both a legal and a sociological point of view.

2.2 Organised crime: Difficulties in definition and scope

The EU has faced persistent conceptual challenges when it comes to framing the material scope of policy intervention (the 'what' question). Despite the above-mentioned old EU third pillar Framework Decision 2008/841/JHA, OC is still treated rather differently by the various legal systems across the EU Member States (Mitsilegas, 2001; Di Nicola et al., 2015).

The conceptual confusion around the notion of OC continues after the legal innovations brought by the entry into force of the Lisbon Treaty at the end of 2009 over EU criminal justice and police cooperation. Art. 83 of the Treaty on the Functioning of the European Union (TFEU) constitutes the main legal basis for EU action in this domain. Its first paragraph stipulates that the Union has been recognised as having shared legal competence to establish, by means of directives, minimum rules concerning the definition of criminal offences and sanctions in the areas of "a particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis" (Art. 83).

Art. 83 TFEU then highlights the specific areas of crime ('Eurocrimes'), which broadly include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of

²¹ See the European Parliament Resolution 25 October 2011 on organised crime in the European Union (2010/2309(INI)) (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0459+0+DOC+XML+V0//EN>).

²² See the report of 26 September 2013 at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0307+0+DOC+XML+V0//EN>.

²³ See European Parliament, Working Document on organised crime and corruption (2015), op. cit.

payment, computer crime and organised crime. OC is framed as only one of these forms of crimes. The same provision also foresees that this list may be expanded with other areas of crime “on the basis of the developments in crime”. Moreover, Art. 83.2 TFEU grants the EU the competence to approximate national criminal laws and regulations if such approximation *proves essential* to ensuring the effective implementation of a Union policy in an area that has been subject to harmonisation measures.

The approach prevailing from the Lisbon Treaty is one recognising EU legal competence to criminalise specified areas of criminality that are deemed “particularly serious” and which may present a “cross-border dimension” or raise “a special need to combat them on a common basis”. Therefore, EU action in this domain is not limited to *transnational or cross-border criminality*. Art. 83 TFEU is indeed very broad in nature. It needs to be interpreted as conferring on the Union competence to define criminal offences and adopt criminal sanctions in areas of crime that have a cross-border dimension. These may not involve cross-border or transnational criminality, such as in cases like terrorism and corruption.

The broad material scope of this Treaty provision comes from the focus on “areas of crime” instead of specific criminal offences. As Mitsilegas (2001) has argued, the use of the OC concept as one of the ‘EU areas of crime’ may lead to overstressing EU criminal law competence. It can be used as a legal basis for harmonisation of a wide range of specific criminal offences and sanctions linked to the activities of a ‘criminal organisation’, as well as other unrelated phenomena. The looseness characterising the scope of action for EU intervention is an obstacle to a proper assessment of when and if ‘more EU’ in this policy domain brings added value, and in turn, its compatibility with the general principles of subsidiarity and proportionality.

Art. 83 TFEU is not the only possible legal basis for EU action in this domain. Other Treaty provisions for the development of substantial criminal law include Art. 325 TFEU. This article deals with criminal provisions in a specific area of crime, i.e. the fight against fraud in relation to the Union’s financial interests. To this we need to add Art. 86 TFEU, which foresees the establishment of a European Public Prosecutor Office (EPPO). While the primary focus of the EPPO’s work is meant to be offences against the Union’s financial interests, Art. 86.4 TFEU foresees the possibility to extend its powers to include “serious crime having a cross-border dimension”. The question therefore arises as to whether legal measures defining criminal offences and imposing criminal sanctions for the purposes of the EPPO would be adopted on the basis of Art. 83 or rather Arts. 86(2) and/or 86(4) TFEU. In any case, these measures would be limited to the operability of the EPPO and would not exclude further (parallel) EU harmonisation in these areas.²⁴

OC definitions tend to be broad, ambiguous, flexible and difficult to capture. The example of Framework Decision 2008/841/JHA on the fight against crime and the disparate ways in which EU Member States have implemented its provisions in their domestic legal regimes, is a case in point.²⁵ It demonstrates the still open conceptual dilemmas inherent to EU policies on crime, and the inherent caveats of any further attempt to bring conceptual consistency to this field.

According to Art. 1 of the Framework Decision, a

‘criminal organisation’ means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.

“Structured association”, in turn, means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership or a developed structure. The predominating approach under the

²⁴ As Mitsilegas (2001) has argued, this would lead to a “risk of proliferation and fragmentation of the criminal law on fraud being visible”. He continues by saying that “Article 86(4) TFEU on the other hand – which refers to the inclusion of further areas of crime – should be read as mandating not a criminalisation process, but merely the listing of offences already defined elsewhere” (p. 120).

²⁵ See Council Framework Decision 2008/841/JHA, OJ L 300, 11.11.2008, p. 42.

regime enshrined in the Framework Decision is one of criminalising participation in a criminal organisation. Still, and indeed as underlined by Paoli (2014a), “[t]he definition provided by the 2008 Framework Decision is very broad. ...This definition means that any group from the Sicilian Cosa Nostra to a burglars’ clique, from Al Qaeda to a youth gang engaging in assaults, can be considered a form of organized crime.”

The OC definitions provided in Framework Decision 2008/841/JHA have been criticised by academics. They have underlined its vague terms, which may lead to ‘overcriminalisation’ (Mitsilegas, 2011), as well as confusion in contexts of legal cooperation and mutual assistance (Van Dijck, 2007). Mitsilegas (2014) has concluded that “defining and criminalising organised crime is a legally complex task, as it is difficult to translate into a legal norm providing a sufficient degree of legal certainty and precision the multifarious activities of organised criminals”.

Moreover, key problem areas related to ‘definitions’ cannot be properly ascertained through a simple ‘legal check’ of transposition in national law. Further diversities in conceptual understandings of OC are expected to flourish when analysing the definition of OC by courts and by the use of the concept in terms of prosecutions and convictions.

The challenges characterising a common definition of OC also relate, for instance, to open issues on the definition of what is a ‘criminal organisation’, such as the actual degree of ‘organisation’ or ‘association’ required, the structure and exact number of persons involved, the actual level of knowledge or intention (in order to determine ‘conspiracy’), and the actual degree of participation.

These differences emerged clearly in the responses to the survey backing up our research (see Annex 5). The survey participants among national law enforcement practitioners considered it easier to define and estimate the cross-border cases where the EU has brought ‘added value’, than in OC cases with a cross-border element. This was corroborated by interviews conducted for the purposes of this study, which also revealed that there is tension and a lack of common understanding among the national practitioners as to *what* are the ‘organised crime’ cases. Some practitioners, especially at the EU level, used it as a separate type of crime apart from ‘Eurocrimes’, while others used it interchangeably to define such crimes as drug trafficking, money laundering and cybercrime.

The national transposition of the Framework Decision has illustrated several instances where Member States have introduced new domestic legislation targeting activities that may not be sufficiently ‘serious’ or lack a cross-border nature, and show rather diverse approaches in the design of various definitional elements and offences linked to a ‘criminal organisation’ (Di Nicola et al., 2015). What is ‘organised’ in a particular national, regional or local setting, may not be considered so in others. It is therefore by and large unfeasible to aim at a common or harmonised concept and understanding at the EU level.

This patchy legal scenario was already predicted by the European Commission in 2006, which expressed serious concerns about the final output resulting from the negotiations within the Council on the Framework Decision. The Commission stated that the adopted text failed to achieve the objective of enabling:

the minimum degree of approximation of acts of directing and participating in a criminal organization on the basis of a single concept of such an organization... Furthermore, the Framework Decision enables Member States not to introduce the concept of criminal organisation but to continue to apply existing national criminal law by having recourse to general rules on participation in and preparation of specific offences. The Commission is therefore obliged to note that the Framework Decision does not achieve the objective of approximation of legislation on the fight against organised crime.²⁶

²⁶ See the annex of the adopted Framework Decision, Council of the European Union, Proposal for a Council Framework Decision on the fight against organised crime, Council Document 9067/06, Brussels, 10 May 2006.

That notwithstanding, it can be argued that new EU legal acts (directives) adopted under Art. 83 TFEU and which establish 'minimum rules' concerning the definition of criminal offences and sanctions in Eurocrime areas now place clearer barriers for EU Member States to 'over-criminalise' or adopt more extensive/harsher substantive, criminal law penalties than those outlined in EU legislation (Nilsson, 2011; Mitsilegas, 2014). Directive 2014/42/EU on the freezing and confiscation of assets constitutes a case in point.

As already acknowledged by the European Parliament a decade ago, OC is "a complex phenomenon, one that is difficult to distinguish from 'organised gangs' and 'mafias.' 'Organised gangs' form the embryo of organised crime while 'mafias' comprise the most extreme form."²⁷ Academic experts in the field of OC have convincingly argued on that matter that the existence of large, stable, organised criminal organisations operating in various EU Member States remains limited in reality and a rare thing, and in general, there is no common agreement on material remit and scope of OC (Paoli and Vander Beken, 2014).

Furthermore, as reminded by Varese (2011) in his analysis of the mobility of organised crime groups (including mafia-style groups), "from the few academic studies that mention the phenomenon, we know that mafias are rather stationary". Moreover, the 'network perspective' of OC that has prevailed over the last two decades remains at a high level of generality, "subsuming almost any form of co-offending, ranging from car thieves to structured groups that aspire to control territories and markets" (Varese, 2010).

The lack of legal certainty resulting from the current EU policy landscape on OC is exacerbated by the fact that at a strategic EU policy level (the EU policy cycle and operational concepts pursued by EU JHA agencies like Europol), the ambiguities in the use or proliferation of non-Treaty based or 'policy' concepts of OC or OC-related operational definitions are blurring even further the material scope of EU action. They undermine a robust knowledge-based approach at the policy level enabling a proper assessment of non-EU in this domain (this issue is developed further in the following section).

The difficulty in normatively grasping the phenomenon of OC in the EU is illustrated in Europol's own assessment of it. Such an assessment is intrinsically linked to the remits of its mandate and the work of the Agency. As described by Van Dijck (2007), Europol used in its first OCTA (Organised Crime Threat Assessment) reports the so-called '4+7 criteria list approach'. Criminal cooperation structures were considered to be (involved in) organised crime if they complied with four main criteria:

- 1) collaboration of three or more people;
- 2) for a prolonged or indefinite period of time;
- 3) suspected or convicted of committing serious criminal offences; and
- 4) with the objective of pursuing profit and/or power.

In addition, they had to comply with at least two of the remaining seven criteria:

- 1) having a specific task or role for each participant;
- 2) using some form of internal discipline and control;
- 3) using violence or other means suitable for intimidation;
- 4) exerting influence on politics, the media, public administration, law enforcement, the administration of justice or the economy by corruption or any other means;
- 5) using commercial or business-like structures;
- 6) engaged in money laundering; and

²⁷ See the official website of the European Parliament, Committee on Citizen's Freedoms and Rights, Justice and Home Affairs (LIBE Committee), "Fight against Organised Crime" (http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/291_en.htm#1).

7) operating on an international level.

However, “Europol was the first to admit that the annual reports are construed according to very diverging methodologies and interpretations of the criteria list” (Van Dijck, 2007). OCTA has since been replaced by SOCTA (the EU Serious and Organised Crime Threat Assessment), which is still based on law enforcement information,²⁸ and a new methodology was designed to overcome the above-mentioned difficulties (this aspect is developed in the following subsection). The SOCTA illustrates how the concept of OC has been progressively replaced by other areas of crime that are framed as ‘serious’. In 2015, Europol stated that “the organised crime landscape in Europe will be increasingly dominated by loose, undefined and flexible networks made up of individual criminal entrepreneurs. Criminals work on a freelance basis and are no longer part of a bigger network or group.”²⁹

This claim has been supported by the main findings of the Organised Crime Portfolio project, which found that if “large and structured groups may be still important in those criminal activities entailing a high level of organisation, smaller groups and free-lance criminals have become central” (Savona and Michele, 2015).

These various approaches to OC, and their interpretative divergences (between mafia-style groups, ‘loose, organised criminal groups’ and ‘criminal freelancers’) were also found in the approach taken by the European Parliament’s CRIM committee (2012–14). Yet the CRIM committee has been strongly criticised for having presumed the existence of mafia-style groups operating in comparable ways across the EU (Fijnaut, 2013).³⁰

This lack of a common understanding of OC goes hand in hand with a significant challenge to grasping *the scale* of OC in the EU. If a consensus is to be found here, it is on the difficulties in providing reliable statistics on organised criminal activities (Levi et al., 2013). Among the most recent work in that field, the Organised Crime Portfolio project tried to analyse the economy of organised criminal groups (OCGs), and has produced one of the first measurements at the European level of the revenues from illicit markets (Savona and Michele, 2015). The report announced that the main illicit markets in the EU generate around €110 billion each year (this figure corresponds to approximately 1% of EU GDP). The study nonetheless recognised that there is a “lack of data and information that would enable comprehensive analysis of the phenomenon”: “Organised crime groups do not publish financial statements, and it is necessary to rely on indirect proxies for their businesses.” The authors are thus cautious and warn that “the available studies in this field furnish

²⁸ According to the methodology included in Annex 1 of the 2013 SOCTA report on data sources, “[t]he SOCTA is based on data from law enforcement agencies and open sources. Law enforcement data includes data available within Europol, data obtained from MS via questionnaires, and data obtained from third organisations and countries” (p. 42) (<https://www.europol.europa.eu/content/eu-serious-and-organised-crime-threat-assessment-socta>).

²⁹ See Europol, *Exploring Tomorrow’s Organised Crime*, The Hague, 2015 (<https://www.europol.europa.eu/sites/default/files/edi/EuropolReportDigitalCove.html>).

³⁰ In an interview given in 2013, Fijnaut offered the following statement about the report produced by the CRIM Committee:

It consisted of a chaotic pile of very heterogeneous documents, a number of official statements and a larger number of power point presentations. The twenty page “report” that resulted from these efforts was not a balanced and grounded summary of thoughtful analysis of the realities of organized crime, corruption and money laundering and of the efforts to contain the related problems in the European Union and (a selected number of its) Member States. On the contrary, there is no report in the usual sense of the word: the “report” the European Parliament has accepted last October, is only a long litany of all sorts of references to conventions, pieces of legislation and policy documents as well as a large number of disconnected, superficial and quite often senseless statements concerning the nature, extent, and evolution of organized crime, corruption and money laundering and the measures which should be taken to contain them. It is therefore no wonder that the (qualified) European press has scarcely paid any serious attention to this complete failure of the European Parliament. And it is unlikely that Member State[s] will take this “report” seriously into account in their organized crime control effort.

See <https://www.law.kuleuven.be/linc/nieuws/topic/8-augustus-2014-interview-cyrille-fijnaut>.

only a partial understanding of the dynamics of the economics of organised crime” (Savona and Michele, 2015, p. 31).

The feasibility of collecting crime statistics at the EU level (and common EU-wide statistics) has been a long-lasting cause of debate. The European Parliament even rejected the Commission’s proposal on the matter in 2011, on the basis of an unsound proposed methodology and the lack of budget clarity.³¹ These methodological difficulties stem also from the conceptual diversities inherent to the various phenomena often artificially related or put under the umbrella of the concept of OC in the EU.

2.3 From ‘organised crime’ to ‘serious crime’: A target in constant transition?

Some have argued that given the difficulties of finding an OC working definition that would apply across the EU Member States, the focus should instead be placed on how the EU can improve its capacities against serious crime in general (Allum and Gilmour, 2011). ‘Serious crime’ refers to criminal activities deemed serious, i.e. worth reporting, while not meeting the OCG definition of the 2008 Framework Decision through criminal association. De facto it also concerns lone actor or individual actions. That notwithstanding, using the concept of ‘serious crime’ raises similar conceptual and national diversity dilemmas and cannot be seen as a panacea. A key legal challenge inherent to any EU attempt to further harmonise the concept of OC or serious crime (or both) would be a potential collusion against the respect for the different legal systems and traditions of EU Member States, enshrined in Art. 67.1 TFEU.

This progressive co-existence in policy discourses of ‘serious and organised crime’ (which is noticeable since the second half of the 2000s) can be explained by several factors. Mitsilegas (2011) underlines the evolution of the main focus in the development of Europol and Eurojust in the post-Lisbon era, as Art. 85(1) TFEU defines the mandate of both bodies by reference to ‘serious crime’. The post-Lisbon evolution of the mandate of Europol is key here and was formalised further in the 2009 Europol Council Decision (2009/371/JHA):³² by dropping the ‘organised crime’ requirement and replacing it with ‘serious crime’, Europol gained the competence for serious crime (which can be organised or not) (Van Daele and Van der Beken, 2011).

The ‘expansionist’ approach in Europol’s mandate, and the move from organised crime towards serious crime is reflected in the latest deal between the European Parliament and Council (of November 2015) on the new Europol mandate.³³ After Regulation (EU) 2016/95 was agreed, the new Art. 3 states that Europol’s task is to support and strengthen Member States’ actions in “preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime

³¹ See <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0365&language=EN>.

³² See Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121/37, 15.9.2009.

³³ See European Parliament Press Release, “Europol: Deal on new powers to step up EU police cooperation and fight terrorism”, 30 November 2015.

which affect a common interest covered by a Union policy”,³⁴ and it shall “also cover related criminal offences”.³⁵

As underlined by Dorn (2009), focusing on the seriousness of offences instead of on the level of organisation of their perpetrators has far-reaching consequences for the assessment of OC in Europe. More specifically, this “changes the sphere of police cooperation through Europol, from ‘organised crime’ (how criminality is constituted) to ‘serious crime’ (who and how it harms).”

The co-existence of the two EU concepts (‘organised crime’ and ‘serious crime’) in the last decade, far from clarifying the understandings of criminalities in the EU, perpetuates a long-lasting conceptual confusion between ‘what’ is or should be the scope of public policy intervention by the EU in these domains (Paoli and Van der Beken, 2014). Indeed, as stated in the 2012 SOCTA methodology prepared by Europol, “the SOCTA looks into all forms of organised crime, covering both organised crime groups and networks in all possible varieties and may include individually operating criminals”.³⁶

These conceptual difficulties have important consequences from a policy and accountability perspective. As Fijnaut (2014a) has rightly emphasised, the development of EU policy on OC and the innovations brought by the Lisbon Treaty were mainly driven by the fact that “policymaking institutions of the EU have consistently identified organized crime as a genuine threat to the union, supported by Europol’s analysis”. He recommends that “it would be advisable to subject these analyses to critical and continuous assessment, [given] their impact on policy making”.

A critical and continuous assessment of criminality in the EU appears to be an efficient way forward when problematising the added value of ‘more EU’ in the domain of OC in a way that would be able to capture the highly dynamic, context-specific and nationally-embedded particularities of criminality and ‘criminal organisations’ across the Union.

A number of evaluation mechanisms were developed to monitor Member States in the EU legislation on organised crime and terrorism under the old EU third-pillar framework (Weyembergh and de Biolley, 2006).³⁷ These were based on a peer-review model of a purely intergovernmental nature, neither independent nor impartial in their assessment and without any involvement of the European Parliament. The Treaty of Lisbon introduced a new provision, Art. 70 TFEU, which if used could

³⁴ See Regulation (EU) 2016/95 of 20 January 2016 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters, OJ L 26, 2.2.2016. Annex 1 of this Regulation provides a detailed list of ‘forms of crime’, which include

terrorism, - organised crime, - unlawful drug trafficking, - illegal money-laundering activities, - crime connected with nuclear and radioactive substances, - illegal immigrant smuggling, - trafficking in human beings, - motor vehicle crime, - murder, grievous bodily injury, - illicit trade in human organs and tissue, - kidnapping, illegal restraint and hostage taking, - racism and xenophobia, - robbery and aggravated theft, - illicit trafficking in cultural goods, including antiquities and works of art, - swindling and fraud; - crime against the financial interests of the Union, - insider dealing and financial market manipulation, - racketeering and extortion, - counterfeiting and product piracy, - forgery of administrative documents and trafficking therein, - forgery of money and means of payment, - computer crime, - corruption, - illicit trafficking in arms, ammunition and explosives, - illicit trafficking in endangered animal species, - illicit trafficking in endangered plant species and varieties, - environmental crime, including ship source pollution, - illicit trafficking in hormonal substances and other growth promoters, - sexual abuse and sexual exploitation of women, and children, including child abuse material and solicitation of children for sexual purposes, - genocide, crimes against humanity and war crimes.

³⁵ See Art. 3 of the new Europol mandate.

³⁶ See Council of the European Union, Serious and Organised Crime Threat Assessment (SOCTA) - Methodology, 12159/12, Brussels, 4 July 2012.

³⁷ See the Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344, 15.12.1997, p. 7. See also the evaluation of Member States’ legal systems and their implementation in the fight against terrorism in Decision 2002/996/JHA, OJ L 349, 24.12.2002, p. 1. For an assessment of evaluation in practice, see H. Nilsson, “Eight Years of Experiences of Mutual Evaluation within the EU” in Weyembergh and de Biolley (2006), pp. 115-124.

provide for the possibility to address these evaluation gaps and caveats by establishing an objective and impartial evaluation of the implementation of Union policies to facilitate the full application of the EU general principle of mutual recognition, including judicial cooperation in criminal matters. There is a need for regular, permanent monitoring and evaluation of the ways in which these concepts are operationalised and interpreted at various EU levels, as well as the ways in which EU legislative harmonisation is affecting Member States' criminalisation policies.

2.4 Law enforcement-driven perspectives and non-criminal justice approaches

2.5 The challenge of robust, knowledge-based EU policies

Because of the above-mentioned difficulties in accounting for the existence and consequences of OC in Europe, the current threat assessments of OC in Europe, particularly those produced by Europol, need to be considered cautiously. For similar methodological caveats, the over-reliance on EU threat assessment and risk analysis reports in the design of EU policy cycles has been regularly called into question.

OCTA reports, for instance, have been widely criticised by scholars.³⁸ The OCTA methodology has been described as confusing and unclear. A 2011 study emphasised the methodological issues and concluded that in the absence of a detailed methodological note accompanying each OCTA report, it was difficult to assess their robustness. The study furthermore underlined the vagueness of the concepts used in Europol reports, and the near absence of reliable statistics (Scherrer, Jeandesboz and Guittet, 2011).

The 2013 Europol report in the area of OC was renamed *EU Serious and Organised Crime Threat Assessment – SOCTA*, based on a revised methodology. Despite an annex titled “the SOCTA methodology” and a page summarising “academic comments”, no information was given on the methods used to produce the report.³⁹ If another document aimed at the Council provided further indications of the methodological approach chosen for SOCTA, very little is known about how the information was gathered and assessed.⁴⁰ Paoli (2014a) has argued as regards the 2013 SOCTA report that it “merely provides a list of banalities that are partially contradicted by the results of empirical research and sometimes even by common sense. Furthermore, Europol’s analysis makes no distinction between the harms caused by the activities and the harms and costs of the policy interventions carried out to tackle the activities themselves.”

Between 2013 and 2015, Europol revised its SOCTA methodology, which was validated by COSI in December 2015.⁴¹ Europol elaborates on the aim of the SOCTA methodology, which is

to help [define] the key threats and risks of SOC [serious and organised crime] to the EU in a consistent way. The threat of SOC is determined by the activities of the criminal groups in different crime areas. The risk is determined by adding the probability/likelihood of change (decrease – increase) and the effect that SOC could have on the society as a whole.⁴²

Europol thus follows a ‘threat risk model’ (see Figure 3 below).

³⁸ See for instance, Van Duyne and Van der Beken (2009) and Zoutendijk (2010).

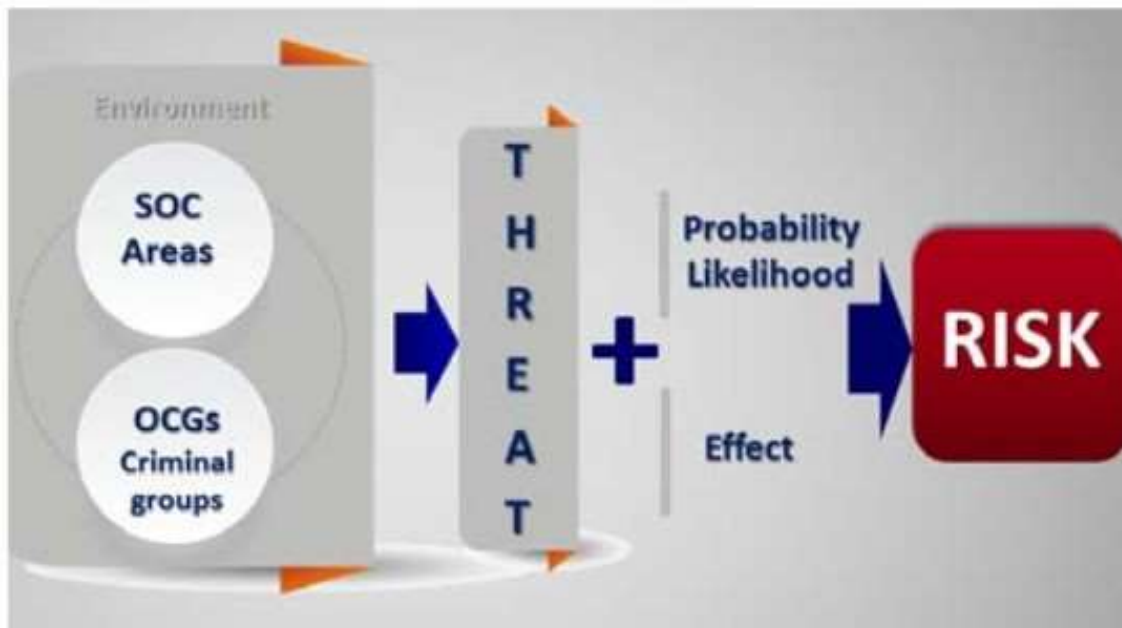
³⁹ See Europol, *EU Serious and Organised Crime Threat Assessment – SOCTA*, The Hague, 2013.

⁴⁰ See Council of the European Union, *Serious and Organised Crime Threat Assessment (SOCTA) – Methodology* (2012), op. cit.

⁴¹ See Council of the European Union, *Serious and Organised Crime Threat Assessment 2017 - Revised methodology* (no. prev. doc. 14056/1/15 REV 1), 14913/15, Brussels, 11 December 2015 (<http://www.statewatch.org/news/2015/dec/eu-council-socta-2017-methodology-14913-15.pdf>).

⁴² Ibid.

Figure 3. Threat risk model



Source: Council of the EU, Serious and Organised Crime Threat Assessment 2017 – Revised methodology (2015), op. cit.

The document explains furthermore that the SOCTA methodology focuses on three key aspects: crime areas (types of crime), organised criminal groups and criminal groups or criminals committing serious crimes, and the environment in which serious organised crime is committed and criminals are acting. The conceptual model of the SOCTA methodology is illustrated in Figure 4.

Figure 4. Conceptual model of the SOCTA methodology



Source: Council of the EU, Serious and Organised Crime Threat Assessment 2017 – Revised methodology (2015), op. cit.

Despite a real effort by Europol to clarify its methodology and the data used, as well as the constitution of an academic Advisory Group, the methodological note underlines important caveats:

Analysis and discussions with contributing partners and during the SOCTA Advisory Group meetings show that a uniform data collection remains challenging. Not all partners contributing to the SOCTA are able to provide the data in a similar structure as requested by the SOCTA methodology. Therefore flexibility remains required during the SOCTA data collection. Additionally, differences in interpretations about serious and organised crime and organised crime groups may have an effect on the overall reporting on organised crime groups in the EU.⁴³

The methodological inaccuracy and the persistence of elastic interpretations of Europol's operational concepts of OC and serious crime are highly problematic. As stressed in the 2015 SOCTA revised methodology, "the link between the SOCTA conclusions and the definition of the crime priorities by the Council is important". As discussed in our case study on the policy cycle, SOCTA reports are key to the development of the cycle priorities. An interim 2015 SOCTA report⁴⁴ was submitted to COSI in March 2015. The next SOCTA report is scheduled for 2017.

The 2015 interim SOCTA report emphasises that criminal groups are increasingly poly-criminal (i.e. involved in more than one crime area), and ever less structured. On the latter aspect, and as discussed above, the report refers to an increasing use of brief collaborations among criminals for a limited period of time. The report lists the following areas of crime as the most significant in the EU:

- drug trafficking and drug production;
- counterfeiting (including medicines, euro bank notes);
- crimes against persons (facilitation of illegal migration, trafficking in human beings);
- organised property crime (burglaries and robberies);
- weapons trafficking;
- environmental crime;
- economic crimes (fraud, money laundering); and
- cybercrime.

Another Europol document, also published in 2015, focused on the same crime areas but distinguished between the "most dynamic criminal markets" (e.g. synthetic drugs and new psychoactive substances (NPS), counterfeit goods, cybercrime and environmental crime), the stable criminal markets (e.g. cannabis, facilitation of illegal immigration, trafficking in human beings, fraud, organised property crime, trafficking in firearms) and (possible) "criminal markets in decline" (counterfeit currency, cocaine and heroin).⁴⁵

If the lists established by Europol give an interesting overview of the criminal activities in the EU, which can help to prioritise operational objectives, the 'organised' element of its perpetrators remains unclear, and is actually clearly dismissed in the latest Europol report,⁴⁶ which focuses rather on "crime as a service business model" and trading in diversified commodities. A crucial issue of concern is how to capture the expansionist conceptual remit and material scope of action of this and other EU JHA agencies, informal networks of national actors and experts under EU rule-of-law remits.

Moreover, Europol's SOCTA list of 'crimes' in the EU does not clarify the extent to which the listed items should be prioritised or not. If the 2015 EU Agenda on Security has prioritised some areas of crime and has put the political emphasis on terrorism, organised crime and cybercrime (EU Security Agenda, 2015), the EU policy cycle and EMPACT projects cover most of (but not all) the areas

⁴³ Ibid.

⁴⁴ See Council of the European Union, Interim SOCTA 2015: An update on Serious and Organised Crime in the EU, 7271/15, Brussels, 16 March 2015 (<http://www.statewatch.org/news/2015/mar/eu-europol-interim-SOCTA-7271-15.pdf>).

⁴⁵ See Europol, *Exploring Tomorrow's Organised Crime*, The Hague, 2015.

⁴⁶ Ibid.

presented in SOCTA. This raises the question of consistency in the different steps taken at the EU level against OC.

Scholars have usefully pointed out that, for instance, the EU has largely focused on some areas of OC, while leaving aside other issues (Scherrer, Jeandesboz and Guittet, 2011). The fight against drug trafficking, money laundering and terrorist financing has led to an impressive set of decisions and regulations. Cybercrime has also become an important priority of the EU, with dedicated Europol threat assessments (iOCTA, Internet Organised Threat Assessment) and a new unit (EC3, the Europol cybercrime centre).⁴⁷ Still, important issues such as corruption, environmental crime and corporate crime, have been given less priority. On corporate crime, Europol itself recognises this as follows:

Traditionally, corporate crime was not pursued by law enforcement authorities as actively as other forms of criminal activity. Some forms of corporate criminality were accepted as a cost of doing business and a minor concern so long as companies provided employment and benefited the overall economy. Organisational or corporate crime was overlooked and under-investigated. However, a series of scandals involving corporate crimes publicised in the press in the early 2000s highlighted the impact and cost of these activities. Criminal activities carried out by corporations are likely to occur at least as frequently as other forms of crime. Targeting organisational crime remains difficult: companies and administrations do not want bad publicity and often these crimes remain hidden from the public and law enforcement. Except where there are whistleblowers, many cases of corporate crime only come to light once a larger group of victims is affected.⁴⁸

The recent focus on corruption and the fight against tax havens at the EU level are fairly new and are welcome steps in that regard. In particular, discussions around the EPPO, which would allow the conduct of EU-led criminal investigations, opened up welcome debates on acquisition/carousel fraud, and misallocated or misemployed EU subsidies. These discussions also raise important questions concerning the robustness of the EU arsenal pertaining to these matters, in particular the role of OLAF (the European Anti-Fraud Office).

The issue of environmental crime has been another under-treated aspect of criminal activities at the EU level, which strongly affects EU citizens (EFFACE project, 2013–16). This issue is currently not included in the EMPACT projects, despite growing concerns and very recent acknowledgement of the issue in Europol threat assessments. Indeed, the 2015 Interim Serious and Organised Crime Threat Assessment included for the first time a section dedicated to environmental crimes, underlining that significant gaps remained concerning the lack of intelligence in this domain.⁴⁹

The report points in particular to illicit trafficking of waste and illegal trade in wildlife, trafficking in hazardous chemicals/fuels, illegal logging and illegal fishing, thus echoing the report by the EnviCrimeNet Intelligence Project on Environmental Crime published in early 2015.⁵⁰ This issue has also been integrated into the priorities of the 2015 EU Security Agenda. The 2015 Europol report on *Exploring Tomorrow's Organised Crime* furthermore refers to potential criminal market opportunities offered by the illicit trade in e-waste, set to increase substantially over the next decade. The European Parliament could follow up on this emerging trend, as developed in the conclusion of this section.

The EU approach in the field of organised crime has thus mixed a wide range of crimes that often have very few similarities in their operating structures (or lack of), their scope or impact on EU citizens and individuals more generally. The 2015 EU Security Agenda is particularly illustrative of this lack of prioritisation. The Agenda states that it “prioritises terrorism, organised crime and

⁴⁷ For more information refer to Europol at <https://www.europol.europa.eu/ec3/ec3-in-action>.

⁴⁸ See Europol, *Exploring Tomorrow's Organised Crime* (2015), op. cit.

⁴⁹ See Council of the European Union, SOCTA Interim Report (2015), op. cit.

⁵⁰ See Environmental Crime Network (EnviCrimeNet) and Europol, *Report on Environmental Crime in Europe*, The Hague, 2015 (<https://www.europol.europa.eu/content/report-environmental-crime-europe>).

cybercrime as interlinked areas with a strong cross-border dimension, where EU action can make a real difference".⁵¹

The Agenda provides no more than a catalogue of various types of crimes (the financing of organised crime, trafficking of firearms, illicit drugs, smuggling of migrants and trafficking in human beings, environmental crimes and corruption), while cybercrime is addressed separately. The current EU threat assessments carried out by Europol and which inform the EU policy cycles in the field of 'serious and organised crime' does not help in providing any clarification on that matter. They rather exacerbate legal uncertainty and the use of assessment methods lacking scientific soundness.

2.5.1 *The prevalence of law enforcement perspectives*

OC is an area in which law enforcement perspectives and 'intelligence-led policing' adopting a preventive logic of fighting criminality have largely dominated over the last two decades. As demonstrated by the above-mentioned EU threat assessments produced by Europol, EU analyses in this field have very much only focused on Europol's views and assessments, i.e. from a policing perspective. Crime prevention perspectives, understood as a multi-disciplinary approach involving criminal law, social policy, education, town planning, taxation, local authorities, etc., have been far less present in EU discourses. This may have been due to the fact that EU Member States had until recently the primary legal competence for crime prevention matters. Since the entry into force of the Lisbon Treaty (Art. 84 TFEU), however, the EU now has the possibility to establish measures to promote and support EU Member States' actions in this field.

This new field of competence has mainly taken the form of promoting best practices across Europe. Since 2001, the European Crime Prevention Network has offered an EU-wide platform for exchanging best practices, research and information on different aspects of local crime prevention. This platform is currently funded up until the summer of 2016. The goals of the Network are to disseminate qualitative knowledge on crime prevention and to support crime prevention activities at the national and local level, as well as to contribute to the policy, strategy and various other aspects of crime prevention at the EU level in respect of the EU's strategic priorities.

Between 2007 and 2013, the EU developed a dedicated fund for crime prevention: the Programme for the Prevention of and Fight against Crime (ISEC) with a budget of €600 million, which funded a wide range of crime prevention projects. Yet, a close analysis of the projects funded by ISEC shows that the projects have mostly concentrated on supporting law enforcement operations and law enforcement training programmes, far less on *multidisciplinary approaches* to OC (involving for instance, the education sector) or on the development of promising practices for the protection and support of witnesses and crime victims.⁵² Afterwards, ISEC was replaced by the Internal Security Fund (ISF) with a budget of €4,648 million for the period 2014–20.⁵³

This lack of serious consideration given to non-policing (crime prevention) approaches raises an important question: To what extent can EU policies in the field of OC be effective without proper crime prevention mechanisms? This aspect is all the more important given that, according to a wide range of researchers, a strictly judicial and police perspective might not provide the best way to address criminality.

⁵¹ See European Commission, European Agenda on Security, COM(2015) 185 final (2015), op. cit.

⁵² See the European Commission's mid-term evaluation of the Framework Programme 'Security and Safeguarding Liberties', COM(2011) 318 final, Brussels, 16.06.2011 (http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/com2011-318_final_16062011_en.pdf).

⁵³ The ISF consists of two instruments, ISF Borders and Visas, and ISF Police, and the crime prevention dimension (that goes beyond police and justice cooperation) is now largely absent. For more information refer to http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police/index_en.htm.

Some insist on the need to focus on alternative conceptions of security that emphasise the underlying conditions that produce crime in the first place (Edwards and Gill, 2003). The prevention and reduction of crime do not exclusively involve intervening in the risk factors before crime happens, but also addressing the social and economic factors that lead to crime, such as working and living conditions, social marginalisation and political frustrations (Beckett and Herbert, 2011; Wacquant, 2007). Many emphasise the possibilities of developing more effective crime reduction strategies through structural social adjustments, which differ from the practical responses of the police.⁵⁴

The shyness of EU policies in the area of crime prevention can be illustrated by the patchy influence of the work by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) on Community drug strategies. Up until recently, the work carried out by EMCDDA has had very little impact on the development of EU security strategies. For several years, the collaboration between EMCDDA and Europol/Eurojust has been mainly driven by a law enforcement approach (Scherrer, Jeandesboz and Guittet, 2011). EMCDDA's work in the field of prevention and the development of evaluation mechanisms to better assess the responses to drugs across the EU and its exploration of alternative options (not necessarily linked to policing) in order to reduce social harms has remained marginal in EU discussions on the matter. It should be noted, however, that for the first time, the EU drugs strategy 2013–20 incorporated the “reduction of the health and social risks and harms caused by drugs” as a policy objective, alongside the two traditional aims of drug policy to reduce the supply and demand.⁵⁵

EMCDDA also notes in its latest report on drugs that, if EU Member States' initial responses to the emergence of new psychoactive substances have been predominantly regulatory in nature and have focused on tackling their supply using legislative tools, more attention is being paid to the development of targeted education and prevention activities, as well as training and awareness-raising activities for professionals. EMCDDA points out in that regard that health and social responses to the challenges posed by new drugs have been piecemeal and slow to emerge, but are now gathering momentum. Despite this progress, the report observes that austerity measures across the EU have led to reductions in public spending in the categories of government activity that encompass the bulk of drug-related initiatives. Analysis carried out by the EMCDDA suggests that overall, bigger cuts were more often registered in the health sector than in other areas, such as public order and safety or social protection.

2.5.2 *Non-criminal justice approaches: An administrative approach at the EU level*

Recently, the EU has integrated non-criminal justice approaches in its tools against OC, such as the ‘administrative approach’ in the fight against OC in the EU. This approach is a combination of administrative instruments to prevent organised crime from infiltrating the public sector, the economy or key parts of the public administration. It has been strongly influenced by the Dutch, Italian and American experiences. Its rationale is to supplement the traditional criminal investigation by the adoption of multifaceted programmes to prevent and to reduce the influence of organised criminals on municipal government and the local economy.

In the city of Amsterdam at the beginning of the 2000s, for instance, authorities focused on better sharing of information (from municipal, law enforcement and tax authorities) in order to refuse or withdraw licenses and permits to certain establishments (such as those operating in the red light district) when they facilitated criminal activities (Huisman and Nelen, 2007). This approach was also taken in the field of real estate property to end undesirable usage of buildings (Ayling, 2014). The Dutch experience involved administrative authorities, as well as private companies, banks, housing associations and NGOs. The administrative approach is presented as reducing crime opportunities,

⁵⁴ See Hughes and Edwards (2002), Crawford (2009), Levi and Maguire (2004) and Maguire (2004).

⁵⁵ See EMCDDA, “The EU drugs strategy 2013–20 and its action plan (2013–16)”, Lisbon, 2015.

by making it more difficult for criminals to obtain public contracts, invest the illicit proceeds in real estate or legitimate businesses or to use legitimate businesses as cover for illegal activities (von Lampe, 2015).

A recent study funded by the DG Home Affairs of the European Commission focused on these approaches to crime and on legal possibilities and practical applications in ten EU Member States (Spapens, Peters and Van Daele, 2015). The report reviewed the following areas of preventive actions *from an administrative perspective*: instruments to screen and monitor persons and legal entities, instruments directed at preventing the disturbance of public order and the information position of the administrative authorities. The report concludes that, if in practice an administrative approach is common to tackle the most serious and organised crime problems at the local, regional and national levels across the EU Member States studied, the use of administrative measures to prevent criminals from infiltrating the legitimate economy is, however, less far developed in most of the countries studied.

The study emphasises that the concept of ‘administrative law’ is very broad and grounded by each state in its national law and practices. Consequently, administrative law is nationally oriented and the same is true for the concept of ‘administrative authority.’ Because of the difference between common law and the European continental legal systems, there is no universally accepted definition of the term ‘administrative law’. The study also reveals very different practices in national policy to prevent crime by administrative means. Notable exceptions are Italy and the Netherlands, which have adopted overarching legislation in that field.

There is indeed not a clear and transparent understanding at EU levels as to what precisely this ‘administrative approach’ is all about. One of the key ideas behind it seems to be improving cooperation between the ‘traditional’ law enforcement actors and ‘administrative authorities’. A Council Document outlining the Activity Report on the EU administrative approach identifies the importance of collaboration of law enforcement authorities with “other administrative authorities, including local authorities, chambers of commerce, private partners, media and civil society, including NGOs and law and other financial authorities”.⁵⁶ An EU handbook “on complementary approaches and actions to prevent and combat organised crime: a collection of good practices examples from Member States” was prepared by the Hungarian Presidency in 2011.⁵⁷

Reference is made to a ‘multidisciplinary approach’ as one of the objectives to be pursued; yet the understanding of ‘multidisciplinarity’ is mainly framed in a way whereby social and welfare services at regional and local governance levels ‘cooperate’ and exchange information with law enforcement in preventing and disrupting OC. When it comes to the role of local government administrative authorities, the EU administrative approach promotes the controversial idea that

[a]dministrative measures are sometimes easier to implement and will take less time than a prosecution, subject to national legislation and practice. This is because a conviction (or warrant) is not necessary to take administrative action. One type of administrative measure that can be of great

⁵⁶ See Council of the European Union, Activity Report on the Administrative Approach to Prevent and Fight Organised Crime, 13498/13, Brussels, 16 September 2013, p. 6.

⁵⁷ See the handbook at <http://data.consilium.europa.eu/doc/document/ST-10899-2011-INIT/en/pdf>. It was prepared in the scope of the COSI Project Group on Organised Crime. It is a document “partially accessible to the public”. The authors of this study requested public access to the document from the Council Registry and received a negative reply on disclosure because it “would therefore undermine the protection of the public interest as regards public security”. The letter from the Council Registry stated that

[t]his document contains details on good practices and instruments that national authorities have developed in the fight against organised crime. It describes key elements of the measures intended to maintain and improve security in a certain number of Member States with a view to exchange experiences and working methods. It constitutes a handbook compiling key elements in order to provide information and guidance to officials in public administrations dealing with the fight against organised crime.

use is the power to close down premises or businesses, for example by refusing or withdrawing a permit.⁵⁸

That notwithstanding, the EU agenda on the administrative approach appears to have been quite influential in EU policy circles. The Commission has facilitated the development and implementation of the approach EU-wide by establishing a network of informal contact points for exchanging ‘best practices’ and “by sponsoring pilot projects on practical issues”.⁵⁹ The first meeting of the Informal Network on the administrative approach to prevent and fight organised crime took place in September 2011 and has since met every six months. The meetings are co-chaired by the Commission and the EU Presidency, and Europol and Eurojust have been actively involved in the meetings.⁶⁰ Europol has offered its infrastructure to exchange administrative information between EU Member States under the Europol Platform for Experts (EPE) at a more operational level. A number of projects have received EU funding to develop the approach in the context of ISEC.⁶¹

There are a number of blind spots characterising this approach, notably concerning issues of accountability and oversight of these administrative measures. EU policy processes and the work of the Informal Network operate largely outside any judicial scrutiny and effective democratic control or independent supervision. This can be of particular concern when addressing specific forms of crime. For instance, in the field of counterterrorism, the development of administrative measures – such as search powers, port and border control powers, deportation orders, control orders and terrorism investigation and prevention measures (TPIMs), prescribing powers, fundraising offences, asset freezing and indirect measures – have raised for instance legitimate concerns in terms of civil liberties, redress and social cohesion (Bigo et al., 2014).

