Operational Challenges with Asset Recovery

DRAFT 1: OCTOBER-NOVEMBER 2020

Acronyms

This section will be added ahead of finalisation.

Executive Summary

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

Contents

Introduction

1.1. The status quo

1. Asset recovery plays an integral role in countries' justice systems, ensuring social cohesion by returning assets to the victims of crime. Asset recovery, by depriving bad actors of their ill-gotten gains, also plays a critical role in protecting the integrity of the global financial system, shielding the economy from the threats of money laundering and other financial crimes, and dis-incentivising criminal activity. Cases of corrupt politicians embezzling state funds have even led to the near bankruptcy of States, and returning these stolen assets plays a central role in maintaining basic services and protecting peoples' livelihoods. Accordingly, effective asset recovery regimes are vital. They are one of the core building blocks of anti-money laundering (AML) counter-terrorist financing (CFT) regimes, and central to the Financial Action Task Force's mandate.

2. Over the last few years, there have been a number of success stories. The United States, for example, has recovered or assisted Malaysia in recovering more than 1 billion USD in assets allegedly associated with the misappropriation of more than 4.5 billion USD belonging to Malaysia's sovereign wealth fund, 1 Malaysia Development Berhad (1MDB). Brazil, the United States, and Switzerland have also secured over 3.5 billion USD in criminal fines, criminal penalties, and disgorgement payments as part of the "Lava Jato" (car wash) case, an investigation into a Brazilian conglomerate's international bribery scheme to secure infrastructure projects across Latin America[1]. Yet even in successful cases such as these ones, authorities have had to spend a considerable amount of time, resources and effort identifying, tracing, securing and recovering laundered property, with only a proportion of the misappropriated funds recovered after a number of years.

3. The current round of FATF Mutual Evaluation Reports (MERs), with 102 jurisdictions evaluated to date (49%[2]), provides an indication of the scale of the challenges faced both internationally and domestically. The majority of jurisdictions across the Global Network achieve largely compliant or compliant ratings with Recommendations 4 on confiscation and provisional measures and Recommendation 38 on mutual assistance for freezing and confiscation, yet 80% of the countries evaluated in this round scored a low or moderate level of effectiveness for Immediate Outcome 8. That is to say, 81 of the 102 jurisdictions assessed[3] have been evaluated as only meeting the characteristics of an effective system (depriving criminals of the instrumentalities of their crimes – see Box 1.1) to some extent, or to a negligible extent, with major or fundamental improvements needed.

[1] At least six other jurisdictions have concluded resolutions as part of the Car Wash case, amounting to several hundred millions of U.S. dollars. See: OECD (2019), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention.

[2] 208 jurisdictions are members of the FATF and FSRB global network and therefore will be assessed against the effective implementation of the FATF Standards.

[3] As at September 15, 2020.

Box 1.1. FATF Methodology for assessing confiscation

IO.8 Proceeds and instrumentalities of crime are confiscated:

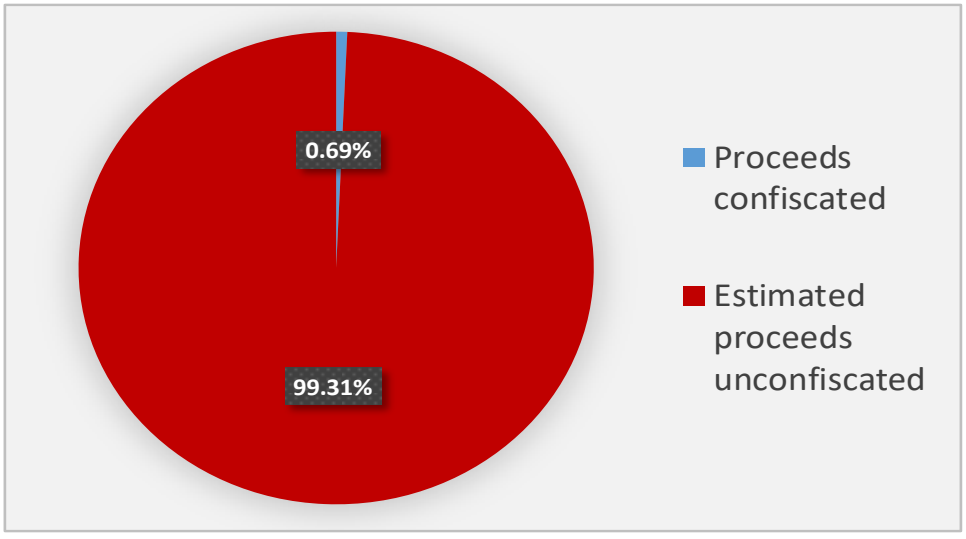
Characteristics of an effective system

Criminals are deprived (through timely use of provisional and confiscation measures) of the proceeds and instrumentalities of their crimes (both domestic and foreign) or of property of an equivalent value. Confiscation includes proceeds recovered through criminal, civil or administrative processes; confiscation arising from false cross-border disclosures or declarations; and restitution to victims (through court proceedings). The country manages seized or confiscated assets, and repatriates or shares confiscated assets with other countries. Ultimately, this makes crime unprofitable and reduces both predicate crimes and money laundering.

Source: FATF (2013-2019), Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems, updated October 2019, FATF, Paris, France, http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html

4. One way to get a sense of asset confiscation and recovery levels is to compare the amounts confiscated or recovered by each jurisdiction, as detailed in the MERs, against a general benchmark for proceeds of crime as a percentage of gross domestic product. There are many challenges associated with using such figures, including the different types of risks affecting different jurisdictions and the completeness of statistics that jurisdictions have available. Nevertheless, these statistics can provide a very general indication of the extent that proceeds are being confiscated. Similar to the outcomes of MERs detailed above, the figures indicate that jurisdictions are continuing to face significant challenges confiscating the proceeds of crime, with the proportion of proceeds confiscated estimated to be less than 1% of the estimated proceeds of crime on average in a sample of 62 MERs adopted during the current round.

Figure 1.1. Share of estimated proceeds of crime confiscated



Note: This report uses the UNODC figure of 3.6% of GDP for the estimated proceeds of crime.
Source: Data from 62 MERs adopted during the current round.

5. While it is clear that jurisdictions are experiencing challenges, the benefits of recovering the proceeds of crime are numerous and have been widely recognised by international bodies. Over the past decade, several bodies have mobilised resources to improve the effectiveness of asset recovery, including the FATF, U.N. Office on Drugs and Crime (UNODC), the World Bank, the Camden Asset Recovery Inter-Agency Network (CARIN), and the network of seven regional CARIN-style-bodies (ARINs).

6. These efforts appear to have yielded some success in promoting structural and legal changes, in particular to support more effective recovery of the proceeds of corruption. But the barriers to asset recovery can be structural, behavioural, and cultural in nature, and therefore difficult to dismantle – as shown by the statistics above. Advances in technology only deepen these challenges. For example, it is possible to form a company, open a bank account, and transfer illicit funds from one country to another in a matter of hours. In contrast, recovering these funds through mutual legal assistance can take months, or even years, and is often not achievable at all, whether due to legal obstacles, the dissipation of funds, lack of resources or one of the many other challenges identified in this project. Some of the barriers to effective asset recovery relate to necessary and important processes designed to protect individuals' human rights, including property rights[4], and the rights of bona fide third parties. Nevertheless, the negligible extent to which the proceeds and instrumentalities of crime are being recovered globally also implies that ambitious reform is needed, while continuing to protect these rights.

7. There is no 'silver bullet' that can resolve these issues. While improving global outcomes requires ambition and the application of all of the stakeholders involved, it also takes time, requiring incremental improvements both on a domestic and multilateral level. Evaluations by the FATF and the Global Network of FATF-Style Regional Bodies, the work completed as part of this project's first phase, and the work completed by other organisations show that effective asset recovery cannot be tied to one particular measure or mechanism. At the same time, a distinguishing feature of a successful asset recovery regime is the ability to build and maintain a culture in which asset recovery is prioritised and pursued by all relevant agencies and at all levels of government. This also includes building a culture amongst the general public whereby the benefits of asset recovery are understood by the public and private sectors, and ultimately all stakeholders work together towards the shared goal of effectively and efficiently recovering the proceeds of crime. The recommendations in this report aim to help countries develop this culture.

8. As the global body responsible for protecting the integrity of the financial system from the threats of money laundering and terrorist financing, and given that its standards cover the proceeds and instrumentalities generated by a range of crimes[5], the FATF is in a unique position to foster and implement improvements in asset recovery efforts, ensuring all jurisdictions have in place infrastructure enabling them to build a culture of asset recovery over time.

1.2. Benefits associated with effective asset recovery

9. For criminals committing major proceeds generating offences, whether fraud, corruption, tax evasion or the illicit trafficking of narcotic drugs and psychotropic substances, the primary motivation for committing the crime is almost always financial

[4] "No one shall be arbitrarily deprived of his property*"*; *Universal declaration of Human Rights* (Article 17-2)

[5] At a minimum the proceeds and instrumentalities generated from the 21 predicate offences detailed in the *FATF Recommendations*.

gain.[6] **Recovering the proceeds of criminal activity therefore removes the incentives for criminal activity**, thus reducing the occurrence of predicate offences and the resulting damage to society. In addition, for organised criminal groups in particular, the proceeds of crime provide prestige, credibility, and power. Recovering proceeds from these organisations undermines these aspects and reduces the attractiveness of organised crime gangs, as well as acting as a disruptive tool, impacting the operations of criminal groups.

10. Effective asset recovery also contributes to the stability of national and foreign governments, as theft, misappropriation, and other forms of corruption can deplete trust in governments, reduce their operating budgets for critical programmes, and undermine their capacity, leaving power vacuums in which criminals and terrorists can thrive. In some cases, stolen assets have led to the bankruptcy of whole States, and the functioning of the State may depend upon (or be significantly impacted by) the recovery and return of the stolen assets in question. Asset recovery also raises public confidence in the financial and criminal justice systems more generally by, among other things, returning the proceeds of crime to victims and demonstrating that crime does not pay.

11. When considering the investment that jurisdictions must make to improve domestic and cross-border asset recovery it is important that governments also appreciate the many other significant benefits of an effective asset recovery regime, alongside the broad objectives above. These include:

- **Reducing dangers to society**. Asset recovery ensures that dangerous weapons, drugs, and the assets used to acquire and profit from them are taken out of society. Similarly, threats to national security arising from criminal gangs and others' use of dangerous weapons are also prevented. Depriving terrorists of assets that could be used to prepare or execute an attack, or finance a third person's terrorist activities, also reduces dangers to society.[7]
- **Supporting social cohesion and justice.** Where stolen assets are recovered, jurisdictions may be able to return them to injured parties, whether individuals, legal entities or jurisdictions, which can help repair the damage to the population caused by criminality.
- **Protecting the integrity of the financial system**. Reducing the circulation of illicit sources of income reduces the instability of the financial system – both on a micro and macro level, and ensures a level playing field for competition, strengthening the competitiveness of the economy, increasing tax yields, and reducing the potential for corruption.
- **Recovering funds that can be put to use.** Generating funds for governments should not be the primary goal of asset recovery, as the assets are a function of a criminal act. In addition, returning assets to victims should be the primary aim whenever possible. Nevertheless, funds that cannot be returned to the victim may still represent money that could be reinvested, where appropriate, in further improving asset recovery efforts and social programmes and infrastructure.

[6] Note there are some exceptions, including terrorist financing.

[7] Note that the implementation of UNSCR 1267 and 1373 is not within the scope of this report. The identification, tracing, freezing and confiscation of assets considered as assets used for the purposes of terrorist financing in line with FATF Recommendation 4 and the UN Convention for the Suppression of Terrorist Financing are relevant to this report, although not its primary focus. See also guidance being drafted on the investigation and prosecution of terrorist financing FATF/RTMG(2020)28.