Those types of decisions indeed do not necessarily require a decision or supervision by an independent judge, thus opening up legal challenges from the perspective of the impact of the administrative approach over the rights of defence, fair trial principles and privacy. Moreover, it is far from clear what are the exact standards and methods when identifying and qualifying certain practices or projects as ‘best practices’ across the Union, and the extent to which the methodologies used meet independence, impartiality and sound scientific quality standards are able to capture the specificities of the social phenomena targeted by these policies. EU administrative multi-disciplinary approaches should not lead to an ‘*over-criminalisation*’ or to law enforcement ‘*function creep*’ in the roles played by local/regional authorities, civil society and NGOs in ensuring social welfare, social cohesion and the provision of services.

Both the law enforcement (EU JHA agencies and networks of practitioner-driven) approaches to countering OC, and the more recent focus on an EU administrative approach to OC, give priority to facilitating ‘*mutual trust*’ and cross-Member State cooperation among law enforcement and administrative practitioners. They have not paid a similar degree of attention to better ensuring, regularly monitoring and independently evaluating their effects over the current presumption of *mutual trust that EU Member States actually comply with rule of law and fundamental rights*.

They have so far also failed to ensure and to develop approaches and models that take into consideration the potential effects and implications of this new ‘experimental’ form of supranational cooperation on the rule of law and fundamental human rights of individuals. Both approaches lack

⁵⁸ See Council of the European Union, Activity Report on the Administrative Approach to Prevent and Fight Organised Crime (2013), op. cit., p. 10.

⁵⁹ See the Communication from the Commission to the European Parliament and the Council, “The EU Internal Security Strategy in Action: Five steps towards a more secure Europe”, COM/2010/0673 final, Brussels, 22 November 2010.

⁶⁰ See the Minutes of Third meeting of the Informal Network on the administrative approach to prevent and fight organised crime (summary findings and follow up), Brussels, 21 November 2012.

⁶¹ See European Commission, DG HOME Official website, “The Programme Prevention of and Fight against Crime (ISEC)” (http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime/index_en.htm).

proper EU-level checks and balances when it comes to independent and impartial judicial oversight and democratic accountability of EU-led and supported activities, methodologies and EU-coordinated networks.

3 The Freezing and Confiscation of Criminal Assets

Key findings

- Key issues in the evolution of EU law on the freezing and confiscation of assets relate to the lack of a common playing field on harmonisation across the Union, the full compliance of freezing and confiscation with fundamental rights and EU law guarantees, and the ongoing challenges in mutual recognition of confiscation orders.
- Directive 2014/42/EU has not succeeded in harmonising national systems at a high level and has left EU Member States considerable room for discretion. The main difficulties in implementing the Directive relate to domestic measures on third party confiscation, different national versions of non-conviction confiscation, management of frozen and confiscated property, and their compliance with the set of safeguards outlined in Art. 8 and the EU Charter of Fundamental Rights.
- Framework Decision 2006/783/JHA on mutual recognition of confiscation orders entails a number of important limitations that call for ‘Lisbonisation’ of its provisions. Priority should be given to ensuring the application of grounds of refusal and guarantees similar to those outlined in the European Investigation Order.
- The Financial Intelligence Units and Asset Recovery Offices have been reported to contribute added value when responding to criminality in the EU. That notwithstanding, they also present accountability and legality challenges, as they lack proper judicial, democratic and EU rule-of-law checks and balances on ‘who does what and where’ and under which conditions for legal scrutiny.

Detecting so-called ‘illicit financial flows’, fighting against money laundering and terrorist financing and confiscating criminal assets have been major priorities in the international regime against OC since the 1990s. The Financial Action Task Force on Money Laundering (FATF) and its recommendations (1996, updated in 2001, 2003 and 2012) have been a catalyst for the development of international norms and standards in that domain. FATF has been recognised as a main player in that field (Scherrer, 2009).

The four consecutive anti-money laundering (AML) EU Directives⁶² provide a common European framework built around the FATF standards. These directives progressively built up a shared EU

⁶² See Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77); Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344, 28.12.2001, p. 76); Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15); and Directive (EU) 2015/849 of the European Parliament and of the Council of 20

legal regime in the field of money laundering and the detection of illicit money flows. This legal setting has also led to the establishment of a new EU cooperation instrument taking the shape of the EU Financial Intelligence Units.

The EU has adopted additional instruments to improve the freezing and confiscation of proceeds of crime in the EU. These have included pre-Lisbon Treaty (EU third pillar) instruments, such as the 2005 Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, which attempted to harmonise national criminal justice systems in the field.⁶³ Another instrument was Council Decision 2007/845/JHA concerning cooperation between the Asset Recovery Offices of the Member States on tracing and identifying proceeds from crime,⁶⁴ which call upon EU Member States to set up by 2014 national AROs. More recently, this has been complemented by the 2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.⁶⁵

EU justice and home affairs agencies have shown increasing interest in this specific domain over the last years. Eurojust issued an opinion on the Commission proposal for the 2014 Directive in which it stated that the “freezing and confiscation of proceeds of crime are essential tools in the fight against serious cross-border and organised crime. Confiscation aims at hampering activities of criminal organisations, at preventing criminal wealth from being used to finance other criminal activities and at preventing infiltration in the legal economy.”⁶⁶

Confiscation is a strategic priority in the EU’s policy agenda on the fight against organised crime. This is reflected in the European Commission’s EU Internal Security Strategy in Action⁶⁷ as well as in the 2015 EU Security Agenda.⁶⁸ This priority-setting echoes the opinions expressed by some practitioners working in the field of financial crime. Two-thirds of online survey respondents in this study claimed that EU added value in fighting financial crime is significant (see Annex 5, Figure A5.18).

Some respondents interviewed, who are working in asset recovery activities, noted a sort of ‘virtuous circle’ in the freezing and confiscation of criminal assets: it is deemed efficient against criminals, who are deprived of their financial means and thus cannot reinvest in criminal activity; additionally, recovered assets provide a new source of income for the state. In some Member States, it also opens up financial possibilities for victim compensation.

Nevertheless, academics and other practitioners working on the side of the defence have expressed serious concerns about the sweeping use of the ‘extended confiscations’ clause. These concerns pertain to the lowered thresholds for judicial scrutiny and effective remedies, as the judge does not need to be ‘fully convinced’ but only ‘satisfied’ with the proofs provided by law enforcement. Thus, the presumption of innocence and the right to property could be violated with a higher likelihood of making ‘pro-law enforcement’ civil decisions. There are other important questions to be aired

May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (OJ L 141, 5.6.2015, p. 73).

⁶³ See Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, pp. 49–51).

⁶⁴ See 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, pp. 103–105).

⁶⁵ See Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, pp. 39–50).

⁶⁶ See Eurojust, Opinion on the proposal of the EU Commission for a directive on the freezing and confiscation of proceeds of crime in the EU, 2012.

⁶⁷ See “Priority Action 3: Confiscate Criminal Assets” (p. 6) in European Commission, EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010) 673 final, Brussels, 22 November 2010 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0673&from=EN>).

⁶⁸ See European Commission, European Agenda on Security, COM(2015) 185 final (2015), op. cit.

about asset recovery, its use and whether there are financial benefits and misuses by law enforcement in these actions.

The recent involvement of Romania in AROs and relevant EU legislation provides an interesting case study on the changes *before and after* EU intervention. The Directorate for Investigating Organised Crime and Terrorism (hereinafter DIICOT),⁶⁹ which had expanded functions and competences after the transposition of Directive 2014/42/EU, indicated a big change in assets recovered. In the first nine months of 2015, €160 million had been recovered, compared with only €5 million confiscated in previous years – e.g. 2011.⁷⁰ The Romanian practitioners named the extended confiscations clause as particularly effective in helping to recover more assets. Yet this gives rise to an unaddressed question: What are the costs of the law enforcement efficiency? And who is bearing these costs? One of the respondents drew parallels with the European Arrest Warrant (EAW), which was also seen as a very efficient tool in speedy extradition, although the overuse of this tool has resulted in a number of human rights challenges from the perspective of the rights of the defence.

Furthermore, financial investigations have often been recognised as bringing added value to the fight against organised crime. Their purposes are usually multiple, particularly in “scrutinising the assets of suspected criminals to find out whether there is a relation to possible charges and unravelling the paper-trails in a labyrinth of money transactions in order to get a clear picture of the money flows and prove charges”.⁷¹

‘Financial intelligence’ and ‘financial investigations’ are seen as critical tools to fight OC at EU levels, and are now widely recognised as among the most efficient for tackling criminalities in the EU. On that matter, the report of the Organised Crime Portfolio project pointed out the “crucial role of the confiscation of criminal assets in the fight against organised crime in Europe” and recommends an opportunity reduction approach to effectively tackle OC in the EU (Savona and Michele, 2015). The authors have argued that, “to improve the prevention, it is necessary first to determine where opportunities of criminal infiltration can emerge and then develop policies to reduce them” (ibid.). Still, the exact ways in which the EU can ensure added value in preventing financial crime while fully meeting rule of law and fundamental rights standards is far from clear.

The EU Security Agenda calls for more systematic use by EU Member States of existing Union legal instruments. It also states that, “national judges should take advantage of the European Judicial Network (EJN) for the execution of freezing and confiscation orders”.⁷² The Agenda emphasises that the mutual recognition of freezing and confiscation orders should be improved. A fundamental issue for this improvement to take place will be the capacity for the EU to better ensure and strengthen the *mutual trust premise* (now a rebuttable assumption) according to which EU Member States fully comply with fundamental rights and freedoms in financial crime-fighting actions in their national jurisdictions. The Commission is expected to deliver during 2016 a feasibility study on common rules on the non-conviction based confiscation of property derived from criminal activities.⁷³

Under which conditions can the EU bring added value and not create more ‘insecurity’ and mistrust in this specific policy domain? This section examines the ‘illicit money trail’ and the challenges in assessing the costs of non-EU in financial crimes. Special attention is paid to first, the post-Lisbon Treaty EU legal framework on targeting and confiscating instrumentalities and proceeds of crime, in particular Directive 2014/42/EU (section 3.1); and second, EU-coordinated networks of Member

⁶⁹ DIICOT was established in 2004 and placed in the Chief’s Prosecutor’s Office by Law 508/2004. In 2014, the agency was transferred to the public ministry to serve the national interests of investigating and combating national and transnational organised crime and terrorism by a governmental emergency decision, 3/2014.

⁷⁰ Information derived from the interview with an ARO Romania practitioner.

⁷¹ See Council of Europe, *Combating Organised Crime: Best-practice Surveys of the Council of Europe*, Strasbourg, 2004, p. 316.

⁷² See European Commission, European Agenda on Security, COM(2015) 185 final (2015), op. cit.

⁷³ Ibid., p. 10.

States' representatives and experts (law enforcement practitioners) for the detection and intelligence analysis of illicit finance (FIUs), and for criminal asset recovery (AROs) (section 3.2).

3.1 The EU legal framework on the freezing and confiscation of instrumentalities and proceeds of crime

The adoption of confiscation measures has been a crucial part of the development of global measures to fight money laundering and organised crime, the main rationale being to target the proceeds of crime and deprive criminals of their profits. The expansion of the global legal framework against organised crime in the past two decades has witnessed a number of calls at the level of the United Nations and ad hoc expert bodies in the field, notably the FATF, to extend confiscation measures beyond targeting the proceeds of a specific criminal activity that has resulted in a conviction. There are three main ways in which confiscation measures can be extended:

- by adopting an extended confiscation regime, with confiscation going beyond the proceeds of the specific criminal offence in question;
- by adopting a system of non-conviction based confiscation, where confiscation can be imposed without the existence of a criminal conviction; and
- by adopting a system of third party confiscation, where confiscation is targeted at the assets of a third party.

Key issues in the evolution of EU law on confiscation are the extent of harmonisation of very divergent national systems across the EU and the compliance of European law on confiscation with fundamental rights (in particular fair trial, legality, property and privacy). Another issue is the feasibility of operating the Framework Decision on mutual recognition on confiscation orders without a common, level playing field providing an adequate level of harmonisation of national systems.

As seen above, there are three aspects of extending the scope of confiscation that are controversial: extended confiscation (beyond proceeds of a specific offence); non-conviction based confiscation, which means that confiscation is not dependent upon conviction for a criminal offence (a mechanism similar to civil recovery systems as established in the UK by the Proceeds of Crime Act); and third party confiscation – namely the confiscation of proceeds/property belonging to a third party, which has been criticised by the European Court of Human Rights in its recent ruling in *Varvara*.⁷⁴

What is lawful in one Member State may be unconstitutional in another. This means that even the post-Lisbon Directive on confiscation has not succeeded in harmonising national systems at a high level, but has left considerable discretion to Member States to regulate further.

On the one hand, mutual recognition is problematic in this domain in view of the different legal systems and practices in Member States, but also in light of the requirement to comply with the EU Charter of Fundamental Rights. This particularly applies to cases of non-conviction confiscation and third party confiscation. On the other hand, the Directive on confiscation includes some innovative provisions with interesting potential, such as the permissive provision on the social reuse of assets.

Lastly, EU intervention is informed by the limits of EU competence in the field and by the general question of the aim of confiscation law. The post-Lisbon Directive has been adopted under Arts. 82.2 and 83.1 TFEU, which means that it applies only in relation to areas of crime listed in Art. 83.1 and thus retains the applicability of the pre-Lisbon Framework Decision on confiscation with regard to other areas of crime. When it comes to the aim of EU confiscation law the following question arises:

⁷⁴ See *Varvara v. Italy*, Application no. 17475/09, judgment of 29 October 2013.

Is it a sanction on the underlying offence, or part of a general strategy to target profit from crime? The following subsections address in detail the current EU legislative framework on confiscation.

3.1.1 *Harmonisation*

Before the entry into force of the Treaty of Lisbon, a former EU third pillar Framework Decision on confiscation of crime-related proceeds, instrumentalities and property attempted to harmonise national criminal justice systems in the field.⁷⁵ The Framework Decision aimed in particular at creating a level playing field with regard to extended confiscation (Art. 3). That notwithstanding, it still left considerable discretion to Member States as to the way in which they could introduce extended confiscation in their domestic systems.

The Treaty of Lisbon saw further efforts to harmonise national law in the field while at the same time attempting to extend confiscation powers across the EU. The final outcome was the adoption of the above-mentioned Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, adopted in the spring of 2014.⁷⁶ The Directive sought to move forward more decisively the efforts to level the EU playing field, not only on extended confiscation, but also on non-conviction and third party confiscation.

When it comes to non-conviction confiscation, according to Art. 4.2 of the Directive, where confiscation based on a final conviction is not possible, Member States must take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence that is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Art. 5 on extended confiscation, which replaces for those Member States participating in the Directive Art. 3 of the Framework Decision mentioned above, stipulates that EU Member States have the obligation to adopt measures to

enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.⁷⁷

⁷⁵ See Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, pp. 49–51).

⁷⁶ See Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, pp. 39–50), Art. 5.

⁷⁷ Para. 2 of the same provision states that

[f]or the purpose of paragraph 1 of this Article, the notion of ‘criminal offence’ must include at least the following: (a) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials; (b) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit; (c) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive; (d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive; (e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question

On third party confiscation, according to Art. 6.1 of the Directive, Member States must take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances. This provision must not prejudice the rights of bona fide third parties (Art. 6.2).

The Directive includes a provision on legal safeguards, covering a series of provisions on effective remedies and fair trial (Art. 8), and a provision on the management of frozen and confiscated property in Art. 10. According to this article, EU Member States need to establish centralised offices to guarantee the adequate management of property frozen with a view to possible subsequent confiscation. Paragraph 3 states that “Member States must consider taking measures allowing confiscated property to be used for public interest or social purposes”.⁷⁸

3.1.2 *An assessment of EU harmonisation and implementation on confiscation*

The Directive on confiscation has made modest steps towards establishing a level playing field and harmonising legislation in EU Member States, while at the same time extending the confiscation regime across the EU. The UK and Denmark do not participate in the scope of this Directive.

Moreover, the extent of harmonisation remains limited. This has led the European Parliament and the Council, subsequent to the adoption of the Directive, to call upon the Commission to look at further possibilities for harmonisation of non-conviction confiscation. It must also be noted that the extent of harmonisation remains constrained by the limited possibilities that the Lisbon Treaty provided for the adoption of EU confiscation law.

The clarification of EU competence in criminal matters after the Lisbon Treaty, and the abandonment of the catch-all, broad, third pillar legal bases, has meant that the Directive was adopted under a dual legal basis of Arts. 82.2 and 83.1 TFEU. This choice of legal basis means that confiscation measures are considered by the European legislator to be both criminal sanctions (Art. 83.1 TFEU) and measures on criminal procedure (Art. 82.2 TFEU).

The labelling of confiscation measures as criminal sanctions limits the possibilities for non-conviction confiscation, as it is questionable whether the EU has the competence to adopt measures on civil recovery under Arts. 82 and 83 TFEU. Moreover, the use of Art. 83.1 TFEU as the legal basis for the confiscation Directive means that the Directive – and the new extended measures it has introduced – is applicable *only* to the areas of crime mentioned in Art. 83.1 TFEU and not across the board as with the third pillar instrument.

This is also evident in the replacement of the Framework Decision provisions on extended confiscation by the relevant provisions of the Directive. It is still too early to have a clear picture as regards the state of national transposition and implementation of Directive 2014/42/EU. According to Art. 12 of the Directive, EU Member States had to align their domestic legislation to the set of norms and standards outlined in the Directive by 4 October 2015.

There is currently no publicly available information regarding the state of play in Member States’ implementation. Interviews conducted for the purpose of this study have revealed that a number of issues have arisen during preliminary discussions between DG Home Affairs and EU Member States’ ministries of justice related to implementation. These concern, for instance, domestic measures on third party confiscation, and whether third party confiscation also applies to extended

does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

⁷⁸ See Directive 2014/42/EU, Art. 10, para. 3.

confiscation, the specific cases where non-conviction based confiscation is applied in practice and confiscation in proceedings *in absentia*.⁷⁹ In addition are the diverse national applications of extended confiscation to potentially different forms of crime (and whether they conform or not with the list of Eurocrimes specified in Art. 83.1 TFEU),⁸⁰ and the exact ways in which national law prescribes that the national judge will be ‘satisfied’ (and yet ‘not fully convinced’) that the property in question is derived from criminal conduct.⁸¹

Another key issue on which the Commission’s assessment will focus is the compliance of Member States’ national laws and administrative/judicial practices with the previously mentioned safeguards outlined in Art. 8. These include questions related to their obligation to ensure “effective possibility” for the persons affected by a freezing decision to challenge the freezing order before a Court,⁸² or in cases of extended confiscation to challenge the circumstances of the case, as well as other communication, access to a lawyer and compensation for victims’ rights.

It will be particularly crucial to closely monitor the exact ways in which EU Member States are ensuring “effectiveness” in the execution of confiscation orders (Art. 9 of the Directive), and the particularities characterising the implementation of the above-mentioned management of frozen and confiscated property, such as the use of confiscated property for social and public interest purposes (Art. 10.3).

Any future further harmonisation of EU law by means of further extending confiscation, in particular as regards non-conviction and third party confiscation, would pose significant challenges to the constitutional and criminal justice systems of a number of Member States. It is still a minority of EU Member States that have introduced extensive regimes on non-conviction confiscation.

Another aspect where national transposition would be essential to test from an added value perspective is the call included in Art. 11 for EU Member States to centralise and fine-tune the collection on a yearly basis of statistical knowledge on issues such as

- a) the number of freezing orders executed; (b) the number of confiscation orders executed; (c) the estimated value of property frozen, at least of property frozen with a view to possible subsequent confiscation at the time of freezing; (d) the estimated value of property recovered at the time of confiscation.⁸³

A full and effective implementation of this article has the potential of filling a fundamental gap that currently exists in the state of knowledge at EU levels on freezing and confiscation orders and proceedings, and the effects of EU intervention in this domain. The fact that the deadline for national implementation of Directive 2014/42/EU has only expired recently and such a statistical overview does not currently exist prevents a comprehensive and sound economic analysis of the costs and benefits of having ‘more Europe’ in this specific area in light of the Directive.

⁷⁹ Information derived from a face-to-face interview with an ARO expert at DG Home.

⁸⁰ See the Art. 83.1 of the consolidated version of the TFEU (OJ C 326, 26.10.2012).

⁸¹ Information derived from a face-to-face interview with an ARO expert at DG Home.

⁸² Art. 8.4 stipulates that “[s]uch procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court”.

⁸³ Art. 11.2 further states that

2. Member States shall also send each year the following statistics to the Commission, if they are available at a central level in the Member State concerned: (a) the number of requests for freezing orders to be executed in another Member State; (b) the number of requests for confiscation orders to be executed in another Member State; (c) the value or estimated value of the property recovered following execution in another Member State.

3.1.3 *Mutual recognition*

Harmonisation in the field of confiscation is accompanied by the establishment of a system of mutual recognition of confiscation orders across the EU. Framework Decision 2006/783/JHA has established such a system.⁸⁴ In spite of the limited extent of harmonisation in the field, the Framework Decision – which so far has not been ‘Lisbonised’ and thus is still in force as drafted – provides for a system of mutual recognition of confiscation orders under a high level of automaticity.

The grounds for refusal to execute a confiscation order by concerned Member States are all optional and enumerated in Art. 8 of the Framework Decision. These include the principle of *ne bis in idem*, when the acts do not constitute an offence permitting confiscation under the law of the executing state in cases where the dual criminality rule applies, when there is immunity or privilege under the law of the executing state that would prevent the execution of a domestic confiscation order on the property concerned, or in situations when the rights of any interested party are affected in a way contrary to the law of the executing state.

According to Art. 8.3 of the Framework Decision, if it appears to the competent authority of the executing state that i) the confiscation order was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Art. 2(d)(iii), and ii) the confiscation order falls outside the scope of the option adopted by the executing state under Art. 3.2 of Framework Decision 2005/212/JHA, it must execute the confiscation order at least to the extent provided for in similar domestic cases under national law.

The system of mutual recognition established by the Framework Decision thus seeks to respect national diversity and national constitutional safeguards on extended and third party confiscations. This system also applies now, after the adoption of the post-Lisbon confiscation Directive. The mutual recognition Framework Decision does not include a general ground for refusal to execute based on human rights grounds or a ground for refusal related to non-conviction confiscation, as the issue of non-conviction confiscation was not included in third pillar law on confiscation.

It is submitted that the markedly different national approaches on non-conviction confiscation, the spirit of the Framework Decision on the mutual recognition of confiscation orders and subsequent developments in post-Lisbon instruments on mutual recognition, including the EIO,⁸⁵ where non-compliance with fundamental rights constitutes a ground for refusal to execute, mean that national authorities may refuse to execute a confiscation order in the case of a non-conviction based confiscation where such confiscation would not be allowed under their domestic law.

3.2 EU-coordinated networks on financial crimes

3.2.1 *Financial Intelligence Units*

3.2.1.1 *Assessing and identifying the EU added value of FIUs*

The requirement for the establishment of FIUs was first established by the FATF standards and subsequently laid down in the third EU AML Directive 2005/60/EC.⁸⁶ FIUs – central national agencies responsible for receiving, analysing and transmitting disclosures on suspicious transactions to the competent authorities – started to be set up in the middle of the 1990s. The IMF has reported that FIUs are central because they support law enforcement authorities with elements that are critical

⁸⁴ See Framework Decision 2006/783/JHA, OJ L 328, 24.11.2006, p. 59.

⁸⁵ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1.

⁸⁶ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

to their investigations, and they enable better cooperation with the financial institutions (with the obligations of suspicious transactions reports, STRs) (IMF, 2004).

The Egmont Group provides an international forum for exchange of information for FIUs around the world. The Egmont Group currently comprises 151 member FIUs, including the 28 EU Member States. The Egmont Group gives support in the following areas:

- expanding and systematising international cooperation in the reciprocal exchange of information;
- increasing the effectiveness of FIUs by offering training and promoting personnel exchanges to improve the expertise and capabilities of personnel employed by FIUs;
- fostering better and secure communication among FIUs through the application of technology, such as the Egmont Secure Web;
- fostering increased coordination and support among the operational divisions of member FIUs;
- promoting the operational autonomy of FIUs; and
- promoting the establishment of FIUs in conjunction with jurisdictions with a programme in place on AML/combating the financing of terrorism (CFT), or in areas with a programme in the early stages of development.⁸⁷

In 2014, the Egmont Group adopted a more regional approach that involves designating members to regions more closely aligned with FATF-style regional bodies (Egmont Group, 2014). The Europe region, previously the largest with 52 FIUs, is now divided into three smaller regions: Europe Region I, Europe Region II (corresponding to those jurisdictions that are part of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism but which are not EU members), and Eurasia (corresponding to the Eurasian Group on Combating Money Laundering and Financing of Terrorism).

Europe Region I corresponds to the FIUs that are part of the EU FIUs Platform, which was set up in 2006 by the European Commission. Its main purpose is to facilitate cooperation among the national FIUs, whose tasks are to receive, analyse and disseminate to competent authorities reports about suspicions of money laundering or terrorist financing. This forum discusses varying matters, such as technical aspects for transposing the EU directives, a harmonised approach to FIUs, data protection and confidentiality, harmonised databases, the content of disclosures, disclosures of cash and cooperation among FIUs at the EU level. In addition, it provides a secure computer network (FIU.NET), set up to exchange information among Member State FIUs. This EU FIUs Platform has been progressively absorbed by Europol.

Among its 2013 annual objectives, Europol refers to the strengthening of its financial intelligence capabilities:

in 2013, final preparations will be underway for the formal integration of the FIU.NET Bureau into Europol. In order to realise the full potential of operational synergies between Europol and FIUs, the network facilitating information exchange between FIUs (FIU.NET) will be replaced by SIENA and the services of the FIU.NET Bureau will be fully embedded within Europol (including the staff of the FIU.NET Bureau). Remaining details around governance, data processing and FIU activities will be addressed with view to achieving more operational added value from linking general money flows to criminal activities and following up to identified links.⁸⁸

The 2015 Europol work programme makes reference to preparing for embedding the FIU network bureau (FIU.NET) into Europol by January 2016 and to embedding FIUs into SIENA in 2016. (This

⁸⁷ See the Egmont Group website, at <http://www.egmontgroup.org/about>.

⁸⁸ See Europol, "Annual objectives for 2013", The Hague, 2012.

integration of EU FIUs by Europol was confirmed during our interviews held at Europol in January 2016.) The platform of information is provided by the Secure Information Exchange Network Application (SIENA), a Europol tool designed to enable swift, secure and user-friendly communication and the exchange of operational and strategic crime-related information and intelligence between Europol, Member States and third parties that have cooperation agreements with Europol.

FIUs enable the centralisation and exchange of important information for financial investigations. Their main tasks have been said to ensure a ‘continuous flow of information’. According to the IMF, their functions mainly consist of “[r]eporting entities and other FIUs provide information to the FIU, which, in turn, analysis this information and passes the results of its analyses along to investigators and prosecutors, as well as other FIUs”.⁸⁹

Additionally, Art. 35 of the third AML Directive requires FIUs to provide the following feedback on suspicious transaction reports, to inform the reporting entities about their follow-up (this case-by-case feedback should be provided “wherever practicable”), and feedback on money laundering and terrorist financing practices (trends and typologies).

In the detection of illicit flows, the exchange of information is crucial and the EU FIUs enable better exchange of it. The latest 2015 EU Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing reiterates the need to improve coordination and cooperation, in particular between FIUs. In order to improve such coordination and cooperation, and especially to ensure that suspicious transaction reports reach the FIU of the Member State where the report would be of most use, detailed rules are laid down in this Directive. In that regard, the Directive refers to the key role of EU FIUs Platform.

On that matter, this pivotal role, as well as the added value of the EU FIUs for law enforcement purposes compared with the FIU cooperation that occurs within the Egmont Group, has been referred to in some of the survey responses and interviews conducted for the purpose of this study. With the better integration of European FIUs at the EU level, the Egmont group platform is used solely for the purpose of exchange with third countries. Some of the interviewees mentioned the following aspects of added value of EU FIUs:

- a streamlined process of reporting;
- a better exchange of information across EU Member States and ‘fluid’ cooperation; and
- a sense of ‘trust’ in the information provided.

A powerful tool that was set up within FIU.NET has additionally been mentioned by the interviewees: the Ma³tch – ‘Autonomous Anonymous Analysis’. It is a sophisticated technology that allows connected FIUs to match their data with other FIUs in an anonymous way. Very simplified, it converts FIU data into uniform anonymised filters without sensitive personal data. These filters can therefore safely be shared with and used by other FIUs. The FIU.NET provides the following illustrative example of how this works:

For example to identify if their subjects are known to the other FIU: FIU A creates a filter from the subjects in its own database and shares this filter with FIU B through FIU.NET. By typing the name in FIU.NET FIU B checks at its own premises whether a particular subject of their own might be present in the filter they have received from FIU A. This way, no sensitive data is placed beyond the premises of each FIU. But the anonymised filters can also be used for conducting joint analyses. An example is the automated matching of subjects across the different databases to detect relations and similarities. Only in case of a positive hit, FIU.NET will display the information to the FIUs involved. In practice

⁸⁹ Refer to “Financial Intelligence Units: An Overview”, IMF (2004) (<http://www.imf.org/external/pubs/ft/FIU/fiu.pdf>).

this means that FIUs are able to compare their subjects without revealing the names and thus, without breaching privacy.⁹⁰

With Match in place, FIUs can detect subjects of interest in other countries even though they were not aware that the subject was trying to hide his/her proceeds in other countries. In this way, as stated in interviews for this study, the EU FIUs can operate as one, with FIU.NET as a virtual entity to detect suspicious and hidden transactions.

3.2.1.2 *Gaps and barriers in using FIUs*

a) Law enforcement perspective

FIU.NET is a voluntary tool for Member States. Our interviews showed that there is still some reluctance to make full use of the platform of information provided by Europol (SIENA). There was also mention of further work needing to be done to overcome national differences and increase awareness of the EU tools available to support EU Member States in this domain.

Another issue seems to be related to the wide range of sources and types of reporting methods for exchange of information (e.g. banks, insurance companies, investment firms, lawyers, notaries, accountants, trust and company service providers, casinos, etc.), as well as the variety of law enforcement authorities to which STRs can be referred. This was reported as causing practical and legal difficulties for the exchange of information. Furthermore, from a technical perspective, it seems to be difficult to develop a universal format system to be able to process different types of information.

The consultation with national practitioners within the scope of this study also indicated that the EU FIUs constitute a usual tool for facilitating the exchange of information at transnational levels for financial crime-fighting activities. They also indicated that another outstanding dilemma is improving the training capabilities of the authorities involved. If some EU Member States have dedicated important resources to training, others are lagging behind. This aspect was reported to be problematic, as investigations regarding the tracing, freezing, confiscation and recovery of criminal assets are very complex and require specific training.

b) Criminal justice perspective

There are, however, a number of accountability and legality challenges associated with their activities. Non-law enforcement interviewees raised concerns that as FIUs are indeed of a more 'analytical' or 'intelligence' nature, they are not subject to proper judicial, democratic, and EU rule-of-law checks and balances. From a fundamental rights perspective, given the level of sensitivity of the information exchanged through the EU FIUs Platform, the issue of data protection and privacy are of paramount importance, irrespective of the fact that the data gathered and exchanged may be 'personalised' or not through automated means. This concern is particularly relevant when informal networks of cooperation with third countries are involved, for instance through the Egmont group.

Another example is the Anti-Money Laundering Operational Network (AMON), which was set up in 2012. Europol holds the permanent secretariat of the AMON. The aim of this additional informal network of national contacts from national law enforcement units on anti-money laundering is once

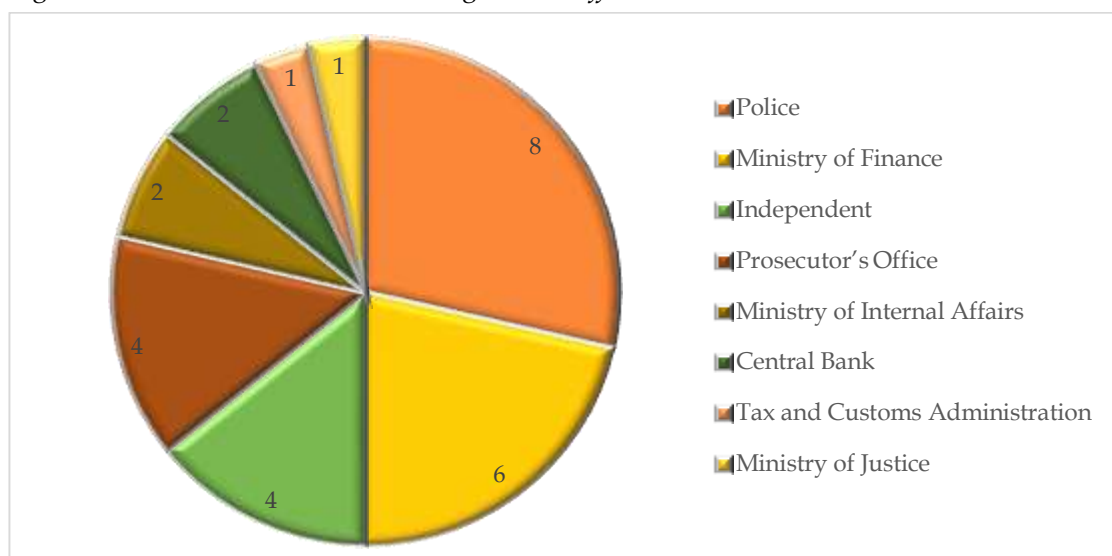
⁹⁰ See FIU.NET information.

again “to enhance and facilitate information exchange”.⁹¹ Though in this case, besides the EU Member States, there are other states involved.⁹²

EU FIUs need to be viewed in a larger multi-group and multi-level network (information exchange-led) setting, which complicates having a transparent and clear picture of the kinds of national authorities and actual experts who participate in each of them, and the extent to which there is duplication in participation and membership. Still, global initiatives (FATF Recommendations and the Egmont Group) and EU law (including the fourth money laundering Directive) have called for *maximum* information exchange among FIUs.

Accountability deficits are exacerbated by the fact that the authorities in the network may have different tasks and competences in domestic arenas. Indeed, EU law does not harmonise the nature or powers of FIUs, with Member States developing largely divergent models (police FIUs, administrative FIUs, judicial FIUs and independent FIUs).⁹³ These may include four different models, ranging from judicial, police, administrative or even ‘hybrid’ models,⁹⁴ which in turn may have domestic responsibilities of a different nature and be subject to specific frameworks of checks and balances and have relations/accountabilities linked to a varying set of bodies or judicial authorities. Annex 3 of this study offers a detailed list of authorities participating in EU FIUs. Figure 5 and Table 1 provide a detailed account of ‘who is who’ in EU FIUs, and each of the participating entities.

Figure 5. FIUs across the EU according to their affiliation



Sources: Authors, based on the 2013 *Annual Report of Financial Intelligence Unit (FIU), Germany, Bundeskriminalamt Wiesbaden*, 2014; FIU.NET (<https://www.fiu.net/fiunet-unlimited>) and the Egmont Group

⁹¹ See Europol's official website, “International Anti-Money Laundering Operational Network (AMON) launched”, 30 January 2012 (https://www.europol.europa.eu/latest_news/international-anti-money-laundering-operational-network-amon-launched).

⁹² In January 2012, Europol indicated that besides 25 EU Member States, a further 8 third countries were involved: Australia, Georgia, Iceland, Israel, the Russian Federation, Switzerland, Turkey and the US (https://www.europol.europa.eu/latest_news/international-anti-money-laundering-operational-network-amon-launched). In 2015, there were practitioners from 46 jurisdictions attending the AMON meeting (https://www.europol.europa.eu/latest_news/anti-money-laundering-investigators-meet-spain).

⁹³ See the 2013 *Annual Report of Financial Intelligence Unit (FIU), Germany, Bundeskriminalamt Wiesbaden*, 2014.

⁹⁴ See European Commission, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing and Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds, Staff Working Document, SWD/2013/021 final, Strasbourg.

(<http://www.egmontgroup.org/membership/list-of-members/by-region/europe>). The typology was found in Appendix 2 of the above-mentioned 2013 Annual Report.

Table 1. FIUs according to their location and affiliation in the EU Member States

Police	Ministry of Finance	Independent agencies	Prosecutor's Office	Ministry of Internal Affairs	Central Bank	Tax and Customs Admin.	Ministry of Justice
AU, EE, DE, FI, IE, PT, SE, UK	BG, HR, CZ, FR, PL, SL	BE, EL, MT, RO	CY, DK, LV, LU	LT, SK	ES, IT	HU	NL

Sources: Authors, based on the 2013 Annual Report of Financial Intelligence Unit (FIU), Germany, Bundeskriminalamt Wiesbaden, 2014 (<https://www.fiu.net/fiunet-unlimited>) and the Egmont Group (<http://www.egmontgroup.org/membership/list-of-members/by-region/europe>). The typology was found in Appendix 2 of the above-mentioned 2013 Annual Report.

In this way, a key risk in EU FIUs is the potential for 'venue shopping' – escaping domestic checks and obstacles in gaining access to information when going transnational in the scope of the EU-coordinated network. The list of participating agencies also shows a largely heterogeneous list of authorities, which include mainly representatives from traditional law enforcement authorities (police, ministries of interior and justice, and prosecutors' offices), but also other actors with a more 'administrative' role, such as tax and customs authorities, ministries of finance and central banks. The prevalence of law enforcement actors may lead to a policing function creep in the activities of the other actors, and pose particular challenges for ensuring that national-level checks and balances applicable to information exchange are not circumvented when going transnational in the scope of EU FIUs.

These challenges become even more complicated when taking into account that this informal network gathers approximately 35 jurisdictions (+/- 150 participants) and raises the question of oversight of the information exchanges in terms of their compatibility with EU laws, especially (yet not only) in the field of effective data protection and legal remedies for individuals as enshrined in Art. 47 of the EU Charter of Fundamental Rights.

Another important issue is the extent to which EU FIUs comply with the safeguards and guarantees set out in the EU AML legal framework, especially the exact ways in which their activities and exchanges have been aligned with those provided by Directive (EU) 2015/849 on preventing use of the financial system for the purposes of money laundering or terrorist financing. These should be major components in any future training follow-up activity as mentioned above. In particular, para. 39 of the Preamble of this Directive stipulates that

[f]or certain obliged entities, Member States should have the possibility to designate an appropriate self-regulatory body as the authority to be informed in the first instance instead of the FIU. In accordance with the case-law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member States should provide for the means and manner by which to achieve the protection of professional secrecy, confidentiality and privacy.⁹⁵

⁹⁵ Moreover, para. 43 states that

[i]t is essential that the alignment of this Directive with the revised FATF Recommendations is carried out in full compliance with Union law, in particular as regards Union data protection law and the protection of fundamental rights as enshrined in the Charter. Certain aspects of the implementation of this Directive involve the collection, analysis, storage and sharing of data. Such processing of personal data should be permitted, while fully respecting

The fourth AML Directive calls for the setup of “operationally independent and autonomous FIUs” at the national level to collect and analyse the information that they receive with the aim of establishing links between suspicious transactions and underlying criminal activity so as to prevent and combat money laundering and terrorism financing.⁹⁶ Recital 37 of the Directive (replicated in Art. 32.3) explains that an operationally independent and autonomous FIU is understood as a unit that “has the authority and capacity to carry out its functions freely, including the autonomous decision to analyse, request and disseminate specific information”.

The Directive requires that suspicious transactions and other information regarding money laundering should be reported to the FIU, which should serve as a central national unit for receiving, analysing and disseminating to the competent authorities the results of its analyses.

Furthermore, as with the third AML Directive, the proposal for the directive explicitly left the choice of organisational model for their respective units (administrative, independent, judicial or mixed) to the discretion of EU Member States. However, this reference was dropped in the final text, thus leaving the issue outside of the legislative scope. The only reference in this regard can be found in Art. 52, where it is merely stated that “Member States must ensure that FIUs cooperate with each other to the greatest extent possible, *regardless of their organisational status*”.⁹⁷

The exchange of information should take place “spontaneously or upon request”, “even if the type of predicate offences that may be involved is not identified at the time of the exchange” (Art. 53.1). A Member State can refuse to exchange information “in exceptional circumstances where the exchange could be contrary to fundamental principles of its national law” – a significant reform in comparison with the proposal (Art. 53.3).

These calls for cooperation pose major privacy and data protection dilemmas. Information held by FIUs involves suspicious transaction reports that involve everyday activities. FIUs filter this information in order to determine whether it should be reported to criminal justice agencies. A number of EU Member States have established FIUs as independent or administrative entities exactly in order not to place this information within the criminal justice system. Mandating maximum information exchange among different FIUs undermines the rights to privacy and data protection, most notably by challenging the well-established principle in EU data protection law of purpose limitation. It remains questionable whether under EU law an independent FIU can lawfully send unfiltered, suspicious transaction reports to a police FIU, as this would mean that personal data obtained in one Member State outside the realm of the criminal justice system ends up in the criminal justice databases of another EU Member State. Secondary EU law contains very limited rules on applicable law, with privacy and data protection considerations being largely underplayed in the development of the EU anti-money laundering framework.

fundamental rights, only for the purposes laid down in this Directive, and for the activities required under this Directive such as carrying out customer due diligence, ongoing monitoring, investigation and reporting of unusual and suspicious transactions, identification of the beneficial owner of a legal person or legal arrangement, identification of a politically exposed person, sharing of information by competent authorities and sharing of information by credit institutions and financial institutions and other obliged entities. The collection and subsequent processing of personal data by obliged entities should be limited to what is necessary for the purpose of complying with the requirements of this Directive and personal data should not be further processed in a way that is incompatible with that purpose. In particular, further processing of personal data for commercial purposes should be strictly prohibited.

⁹⁶ See Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

⁹⁷ See Art. 52 of the AML Directive (emphasis added).

3.2.1.3 *The economic costs and benefits of FIUs*

Previous studies have engaged in an examination of the costs with regard to national implementation of the third AML Directive by financial institutions.⁹⁸ On the basis of the findings put forward there, the analysis provided in Annex 1 of this study advances that the average budget spent on FIUs per country per year is around €2.6 million. According to Eurostat 2010 data, the average number of STRs issued by FIUs was around 12,716 per country. Interviews revealed that the numbers of incoming and outgoing STR reports are increasing, though the staffing has not changed accordingly. In addition, practitioners working at the FIUs expressed that they receive almost no feedback on how their information has or has not served law enforcement. Therefore, FIU practitioners focus on counting their outputs: the number of requests and the quality of the report, with little information about the actual importance of the information for the specific case or the existence of any instances of misuse.

That being stated, law enforcement keeps track of statistics, which is also shared with Eurostat.⁹⁹ The economic analysis in Annex 2 also examines the share of STRs sent to law enforcement authorities and ultimately leading to a case. The 'efficiency rate' demonstrates that out of the overall number of STRs filled in, 29% are sent to law enforcement; of those sent to law enforcement, 54% led to a case. Thus, approximately 16% of all STRs filled in lead to cases. Yet there are no statistics on how many of these cases have led to money recovered or criminals convicted.

Quantification or monetarisation of this 'efficiency rate' is difficult and would tell us little of the actual factors triggering those numbers, be they nation-specific or a result of the EU's intervention. There are profound methodological caveats connected with finding and using updated data covering these same issues in order to extrapolate a sound reading of the actual costs (inputs) and benefits (outputs and results) of having EU FIUs established. The economic analysis in this case does not enter here into a debate on how much the 'average' case is worth and with or without the STRs, or whether it would have been impossible or more difficult to solve the case. In addition, what are the opportunity costs of officers focusing on the STR requests instead conducting other activities? Finally, what are the costs of 'unintended outcomes', such as information misuse?