- **Negating criticism from the private sector and improving private sector implementation.** The costs of implementing AML/CFT compliance by the private sector have been estimated to be substantial, and in excess of the amounts of criminal proceeds being recovered.[8] While AML/CFT compliance programmes are critical to deterring criminal conduct, and although the associated implementation costs and the quantum of proceeds recovered by countries are entirely independent from each other, weak outcomes in the proportion of proceeds recovered inevitably lead to criticism of the FATF and governments on the cost of implementing AML/CFT regulation.
- **Fostering effective international co-operation.** Competent authorities' co-operation on cross-border cases builds trust between and among counterpart agencies, facilitating closer working relationships. This in turn supports cooperation in future asset recovery and other related criminal cases.

1.3. Objectives and outcome of phase one

12. The FATF initiated this project in February 2019 in response to the weak results in the MERs and the outcomes of the Argentinian Presidency's work with judges and prosecutors during 2017-18.[9][10] While other international bodies have analysed and reviewed asset recovery trends, the FATF has not conducted work on asset recovery outside of the evaluation process since a 2012 best practice paper and the 2013 Standards revisions.

13. This project has been split into two phases, with the first focused on updating our understanding of the operational challenges associated with asset recovery, and the second designed to consider possible solutions to the challenges identified. This paper is a culmination of the latter.

14. The objectives of the first phase of the project were to assess the current challenges affecting the asset recovery process. In a report presented to the June 2019 Plenary,[11] the Secretariat summarised findings based on MERs,[12] a questionnaire sent to jurisdictions, and a workshop during the 2019 Joint Experts Meeting. Many of the challenges identified during the first phase of work closely resembled those identified in previous work by other

[8] Recent estimates have put the annual 'true cost' of the private sector's AML/CFT compliance in five European countries (France, Germany, Italy, Switzerland and the Netherlands) at USD 83.5 billion. This is almost six times as much as the sums recovered annually by the five highest-performing countries (in terms of total amounts confiscated) evaluated in the current round. See: LexisNexis. (2017), *The True Cost of Anti-Money Laundering Compliance – European Survey*.

[9] This work was undertaken by the Risk Trends and Methods Group.

[10] See https://www.fatf-gafi.org/media/fatf/documents/reports/AML-CFT-Judges-Prosecutors.pdf.

[11] See FATF/RTMG(2019)11

[12] The analysis of MERs conducted during phase one revealed challenges associated with the FATF's MER assessment process. The breadth of content covered as part of the MER process, and correspondingly the relatively small amount of time spent by assessment teams on an individual Immediate Outcome, means that only high-level analysis can be conducted on a complex topic like asset recovery. In general, MERs do not provide sufficient detail to illustrate all of the underlying challenges and specific reasons why a jurisdiction may or may not be effective. Nevertheless, some insights were drawn from the MERs.

bodies, in particular through the World Bank/UNODC Stolen Asset Recovery (StAR) initiative.[13]

15. In concluding the first phase, the FATF Plenary agreed that the scope of the project should include both conviction-based and non-conviction based confiscation – even though R.4 does not make the latter mandatory – and cover domestic and cross-border confiscation. Asset management was not included within the scope of the project to limit its breadth.

16. Some of the key insights from the first phase of work are summarised as follows.

- A reasonably significant number countries cited that they had **never had a cross-border asset recovery case, or had had only one or two such cases.**[14] This figure is likely to be even higher than reported, as the majority of responses did not provide any details of cases or statistics.[15]
- The questionnaire responses suggested that many of **the most significant barriers exist at the earlier stages of the confiscation process**, during the tracing and freezing stage. This may be because jurisdictions have little or no experience with confiscating and repatriating assets, since they have been unable to find or trace the assets effectively. Nevertheless, a number of challenges were identified at each stage of the asset recovery process.
- **There is an overriding need for swift tracing and securing of assets.** This was frequently cited as an imperative to prevent asset flight, with a number of examples provided in which bank accounts were emptied or closed long before they had been traced and there was an opportunity to secure the assets.
- A major issue appears to be the **availability and accessibility of information to support the effective tracing of assets**. Given the need to swiftly trace and secure assets to prevent asset flight, the lack of easily accessible information seems to be a significant barrier. Gaps include the breadth of information for which data is required, and the speed and ease of access to this information, with appropriate access to financial information being particularly critical due to the importance of financial information in many asset tracing investigations.
- Many jurisdictions are not routinely and expeditiously undertaking proactive parallel financial investigations when pursing money laundering or associated predicate offences. Only 10% of the countries evaluated as part of the current round had achieved a high or substantial level of effectiveness in conducting effective money laundering investigations and prosecution under IO7. This suggests **many countries are not well-equipped to effectively trace assets when there is suspicion of criminal activity**. The challenges associated with law enforcement agencies' (LEAs') capacity to trace assets at the early part of an investigation included a lack of prioritisation and a lack of resources.
- The **inability to timely freeze assets through swift and effective asset freezing mechanisms was consistently recognised as a problem**, particularly given that swift action is needed to prevent asset flight. Often a court order is required to secure assets. This process can be slow and complicated at the domestic level, and

[13] Brun, J.P. et al. 2011. "Barriers to Asset Recovery An Analysis of the Key Barriers and Recommendations for Action". Stolen Asset Recovery Initiative.

[14] Ten of the 48 delegations that submitted responses to the questionnaire.

[15] The countries without experience of successful cross-border cases included two jurisdictions that had received a substantial and a high rating respectively, and that had material risks of cross-border ML affecting their jurisdictions.

differences in national procedures can make cross-border cases even longer. Difficulties translating provisional seizures into permanent confiscation were also frequently cited as a deficiency in the current round of FATF assessments.

- The **lack of effective co-operation by third countries**. Examples included requests ignored by third countries – even after several requests were sent – as well as jurisdictions failing to respect the principle of reciprocity and issues with trust between countries or domestic authorities. Insufficient expertise or gaps in domestic co-ordination and co-operation were also cited as underlying reasons for a lack of effective co-operation across borders.
- **The importance of jurisdictions having bilateral instruments in place to support the confiscation process**. Jurisdictions from various regions cite the lack of memoranda of understanding (MOUs), mutual legal assistance (MLA) agreements, or other international instruments as barriers. Sometimes jurisdictions refuse to acknowledge and execute confiscation orders if bilateral agreements are not in place. Having a bilateral agreement in place is particularly important for the repatriation phase, when issues arise such as the proportion of assets returned to respective jurisdictions, how the costs associated with property management will be attributed, and what happens should victims or third parties seek compensation.
- Throughout the cross-border confiscation process, **one of the consistent challenges is the inconsistency or incompatibility of legal processes**. Many jurisdictions have legal requirements in place to ensure due process (i.e. judicial processes), but these processes frequently differ due to the differences in the broader legal frameworks. This means that when MLA is initiated and a formal request is made, it may not be initially accepted or a separate domestic process is required resulting in delays.
- **Dual criminality** can also be a problem, in particular if the specific nature of the predicate offence is not the same in the two jurisdictions. For example, even when two jurisdictions have criminalised fraud, the terminology associated with different types of fraud may be different, or based on different concepts, delaying MLA or even making it impossible.
- **The burden of proof required for both seizing and confiscating assets was considered too high by many jurisdictions**. Despite the FATF Standards requiring countries to enable their competent authorities to freeze or seize property of a corresponding value to the property laundered, sometimes jurisdictions require that requests provided by third countries describe the precise relationship between the asset being seized and the criminal act that has been committed, Similarly, the exact location of the assets in the third country may also be required for a freezing order from the requesting country. This makes freezing or seizing action time consuming and extremely difficult to execute in practice.
- **A large number of practical challenges were cited with the execution of the cross-border confiscation process**. The need for more efficient ways to facilitate the exchange of information and other practical information, such as contact information, was a common theme in questionnaire responses. In addition, there appear to be weaknesses in the content of requests and the quality of responses, including poor translations, language barriers, insufficient or inaccurate information, and a lack of justification for requests.
- There are also a number **of broader issues impacting countries' ability to effectively confiscate assets**. These may relate to a lack of transparency of

beneficial ownership, a lack of or poorly carried out financial investigations, vulnerabilities linked to the use of cash outside the formal financial system, or insufficiencies in detecting potential ML activity by reporting entities. While these issues are all beyond the scope of this project, they do have an impact on the extent to which proceeds of crime are ultimately recovered.

1.4. Objectives and outcome of phase two

17. Following discussions on its scope in October 2019, the second phase of work began in February 2020. An expert group was formed to identify possible solutions for each of the challenges identified during phase one. The expert group includes experts from Brazil, China, France, the Isle of Man (MONEYVAL), Israel, Italy, Sweden, the United Kingdom, the United States, and the CARIN Steering Group, including contributions from CARIN members such as Belgium, Spain, and the Netherlands.

18. The objective of phase two was to provide recommendations to the Plenary on the ways that the FATF could support improvements in global efforts to recover the proceeds of crime. The content has been tailored for the benefit of the primary audience – policy makers and other competent authorities represented at the FATF. This paper is not intended to be made public.

19. The recommendations are based on the collective operational, on-the-ground experience of the experts working within their respective national competent authorities. The expert group has practical experience in all aspects of the asset recovery process, and is drawn from both law enforcement and judicial/prosecutorial practice. The expert group has also relied on the experience of other experts domestically, and have also sought input from a range of key stakeholders, including the World Bank and the UN (to learn from their experiences supporting the StAR initiative and administering U.N. Convention Against Corruption (UNCAC), in the case of the UN), the European Commission, the network of five regional asset recovery interagency networks (ARINs), Interpol, Europol, and the Egmont Group of Financial Investigation Units (FIUs). This paper presents the culmination of phase two. [Note to delegations: engagement is ongoing. Therefore this paragraph will be updated for the final draft]

20. While the FATF Recommendations do not require jurisdictions to adopt non-conviction-based confiscation regimes, this type of asset recovery can be an effective tool where permitted by a jurisdiction's legal framework[16]. Non-conviction-based confiscation permits law enforcement to recover criminally derived property where the criminals are deceased, are not physically present in the jurisdiction where the property is located, or in any other circumstance where criminal prosecution is not an option. For example, non-conviction-based confiscation has proven exceptionally effective in corruption and bribery cases in which the criminally derived property can be found in multiple jurisdictions across the globe, but the wrongdoers are fugitives or will be prosecuted only in one jurisdiction. Other important aspects of non-conviction regimes may include measures to require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation,

[16] FATF Recommendation 4 states that countries should consider adopting measures that allow the proceeds of crime or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that this is consistent with the principles of their domestic law. FATF recommendation 38 requires countries, with respect to requests for cooperation made on the basis of non-conviction based confiscation proceedings, to have the authority to act on the basis of all such requests, at a minimum in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or the perpetrator is unknown.

civil cases between private individuals or entities, or administrative measures where statute may allow the confiscation of assets seized in the course of an investigation.

21. This paper accordingly addresses some best practices for non-conviction-based confiscation. It also highlights the need for greater cross-border recognition and enforcement of non-conviction-based confiscation orders so that law enforcement can better neutralize wrongdoers' attempts to immunize criminally derived property from law enforcement's reach merely by transporting it across borders.

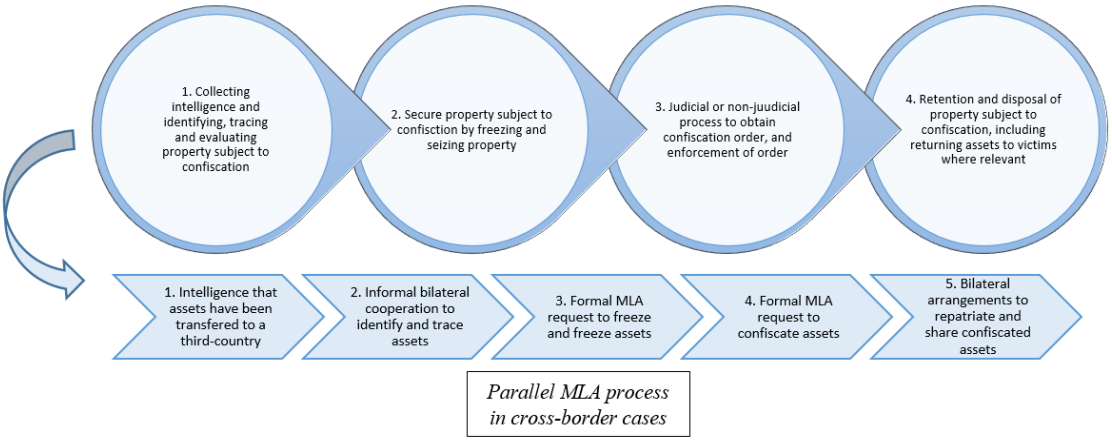
1.5. Asset Recovery Process and Terminology

22. The asset recovery process involves a number of steps, from identifying possible criminal activity, to ultimately recovering the proceeds of crime and returning them to the victim or the state if returning the assets to the victim is not possible[17]. In addition, the different phases associated with the asset recovery process may overlap. Nevertheless, a flow chart provided below (figure 1.2) summarises the general steps involved in the asset recovery process, including the parallel steps that may be involved in a cross-border case, including through the use of mutual legal assistance (MLA). These steps have been used to help structure this report and are referred to throughout. As above, the final step – managing and disposing of the recovered assets - has been omitted from this report in order to limit its scope. Despite this, a successful asset recovery case is one to have progressed from the initial phase of tracing the assets to the ultimate step of confiscating and returning the assets to the victim or other third party (such as the State when it is not possible to return the assets to the victim).