To conclude, a central question that remains open is 'whose costs and benefits' would actually taken be into account in this equation or assessment. To this we may add the difficulty of developing a cross-Member State analysis in light of the large diversities in domestic legal and institutional areas despite the further harmonisation brought about by post-Lisbon Treaty legal acts.

3.2.2 *Asset Recovery Offices*

3.2.2.1 *Assessing and identifying the EU added value of AROs*

At the other end of the 'money trail' - when criminal assets are to be frozen and confiscated - the EU adopted in 2007 the 'ARO Decision' that obliged Member States to set up or designate national AROs as central contact points that facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime.

Council Decision 2007/845/JHA allows AROs to exchange information and best practices, both upon request and spontaneously, regardless of their status (administrative, law enforcement or judicial authority). It requests AROs to exchange information under the conditions laid down in Framework Decision 2006/960/JHA and in compliance with the applicable data protection

⁹⁸ See in particular, Europe Economics (2009).

⁹⁹ See Eurostat, *Money Laundering in Europe*, Brussels, 2010 (<http://ec.europa.eu/eurostat/documents/3888793/5856465/KS-TC-13-007-EN.PDF/69cde077-3bd9-4d0d-8c19-a6fe3608c2cd>).

provisions. In a 2011 European Commission report on the transposition of the ARO Decision,¹⁰⁰ the Commission noted the following positive aspects of the transposition:

- AROs have generally expressed satisfaction with the degree of cooperation and exchange of best practices with other AROs.
- Regarding the exchange of information between AROs on request, the Member State-designated AROs indicated that they are generally able to meet the set deadlines as laid out in Art. 3 of the Decision.¹⁰¹
- Most of the AROs indicated that the existing rules on data protection do not impact on the exchange of information with other AROs.
- Notwithstanding the relative lack of comparable data, the discussions in the ARO Platform have shown that, since the adoption of the Decision, the number of requests made by AROs to other AROs has increased substantially and the quality of the replies has generally improved. If the opinions of the AROs on the quality of the replies they received vary considerably, the information received was sufficient to start an investigation.
- Feedback from the cooperation between AROs is generally positive. Some of these practices are regularly exchanged at the meetings of the EU's informal ARO Platform.

Prior the obligation to set up AROs in each of the EU Member States, most of the EU coordination as regards asset recovery was operated through the CARIN Network (Camden Assets Recovery Inter-Agency Network), launched in 2004. The CARIN Network works as a global network of practitioners and experts. It is also hosted by Europol and aims at enhancing mutual knowledge about methods and techniques for cross-border identification, freezing, seizure and confiscation of illicitly acquired assets.¹⁰² The ARO 2007 Decision was clearly intended to support CARIN. The setting up of the EU ARO Platform, which operates through Europol, is intended to work in synergy with the CARIN Network.¹⁰³

The added value of EU AROs has been recognised by some of the law enforcement practitioners interviewed for the purpose of this study, across the selected EU Member States. Moreover, survey respondents have highlighted the benefits stemming from EU intervention in this domain.

First, EU work in the field of criminal assets recovery has allowed a certain degree of harmonisation or rather approximation of legal concepts and practices. The law enforcement practitioners interviewed said that EU tools such as Directive 2014/42/EU provided a better basis and common grounds for cooperation. Some of the national practitioners stressed the need to respect national legal traditions and that with the increasing role of the EU in this area, it is becoming increasingly difficult to ensure coherence of national laws and procedures, especially when complying with the mutual recognition requests. For example, the UK has not opted into Directive 2014/42/EU, though

¹⁰⁰ See European Commission, *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*, COM(2011) 176 final, Brussels, 12.4.2011.

¹⁰¹ These are eight hours for urgent requests for information and intelligence regarding serious offences (when the requested information or intelligence is held in a database that is directly accessible by a law enforcement authority), one week for non-urgent requests for information and intelligence regarding serious offences (when the requested information or intelligence is held in a database that is directly accessible by a law enforcement authority) and two weeks in all other cases (the database is not directly accessible or the request is not related to a serious crime).

¹⁰² CARIN is an informal network of contacts and a cooperative group concerned with all aspects of confiscating the proceeds of crime. It is a network of practitioners from 53 jurisdictions and 9 international organisations. It is linked to similar asset recovery networks in southern Africa, Latin America and Asia Pacific.

¹⁰³ See the Europol presentation from the TAIEX Seminar on Asset Recovery Offices: "Cooperation at International Level – CARIN, ARO Platform, AMON", Ankara, 14–15 December 2011.

the UK's ARO still can receive mutual recognition requests for 'extended confiscations'. Such a provision does not exist in the national law of the UK. Half of the survey respondents agreed with the statement that EU-led interventions improved criminal assets recovery, in particular the number of freezing and confiscation procedures in the EU (see Annex 5, Figure A5.21). Nonetheless, the respondents were more positive about the overall EU added value in fighting financial crime (see Annex 5, Figure A5.18).

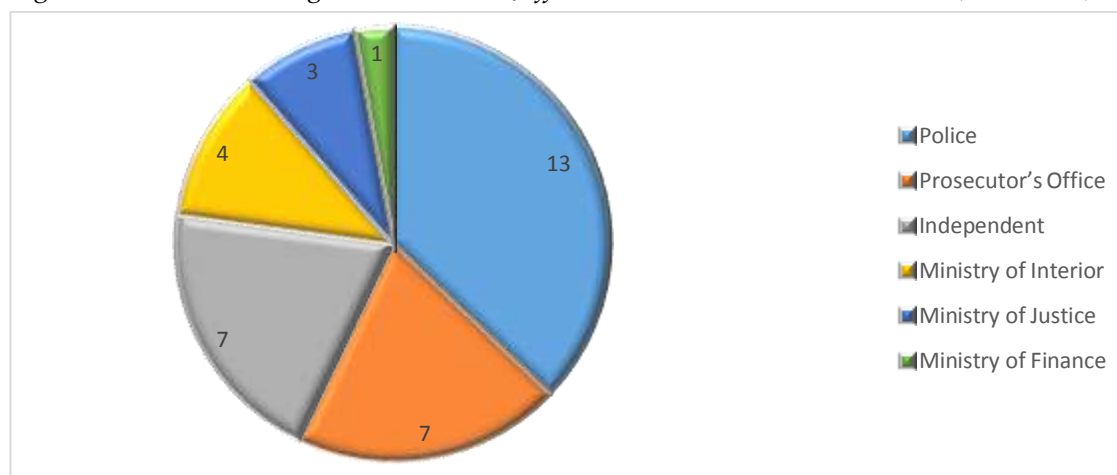
Second, a very useful EU tool often mentioned is the EU standard certificates for freezing and confiscation, introduced by Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders. The certificate can be downloaded from the Eurojust website. Survey respondents underlined that it is a very useful tool because it limits the means and avenues of legal challenges available to the individual whose assets have been seized when a decision taken by another Member State authority is contested.

3.2.2.2 Gaps and barriers in using AROs

a) Law enforcement perspective

Law enforcement practitioners participating in our survey expressed concerns about or identified as a significant obstacle for mutual trust in the context of assets recovery and confiscation the lack of legal certainty and security as regards the applicable law. This reflects the heterogeneity or persistent lack of a common, level playing field in the EU on confiscation of criminal assets and instrumentalities of crime, and the relevance of national constitutional and legal traditions as exceptions or derogations to supranational cooperation. Similar to the situation of EU FIUs, the national actors participating in AROs are also rather diverse in nature and competences (see Figure 6), though a majority of AROs are police-based. A fifth of all AROs are affiliated with prosecution services. A fifth of AROs are located within specialised asset recovery agencies or specialised independent institutions. The remaining AROs are found under the ministries of justice or interior. Only in Greece is the ARO located under the ministry of finance. Table 2 provides the complete list of participating entities (for more information, see Annex 4). Interviews conducted for the purpose of this study in the UK revealed that sometimes AROs and FIUs are located within the same national institution. The desk research showed that it is especially the case when these functions are delegated to police forces – as in Austria, Cyprus, Denmark, Finland, Germany, Sweden and the UK.

Figure 6. AROs according to their location/affiliation in the EU Member States (35 in total)*



* This figure is provisional – pending approval from DG Home.

Sources: Authors, based on European Commission, *Report 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*, COM(2011) 176 final, Brussels, 12 April 2011.

Table 2. AROs according to their location/affiliation in the EU Member States*

Police	Prosecutor's Office	Independent	Ministry of Interior	Ministry of Justice	Ministry of Finance
AU, CZ, EE, FI, FR, DE, IT, LV, LT, MT, PL, PT, SE	BG, CY, DK, LT, LU, SL, NL	BE, BG, FR, HU, IE, ES, SE	HR, SK, UK (2)**	DE, RO, ES	EL

* This table is provisional – pending approval from DG Home.

** The UK has two AROs placed within the Home Office.

Sources: Authors, based on European Commission, *Report 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*, COM(2011) 176 final, Brussels, 12 April 2011.

There are also important differences across EU Member States as regards the kinds of information that can be accessed by AROs in light of national law. Interviewees signalled that most AROs do not have access (direct or indirect) to all relevant databases. For instance, if all AROs have access to company registers, centralised land registers do not exist in all Member States. Only a few AROs are involved in the management of frozen assets, and about half of the AROs do not have access to judicial statistics on freezing and confiscation. Training has also been signalled in both the survey and interview results as something in need of further improvement. Some practitioners underlined that financial investigations require specific training, and there are real discrepancies across the EU Member States in terms of qualified staff. As a result, confiscation procedures remain underutilised and practitioners frequently prefer to resort to 'traditional' instruments of mutual legal assistance (MLA) in criminal matters, such as the Council of Europe Convention on Mutual Legal Assistance and the 2000 European Convention on Mutual Assistance in Criminal Matters.

Another concern relates to budgetary oversight. As regards the CARIN Network, despite being referred to as an 'informal network', Europol provides a permanent secretariat function and the staff of the secretariat is part of the Europol staff. Furthermore, the secretariat can draw on the administrative resources of Europol as is necessary for the performance of its tasks. Therefore, CARIN, which works as an informal network but which provides formal channels for exchange of information, does not have a proper legal basis. This raises questions about the oversight and accountability of CARIN, its activities and the links it has with other networks and supranational information exchange fora.

b) Criminal justice perspective

Similar to the challenges identified in the previous subsection in relation to the EU FIUs, a key issue when it comes to the legality of ARO activities is the relationship and compatibility of their actions with European law guarantees (as stipulated in Directive 2014/42/EU; see section 3.1 above) and the EU Charter of Fundamental Rights. This relates in particular to cases of non-conviction-based confiscation and extended confiscation, as well as in relation to the rights of bona fide third parties and confiscation orders issued following *in absentia* convictions,¹⁰⁴ or when it comes to legality standards in the scope of cooperation with the private sector.

¹⁰⁴ See *Eurojust News*, No. 13, June 2015.

3.2.2.3 *Economic costs and benefits of AROs*

The majority of the AROs have relatively few personnel. Annex 2 of this study notes that the main, ongoing cost driver is related to the number of staff needed for exchanging information between AROs, which can be estimated as 40% of that of FIUs. The analysis also shows that inbound ARO requests increased by 60% from 2013 to 2015. This suggests that EU intervention is leading to increased information sharing among Member States with regard to asset recovery. Annex 2 also estimates the annual costs of FIUs and AROs at roughly €120 million (€90.3 million for FIUs and €29.2 million for AROs).

Yet all this statistical data tells us little regarding the actual added value, indirect costs, benefits or effectiveness (including compliance with legal and fundamental rights standards enshrined in EU law and the EU Charter) of 'information exchange' in the scope of AROs when it comes to addressing financial OC in the Union. For instance, even if an increase in the sums recovered could be observed over time, it would not be accurate to directly attribute this change to the setting up of EU AROs or FIUs.

The Romanian case examined in this study showed a higher value being recovered by using the extended confiscation clause, which is contested in other EU Member States as it may be applied in an over-broad manner in some national jurisdictions. Moreover, there is no information on actual impacts. For instance, has it helped to reduce criminal assets? Has criminality itself decreased due to such actions? Have other unexpected effects occurred, such as a negative impact on the property rights of persons accused, compliance with EU law guarantees or compliance with the proportionality test?

4 Criminal Justice Investigations in the EU

Key findings

- The current EU legal framework on substantive and procedural criminal law is a patchy and largely fragmented one, with instruments falling in between old EU third pillar tools and post-Lisbon Treaty legal acts. This poses a significant difficulty in ensuring the coherence of EU criminal law.
- The European Investigation Order constitutes a legal act setting unprecedented benchmarks in EU criminal justice cooperation, which include the respect of legal and constitutional systems of the executing Member State, a proportionality test by the issuing authority and an express ground for refusal on fundamental rights grounds.
- Joint Investigation Teams are among the most known means of cross-border operational cooperation by national authorities to fight against OC and present greater potential for deepening current cooperation. They have initiated important changes in the professional culture of law enforcement practitioners in the EU.
- JITs, however, present a number of gaps and challenges related to uncertainty, lack of clarity and oversight of the current version of Model Agreement specifying the rules, responsibilities, accountabilities and applicable legal frameworks and fundamental rights issues applying to a specific joint

During the last 15 years the Union has set the goal of establishing a common European criminal justice area (Mitsilegas, 2012a and 2012b). This political ambition has been anchored on the principle of mutual recognition, which calls for EU Member States to accept decisions by judicial authorities from other Member States as presenting the same value and effects as those of their own.¹⁰⁵ This principle is in turn based on a presumption of mutual trust that EU Member States comply with fundamental rights and the rule of law in the functioning of their domestic legal and institutional arenas.

Despite the fact that judicial cooperation in criminal matters has been a domain traditionally ingrained in national sovereignty, the EU has developed a dynamic framework of legal instruments (in the form of both international agreements and EU law) covering various aspects related to judicial cooperation in criminal matters. These now constitute the foundations of a criminal justice-led approach to various forms of criminality in the Union. After the entry into force of the Lisbon Treaty, all these instruments need to be read in light of the EU Charter of Fundamental Rights, in particular Chapter VI, Justice (Peers et al., 2014).

An emblematic, and yet controversial, case in point in European cooperation has been the European Arrest Warrant.¹⁰⁶ The EAW has introduced a simplified and expedited judicial procedure for the

¹⁰⁵ On the application of the principle of mutual recognition in criminal matters, see Mitsilegas (2006), along with ch. 3 in Mitsilegas (2009) and Van Ballegooij (2015).

¹⁰⁶ See Council of the European Union (2002), Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L 190, 18.7.2002. According to Article 1.1, “[t]he European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another

surrender of suspects of crime for purposes of conducting a criminal prosecution or executing a custodial sentence or spell in detention. One of the latest legal developments in this field has been the European Investigation Order, adopted in 2014.¹⁰⁷ The EIO regulates the exchange of evidence between EU Member States in the field of criminal justice. It has extended the scope of application of the principle of mutual recognition to the field of evidence in criminal proceedings.

The EU legal framework on substantive and procedural law is a patchy and largely fragmented one, with instruments still lying between old EU third pillar tools and post-Lisbon Treaty legal acts. The European Parliament has acknowledged and underlined the resulting inconsistencies. For instance, in a Resolution on an EU approach to criminal law adopted in 2012, the European Parliament called for an inter-institutional agreement on the principles and working methods governing proposals for future substantive EU provisions on criminal law. The Parliament also invited the Commission and the Council “to establish an inter-institutional working group in which these institutions and Parliament can draw up such an agreement and discuss general matters, where appropriate consulting independent experts, with a view to ensuring coherence in EU criminal law”.¹⁰⁸

In a report adopted in 2014 on the review of the European Arrest Warrant,¹⁰⁹ the European Parliament called upon the European Commission to present legislative proposals to ensure, among other important issues, the proportionality check:

a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure.¹¹⁰

In addition, the European Commission proposed a mandatory ground for refusal based on fundamental rights.¹¹¹ The Parliament also recommended that the Commission set up a network of defence lawyers specialised in EU criminal law and extradition, and that it provide more adequate funding for the European Judicial Training Network (EJTN).¹¹²

Parallel to the emergence of this common legislative framework, the EU has paid special attention to fostering and strengthening cross-border cooperation among competent national authorities and the organisation of joint operations involving police, customs, border guards and judicial authorities in different EU Member States. EU JHA agencies like Eurojust and Europol play an important role in this respect. When it comes to criminal investigations, the Union has devised the JITs as a key instrument in achieving this closer cooperation in the scope of the Framework Decision 2002/465/JHA on JITs.¹¹³

Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”. For a detailed analysis, refer to Carrera, Guild and Hernanz (2013).

¹⁰⁷ See Directive 2014/41/EU regarding the European Investigation Order in criminal matters, op. cit., p. 1.

¹⁰⁸ Refer to para. 15 in the Resolution of 22 May 2012 (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0208&language=EN&ring=A7-2012-0144>).

¹⁰⁹ European Parliament, *Report with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))*, Rapporteur: Sarah Ludford, 28 January 2014 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0039+0+DOC+XML+V0//EN>).

¹¹⁰ Specifically, the European Parliament stated, “(d) a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality.”

¹¹¹ Ibid.

¹¹² See para. 14 of the report.

¹¹³ See Council of the European Union, Framework Decision 2002/465/JHA of 13 June 2012 on Joint Investigation Teams (OJ L 162, 20.06.2002). (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0465&from=EN>).

JITs consist of judges, prosecutors and law enforcement authorities, established for a fixed period and a specific purpose by way of a written agreement between the Member States involved to carry out criminal investigations in one or more of them. The informal JITs Network was established in 2004 to support JITs. EU JHA agencies play a major role here. Eurojust finances the activities of JITs from its regular budget, and Eurojust and Europol jointly produced a JITs Manual, which is intended to inform practitioners of the legal basis and requirements for setting up a JIT and to provide advice on when a JIT can be usefully employed.¹¹⁴ The effectiveness of JITs has not received much focus in the literature.¹¹⁵

This section pays special attention to the challenges and added value of the EIO (section 4.1), and European cooperation in the scope of JITs (section 4.2).

4.1 The European Investigation Order

4.1.1 *Assessing and identifying the EU added value of EIOs*

An EIO constitutes a judicial decision issued or validated by a judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State with the intention to obtain evidence.¹¹⁶ It may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State (Art. 1.1). Its issuing may be requested by a suspected or accused person, or by a lawyer on his/her behalf, within the framework of applicable defence rights in conformity with national criminal procedure (Art. 1.3). It may be issued in the following circumstances (Art. 4):

- (a) With respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- (b) In proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State 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;
- (c) In proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State 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; and
- (d) In connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

The impact of the EIO in the scope of EU criminal investigations is expected to be large, at least from a legal viewpoint. The EIO will replace the corresponding provisions applicable among Member States bound by it of the Council of Europe Mutual Legal Assistance and its protocols, the Convention implementing the Schengen Agreement and the EU Mutual Legal Assistance Convention and its Protocol (Art. 34.1). The Directive will also take over the Framework Decision

¹¹⁴ For more information on JITs, see www.europol.europa.eu/content/page/joint-investigation-teams-989 (Europol) and www.eurojust.europa.eu/practitioners/jits/pages/historical-background.aspx (Eurojust).

¹¹⁵ See for instance, E. Bakker and J. Powderly, "Joint Investigation Teams Added Value, Opportunities and Obstacles in the Struggle against Terrorism", Expert Meeting JITs of 21 February 2011, The Hague, International Centre for Counter-Terrorism (<http://www.icct.nl/download/file/ICCT-Bakker-EM-Paper-Joint-Investigation-Teams.pdf>).

¹¹⁶ For all relevant documents on the EIO's legislative procedure refer to <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=586561#tab-0>; see also Art. 1.1 of the Directive. For an analysis, refer to Carrera et al. (2015).

on the European Evidence Warrant,¹¹⁷ and the relevant provisions of the Framework Decision on the mutual recognition of freezing orders.¹¹⁸

The EIO can be seen as an instrument setting unprecedented ‘benchmarks’ in the framework of EU judicial cooperation in criminal matters and EU policies fighting OC. It lays down a set of supranational safeguards with regard to the respect of the legal and constitutional system of the executing Member State. The Directive requires the issuing authority of an EIO to do so only in those cases where the investigative measures could have been ordered under the same conditions in a domestic case.¹¹⁹ It also calls for ensuring the applicability of legal remedies equivalent to those applicable in a similar domestic case to the investigative measures indicated in the EIO.¹²⁰

Additionally, the EIO has introduced an obligation for the issuing authority to carry out a ‘proportionality test’ before issuing an order,¹²¹ and contains for the first time an express ground for refusal on fundamental rights grounds. Art. 11.1(f) of the Directive stipulates that the executing authority may refuse to recognise or execute an EIO where there are substantial grounds to believe that the execution of the investigative measure would contravene the executing State’s obligations under Art. 6 TEU and the Charter.¹²² Furthermore, Recital 19 of the Preamble of the Directive states that

[t]he creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.

The deadline for EU Member States to transpose the Directive into their domestic legal systems is 22 May 2017. It is therefore not possible at this stage to examine its costs and benefits.

4.2 Joint Investigation Teams

4.2.1 *Assessing and identifying the EU added value of JITs*

The survey conducted for the purposes of this study reveals that JITs are among the most well known means of cross-border cooperation to fight OC. Some survey participants and interviewees confirmed that JITs are especially useful in complex cases presenting transnational dimensions or cross-border ramifications. It was reported that JITs allow for investigative capabilities to be better organised when two or more EU Member States are involved. They also allow competent authorities in participating Member States to undertake investigative measures without a formal request and are said to ease ‘direct’ exchange of information. Some respondents said that JITs have generally improved the investigative capabilities of the EU in the field of OC. Therefore, it appears as if

¹¹⁷ See Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72.

¹¹⁸ See Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45, Art. 34.2.

¹¹⁹ See Art. 6.1(b). This provision has been included to avoid instances where Member States use the EIO to ‘fish’ for evidence and obtain evidence abroad that they are not able to obtain under their own domestic legal and constitutional procedures.

¹²⁰ See Art. 14.1, and see para. 4 on time limits and para. 6 on suspensive effect.

¹²¹ Art. 6.1(a) of the Directive.

¹²² In addition, para. (39) of the Preamble states that

[t]his Directive respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States’ constitutions in their respective fields of application.

European cooperation and JITs more specifically have initiated important changes in the *professional culture* of law enforcement practitioners across the EU Member States.

Furthermore, as underlined by some of our interviewees, JITs allow for simplifying investigative cooperation at the EU level, while making the model for requesting mutual legal assistance redundant. Some interview respondents perceive the EIO to be useful, especially when an investigation is stuck. The setting up of a JIT and the gathering of evidence within such a team require specific rules, which are better dealt with separately.¹²³ Without prejudice to the application of the EIO Directive, existing instruments therefore continue to apply to this type of investigative measure.

According to Eurojust, “JITs, along with coordination meetings and coordination centres, assist the Member States in the collection and connection of vital case-related information. These tools provide speedy, results-driven cooperation.”¹²⁴

In 2014, 122 JITs were supported by national Members, 45 of which were newly formed in 2014, which according to Eurojust has meant an increase of more than 20%. Eurojust also financially supported 67 JITs. Concerning the ‘forms of crime’, among of the 45 new JITs set up in 2014, 14 related to participation in a criminal investigation, 13 to fraud, 11 to drug trafficking, 7 to money laundering and 7 to trafficking in human beings (THB).

Since 2011, Eurojust has hosted the secretariat of the Network of National Experts on Joint Investigation Teams (JITs Network). The JITs Network has functioned since 2005 and is the result of EU Member States’ commitment to designate (at least) one national expert “with a view to encouraging the use of JITs and exchanging experience on best practice”.¹²⁵ These national members “represent both the judicial (judges, prosecutors, Ministries of Justice) and law enforcement (police officers, Ministries of Interior) dimensions of a JIT”.¹²⁶ Eurojust promotes the JITs Network and supports the national experts. In reality, though, there is only one impartial judge in the JITs Network, whereas two-thirds are prosecutors and ministry of justice representatives, and one-third are police and ministry of interior representatives (see Figure 7). Thus, there is the lack of representation and oversight by impartial judges within the Network.

¹²³ Art. 3 of the EIO Directive lays down the ‘scope’ and stresses that

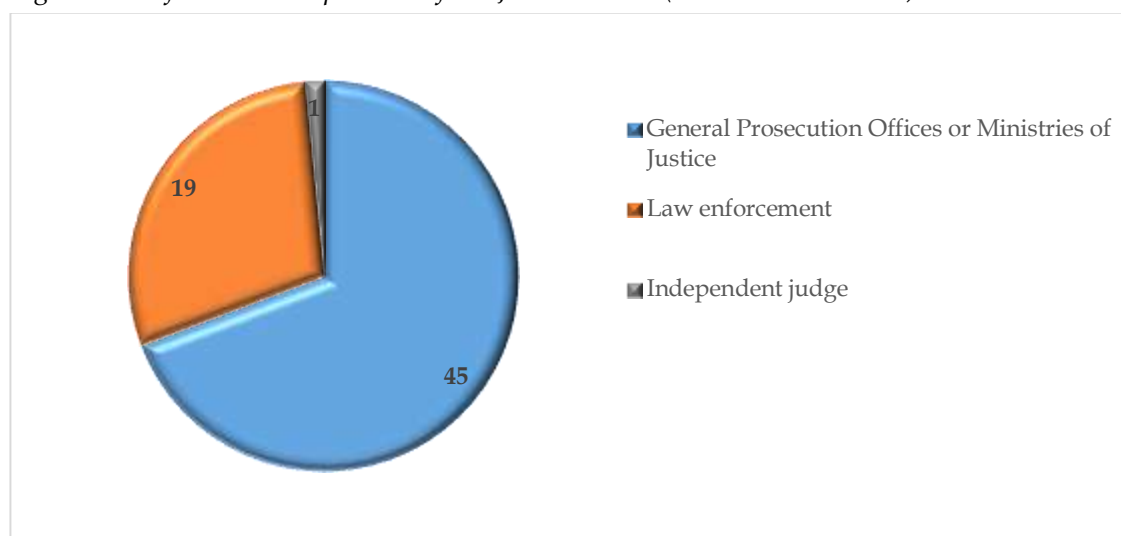
[t]he EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team as provided in Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (1) (‘the Convention’) and in Council Framework Decision 2002/465/JHA (2), other than for the purposes of applying, respectively, Article 13(8) of the Convention and Article 1(8) of the Framework Decision.

¹²⁴ See Eurojust, 2014 *Annual Report*, The Hague, 2015 (<http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202014/Annual-Report-2014-EN.pdf>).

¹²⁵ For more information, see “JITs Network” at <http://www.eurojust.europa.eu/Practitioners/JITs/jitsnetwork/Pages/JITs-network.aspx>. According to the JITs Network website, the “National Experts are mainly representatives from law enforcement, prosecutorial and/or judicial authorities. Institutional bodies such as Eurojust, Europol, OLAF, the European Commission and the European Council have also appointed contact points to the JITs Network.”

¹²⁶ Ibid.

Figure 7. Professional composition of the JITs Network (in total 65 members)



Source: Authors, based on data provided by Eurojust.

As mentioned earlier, in 2011 Eurojust and Europol developed a JITs Manual. This manual aims at informing practitioners about the legal basis of JITs and how in practice to set up a JIT. In addition, the manual provides advice on the ways in which JITs can be effectively used.¹²⁷ JITs are generally set up in situations in which, first, a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States; or second, a number of Member States are conducting investigations into criminal offences in which the nature of the case necessitates coordinated and concerted action in the Member States involved.¹²⁸ According to the JITs Manual, "JITs will usually be considered when investigating more serious forms of criminality. However, when considering setting up a JIT, national legislation and operational guidelines should be checked to determine whether the creation of a JIT is subject to a seriousness threshold or any other qualifying criteria."¹²⁹

The Eurojust report of 2014 underlines that coordination meetings in the context of JITs have contributed to resolving operational and legal obstacles. These include differences in national legal systems with regard to rules on the gathering of evidence, issues related to the admissibility of evidence or disclosure of information, as well as time limits for data retention.¹³⁰

4.2.2 Gaps and barriers in using JITs

Since their inception in 2002, an assessment of how JITs work on the ground shows improvements, but also perpetual obstacles, at both the operational and the legal levels. The first evaluations of JITs pointed to some difficulties, most of which are still valid today. In an early evaluation of JITs by Rijken (2006), the following elements were highlighted:

¹²⁷ See Council of the European Union, Joint Investigation Teams Manual, 15790/1/11, Brussels, 4 November 2011.

¹²⁸ Refer to Art. 13.1 of the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.07.2000, p. 3.); and Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.06.2002).

¹²⁹ See Council of the European Union, Joint Investigation Teams Manual, 15790/1/11, Brussels, 4 November 2011, p. 7. Interestingly, the Manual adds on the same page, "[t]hat said, JITs may also prove useful in the investigation of smaller cross-border cases. This is because a JIT can facilitate co-operation in the specific case and also prepare the groundwork for future JITs by building mutual trust and providing experience in cross-border co-operation."

¹³⁰ See Eurojust, 2014 Annual Report (2015), op. cit.

- JITs can be based on two different legal bases: the 2000 Convention on Mutual Assistance in Criminal Matters and the 2002 Framework Decision on Joint Investigation Teams. The extent to which JITs can be operated based on the Framework Decision depends entirely on the degree to which countries have created a legal basis for JIT cooperation in their domestic legislation. The situation is different in cases where the EU MLA Convention is used as the legal basis for a JIT, because some of these provisions can be applied directly as a result of their self-executing character.
- Related to the dual legal basis of JITs, the non-compliance of the Member States with the requirements imposed by the European legal framework can be a major obstacle to the establishment of an operational JIT. Insufficient or unclear transposition of the Framework Decision and/or the Convention can be deeply problematic.
- If one of the major advantages of a JIT is the informal information exchange between the States participating in a JIT, delays in cooperation in criminal matters can be caused by the fact that the authority seeking information is not familiar with the organisational structure and proceedings in the requested country, or by the fact that the formal agreement of different authorities is required once the information exchanged is used in a trial. Although the JIT legal framework provides for direct information exchange, the first attempts for setting up JITs show that this does not solve all the problems related to this case at issue. The problematic information exchange between different countries is a well-known problem within the EU.
- In operational activities where the development of mutual trust is one of the most important prerequisites for intensified cooperation, JITs can face several issues in the organisation of the investigations. In cases of [a] top-down approach in setting up JITs for instance, lack of continuity as regards the presence of persons involved can make the functioning of [the] related steering group difficult. The management of the JIT project can also be difficult. The necessary tasks are executed on the basis of willingness and agreements and not on the basis of a real mandate giving the persons involved formal authoritative power that could be formally exercised.
- When [a] bottom-up approach is used in JITs, in which the initiative originated from the operational level, concrete investigation is already available at the outset and further intelligence gathering can be built up around it. A bottom-up approach has been said to allow practitioners who will eventually perform the 'intelligence gathering' and investigation to make the necessary decisions.

This evaluation concluded that in order to ensure the success of JITs, they could be organised in various ways and the legal framework would need to leave enough options to use the instrument in a flexible way. Depending on the cases under consideration, bottom-up or top-down approaches could be used. The JIT instrument could be used for the coordination of police and judicial activities and for information exchange, and it could be chosen in order to make use of the advantages of the JIT without locating the joint team in one country.

The evaluation furthermore concluded that if JITs do indeed facilitate cooperation, successful cooperation remains dependent on numerous other factors. These include an adequate legal framework, a familiarity with possibilities offered by the EU in the field of police and judicial cooperation and, most importantly, a willingness to engage in intensified cooperation at the strategic and operational, as well as the political level. The evaluation also underlined that basic knowledge of each other's legal system with regard to the competence of the different authorities involved and the legislation on investigative methods, along with the organisational structure of the investigation and prosecution, are necessary preconditions to start a JIT.

More recently, a 2014 report for the European Commission on the effectiveness of specific criminal law measures targeting organised crime reiterated similar outstanding issues as regards the efficiency of JITs (Di Nicola et al., 2015). In particular, the report cited the following issues: first, the dual basis for JITs; second, the lack of trust and reluctance to share sensitive information among States and a lack of knowledge of the laws of the participating states; and third, JITs are still used relatively infrequently, despite a steady increase over the last few years.

In addition to the above-mentioned problems, the report highlighted a 'perceived slow process' in setting up JITs, and stated that

interviewees in several Member States (AT, BE, CZ, DK, FI, DE, LT, LU, NL, PT) believed that the process of setting up a JIT was too formal and time-consuming to be able to be effectively used in organised crime investigations. For example, one interviewee (DE) cited accounting and billing/financial reporting as being particularly complicated. Denmark has tried to reduce such administrative hurdles by designating a 'JIT specialist' to set up all JITs.¹³¹

The report nonetheless noted that the establishment of designated experts on JITs in Member States and the setting up of the JITs Network had helped to overcome Member State hesitations to use JITs.

According to the report, the perceived high administrative burden of setting up a JIT often results in the use of alternative forms of cooperation, such as conducting mirror investigations or relying on information exchange through other organisations such as Interpol. The reported problem is further exacerbated by the fact that some Member States have put in place different formal requirements for signing JIT agreements. Finally, the report revealed that in some cases they were not established because the proposal for formation of a JIT came too late or the investigations were at different stages within each country. Recommended changes in the report on that matter included the simplification of the procedure for setting up a JIT in order to ensure an efficient and speedy process, the expansion of training opportunities, an increase of EU funding and the setting up of a unified procedure/authorisation required for establishing JITs at the EU level.

These conclusions echo some of the results emerging from our interviews with national practitioners, Eurojust and Europol. Some national practitioners mentioned that when a case involved two EU Member States, instead of JITs, bilateral cooperation approaches were usually favoured. Eurojust officials explained that while initially the case can look, for example, like bilateral cross-border human trafficking, it appears only later during the investigation that the case also involves drug trafficking or other criminal activities in other countries.

In addition, Eurojust and Europol officials explained that the EU added value of creating a JIT depends on the specific case. They highlighted that if the case is at the beginning of the investigation, it is easier for Member States to cooperate or at least they are at the same level, than if the investigation is about to be concluded in one Member State and another just starts to look into the case. In the former country, there is a lot of investment in terms of money and time, therefore it can be reluctant to restart the process with another Member State.

JITs were the best known EU tool for cooperation among survey respondents, among whom 85% indicated that EU cross-border cooperation is undertaken and developed in the form of JITs (see Annex 5, Figure A5.8). A majority of national practitioners interviewed also recognised JITs as a major achievement in European cooperation against OC. Some interviewees recognised that JITs were more efficient than letters rogatory in international criminal investigations and only a minority of them raised concerns as regards the time needed to create a JIT. They expressed doubts, however, about which country would bring the case to court after a JIT. This can potentially raise some tension among JIT participants, as it is within the professional culture of police and prosecutors that they want to 'own' the outcome of the case. As one of the interviewees explained, at the very end the value for practitioners is "what can you put on your website or show to the press after solving a complicated case".

According to Eurojust officials, there is a difference in perceptions across practitioners. It can be explained by very heterogeneous levels of familiarity and experience with European instruments such as JITs, as well as different backgrounds, as for example in some jurisdictions prosecutors are keener to cooperate with police officers than in others. The law enforcement practitioners who are more familiar with these instruments recognised that JIT procedures are very simple and they acknowledged the added value of JITs, which according to them improve European professional culture and promote the creation and reinforcement of networks of professionals across Europe.

¹³¹ Derived from Di Nicola et al. (2015).

Others less familiar with JITs often assumed the procedures to be complicated and the language barrier was also perceived as problematic, though JITs receive funding for translations of evidence and interpretations at meetings. Despite these mentioned difficulties, a majority of the respondents considered that JITs are an efficient tool for addressing OC in the EU.

In addition, the survey revealed that law enforcement practitioners especially value in their daily work the contribution of EU cooperation tools when it comes to ‘information sharing’ (88% respondents). EU tools on information sharing were reported during the interviews to facilitate solving the cases and responding to requests in more efficient ways. Some interviewees raised concerns regarding information exchanges, which related for instance to the existence of multiple national and EU databases for the same purpose, as these create confusion among the practitioners, or the possibility to misuse the information. Respondents to the survey who were either academics or defence lawyers raised additional concerns about increasing *informal* information sharing at EU levels and the use of such information in ways that do comply with national requirements for the information to be considered ‘evidence’ in criminal proceedings, and which contravene the presumption of innocence and fair trial principles.

Furthermore, the concerns expressed about the gaps in the applicable legal framework are well founded. A key open question in any JIT is the applicable law for guest team members and their powers in the jurisdiction of another Member State. There are also the questions of coordination and authority and the position of EU agencies (Europol and Eurojust) in JITs. The current legal framework stipulates that every JIT needs to have a team leader or leaders having the responsibility over the investigation, but too much room for discretion is left to the national levels. It is not clear the extent to which a representative from the judiciary is always the leader in those cases where investigating magistrates or prosecutors direct operations.¹³² While as a general rule the team leader needs to come from the Member State in which the team is at any time when carrying out its operations, in practice it appears that EU Member States prefer having more than one team leader.

Other open questions relate to the actual working arrangements of each specific JIT and specific issues of legal responsibility or liability (or both) in cases where legal standards and fundamental rights are violated or disregarded, or in situations of misconduct or wrongdoing. This is particularly problematic in cases of ‘flowing leadership structures’ with evolving or dispersed geographical areas of intervention. Moreover, the specific responsibilities of Europol and Eurojust members are also an issue where more attention and scrutiny is needed. Even when participating in ‘support capacities’,¹³³ EU JHA agencies may be subject to legal responsibilities under EU law (Carrera, den Hertog and Parkin, 2013).

Justice and police cooperation enabled by JITs could set a high benchmark in operational efficiency, but also in terms of safeguarding fundamental rights in criminal investigations. However, their current legal shapes are by and large unsatisfactory from this perspective. The 2015 Eurojust report, for instance, mentioned the safeguard of data protection in the context of exchange of information,

¹³² The JITs Manual (p. 9) stipulates that

[e]very JIT needs to have a team leader or leaders. Article 13 of the 2000 MLA Convention offers several possibilities and again leaves room for national interpretation. It is not specified whether the team leader should be a public prosecutor, a judge or a senior Police or customs officer. As this issue is very much dependent on national legislation, no suggestions will be given here. However, since the JIT is considered in some Member States as a particular form of mutual legal assistance, it is recommended that a representative from the judiciary should be the leader in those cases where investigating magistrates or prosecutors direct operations.

¹³³ According to the JITs Manual (p. 14),

Eurojust National Members, their Deputies and Assistants can be members of a JIT when their Member State has defined, as required by Article 9f of the revised Eurojust Decision, their participation in the Joint Investigation Team as national competent authority. Officials from Europol, OLAF, and National Members of Eurojust, their Deputies or Assistants, not acting as national competent authority, may be participants in the operation of a JIT, but cannot lead or be a member of it. In accordance with Article 6 of the Europol Council Decision Europol officials may participate in a JIT in a support capacity but are not permitted to take part in any coercive measures.

as well as the need to carefully address the extension of JITs with third countries that do not respect European standards regarding fundamental rights. The compliance of JITs with the EU Charter represents an issue on which more effort is needed.

Every JIT is anchored on a JIT Agreement, which provides the operational arrangements for any of these operations. The Council of the European Union first adopted a Recommendation on a Model Agreement for setting up a Joint Investigation Team on 8 May 2003, then a Resolution on 26 February 2010.¹³⁴ Some Member States have agreed draft JIT templates among themselves to speed up the agreement process.

The current version of the JITs Model Agreement does not foresee an obligation to draw up a report on the operation showing how the operational action plan was implemented or what results were achieved. There is also an accountability and transparency challenge concerning the specific practical arrangements, operational plan (purpose, members and their roles, legal procedures and rules applicable to information and evidence,¹³⁵ accountabilities and responsibilities, etc.) safeguards and conditions under which these joint investigations are implemented in practice and their compatibility with relevant fundamental rights under the EU Charter. The Model Agreement should be amended or revised in light of the innovations brought by the Lisbon Treaty and the legally binding EU Charter of Fundamental Rights.

Another dilemma relates to what happens to the ‘information’ collected in the course of JIT operations. One question concerns whether authorities in the host Member State are called to collect evidence in cases for which this is not allowed by the law of the host Member State but it is allowed by the law of guest Member State officers. Another is the extent to which guest officers can collect evidence in cases where this is lawful by the law of the host Member State but unlawful in accordance with the law of their own country. What may be considered ‘evidence’ in criminal proceedings in one Member State may differ from the requirements in another. Indeed, the information gathered may not meet the requirements for qualifying as ‘evidence’ in all participating EU Member States. The EIO should provide here the desired standard in the context of mutual recognition of evidence. The EIO framework prohibits ‘fishing expeditions’ and allows authorities in the executing state not to execute measures where this would not be in accordance with their domestic law.

Other areas of improvement could include further simplification, harmonisation and transparency of the procedures: simplification of the procedure to set up a JIT and the establishment of a unified procedure/authorisation required for setting up JITs at the EU level. Such simplification would complement the current JITs Manual, jointly prepared by Eurojust and Europol.¹³⁶ Eurojust has reported that “[c]oordination meetings organised to facilitate the work of JITs contributed to the resolution of recurring obstacles, such as i) differences in legal systems with regard to rules on the

¹³⁴ See Council Recommendation of 8 May 2003 on a Model Agreement for setting up a Joint Investigation Team (OJ C 121 of 23.05.2003, p.1); and Council Resolution of 26 February 2010 on a Model Agreement for setting up a Joint Investigation Team (JIT) (OJ C 70 of 19.03.2010), which also contains specific provisions applicable to Europol’s participation. The rules concerning Europol participation were adopted by the Europol Management Board on 9 July 2009 (file No 3710-426r6). See also Europol Management Board on 18 November 2009 (file No 2610-74r2). The Model Agreement is also contained in Annex 2 of the JITs Manual.

¹³⁵ The current version of Art. 9 (Evidence) of the Model Agreement states loosely that
[t]he parties entrust the leader or a member(s) of the JIT with the task of giving advice on the obtaining of evidence. His or her role includes providing guidance to members of the JIT on aspects and procedures to be taken into account in the taking of evidence. The person(s) who carry out this function should be indicated here. In the OAP the parties may inform each other about giving testimony by members of the JIT.

¹³⁶ See the JITs Manual (<http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/JITs%20Manual/JITs-manual-2011-11-04-EN.pdf>).

gathering of evidence; ii) admissibility of evidence; iii) disclosure of information; and iv) time limits for data retention".¹³⁷

More efforts could also address or ease the perception of administrative burdens on JITs. A regular or periodic reporting on JITs and a system for collecting and gathering statistical and qualitative knowledge on their practical use would also facilitate a better understanding of their added value.

Training on European investigative tools was also mentioned in our interviews as an area where more efforts are needed by EU Member States or by EU agencies, including Eurojust, Europol and especially CEPOL. However, training (and as a consequence, trained staff) is uneven across the EU Member States. CEPOL regularly conducts seminars on JITs, which attract very high interest among police, prosecutors and judiciary officers, because of their focus on practical issues arising from real case studies. These seminars are aimed at creating synergies and at reinforcing mutual trust and cooperation among prosecutors, judges and senior police officers involved in leading/operating JITs.¹³⁸ This objective corresponds to survey results. When comparing the awareness of the tools (see Annex 5, Figure A5.8) with actual participation in training on EU tools (see Annex 5, Figure A5.9) some correlation was observed: the respondents who claimed to participate in training reported that in their country on average there were more tools available than those who did not participate (see Annex 5, Figure A5.10).

CEPOL's training capacity could therefore be further strengthened. CEPOL should be encouraged to create further educational tools for JITs, as well as expand its use of e-learning multilingual materials that could be used by law enforcement officials. EU Member States should be encouraged to subscribe and make more use of CEPOL's Learning Management System. The cooperation between the JITs Network and CEPOL in organising seminars on JITs for judges and prosecutors should be expanded to JITs in the context of cooperation with third countries. This objective was initiated at the 10th annual meeting of the JIT national experts and should be supported, as cooperation with third countries is increasing.

4.2.3 *Economic costs and benefits of JITs*

In terms of funding, it should be noted that Eurojust set up a new procedure at the end of 2014 to improve the efficiency of grants for practitioners, including simplified forms. When it comes to the financial costs and benefits of JITs, Annex 1 of this study highlights that Eurojust can either fund or support a JIT. Eurojust provides grants to Member States to facilitate the organisational and financial aspects of JITs. The grants delivered have a ceiling of €50,000 per JIT and cover up to 95% of the total eligible costs to Member States. This funding seeks to assist Member States by reducing the impact of costs related to the transnational nature of JITs. Annex 1 identifies a cost of €3,700 per JIT supported or funded. The overall costs of JITs can be estimated to be a minimum of €4.38 million in 2016 based on an estimate that 10% of Eurojust's overall budget indirectly supports JITs.

When it comes to the results or 'benefits' of JITs, it is not possible to gain a proper and objective understanding of the actual contributions in the fight against criminality in the EU. According to Eurojust's 2014 annual report, "JITs enable more efficient, affordable and speedier justice".¹³⁹ Such a depiction of JITs mainly reflects the views of the law enforcement practitioners, but not impartial judges. Time and time again, there is almost no mention of fundamental rights issues or ensuring criminal justice checks and balances throughout the cooperation.

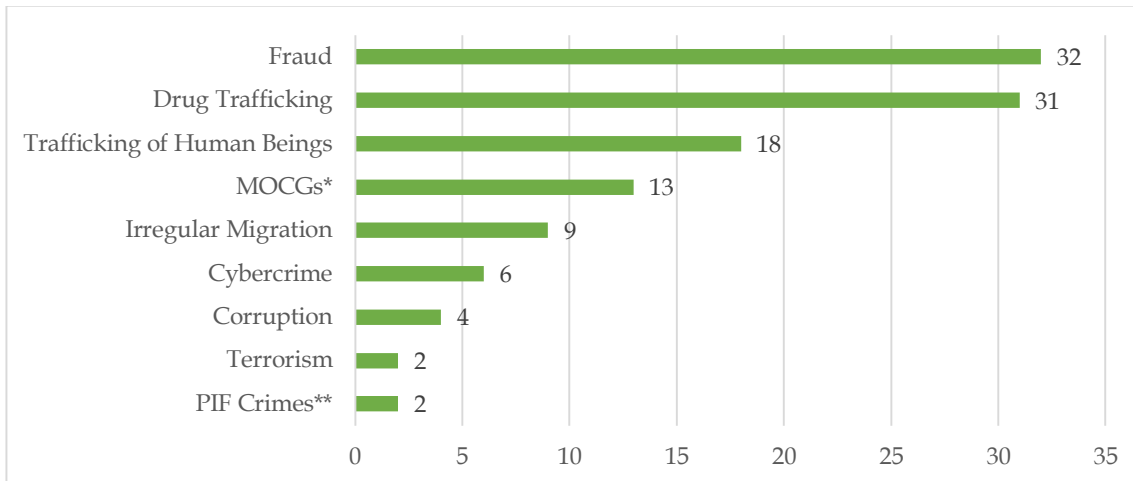
¹³⁷ See p. 22 of Eurojust, *2014 Annual Report* (2015), op. cit.

¹³⁸ See CEPOL, *2014 Annual Report*, Luxembourg: Publications Office of the European Union, 2015.

¹³⁹ See Eurojust, *2014 Annual Report* (2015), op. cit., p. 14 (<http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202014/Annual-Report-2014-EN.pdf>).

Survey data shows that JITs are well known and thus potentially more used as a cross-border cooperation tool. Among the respondents, 85% or 29 out of 34 said that their country used JITs for cross-border cooperation (see Annex 5, Figure A5.8). This could stem from the fact that JITs are flexible and can cover several crime priorities (see Figure 8), unlike AROs or FIUs.

Figure 8. Number of JITs per crime priority



* MOCGs refer to mobile, organised crime groups.

** PIF crimes refer to protection of the financial interests of the EU.

Source: Authors, based on the Eurojust 2014 Annual Report (2015), op. cit.

Even though JITs represented the tool of cooperation that is the most well known among the respondents, it is hard to measure how much added value they bring in economic terms. As discussed, difficulties arise for very similar reasons when talking about FIUs and AROs.

5 EU Policy Cycle for Serious and Organised Crime

Key findings

- Europol's analysis in the form of threat assessments (SOCTAs) plays a key role in the EU policy cycle and COSI's decisions. SOCTAs are affected by deep deficiencies when it comes to the quality of the information gathered, the scientific and independent basis of analysis and the rationale behind prioritising certain crimes and not others.
- There are important deficits affecting the reporting, ex ante and ex post evaluation of the added value and results of EMPACT projects.
- There are major democratic and transparency deficits in the way in which the EU policy cycle works and develops, as well as in the activities and results of COSI. EU JHA agencies focused on fundamental rights and liberties (such as the European Union Agency for Fundamental Rights or the European Data Protection Supervisor) are generally excluded from participating in EU policy cycle meetings.

The EU policy cycle is a methodology adopted in November 2010¹⁴⁰ to address 'criminal threats' affecting the EU. The cycle comprises different steps (Multi-Annual Strategic Plans, MASPs) and contributions from different EU actors and agencies.¹⁴¹ Europol and COSI¹⁴² play a particularly central role in the cycle.

COSI was set up by Art. 71 TFEU. It is a Council structure composed of members of the competent national ministries who are assisted by the permanent representatives to the EU of the Member States in Brussels and by the secretariat of the Council. COSI's objective is to facilitate, promote and strengthen the coordination of operational cooperation of EU countries in the field of internal security. In this capacity, it acts in a number of different areas, including police and customs cooperation, the protection of external borders and judicial cooperation in criminal matters. It must submit a regular report on its activities to the Council, which then informs the European Parliament and the national parliaments. COSI, as well as the Political and Security Committee, must also assist the Council with regard to the 'solidarity clause' (Art. 222 TFEU). COSI does not take part in the preparation of new legislation or the conduct of operations.

Europol analysis and threat assessments are central in COSI's decisions. Europol delivers the SOCTAs, and COSI examines and follows up (through operational action plans) and drives reporting on SOCTAs' recommended priorities. A number of projects are also funded, such as the EMPACT projects.

¹⁴⁰ See Council of the European Union, Council conclusions on the creation and implementation of an EU policy cycle for organised and serious international crime (3043rd JHA Council meeting), Brussels, 8-9 November, 2010 (https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/117583.pdf).

¹⁴¹ See European Commission, DG HOME official website, "Operational Cooperation" (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/operational-cooperation/index_en.htm).

¹⁴² See European Council, official website, "Standing Committee on Operational Cooperation on Internal Security (COSI)" (<http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/standing-committee-operational-cooperation-internal-security/>).

The EU policy cycle originated from the development of the ‘Harmony project’,¹⁴³ which aimed at ensuring effective cooperation between Member States’ law enforcement agencies, EU institutions, EU agencies and relevant third parties, as well as delivering “coherent and robust operational action targeting the most pressing criminal threats facing the EU”. The full policy cycle covers the 2013–17 period. It consists of four key steps, which are detailed on Europol’s website:

- Step 1: The SOCTA developed by Europol delivers a set of recommendations based on an in-depth analysis of the major crime threats facing the EU. The Justice and Home Affairs (JHA) Council uses these recommendations to define its priorities for the next four years (2014-2017).
- Step 2: MASPs are developed from the priorities in order to define the strategic goals for combating each priority threat.
- Step 3: These (EMPACT) projects will set out Operational Action Plans (OAPs) to combat the priority threats.
- Step 4: Evaluation – The effectiveness of the OAPs and their impact on the priority threat will be reviewed by COSI.¹⁴⁴

The policy cycle approach has been perceived as a major innovation because “it embodies a more rational, efficient and accountable policy-making, in which crime control goals are set on the basis of evidence and public arguments and outcomes are objectively evaluated ex-post” (Paoli, 2014a). Yet, is this really the case? What are the main challenges affecting the added value of the EU policy cycle? This section focuses more specifically on SOCTAs and the EMPACT projects.

5.1 The EU policy cycle: SOCTA and setting policy priorities

In its 4 December 2014 conclusions on the development of a renewed EU Internal Security Strategy,¹⁴⁵ the Council endorsed the “added value and success of the EU policy cycle as an efficient model in the fight against organised and serious international crime” and welcomed “the results and lessons learnt from the EMPACT projects”. The ministers furthermore welcomed an “intelligence-led approach that identifies and monitors new and emerging threats, based on threat assessments and on the basis of the policy cycle’s methodology”.

As described in section 2 of this study, Europol’s assessments are key to COSI’s decisions and in setting up the EU policy cycle priorities. Challenges and caveats pertaining to the SOCTA methodologies have been raised, however. Europol has improved its methodology since 2011. It has diversified its analysts’ backgrounds and is now working with an academic advisory board. This improvement, which still requires continual effort to refine, can be seen as a welcome step forward.

The interviews conducted for the purposes of this study with Europol representatives confirmed that Member States are more willing to contribute to SOCTA questionnaires, and the current revision of Europol’s mandate reinforces EU Member States’ responsibilities to provide the agency with the data necessary to fulfil its objectives. To this end, Europol should also submit an annual report to the European Parliament, the Council, the Commission and national parliaments on the information provided by individual Member States, with a view to encouraging further information sharing.

The SOCTA 2013 provided the basis on which the Council agreed priorities for 2013–17. Each of these priorities was translated into MASPs defining the strategic goals. To achieve these strategic

¹⁴³ See Council of the European Union, Result of the “Harmony” project, 14851/10, Brussels, 25 October 2010.

¹⁴⁴ See the Europol website at <https://www.europol.europa.eu/content/eu-policy-cycle-empact>.

¹⁴⁵ See Council of the European Union, “Development of a renewed European Union Internal Security Strategy, press release following the Justice and Home Affairs Council meeting”, Brussels, 4 December 2014 (https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/146042.pdf).

goals, OAPs were designed, and nine EMPACT projects were launched to coordinate actions by Member States and EU organisations against the identified threats. EU ISF (police) funding of €7 million was injected into these projects, which are supported by Europol. The nine EMPACT projects cover the following matters:

- facilitation of ‘illegal immigration’ – seeking to disrupt organised criminal groups involved in facilitation of irregular immigration operating in the source countries, at the main entry points to the EU on the main routes and, where evidence based, through alternative channels. To reduce OCGs’ abuse of legal channels for migration, including the use of fraudulent documents as a means of facilitating irregular immigration;
- trafficking in human beings – seeking to disrupt OCGs involved in intra-EU human trafficking and human trafficking from the most prevalent external source countries for the purposes of labour and sexual exploitation, including those groups using legal business structures to facilitate or disguise their criminal activities;
- counterfeit goods – seeking to disrupt the OCGs involved in the production and distribution of counterfeit goods violating health, safety and food regulations and those producing sub-standard goods;
- excise and missing trader intra-Community (MTIC) fraud – seeking to disrupt the capacity of OCGs and specialists involved in excise and MTIC fraud;
- synthetic drugs – seeking to reduce the production of synthetic drugs in the EU and to disrupt the OCGs involved in synthetic drugs trafficking;
- cocaine and heroin – seeking to reduce cocaine and heroin trafficking to the EU and to disrupt the OCGs facilitating the distribution in the EU;
- illicit firearms trafficking – seeking to reduce the risk of firearms to citizens, including combating illicit trafficking in firearms;
- organised property crime – seeking to combat organised property crime committed by mobile organised crime groups (MOCGs); and
- cybercrime – seeking to combat cybercrimes committed by OCGs generating large criminal profits (such as online and payment card fraud), cybercrimes that cause serious harm to their victims (such as child sexual exploitation) and cyber-attacks affecting critical infrastructure and information systems in the EU.

The EMPACT projects have led to some visible results, such as the Operation Blue Amber – which led to more than 500 arrests in 260 locations across the world, 2.8 tonnes of cocaine seized, 390 vehicles confiscated and nearly 1,300 tonnes of stolen metal seized.¹⁴⁶ The operation targeted a series of criminal groups involved in drug trafficking, facilitation of irregular migration and vehicle thefts. At the moment only one of the EMPACT projects is closed (on irregular immigration) – the others are still underway.

The organisation of ‘joint action days’ has also been recognised as very useful. For instance, one was organised concerning airports in November 2014: the Global Airport Action. Airports are places where all sorts of crimes are committed – and this joint action day targeted criminals suspected of fraudulently purchasing plane tickets online using stolen or fake credit card data. The operation gathered practitioners from various fields: border guards, customs officials, cyber-crime specialists, etc., and was organised globally through three coordination centres at Europol in The Hague,

¹⁴⁶ See the Europol official website, “Europol supports huge international operation to tackle organised crime”, 29 June 2015 (<https://www.europol.europa.eu/content/europol-supports-huge-international-operation-tackle-organised-crime>).

Interpol in Singapore and Ameripol in Bogota. The operation took place in 80 airports across the world. Over 60 airlines and 45 countries were involved in the activity. The operation led to 118 arrested, and a global alliance of airlines and law enforcement agencies working on an ongoing basis to combat online fraud and crime was established.¹⁴⁷

EU JHA agency representatives see EMPACT projects as efficient tools to promote intensive police operations at the EU level, but also as positively affecting the *modus operandi* of the law enforcement practitioners across the EU. According to the Europol staff interviewed for the purpose of this study, EMPACT projects enable ‘intensified exchange of information’ and SIENA highly benefits from this exchange of data. During our interviews, the EMPACT projects were said to add ‘operational value’ at the EU level: as one respondent put it, “information is exchanged intensively, and arrests and seizures are carried out”.

Still, several difficulties affect the setting up, functioning and results of the EU policy cycle. Concerning SOCTA and the setting of priorities driving the EU policy cycle, an important inconsistency is highlighted in section 2 above: Europol’s SOCTAs provide a list of ‘crimes’ in the EU, but do not clarify the extent to which the listed items should be prioritised or not, or on what basis. The EU policy cycle and EMPACT projects cover most (but not all) of the areas presented in SOCTAs. Certain criminalities are included to the detriment of others. The issue of environmental crime, for instance, is not included in the EMPACT projects, despite growing concerns and acknowledgement of it in Europol’s threat assessments.

Furthermore, certain social and human mobility phenomena are also artificially encapsulated in a ‘criminalisation’ or crime-related logic, while having little or nothing to do with it, e.g. irregular immigration, and at times without properly acknowledging the potentially discriminatory nature of over-expansionist agendas covering activities artificially called MOCGs, which may include Roma communities.

5.2 EMPACT: Added value in question and the issue of accountability

When it comes to EMPACT, the added value of the EMPACT projects compared with other operational joint actions (such as the Global Airport Action) remains unclear. The actual added value of EMPACT projects in intensified exchange of information has also been questioned. The 2015 COSI progress report on the policy cycle underlines that exchange of information in the field of the financial aspects of organised crime remains insufficient. The report notes that Europol’s Focal Point Asset Recovery has not received any SIENA messages dealing with EMPACT. It further notes that “EMPACT should be leading the way because there are some examples in the current Driver reporting describing significant seizures of cash and financial documents but these are not reported to the specialist Focal Points or recorded under the OAs that deal with support to financial investigations”.¹⁴⁸ In that respect, the report mentions that Europol favours a ‘more active approach’ to raise awareness across the EU Member States about the benefits of sharing financial data with Europol specialist units.

¹⁴⁷ See the Europol official website, “118 arrested in global action against online fraudsters in the airline sector”, 28 November 2014 (<https://www.europol.europa.eu/content/118-arrested-global-action-against-online-fraudsters-airline-sector>).

¹⁴⁸ See the COSI progress report in Council of the European Union, *EU Policy Cycle – Implementation monitoring – First progress reports 2015*, 9853/15, Brussels, 17 June 2015 (<http://www.statewatch.org/news/2015/jun/eu-council-cosi-policy-cycle-progress-2015-9853-15.pdf>).

Other questions have been raised concerning the EMPACT projects. In a political evaluation of the EU policy cycle on serious and organised crime conducted by the European Commission in 2013,¹⁴⁹ the following shortcomings were underlined:

- There was an identified need for genuine commitment of all other Member States participating in EMPACT projects: some appear to be ‘passengers’ rather than ‘participants’. Many Member States do not appoint national experts or send participants who are too junior to play an active role in committing resources to the project. There was also insufficient willingness of the participating Member States to be leaders of single actions contained in EMPACT projects. Some Member States decided not to join EMPACT priorities even though they were experienced in these crime areas and involved in relevant operational activities;
- Some strategic goals within the priorities did not have operational emphasis and were not really achievable, or they were too broadly formulated to be translated into concrete operations; and
- The policy cycle process was not sufficiently supported with appropriate training and resources.

The above-mentioned COSI progress report released in 2015¹⁵⁰ gives a number of indications as to how these issues, identified at the early stage of the cycle, could be addressed, including better reporting and management, as well as clearer leadership.

Europol reports to COSI about the EMPACT projects twice a year. In a 2015 summary of COSI discussions,¹⁵¹ COSI expressed its concerns over the way the projects were reported: “various delegations pointed out that the reporting, notably the Europol’s Director Report, should focus more on the operational content and analyse the operational results. The current report was considered too much process oriented.”¹⁵²

The issue of reporting was raised during our interviews at Europol. It was felt that too little time was given to Europol to properly assess the EMPACT projects and that the drivers of the projects in Member States sometimes do not provide sufficient information. The current shortfalls affecting the reporting and audit procedures in EMPACT projects generally impact on their accountability and scrutiny, which in turn prevents a proper assessment of added value.

There is a need to improve the democratic accountability and transparency mechanisms of COSI, especially in the design and development of the EU policy cycle. Shortly after the setting-up of COSI, a study conducted in 2011 for the European Parliament identified room for improvement in including the “justice” dimension in COSI’s activities (Busuioc, 2011). This aspect was reinforced in another Parliament study that analysed in depth the changes introduced by COSI in the approach to internal security within the EU (Scherrer, Jeandesboz and Guittet, 2011). The latter particularly underlined the following aspects:

- the work methodology adopted by COSI raised questions in terms of transparency and accountability;
- the analysis of the managerial model that is applied to EU security activities highlighted a lack of monitoring arrangements involving the European Parliament; and

¹⁴⁹ European Commission, Evaluation of the EU policy cycle on serious and organised crime 2011-2013, Commission Staff Working Document, SWD(2013) 17 final, Brussels, 24 January 2013.

¹⁵⁰ Council of the European Union, EU Policy Cycle – Implementation monitoring (2015), op. cit. (<http://www.statewatch.org/news/2015/jun/eu-council-cosi-policy-cycle-progress-2015-9853-15.pdf>).

¹⁵¹ See Council of the European Union, Summary of discussions of 29 June 2015 (of COSI) (10835/15), Brussels, 14 July 2015 (<http://data.consilium.europa.eu/doc/document/ST-10835-2015-INIT/en/pdf>).

¹⁵² See Council of the European Union, Summary of discussions, 10835/15, Brussels, 14 July 2015.

- the EU policy cycle does not specify mechanisms through which, in accordance with Art. 70 TFEU on impartial evaluation of EU policies, Art. 71 TFEU on COSI and Art. 6(2) of the COSI Decision, the European Parliament and national parliaments are kept ‘informed’, and how their comments and recommendations can be taken on board.

The study observed that it is far from evident the extent to which the EU internal security agenda ensures and promotes a policy process guaranteeing proper functioning of the EU system of (rule of law) checks and balances and guaranteeing democratic accountability. The analysis of the work methodology adopted by COSI shows a lack of any monitoring arrangement involving the European Parliament. Moreover, and despite the commitments laid out in the 2009 Stockholm Programme in this respect, EU agencies responsible for EU fundamental rights and freedoms (such as the European Union Agency for Fundamental Rights (FRA), the European Data Protection Supervisor (EDPS) or the Art. 29 Working Party) are systematically not included in internal security or COSI’s activities.

The research for the purposes of this study, as well as the interviews conducted, show that COSI’s meetings have progressively included, in addition to Europol representatives, representatives from other EU agencies, such as Frontex, Eurojust, EU LISA,¹⁵³ the FRA and the European Asylum Support Office. That notwithstanding, invitations to participate in COSI’s meetings are made on an ad hoc basis, depending on the agreed agenda. The FRA, for instance, attended a COSI meeting along with EU LISA last December in Brussels.¹⁵⁴ The survey results also show that a majority of respondents are the least familiar or cooperate the less with COSI.

Despite this progress in the better inclusion of other liberty-oriented EU JHA agencies, Europol and Frontex remain the main interlocutors of COSI, followed by CEPOL and then Eurojust (Arcarazo and Murphy, 2014). The FRA and the EDPS are not included in COSI’s activities in a systematic manner. This aspect is critical for ensuring that fundamental rights are given priority in COSI’s activities.

Concerning the European Parliament’s involvement in COSI activities, the CRIM committee’s final report¹⁵⁵ called for the Council to enable the Parliament to be involved in determining the priorities, discussing the strategic objectives and assessing the results of the policy cycle. It thus asked to be briefed by the Council on the outcome of the first (2011–13) policy cycle and to hear from COSI annually in order to obtain a detailed progress report on the annual plans for achieving the strategic objectives. Yet, the reports transferred to the European Parliament are very succinct, and lack meaningful budgetary figures or clear indicators for measuring progress and added value.¹⁵⁶ The Parliament could play a more significant role in monitoring COSI’s activities – including the management and evaluation of EMPACT projects.

Annex 1 of this study provides an analysis of the costs and benefits of EMPACT projects. It concludes that the total cost of EMPACT in 2015, taking into account the necessary assumptions regarding administrative costs, was €11,464,560. The proportion born by Member States is estimated at €7,088,517 (62%), although it is not questioned whether Member States would have undertaken the operations in the EMPACT priority fields anyway. For example, when survey respondents were

¹⁵³ EU LISA refers to the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

¹⁵⁴ See the FRA official website, “Justice and Home Affairs Agencies present their work to the EU Council” (<http://fra.europa.eu/en/news/2015/justice-and-home-affairs-agencies-present-their-work-eu-council>).

¹⁵⁵ European Parliament, *Final Report on organised crime* (2013), op. cit. (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0307+0+DOC+XML+V0//EN>).

¹⁵⁶ See for example this report: Council of the European Union, Draft Report to the European Parliament and national Parliaments on the proceedings of the Standing Committee on operational cooperation on internal security for the period January 2010–June 2011, 12980/11, Brussels, 18 July 2011 (<http://www.statewatch.org/news/2011/aug/eu-council-cosi-annual-report-jan-10-jun-11-12980-11.pdf>).

asked about additional activities, for them it was hard to identify which 'additional' elements are done solely because of EU tools, as there were some similar mechanisms were already in place. For 41% of respondents, it was difficult to identify whether undertaking cooperation with EU tools was more costly than national tools (see Annex 5, Figure A5.17). The remaining respondents, however, mainly claimed that the costs of EU tools were similar to (32% of the respondents) or less than (23% of the respondents) the costs of national tools.

The methodological gaps and obscurity characterising current monitoring and evaluation procedures of EMPACT projects pose fundamental obstacles to ascertaining the actual outputs and 'benefits' of this dimension of the EU policy cycle. Not only is the funding support for EMPACT projects rather complex and only partially visible to Europol, it is not possible to calculate the administrative costs related to all stages of the EU policy cycle. It is therefore not feasible to assess its tangible (direct and indirect) results given that the documents containing this information are not accessible or simply non-existent.

The survey carried out for the purposes of this study provide some indications, yet are inconclusive. First, it showed that COSI is the least known body, and that cooperation with this body was ranked as less significant than with Europol and Eurojust (see Annex 5, Figure A5.20). Still, there are indirect or perceived benefits of the EU policy cycle when it comes to increased European cooperation (though there is lack of data to check the relevance of this causality). Among the respondents, 85% (29 out of 34) identified European cooperation as 'very important' to their daily work (see Annex 5, Figure A5.6). That being stated, the majority of respondents named 'information sharing' (88%) and 'operational cross-border cooperation' (74%) as the most relevant forms of cooperation in place at the EU level aimed at fighting organised crime. In the survey, 86% (19) of respondents reported that EU instruments, such as the EU policy cycle for serious and organised crime, enable cross-border investigations and cooperation. It is, however, impossible to assess or establish a direct correlation as regards the extent to which cross-border cooperation tools can be linked back to the EU policy cycle.

6 Conclusions and Policy Options

This study has examined the added value of the EU in policies addressing organised crime. It has reviewed from a multidisciplinary perspective the main challenges in the current state of play in the EU legal and policy landscape in this domain. The study has assessed the costs of non-EU in this domain from a socio-political, legal and economic perspective. Particular attention has been paid to the shortfalls and barriers in the fight against OC at the EU level in the following three areas falling under the remit of EU OC policy: first, the freezing and confiscation of assets; second, criminal justice investigations; and third, the EU policy cycle.

The assessment constitutes a first attempt to fill a gap in state-of-the-art knowledge on the added value of EU policy on OC, i.e. with the experiences, views and perceptions of national practitioners involved in various aspects of transnational practices and networks for the purpose of fighting OC, and the value they ascribe to European cooperation. The following five EU Member States have been the subject of a more in-depth examination: France, Romania, Spain, the Netherlands and the UK.

European cooperation in the fields of police and criminal justice has traditionally faced several obstacles and deficits. These have mainly related to weak Treaty and legal foundations, democratic and judicial deficits, intergovernmental methods of cooperation and secretive decision-making processes lacking transparency and legal certainty. While the Lisbon Treaty was meant to address a majority of these issues, a number of far-reaching areas for improvement remain. A key finding of our research is that the EU rule of law is still lagging behind when trying to capture the main legal, policy, operational, network and project-based components of the EU policy landscape on OC.

The research also shows that the main legal and policy developments focusing on OC-related matters have adopted a predominantly *law enforcement or preventive policing approach* characterised by intergovernmental, informal network-based and non-transparent modes of decision-making, information exchange, a threat assessment-based logic, exchanges of promising practices and the funding of projects to tackle criminality in Europe. In short, this approach has consisted of a largely broad and over-expanding conceptual framework for action and the promotion of information-exchange models of crime fighting by EU JHA agencies and the law enforcement authorities and experts in EU Member States. The issues inherent to such an EU policy approach on crime are outlined below.

First is the blurring and over-expansive reach in the material scope of EU action on criminality and the emergence of 'operational', flexible and all-encompassing EU concepts of crime. These have taken the guises of open-ended notions of 'organised crime', 'serious crime' or other broad categories. This has resulted in the over-criminalisation of various phenomena across the national arenas, which often have little or varied forms of resemblance to any 'organised' or 'serious' forms of criminality, as well as the prioritisation of certain crimes and the marginalisation of others more related to 'social harm' (e.g. white-collar or environmental crime) (Bigo, 2011).

This expansionist logic has been particularly visible when it comes to the activities of some EU agencies, like Europol and Eurojust, which cover forms of crime often going far beyond 'organised crime' or 'serious crime'. This expansionist logic sometimes artificially contaminates a policing framing. It encompasses social phenomena related to poverty, social exclusion and human mobility (thereby creating a problematic link between migration or Roma communities and criminality), which are not considered 'crimes' in all EU Member States, and are neither organised nor serious in nature.

Second, EU policy has also evolved through a wide array of EU-coordinated and funded formal and informal networks of actors comprising a diverse, heterogeneous and secret set of national authorities and experts (police and public prosecutor-like actors). Cases in point are the Asset Recovery Offices and Financial Intelligence Units. They engage in and aim at fostering the exchange

of knowledge and information among law enforcement actors through experimental forms of EU governance.

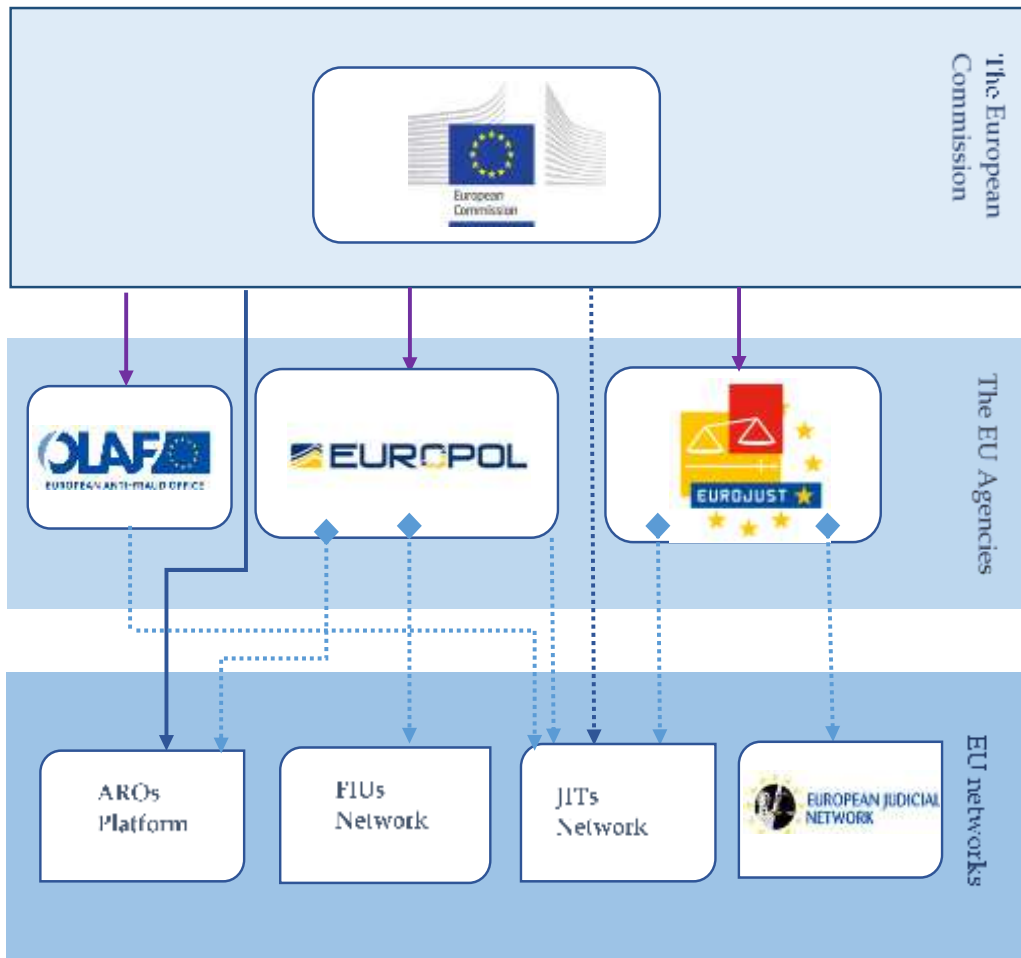
Networks of national experts from different EU Member State ministries are set up for exchanging knowledge, identifying 'best practices' and funding projects implementing EU-set priorities in the fight against organised crime. As the EU FIU network shows, there are national ministries of finance sharing information with ministries of interior and police. These networks and groups also have links with other regional and international networks on law enforcement cooperation. This experimental setting of Europeanisation in EU OC policy blurs 'who' is involved in 'which' networks or fora, and the various kinds of activities and accountabilities applicable to each of them.

A case in point when it comes to the proliferation of law enforcement-like informal networks concerns the '*administrative approach*'. Since 2011, this approach has led to the setting up of a network of national contact points to develop best practice and to sponsor pilot projects with the goal of facilitating cooperation between law enforcement and administrative actors. This includes, for instance, better information exchange between the traditional law enforcement authorities and other actors, such as local and regional public administrations as well as the private sector and civil society.

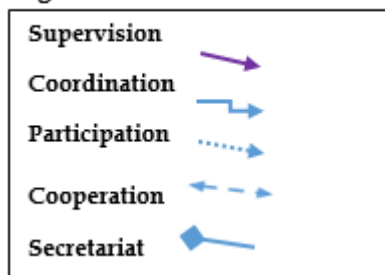
Figure 9 provides a visual representation of the European Commission (DG Home and DG Justice), relevant EU agencies, networks and expert groups for EU policies on OC. It shows the increasingly central role of EU JHA agencies, in particular Europol and Eurojust, in indirectly coordinating these networks of experts and national actors, by the fact that their secretariats are embedded into the EU agencies. The Commission (together with EU Member States) generally supervises the work of these agencies through its participation in their management boards. Europol plays a more important role when it comes to FIUs, but it also supports the JITs Network and participates in the ARO Platform, which is coordinated by DG Home. In addition to these mainly EU networks, Europol is an observer and also hosts a secretariat for the AMON network (see Annex 6). Eurojust is active when it comes to the JITs Network and the European Judicial Network, which are said to be independent bodies.

It is far from clear who participates in what or the extent to which there is duplication or multiple participation by national actors/experts in each of these transnational groups or networks (see Annex 6). This becomes even more pressing when it comes to assessing the added value of these EU structures in comparison with other (previously existing) transnational networks such as CARIN, the Egmont Group or FATF. As our research has already indicated, informal networks are prevalent among these EU groups and fora (mainly police officers, prosecutors, specialised officers and even governmental bodies). That being stated, even in relation to so-called 'judicial' cooperation instruments, independent judges, legal counsellors or defence lawyers who would potentially provide some balance are virtually excluded from these networks. Finally, the issue of responsibility for what is happening within and among the networks remains open.

Figure 9. EU agencies and networks in EU OC policy



Legend



Source: Authors.

Third, priority has not been given so far to ensuring proper EU-level (rule of law) checks and balances when it comes to independent and impartial judicial oversight of European models for law enforcement cooperation ensuring a similar scope and remit as those applicable in the national legal systems and traditions of the Member States. The post-Lisbon Treaty framework of cooperation on OC still lags behind in ensuring proper transparency and democratic accountability on EU-led activities, methodologies, EMPACT projects, EU-coordinated networks and operational activities. The same applies to the impact of EU-driven internal security policies on individuals’ rights and freedoms enshrined in the legally binding EU Charter of Fundamental Rights and Freedoms, such as the rights of the defence, fair trial and privacy.

Fourth, the priority has been on developing ‘intelligence-led policing’¹⁵⁷ through the use of threat assessment and risk analysis methodologies and tools (e.g. SOCTA). However, sufficient priority has not been given to *alternative multi-disciplinary (crime prevention) approaches when addressing criminalities in the EU*, which could move beyond a model based on preventive policing or law enforcement practitioners’ needs towards one focused on the relevance and effects of any public policy actions on social policy, education, town planning, labour standards, taxation or local authority approaches to these contributory factors. Any multi-disciplinary approaches should not lead to an ‘over-criminalisation’ or a law enforcement ‘function creep’ in the roles played by local/regional authorities, civil society or NGOs in ensuring social welfare and the provision of services. Rather, they should take due account of the actual social contexts and the potential negative social effects and discriminatory consequences of police crime-fighting policies.

Fifth, too much attention has been given to addressing obstacles to strengthening mutual trust among law enforcement practitioners in cross-Member State cooperation, so that ‘more information’ is exchanged. A similar focus has not been given to better ensuring, regularly monitoring and independently evaluating the current presumption of *mutual trust that EU Member States actually comply with the rule of law and fundamental rights*. This kind of mutual trust is of critical importance, as it lays at the very basis of the principle of mutual recognition of criminal and administrative justice decisions.

Thus, coming back to our original question about the ways in which EU policy interventions could bring more effective and optimal inputs and benefits to OC policies, a first recommendation is that when thinking ahead, the primary focus should not be on trying to overcome current uncertainties in EU definitions and conceptual disagreements related to the notion of OC with new legal acts or the revision of current ones. Instead, the Union should give priority to improving and further developing EU ‘operational cooperation’ in crime fighting policies under a remit guided by a criminal justice-led approach, and frameworks on fundamental rights and the EU rule of law (accountability and scrutiny). A key dilemma that requires further democratic debate is whether the criminalisation of participation in a criminal organisation is used as a criminal deterrence tool, or rather serves as a legal fiction enabling judicial cooperation (the EIO does not allow dual criminalisation), the operation of EU JHA agencies (e.g. Europol and Eurojust) and the confiscation of criminal assets.

Further efforts should be invested in fully bringing EU criminal justice and police cooperation under the EU rule of law framework enshrined in the Lisbon Treaty, the EU Charter of Fundamental Rights and a higher degree of independent (supranational) judicial supervision of EU-led law enforcement activities that ensures at least similar levels of checks and balances as those enshrined in the Member States’ constitutional traditions and legal systems. It is argued that this would be the best way forward for ensuring a mutual trust-based AFSJ and EU policies on organised crime.

6.1 Policy options

When looking at where ‘more EU’ can bring more added value in the domain of OC, the policy options below have been broken into the three main components of EU OC policy: first, the legal framework; second, institutions, agencies and networks; and third, policy and funding.

¹⁵⁷ As Bigo (2011, p. 20) explains,

[i]ntelligence here means developing data gathering, including and integrating covert and open sources, personal and non-personal information, to rely on an expert system (software or group of experts) in order to discover patterns of behaviour of a special group, from whose past behaviour, future steps can be deduced. It pushes towards methods of intelligence policing more than detective and criminal justice policing. The model is oriented towards the present and the future actions committed by suspects more than the discovery of past events and the conviction of criminals.

6.1.1 EU legal framework on OC

The current EU legislative setting is still sitting ‘in between’ the old EU third pillar and the post-Lisbon Treaty. The ‘Lisbonisation’ of police and judicial cooperation in criminal matters is still unfinished. Much work remains to be done to bring it under the EU rule of law. European law in this domain is composed of a patchy and fragmented set of legal instruments having different legal effects and scope. A first step in that direction would be to elaborate an inventory of all the existing EU instruments, their scope of application and interrelationships and linkages, which should go along with an EU guide for practitioners.

Especially those legal instruments qualifying as ‘framework decisions’ leave a large margin of discretion to Member States in their practical implementation and application, which have led to over-criminalisation and overstretch in domestic arenas. An example in this regard is Framework Decision 2008/841/JHA. The expiration in December 2014 of the five-year transitional period envisaged in Protocol 36 of the Lisbon Treaty means that the European Commission now has the competence to conduct an in-depth ‘quality check’¹⁵⁸ and fully enforce EU Member States’ obligations under EU criminal justice and police legislation, including those envisaged in framework decisions.

The current state of affairs is therefore unsatisfactory and calls for more EU action. Special focus should be given to addressing current gaps in national transposition of existing EU laws and standards, and to effecting ways to ensure greater legal certainty in areas where shortfalls in Member States’ implementation have already been identified and highlighted. Priority should be given to an in-depth evaluation of the problem areas in the effective implementation of Framework Decision 2008/841/JHA in terms of harmonisation, and then to deciding whether this Framework Decision needs to be ‘Lisbonised’ or not.

This follow-up quality check should extend beyond a simple legal check. For instance, notable problem areas related to the looseness and uncertainty characterising some national definitions of OC call for an analysis of the definitions and interpretations given by national courts and tribunals, and by the actual understanding and uses of the concept in terms of prosecutions and convictions.

Post-Lisbon Treaty legal acts, such as Directive 2014/42/EU on the freezing and confiscation of assets, or the anti-money laundering Directives, now provide a clear set of common standards and legal guarantees that must be ensured in European cooperation against OC. The evaluation of the national transposition and practical implementation of these standards and guarantees should be a key priority. Moreover, particular attention should be given to ensuring that EU Member States have not adopted more extensive or harsher, substantive criminal law penalties than those outlined in EU legal acts.

The ‘Lisbonisation’ of EU criminal justice and police law should better integrate the implications of the legally binding EU Charter of Fundamental Rights in all existing instruments. The EIO now provides for a ‘benchmark’ that should be followed and promoted in all the existing and upcoming acts related to ‘mutual recognition’. The EIO benchmark provides a milestone in European cooperation for ensuring cooperation based on the EU rule law and fundamental rights in fighting

¹⁵⁸ The new First Vice President on Rule of Law and Fundamental Rights, Frans Timmermans, referred to the Commission’s intentions to implement its new enforcement powers through political dialogue and cooperation. In his own words, the new role of the Commission will mean

[g]uaranteeing, whenever measures are decided and countries commit to implement them, that there will be a quality check. And as prevention is always better than cure, the Commission is always there to help with transposition. That’s the whole point: making sure that more care is put into transposing common rules. And in any case, before any infringement proceedings, the first step will normally always be to have a constructive dialogue between the Commission and the Member State, through what we call ‘EU Pilot’.

Refer to his speech of 13 November 2014 at http://europa.eu/rapid/press-release_SPEECH-14-1701_en.htm.

criminality in the Union, while respecting the full application of the principle of mutual recognition and the national constitutional traditions and legal diversities.

A common EU definition of OC is neither feasible nor desirable. Nor is it a condition for improving European cooperation on policies addressing OC. Such an attempt would face a fundamental difficulty in relation to complying with the principles of subsidiarity and proportionality, and respect of the different legal systems and traditions of the Member States. Priority should also be given to limiting the use of non-Treaty based and ‘operational’ crime concepts by EU JHA agencies, which have tended to over-expand the material scope of EU actions and focus on activities that are not crimes, or which do not present any cross-border, organisational or serious connotations. The focus of further legislative Lisbonisation could instead be on harmonising the actual sanctions that apply in cases of ‘participation’ in a criminal organisation, and on bringing other old EU third pillar instruments on mutual recognition (e.g. Framework Decision 2006/783/JHA) in line with the EIO benchmark. In this respect, the previous calls made by the European Parliament in the 2014 report on the review of the European Arrest Warrant should be properly and fully followed up by the European Commission.¹⁵⁹

Current methods and capacities for monitoring ‘mutual trust’ in criminal justice cooperation in the EU need to be further improved and boosted. The possibility offered in Art. 70 TFEU should be used to develop a permanent and regular (objective and impartial) evaluation system of EU Member States’ implementation of their obligations under EU criminal justice law and in the spirit of sincere and loyal cooperation for attaining the objectives of the AFSJ (Art. 4.3 TEU).

Current mutual (peer review) evaluation techniques remain intergovernmental, secretive and non-independent in nature. The new EU evaluation system should look to ensuring a scientifically and (*quali-quantum*) methodologically sound evaluation regime, which would not consist of ‘benchmarking’ EU Member States’ performances, but rather ensuring a high-quality independent assessment taking due account of country- and context-specific circumstances and their practical applications and societal effects on the ground. This could in turn help European institutions in being better equipped to assess the added value of European cooperation instruments and actions. The evaluation method should start by setting up a permanent group of academic experts on criminal law and policing in Europe, which would prepare annual reports on key issues and obstacles related to the state of play in the European justice area, as well as leading to the elaboration of suggestions regarding the way forward.

6.1.2 Agencies, networks and operational frameworks

The current institutional status quo on EU policies directed at fighting OC remains unsatisfactory. It is a multi-actor and multi-fora scene, which poses fundamental challenges for democratic accountability, judicial scrutiny and proper checks and balances against EU rule of law standards and fundamental human rights. The EU has promoted and developed a wide range of Union-coordinated (formal and informal) networks of national actors, experts and representatives, which come mainly from domestic law enforcement communities and engage in informal or flexible exchanges of information, the sharing of ‘promising practices’ and funding of projects. These are often coordinated by EU JHA agencies (Europol and Eurojust) or directly by the European Commission (DG Home Affairs).

The resulting picture makes it extremely complicated to know ‘who does what where’. It also prevents a proper level of scrutiny of these actors similar to that applicable in their domestic arenas. The risk is that EU fora and networks may be used for ‘venue shopping’ by certain actors and experts

¹⁵⁹ See European Parliament, *Report with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))* (2014), op. cit. (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0039+0+DOC+XML+V0//EN>).

to steer their interests in transnational venues that escape democratic, judicial and administrative controls. Some actors participate in more than one network. The fact that these groups build upon and interact with other pre-existing, supranational expert groups (e.g. the Egmont Group or CARIN) prevents a proper understanding of the added value of EU-driven networks. Furthermore, an overview of existing networks and fora reveals the law enforcement function creep of policing and interior ministry-like actors towards administrative spheres of action (e.g. finance ministries and local and regional authorities) and exchanges of information.

More EU action is needed to ensure legal certainty and proper accountability of this network-based model of EU intervention in the field of OC. A particular difficulty remains the extent to which the activities of these networks and groups comply with the common EU law standards, legal guarantees and the EU Charter of Fundamental Rights in their activities, as well as in their cooperation with third country or other (non-EU) transnational networks involving third country experts. The European Parliament should make sure that the accountability mechanisms applicable to EU JHA agencies include a proper follow-up and assessment of the added value of the functioning of EU networks such as AROs and FIUs.