23. Jurisdictions have different legal systems, institutional structures, and cultural practices, so terminology can differ significantly. For consistency, the terminology used in this report is explained in Box 1.2 below, and is derived from the terminology used in the FATF Standards. Where there are case studies referencing the practices in a particular country, the terminology used within that particular jurisdiction has been retained. A complete list of acronyms has been included at [TBC for final draft].

[17]Some jurisdictions return to victims a net amount of forfeited funds subtracting the recovery of costs for the liquidation of assets and like expenses.

Figure 1.2. Asset recovery process



Box 1.2. Definitions

Asset recovery process. For the purposes of this report, the asset recovery process is considered the whole process of identifying, tracing, evaluating, freezing, seizing, confiscating, recovering and ultimately returning the assets to the victim, or state when it is not possible*. The term asset recovery also includes the return and repatriation of the illicit proceeds when they are located in or obtained from foreign countries.

Trace. For the purposes of this report, the term trace means to identify assets with or from their criminal origins, through all mutations, if any, to the eventual form and state in which they exist at the time they are located. Tracing may also include the identification of lawful assets held by an offender for the purposes of confiscating property of corresponding value to the property laundered.

Evaluate. For the purposes of this report, the term evaluate means to determine the value of the criminal assets, regardless of their form and state, which may be the subject of provisional measures and confiscation proceedings, including property of corresponding value to the property laundered.

Freeze. The term freeze means to prohibit the transfer, conversion, disposition or movement of any property, equipment or other instrumentalities on the basis of, and for the duration of the validity of, an action initiated by a competent authority or a court under a freezing mechanism, or until a forfeiture or confiscation determination is made by a competent authority. *Glossary to the FATF Recommendations.*

Seize. The term seize means to prohibit the transfer, conversion, disposition or movement of property on the basis of an action initiated by a competent authority or a court under a freezing mechanism. However, unlike a freezing action, a seizure is effected by a mechanism that allows the competent authority or court to take control of specified property. The seized property remains the property of the natural or legal person(s) that holds an interest in the specified property at the time of the seizure, although the competent authority or court will often take over possession, administration or management of the seized property. *Glossary to the FATF Recommendations.*

Confiscation. The term confiscation, which includes forfeiture where applicable, means the permanent deprivation of funds or other assets[18] by order of a competent authority or a court. Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to be transferred to the State. In this case, the person(s) or entity(ies) that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture loses all rights, in principle, to the confiscated or forfeited funds or other assets. Confiscation or forfeiture orders are usually linked to a criminal conviction or a court decision whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law. *Glossary to the FATF Recommendations.*

Non-conviction based confiscation. Non-conviction based confiscation means confiscation through judicial procedures related to a criminal offence for which a criminal conviction is not required. *Glossary to the FATF Recommendations.*

* Some jurisdictions return to victims a net amount of forfeited funds subtracting the recovery of costs for the liquidation of assets and like expenses.

[18] See glossary to the FATF Recommendations for a definition of *funds or other assets*.

Strategic and Operational Prioritisation and Co-ordination: Building a Culture of Asset Recovery

24. An effective asset recovery process involves a variety of actors: law enforcement authorities (LEAs) including tax customs authorities and anti-corruption authorities, prosecutors, FIUs, the judiciary, asset recovery and asset management agencies, central authorities for international co-operation, and so on. Looking at the MERs of higher-performing countries (in terms of ratings and amounts recovered), the common thread is that the agencies in these jurisdictions work together based on a shared commitment to recovering proceeds through cooperation and information exchange. Additionally, these agencies have the power, resources, and expertise to actively trace and secure assets to avoid asset flight and to see the process through to the eventual recovery of frozen assets. To achieve these ideals, countries with effective regimes should develop a culture in which all entities and individuals involved in asset recovery cooperate effectively at all levels and are committed to overcoming barriers to improve the effectiveness of the system over time.

2.

2.1. Ensuring a shared strategic vision and commitment

25. Creating and maintaining a culture of asset recovery requires strategic co-ordination to ensure a shared commitment and buy-in at all levels of government. Politicians and senior executives should recognise the importance of asset recovery in order to be willing to allocate sufficient resources, to ensure asset recovery is prioritised, and to set a clear tone-from-the-top when it comes to policy setting and legislative changes. The political will to prioritise and promote asset recovery is particularly important when the end results may appear to benefit a third country or where deep structural challenges may need resolving. Meanwhile, practitioners and law enforcement officers (both at the agency and individual level) must have the missing support and drive to pursue asset recovery on a systematic basis, and find creative solutions to overcome obstacles.

2.1.1. Developing cross-government values on asset recovery

26. Effective asset recovery requires each jurisdiction to develop a system of shared cultural values that integrates asset recovery into operational and strategic decision making across all relevant agencies. Government representatives and relevant agencies involved in the asset recovery process should come together to **articulate the overarching reasons that the country pursues asset recovery**. Laying out a clear vision of the high-level objectives of asset recovery ensures that legislators, officials, and practitioners executing the programme understand its larger goals. This shared understanding also encourages politicians and senior executives to dedicate sufficient resources and support necessary policy changes, and it encourages agencies and individual officers to implement processes and actively pursue asset recovery. All relevant agencies and the jurisdiction's government should clearly commit to these over-arching goals as part of a **national strategy or policy on asset recovery**.

27. In addition to articulating the rationale for pursuing asset recovery, agencies need to frankly and objectively discuss and identify the strengths and weaknesses of their asset recovery system. Competent authorities with responsibility for tracing, freezing, seizing, and confiscating funds, and with first-hand experience on the ground should play a central role in the process of establishing the strengths and weaknesses in the system and generating ongoing incremental improvements. This self-assessment – which should be done frequently – should cover the sufficiency of relevant laws and regulations, guidance,

processes and procedures, and domestic and international co-operation. Competent authorities should be encouraged to identify practical hurdles they have encountered in pursuing asset recovery. Cross-border asset recovery should be integrated into the assessment, taking into account the particular risks that the jurisdiction faces.

28. A jurisdiction cannot fully understand its strengths and weaknesses without access to complete information, and effective communication of this information, including between practitioners and policy makers. Developing a robust strategy on asset recovery requires authorities to have a clear grasp of their jurisdiction's performance. Jurisdictions should therefore collect, where possible, national-level statistics on amounts frozen, seized, confiscated, and realised; the number of freezing and confiscation orders; the underlying assets and predicate crime-types, and breakdowns based on cross-border and domestic cases. While it may not be necessary (and indeed may be burdensome) to collect detailed statistics on every aspect of asset recovery all of the time, authorities need access to have sufficiently precise and up-to-date statistics in order to have an understanding of the strengths and weaknesses in their system. Other supporting or linked statistics, such as the proportion of investigations in which assets have been recovered, may also be useful to understand where the weaknesses in the system may lie. **These statistics should be made public** to increase accountability and support resource allocation wherever possible. The majority of countries evaluated during the current round do not maintain adequate statistics on the amounts traced, seized, confiscated and recovered. Freezing data is incomplete in 66% of MERs and confiscation data is incomplete in 53% of MERs.

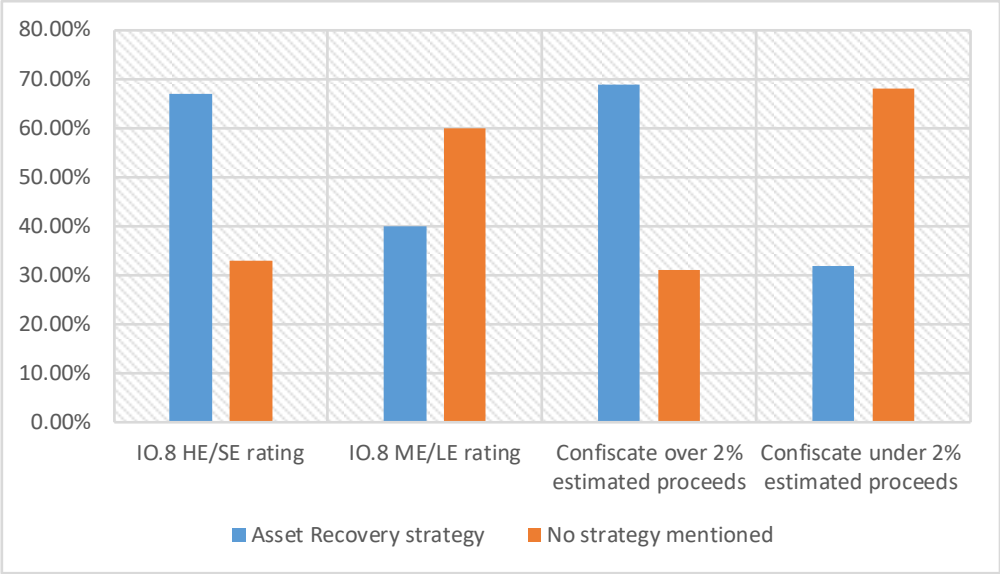
29. Through the self-assessment process, relevant competent authorities should reach a shared understanding of the areas for improvement and **identify the policy and operational changes required and deadlines for implementation.** The resulting asset recovery strategy should reflect the jurisdiction's common understanding of and commitment to necessary institutional and legal changes, allocation of significant human and financial resources, training and formation, agency co-ordination, international co-operation, and any other implementing actions. Higher-performing jurisdictions commit significant resources to the asset recovery process, but see a positive return.

30. These strategic discussions and goal-setting efforts should involve **representatives from all relevant agencies, at different levels**. Operational-level investigators and technical experts should contribute to these discussions to ensure they reflect the situation on-the-ground and to ensure relevant agencies feel involved in the process. The over-arching objectives and outcomes reflected in the asset recovery strategy should also be endorsed or adopted at the highest level to ensure political support. This top-down and bottom-up approach ensures buy-in from different agencies and levels, and will help establish a shared culture of asset recovery. Without a top-down approach, there will not be the necessary oversight or political support, and without a bottom-up approach the strategy cannot be sufficiently targeted to respond to the day-to-day challenges impacting practitioners, and it may not secure buy-in by those tasked with executing it.

31. Numerous bodies and networks, including the FATF, currently recommend that countries adopt an asset recovery strategy (see Figure 2.1 below). Looking at trends from FATF and FATF-Style Regional Bodies (FSRBs) mutual evaluations, the existence of a written asset recovery strategy is common across countries with higher ratings for IO.8 (67% of countries rated HE or SE) and across countries confiscating relatively higher amounts (69% of those confiscating more than 2% of estimated proceeds).

Figure 2.1. Asset recovery strategy and confiscation

Countries with an asset recovery strategy tend to have more effective confiscation regimes



Source: Data collected from 59 MERs (FATF and FSRBs) evaluated during the current round.

Box 2.1. The International Framework: Recommendations Relating to Asset Recovery Strategies

FATF

In its mutual evaluations, the FATF requires assessors to examine "To what extent is confiscation of criminal proceeds, instrumentalities and property of equivalent value pursued as a policy objective?" (Core Issue 8.1). One aspect of this Core Issue is looking at whether the assessed country has a documented asset recovery plan or strategy.