The predominant focus in various EU arenas is prioritising ‘the needs’ of law enforcement practitioners and leaving aside those of other actors, such as independent judicial authorities and defence lawyers. While some EU JHA agencies like Eurojust or the European Judicial Network have the participation of members from the judiciary, others have actors who mainly come from public prosecutor offices (or investigative judges), which are not impartial, or even from police authorities in some EU Member States.

In light of the above it would be necessary to first carry out an exhaustive mapping exercise, identifying ‘who is who’ among the EU’s national contact points in criminal justice, police and networks. This would allow for a proper understanding of who is doing what and under which rules and conditions/checks and balances (in both the domestic and EU arenas), and the purpose or domain for which are they actually responsible. This should go hand in hand with the setting-up of a new EU forum of defence lawyers, human rights organisations and civil society, specialised in issues related to criminal justice matters. The work of this EU forum could feed into the work of the above-mentioned EU evaluation mechanism on judicial cooperation in criminal matters.

The European Judicial Network should be further developed into a body bringing together a network of representatives solely from national courts with jurisdiction for the purposes of EU law. This network would bring together those judicial actors who are in charge of applying the rule of law and are independent and impartial in nature, with no other interest than applying the rule of law.¹⁶⁰ CEPOL has developed resources to increase training capabilities for practitioners across EU Member States in the field of criminal asset detection, freezing and confiscation.¹⁶¹ Further use of CEPOL’s training resources should be supported. EU educational materials should continue to be created and further developed in order to enhance a common law enforcement and judicial culture in the field of criminal investigations.

The new powers given to Europol in the currently revised mandate are accompanied by more parliamentary scrutiny (by both national parliaments and the European Parliament) in line with Art.

¹⁶⁰ See for instance, Case C-54/96 *Dorsch* and Case C-506/04 *Wilson* of 19 September 2006, where the CJEU clarified the notion of independent judicial authority.

¹⁶¹ See the CEPOL website ([https://www.cepola.europa.eu/education-training/what-we-teach-results?combine=&field_categories_tid=23&field_type_of_training_course_tid=All&field_date_value2\[value\]\[date\]](https://www.cepola.europa.eu/education-training/what-we-teach-results?combine=&field_categories_tid=23&field_type_of_training_course_tid=All&field_date_value2[value][date])). In its 2014 report, CEPOL referred to two residential courses and two webinars in 2014 in the field of economic crime, in which activities were targeted at law enforcement officers and experts with a background in the investigation and prevention of corruption, organised economic and financial crime issues, money laundering and asset recovery (CEPOL, *Annual Report 2014*, Luxembourg: Publications Office of the European Union, 2015, <https://www.cepola.europa.eu/sites/default/files/annual-report-2014.pdf>).

88 TFEU.¹⁶² The new mandate foresees a Joint Parliamentary Scrutiny Group (JPSG) with members from national parliaments and the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament (new Art. 53 of the mandate). Special attention will need to be paid to ensuring the effectiveness of Art. 53.2 of the mandate, which states that “[t]he JPSG shall politically monitor Europol’s activities in fulfilling its mission, including as regards their impact on the fundamental rights and freedoms of natural persons”.¹⁶³ Furthermore, the deal involves a much more active role of the Data Protection Supervisor, who will be responsible for checking if anything goes wrong with internal standards set up by Europol’s own Data Protection Officer.¹⁶⁴ The European Parliament should be particularly cautious that the new deal on Europol’s mandate allows for the following aspects: first, more scrutiny of Europol’s activities, including the resources mobilised and activities carried out by its ‘informal and formal networks’ that function without proper legal basis (the CARIN network); second, better oversight of the database developed by Europol; and third, better oversight of data exchanged with third countries.

These aspects are all critical to ensuring that, while improving cooperation capabilities, EU citizens’ rights are guaranteed. Similar checks and balances should be ensured when it comes to the work and mandate of Eurojust. Particularly relevant will be the effective implementation of the new Art. 54 of Europol mandate, which deals with ‘sensitive non-classified information’. It is regrettable that this provision does not apply to ‘EU classified information’ as well. Further efforts should be made to ensure that proper democratic accountability and scrutiny by the European Ombudsman of Europol’s classification and de-classification powers meet the necessity and proportionality principles.

The JITs model for cross-border operational cooperation should be given a clear priority and be further developed. This should be done by bringing JITs closer to EU rule of law and common legal standards on criminal investigation as laid down in the EIO benchmark. A practical way to overcome current deficits and dilemmas in their operation would be by revising the current rules applicable to the JITs Model Agreement in light of the innovations and latest EU law developments since the Lisbon Treaty.

The current JITs Model Agreement does not provide a fully comprehensive and complete overview dealing with all the relevant legal, responsibility and accountability criteria necessary to ensure that any joint investigation is in accordance with EU law, general principles and the EU Charter. Particular attention should be paid in this revision to include an obligation to set clear rules regarding leadership, responsibility, accountability and liability issues (including for EU JHA agencies), as well as proper reporting mechanisms on how the operational action plan has been implemented and precisely which results have been achieved. This could go along with further simplification and transparency of current procedures for the setting-up and development of JITs.

The Model Agreement should also be more specific concerning practical arrangements and operational plans, as well as the safeguards and compatibility of the JIT with fundamental rights obligations. The Model Agreement should also prevent the possibility for ‘fishing expeditions’ in the search for information while disregarding national legal standards. Bilateral or supplementary

¹⁶² Art. 88 TFEU states that “[t]hese regulations shall also lay down the procedures for scrutiny of Europol’s activities by the European Parliament, together with national parliaments”.

¹⁶³ Europol will need to share with the JPSG threat assessments, strategic analyses and general situation reports relating to Europol’s objective, the results of studies and evaluations commissioned by Europol, administrative arrangements, etc. The JPSG will draft “summary conclusions on the political monitoring of Europol’s activities and submit those conclusions to the European Parliament and national parliaments”.

¹⁶⁴ See also Art. 53.2 of the mandate, which states,

(b) the European Data Protection Supervisor shall appear before the JPSG at its request and at least once per year to discuss general matters relating to the protection of fundamental rights and freedoms of natural persons, and in particular the protection of personal data, with regard to Europol’s activities, taking into account the obligations of discretion and confidentiality.

national agreements in the context of JITs should be limited and subject to proper review as regards their compatibility with the EU Model Agreement. The Model Agreement and the report resulting from the JIT could also be submitted to the above-mentioned JPSG.

More coordination and training meetings could be also helpful here. CEPOL, in cooperation with a new European Judicial Network (see above), could also play a more active role in the training dimension of JITs. Training is still rather uneven across the EU Member States. CEPOL regularly conducts seminars on JITs, which attract high interest because of their focus on practical issues arising from real case studies. These seminars are aimed at creating synergies and at reinforcing mutual trust and cooperation among prosecutors, judges and senior police officers involved in leading/operating JITs.¹⁶⁵ CEPOL should be encouraged to create further educational tools for JITs, as well as to expand its use of e-learning multilingual materials that could be used by law enforcement officials. Member States should be encouraged to subscribe to and make more use of CEPOL's Learning Management System. Moreover, the cooperation between the JITs Network and CEPOL in organising seminars on JITs for judges and prosecutors should be expanded to JITs in the context of cooperation with third countries.

6.1.3 *Policy and funding framework*

The current EU policy cycle and the 'administrative approach' fail to ensure proper EU democratic, legal and financial scrutiny. Further EU intervention would be needed to address these deficits. A key priority should be ensuring robust knowledge-based policies. EU threat assessments and risk analyses present profound methodological shortcomings. More efforts are needed to ensure the robustness of SOCTA, which is critical to the development of a sound EU policy cycle and when setting EU policy priorities in the fight against criminality in the Union.

On that matter, the new powers that have been negotiated for Europol's revised mandate are accompanied by more parliamentary scrutiny and open up renewed possibilities for the European Parliament to ensure the quality of the assessments carried out. The JPSG should duly ensure scrutiny of the priorities set (why some and not others, and the relevance of those chosen) as well as the ways in which these are reflected in the EMPACT projects. The above-mentioned group of academic experts on criminal law and policing in Europe could also feed in their knowledge in order to better ensure the scientific quality of the analysis backing up EU policy cycle activities.

Ensuring better European Parliament access to information concerning the EU policy cycle should be further pursued: an external evaluation of the EU policy cycle is currently underway and the results should be made available at the end of 2016. The results should be followed up closely by the European Commission and the European Parliament. At a more general level, the European Parliament's awareness of activities carried out in the context of the policy cycle could be significantly improved. At the moment, Europol's reporting on the EMPACT projects is not accessible to the European Parliament. Such access could be granted to the JPSG. COSI's activities must be subject to a more permanent and higher degree of control and accountability.

The European Parliament should call upon the European Court of Auditors to conduct an in-depth review and audit of all the funding that has been spent in the context of the EU policy cycle and EMPACT projects. Particular attention should be paid here to the actual use and effects/results of these projects, the extent to which they meet or follow the policy priorities set and their compatibility with the ethical and fundamental rights standards and obligations in their implementation. This should also include a full financial audit of the funding schemes channelled through other EU-coordinated networks and national contact points of law enforcement authorities supported by the European Commission or Europol and Eurojust.

¹⁶⁵ See CEPOL, *2014 Annual Report* (2015), op. cit.

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Annex 1. Intervention Logic for Economic Analysis

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1. Application of the European added value methodology to EU-level cooperation in the field of organised crime

The study by the European Added Value Unit of the European Parliament on mapping the cost of non-Europe 2014-19¹⁶⁶ noted that the concept of the costs of non-Europe in any policy action is closely related to that of European added value. This is because the latter attempts to identify the economic benefit of undertaking – and the former, the **collective economic cost of not undertaking – policy action at the European level in a particular field**. This study uses the concept of assessing European added value, drawing on the well-used approach of intervention logic, as elaborated in the 2015 Better Regulation Guidelines.¹⁶⁷ Yet, police and judicial cooperation on organised crime poses many additional questions, which makes it difficult at least and meaningless at most, to apply this logic directly.

There are four major issues: dependence on the points of departure, a lack of internal logic, uncertainty owing to the external factors and unintended consequences.

- The first issue concerns the departing point. What the costs and benefits are heavily depend on the perspective we take: Is it that of EU citizens or practitioners? For example, if it is the EU taxpayer, what are the benefits of EU-level cooperation on organised crime (OC) for them? Is it more security, more safety or better protection of rights?
- These impacts are hard to quantify as the logic links are weak. We cannot simply state that more European Arrest Warrant (EAW) orders mean more efficient cooperation, as it may mean other things as well, i.e. increased cross-border criminality, more resources allocated to the issue, or prioritisation of cross-border issues to the detriment of national ones.
- There are high levels of uncertainty related to final impact of the external effects, such as socio-economic improvements.
- Regarding unintended consequences, if we keep with the EAW as an example, the high numbers of EAW requests also resulted in cases brought before the European Court of Human Rights in Strasbourg; thus here there are other costs that ‘citizens’ bear, especially those suspected, accused or convicted of committing crimes.

This study can better present the practitioners’ point of view, as they were asked to participate in a survey and interviews. However, there are different departing points even among practitioners, depending on the professional area they represent – judges, prosecutors or law enforcement authorities. Judges would see the aim of value added by the EU as improving the efficiency and functioning of the rule of law in the area of OC, whereas prosecutors and law enforcement authorities tend to focus on putting suspects under investigation and closing their investigations and cases. Nevertheless, EU-level cooperation and this study only reflect the views of prosecutors and police officers, who are direct beneficiaries of EU-level cooperation. Therefore, keeping in mind this complexity and the very indirect links between investment and outputs to the EU public, we explore the limitations of assessing the European added value of policies designed to tackle

¹⁶⁶ See European Parliament, Mapping the cost of non-Europe 2014–2019, European Added Value Unit, European Parliamentary Research Service, Brussels, July 2014.

¹⁶⁷ See European Commission, Better Regulation Guidelines, Commission Staff Working Document, SWD(2015) 111 final, Strasbourg, 19 May 2015.

organised crime.¹⁶⁸ Instead of presenting the overall picture, we draw upon three case studies as examples that show some estimation of the inputs and outputs, while identifying the major limitations to assessing costs and impacts that might be measured.

As stated in the European Commission Staff Working Paper on the added value of the EU budget,¹⁶⁹ ultimately, expenditure at the EU level should be judged by the extent to which it can achieve “a better deal for citizens than spending at a national level”. Still, at the national level there are few statistics on the inputs, activities and outputs, not to mention the accuracy or meaning of their translation into economic value. Therefore, this study does not attempt to quantify all the costs and benefits of EU-level cooperation, but to provide a structured explanation of where the costs and benefits lie, which would provide a framework for the full assessment of costs and benefits if all the data were available. The Working Paper argues that action at a European level can “maximise the efficiency of Member States’ finances and help to reduce total expenditure, by pooling common services and resources to benefit from economies of scale”. The EU budget should be spent on actions that individual Member States “cannot finance themselves, or where it can secure better results”. Here again “better results” come back to the points of departure.

It should also be recognised, as stated in the same Working Paper that the concepts of European added value can be, and have been, used in many different contexts. In addition, it notes that “the final judgement on whether expected added value would justify an EU programme is ultimately the result of a political process”¹⁷⁰. This study has looked at the concept of added value from an economic perspective, but as the European Commission has noted, “the concept of European added value must not be limited to advanced cooperation between Members States but should also contain a ‘visionary’ aspect”¹⁷¹. Therefore, this economic analysis should be considered alongside a wider political perspective, which in the context of this study is the socio-political and legal analysis. The complementarity of the analyses fills the gaps of weak links, uncertainties and a lack of data.

2. Using the intervention-logic approach

The aim of **the intervention-logic approach** employed in this study is to articulate the overall objectives of initiatives and policies designed to address organised crime in Europe through greater cooperation among Member States, and to provide a framework to enable the benefits to be identified and, where possible, quantified. We seek to compare these with both the original objectives of the policies and the resources (costs) deployed to achieve them. The intervention-logic approach is wholly consistent with the concept of European added value, as elaborated in the case studies of the European Parliament’s work on mapping the cost of non-Europe, and particularly in the section on the EAW (p. 56).¹⁷² It involves setting out the ‘building blocks’ of the different stages of policy implementation, and considering the links between the different building blocks, i.e. the evidence base about the transition from spending decisions on policy areas to delivering outcomes, results and impacts.

¹⁶⁸ Furthermore, the European Parliament stated (in the minutes of the internal coordination meeting held on 18 January 2016, Brussels) that they are especially interested in an ex ante assessment rather than an ex post assessment. Our approach takes into account both elements and recognises the importance of both elements. Alongside trying to report on the impacts of EU action using quantitative and qualitative means (i.e. the ex post approach), the economic analysis also examines current barriers and gaps.

¹⁶⁹ See European Commission, *The added value of the EU budget*, Commission Staff Working Paper, SEC(2011) 867 final, Brussels, 29 June 2011.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² See European Parliament, *Mapping the cost of non-Europe 2014–2019 (2014)*, op. cit.

2.1 Definition of the initiative

The first stage involves identifying and agreeing on the nature of the initiative: What is it, what does it involve, and what are the overarching objectives? To avoid getting into a discussion on who defines the initiative, the current methodology suggests looking at the Treaty objectives and the secondary acts (directives and framework decisions) that provide official explanations of EU intervention.

Here, it is essential to be clear in defining the **status quo** prior to the intervention. Yet, in most cases this is not feasible because some measures were in place before the EU legal instruments and tools were employed. Still, new EU Member States can provide a good comparison – before and after the EU initiatives took place. Therefore, reference is made to a Romanian case study (interviews and survey results). The interventions relate to three case studies:

- the introduction of measures on the freezing and confiscation of criminal assets (case study 1);
- cross-border cooperation tools (case study 2);
- and the EU policy cycle for serious and organised crime (case study 3).

2.2 Objectives

In the next step, we look at the objectives of the intervention, i.e. what is the aim of cross-border cooperation and what are the expected benefits? Why is it being done at the EU level rather than at the national level through bilateral cooperation? Is it because of better procedural checks and balances, and high fundamental rights standards, or because of expected rates of convictions, reduced crime or greater efficiency in investigations? It is important to note that, if it is the latter, then there are bigger economic questions about opportunity costs and financial savings. The study returns to the points of departure. In our case studies, the position of law enforcement practitioners was better reflected, as these officers are better represented at the EU level than, for example, judges or defence lawyers.

Opportunity costs are the foregone alternative of a (policy) choice. In this instance, it means that in the case of efficiency savings, there is often a policy choice of if, and how much, efficiency savings can be translated into improvements in outputs or financial savings. For example, if a form of cross-Member State cooperation (e.g. JITs) leads to cases being completed more efficiently, this means that some resources (staff) that were previously occupied have been freed up. These staff can be allocated to new, productive work (either at the EU or national level), thereby increasing outputs (and hopefully outcomes). It is important in any assessment of the added value of any policy initiative that the consequences of each potential course of action are elucidated.

In a final step, we assess how the current situation differs from the status quo and, subject to data availability, seek to determine any costs or benefits in both financial/economic terms with regard to the objectives of the interventions.

2.3 Inputs

To populate the intervention logic with actual data, the resource implications (the inputs) initially need to be identified, as this provides the financial comparison with the status quo. Questions to be addressed here include whether new financial resources have been found and allocated to the new initiative. If there are no new resources, and is this just about reallocating existing resources, the subsequent stages will highlight differences in outputs and outcomes. In addition, we consider the additional inputs (or ‘raw materials’) that are being deployed in order to enable the stated objectives to be delivered. Inputs in this context are factors such as staff, information technology and buildings. If new funding is available, then it is likely that new inputs are being procured over and above the

status quo, i.e. what would have happened in the absence of the new policy. In the case of reallocated resources, existing resources are redeployed among activities. Either is feasible, and an economic assessment using intervention logic needs to set out how resources are being used.

At this stage, a detailed understanding of what activities are being undertaken with the resources funded by the initiative could help to develop the link between spending and final outputs, results and impacts. Such activities could be the number of collaborative, cross-Member State meetings, or the number of transfers of information across Member States. Nevertheless, as outlined at the beginning, in the field of fighting organised crime causal links are often made that entail a high degree of presumption and uncertainty, and are highly dependent on the kinds of agencies that are involved.

2.4 Outputs

Outputs are the immediate products of the activities, for example, the number of EAWs issued or the number of arrests generated by collaborative cooperation. There is often a grey area between activities and outputs, which may not be material, so long as double counting does not occur. In this study, we use the data collected through the case studies specifically on information exchange among Financial Intelligence Units (FIUs), the number of EAWs issued and executed, the number of JITs set up, etc. (see the elaboration on the case studies at the end of this annex).

2.5 Results

Results and impacts are the final effects or consequences stemming from these outputs. Results relate to the medium-term objectives of the intervention, such as increased number of asset freezing operations and the value of the assets frozen and confiscation owing to enhanced cooperation among Asset Recovery Offices (AROs) or FIUs, or increased rates of conviction resulting from executed EAWs. These links again are made based on a high degree of presumption, as in fact the increased number of asset freezing operations or increased rate of convictions from the EAW could take place not only thanks to greater cooperation, but also to looser procedural standards or higher prioritisation at the national level. Finally, impacts should ultimately relate back to Treaty objectives, such as enhanced security in the common area of freedom, security and justice (Art. 83(1) TFEU).

2.6 Impacts

The next stages involve identifying, and ideally quantifying, the results and impacts generated by the outputs. This is a more appropriate technique for assessing other areas where there is more monitoring, statistics and proof of direct links and causality. In the field of OC, quantification (and monetisation) has been achievable, as the analysis has focused on financial and physical inputs as well as activities. Ideally, all the positive results of the interventions assessed can be quantified, to allow a comparison between benefits and costs. How this is achieved for different initiatives depends on the availability of data. Yet, the basic data will involve identifying the unit costs of delivering one unit of output, e.g. the cost of running a JIT, and then comparing these with the result that has been achieved by the JIT (e.g. in terms of financial savings, increased recovery of assets or reduced crime).

2.7 Problematising the links made between different stages

The next stage, which is the most difficult, is to translate the outputs into results that relate back to the stated objectives, i.e. has the new intervention generated improvements in the intended results? These results can then be compared with the original costs, and thus the net benefits of a European initiative estimated relative to the status quo (or equivalently, **the cost of non-Europe**). At first glance, this appears straightforward in the framework of intervention logic. There are a number of issues and challenges, however, which need acknowledging, if not addressing:

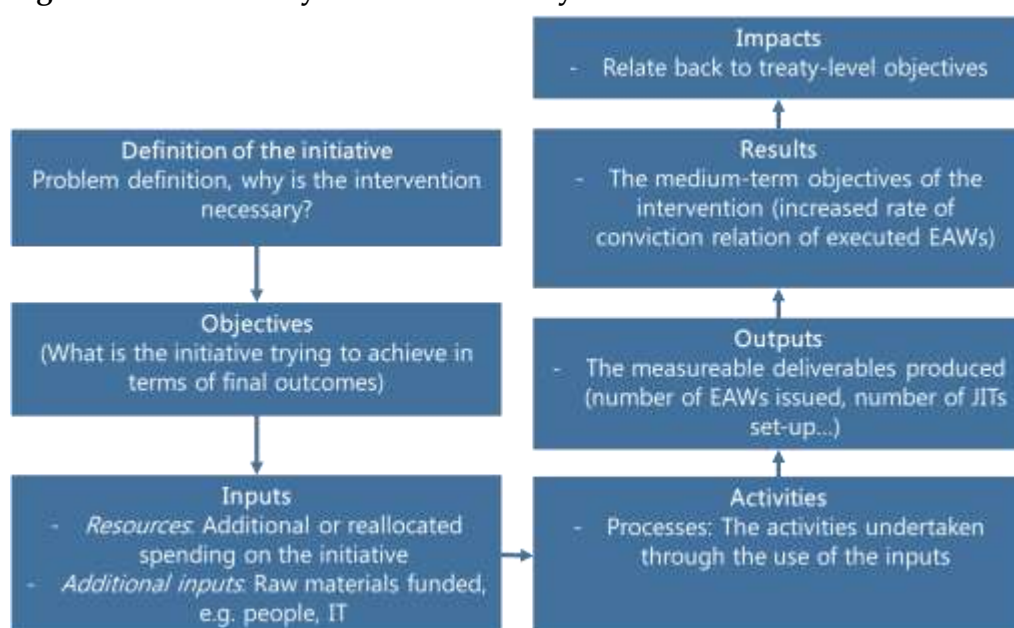
- **Attribution.** It is necessary to be able to present a narrative that demonstrates a logic behind the intervention employed and the outcomes observed. There is a range of statistical techniques that can be used, but these require the right sort of data to be available, or comparison with historical data if possible. At the very least, there needs to be a coherent narrative that underpins the links between inputs and results/impacts, but this may not withstand full scrutiny. In the context of organised crime, the covert nature of both the activity itself, and the necessary responses by the criminal justice system, limits the ability of analysis to identify the activities undertaken, and hence the costs and impacts of these activities. One of the main data collection issues is assessing the size of the organised crime 'market'. While it might be possible to calculate the changes in the rate of prosecution, conviction or recovery of assets, this relates to the law enforcement side of organised crime (i.e. what is 'visible'), rather than the phenomenon as a whole. Such restrictions may also include difficulty in accessing limited documentation, restricted activity and cost data, the methodological challenges in estimating the costs and benefits of organised crime (Levi et al., 2013) and the law enforcement responses to it.
- **Unintended outcomes.** In addition to the observed intended outcomes, it is possible that other consequences may occur that were not intended at the outset of the intervention. These outcomes could have negative connotations, and as such need to be accounted for in the analysis, and taken into consideration as part of the economic assessment of the benefits of European cooperation/the cost of non-Europe. Examples of this within the organised crime context could include knock-on effects on other, legitimate, sectors of the economy or displacement (i.e. a shift of the criminal activity from one sector to another, or one Member State to another).
- **Uncertainty and external factors.** The intervention logic presents a hypothetical linear model that connects inputs through to results and impacts, through a deterministic chain. Public policy is not implemented in a vacuum, however, but is subject to random variations and external influences. Both of these need to be taken into consideration when assessing the results and impacts of changes, as they can exaggerate or reduce the actual impact of interventions. In the organised crime context, it has been shown that there is a range of potential drivers of criminal activity, and changes in crime levels are not solely a result of actions taken by law enforcement agencies. Such factors as technology, the economy, social and demographic changes, and drugs and alcohol policy have all been shown, at different times, to impact on crime levels. Therefore, when assessing the cost of non-Europe in the context of cross-border cooperation to tackle organised crime, the wider social, political and economic context needs to be considered.
- **Data sources and quality.** Ideally, to address the issue of attribution, data would be extracted from a source that tested the cause and effect of the changes. Yet, this is often not possible in a public policy setting, and historically observed data is relied upon to demonstrate results and impacts, which is unlikely to be conclusive. Such data can nonetheless be reinforced by using a range of methods, such as qualitative analysis, to develop a fuller, holistic approach to understanding the costs, results and impacts of initiatives. By presenting this analysis as a narrative alongside a quantitative analysis, we are able to assess the full aspects of the impacts, and allow the reader to develop a judgement of the likely value for money/cost of non-Europe in this context, which can be especially useful if there is a range of benefits/outcomes.

The economic analysis in annex 2 in this report takes this approach. The analysis uses data collected from as wide a range of sources as possible (desk research, interviews with law enforcement practitioners at the national level and EU-level agencies). The economic analysis (see annex 2) seeks to populate the building blocks that make up the intervention logic for the different examples taken

in the case studies. The case studies do not intend to provide an overall picture, as that would end up being inappropriate for the given purpose (and is better addressed through legal and socio-political analysis), but to provide framing from a law enforcement practitioner's point of view. That is far from holistic, thus a further problematising of the EU added value for 'citizens' can better be presented in legal and especially, socio-political analysis. Examples of the intervention logic differ for each of the case studies.

For case study 1, the approach is to build the intervention logic for asset recovery and confiscation by taking a closer look at i) FIUs and ii) AROs (see Figure A1.1 and Table A1.1).

Figure A1.1 Case study 1 on asset recovery and confiscation



Source: Optimity Advisors, 2016.

The building blocks for inputs, activities and outputs are focusing on the FIUs and AROs (Table A1.1).

Table A1.1 Indicators for a building-blocks approach on FIUs and AROs

	FIUs	AROs
Inputs	<ul style="list-style-type: none"> - Number of new FIUs set up after the Third AML Directive; - Costs of the FIUs; - Costs of EU-specific cooperation mechanisms (FIU.NET, Mat³ch); 	<ul style="list-style-type: none"> - Cost of the AROs;
Activities	<ul style="list-style-type: none"> - Different models of FIUs (law enforcement, judicial, administrative and hybrid); Process for UTRs/STRs/SARs; - Cooperation mechanisms (Mat³ch, FIU.NET); 	<ul style="list-style-type: none"> - Activities;
Outputs	<ul style="list-style-type: none"> - Number of UTRs/STRs/SARs; - Number of requests sent/received (using data from the focus countries); 	<ul style="list-style-type: none"> - Number of requests for information sent/received;
Results	<ul style="list-style-type: none"> - Number of STRs sent to the law enforcement authority; 	<ul style="list-style-type: none"> - Amount recovered as a result of the information exchanged.

FIUs	AROs
<ul style="list-style-type: none"> - Number of STRs investigated; - Number of cases brought to prosecution from STRs; - Overall share of prosecutions from STRs out of the total. 	

Note: UTRs refers to unusual transaction reports, STRs refers to suspicious transaction reports and SARs refers to suspicious activity reports.

Source: Optimity Advisors, based on the desk research.

Ideally, wider data on the overall amount recovered as a result of the establishment of these asset recovery and confiscation mechanisms would also be identified. However, no data are available. The ultimate impact of the intervention would change with the scale of the problem (i.e. an increase in the amount of proceeds of crime recovered or confiscated).

This approach entails some limitations and issues relating to data:

- **Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime** is rather new – the EU Member States are in the transposition process now.¹⁷³
- FIUs do not receive feedback on how the intelligence was used by law enforcement authorities, so it is not always possible to link the data back to FIUs.
- Law enforcement authorities do not report whether or how much success there was because of FIU information.
- AROs provide some outputs (i.e. mutual recognition requests) and outcomes (the sums frozen, confiscated and recovered). Even if the sums recovered increase over time, it is not possible to attribute this change to the setting-up of AROs or EU cooperation. The Romanian case shows higher sums being recovered by using the ‘extended confiscation clause’, which is contested in the UK as it tends to be overly broad; however, we do not have any information on impacts. (For instance, has it helped to reduce criminal assets? Has criminality itself decreased owing to such actions? Or has it just changed jurisdiction? Or has it had other unexpected effects, such as negative impacts on the rights of property of the persons accused and on the proportionality test?)

For case study 2, the approach is to build upon the intervention logic for cross-border cooperation by paying attention to i) JITs, ii) EAWs, iii) European Investigation Orders (EIOs) and iv) AROs. The definition of the initiatives as well as their objectives are refined by looking at the legal, socio-economic and political issues as well as through the assessment of the scale of the problem the interventions are trying to tackle – in this case, increased asset recovery and confiscation of assets through mutual cooperation.

Quantifying the impact of cross-border cooperation following the logic laid out in Figure A1.1 (see above) is difficult, especially given that it focuses on non-monetary elements. The value of these instruments is easier to assess for practitioners (law enforcement and judicial authorities, including prosecutors). More efficient cooperation would lead to more time to focus on other tasks, for instance. Trust building among practitioners also facilitates the exchange of information and might have an influence on the effectiveness of cross-border cooperation, which might be difficult to assess, and enable EU-level cooperation by providing translation or covering travel expenses.

¹⁷³ See Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014) ([http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042R\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042R(01))).

The benefits for the wider EU public are more difficult to assess and would require multiple angles of analysis (see Table A1.2). JITs function on the basis of guidelines and there is a lack of a procedural guarantees and overall oversight. The same applies to the EAW, which has been the cause of problems and arguably been used too liberally by the courts of some Member States, posing grave risks to the fundamental right of suspects and accused people. The introduction of EIOs was partly meant to alleviate these problems, but given that the transposition deadline of the new Directive is not until 2017, the data is more difficult to assess.¹⁷⁴

Table A1.2 Indicators for a building-blocks approach on JITs and EIOs/EAWs

	JITs	EAWs/EIOs
Inputs	<ul style="list-style-type: none"> - Costs of setting up a JIT - Average cost of a JIT 	<ul style="list-style-type: none"> - Cost of executing an EAW - Cost of an EAW issued but not executed - (Future) cost of an EIO
Activities	<ul style="list-style-type: none"> - Process of setting up a JIT 	<ul style="list-style-type: none"> - EAW and EIO process
Outputs	<ul style="list-style-type: none"> - Number of successful JITs - Average time gained from the creation of a JIT 	<ul style="list-style-type: none"> - Number of EAWs issued - Number of EAWs executed
Results	<ul style="list-style-type: none"> - Number of successful investigations as a result of JITs 	<ul style="list-style-type: none"> - Increases in conviction rates resulting from EAWs - Increased mutual trust among Member States judicial authorities

Source: Optimity Advisors, based on desk research.

Unlike the two previous ones, case study 3 on the EU policy cycle considers an area that can be assessed without the need to focus on specific areas as proxies. The EU policy cycle consists of four key steps, which are almost exclusively concentrated on law enforcement practitioners. As documented in the EMPACT Framework Terms of Reference, the key objective of the multi-annual EU policy cycle is to tackle serious and organised crime threats in a “coherent and methodological manner” based on “cooperation between the relevant services of the Member States, EU Institutions and EU Agencies as well as third countries and organisations, including the private sector”.¹⁷⁵ Following the logic presented in Figure A1.1 (see above), inputs to the EU policy cycle will largely come from Member States, Europol and COSI. The effects of the EU policy cycles (outputs, results and impacts) are much more difficult to assess, mainly because the outputs of the EU policy cycle are not available to the public. Therefore, a deconstruction of the intervention logic becomes inapplicable to these steps (see Figure A1.1). In any case, the value and benefits focus more on practitioners than on the wider EU public or citizens.

Annex 2: Building Blocks for Economic Analysis of the Added Value of Europe on Organised Crime

¹⁷⁴ See Council of the European Union, Council adopts the “European Investigation Order” Directive, 7559/14, Press release 139, Brussels, 14 March 2014 (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141495.pdf).

¹⁷⁵ Council of the European Union, “EMPACT Terms of Reference”, Brussels, 3 October 2012, 14518/12.

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1. Assessing EU added value and the costs of non-Europe in freezing and confiscation of assets

To assess the EU's added value and the costs of non-Europe in financial intelligence and in the freezing and confiscation of assets, this annex concentrates on the objectives, inputs, activities and outputs of i) Financial Intelligence Units (FIUs) and ii) Asset Recovery Offices (AROs). Focusing on these two tangible instruments allows for a degree of quantification of the costs (inputs), activities and outputs. It is then possible to assess the extent to which the status quo (i.e. the scale of the problem as defined at the outset of the intervention) has to change in order for the EU cooperation mechanisms in place on financial investigations and on the freezing and confiscation of assets to be cost-beneficial. Other benefits can also be identified in terms of enhanced cooperation and greater mutual trust, although these cannot easily be quantified.

1.1 Status quo

To be able to assess EU added value compared with the status quo, it is crucial to assess the scale of the 'problem', in other words, to quantify the proceeds of crime. The impact assessment accompanying the proposed Directive on preventing the use of the financial system for the purpose of money laundering, including terrorist financing (the fourth Anti-Money Laundering (AML) Directive) provides a thorough discussion of the various ways in which money laundering can be valued (IMF, 2001). It must be noted that money laundering can be used as a proxy for the proceeds of crime given that criminal assets must be laundered in order to re-enter the legal economy. Based on estimates produced by the IMF (2001), and applying them to EU GDP (and assuming an even distribution of money laundering activities globally), laundered funds in the EU can be valued at between €245 million and €613 million annually.

Looking more generally at the proceeds of crime, a more recent estimate based on methodology by the UN Office on Drugs and Crime has valued the money laundered in the EU at €330 million annually (UNODC, 2011). Developing estimates of the scale of the problem, while frequently used in impact assessments, are tenuous and their robustness can often be criticised. A recent assessment of methodologies on the quantification of money laundering criticised the use of estimates on the amount of money laundered (Halliday, Levi and Reuter, 2014). It does, however, highlight that "proceeds of crime" is a plausible starting point for assessing the money-laundering problem in a country. Given the lack of evidentiary base and the range of estimates, this way of assessing the 'cost' of crime might also be skewed.

Nevertheless, in a 2013 report for the European Parliament, some of the same authors developed a methodology to "generate a best estimate for the economic, financial and social costs of organised crime in and against the EU and to inform an evidence-based understanding of the associated issues" (Levi et al., 2013). The conclusion of the report highlighted how very little data is available as well as the complexity of the organised crime phenomenon. The report did develop "minimum identifiable direct economic costs of selected activities of organised crime in the EU". Yet these costs only relate to the direct cost of these crimes without any attempt to monetise or quantify their wider impacts or indirect costs.

Table A2.1 Minimum, identifiable *direct* economic costs of OC

Criminal activity	Minimum identifiable direct economic cost (€ billion)
Trafficking in human beings	30
Fraud against the EU (cigarette smuggling)	11.3
Fraud against the EU (VAT/MTIC* fraud)	20
Fraud against the EU (agricultural and structural funds)	3
Fraud against EU individuals	97
Unrecovered motor vehicle theft	4.25
Payment card fraud	1.16
Cost of responding to illicit drugs	34
Total	200.71

* MITC refers to missing trader intra-Community fraud.

Source: Levi et al. (2013).

1.2 FIUs

Inputs

Inputs relate to the costs of the intervention. In the case of FIUs, these include their (ongoing) running costs, as well as setup costs. A study conducted by Europe Economics (2009) provides quantitative data with regard to the costs of compliance with the third AML Directive. This study states that there are **both one-off and ongoing compliance costs related to implementation of the third AML Directive by financial institutions**, which include those outlined below.

- **One-off compliance costs.** These are the costs incurred depending on the type of firm and were estimated to vary from 29% to 16% of a company's operating expenses (in 2007). The one-off cost drivers were, from the most to least important (as a percentage of total costs), investment in IT (54%), training (22%), consultancy (11%), project management (7%), familiarisation with the Directive (3%), staff recruitment costs (2%) and legal advice (1%).
- **Ongoing compliance costs.** The ongoing compliance costs were estimated to be between 5% and 13% of a company's operating expenses (in 2007). The ongoing cost drivers were, from the most to least important (as a percentage of total costs), additional staff (37%), IT (31%), training (13%), audits (10%), external reporting (5%) and internal reporting (4%).

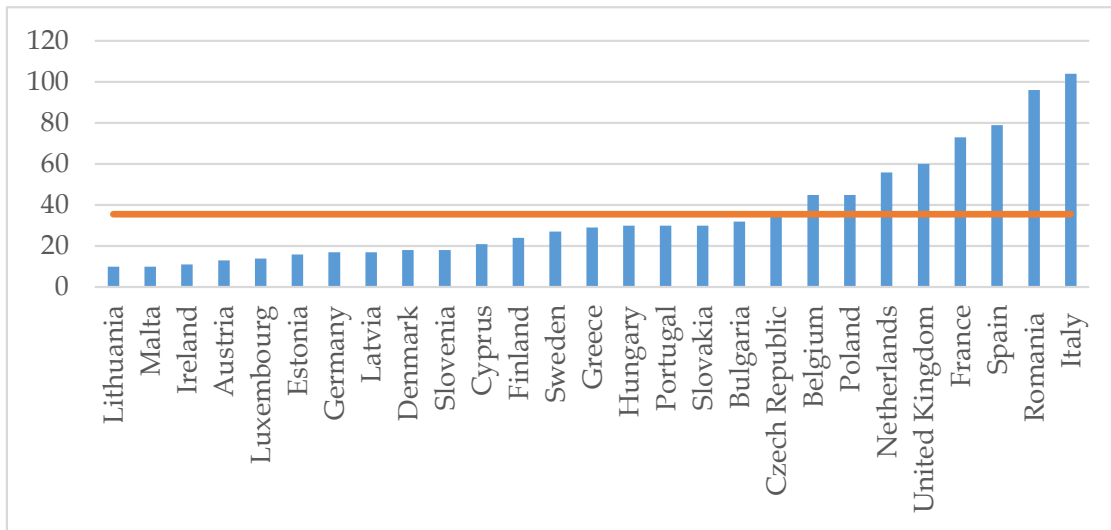
As explained above, some Member States had already set up FIUs and were already members of the international FIU network and, for those countries, we can extrapolate data from a UK impact assessment¹⁷⁶ of the implementation of FIUs and assume that no extra costs for complying with the third AML Directive were necessary. However, for the countries that were not part of the Egmont Group before implementation of the Directive, additional costs relating to the setting up of an FIU at the national level would have to be taken into account. To assess the costs of FIUs, we propose to focus on the ongoing operational costs based on the assumptions that each Member State had some form of financial intelligence structure, even if this was not clearly identified.

Staff is the main cost driver of an FIU and the average FIU in the EU employs 36 people. Figure A2.1 shows that the number of full-time staff needed for the FIU varies by country, ranging from 10 in Lithuania, to more than 80 people in Spain, Romania and Italy. There are less data available on the budget of an FIU per country (presented in Figure A2.2). Still, from the data available, and based on an ECOLEF report, we estimate that the average budget spent on FIUs per country per year is

¹⁷⁶ See HM Treasury and Home Office (2015).

around €2.6 million. There is no reason to assume that this figure has changed since the publication of the ECOLEF report. Yet, there is wide variation in reported costs, as shown in Figure A2.2.

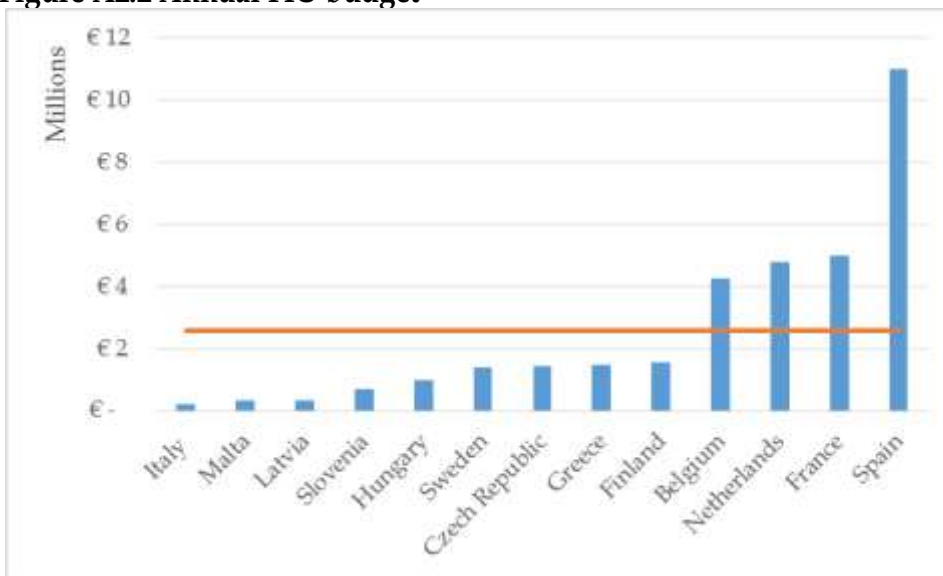
Figure A2.1 Number of staff (full-time equivalent) of the FIU, per country



Note: The year reported varies by country between 2008 and 2012 in the report by ECOLEF.

Source: University of Utrecht, "Project 'ECOLEF' - The Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy", February 2013.

Figure A2.2 Annual FIU budget



Note: The year reported varies by country between 2008 and 2012 in the report by ECOLEF.

Source: University of Utrecht, "Project 'ECOLEF'" (2015), op. cit.

Based on these estimations, the inputs can be monetised, as shown in Table A2.2.

Table A2.2 Overview of FIU inputs

Item	Cost	Notes
Cost of FIUs	28 x €2.6 million = €72.8 million (annually)	A high estimate given that a number of Member States had set up an FIU before the third AML and would have probably set one up as part of their involvement in FATF
Cost of implementing Mat ³ ch and other cooperation tools	€17.5 million (annually)	A high estimate given that this figure relates to the overall Europol information technology budget
Total	Up to €90.3 million annually	

Source: See the Egmont Group website, “Financial Intelligence Units” (<http://www.egmontgroup.org/about/financial-intelligence-units-fius>).

Activities

There are four different types of FIUs¹⁷⁷ in Europe, which vary in terms of their operational activities. The most common types of FIUs in Europe are administrative and law enforcement models (Table A2.3).

- In the **judicial model**, an FIU is part of the judicial branch of the national government. Investigative agencies of a Member State receive disclosures of suspicious financial activities from the financial sector and judicial powers can then be deployed accordingly (e.g. conducting searches, conducting interrogations, seizing funds or freezing accounts).
- In the **law enforcement model**, anti-money laundering measures are implemented alongside enforcement systems that already exist. The efforts of multiple law enforcement or judicial authorities are therefore combined to investigate money laundering.
- In the **administrative model**, the FIU is an independent and centralised authority that works as a ‘buffer’ between the financial and the law enforcement communities. FIUs are in charge of receiving and processing information from the financial sector and this information is then disclosed to judicial or law enforcement authorities for prosecution.
- The **hybrid model** combines elements of at least two of the FIU models. In this model, FIUs serve as disclosure intermediaries that link both the law enforcement and the judicial authorities.

Table A2.3 Types of FIUs in the EU

FIU type	Number of countries
Administrative	14
Hybrid	3
Judicial	2
Law enforcement	9

Source: Eurostat and University of Utrecht, “Project ‘ECOLEF’” (2015), op. cit.

The core function of an FIU is to receive transaction reports from reporting entities and from other connected FIUs. Once the information is received, it has to be analysed and then passed to investigators, prosecutors and other FIUs (IMF, 2004). FIUs also need to ensure that there is enough

¹⁷⁷ See the Egmont Group website, “Financial Intelligence Units” (<http://www.egmontgroup.org/about/financial-intelligence-units-fius>).

capacity in the police to deal with the cases emanating from FIUs. Suspicious transactions mainly come from financial institutions, notaries, casinos, etc. (ibid.), and are reported differently across countries. The types of reports are outlined in Table A2.4; the most popular is the suspicious transaction report (STR), but suspicious activity reports (SARs) and unusual transaction reports (UTRs) are also used in a few countries.

Table A2.4 Types of reports in Europe

Type of report	Number of countries
SAR	4
STR	23
UTR	1

Source: Eurostat, "Money Laundering in Europe", Statistical Working Paper, Luxembourg: Publications Office of the European Union, 2013 (<http://ec.europa.eu/eurostat/documents/3888793/5856465/KS-TC-13-007-EN.PDF/69cde077-3bd9-4d0d-8c19-a6fe3608c2cd>).

For performing their function, European FIUs have access to the FIU.NET computer network and Ma³tch, which are briefly described below.

- **FIU.NET** is a European, decentralised computer network, where the exchange of data between connected FIUs is safely stored on the FIU.NET databases.
- **Ma³tch** (Autonomous Anonymous Analysis) allows an FIU connected with the FIU.NET network to anonymously browse the databases of other EU FIUs prior to requesting information. This allows them to better target requests for information, resulting in time and efficiency savings.

Outputs

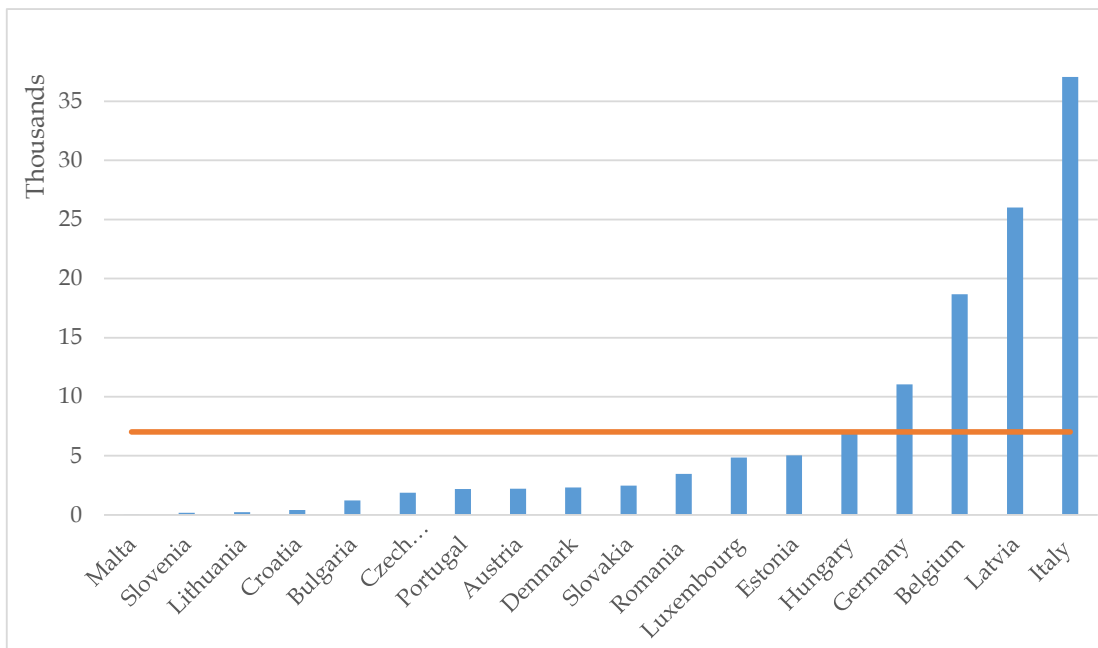
According to Eurostat, in 2010 in the EU, 126,522 STRs, 21,964 SARs (510 for Cyprus and 21,454 for Finland – no data were specified for other countries) and 29,795 UTRs (the Netherlands) were completed.¹⁷⁸ It should be noted that some countries have not given details of the number of reports they completed, potentially leading to an underestimate of the total number. As most countries use STRs as a unit of reporting, Figure A2.3 only reviews the number of STRs delivered by country. The average number of STRs delivered (red line) is estimated to be around 12,716 per country, but with a range of 73 in Malta, to over 35,000 in Italy.

It is important to note, however, that these figures relate to all reports rather than simply cross-border cases. Some more recent data are available on international (cross-border) information exchange for the focus countries. Yet, FIUs do not report this in a consistent manner. Spain, for instance, provides data on the number of information requests sent and received as well as on spontaneous communication between FIUs without providing information on the main FIUs with which it exchanges information.¹⁷⁹ Other FIUs provide information on the units with whom they exchange the most information. In the case of the Netherlands, the top five countries sending requests to the Dutch FIU were Belgium, Luxembourg, Italy, Slovakia and the UK, and the countries receiving the most requests were Belgium, Sweden, Germany, Spain and the UK.¹⁸⁰

¹⁷⁸ See Eurostat, *Money laundering in Europe*, Luxembourg: Publications Office of the European Union, 2013.

¹⁷⁹ See the Spanish FIU report, SEPBLAC, *Memoria 3013*, Madrid, 2014 (http://www.sepblac.es/espanol/informes_y_publicaciones/memoria2013.pdf).

¹⁸⁰ See FIU–Netherlands, *Annual Report 2013*, The Hague, 2013.

Figure A2.3 Number of STRs filled in by Member States, 2010

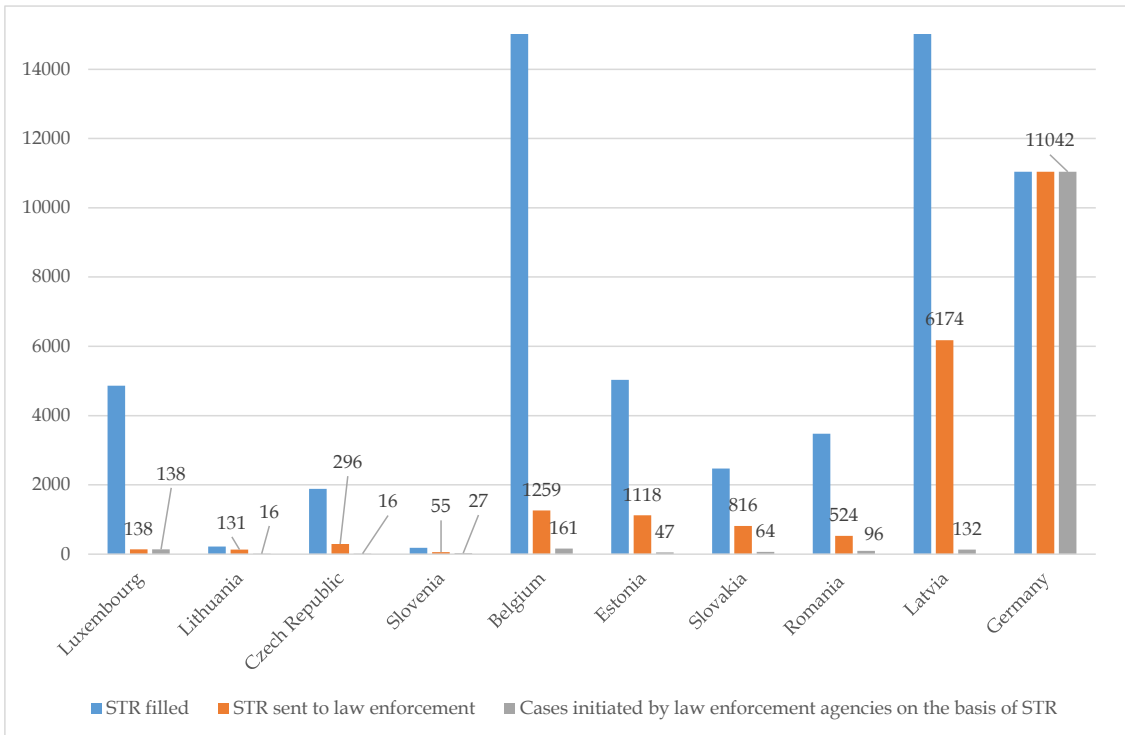
Source: University of Utrecht, "Project 'ECOLEF'" (2015), op. cit.

Results

In 2010, from the countries for which we have full data¹⁸¹ (Luxembourg, Lithuania, the Czech Republic, Slovenia, Belgium, Estonia, Slovakia, Romania, Latvia and Germany), we computed an 'efficiency rate' of STRs, in other words, the share of STRs sent to law enforcement authorities and ultimately leading to a case. Among the overall number of STRs filled in, 29% were sent to law enforcement and of those sent to law enforcement, 54% led to a case. Thus Figure A2.4 shows the data available by country. The rate of STRs converted into an actual investigation is very low but is also likely to be reduced further by outlier countries that have a very high number of STRs, and only a few that are converted into actual cases (i.e. mainly Luxembourg and Belgium). According to the stats of German FIUs, all STRs must lead to a case being opened. This highlights the difficulty in comparing these data among Member States.

¹⁸¹ See Eurostat, *Money laundering in Europe* (2013), op. cit.

Figure A2.4 Number of STRs filled in and sent to law enforcement, and the number of cases initiated by law enforcement agencies

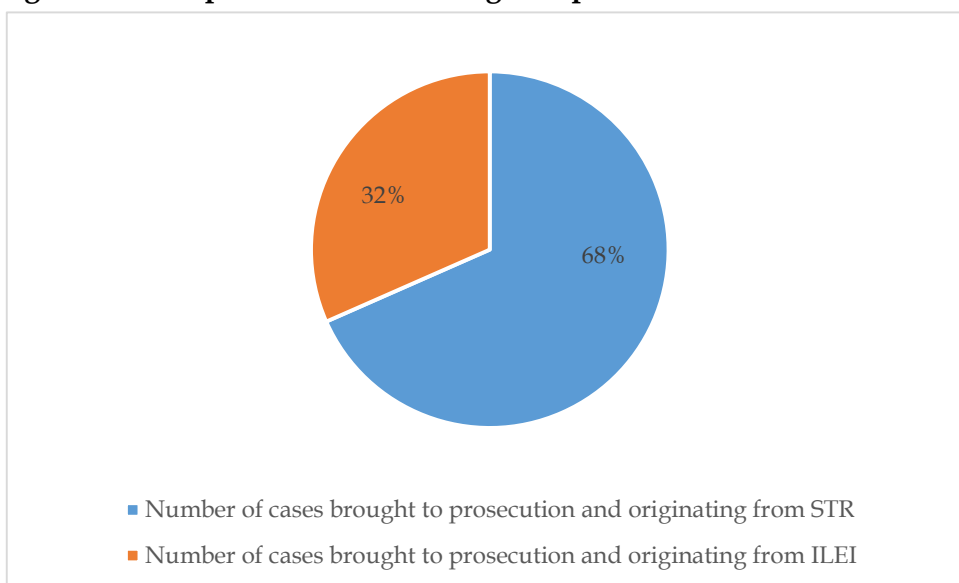


Note: The number of STRs filled in for Belgium and Latvia goes beyond the scale to respectively 18,673 and 26,003.

Source: Eurostat, *Money laundering in Europe* (2013), op. cit.

There are data available from Luxembourg, Lithuania, the Czech Republic, Slovenia, Portugal and Belgium on the number of cases brought to prosecution that originate from STRs and from independent law enforcement investigations (ILEIs). Two-thirds of the cases emanate from STRs (Figure A2.5).

Figure A2.5 Proportion of cases brought to prosecution from ILEIs and STRs



Source: Eurostat, *Money laundering in Europe* (2013), op. cit.

Consequently, completed data are only available for four Member States, but they allow for an estimation of the cost of FIUs per STR sent to law enforcement authorities of €5,208.

Table A2.5 Cost per STR filled in and per STR sent to law enforcement officers

	FIU budget	Number of STRs filled in	Cost per STR completed	Number of STRs sent to law enforcement officers	Cost per STR sent to law enforcement officers
Czech Republic	€1,429,473	1,887	€758	296	€4,829
Slovenia	€691,000	181	€3,818	55	€12,564
Belgium	€4,257,645	18,673	€228	1,259	€3,382
Latvia	€341,490	26,003	€13	6,174	€55
Average of the four countries	€1,679,902	11,686	€1,204	1,946	€5,208

Source: Authors, based on Eurostat and University of Utrecht, "Project 'ECOLEF'" (2015), op. cit.

This information provides a building block that would be useful if more information on the cross-border element of freezing and confiscating criminal assets becomes available or a clearly defined methodology is developed to empirically assess and extrapolate the cross-border element of this phenomenon.

1.3 AROs

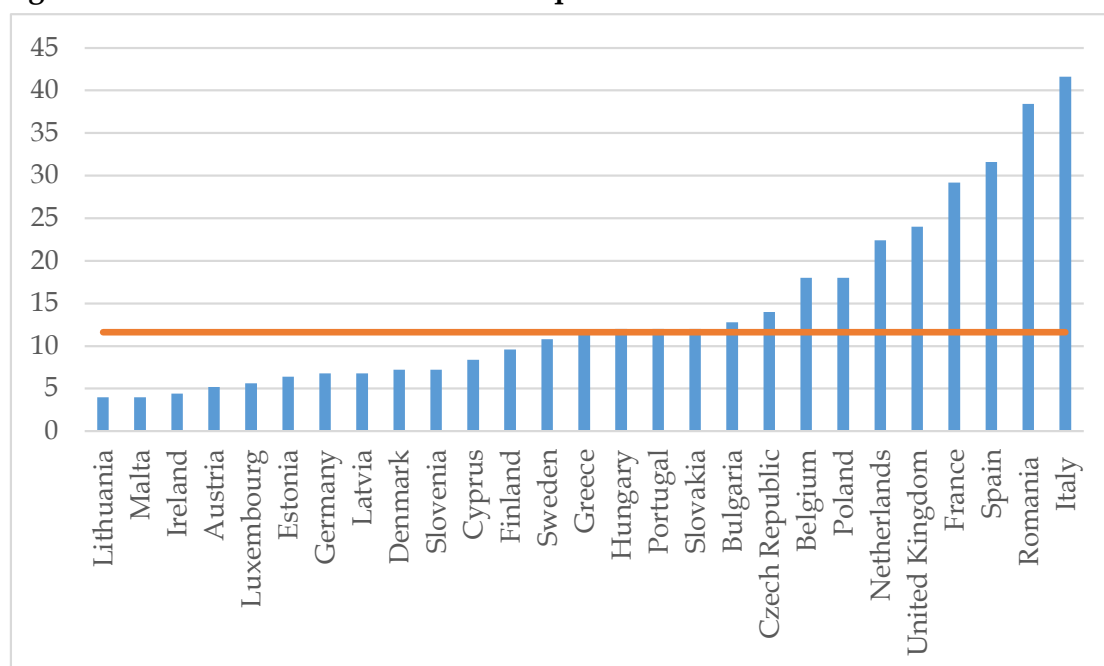
Inputs

AROs and FIUs are somewhat similar in their way of operating. As for the FIUs, most of the countries already had the infrastructure before implementing the Council Decision, and some of the potential cost would be related to training and familiarisation. This **one-off cost** is estimated by a UK impact assessment to be around £10,000/€13,100 (UK Government, 2014). Then, the main ongoing cost driver is related to the number of staff needed for exchanging information among AROs. Because of the similarities with the FIUs, we can estimate the number of staff necessary for running an ARO by estimating a ratio between the number of staff dedicated to the FIU and the number of staff needed to run an ARO. Data are available for France:

- the number of staff in the FIU is 73, and
- the number of staff in the ARO is 30.

The ratio between the two is 40%. The staff required to run an ARO can therefore be estimated at 40% of the total number of staff necessary to run an FIU. Having an estimation of the staff needed for running an FIU from the ECOLEF report,¹⁸² the staff required for managing an ARO per country can then be estimated (Figure A2.5).

¹⁸² See University of Utrecht, "Project ECOLEF" (2013), op. cit.

Figure A2.5 Estimated number of staff required to run an ARO

Note: The mean value is 12, the first quartile is 7 and the third quartile is 18.

Source: Authors, based on FIU data from the University of Utrecht, "Project 'ECOLEF'" (2015), op. cit.

On average, 12 persons (coming mainly from national police and law enforcement bodies) are needed for running an ARO. Among all Member States, it is estimated that 75% of the countries' AROs would have a number of staff allocated of between 7 and 18 persons (the first and third quartiles).

Considering that the main cost driver of AROs is staff, it is also possible to estimate the cost of AROs as 40% of that of FIUs.

Table A2.6 Overview of ARO inputs

Item	Cost	Notes
Cost of AROs	40% of €72.8 million = €29.12 million (annually)	Estimate based on FIU data
Europol staff cost	1 full-time equivalent	Based on an interview with Europol
Cost of implementing Mat ³ ch and other cooperation tools	n/a	No costs added as they are already covered in the section relating to FIUs
Total	Up to €29.22 million (annually)	Based on €100,000 for staff costs

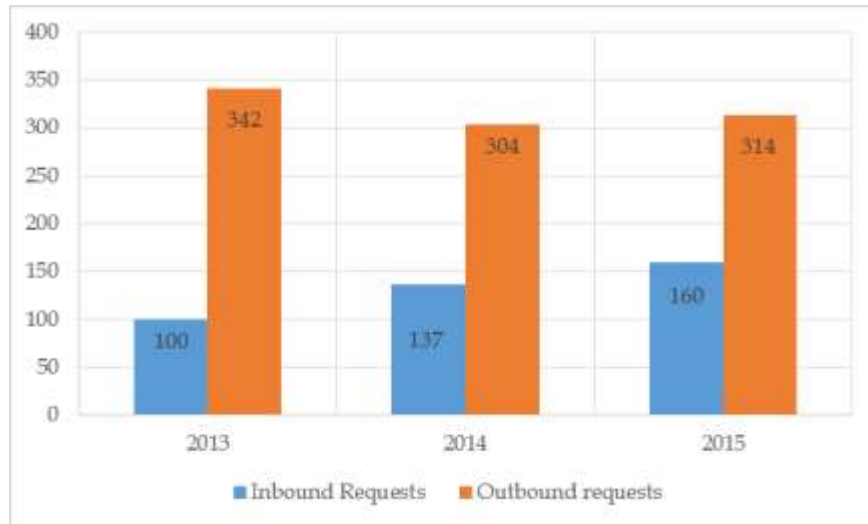
Source: Authors, based on interviews, Eurostat and University of Utrecht, "Project 'ECOLEF'" (2015), op. cit.

Outputs

Data on the outputs of the AROs are difficult to identify. However, the UK ARO provided data on the number of inbound and outbound requests per year in 2013–15. These data are presented below. Although the UK AROs have made fewer requests, it is clear that inbound EU ARO requests have increased – in fact, by 60% from 2013 to 2015. If the number of requests made at the European level cannot be estimated by extrapolating the UK data, it can be inferred that the trend for EU AROs overall is increasing. The number of requests from other countries seems to have risen, suggesting

that EU intervention is leading to greater information sharing among Member States with regard to asset recovery.

Figure A2.6 Inbound and outbound requests for information - UK AROs



Source: National Crime Agency (2015b).

Results

Results of the setup of AROs and their increased collaboration would include figures such as the amounts recovered as a result of the information exchanged among Member States and in particular though collaboration using the CARIN network or Ma³tch, but no data could be found during the research.

1.4 Overall impacts

The impact of EU collaboration on the freezing and confiscation of criminal assets (i.e. the EU added value) relate to the main benefits of EU intervention as well as the main cost drivers if the tools discussed above did not exist, such as time/lower rates of prosecution (in AML and combating the financing of terrorism) or lower rates of assets recovered.

Comparable data has been difficult to identify. This is most evident in the way that FIUs collect information, with diverging definitions and procedures for identifying suspicious transactions (UTRs, SARs and STRs). It has nevertheless been possible to identify and monetise inputs (costs and resources) of AROs and FIUs. Overall, the annual costs of FIUs and AROs can be estimated at roughly €120 million (€90.3 million for FIUs and €29.2 million for AROs).

Based on the assessment of the “minimum identifiable direct economic cost of organised crime” (€200 billion), EU action would be beneficial from an economic perspective if the proceeds of crime were reduced throughout the EU by 0.06% (€120 million divided by €200 billion).

Despite a relatively low response rate to the survey launched for this study, the overwhelming majority of respondents who chose to answer the question agreed with the statement that EU-led interventions improved criminal asset recovery (11 ‘yes’, 2 ‘no’ and 13 ‘I do not know’), in particular the number of freezing and confiscation procedures in the EU.

This assumption does not take into account other benefits, such the time gained by practitioners, the softer benefits of increased cooperation, a decrease in criminal activity as a result of more efficient crime-identification systems or a reduction in the possibility for criminals to engage in forum shopping. Nor does the estimate take into account the wider indirect costs of crime, which, as highly

documented, in particular by Michael Levi, are extremely difficult to assess. That being stated, this assessment, mainly based on inputs, provides a building block to assess the EU added value of the instruments discussed here once more data or an agreed methodology become available to assess the costs of crime.

2. Assessing the EU added value and the costs of non-Europe in criminal justice investigations

To assess the EU added value of and the costs of non-Europe in cooperation tools the approach chosen is to build upon the intervention logic for cross-border cooperation by taking a closer look at i) Joint Investigation Teams (JITs) and ii) European Investigation Orders (EIOs). The definition of these initiatives as well as their objectives have been set out earlier this report in the sections providing a socio-political analysis of cross-border cooperation.

2.1 Status quo

To be able to assess EU added value compared with the status quo, the first step is to assess the scale of the 'problem', in other words, to quantify the effects of crime. Unlike the assessment in section 1 of this annex, where an overall figure could be given for the value of the proceeds of crime, providing an overall upper bound on the benefits of intervention for society as a whole, the value of cooperation in cross-border proceedings should focus on non-monetary elements. The effects of JITs and EIOs would be more easily identifiable for practitioners such as law enforcement authorities, judges and prosecutors, as well as people subject to these instruments, in particular suspects and accused persons. Given that the instruments under consideration are not especially targeted at organised crime offences, it is very difficult to 'quantify' the status quo. The overall figure of the proceeds of crime (€330 billion – see section 1 of this annex) could be used as a proxy, but this will not give the full picture.

The approach taken for the assessment of cross-border cooperation tools is to focus on JITs and EIOs as building blocks to illustrate the intervention logic and allow for costs and benefits to be apportioned to interventions. Here we look in detail at these instruments before using the findings to build an explanation and understanding of the impacts of cross-border cooperation overall.

2.2 JITs

Inputs

The costs of JITs are born at both the European and national level. At the European level, Eurojust can either fund a JIT or support it. Costs at the national level relate to the operational costs of the staff and other resources committed in support of the JIT.

At the European level, Eurojust provides grants to Member States in order to facilitate the organisational and financial aspects of cross-border cooperation through JITs. The grants delivered have a ceiling of €50,000 per JIT and cover up to 95% of the total eligible costs to Member States. This funding seeks to assist Member States by reducing the impact of costs related to the transnational nature of JITs (Eurojust, 2015).

Table A2.7 presents JITs-related expenses from Eurojust, from 2014 and 2015, as a proportion of the overall Eurojust budget. The JIT budget as a proportion of the overall Eurojust budget was no more than 2% for 2014 and 2015, which suggests that the resources for implementation and management of JITs can still be considered minor expenses in relation to the overall Eurojust budget. Also, there are enough data available for 2014 to estimate the cost of a JIT. If we consider that most of the Eurojust budget that is allocated to JITs is used for funding JITs, we can estimate the cost of a JIT at €10,500. Yet, besides directly funding JITs, part of Eurojust's budget could also be dedicated to supporting the JITs that do not receive any funding. By dividing the JIT budget by the total number of JITs funded or supported, we obtain a cost of €3,700 per JIT.

Table A2.7 Eurojust budget and JITs

Item	2016 ^{a)}	2015 ^{b)}	2014 ^{c)}
Overall budget	-	€33,800,000	€33,700,000
JIT budget	€1,000,000	€555,000	€705,000
Proportion of Eurojust budget dedicated to JITs	-	1.6%	2.1%
Number of JITs funded by Eurojust	-	-	67
Number of JITs supported by Eurojust	-	-	122
Cost per JIT funded	-	-	€10,522
Cost per JIT funded or supported	-	-	€3,730

Sources: ^{a)} Eurojust, “Annual Work Programme 2016”, as adopted on 15 December 2015, Final Eurojust AWP 2016 (COM), The Hague.

^{b)} Eurojust, the 2015 amended budget in Statement of revenue and expenditure of Eurojust for the financial year 2015 – amending budget No. 1, OJ C 416/26, 15.12.2015.

^{c)} Eurojust, the 2014 amended budget in Statement of revenue and expenditure of Eurojust for the financial year 2014 – amending budget No. 1, OJ C 110/207, 31.3.2015.

Other organisations and networks are involved in the setting-up of JITs:

- Europol is mainly involved in JITs by providing supportive documents, e.g. a JIT guide to EU Member States and a manual on JITs,¹⁸³ which suggests that some of Europol’s resources are directed at documents that help Member States to set up JITs. The interview with a Europol JITs officer confirmed that JITs are mainly supported by Eurojust, and that Europol is in charge of the data processing and analysis reports that are shared among the JIT partners.
- The JITs Network is made up of national contact points established to foster the exchange of information and best practice among Member States and improve the efficiency and effectiveness of JITs by facilitating contact among practitioners in Member States that hold the legal and operational knowledge on the ground. The JITs Network plays a significant role in promoting JITs and identifying new trends in JIT cooperation. Participation in training organised within and outside the European Union is based, in particular, on the successful partnerships established with CEPOL (European Police College) and the European Judicial Training Network.

At the national level, JITs are voluntary actions undertaken by Member States to fight cross-border crime. The financial costs involved in setting up a JIT are likely to have existed anyway at the national level. In other words, the resources used for a JIT would have been used for a purely national investigation. Despite this, the budget necessary for setting up a JIT has been perceived by the Europol JITs officer as an obstacle for Member States. In these cases, Eurojust’s grants are available in order to limit the operational costs linked with the international element incurred by JITs. It can therefore be assumed that the costs of JITs are unlikely to be more expensive than using traditional national techniques for cross-border investigation (e.g. rogatory letters, formal requests). At a national level the financial costs resulting from JITs might even be less than the national equivalent if Eurojust has provided funding to the Member State (only a limited number of JITs are funded).

A JIT is by definition a team and it therefore requires a team leader and team members. The members come from the Member States that want to establish the JITs and are part of judicial or law

¹⁸³ See the Europol website, “Joint Investigation Teams” (<https://www.europol.europa.eu/content/page/joint-investigation-teams-989>).

enforcement agencies (e.g. judges, prosecutors and a judge or a senior police or customs officer). Eurojust (2015) estimates the standard duration of a JIT action period to be three months. For a JIT to be guaranteed to receive a funding grant, it must consist of 5 to 30 people who will focus on the case for six months to a year.¹⁸⁴ The number of human resources needed for the implementation of a JIT can therefore be estimated to be between 5 and 30 full-time equivalent staff for an average time of nine months, though the activities can last up to a year. At the same time, the activities people undertake as part of a JIT are similar to what they would have to do at the national level. The administrative tasks would not be as significant as in the traditional methods for investigation, as Member States would not have to obtain formal agreement or a rogatory letter before investigating in the other Member States participating in the JIT. The only additional administrative work would be the evaluation forms that need to be completed.

The overall input of costs for JITs are summarised in Table A2.8.

Table A2.8 Inputs of costs for JITs

Item	Cost	Notes
Eurojust support to JITs	€1 million	Based on the 2016 budget
Additional Eurojust inputs	Not fully quantifiable; up to €3.38 million assuming 10% of Eurojust's budget is allocated to these activities	Other Eurojust costs that are not provided as grants or support but which indirectly support JITs
Europol – support, data processing and organisation	Not quantifiable	Europol costs supporting JITs
JITs Network	Not quantifiable	-
Member States' own resources	No cost	Based on the assumption that there are no additional costs at the national level
Total	At least €4.38 million	-

Source: Authors, based on Eurojust and interviews.

The overall costs of JITs can therefore be evaluated at a minimum of €4.38 million in 2016 based on an estimate that 10% of Eurojust's overall budget indirectly supports JITs.

Activities

Figure A2.7 illustrates how resources were spread out across the different Member States between 2009 and 2014.¹⁸⁵ The number of JITs financially supported by Eurojust does not seem to be equally distributed across the different countries. The interview with Europol's JITs officer suggests that JITs are very much used by newer EU countries; if this is the case, then it seems odd that more funding for JITs from Eurojust were given to Western European countries. This unequal distribution can be explained by different hypotheses:

- Some Member States suffer from crimes that are not identified as Eurojust 'priorities', which therefore results in fewer grants delivered to their countries.
- Some countries are not willing to apply for JITs funding. From the interviews, it is suggested that the effectiveness of JITs depends to a large extent on the willingness of the Member States to participate.

¹⁸⁴ See "Interview with Thomas Lamiroy", *Eurojust News*, No. 9, June 2013.

¹⁸⁵ See Eurojust, *Annual Report 2014*, The Hague, 2015.

Figure A2.7 therefore suggests that the EU added value in terms of cooperation through JITs will vary from one country to another due to a difference in the resources available for funding JITs across countries.

Figure A2.7 Eurojust JIT funding (December 2009–August 2014)



Source: Eurojust, *Annual Report 2014 (2015)*, op. cit.

The budget of Eurojust described in the inputs part of this section is partly used to facilitate cooperation among Member States. Eurojust funding particularly targets the following activities:

- meetings of the JIT and participation in investigative measures carried out on the territory of another state (including transport and the loan of equipment);
- interpretation during the activities of the JIT, including for investigative measures and the translation of evidentiary material, procedural or case-related documents; and
- the cross-border transfer of seized items, evidentiary material, procedural or case-related documents.

JITs that are not funded by Eurojust, but merely ‘supported’ can only be used to assist with the following activities:¹⁸⁶

- drafting JIT agreements or extensions to existing agreements,
- advising on the EU and international legal frameworks for setting up a JIT,
- providing information on different procedural systems,
- identifying suitable cases for JITs,
- organising coordination meetings to support JITs, and
- providing assistance concerning coordinated action.

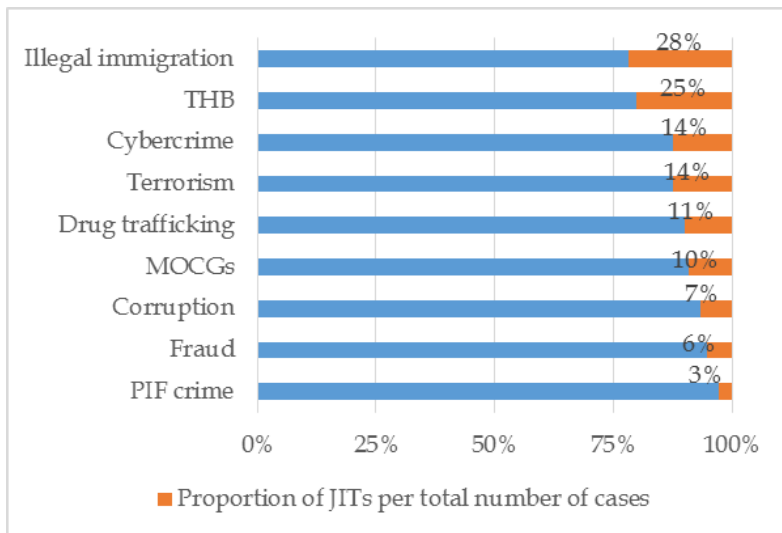
¹⁸⁶ Ibid.

Outputs

In 2014, Eurojust supported 122 JITs, 45 of which were newly formed that year. National members can either use their capacity as competent national authorities to run the JITs or receive funding from Eurojust (67 were funded by Eurojust).¹⁸⁷ Also, Eurojust provided support to the running of 7 JITs involving non-EU countries, 3 of which were newly created in 2014. The interview with Europol's JITs officer revealed that Europol took part in 44 JITs altogether in 2015 and that they were an official participant in 26 JITs.

One of the rationales for the introduction of JITs was to facilitate cooperation between law enforcement agencies to tackle organised crime. The idea was also to concentrate the cooperation on tackling crimes that have been identified as priorities. Figures A2.8 and A2.9 show the number JITs created as a proportion of overall cases, by the priority area of crime. Around 10% of the overall cases were considered priority crimes that resulted in the setup of a JIT. The crimes that most frequently resulted in the creation of a JIT were cases more associated with 'social crimes' (e.g. illegal immigration and trafficking in human beings). Because social crimes are more likely to have a direct impact on European citizens, we can assume that JITs contribute more to the social welfare of citizens than the financial interests of Member States.

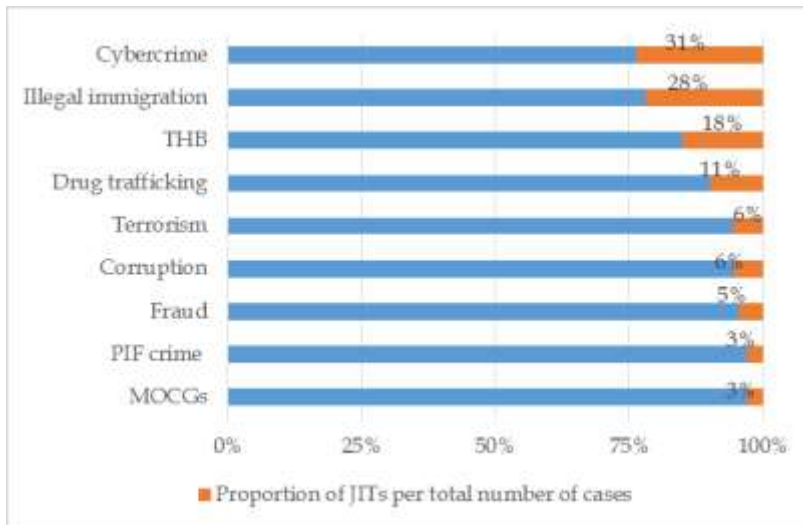
Figure A2.8 JITs as a proportion of the total number of cases in 2014



Notes: THB refers to trafficking in human beings; MOCGs refer to mobile organised crime groups; PIF crime refers to the protection of the financial interests of the EU by criminal law as set out in the PIF convention (Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995).

Source: Eurojust, *Annual Report 2014* (2015), op. cit.

¹⁸⁷ Ibid.

Figure A2.9 JITs as a proportion of the total number of cases in 2013

Notes: THB refers to trafficking in human beings; MOCGs refer to mobile organised crime groups; PIF crime refers to the protection of the financial interests of the EU by criminal law.

Source: Eurojust, *Annual Report 2014 (2015)*, op. cit.

Results

There are success stories emerging from the creation of JITs, although it is difficult to assess their full extent and the effects they have. It is possible, however, to identify positive results. The Eurojust annual report highlights positive results from coordination meetings organised by Eurojust: “Coordination meetings organised to facilitate the work of JITs contributed to the resolution of recurring obstacles, such as: i) differences in legal systems with regard to rules on the gathering of evidence; ii) admissibility of evidence; iii) disclosure of information; and iv) time limits for data retention.”¹⁸⁸ Because JITs are a joint effort between two or more countries, evidence and investigation tools can be shared freely. Less time should therefore be necessary before prosecution.

Survey data appear to show that JITs are used as a cooperation tool. Notably, 85% of survey respondents (n=34) said that their country used JITs for cross-border cooperation. Nevertheless, an important 65% (n=34) responded that they used a bilateral agreement. JITs represented the type of cooperation that was the most used according to respondents. Other types of cooperation were also used; however, the high number of JITs reported suggests that the JITs used by Member States do have added value compared with bilateral agreements.

3. Assessing the added value of the EU policy cycle and the costs of not having these tools

Inputs

Table A2.9 outlines the four steps of the EU policy cycle and aligns them with the activities conducted by Europol and other EU bodies, along with those conducted by Member States as part of the EU policy cycle.

¹⁸⁸ Ibid.

Table A2.9 Europol and Member State activities in the four stages of the EU policy cycle

Step	Description	Activities of Europol & other EU bodies	Activities of Member States
SOCTA	An EU Serious and Organised Crime Threat Assessment (SOCTA) is developed by Europol; a SOCTA identifies key priority threats in the fight against serious and organised crime	<ul style="list-style-type: none"> • Europol development of SOCTA • Data from Europol, Member States, Frontex, Eurojust, third countries and third private partners 	<ul style="list-style-type: none"> • Data collection by Member State law enforcement authorities, to inform the SOCTA
MASP	Development of Multi-Annual Strategic Plans (MASPs) for each of the priorities identified in the SOCTA in order to define the general objectives for each specific threat	<ul style="list-style-type: none"> • The Standing Committee on Internal Security (COSI) examines the SOCTA • The European Commission examines it and comments • JHA Council ministers adopt EU priorities for that cycle • The Commission, alongside Member States, JHA agencies and EU institutions draft a four-year MASP for each of the nine priorities • COSI approves the MASPs 	<ul style="list-style-type: none"> • Member States examine and comment on priorities • Meeting of Member State representatives to draft MASPs for each priority
EMPACT	European Multidisciplinary Platform against Criminal Threats (EMPACT) projects are implemented; EMPACT projects are based on the strategic goals identified above and are detailed in operational action plans (OAPs); one per priority per year	<ul style="list-style-type: none"> • EU institutions and agencies involved in drafting nine OAPs (a two-day process) • Nine OAPs approved by COSI • Joint Member State/agency actions as well as agency actions • The Europol EMPACT Support Unit provides administrative and logistical support and monitors the progress of EMPACT projects • EMPACT support managers are allocated by Europol to ensure operational support for all priorities • COSI monitors implementation on a 	<ul style="list-style-type: none"> • Member State representatives draft OAPs (a two-day process) • OAPs include joint Member State/agency actions, but also agency actions and national actions • Each OAP implementation is driven by one Member State, which volunteers to lead the priority • National EMPACT coordinators help implementation • The EMPACT Support Unit at Europol provides administrative and logistical support to EMPACT projects and monitors progress

Step	Description	Activities of Europol & other EU bodies	Activities of Member States
		<ul style="list-style-type: none"> • six-monthly reporting basis 	<ul style="list-style-type: none"> • Driver Member States provide six-monthly reports to COSI
Evaluation	Evaluation of the EMPACT projects; the effectiveness of the projects and their impact on the priority threat they were designed to combat are reviewed by COSI	<ul style="list-style-type: none"> • Europol undertakes an interim assessment (potential for adaptation/modification of MASPs or priorities) • The European Commission provides an annual state of play to COSI • The European Commission conducts an independent evaluation at the end of the policy cycle 	<ul style="list-style-type: none"> • Driver Member States provide annual reports

Source: Authors, based on desk research and interviews.

Costs associated with the above activities: Summary

- SOCTA & MASP

For the first two steps outlined above (SOCTA & MASP development), it is not possible to calculate the costs of the activities to Member States or EU bodies, including Europol. These costs are purely administrative, however, and do not place a significant financial burden on stakeholders when compared with the operational costs assigned to the EMPACT projects.

- EMPACT

A number of the activities documented are administrative; therefore, it is not possible to calculate these costs and it is assumed that they do not place a significant financial burden on the stakeholders involved. Costs in this category include the costs to Member States, EU institutions and agencies of meetings to draft the operational action plans for each priority area, and their approval by the COSI committee.

In some instances, it has been possible to determine the costs of EMPACT projects and their associated actions. Data are presented below on i) the financial grants awarded under the EMPACT delegation agreement for 2015; and ii) the financial support provided by Europol in 2015 for kick-off meetings on EMPACT priorities, further priority meetings, joint action days and other support.

It is not possible to calculate the remaining costs related to EMPACT projects or actions. As stated in the “First progress reports 2015” on the EU policy cycle,¹⁸⁹ EU funding to support EMPACT projects (through the delegation agreement) has come “rather late”. In place of this funding, projects have found different sources of financial support. The funding situation, however, is “rather complex and only partially visible to Europol”. ISEC (the programme for the Prevention of and Fight against Crime), Europol and CEPOL all supported certain elements of the policy cycle but the financial extent of this support is not documented. In

¹⁸⁹ See Council of the European Union, EU Policy Cycle – Implementation monitoring – First progress reports 2015, 9853/15, Brussels, 17 June 2015.

addition, other EU funding programmes, for example the national programme budget of the Internal Security Fund, have provided support, the extent of which is unknown.

Evaluation

As above, these activities place a purely administrative cost burden on Member States and EU institutions and agencies. It is not possible to calculate the costs of the evaluation stage of the EU policy cycle and it is assumed that the activities do not carry a significant financial burden.

Concerning detailed cost data related to EMPACT projects, as mentioned above, these are available for the two aspects discussed in detail below.

i) EMPACT delegation agreement

The EMPACT delegation agreement, signed between DG Home and Europol on 22 December 2014, allows Europol to award grants for the first time. Prior to this agreement, Europol had been limited to providing financial support in the area of euro counterfeiting, as stipulated under Art. 5(5) of the Europol Council Decision.¹⁹⁰ The grants are stipulated in the 2014 work programme of the EU Internal Security Fund. The grants are solely available to EMPACT projects as defined under the EU policy cycle and will provide up to €7 million in financial support over two years of the EU policy cycle for 2014-17.

In 2015, €4,189,043 was awarded in grants from the ISEC fund across 110 actions in 19 projects, spanning in all 13 priority threat areas. Thus, the projects received ($€4,189,043/19$ projects =) €220,476 on average. For all but one project, the grant covered 95% of the total cost (the maximum proportion that grants are able to cover). In the other case – the project on counterfeit goods – the grant only covered 88% of the total cost of the project. Table A2.10 describes this, outlining the number of Member States involved in each project and the collective cost to Member States per project. As can be seen, **the total cost borne by Member States across the 19 projects is €241,427.**

Using the above figures, it is possible to extrapolate a figure for the total cost of all 280 actions carried out under the EMPACT projects in 2015. The 110 actions covered by the EMPACT delegation agreement grants included total eligible costs (i.e. the Europol grant plus costs to Member States), each costing (total eligible costs $€4,430,470/110$ actions =) €40,277.

Assuming that the remaining 170 actions were fully funded by Member States, the total cost of those 170 actions to Member States would be (individual cost of action $€40,277 \times 170$ =) €6,847,090. Thus, the total cost for Member States of all 280 actions carried out under the EMPACT projects is (€241,427 for actions covered by the delegation agreement plus €6,847,090 for the cost born for the other actions =) €7,088,517.

¹⁹⁰ See Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121/37, 15.9.2009.

Table A2.10 Overview of 2015 grants provided by Europol to EMPACT projects under operational action plans and the Member States involved

OAP	Number of countries (and country codes)	European Commission grant* (€)	European Commission grant * (%)	Total eligible costs	Costs to Member States (€)
Facilitated illegal immigration	2 (FR , IT)	178,487	95	187,881	9,394
Facilitated illegal immigration	4 (AT , HU, EL, NL)	174,985	95	184,195	9,210
Trafficking in human beings	5 (NL , AT, RO, CY, UK)	272,849	95	287,209	14,360
Trafficking in human beings	6 (RO , ES, AT, SK, IE, NL)	85,203	95	89,687	4,484
Counterfeit goods	3 (IT , NL, BE)	250,217	88	284,338	34,121
Excise fraud	2 (ES , PT)	119,871	95	126,180	6,309
Excise fraud	5 (AT , HU, IE, SE, UK)	223,765	95	235,542	11,777
MTIC fraud	4 (SK , SI, HU, NL)	216,682	95	228,087	11,405
Synthetic drugs	5 (PL , NL, BE, DE, LT)	333,683	95	351,245	17,562
Cocaine	2 (FR , ES)	68,888	95	72,514	3,626
Cocaine	5 (ES , FR, PT, SE, IE) + CEPOL, European Policy College	290,129	95	305,399	15,270
Heroin	2 (ES , IE)	359,077	95	377,976	18,899
Cybercrime – payment card fraud	5 (RO , AT, EL, FI, NL)	351,826	95	370,343	18,517
Cybercrime – child sexual exploitation	15 (BE , AT, BG, CY, EE, FI, FR, EL, LV, NL, PT, SK, SE, DK, UK) + NO, CH	110,366	95	116,175	5,809
Cybercrime – child sexual exploitation	3 (NL , SI, UK)	77,532	95	81,612	4,080
Cybercrime – cyber attacks	5 (DE , ES, FR, NL, HR)	360,000	95	378,947	18,947
Firearms trafficking	4 (ES , SE, NL, RO)	355,781	95	374,506	18,725
Organised property crime	3 (FR , BE, DE)	124,394	95	130,941	6,547
Organised property crime	7 (BE , FR, SI, NL, IT, CY, ES)	235,308	95	247,693	12,385
Total:		4,189,043		4,430,470	241,427

* The grants are awarded by the European Commission, mainly from the Internal Security Fund. Europol is appointed as the grants administrator and distributor. Grants are allocated to one Member State, which leads the project, and other Member States are free to join the projects. The Member States leading each project are shown in bold in the above table. Source: Europol, "EMPACT Grants Awarded in 2015", The Hague.

ii) Europol 2015 financial support

Europol provides financial support for operational meetings related to EMPACT projects. Up to the beginning of May 2015, Europol had funded 21 meetings costing €187,000. At the same point in 2014, Europol had funded 19 meetings costing €155,500. Data for 2015 per meeting are outlined in the Table A2.11 below.