Source: *FATF Methodology*, Immediate Outcome 8

StAR Initiative (World Bank and UNODC)

StAR recommends that:

- "Developed and developing countries should adopt, implement, and fund comprehensive strategic policies to combat corruption and recover assets. Countries should identify gaps and be swift and responsive in addressing obstacles encountered during the asset recovery process. They should evaluate the implementation of their policies and consider changes where needed."
- "Developed and developing countries should maintain comprehensive statistics on asset recovery cases, including assets frozen or confiscated, reparations or restitution ordered, and assets returned. Gaps in the data should be identified and their collection addressed"

See: Gray et al. *Few and Far: The Hard Facts on Stolen Asset Recovery* (2014)

32. MER results suggest that the form of the strategy is less important; a range of approaches is seen across higher-performing countries. The strategy may be a standalone asset recovery policy or form part of a broader economic or organised crime strategy, as long as it is sufficiently detailed in its purpose and goals, planned actions for achievement, and indicators of performance or metrics of success (see section 2.1.4 below). A drawback of not having a standalone asset recovery strategy is that it becomes an obligatory mention without much attention in other strategies, whereas a standalone asset recovery strategy can be universally applied across types of offences and emphasises the importance of the topic. What is crucial is the extent to which there is buy-in amongst all stakeholders, and that it achieves the outcome of identifying weaknesses and coordinating action to address them.

2.1.2. Ensuring buy-in from the private sector and general public on asset recovery efforts

33. The private sector plays a unique role in the asset recovery process, and its co-operation and buy-in are vital to effectively trace and recover assets. Private sector institutions often act as the holder or manager of assets, and are therefore the intermediary between law enforcement and a suspect's assets. For this reason, it is important that a jurisdiction's strategic vision on asset recovery **incorporates the views of the private sector, including when identifying the over-arching goals and developing an action plan**. Civil society can also play a key role by contributing to the public debate on issues around the recovery of criminal proceeds.

34. Involvement from the private sector and civil society is particularly important in countries where confiscation is controversial or poorly understood. In fact, in these

countries it is even more critical that economic agents such as private businesses and companies and civil society organisations fully understand the necessity of effective asset recovery. Key actors in the private sector should play an active role in contributing to strategic discussions on asset recovery on an ongoing basis. This includes banks and other financial institutions, virtual asset services providers (VASPs), and designated non-financial businesses and professions (DNFBPs). Civil society can also play a vital role by contributing to debates on asset recovery, good governance and accountability.

35. It is also important that the general public understands the wide-ranging societal benefits of asset recovery. Clear, ongoing public communication on the over-arching objectives of the asset recovery process and its success stories ensures against misunderstanding the purposes of the programme, especially among the public: it is not intended to enrich the government at the expense of individuals, build national wealth or supplant budgets, or redistribute money in an unjust or unaccountable way. It also helps the public understand why competent authorities have freezing and confiscation powers that impact individuals' property rights, and the protections that are in place to mitigate against their misuse. Generating an understanding amongst the public of the benefits of returning assets to the victims of crime may, in turn, further increase public support and help justify the resources that should be devoted to it. The public may also play a key role in investigations by co-operating with law enforcement, and more generally holding governments to account. For all of these reasons, **the asset recovery strategy (or a version of it) should be made public**. Publishing statistics on asset recovery, to the extent possible, may also support this objective (see para.28 above).

2.1.3. Fostering agency and practitioner commitment to asset recovery

36. Each agency and practitioner involved in the asset recovery process plays an important role and effective asset recovery requires active engagement and commitment from each party. The asset recovery chain is only as strong as its weakest link. For this reason, **jurisdictions need to take steps to ensure that all practitioners and relevant competent authorities implement the jurisdiction's asset recovery strategy effectively**. This is to ensure that asset recovery is prioritised and incremental improvements are enacted over time. At the same time, operational agencies should feel that their day-to-day experiences are reflected in system-wide strategies or objectives.

37. Each agency and practitioner should be accountable for implementing the asset recovery strategy, for example through clear, measurable goals, targets or indicators for asset recovery and specific objectives for the different authorities involved. Goals, targets or indicators can be tied to a number of different considerations, including: the extent to which criminal operations are disrupted; case initiations based on inputs from asset recovery agencies; the number and value of the assets subject to early freezing or restraint orders; the correlation between freezing in the investigative stage and confiscation final decisions; and the number and percentage of cases for which freezing and confiscation are requested and executed. In order to generate improvements, countries could also commit to increasing some of the particular values or targets by a specific amount or percentage, for example committing to increasing the number of restraint/confiscation orders or the amounts restrained/confiscated by a particular amount or percentage. To promote accountability, these targets could also be made public.

38. Whatever the type of goal, target or indicator put in place by a country, practitioners should be able to prioritise asset recovery in accordance with their mandates. During *phase one*, in one example provided, law enforcement were mandated to investigate every predicate offence where there was suspicion that criminality had occurred, yet there was no similar incentive requiring law enforcement to trace and secure the proceeds of crime.

This led to investigations into predicate offences being prioritised over asset recovery. **Asset recovery should be integrated into the primary objectives of relevant competent authorities, alongside their other objectives rather than being treated as an additional or peripheral task.**

39. Practitioners should also understand the role of asset recovery as a disruptive tool to inhibit the operations of organised criminal groups. Also known as 'asset denial', asset recovery can be used as an operational tool designed to cause maximum disruption to criminal groups and networks. It is essential that practitioners understand and recognise the role of asset recovery as a disruptive tool so that asset recovery can be both integrated into specific investigations and broader strategies to disrupt organised crime, as part of a culture of asset recovery. As above this could form a specific objective or indicator for a particular practitioner or agency.

Box 2.2. Asset recovery as an operational tactic to disrupt criminal operations

In the United Kingdom, LEAs recognise the effectiveness of asset recovery to target the finances of serious and organised criminals and disrupt their activities. The purpose of this "asset denial" tactic is not to recover the largest sum of money, but to decrease high-risk criminal organisations' ability to plan and carry out future crimes. Specifically, confiscating the assets of criminal organisations prevents them from making long-term investments and covering operating costs. Thus, asset recovery both takes away the incentive for crime (by denying criminals their ill-gotten wealth and status) and diminishes criminals' capabilities.

Source: National Crime Agency website.

40. Another effective method for encouraging buy-in for a jurisdiction's asset recovery strategy is to link the strategy's over-arching goals to tangible incentives, whether at an agency or individual practitioner level. Asset recovery is somewhat unusual in the law enforcement space in that it generates income (through the recovery of proceeds), meaning jurisdictions can create financial incentives, without a budget implication. To encourage agency and individual commitment to the process, **countries could incentivise asset recovery by returning a portion of the recovered assets to the agencies that contributed to the case**.

41. Returning assets to victims should generally be the primary objective. However, when this is not possible or when the State is the victim, recovered funds could be returned to the general budgetary pool for LEAs or to specific agencies involved in asset recovery. Some physical assets, depending on their nature, may be used directly by government authorities or LEAs, in turn increasing their capacity to recover illicit funds in future and creating a virtuous cycle. Offering financial incentives for agency involvement in asset recovery actions helps encourage a wider range of agencies' participation, meaning authorities can leverage the skills, powers, and expertise available in different agencies and have a wider resource pool to draw from. In implementing this approach, it is important that the returned amounts are sufficient to act as a true incentive for the complex, resource-intensive investigations that are often required to recover illicit assets.

Box 2.3. Example of confiscated assets returned to government agencies

In the Isle of Man, customs officers seized two cars at a port which were adapted to conceal items. The Court ordered their forfeiture, and the vehicles were used by LEAs for surveillance. Once the surveillance mission over, the vehicles were given to the Fire Department for firefighter training. [Note further details to be added]

Source: [reference to be added]

[Further examples to be added]

42. These tangible incentives present risks, but these risks can be mitigated or eradicated. There could be risks, for example, that authorities are encouraged to prioritise certain cases ahead of others based on the potential recovery amounts instead of other important factors, such as the impact that the crime has on society, the public interest, or the deterrent effect of securing convictions. It is also possible that financial incentives create the appearance of or even lead to "policing for profit". Similarly, if recovered funds were to be distributed directly to specific teams (instead of to the agency in general or the broader LEA budget pool), it could trigger competition and risks undermining interagency co-operation.

43. Such risks should be taken into account, and can be mitigated, in part, by ensuring jurisdictions have a co-ordinating mechanism to promote co-operation and monitor cases that may involve multiple agencies. Rules and process can also be put in place to help protect against perverse incentives. For example, the team (or person(s)) that makes decisions on pursuing restraint or confiscation should not be the same as the team making decisions on the use of confiscated assets. Victim compensation and international sharing should take precedence over such incentive schemes – and countries can help avoid the perception of "policing for profit" by highlighting these efforts publicly.

44. At the individual practitioner level, enhanced career prospects can also serve as an incentive for law enforcement and others to undertake asset recovery. Successful asset recovery cases could, for example, be a pre-requisite to career progression for some roles and specifically incorporated into performance reviews for relevant staff. High-performing staff could also be recognised through membership on elite investigation teams. Asset recovery achievements - such as winning major cases, signing asset-recovery-related treaties, conducting training, or otherwise contributing to national/international efforts - could be rewarded through agency-wide recognition, ceremonies, and occasional pecuniary bonuses for agency employees. The perception of an investigation's success can also be tied to recovery efforts, such as highlighting asset recovery efforts, including victim compensation, when publicising details of convictions or sentences

45. There is no one-size-fits-all structure that may prove effective in every jurisdiction. In addition, the central objective for law enforcement authorities of disrupting and denying the incentives for criminals by recovering the assets they have stolen and returning them to the victims wherever relevant should be the competent authorities' primary objective. Yet, whatever the specific characteristics of the jurisdiction in question, jurisdictions need to put in place structures – both at the practitioner and agency level – that ensure a culture of asset recovery is built into practitioner and authority actions.

Box 2.4. Examples of structures that support commitment to asset recovery

A number of countries have adopted incentives to encourage government employees to pursue asset recovery. Chinese Taipei and Korea, for example, have individual career incentives to encourage asset recovery. In Korea, as part of implementing the 2017 government's goal of prioritising confiscation, prosecutors that successfully achieve asset recovery are favourably acknowledged in the performance management system. Similarly, in Chinese Taipei asset recovery efforts are one element of investigators' performance reviews.

In Sweden, the prosecution authority sets benchmark targets for the number of seizure and confiscation actions prosecutors are expected to make. Where these targets are consistently not met, a prosecutor may face consequences.

The UK* uses financial incentives for LEAs involved in asset recovery. Policies are in place to encourage confiscation and are supported by practical incentives that see a return of confiscated monies to relevant LEAs to aid further asset recovery efforts and fight economic crime, for example by funding training or enabling the purchase of technical equipment.

Note: *Applies to England, Wales and Northern Ireland only.

Source: MERs of Chinese Taipei (para.195), Korea (para.174), Sweden (para.185), the UK (para.181-185).

2.1.4. Ensuring ongoing progress and reform on asset recovery

46. The strengths and weaknesses of a jurisdiction's asset recovery system are ever changing. As new technologies, risks, and trends emerge, new challenges may be identified and old processes may no longer be fit-for-purpose. As agencies become more successful and new processes are established, goals or targets will likely need to be adjusted to reflect improvements in the system. For this reason, jurisdictions must make an ongoing effort to improve and adjust their asset recovery framework to maintain a culture of asset recovery. The goals, vision, and contents of a jurisdiction's **asset recovery strategy should be updated regularly** to reflect the risks and threats of the country – both domestic and cross-border, and to ensure that new and emerging strengths and weaknesses are understood and taken into consideration.

47. An initial asset recovery strategy should be **reviewed after no more than around two years**, especially when outcomes are not as positive as hoped. Once the system is in place and somewhat effective, the strategy should be **updated at least around every five years**, to allow for a more long-term assessment of its effectiveness. Countries may consider revisiting the strategy at other intervals when circumstances dictate, for example, where the money laundering threats or vulnerabilities are particularly dynamic, or where the country's National AML/CFT Risk Assessment is being updated. Any longer than approximately five years, and the situation on the ground is likely to have changed materially, including the capability or needs of competent authorities and/or the underlying threats and vulnerabilities. Internal or external audits may help track progress while promoting accountability. At an individual level, case debriefs should include an analysis of asset recovery elements, including the extent and swiftness of asset tracing and the success of asset seizure, restraint, and confiscation.

48. Reviewing the asset recovery strategy and reporting against relevant goals and targets require clear data and statistics, both at the country and agency levels. Such statistics

enable each authority to assess its individual strengths and weaknesses. Statistics are also vital to measure implementation of the strategy's goals. By maintaining statistics, countries will also be able to get a sense of a "normal" year and can adjust their quotas and targets accordingly (see para. 41 above on statistics).

Box 2.5. Summary of key parameters for an effective asset recovery strategy

While the MERs reviewed suggest a variety of asset recovery strategies can produce meaningful outcomes, the following were commonly observed for the jurisdictions achieving a substantial or high level of effectiveness.

An effective asset recovery strategy generally:

- Brings together all the actors, at different levels, that make up the confiscation regime to enhance interagency cooperation and dialogue.
- Integrates the views of the private sector and relevant civil society organisations.
- Articulates its overarching goals and the reasons asset recovery should be high on the agenda of all agencies involved.
- Evaluates the strengths and weaknesses of the confiscation regime and asset recovery processes, based on a shared understanding amongst stakeholders, and drawing on sufficiently detailed and up-to-date statistics (such as the examples above).
- Uses well-defined and measurable metrics for success for each of the objectives set.
- Is updated regularly to remain in line with the changing risk environment faced by jurisdictions and integrate lessons learned from past successes and failures.
- Is communicated to the general public to garner support for its overarching goals and associated policy proposals, with the strategy (or a version of it) may be made public.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

2.2. Ensuring operational co-operation

49. There are many competent authorities involved in the asset recovery process. Tracing the proceeds in a complex fraud case may involve, among others, the FIU contributing financial intelligence, the police undertaking search and surveillance activity to identify linked individuals and physical assets, the tax authorities providing information on income streams linked to corporate assets, and customs authorities providing

information on cross-border movements to identify potential assets and interests overseas. At the stage of freezing, the pool of authorities involved grows further. A prosecutor may be required to seek freezing orders granted by the judiciary, prosecutors and police officers may execute the orders, central authorities for international co-operation may be required to request formal MLA to freeze assets abroad, and asset management offices may take custody of the physical assets.

50. Where there is an established culture of asset recovery, all relevant agencies and individuals should understand their roles and responsibilities and routinely pursue asset recovery as an integrated part of their work, in line with relevant strategies and goals. This includes day-to-day operational co-operation and information sharing, as well as the need to co-ordinate strategically, as considered above. To achieve this, structures should be in place to allow agencies to effectively co-operate, co-ordinate and share information and expertise relating to investigations on an ongoing basis. This includes responding to requests for assistance from foreign jurisdictions.

2.2.1. Establishing a mechanism for operational co-ordination on asset recovery

51. A lack of effective co-ordination is a common barrier to effective asset recovery. Without close co-ordination, jurisdictions may find that agencies are unwittingly duplicating efforts, or that cases or assets are falling through the cracks due to a lack of information sharing. In extreme cases, poor co-ordination may result in suspects being tipped off, resulting in a failure to recover assets. Weak domestic co-operation and co-ordination also exacerbate the challenges faced in cross-border cases.[19]

52. To ensure effective co-ordination, jurisdictions wish to consider creating or appointing a mechanism (e.g. a body, unit, or group) responsible for co-ordinating national asset recovery efforts. The purpose of the co-ordinating mechanism is not to centralise asset recovery actions. Given the breadth and number of proceeds-generating offences, individual asset recovery cases should generally be pursued by relevant LEAs (although particular large or complex cases may be handled by a central body or specialised teams). Rather, the co-ordinating mechanism should be responsible and accountable for ensuring and promoting effective collaboration and co-ordination between agencies on asset recovery, and it should have the appropriate powers to do so effectively. The co-ordinating mechanism should also have a close working relationship with all competent authorities involved in the asset recovery process.

53. Looking at FATF and FSRB mutual evaluations, there is a range of co-ordination mechanisms used by jurisdictions. Higher-performing countries (whether in terms of ratings or amounts confiscated) take three different approaches to co-ordination. The most common approach (seen in 44% of evaluated countries) is to have one agency performing a formal co-ordination role. Often this function is performed by the prosecution agency or a specific asset recovery office. It is also relatively common for countries to adopt a decentralised approach (32%), where several specialist teams exist within relevant agencies and co-ordinate through established law enforcement co-ordination mechanisms. A third, relatively less common approach to co-ordination (taken by 11% of countries) is to establish interagency groups that bring together representatives of all relevant authorities.

[19] See paper concluding phase 1 [FATF/RTMG(2019)11].

Box 2.6. Co-ordination on asset recovery in higher performing countries

Interagency meetings and working groups: Israel

In Israel regular conferences are held between agencies to discuss best practices on asset recovery, future goals, and current effectiveness and performance. These events are known as the "Joined Hands" interagency conferences.

Specialised teams at national or regional level: Korea

Korea has taken the approach of establishing specialised teams in each prosecutors' office to focus on asset recovery and ensure confiscation is pursued in all cases involving proceeds-generating offences. While these teams were relatively new at the time of Korea's mutual evaluation, they had already had a measurable and very positive effect on the number of criminal preservation orders—the number of restraint orders increased by 90% within one year of the teams' establishment.

Asset Recovery Office: Latvia

Latvia created an ARO as a separate unit in the Security Police's Criminal Intelligence Management Board. The ARO is tasked with the search for, identification, and recovery of criminal proceeds. It works closely with the FIU, the Prosecutor's office, and with CARIN in cross-border asset recovery cases. Despite its recent creation, officials reported that the ARO played a key role in supporting financial investigations and coordinating asset recovery efforts across agencies.

Source: MERs of Israel (para.204), Korea (para.207,201), and Latvia (para.207-209).

54. The different legal systems, institutional arrangements, and cultures across jurisdictions may mean that a particular arrangement that works well in one country may not be suitable for another. As noted above, there is no correlation between MER outcomes and the type of co-ordination mechanism used. **Jurisdictions should adopt a co-ordinating mechanism that suits their domestic system.**

55. Jurisdictions may choose, for example, to establish a central body, such as an Asset Recovery Office(s) (ARO). A single ARO with sufficient powers and resource, can offer efficiencies by bringing together relevant authorities, including legal assistance, financial investigation, and law enforcement, within one unit to simplify day-to-day co-ordination. This may also support access to information with key bodies brought together under a single structure and a defined set of rules on the use of data. However, this system can also have drawbacks if not implemented effectively. For example, the existence of an ARO may risk reducing engagement from individual practitioners outside of this body by creating the perception that asset recovery exists separately from the 'standard' law enforcement process. The effectiveness of this system also depends on a particular country's framework. For example, in larger federal systems, an ARO may struggle to coordinate cases on a national scale and may lack the regional knowledge necessary to effectively co-ordinate agencies nation-wide. For these countries, it may be more effective for the co-ordination role to be performed by a group or task force comprising representatives of relevant asset recovery bodies.

2.2.2. Ensuring clear roles and responsibilities on asset recovery

56. A poor understanding of agency or individual roles and responsibilities prevents effective co-ordination. Individuals involved in the asset recovery process need to have a clear understanding of which agency is responsible for which aspects of the process, and who does what and when. For example, when tracing assets through bank accounts, does the FIU act as the primary contact for financial institutions? Or is it up to the investigating officer to make contact? If responsibilities are not clear, there is a risk of overlapping roles that could result in multiple agencies tracing the same assets, making inquiries of the same institutions, or collecting the same evidence. This is a particular risk in complex cases that may touch upon various agencies' mandates.

57. There should be clear, written guidance to establish which agency has jurisdiction over which cases and which agencies are responsible for the various aspects of the asset recovery process where there is a risk of confusion. This may not be relevant in jurisdictions where roles and mandates are not clearly defined in statute, or in civil law jurisdictions where the prosecutor's office may be the only authority to issue binding instructions to law enforcement authorities, therefore being in a position to resolve issues that may arise**.**

Box 2.7. Agency mandates and responsibilities

For the jurisdictions where roles and responsibilities are not clearly defined in statue or through legal practice, for the sake of transparency and consistency, guidelines and decisions on agency mandates and responsibilities should explain:

- Which cases are most appropriate for joint investigation. This will depend on the attributes each agency can bring to the case in terms of resources, expertise, and historic knowledge of the investigation.
- What factors should be considered in deciding which agency has the most straightforward legal basis for jurisdiction over the case.
- Which other considerations should be weighed, e.g. efficiency, broader public good, and practicality.

58. Clear roles and responsibilities also help agencies understand the assistance and support different competent authorities can offer and at what stage. For example, tax authorities may have access to a range of information that enables the identification of beneficial owners of corporate assets. This information may be relevant to an anti-corruption agency that is identifying assets held by a suspected corrupt official, but without a clear understanding of the role the tax authority plays in the asset recovery process, the individual investigators may not be aware of this opportunity for collaboration. To effectively collaborate and make best use of agencies' skills, information, and expertise, each agency needs to be aware of the support that can be offered and the role other agencies can play in the asset recovery process. Written guidance on agencies' roles should clearly identify the assistance agencies can provide to each other on asset recovery.

59. A co-ordinating mechanism on asset recovery can perform an effective role here. Through its close working relationship with relevant authorities, a co-ordinating mechanism should be well-placed to promote a common understanding of roles and responsibilities, and help agencies identify potential areas of overlap or where another agency may be able to provide assistance. While a co-ordinating mechanism does not

necessarily need to be aware of all asset recovery cases, it should have details of particularly significant or complex cases to enable it to help competent authorities identify areas of potential overlap or assistance. This expectation could be formalised through written guidance on the asset recovery process, or through bilateral or multilateral MOUs between or among competent authorities.

2.2.3. Promoting information-sharing between and among domestic authorities

60. An important aspect of domestic co-ordination is information sharing. By sharing information, potentially through the coordinating mechanisms used (as above), agencies can easily identify where another authority is already taking action, and avoid duplication. Where several agencies are pursuing interlinked cases, information sharing allows agencies to see the broader picture and take a unified approach.

61. Discussions on asset recovery are useful for identifying cross-cutting issues, but have practical constraints in terms of time (both length and regularity of meetings) and membership (as only a certain number of representatives can attend). To promote the broadest and most helpful sharing of information, **jurisdictions should share data, legal developments, contact details, and other information on a routine basis – outside the context of discussions and other meetings**. To allow individual officers to identify potential overlap of and links between asset recovery cases, agencies involved in asset recovery should share any information on seizures, restraint, confiscation orders, civil and criminal recovery and other information that may be of use to relevant authorities.

62. This information should be freely shared to the extent possible, with few to no restrictions, taking into account the requirements and precautions relating to confidentiality, privilege, classified information, and other sensitivities. This will enable investigators to rapidly identify ongoing or completed work by other agencies that may relate to an open or potential case. They will then be able to co-ordinate with the relevant agency to share information and ensure a joint approach. It is particularly important that the authority in charge of the investigation (i.e. the coordinating authority such as the prosecutor's office or ARO) has direct access to the widest possible range of data and information.