Table A2.11 Overview of 2015 financial support provided by Europol for operational meetings per EMPACT project

Meeting Topic	Cost (€)
Kick-off meetings	
Illegal immigration	10,600
Trafficking in human beings	10,900
Counterfeit goods	7,000
Excise	10,500
Cocaine	8,200
Heroin	7,300
MTIC	12,000
Cybercrime – Child sexual exploitation	8,200
Cyber attacks	10,200
Firearms	6,300
Synthetic drugs	8,600
Organised property crime	9,600
Cybercrime card fraud	8,200
Priority meetings	
Illegal immigration	2,400
Synthetic drugs	10,700
Cocaine	13,000
Cybercrime card fraud	10,600
Cyber attacks	9,500
Firearms	6,600
Joint action days	
Joint action day preparation meeting	3,600
Other support	
Cocaine OA 6.1 Meeting	13,000
21 meetings	187,000

Source: Council of the EU, EU Policy Cycle - Implementation monitoring - First progress reports 2015, 9853/15, Brussels, 17 June 2015.

The costs of the EMPACT projects to Member States, Europol and the Internal Security Fund are summarised in Table A2.12.

Table A2.12 Costs (inputs) of EMPACT

Item	Cost (€)
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Cost of EMPACT to Member States	7,088,517
Cost of EMPACT to Europol	187,000
Cost of EMPACT to Internal Security Fund	4,189,043
Total	11,464,560

Notes: See the explanations above in relation to costs.

Source: Authors.

Thus, the total cost of EMPACT in 2015, taking into account the necessary assumptions regarding administrative costs, was €11,464,560. The proportion borne by Member States was €7,088,517 (62%).

Activities

The activities related to the four stages of the EU policy cycle are outlined in Table A2.9 above. The table categorises the activities by those of Member States and those of Europol and other EU bodies.

Outputs

A number of outputs of the EU policy cycle for serious and organised crime have been identified. Table A2.13 details the outputs for each stage of the EU policy cycle.

Table A2.13 Outputs of the EU policy cycle

Step	Activities of Europol & other EU bodies	Activities of Member States	Outputs
SOCTA	Europol development of SOCTA Data from Europol, Member States, Frontex, Eurojust, third countries and third private partners	Data collection by Member State law enforcement authorities, to inform the SOCTA	Production of the 2013 SOCTA
MASP	COSI examines the SOCTA The European Commission examines it and comments JHA Council ministers adopt EU priorities for that cycle The Commission, alongside Member States, JHA agencies and EU institutions draft a four-year MASP for each of the nine priorities COSI approves the MASPs	Member States examine and comment on priorities Meeting of Member State representatives to draft MASPs for each priority	Production of 9 MASPs
EMPACT	EU institutions and agencies involved in drafting 9 OAPs (a two-day process) Nine OAPs approved by COSI	Member State representatives draft OAPs (a two-day process) OAPs include joint Member State/agency actions, but	Production of 9 OAPs In 2015: Implementation of 13 EMPACT projects

Step	Activities of Europol & other EU bodies	Activities of Member States	Outputs
	<p>Joint Member State/agency actions as well as agency actions</p> <p>The Europol EMPACT Support Unit provides administrative and logistical support and monitors the progress of EMPACT projects</p> <p>EMPACT support managers are allocated by Europol to ensure operational support for all priorities</p> <p>COSI monitors implementation on a six-monthly reporting basis</p>	<p>also agency actions and national actions</p> <p>Each OAP implementation is driven by one Member State, which volunteers to lead the priority</p> <p>National EMPACT coordinators help implementation</p> <p>The EMPACT Support Unit at Europol provides administrative and logistical support to EMPACT projects and monitors progress</p> <p>Driver Member States provide six-monthly reports to COSI</p>	<p>13 kick-off meetings</p> <p>6 priority meetings</p> <p>1 additional meeting on cocaine</p> <p>1 joint action day</p> <p>280 actions undertaken across 13 EMPACT OAPs – no data on completion of actions</p> <p>27 actions led by CEPOL</p> <p>14 actions led by Eurojust</p> <p>8 actions led by Frontex</p> <p>4 actions led by OHIM*</p> <p>7 actions led by the European Monitoring Centre for Drugs and Drug Addiction</p> <p>3 actions led by MAOC-N**</p> <p>2 actions led by Interpol</p> <p>2 monitoring reports</p>
Evaluation	<p>Europol undertakes an interim assessment (potential for adaptation/modification of MASPs or priorities)</p> <p>The European Commission provides an annual state of play to COSI</p> <p>The European Commission conducts an independent evaluation at the end of policy cycle</p>	<p>Driver Member States provide annual reports</p>	<p>13 annual reports</p>

* OHIM refers to the Office for Harmonization in the Internal Market.

** MAOC-N refers to the Maritime Analysis and Operations Centre – Narcotics.

Source: Council of the EU, First progress reports 2015 (2015), op. cit.

Results

Going beyond the simple outputs of the EU policy cycle, it is difficult to assess its tangible results given that the documents containing this information are not accessible. It is, however, possible to reconstruct the overall benefits to law enforcement practitioners based on their views and on some anecdotal evidence and success stories.

The EU policy cycle aims at tackling serious and organised crime threats in a “coherent and methodological manner” based on “cooperation between the relevant services of the Member States, EU institutions and EU agencies as well as third countries and organisations, including the private

sector".¹⁹¹ The surveyed covers some important indicators that suggest success regarding the objective of increased cooperation among stakeholders through the EU policy cycle.

- Among the respondents, 85% (n=34) indicated that European cooperation is 'very important' to their daily work.
- The majority of respondents named 'information sharing' (88%; n=34) and 'operational cross-border cooperation' (74%, n=34) as the most relevant forms of cooperation in place at the EU level aimed at fighting organised crime.

In addition to the above findings, which report positively on the impact of EU interventions such as the policy cycle, were the results from respondents on other matters, though these varied widely; responses to the percentage of reduced crimes as a result of cross-border cooperation ranged from 5% to 50%. This means that it is difficult to assess the extent to which better cross-border cooperation can be linked back to the EU policy cycle as opposed to other tools. Furthermore, the survey results suggest that the COSI is the least known form of cooperation among respondents (1.95 on a scale of up to 4.0). Interviews with the practitioners revealed that many of them were not even aware of this body or knew very little about it, even though COSI is setting operational priorities and should be of significant importance to practitioners. Just in few cases did practitioners say they had been consulted through their national governments on EU policy cycle issues.

Additionally, Europol has outlined the key aims for each EMPACT project. Yet, it is clear that the data required to determine the extent to which the results have been achieved are not available. This was confirmed in interviews with responsible officers for the EU policy cycle at Europol and DG Migration and Home Affairs. It was reported that there is currently little data, particularly on the operational value of the EU policy cycle, and that access to documents and statistics is an issue. Furthermore, it was stated that an assessment will not take place until the end of the first policy cycle.

Impacts

As discussed above, the added value of the EU policy cycle is more immediately felt by practitioners. It is nonetheless possible – given the estimated minimum, identifiable, direct economic cost of organised crime in the EU – to draw some conclusions on its overall monetary impact. According to a 2013 study, this minimum, identifiable, direct economic cost of organised crime is €200 million.¹⁹²

Taking into account the inputs, which were estimated at €11,464,560, the EU policy cycle would have a beneficial impact if it led to a reduction of (€11,464,560/€200 billion =) in crime of 0.006%. While this figure in itself does not provide much information without any data on the results and impacts of the EU policy cycle, it is interesting to compare it with the figures this study has identified on the likely impact of EU collaboration on the freezing and confiscation of criminal assets. The monetary inputs to the EU policy cycle as a methodology appear to be roughly 10% of the operational costs of EU collaboration on the freezing and confiscation of criminal assets. More information on tangible impacts (even if only focusing on the direct costs of crime) would provide an interesting comparator to assess the EU added value of these two very different types of cooperation methods.

¹⁹¹ See Council of the European Union, "EMPACT Terms of Reference", 14518/12, Brussels, 3 October 2012.

¹⁹² See Levi et al. (2013) and section 3 of the report.

Annex 3: List of Financial Intelligence Units in the EU

Table A3.1 FIUs according to type (who is who)

EU Member State	FIU	Type*	Location
Austria	Bundeskriminalamt (A-FIU) Austria Financial Intelligence Unit	Law enforcement	Police
Belgium	Cellule de Traitement des Informations Financières/Cel voor Financiële Informatieverwerking (CTIF-CFI) Financial Information Processing Unit	Administrative	Independent
Bulgaria	Financial Intelligence Directorate of National Security Agency (FID)	Administrative	Ministry of Finance
Croatia	Anti-Money Laundering Office (AMLO)	Administrative	Ministry of Finance
Cyprus	Unit for Combating Money Laundering (MOKAS)	Law enforcement	Attorney General's Office
Czech Republic	Finanční analytický útvar (FAU - CR) Financial Analytical Unit	Administrative	Ministry of Finance
Denmark	SØK/Hvidvasksekretariatet Stadsadvokaten for Særlig Økonomisk Kriminalitet/Hvidvasksekretariatet (HVIDVASK) State Prosecutor for Serious Economic Crime/Money Laundering Secretariat	Law enforcement	Public Prosecutor's Office
Estonia	Rahapesu Andmebüro/Money Laundering Information Bureau Estonia Financial Intelligence Unit	Law enforcement	Estonian National Police
Finland	RAP Keskusrikospoliisi/Rahanpesun selvittelykeskus National Bureau of Investigation/Financial Intelligence Unit	Law enforcement	Police
France	Traitement du renseignement et action contre les circuits financiers clandestins (TRACFIN) Unit for Intelligence Processing and Action against Illicit Financial Networks	Administrative	Ministry of Finance
Germany	Zentralstelle für Verdachtsanzeigen Germany Financial Intelligence Unit	Law enforcement	Federal Criminal Police Office
Greece	Foreas Arthrou 7 N.2331/95 Hellenic Anti-Money Laundering	Administrative	Independent

EU Member State	FIU	Type*	Location
	and Anti-Terrorism Financing Commission (HAMLC)		
Hungary	Hungarian Financial Intelligence Unit (HFIU)	Administrative	National Tax and Customs Administration
Ireland	Bureau of Fraud Investigation (MLIU)	Law enforcement	Ireland's National Police Service (An Garda Siógana)
Italy	Unità di Informazione Finanziaria (UIF) Financial Intelligence Unit	Administrative	Central Bank (Banca d'Italia)
Latvia	Kontroles dienests, Noziedzīgi iegūto līdzekļu legalizācijas novēršanas dienests (KD) Control Service - Office for Prevention of Laundering of Proceeds Derived from Criminal Activity	Administrative	Prosecutor's Office
Lithuania	Financial Crime Investigation Service under the Ministry of the Interior of the Republic of Lithuania	Law enforcement	Ministry of the Interior
Luxembourg	Cellule de Renseignement Financier (FIU-LUX)	Law enforcement	Prosecutor's Office
Malta	Financial Intelligence Analysis Unit (FIAU)	Administrative	Independent
Netherlands	Nederland (FIU-Netherlands/MOT) Financial Intelligence Unit	Administrative	Ministry of Justice
Poland	Generalny Inspektor Informacji Finansowej (GIIF) General Inspector of Financial Information	Administrative	Ministry of Finance
Portugal	Unidade de Informação Financeira (UIF)	Law enforcement	Police
Romania	Oficiul National de Prevenire si Combatere a Spalarii Banilor (ONPCSB) National Office for the Prevention and Control of Money Laundering	Administrative	Independent
Slovakia	Spravodajská jednotka finančnej polície Úradu boja proti organizovanej kriminalite (SJFP UBPOK) Financial Intelligence Unit of the Bureau of Organised Crime	Law enforcement	Ministry of Interior
Slovenia	Office for Money Laundering Prevention (OMLP)	Administrative	Ministry of Finance

EU Member State	FIU	Type*	Location
Spain	Servicio Ejecutivo de la Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetarias (SEPBLAC) Executive Service of the Commission for the Prevention of Money Laundering and Monetary Infractions	Administrative	Central Bank
Sweden	National Criminal Intelligence Service, Financial Unit (NFIS)	Law enforcement	Police (Finanspolisen Rikskriminalpolisen – FIPO)
UK	National Crime Agency (NCA)	Law enforcement	Police

* The typology is derived from Appendix 2, 2013 *Annual Report of Financial Intelligence Unit (FIU) Germany*, Bundeskriminalamt Wiesbaden, 2014.

Sources: Authors, based on the 2013 *Annual Report of Financial Intelligence Unit (FIU) Germany*, Bundeskriminalamt Wiesbaden, 2014 (<https://www.FIU.NET/fiunet-unlimited> and <http://www.egmontgroup.org/membership/list-of-members/by-region/europe>).

Annex 4: List of Asset Recovery Offices in the EU

Table A4.1 AROs according to type (who is who)

Country	ARO	Type	Location
Austria	The Federal Criminal Police (Bundeskriminalamt – Referat “Vermögensabhöpfung”)	Law enforcement	Police
Belgium	Organe Central pour la Saisie et la Confiscation (Central Office for Seizure and Confiscation – COSC)	Administrative	Independent
Bulgaria	Commission for Establishing Property from Criminal Activity (CEPACA, which subsequently changed its name to CEPAlA)	Administrative	Independent
Bulgaria	The Supreme Prosecutor’s office	Law enforcement	Prosecutor’s Office
Croatia	MUP (Ministry of Interior)	Administrative	Ministry of Interior
Cyprus	Unit for Combating Money Laundering (MOKAS-FIU Cyprus)	Law enforcement	Prosecutor’s Office
Czech Republic	The Unit Combating Corruption and Financial Crimes (UOKFK), International Cooperation Department	Law enforcement	Police
Denmark	State Prosecutor for Serious Economic Crime (Statsadvokaten for Særlig Økonomisk Kriminalitet)	Law enforcement	Prosecutor’s Office
Estonia	V Division, Investigation Department, Central Criminal Police	Law enforcement	Police
Finland	National Bureau of Investigation, Criminal Intelligence Division/Communications Centre	Law enforcement	Police
France (1)	Agency for the management and recovery of the assets seized and confiscated (AGRASC)	Administrative	Independent
France (2)	Central Directorate for Criminal Investigations (Plateforme d’Identification des Avoirs Criminels – PIAC)	Law enforcement	Police
Germany (1)	Federal Criminal Police (Bundeskriminalamt Referat SO 35 “Vermögensabschöpfung”)	Law enforcement	Police
Germany (2)	The Ministry of Justice (Bundesamt für Justiz)	Administrative	Ministry of Justice
Greece	The Financial and Economic Crime Unit	Administrative	Ministry of Finance
Hungary	National Investigation Office (Nemzeti Nyomozó Iroda)	Law enforcement	Independent
Ireland	The Criminal Assets Bureau	Administrative	Independent
Italy	International Police Cooperation Service (Servizio per la Cooperazione Internazionale di Polizia – SCIP)	Law enforcement	Police
Latvia	The Economic Police Department of the Central Criminal Police Department of the State Police	Law enforcement	Police

Country	ARO	Type	Location
Lithuania (1)	The Criminal Police (Lietuvos kriminalines policijos biuras)	Law enforcement	Police
Lithuania (2)	The General Prosecutor's Office (Lietuvos Respublikos generaline prokuratura)	Law enforcement	Prosecutor's Office
Luxembourg	Parquet du Tribunal d' Arrondissement de Luxembourg, Section éco-fin	Law enforcement	Prosecutor's Office
Malta	The National Fraud Squad	Law enforcement	Police
Netherlands	The Criminal Assets Deprivation Bureau Public Prosecution Service (Bureau Ontnemingswetgeving Openbaar Ministerie - BOOM)	Law enforcement	Prosecutor's Office
Poland	The Assets Recovery Unit, Criminal Bureau, General Headquarters of Police	Law enforcement	Police
Portugal	Asset Recovery Office (ARO) (Gabinete de Recuperação de Activos - (GRA)) under the Criminal Police	Law enforcement	Police
Romania	National Office for Crime Prevention and Cooperation for Asset Recovery	Administrative	Ministry of Justice
Slovakia	The Financial Intelligence Unit of the Bureau for Combating Organised Crime of the Presidium of the Police Force	Law enforcement	Ministry of Interior
Slovenia	SL ARO under the responsibility of the Public Prosecution Office	Law enforcement	Prosecutor's Office
Spain (1)	The Intelligence Centre against Organised Crime (CICO)	Administrative	Independent
Spain (2)	The Anti-drugs Special Prosecution Office (Fiscalia Especial Antidrogas)	Administrative	Ministry of Justice
Sweden (1)	The National Economic Crimes Bureau (Ekobrottsmyndigheten)	Law enforcement	Independent
Sweden (2)	National Criminal Intelligence Service	Law enforcement	Police
UK (1)	The Serious Organised Crime Agency (SOCA) for England, Wales, and Northern Ireland	Law enforcement	Ministry of Interior
UK (2)	The Scottish Crime and Drug Enforcement Agency (SCDEA) for Scotland	Law enforcement	Ministry of Interior

* This table is provisional – pending approval from DG Home.

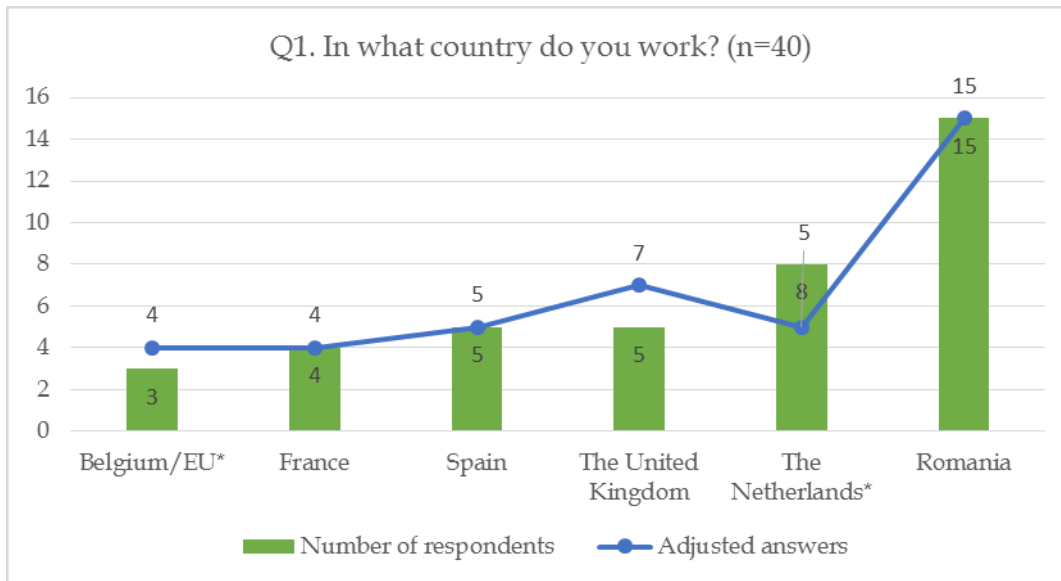
Sources: Authors, based on *Report based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*, COM(2011) 176 final, Brussels, 12 April 2011 (http://ec.europa.eu/dgs/home-affairs/news/intro/docs/1_en_act_part1_v8.pdf (pending update from DG HOME)).

Annex 5: Analysis of Survey Results

1. Profile of the respondents

In total, 40 respondents participated in the online survey. More than a third of the responses came from Romania, as the Permanent Representation of Romania encouraged the relevant institutions to cooperate. The second highest group came from respondents in the Netherlands. However, as Europol and Eurojust are based in The Hague, some of the national experts were based at the national desks of these agencies (see adjusted answers in Figure A5.1), while others worked at the EU level, as did all of the respondents based in Brussels (DG Home and DG Justice officials).

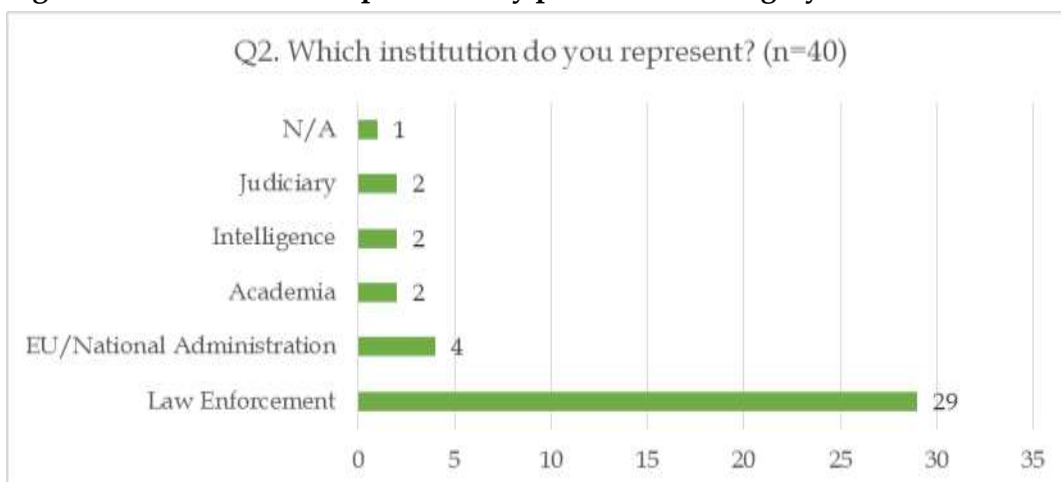
Figure A5.1 Number of respondents by country of employment



Source: Authors.

Among the respondents, 72.5% represented the law enforcement community (see Figure A5.2).

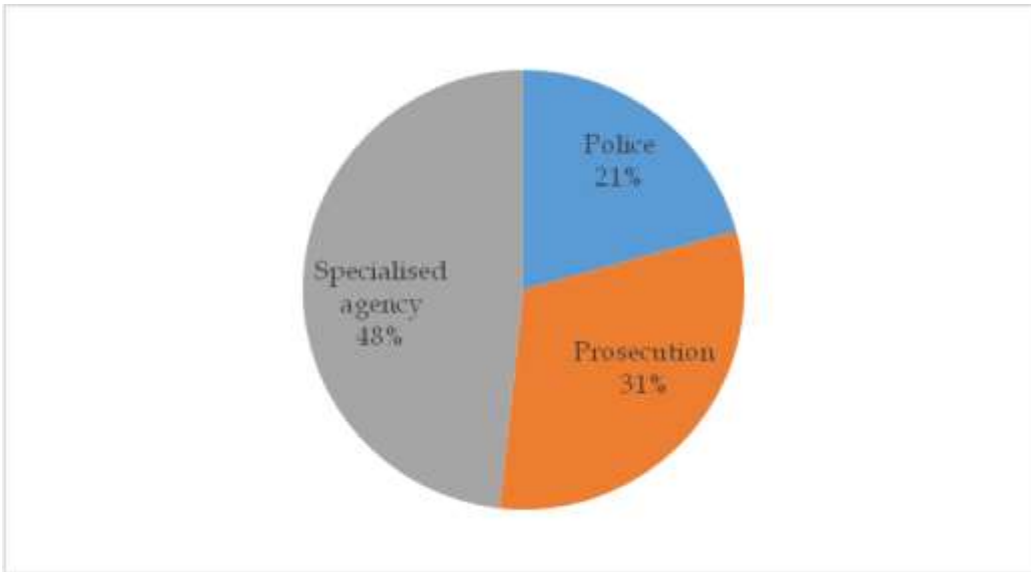
Figure A5.2 Number of respondents by professional category



Source: Authors.

Within the law enforcement community, a majority of respondents represented specialised agencies having law enforcement powers, prosecutors and finally, police officers (see Figure A5.3).

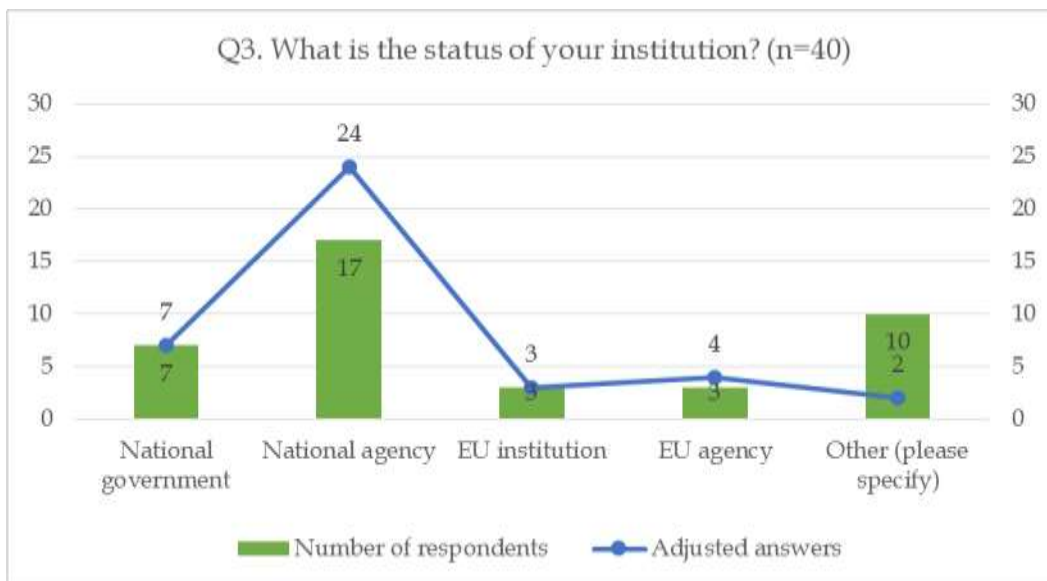
Figure A5.3 Types of respondents among the law enforcement community



Source: Authors.

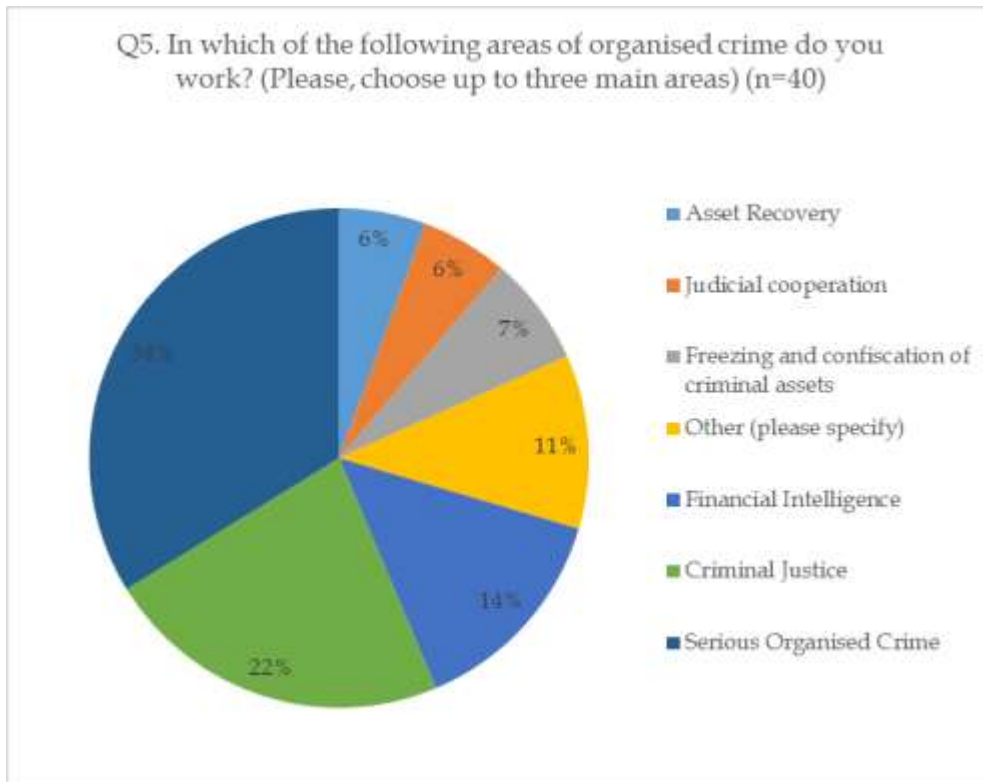
National-level practitioners represented 60% of the respondents (see Figure A5.4). Yet, according to the analysis of previous answers, the adjusted numbers reached 31 respondents or 77.5%. This indicates that the survey largely reflects the views of national practitioners.

Figure A5.4 Respondents by type of institutional affiliation



Source: Authors.

The respondents were asked about their expertise in the field of organised crime (OC) (see Figure A5.5). A third of practitioners indicated that they work in the area of serious and organised crime (covering several substantial crimes). A fifth indicated involvement in the broader criminal justice field. The remaining categories of answers narrowed respondents' choices down to substantive crimes, involving asset recovery and confiscation, financial intelligence and other areas, such as organised property crime, illegal work and labour exploitation, trafficking in human beings and people smuggling, money laundering, cybercrime and anti-fraud policies. Therefore, the survey managed to reach respondents covering different angles of OC.

Figure A5.5 Number of respondents by area of expertise

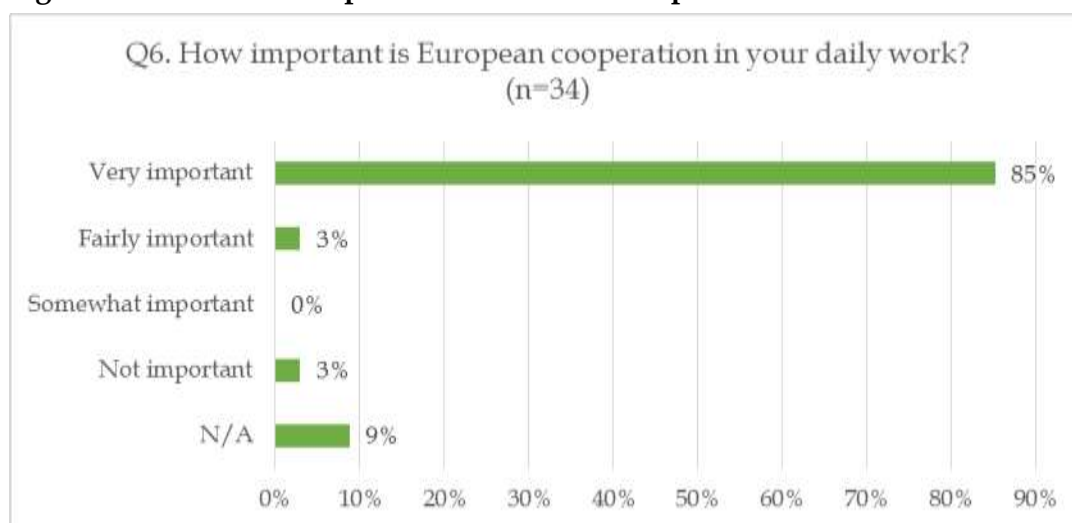
Source: Authors.

2. European toolbox in the field of organised crime

The survey questions on this topic aimed at assessing the perceived importance of EU-level cooperation among law enforcement practitioners. In addition, it addressed the kinds of tools that the practitioners were aware of and which ones they used in their daily activities.

In their responses, 85% indicated that EU-level cooperation was very important in their daily work (see Figure A5.6). Only one person found such cooperation unimportant. A majority of the respondents explained that the crimes they were dealing with were cross-border – from money laundering and tax fraud to cybercrime, drugs and human trafficking. Some submissions argued that changing environments and technologies enable cross-border elements in crime.

The other reason European cooperation was very important in their daily work was that some of respondents were directly involved in judicial or law enforcement cooperation (or both) – either on behalf of national agencies (Financial Intelligence Units (FIUs) and Asset Recovery Offices (AROs)) or by representing their countries in European agencies (national desks at Eurojust and Europol or as liaison officers).

Figure A5.6 Perceived importance of EU-level cooperation

Source: Authors.

Box A5.1 Example of the cross-border cooperation in economic and financial crime

Organised criminal groups have developed skills in committing economic and financial crimes transnationally. They are benefiting from professional advice (i.e. tax consultants, lawyers, accountants and fiduciary companies) in order to exploit their best interests in the bank secrecy privilege.

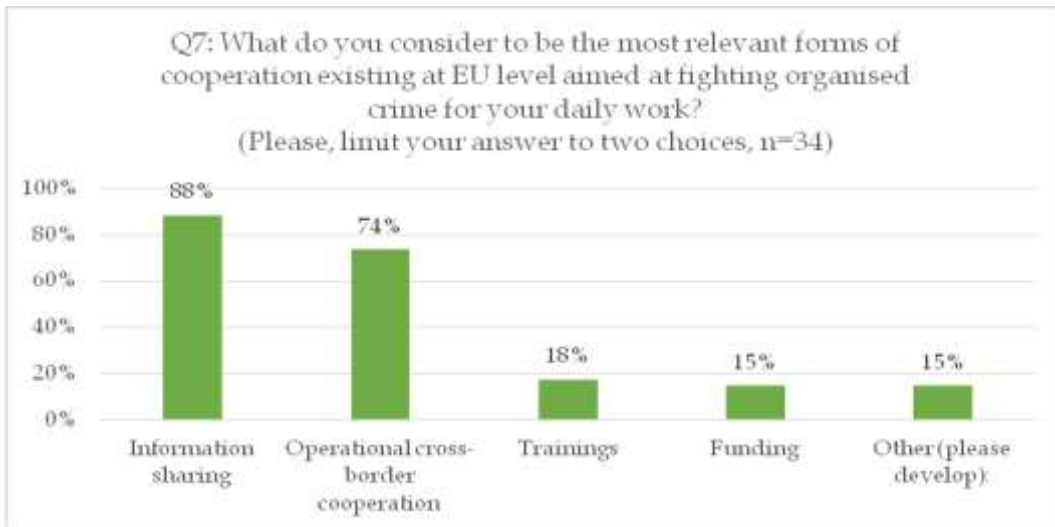
For example, money laundering takes place through offshore companies incorporated in the British Virgin Islands, Seychelles, United Arab Emirates, Cyprus, Delaware and Panama. Bank accounts for these companies are opened in other EU and EEA countries (i.e. Switzerland, Slovakia and Latvia) and third countries (i.e. the Mauritius Islands).

This complex scheme is implemented in order to create obstacles in collecting evidence through MLA [mutual legal assistance] requests. Criminals are aware that some offshore jurisdictions rarely respond, and thus delays in execution might arise. Therefore, without efficient cooperation, criminal products are kept safe and integrated into the legal economy before the law enforcement can trace the money and establish the actual right of disposal over the criminal product.

In this respect, it's worth mentioning the differences between legal systems and legal concepts, such as legal ownership, control and beneficial ownership.

The majority of the respondents (88%) mentioned information sharing as the most relevant form of cooperation (see Figure A5.7). Operational cross-border cooperation came only as a second option. As discussed above, many respondents were tasked with cross-border cooperation issues – i.e. those at the Europol and Eurojust national desks, managers at the specialised agencies, those at the FIUs or the contact points for the European Judicial Network (EJN). Two respondents indicated their involvement in JITs, while two others mentioned the legal tools and frameworks as providing an important basis for cooperation.

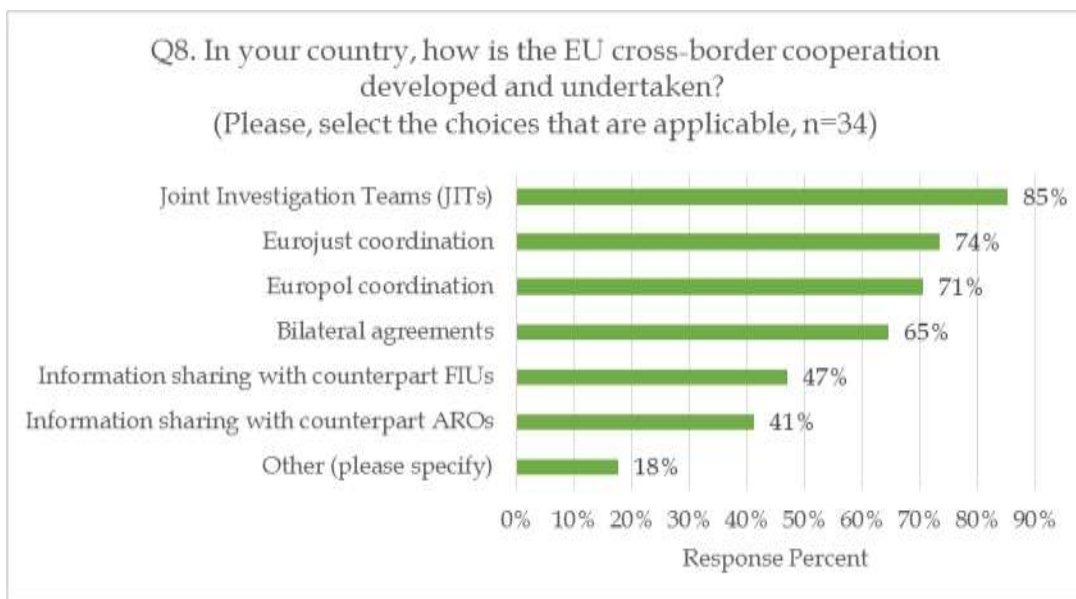
Figure A5.7 Most relevant forms of cooperation



Source: Authors.

The survey results reveal that among the law enforcement practitioners who participated in the survey, JITs were the most well known means for cross-border cooperation (see Figure A5.8). Both of the EU agencies tasked with coordinating law enforcement practitioners were also known and were the most likely to have been used by practitioners. Fewer than half of the respondents were aware of information sharing among counterpart FIUs and AROs, even though the ARO Platform and FIUs Network cover all the EU Member States. However, this could be a result of a diverse group of respondents, as not all of them work on economic and financial crime. Some respondents also highlighted the importance of requests for mutual legal assistance (MLA), coordination by the European Anti-Fraud Office (OLAF) and even relevant Council of Europe (CoE) conventions.¹⁹³

Figure A5.8 Awareness of cross-border cooperation tools

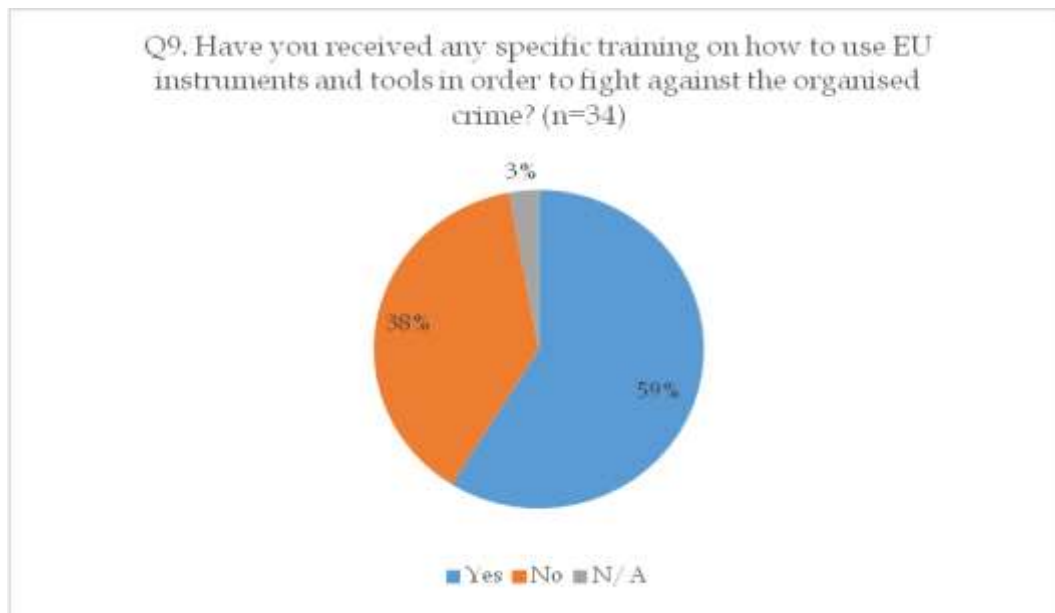


Source: Authors.

¹⁹³ The OLAF coordination and CoE conventions were put forward by the respondents.

Around two-thirds of the respondents indicated that they had undergone specific training on how to use EU instruments and tools in order to fight organised crime (see Figure A5.9). In the survey, 12 respondents provided more detailed explanations about the training they had attended. They mentioned either national or EU training. The latter had been delivered mainly by Eurojust and the European Judicial Training Network.

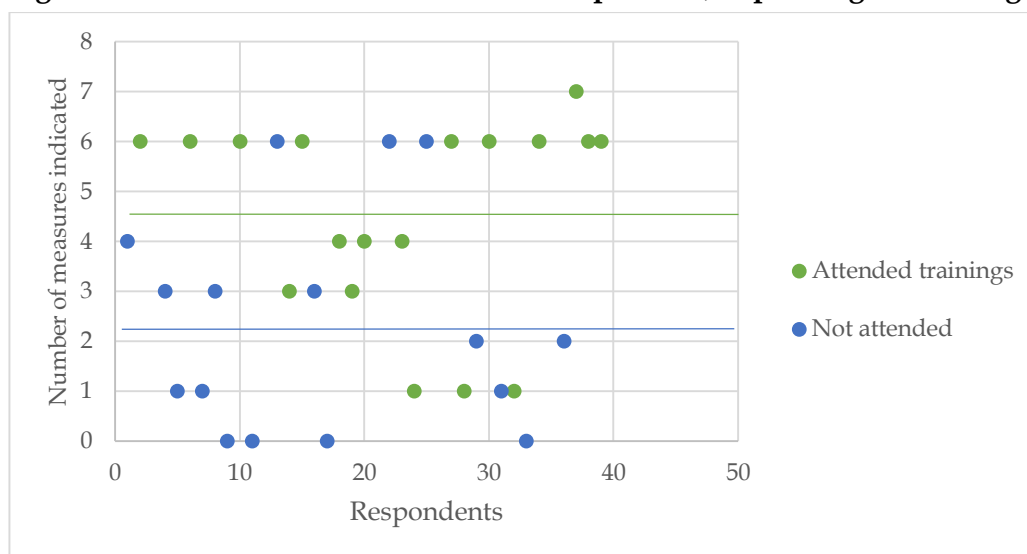
Figure A5.9 Participation in training on cooperation tools to fight OC



Source: Authors.

When comparing awareness of EU tools (see Figure A5.8) and actual participation in training on them (see Figure A5.9) some correlation was observed: on average, those respondents who claimed to have participated in training indicated a higher number of tools available in their country than those who had not participated. More specifically, those who had attended training on average named 4.5 out of 6 tools, whereas the other group identified 2.4 out of 6 tools.

Figure A5.10 Awareness of cross-border cooperation, depending on training attendance

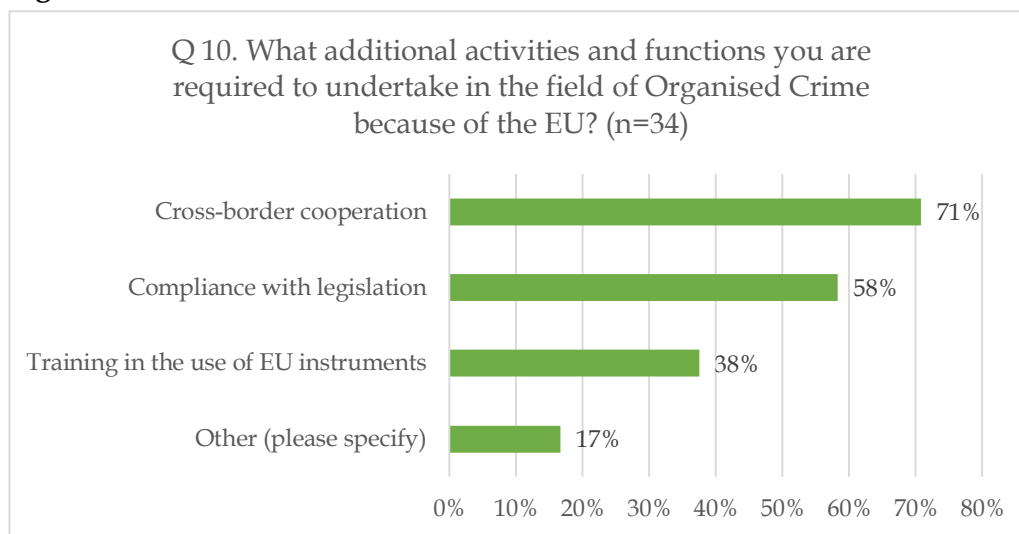


Another set of survey questions tried to assess whether and what kinds of costs were incurred by national practitioners. It also tried to estimate the benefits for practitioners, following their involvement in EU-level cooperation or using the tools available.