63. Information sharing can also play an important role in expanding the skills and knowledge of individuals and agencies involved in the asset recovery process. Access to information on assets and individuals is vital for effective asset tracing, but information and guidance on the asset recovery process itself is also crucial. By sharing information on the process, agencies can ensure practitioners are aware of legal and case developments, best practices, and useful contact points. This helps put practitioners in the most informed position to achieve successful asset recovery. In particular, relevant agencies should share and have access to information and guidance on the asset recovery process:

a. **Relevant laws, regulations, and precedent cases relating to asset recovery.** This ensures practitioners are up-to-date on relevant powers and how they should be applied. A poor understanding of the legal framework risks orders being overturned and assets being lost.

b. **Sample filings and pleadings for obtaining necessary orders and warrants.** Sample documents help increase efficiency by providing templates upon which practitioners can base their own filings. By sharing good examples, practitioners can ensure their own filings meet the appropriate standards, which increases the chances that orders and other requests will be granted.

c. **Contact information for relevant private sector institutions, national experts, international networks, and foreign liaisons or contact points** (see section

4.2.1). Individual contact points can make the difference between successful and unsuccessful requests for financial information, international co-operation, or domestic assistance. The asset recovery process may stall, or even collapse, where practitioners are not able to obtain information on the requirements for requesting international co-operation from another jurisdiction. Connecting practitioners with knowledgeable and willing contacts helps enable effective asset recovery.

d. **Available information sources for identifying and tracing assets. Identifying** assets can be problematic where the necessary information is held by different sources within different agencies' systems (e.g., customs, tax, and law enforcement) or held by the private sector. If investigators are not aware of what sources of information may be available, and what data can be obtained and how (especially in relation to sources held within other jurisdictions and within the private sector) there is a real risk that concealed assets will not be identified and, subsequently, not recovered.

2.2.4. Providing a clear domestic and international contact point

64. In jurisdictions with an established culture of asset recovery, all relevant individual practitioners actively pursue asset recovery. Depending on the case and the practitioner involved, there will be differing levels of knowledge and expertise of the asset recovery process. Strong operational co-ordination helps overcome these differences by ensuring that agencies and practitioners share information and draw on each other's expertise as described above. The various measures described above (including written guidance on agency roles and responsibilities and the asset recovery process) help less-experienced practitioners understand the process and maximise their effectiveness. Nonetheless, there will be times when these are insufficient. In such cases, **practitioners should have access to an easily identifiable, go-to contact point for advice and expertise on asset recovery**. The co-ordinating mechanism may provide this channel in light of its co-ordinating role, knowledge of asset recovery, and relationship with competent authorities.

65. An accessible contact point is also important for international co-operation. Access to an individual with knowledge of the country's asset recovery process is vital for tracing and recovering assets across borders. Such contacts can provide guidance on the types of formal and informal assistance available and the process and format for requesting assistance. This information can make the difference between successful and unsuccessful asset recovery; for example, if authorities unknowingly resort to a lengthy MLA process to obtain information that could have been obtained rapidly through informal channels, assets may end up dissipated. The network of CARINs and ARINs currently has designated contact points for 164 jurisdictions, and Interpol Global Focal Point Network provides contact points experts on asset recovery of assets linked to corruption in 131 jurisdictions[20]. As above, the role of the co-ordinating mechanism (for example an ARO) may make it a well-suited to acting as a contact point for international requests.

Recommendations

Drafted at a later stage.

This section will summarise, in bullet form, the measures to be implemented.

[20] As of 2017. See: INTERPOL's Asset Recovery Initiatives and Support. https://polis.osce.org/file/21321/download?token=wk2zHxwG

Effective tracing of assets

3.1. Measures and information to rapidly identify and trace assets

3.

66. Today's technology allows criminals to rapidly move the proceeds of crime between jurisdictions. For example, in cyber-enabled crime, victims are enticed to wire funds to accounts held by criminals, often layered through multiple financial institutions and through at least one foreign jurisdiction. Proceeds may be converted into assets such as property or concealed within a trust or a shell company with relative ease. The ease and speed with which funds can be converted and moved across borders or within jurisdictions are challenging for law enforcement and makes it increasingly difficult to trace and confiscate criminal proceeds. Law enforcement authorities must be able to trace proceeds with similar ease and speed - if not, they find themselves two steps behind the criminals, with the proceeds laundered and reintroduced into the financial system before authorities are able to trace them.

67. Phase one of the asset recovery project found that the initial tracing phase is particularly challenging. Many countries have taken steps to ensure freezing orders can be obtained and executed urgently. However, without accompanying measures to facilitate rapid tracing, authorities are unable to promptly identify and locate the assets prior to a freeze. As a result, assets are dissipated before authorities are able to trace and restrain them.

68. During the 2019 Joint Experts Meeting, the experts who took part in the workshop on asset recovery concluded that it is necessary for law enforcement to be able to identify and trace assets as soon as possible and ideally within a matter of hours (i.e. 24 hours) in order to prevent them from being liquidated. Criminals are more likely to move or liquidate assets if they have even a vague suspicion that the assets are under investigation, making it imperative that law enforcement is able to trace, identify, and freeze assets that may be subject to confiscation ideally within this timeframe, or as quickly as possible.

3.1.1. Ensuring tracing at the earliest opportunity

69. The first step in achieving rapid asset tracing is to ensure authorities act to trace assets from the earliest opportunity. The FATF Recommendations require countries to have in place a range of investigative measures relating to tracing proceeds (see Box 3.1 below), but there is no clear requirement on the timeframe within which jurisdictions must trace assets and at what point in an investigation this should take place. While R.38 requires "expeditious" action to respond to requests for assistance on asset recovery, there is no definition or expectation on the timeframe that satisfies this requirement. When assessing R.38, a small minority of MERs (8%) discuss the specific timeframes within which the assessed country can provide assistance on asset recovery, but of the 8% that consider timeframes, most look at the timeframes for freezing and confiscation measures rather than tracing.

Box 3.1. FATF Recommendations related to asset tracing

Recommendation 4

Countries should adopt measures … to identify, trace and evaluate property that is subject to confiscation.

Recommendation 30

Countries should ensure that competent authorities have responsibility for expeditiously identifying, tracing and initiating actions to freeze and seize property that is, or may become, subject to confiscation, or is suspected of being proceeds of crime.

Recommendation 31

When conducting investigations of money laundering, associated predicate offences and terrorist financing, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions, DNFBPs and other natural or legal persons, for the search of persons and premises, for taking witness statements, and for the seizure and obtaining of evidence.

Countries should ensure that competent authorities conducting investigations are able to use a wide range of investigative techniques suitable for the investigation of money laundering, associated predicate offences and terrorist financing. These investigative techniques include: undercover operations, intercepting communications, accessing computer systems and controlled delivery. In addition, countries should have effective mechanisms in place to identify, in a timely manner, whether natural or legal persons hold or control accounts. They should also have mechanisms to ensure that competent authorities have a process to identify assets without prior notification to the owner. When conducting investigations of money laundering, associated predicate offences and terrorist financing, competent authorities should be able to ask for all relevant information held by the FIU.

Recommendation 38

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value.

Source: FATF, *The FATF Recommendations* (2012).

70. Rapid and effective asset tracing requires authorities to be proactive, not reactive. Authorities must consider and prioritise asset tracing at the earliest inception of a case, ideally when intelligence is being developed and considered for an investigation. Higher-performing countries generally have systems in place to ensure asset recovery is considered at an early stage (see Box 3.2 below). By giving thought to asset recovery early in the development of a case, authorities can ensure that the investigative plan is sufficiently detailed and the team is adequately equipped to perform effective asset tracing. As part of this, authorities should consider what resources may be required, including specialised support such as forensic accountants or bulk data processing, to ensure this is available immediately whenever required. This avoids precious time being lost obtaining such resources at a later stage in the investigation.

71. These elements need to be considered and documented within investigation and recovery strategies. In more complex cases where asset tracing may be particularly difficult, it is essential that investigators with adequate knowledge of asset recovery form part of any investigation from the outset to help devise an effective and comprehensive recovery strategy detailing how this will be undertaken.

72. In practice, in order to identify and trace proceeds, financial investigations may run parallel to, or as a component of, criminal investigations, depending on a country's legislation and the nature of the case. Different civil and criminal powers may be available and used for each investigation or component of the investigation. Information obtained in the course of one investigation will be relevant to the other, making co-ordination and collaboration between the two processes essential. Accordingly, any recovery strategy and investigation plan must clearly define and record what each investigation is seeking to achieve, how this will be done, and what powers will be utilised to prevent duplication or gaps between the investigations and ensure there is a cohesive plan to identify and recover assets.

73. Financial investigations are defined as an enquiry into the financial affairs related to a criminal activity, with a view to identifying the extent of criminal networks and/or the scale of criminality, identifying and tracing the proceeds of crime or any other assets that may become subject to confiscation or developing evidence that can be used in criminal proceedings.[21] An investigation into a predicate offence, including a parallel financial investigation, has the objective of determining whether a predicate offence occurred, and is likely to reveal some information in relation to the suspect's assets.[22] A money laundering investigation is likely to investigate criminal proceeds, and therefore may replicate the identification and tracing of the assets that may become subject to confiscation.

74. Because the criminal investigation will seek and obtain information relevant to the financial investigation, and vice versa, regular communication and information-sharing is important. **Information and material obtained during the course of an investigation (or investigations) must be shared across both investigative teams** where the source of the information and how it was obtained permit it. If this does not happen, valuable information required to advance a case may be missed or its significance undervalued, which can lead to an ineffective investigation and an inability to trace and recover assets.

75. Depending on the requirements for disclosure within a country, there may also be serious repercussions for the disclosure process if information is not shared amongst all of the members of the investigating team. If information is not disclosed to a suspect at the right time, or is not disclosed at all when it should be, it can result in criminal cases not being pursued or being unsuccessful at court. If a criminal conviction is required before assets can be recovered, it can have a detrimental effect on the asset recovery process. Engagement and communication with other law enforcement agencies is also essential to ensure all material which may support an investigation is made available. This is important from a disclosure perspective but also ensures the opportunity to recover assets is not lost because of action taken by another organisation against the suspect in a case, be it a tax authority or another law enforcement agency.

76. Among the challenges identified during phase one of the asset recovery project was the requirement in some jurisdictions that LEAs investigate a predicate offence, should they receive information that an offence may have taken place. However, there may be no similar requirement to trace the proceeds of crime or carry out a parallel financial investigation. As a result, law enforcement do not always prioritise the tracing of proceeds early in an investigation, or they do not pursue assets at all, leading to the movement or dissipation of proceeds before recovery is possible.

77. R.30 requires LEAs to conduct a parallel financial investigation when pursuing all major proceeds-generating predicate offences, money laundering and terrorist financing

[21] See FATF Recommendation 30.

[22] Ibid.

cases. **Asset tracing should be considered undertaken whenever a parallel financial investigation occurs, with simultaneous investigations closely coordinated.** In jurisdictions where rules requiring mandatory investigations into predicate offences, money laundering or terrorist financing exist, similar mandatory rules for asset tracing investigations should also be considered.

78. **Asset tracing investigations should be considered at an early stage of every investigation into a predicate offence, money laundering or terrorist financing investigation,** and in all cases where there is evidence to suggest that assets may dissipate or be liquidated by the offender making them difficult or impossible to recover. Asset tracing should also include assets that do not represent the direct proceeds of crime, at least in cases where there is a risk that assets may dissipate or be liquidated. This is so that other assets held by the offender may be frozen or confiscated if necessary, in line with R.4.[23]

Box 3.2. Ensuring systematic consideration of asset recovery at an early stage

United Kingdom and Korea

The United Kingdom and Korea have put in place mechanisms to ensure the systematic consideration of asset recovery. Both jurisdictions have case management systems used by all investigation agencies, and they structure these systems to ensure that investigators routinely consider restraint and confiscation. Korea's Information System of Criminal Justice Services (KICS), for example, automatically identifies and flags cases with potential recoverable assets–either proceeds or property of equivalent value.

Source: MERs of Korea (para.174), the UK (para.181-185).

[Further examples to be added]

3.1.2. Providing rapid access to information

79. As above, LEAs should be able to trace assets swiftly, ideally in a matter of hours. To enable this, **LEAs must have rapid access to the information necessary for tracing.** If authorities do not have access to the information, lack the powers needed to retrieve the information, or have to resort to complicated processes to seek such information, law enforcement officers find themselves spending critical time and resource obtaining the information. This slows down the tracing process and can result in proceeds being laundered and reintroduced into the financial system before authorities are able to trace them. Extensive time devoted to seeking information also limits the number of asset recovery cases that law enforcement officers can pursue. This may mean that tracing occurs only in the most significant cases, or that officers conclude it is not worthwhile for them to pursue asset recovery in particularly complex cases where multiple sources of information must be retrieved.

80. While the FATF Standards require authorities to have access to information for tracing assets (see R.31), they do not set forth requirements on how and when this information should be available. Looking across MERs, a common factor in higher-performing countries (in terms of IO.8 ratings and/or proceeds recovered) is the ease and

[23] See FATF Recommendation 4.2: "Countries should have measures, including legislative measures, that enable the confiscation of the following, whether held by criminal defendants or by third parties: (…) property of corresponding value."

speed with which investigators can access information to identify and trace assets. Some examples are included in Box 3.3.

Box 3.3. Access to information for asset tracing

Direct access to a single, comprehensive database: Italy

Asset-tracing authorities in Italy have direct access to MOLECOLA, a tool used in financial investigations. MOLECOLA electronically imports bulk information from different databases, including law enforcement databases, the tax administration database, the land register, the companies register, and information from other open sources. MOLECOLA also analyses information according to the operational activities investigated, allowing investigators to obtain standardised reports suitable for investigations as well as operational analysis identifying the people involved in financial transactions and disparities in the incomes and expenses of individuals under investigation

Leveraging the FIU's broad access to information: Russia

In Russia, LEAs routinely make use of the FIU (Rosfinmonitoring) to identify and help trace criminal assets. Rosfinmonitoring has access to a range of information (either directly or upon request) that proves useful in locating criminal assets, including bank account registry, vehicle ownership registry, property/land registry, tax information, insurance information, import/export revenue and customs declarations, cross-border cash/bearer negotiable instrument declarations, notarised deals, court records, commercial databases, and open source websites.

Source: MERs of Italy (Chpt.3, Box.3), and Russia (para.251)

81. To effectively trace and identify assets, as highlighted by the examples above, investigators must have direct access to a range of databases and systems in which they can search or access financial and other information. This information should also be available to requesting countries via international co-operation (including informal co-operation through asset recovery networks (see Chpt.4)) wherever possible. Investigators should also be able to immediately search, display, and analyse data on assets registered in the name of the suspect, relatives, or other related persons and entities. Access to these systems facilitates the financial investigation of the subjects and helps investigators create a comprehensive financial profile. Aside from helping to locate assets, a complete picture of a subject's financial status can help authorities prepare for possible legal defences during the prosecution of the criminal or anticipate claimants in civil recovery actions.

82. The format in which information is received can have a significant impact on the ease with which investigators can understand and analyse the information. National authorities and regulators should consider whether to require or request institutions and businesses provide electronic information in a standard format or range of formats, with due regard to the impact of such a requirement, including the potential burden that can be put on smaller entities in particular. In complex cases when information is received in bulk, the format of information is especially important to facilitate rapid analysis. If technology permits, banking material, for example, should be requested in an accessible and editable electronic format to enable such material to be stored, shared, compared and contrasted, and reviewed using specialist investigation management software. The use of technology

saves resources and time in the analysis of bulk data and enables illicit money flows to be easily identified and traced within substantial volumes of information.

Rapid access to critical information

83. In the course of an investigation, certain information can be particularly crucial in LEAs' efforts to trace and identify assets. For example, registers identifying the owners of physical and financial assets (such as property, vehicles, accounts, or corporate structures) allow investigators to quickly identify assets belonging or linked to suspects. Having rapid access to this crucial information is vital to successful tracing. All investigative teams involved in asset tracing would ideally have immediate, electronic access to this information in up-to-date, searchable databases with appropriate authentications and certifications to ensure accuracy and confidentiality. If information cannot be immediately accessed directly by LEAs in a database, it should ideally be available from another competent authority within a matter of hours - if necessary, without the need for a court order, and without the need to set-up a new agreement or arrangement. Where information needs to be accessed via another competent authority, there should be a known, permanent contact point, and information should be disseminated electronically.

84. The types of information that all jurisdictions' competent authorities should have rapid access to on the above terms includes:

a) **Basic bank account ownership information.** This includes information on who currently and historically owns accounts, account balances, and the opening and closing of accounts. This information provides the foundation for many tracing analyses by allowing authorities to identify financial assets stored in bank accounts. In some countries, this information may be held by the government, e.g. through a centralised bank account register, or may be searchable through other mechanisms, such as FIU tools. Centralising bank account information in a register can be particularly beneficial by facilitating rapid access to this information as it removes the need to contact multiple financial institutions independently. If bank account information cannot be accessed directly, it should be available within a matter of hours through an alternative channel (e.g., via the FIU).

b) **STRs, CTRs, and cross-border currency declarations.** This information is critical to financial investigators and often contains invaluable and otherwise unknown information. This information should be available to LEAs from the FIU upon request and without judicial intervention. The FIU must be able to convey financial intelligence and operational, analytic products to LEAs. These, combined with other banking material, can form important records in the timely and effective identification and tracing of assets for recovery.

c) **Tax information** (both direct and indirect taxes). This should be available to LEAs from the relevant tax authority (or authorities), upon request and without judicial intervention. In many jurisdictions, obtaining this information requires court warrants, meaning that while it is quite possible to obtain tax records, it is not especially quick or convenient, which compromises the utility of this information. Tax information can be relevant for many reasons, including for checking income from renting out real estate or inheritance payments received or obtaining information on VAT-refunds pending. Tax information that may be necessary when identifying and tracing assets includes, name, address, date of birth, tax numbers, what type of tax returns are made, the tax years covered, records or notes of any previous or current tax investigations, record of any state benefits claimed, name of any accountant or tax agent being used by the individual etc. Tax records for the

individual and any businesses / companies they are involved in may be required depending on the type of investigation undertaken.

d) **Land and real estate records.** This includes title, transfer, and purchase price information. This information allows the tracing of property ownership and the identification of real property assets. Such assets are often used to hide proceeds, and are commonly used to fulfil value-based confiscation orders. Property records may be kept locally or nationally, but should be accessible electronically, available in a searchable format (e.g., by the name of the natural or legal person), and with relevant information such as construction permits. Although these records are not always available digitally, digitisation of such records greatly streamlines the tracing process and permits swift action to prevent real property from being sold or encumbered to frustrate its confiscation. These records should clearly indicate, where possible in light of privilege, confidentiality, and other sensitives, whether any confiscation proceedings are ongoing in relation to particularly properties. Such notices have the effect of clouding title to the property, putting all persons on notice that the property is subject to a pending action, and essentially preventing the sale of the property.

e) **Vehicle, aviation, and port information.** This allows investigators to identify physical assets belonging to or registered by the defendant or their associates. As with real property, such assets may be used to hide proceeds, or can be used to fulfil value-based orders. An online system linking LEAs with the vehicle/land transport authority can ensure relevant authorities are aware of vehicle ownership and registration.

f) **Basic and beneficial ownership information on legal persons and arrangements.** Basic and beneficial information on legal persons and arrangements should be readily and easily available to investigators and other competent authorities in a timely manner, as required by the FATF Standards.[24] This is essential given that the use of shell and shelf corporations by criminal actors is a major money laundering concern. For tracing purposes, it is critical that jurisdictions require adequate information on beneficial ownership in line with the Standards. Information from TCSPs formed within their borders may be particularly important to allow competent authorities to ascertain the real beneficial ownership of the corporate entity.

g) **Criminal records, LEA records (vehicle stops, property visits), and previous legal actions and proceedings**, including asset recovery actions such freezing and confiscation orders but also when cash or other alternative forms of value may have been seized. This helps investigators collect information on assets previously identified and confiscated and can help support a case for recovery by establishing that a suspect was involved in proceeds-generating crime. See also Chpt.2, section 2.2.1.

h) **LEAs should provide shared access to investigative databases** to the extent possible. This allows investigators to easily and quickly identify potentially duplicative investigations, which in turn avoids wasting asset recovery resources. It also lets investigators identify links between and among ongoing investigations, which may open unknown investigative leads, help identify other assets, and ensure agencies take a co-ordinated approach and do not unintentionally disrupt each other's investigations. See also Chpt.2, section 2.2.1.

[24] See FATF Recommendations 24 and 25.

85. Given the ease with which assets can be moved across borders, jurisdictions should consider making databases directly available to law enforcement authorities from third countries, whether public and available online to the extent possible or through another means. This allows foreign authorities to rapidly access this information for their own investigations. When authorities are striving to trace assets in a matter of hours, any time spent requesting information from foreign authorities (even informally) can cost precious time and increase the chances of assets being moved or liquidated. Domestic mechanisms can only go so far in facilitating tracing assets. The ability to quickly transfer criminal proceeds internationally, often multiple times, takes them beyond the legal reach of the jurisdiction in which the crime occurred.

Box 3.4. Immediate access to financial information

In Italy, a 2008 agreement between LEAs and ABI (Associazione Bancaria Italiana, the Trade Association of Italian Banks) provides LEAs and tax authorities with direct access to a database with information on bank accounts, financial products and contracts, wire transfers, and individual transactions handled by any bank, financial institution, or money transfer business subject to AML and financial regulation. The database allows investigators to search, display, and analyse information on financial data based on the name of the suspects, relatives, or related persons, and such searches automatically include any co-holder of the account or person delegated to operate. Access to this database is the essential initial step of any financial investigation.

[Source to be added]

Prompt access to other useful information

86. Other information may not be essential for asset tracing but is nonetheless important to allow investigators to build a more complete financial profile of a suspect, their associates and their assets. This information may be accessible directly from the particular natural, legal person or reporting entity, via another agency, or through a court order. Regardless, the information should be promptly available upon request, and, to the extent possible, with relevant authorisations easily obtainable, ideally within a few days if needed (i.e. no more than 2 or 3 days). Investigators also need to be proactive, contacting compliance personal or FIU staff as appropriate, and considering issues that may delay the execution of court orders. The use of warrants serves as an example – there can sometimes be a lag between the time frame of the records provided to investigators and more recent, and even real-time, financial activity. Investigators must be aware that such lags may impair the ability to seize, restrain, and confiscate assets, and should, where possible, word warrants to address this issue.

87. This information includes:

a) **Detailed bank records and account information.**[25] This includes transaction records, copies of individual items such as cheques and deposit slips, records of wire transfers and other electronic money transfers, account opening documents, CDD information and supporting documents, reports by bank personnel, loan and mortgage records, reports of cash deposits and withdrawals, etc. Financial institutions may also maintain photographs and video of bank customers taken at

[25] Banks defined as entities that accept of deposits and other repayable funds from the public. See glossary to the FATF recommendations.

the time of transactions, both in bank lobbies and at ATMs. Additionally, FIs may be able to provide unique data about the IP addresses used to access online banking and account websites. Authorities should be able to gain easy access to records and information held by bank branches, and other offices located within their jurisdiction. Authorities may also have tools that can be used, in certain circumstances, to obtain records from a foreign bank, with no branches or offices in the jurisdiction, where the bank holds a correspondent account with one of the jurisdiction's financial institutions.

Bank records and information are often kept in an electronic format, however, and there is wide variance in whether the bank's electronic information can be provided to investigators quickly and efficiently. Secure, electronic communication systems should be established to connect LEAs with financial institutions to facilitate requests for information on accounts and account-holders and ensure security and confidentiality of exchanged information. Some banks still print and scan records when electronic records are requested. Information should be provided in open electronic formats where possible, and countries should seek to establish a standardised format for providing information (i.e., different financial institutions should provide bank account information in a consistent format to facilitate analysis by competent authorities).

b) **Information and records from non-bank financial institutions, VASPs and DNFBPs that facilitate the movement or management of funds or assets**. Information from these entities allows investigators to identify asset holdings and movements and to build a complete financial profile of relevant individuals. For example, information on vehicle or property insurance can help identify the beneficial owner of a vehicle, who may not be identified on the vehicle registration. Home insurance information provides an indication of assets in a particular property, and the property's estimated value.

c) **Other businesses that may facilitate the movement or management of funds or assets.** This includes businesses that sell high-value goods such as art and antiquities, and luxury and high-performance vehicles. It also includes high-value goods that are easily movable such as watches.

d) **Information on social benefits.** This can identify financial assets being received by a suspect. Such information may be available from other government entities.

e) **Utility bills.** Information from water, property tax, gas, electricity, and other utility bills allows investigators to cross-check ownership information against real estate records to identify real property assets.

f) **Travel details from airlines and travel companies** may provide an indication of lifestyle and available assets, as well as information on how flights are paid for to trace debit or credit cards. Information on travel companions may also help identify associates.

g) **Information on acts and instruments approved by notaries or legal professionals**, such as wills, powers of attorney, divorces, and similar information, may help with the tracing of assets through shifting ownership and the identification of relevant third party asset-holders. This information should be available to the extent possible, while respecting due process, appropriate legal professional privilege, confidentiality, and privacy concerns.

h) **Information from schools and educational institutions**, especially tuition statements and payment records. Such information can reveal third-party payers or previously unknown accounts and affiliations.