Almost three-quarters of the respondents indicated that cross-border cooperation comes as an additional element to their work. Almost two-thirds of them referred to the need to comply with EU legislation, whereas training in the use of EU instruments was identified in a little over a third of the cases.

Still, some of the survey respondents raised concerns that for them it was hard to identify which 'additional' activities were undertaken solely because of the EU tools, as some mechanisms and tools had already been in place. In other cases, law enforcement practitioners claimed that EU-level cooperation was at the core of their daily work (see Box A5.2).

Figure A5.11 Additional activities undertaken



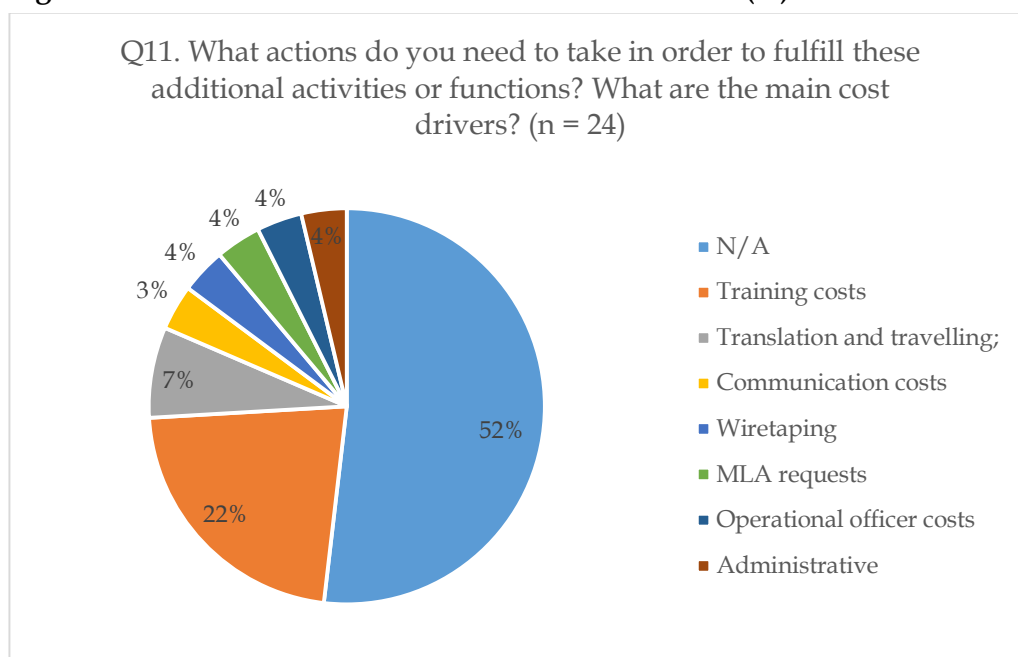
Source: Authors.

Box A5.2 A view of the additional activities

I don't think the above-mentioned activities (cross-border cooperation, compliance with legislation, and training in the use of the EU instruments) are additional. The EU makes possible the easier management of criminal charges in the field of organised crime, and for this, knowledge of EU instruments, compliance with legislation and cross-border cooperation is required. However, I appreciate that this is a daily reality, not an activity or function required in addition.

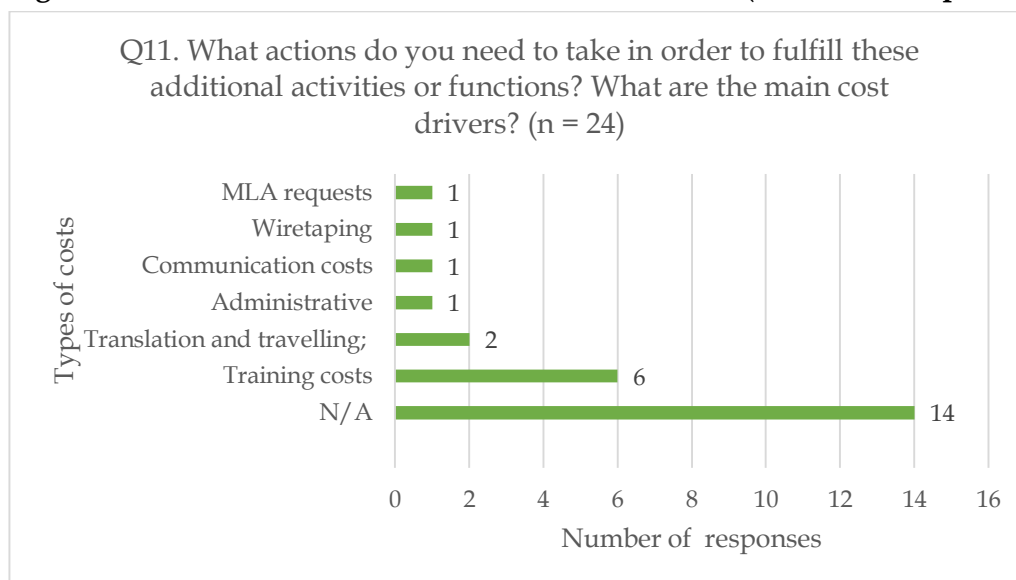
Source: Anonymous respondent submission, edited by the authors.

For the abovementioned reasons, more than half of the respondents could not give an indication about the costs (see Figure A5.12). The respondents either claimed that it is impossible to differentiate the costs or that they are not aware of such costs. Nevertheless, a fifth of the survey respondents mentioned their personal or their institution's costs (or rather investments) in training. Other categories of costs were briefly mentioned on several occasions.

Figure A5.12 Main cost drivers for additional activities (%)

Source: Authors.

The survey results are too limited for any kind of broad interpretation (see Figure A5.13). It is interesting, however, to see that training was considered one of the main cost drivers by practitioners, but it was not regarded as important as information sharing or operational cooperation (compare with Figure A5.7).

Figure A5.13 Costs and drivers for additional activities (number of responses per activity)

Source: Authors.

The majority of respondents (14 out of 24) were not able to detail the additional costs. Nevertheless, 10 respondents provided some information about the labour costs, which should be interpreted carefully (see Table A5.1). The numbers pertain to different types of institutions, thus it is hard to find a common denominator. Also, some of the respondents identified all the people working in their institution, whereas others tried to identify only the key personnel working on cross-border cooperation. Thus, the survey analysis, which entails a huge approximation, finds that on average

there are 3.9 persons employed per institution to perform additional tasks related to cross-border cooperation. The working time differs, from part-time personnel or the time allocated to cross-border tasks, to full-time employees; hence, on average employees work on cross-border cooperation around 35 hours per week. Even if these numbers can be quantified they do not say much about the real costs, as the number of responses is too low and important additional costs are missing.

During the interviews, practitioners named inadequate allocation of staff as a hindrance to the assessment of MLA requests, mutual recognition of AROs, European Investigation Orders (EIOs), serious activity reports (SARs), and other incoming and outgoing requests. One respondent provided an example of Italy, where the MLA process is not functional due to inadequate staffing.

Table A5.1 Estimated labour costs

Q12. Could you indicate the costs required for such additional actions? (n=24)			
List of respondents	Number of employees	Working hours per week	Total working hours per week
Respondent 1	2	15	30
Respondent 2	1	40	40
Respondent 3	6	40	240
Respondent 4	2	40	80
Respondent 5	4	24	96
Respondent 6	3	35	105
Respondent 7	4	36	144
Respondent 8	2	40	80
Respondent 9	7	40	280
Respondent 10	8	40	320
Average	3.9	35	141.5

Source: Authors.

The respondents were also asked about the costs for equipment and for external services. There were very few answers to these questions; therefore, it is hard to draw any conclusion. However, one of the submissions indicated that translation is a significant cost driver (see Box A5.3). This potentially could be a barrier to cooperation, particularly in countries where law enforcement works on a tight budget.

This barrier (not speaking the same language and the need for translation) was also highlighted by several practitioners during the interviews. They mentioned that rare languages were posing particular challenges for law enforcement cooperation.

Box A5.3 External service costs

According to my personal estimation, the entire institution for organised crime spends around €430,000 per year on translation, which is an external service for the institution.

Source: Anonymous respondent submission, edited by the authors.

More than two-thirds of the respondents (17 out of 24) were unable to give any indication about the funding they received. Seven remaining respondents mentioned some funding coming from Eurojust for national desks and for JITs. Another respondent indicated some EU funding for the FIUs Network. Only for AROs was it mentioned that funding came from the ministries of justice,

though only a few submissions indicated the exact numbers (see Box A5.4). Therefore, with some numbers indicated without the context, it is not possible to make estimations. This is especially so as practitioners were not aware of whether the money allocated from ministries of justice or interior came from some European scheme.

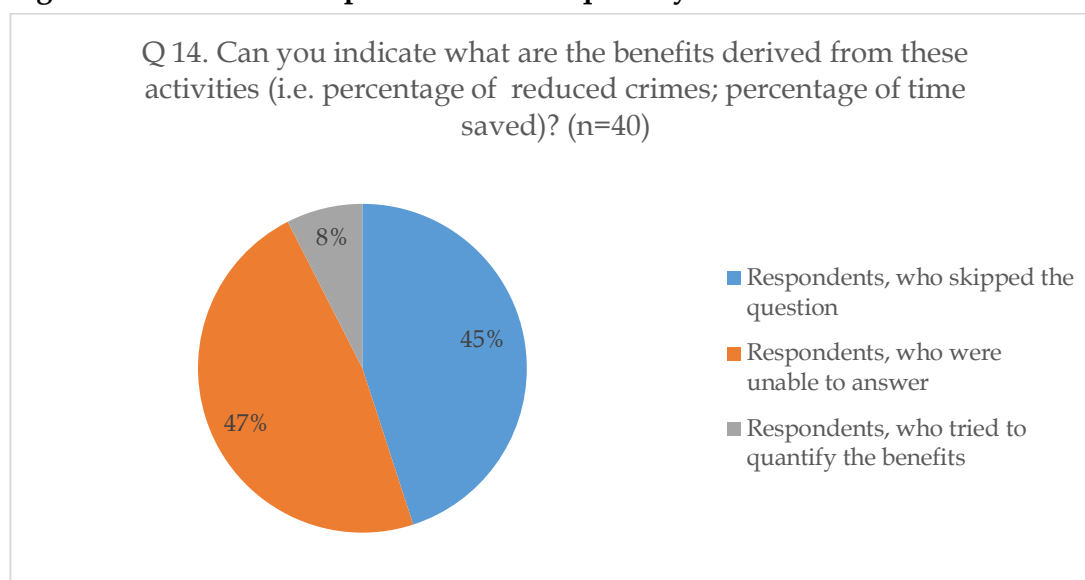
Box A5.4 Benefits

The amount of money that was refunded from Eurojust for the JITs that I had this year was €57,000.

Source: Anonymous respondent submission, edited by the authors.

Finally, when asked to estimate and indicate results, the majority of respondents either skipped the question or explained that it was impossible for them to make such estimates (see Figure A5.14).

Figure A5.14 Share of respondents able to quantify the benefits of cross-border cooperation (%)



Source: Authors.

A majority of the respondents indicated that they were unable to quantify the benefits of cross-border cooperation (see Box A5.5). From the interviews, some insights can be drawn. The main reason underlying this inability could be that cooperation has more intangible than tangible impacts, i.e. it adds to the quality of the case, which otherwise would not be solved or would take longer to do so.

Box A5.5 The inability to quantify

We do recognise the benefits of these activities, however, it cannot be expressed in percentages.

Source: Anonymous respondent submission, edited by the authors.

Three responses providing quantified data are too scarce and discrepant to draw any kind of conclusion or estimate (see Table A5.2).

Table A5.2 Respondents who quantified the benefits

Q 14. Can you indicate the benefits derived from these activities?			
	Reduced crimes as a result of cross-border cooperation (%)	More time gained by having learned a more efficient way to carry out certain procedures (%)	Other, please specify
Respondent 1	50	50	n/a
Respondent 2	5	5	n/a
Respondent 3	n/a	100	n/a

Source: Authors.

Nevertheless, one of the responses suggested a change in the number of cases solved as an indicator of the benefits of cross-border cooperation (see Box A5.6). This indicator is more tangible, though it also suffers from weak logic. On the one hand, cross-border cooperation can help to solve cases that otherwise would not be solved. On the other hand, as the complexity of cases differs, it could also mean having more simple cases. Moreover, external factors, such as increased funding, staffing or also intensified criminal activities could add to the fact that there were more cases solved this year than last year, but this tells us little about the importance or role of cross-border cooperation.

Box A5.6 A better indicator

I cannot estimate [the percentage of reduced crimes as a result of cross-border cooperation or the amount of more time gained for having learned a more efficient way to conduct a certain procedure], but the fact that every year the number of solved cases (at level of the office for international judicial cooperation) increases by 20% could be an indicator.

Source: Anonymous respondent submission, edited by the authors.

4. Measuring and assessing the EU impact on everyday work

The respondents could hardly quantify the organised crime cases with a cross-border dimension on which they worked: 45% of respondents (10 out of 22) indicated that they were unable to provide any figures for such cases (see Table A5.3). The remaining respondents provided numbers that are hardly comparable – ranging from one prosecutor’s files, to all the files of the national desk at Europol or Eurojust and all the cases dealt with by the EJNI. The big volumes also showed incoming and outgoing information requests sent through FIUs or AROs (or both), which could be related to the same case. Therefore, numbers vary greatly and the average does not provide a sound basis for further assumptions.

The estimations of cases with a cross-border dimension are more comparable. The estimations of nine respondents show that around 88% of all cases dealt with by practitioners participating in the survey have a cross-border dimension. Yet this number could not be generalised to other practitioners. The survey has a high risk of self-selection bias, as only practitioners involved with or exclusively working on cross-border cooperation were interested in contributing to the study. Thus, the survey cannot provide insight on the percentage of such cases among other law enforcement practitioners.

Table A5.3 Assessment of OC cases with a cross-border dimension among all the workload

Q 15. Can you give an estimate of the number of OC crime cases per year that entail a cross-border European dimension in your work?	Q 16. How many of them are successful?
---	--

List of Respondents	Number of OC cases	Cases with a cross-border dimension (%)	(%)
Respondent 1	n/a	n/a	n/a
Respondent 2	15	n/a	75
Respondent 3	n/a	100	n/a
Respondent 4	5	n/a	100
Respondent 5	n/a	n/a	n/a
Respondent 6	60	100	75
Respondent 7	n/a	100	n/a
Respondent 8	300***	n/a	70
Respondent 9	10	n/a	100
Respondent 10	n/a	60	60
Respondent 11	5	42	100
Respondent 12	n/a	n/a	n/a
Respondent 13	100*	n/a	50
Respondent 14	6,000*	100	n/a
Respondent 15	n/a	n/a	n/a
Respondent 16	n/a	n/a	n/a
Respondent 17	n/a	n/a	n/a
Respondent 18	20	n/a	n/a
Respondent 19	n/a	100	n/a
Respondent 20	206*	100	90
Respondent 21	17,000**	100	95
Respondent 22	200***	n/a	n/a
Average	1,993.42	0.88	82

* Incoming and outgoing information requests counted.

** All cases (including non-OC) supported by the EJN.

*** Cases per country desk/ministry of justice.

Source: Authors.

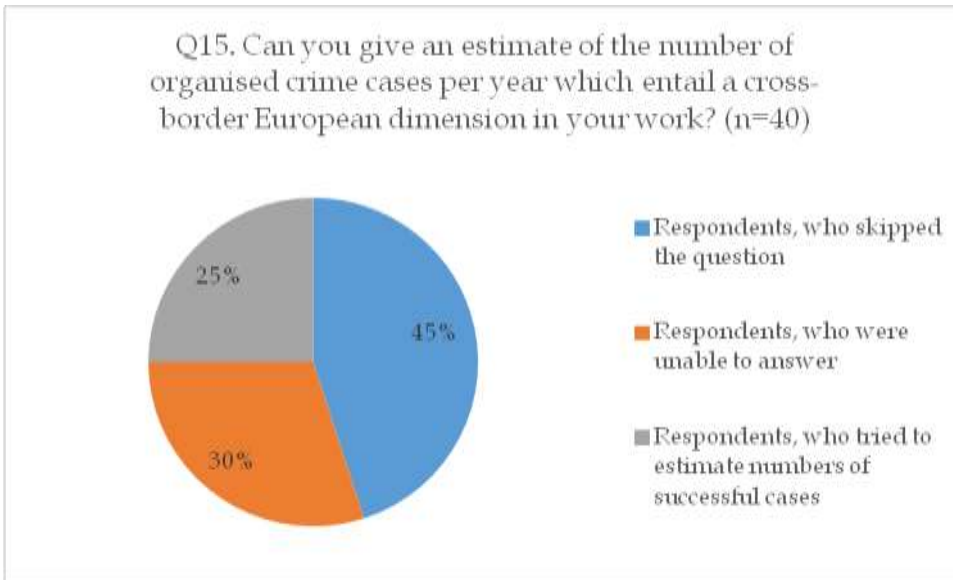
It should be noted, however, that it is much easier for practitioners to define and estimate the cross-border cases than organised crime cases with a cross-border element (see Box A5.7). Interviews also revealed that there is a tension among the practitioners as to which cases involve 'organised crime'. Some practitioners, especially at the EU level, viewed OC as a separate type of crime apart from 'Eurocrimes', while others used it interchangeably to define drug trafficking, money laundering, cyber-crime, etc.

Box A5.7 The types of cases dealt with by institutions, according to two respondents

- Almost all **organised crime** cases that are dealt with by our institution entail a **cross-border** European dimension.
- All cases dealt with by the [x] national desk are by definition **cross-border**; not all are **organised crime** cases though.

Only a quarter of the respondents tried to indicate the number of successful cases on organised crime containing a cross-border element (10 out of 40) (see Figure A5.15).

Figure A5.15 Share of respondents to the question on the number of cases involving a cross-border dimension (%)



Source: Authors.

A majority of law enforcement practitioners who were not able to respond subsequently raised the question of what a successful case is. This indicates a lack of consensus on the overall aims. Further answers by the respondents reflected dependence on the points of departure: ‘success of cooperation’ means different things to different law enforcement practitioners (see Table A5.4).

Table A5.4 Definition of success according to the different actors

For whom?	Success indicators
Prosecutors	Number of JITs concluded Cases resulting in courts Investigations finalised Criminal convictions Criminal groups dismantled
Police officers	Investigations finalised Arrests made Criminal groups dismantled
ARO officers	Responses to ARO requests Criminal assets frozen Criminal assets recovered
FIU officers	Responses to FIU requests
Ministries of justice	Mutual cooperation with international partners
EU agencies (Europol, Eurojust)	Number of JITs concluded Smooth cooperation among partners

Source: Authors.

Box A5.8 'Successful cases' from the viewpoint of two prosecutors

- In my opinion, the success of a case means arresting the members of the organised criminal groups, seizing the money, sending the defendants to court, confiscating the criminal product and dismantling the whole group.
- All of the cases are successful because I am building the money trail in order to freeze bank accounts or to discover other deposits. The success is given by the fact that I have clear steps to follow.

Source: Anonymous respondent submissions, edited by the authors.

Box A5.9 'Successful cases' from the viewpoint of a national Eurojust desk

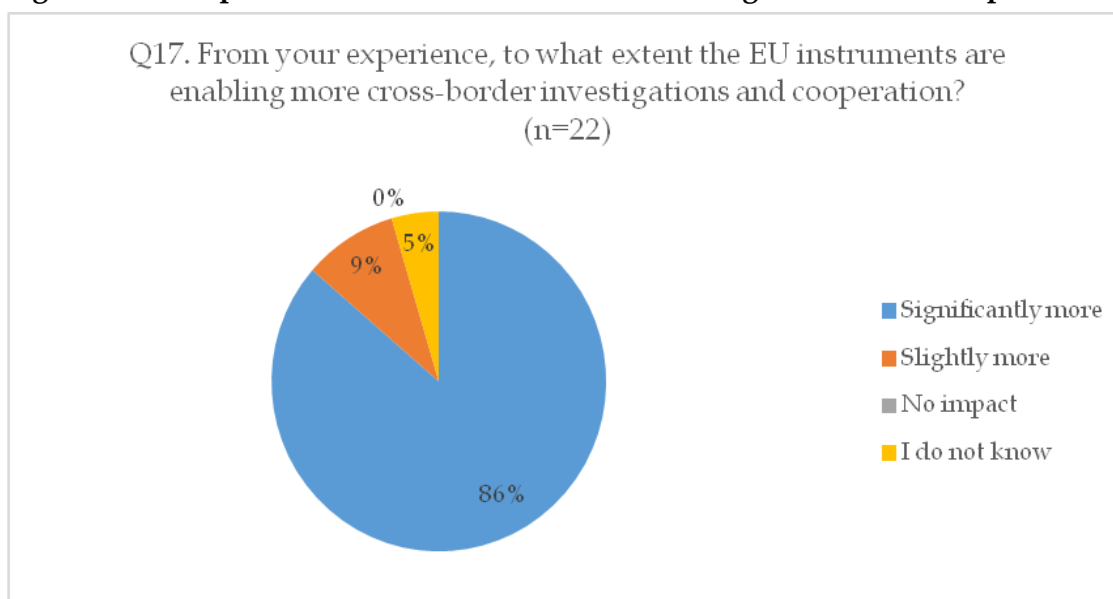
Our role is facilitative, so we cannot say whether cases were ultimately successful. We measure success by the outcomes of coordination meetings, numbers of JITs concluded and whether we deliver results for other desks.

Source: Anonymous respondent submission, edited by the authors.

When responding to the survey, 86% indicated that EU instruments contributed significantly to cross-border cooperation. This result shows that there was high appreciation of the EU-level tools, particularly in the law enforcement community. The results of the interviews supported this finding: despite existing shortfalls and barriers to cooperation, the EU tools were regarded as very useful.

At the same time, the survey rating and interview results could be overly optimistic and should not be generalised due to the self-selection bias. Only those persons who are already actively involved in cross-border cooperation, or for whom it is their main function, responded to this questionnaire or took part in the interviews. Therefore, it is highly likely that the views of a 'typical' prosecutor or police officer are not reflected.

Figure A5.16 Importance of EU instruments for enabling cross-border cooperation



Source: Authors.

A number of practitioners (41%) were not able to compare the costs between EU and national tools. During the interviews, some aspects were clarified: JITs, FIUs and AROs are tools designed for

cooperation, so one simply does not have them at the national level alone. However, there could be comparable tools at the international level – MLA requests and the networks of the Egmont Group and CARIN.

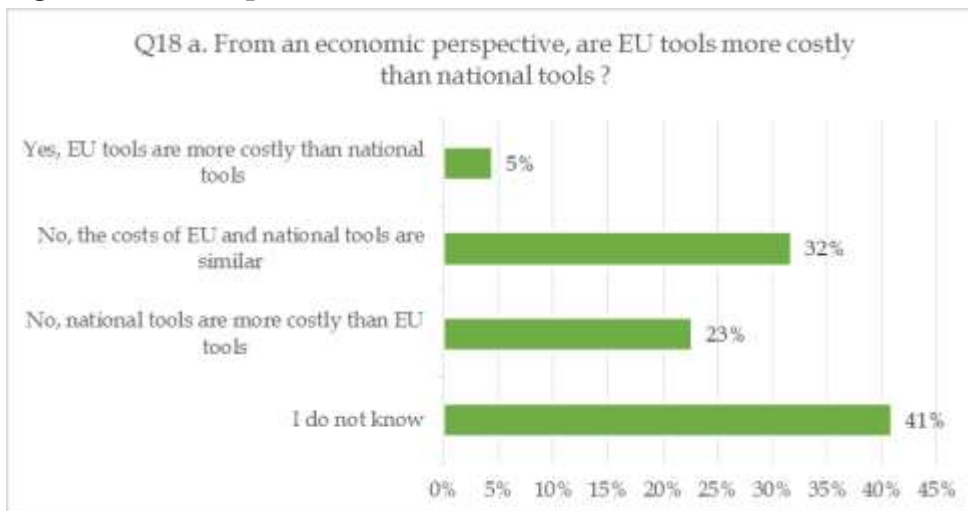
A third of the respondents claimed that costs were similar for the EU and national tools. The interview respondents who had this opinion said that these were just part of their work at the national level.

Among the respondents, 23% claimed that national tools were more costly than EU tools. The interview respondents claimed that their countries would still need to cooperate and without the EU tools and funding it would be more burdensome and would require more money from the national budget. Finally, only 5% of the respondents claimed that EU tools were more expensive than national tools. Just one respondent gave the example of JITs being more costly than national measures.

The answers to the question and the reasoning behind them demonstrate how differently the costs were perceived and interpreted. Thus, it could be concluded that the survey question would have prompted different answers if it were more beneficial for Member States to address OC issues bilaterally (if no EU cooperation existed) or if the respondents had been asked to compare the costs of EU and corresponding international tools.

They also indicate a broader problem for the study as a whole, which is that counting the costs of non-Europe does not have a clear baseline situation or a comparator at the national level. It seems very unlikely that countries would not cooperate at all because of ‘non-EU’ in this field. Therefore, some more quantitative analysis and scenarios could be foreseen, such as costs for more bilateral or more international-level cooperation. Still, most of the differences in cooperation would arise not in terms of direct costs, but in terms of quality.

Figure A5.17 Comparison of costs between EU and national tools



Source: Authors.

5. EU added value

The majority of respondents claimed that EU added value is significant (see Figure A5.18). The respondents who expressed this view mentioned the following reasons:

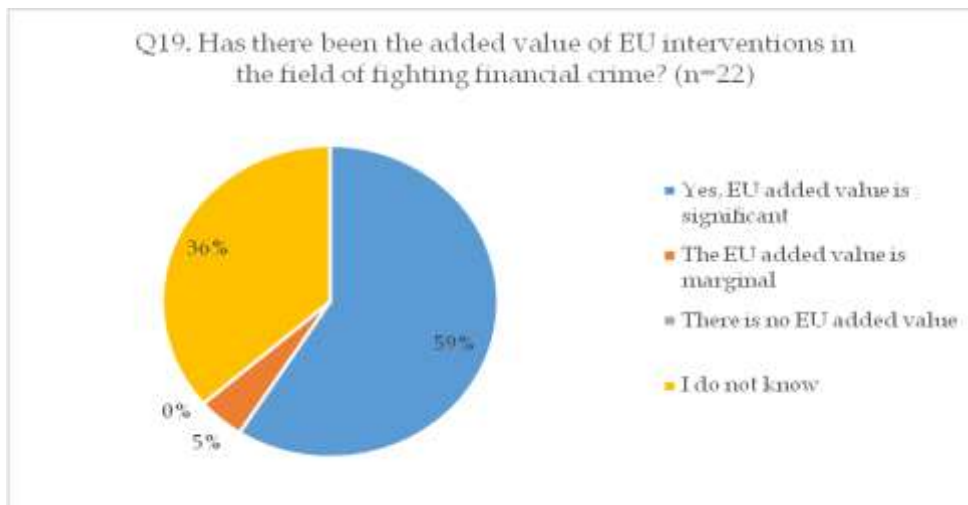
- an increased number of mutual recognition requests,
- EU seizure and confiscation orders,
- more efficient exchange of financial intelligence,

- investigations being speeded up,
- shorter response times for the MLA requests, and
- the very existence of networks for cooperation (AROs and FIUs).

These reasons resonate with the discussion on benefits and ‘successful cases’ – each respondent mainly seeing the angle of his/her work, but not the role it plays in the bigger picture of EU-level cooperation, i.e. in the EU policy cycle on OC.

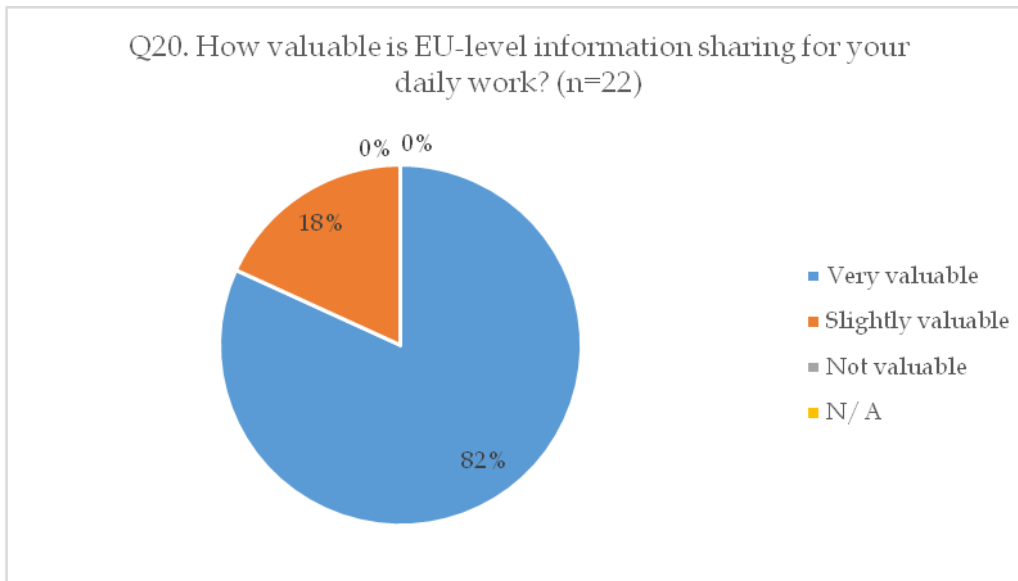
A third of the respondents could not answer this question, as they most likely dealt with other types of substantive crime or criminal justice in general (see Figure A5.18).

Figure A5.18 Perceived EU added value in fighting financial crime



Source: Authors.

Nevertheless, 82% of the respondents claimed that EU-level information sharing is very valuable in their daily work (see Figure A5.19). The practitioners in the interviews also expressed that information sharing allows them to solve cases and respond to requests in more efficient ways. Some of the respondents, however, revealed their dissatisfaction with increasing data protection requirements, whereas others were concerned that their counterparts would not treat the information appropriately. The respondents who were either academics or legal defence lawyers raised concerns about the increase of informal information sharing and the use of information in a way that cannot be used as evidence but contravenes the presumption of innocence. Only 18% of the respondents claimed that information sharing is slightly valuable.

Figure A5.19 Perceived value of information sharing in daily work

Source: Authors.

During the interviews, practitioners did not perceive an information sharing or intelligence-based approach to be in competition with traditional criminal justice. They saw the exchange of information as enhancing the criminal investigations. Some of the information exchanges, however, avoided traditional checks and balances in criminal justice, i.e. judges were not overseeing the information exchange.

There were only a minority of law enforcement practitioners who, during interviews, raised other concerns regarding information exchange, i.e. the existence of multiple databases for the same purpose created confusion among the practitioners and the possibility to misuse the information (see Box A5.10). Others highlighted the need for 'more and better' exchange of information, as some interoperability challenges exist, for example between FIUs and AROs.

Box A5.10 A prosecutor's view of information sharing

I do not trust that sharing information about one of my current cases with some national Europol desk will not blow my case, in particular when we talk about important people with a wide range of connections among police officers.

Source: Anonymous respondent submission, edited by the authors.

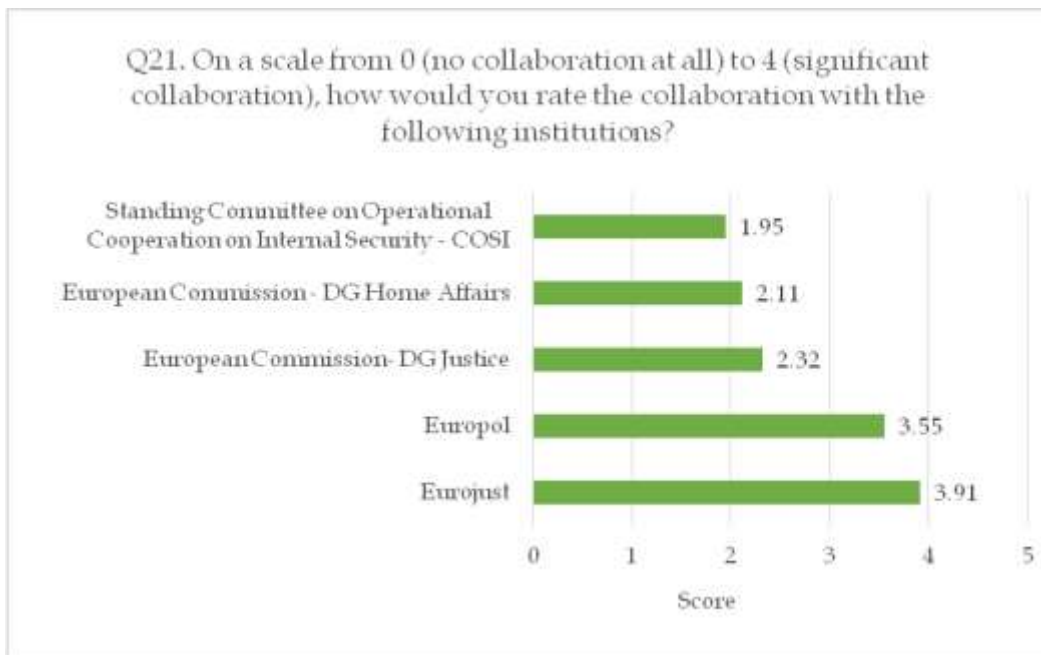
The survey responses claimed that cooperation with Eurojust (3.91 on a scale of 0 to 4.0) and Europol (3.55 out of 4.0) is very significant. This result could be linked back to the profiles of the respondents (compare with Figure A5.3 above), in which law enforcement is represented by prosecutors and police officers. Again, there is also the self-selection bias, as the survey was undertaken by practitioners who already cooperate with these agencies – either through funding, contacts or the involvement of national desks. As could be expected, the more political the cooperation is, the less significant it is to practitioners. Lower levels of cooperation with the DG Home or DG Justice were also indicated during interviews. The respondents explained that it is mainly people from the respective ministries who become involved in the European Commission processes.

Finally, cooperation with COSI was the lowest rated among the survey respondents (1.95 out of 4.0). Interviews with the practitioners revealed that many of them were not even aware of this body or knew very little about it, even though COSI sets operational priorities and should be of significant

importance to practitioners. In just a few cases did practitioners say that they had been consulted through their national governments on EU policy cycle issues. The respondents mentioned OLAF among the relevant EU-level institutions. However, practitioners also referred to cooperation with their counterparts in informal networks:

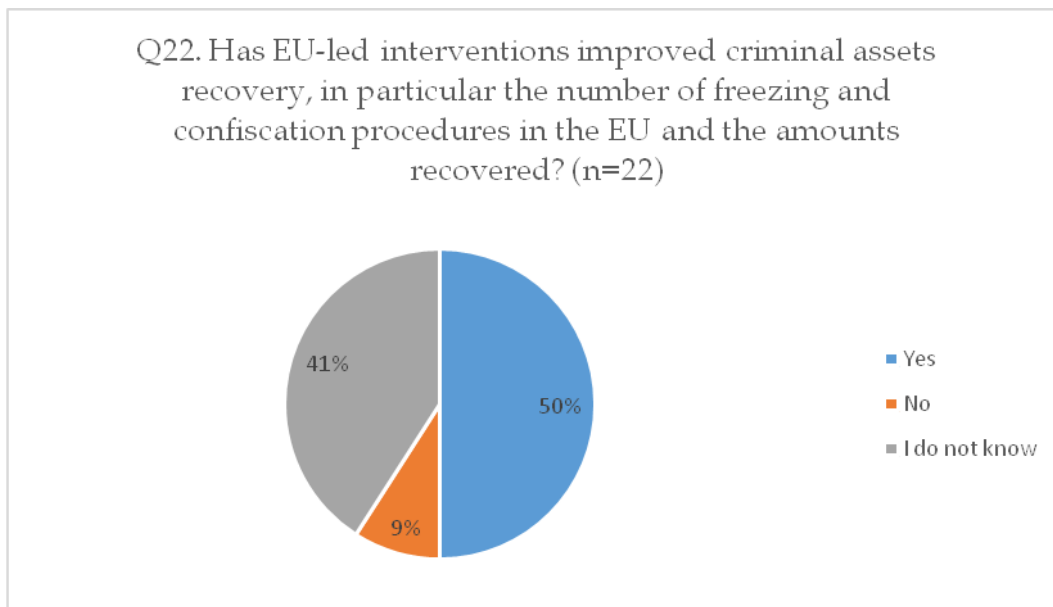
- FIUs Network,
- AROs Platform,
- European Joint Investigation Team Network, and
- European Judicial Network on Criminal Matters.

Figure A5.20 Degree of collaboration with different institutions



Source: Authors

Half of the respondents agreed with the statement that EU-led interventions improved criminal asset recovery. Notably, 41% of the respondents could not answer the question. The reason may be the same as the one discussed above – not all the respondents are experts on asset confiscation and recovery issues (see also with the comments on Figure A5.18 above).

Figure A5.21 Impact of the EU-led interventions on criminal asset recovery

Source: Authors.

6. Main findings and conclusions

Profile of the respondents

- There were 40 respondents to the online questionnaire. Among them were national practitioners from Romania, the UK, the Netherlands, France and Spain, along with EU-level officials based in Brussels (DG Home and DG Justice) and The Hague (Eurojust, Europol and the European Judicial Network).
- The survey respondents were law enforcement representatives – at the national and EU levels, in particular prosecutors, police officers and those from specialised agencies on particular crimes.
- The survey cannot be generalised as reflecting the views of all law enforcement representatives because of two main shortcomings:
 - the limited sample size – 40 people started the survey and only 22 finished it; and
 - the self-selection bias – only people already taking part in EU-level cooperation, mainly through Eurojust and Europol, were interested in contributing to the survey. Therefore, the high level of appreciation for EU tools could differ for those practitioners who are less involved.

EU toolbox in the field of organised crime

- The survey showed some correlation between being involved in training on EU tools and being aware of the diversity of tools available.
- However, practitioners value information sharing and operational cooperation more than training.
- JITs, Eurojust and Europol coordination were considered the most common tools for cross-border cooperation undertaken in the EU Member States.

Costs and benefits

- For the respondents, it was difficult to assess the exact costs of EU-level cooperation. Below are the main cost drivers in EU-level cooperation:
 - training,
 - translation and travelling,
 - communication,
 - wiretapping,
 - MLA requests,
 - operational officer costs, and
 - administrative costs.
- The inability to quantify the benefits of EU-level cooperation revealed the lack of consensus on what are regarded as 'benefits'.

Measuring and assessing the EU impact on every day work

- Attempts to assess the number of cross-border organised crime cases revealed that the 'cross-border' category was more functional for the respondents than that of 'organised crime'.
- Attempts to quantify or determine the percentage of successful cases indicated the lack of a common denominator among different law enforcement agencies (i.e. closing cases or responding to requests).
- In addition, they showed lack of 'consensus' on what success is in the OC area and what should be the main indicators of it.
- The comparison of costs between the national and EU tools revealed that there are different rationales in practice. Thus, different scenarios should be assessed to determine the kinds of cooperation that would take place if there were no EU tools or cooperation.
- The assessment should bear in mind the importance of qualitative aspects of cooperation that are hard or sometimes even improper to quantify. For example practitioners were asked about the number of successful cross-border cases in fighting organised crime. There was hardly found a common denominator (see Table A5.4).

EU added value

- EU-level information sharing is regarded as having a significant role in the everyday work of practitioners. That being stated, in the survey and during interviews there were alternative views about the controversial aspects of information sharing – the misuse of information, data protection concerns, etc.
- The respondents agreed that EU interventions and tools played a major role in the area of financial and economic crime, in particular on asset freezing and confiscation.
- The majority of respondents indicated that they have the best connections with two coordinating agencies, Eurojust and Europol. COSI was the least known body among national practitioners, though it defines the priorities for operational cooperation at the EU level.



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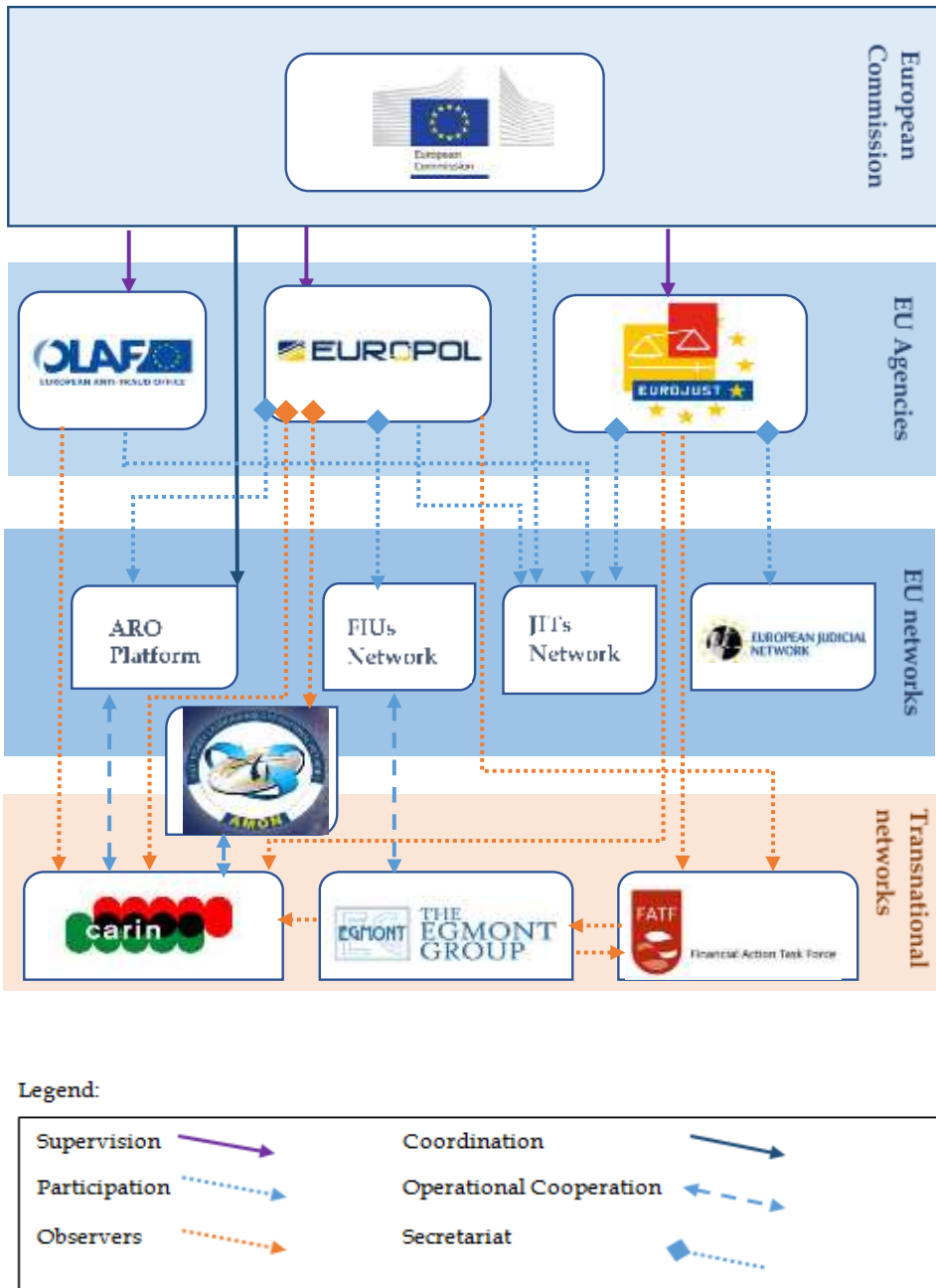
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Annex 6: Networks of Practitioners in the EU and Internationally

Figure A6.1 EU agencies and networks in EU OC policy*



* Only the most important networks for this study are covered.

Source: Authors.