Box 3.5. Judicial orders to obtain private sector information

In the United Kingdom, disclosure orders can be used in money laundering investigations and asset recovery investigations. Disclosure orders are issued by a court and authorise a request for information with which the recipient is obliged to comply. They are usually backed up by penal sanctions for non-compliance. Disclosure orders can be obtained requesting any business, organisation or individual subsequently served with a disclosure order notice to provide information and / or to answer questions. Once obtained, this order can stay in place for the entirety of an investigation and negates the need for further production orders to be obtained in relation to the suspect who is named on the disclosure order. This saves a significant amount of time by enabling subsequent information to be sought from the relevant entity without the need for a further court order.

Source: MER of United Kingdom (para.128).

3.1.3. Facilitating information-exchange with the private sector

88. Private sector institutions hold a range of information required to effectively trace assets and often act as the intermediary between LEAs and the asset itself (e.g., by managing bank accounts). When the private sector supports asset recovery efforts and has a positive relationship with LEAs, they are more likely to openly and actively share useful information to facilitate asset tracing. Ensuring buy-in from the private sector on asset recovery efforts is important to achieve an effective culture of asset recovery (see section 2.1.2).

89. As set out above, FIs, VASPs, DNFBPs, travel companies, education providers, and other institutions can help investigators identify assets and build a financial profile of suspects. Countries should have in place information access requirements in line with R.31 so that LEAs can access all relevant information when tracing assets. Dissuasive, proportionate and effective sanctions should be in place if legal and natural persons, include private sector entities, fail to provide this information in an appropriate form sufficiently swiftly.

90. In addition, jurisdictions should put in place mechanisms through which LEAs can engage and work with the private sector. This could include establishing public/private partnerships and individual contact points (see Box 3.6). Such initiatives help build relationships between LEA officials and private sector representatives, which, in turn, fosters trust and creates an environment in which the private sector more effectively support LEA efforts to trace and recover assets.

91. LEAs should approach relationships with the private sector as a two-way street. This includes the provision of feedback regarding how law enforcement has made use of information provided by the private sector for the recovery of assets. Engagement may also cover how the presentation of information or the content itself could be improved in future to better support asset tracing investigations. Intelligence provided by the private sector can only be improved if they are aware of what information types are required by law enforcement to advance investigations and how it is subsequently used within cases to trace and recover assets. In turn, law enforcement needs to be aware of what information is held

within the private sector, what powers are available to access this material, what the process is for obtaining it, and how long the process can take. Investigators should communicate with those holding the required information in advance to discuss and understand what material is held and in what format. Such discussions will help ensure the legal orders required to access such material are drafted to ensure all required material can be provided to the investigator within the agreed time frames and the priority in which the information should be provided.

Box 3.6. Effective engagement with the private sector

Public-private partnerships: The UK's Joint Money Laundering Intelligence Taskforce

In the UK, the Joint Money Laundering Intelligence Taskforce (JMLIT), created in 2015, is a partnership between law enforcement and the private sector to exchange and analyse information relating to money laundering and wider economic threats.

JMLIT holds weekly meetings between member LEAs and vetted bank representatives, supporting real-time requests for intelligence in ongoing law enforcement investigations. Members are briefed on an average of three cases per week by relevant LEAs and provide information in response to the requests on an ongoing basis to aid in the investigations. Private-sector members of JMLIT are also encouraged to refer cases to JMLIT using an information-sharing gateway which complements mandatory reporting obligations.

Since its inception, JMLIT has supported and developed over 500 law enforcement investigations, which contributed to over 130 arrests and the seizure or restraint of over GBP 13 million. In addition, over 3 000 accounts have been identified that were not previously known to law enforcement and over 1 500 accounts have been closed.

[Other examples relevant to asset recovery to be added]

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

3.2. Skills and experience to effectively identify and trace assets

92. Successful asset tracing consists of various components, requiring authorities to develop financial intelligence, conduct analysis, and undertake financial investigations. Deficiencies in these areas have a clear impact on countries' ability to recover assets; this is evident from MER ratings, which show a positive correlation between countries' ratings on IO.6 (use of financial intelligence) IO.7 (money laundering investigations and prosecutions), and IO.8 (asset recovery).

93. A successful asset tracing programme requires investment in each element of the tracing process, including resources for the hiring of experts, training, technology, and other tools. For countries that do not have a robust asset recovery system, this will require a significant up-front investment (in terms of the amount of resources and available tools) to create a long-term and sustainable structure that relies on skilled experts, expert trainers, and a range of tools, including IT experts and ad-hoc software and hardware. Such

structures should be adequately funded and provided with sufficient personnel to address the organised and financial criminality occurring domestically, as well as requests from foreign jurisdictions. As the asset recovery process becomes more established and successful, the resources recovered may fund the asset recovery system itself, although disrupting criminality and returning assets to victims should generally be the primary aim.

3.2.1. Ensuring access to necessary skills and expertise

94. The different components of the asset tracing process require different skills and expertise. As a result, the most effective tracing work is undertaken by a variety of personnel with diverse backgrounds, tailored to the nature of the specific case. Specialist skills, including forensic accounting, are often required to review information from financial institutions, lawyers, company records and accounts, personal tax accounts, etc. Competent authorities involved in the asset recovery process should have access to forensic accountants, financial intelligence analysts, and accounting and legal experts. Investigators also need experience in gathering business and financial intelligence and evidence, following the money, and identifying complex illegal schemes.

95. A lack of expertise across the asset recovery process is a common issue identified in the FATF and FSRB MERs. The MERs frequently recommend actions to increase resources and specialist asset tracing expertise, particularly for countries that are less effective in asset recovery. In practice, specialisation and expertise can have a significant impact on a country's asset recovery efforts, as demonstrated by the examples discussed below (see Box 3.7). Several higher-performing jurisdictions have had success leveraging the skills and experience available across national and regional LEAs by using specialised task forces, especially to investigate complex cases such as those with multi-jurisdictional aspects or involving sophisticated schemes. Intelligence and operations "fusion centres" can be used to de-conflict operations and investigations pertaining to specific targets, among other things, and leverage the expertise, human, and technological resources of various LEAs and other authorities.

Box 3.7. Specialised resources leading to positive asset recovery results

Australia: Criminal Asset Confiscation Taskforce

Australia established its Criminal Asset Confiscation Taskforce (CACT) in 2011. CACT is a multiagency taskforce that has primary responsibility over most federal restraint and confiscation actions. Its main policy objective is to draw on agency skills to target the criminal economy and take the profit out of crime.

In 2015, when Australia was evaluated, CACT was equipped with around 100 personnel with a variety of skills and expertise. Staff included forensic accountants, financial investigators, investigators, secondees and support staff. In addition, CACT was supported by over 30 in-house litigation lawyers and litigation assistants.

At the time of Australia's mutual evaluation, CACT had been operational for only two years meaning it was difficult for the assessment team to assess the impact of its efforts

on the recovery of criminal proceeds. However, restraint figures had surged under CACT, which was seen as a positive sign.

Sweden: Expertise within the FIU

Sweden's mutual evaluation report noted that Fipo (Sweden's FIU) and LEAs consistently use financial intelligence for asset tracing , in part as a result of Fipo's long-standing expertise in this area. Fipo has dedicated staff available to identify and trace assets, and to provide assistance to LEAs with complicated cases of asset tracing.

In addition, Swedish LEAs have developed guidance and training on asset-tracing investigations and prosecutions, which enables them to more effectively follow the money and deprive criminals of proceeds.

The UK

The UK has specialised officers and teams to facilitate asset recovery. All prosecutorial agencies have specialised proceeds-of-crime teams that provide advice to law enforcement on asset recovery. All LEAs, including regional police forces, similarly have specialised proceeds-of-crime units providing in-house expertise. These units include financial investigators who have accreditation and training from a central Proceeds of Crime Centre and who are able to exercise relevant powers, including search, seizure, and application for restraint.

The MER of the UK, conducted in 2017, found that the specialist teams had proven effective. In one example, one of the various specialist teams, the Proceeds of Crime Intervention Team within Her Majesty's Revenue and Customs, focused solely on cash interventions for customs offences, and seizing GBP 13.5 million and forfeited GBP 7.5 million over a two-year period.

Source: MERs of Australia (para.105-106), Sweden (para.112 and 197), and the UK (paras.197-198).

96. In addition to specialist financial investigative skills, asset tracing investigators should have access to the skills required to undertake the other aspects of the criminal investigation, such as interrogating or assisting with interrogations of suspects and adequately presenting the financial information to the prosecution for presentation in court. Staffing investigative teams with only financial experts and analysts may give poor results. Investigative teams should have a broad range of professional skills that cover both 'follow-the-money' and 'follow-the-person'/'know-your-target' approaches, in order to obtain information from different sources. Teams therefore should be equipped to exercise more traditional investigative techniques, in addition to financial investigative techniques, e.g. cyber-investigation (to verify IP addresses and other online data), surveillance reports (to obtain information on the existence, use, and management of assets), witness questioning, etc. Wide-ranging expertise and experience allow the investigative team to obtain significant results for the benefit of both asset tracing and the wider criminal investigation.

97. In a given case, tracing issues can range from the extraordinarily complex to the relatively straightforward. Reviewing bank records for activity involving particular persons or entities, or certain types of transactions, for example, can be done by investigators with less-advanced training, whereas conducting a net-worth analysis or mining financial intelligence requires drawing on a broader range of sources and more sophisticated skills. Recognising these differences allows for an expanded pool of personnel to be put in place that draws on individuals with a range of skills and experience suitable to the specific task in hand. This also provides opportunities to train less experienced officers in differing areas

of asset tracing Additionally, in more complex cases, having staff with asset recovery knowledge and expertise involved in the investigative planning for a case is essential to ensure the recovery of assets is adequately considered from the earliest stages and to ensure clear direction is provided from the outset of a case.

98. Tracing challenges can also evolve throughout the course of an investigation, and investigators need to be fully aware of this. It is essential that after any asset recovery investigation, practitioners undertake a full debrief. This will ensure best practices and any lessons learned are shared and that any intelligence about how criminals move and hide their assets is understood and recorded, helping to identify emerging threats. Such information should be shared nationally within a jurisdiction and should also be considered for dissemination at the international level.

3.2.2. Providing training and guidance to LEA officers on asset tracing

99. In countries with an established culture of asset recovery, asset tracing is an integral part of all investigations into proceeds-generating offences. This requires all LEA officers working on such investigations to have sufficient understanding and knowledge of the asset recovery process. To ensure the necessary expertise is available, all new relevant LEA officers should receive thorough training in financial investigation and asset recovery. In addition, they should receive ongoing training throughout their career in order to address individual and system-wide weaknesses, understand new methods used to conceal assets, and adapt to new technologies.

100. While all LEA officers should have a basic knowledge of the asset recovery process, the specific knowledge required by individual officers will depend on the role and function of the particular officer. For example, investigators working on cybercrime cases may need a deeper knowledge of how to trace virtual assets, while those working on drug offences may require more expertise in the challenges of tracing cash. Training should therefore be job-specific (e.g. training for customs officers will have a much different curriculum than training for national investigators investigating white-collar fraud). The specific knowledge and expertise required will also depend on the particular risks and crime profile of the jurisdiction. Nonetheless, training should generally cover:

a. intelligence development skills to identify various types of assets (properties, businesses, high-value vehicles, high-value jewellery, etc.), knowledge of how assets are owned or controlled, and the impact of different kinds of ownership;

b. financial analysis and tracing techniques (including the use of social media to trace, identify, and geo-locate assets), available tools, information, and powers;

c. schemes to launder money and conceal property through real people (e.g., family members, underlings, straw men, professionals) or legal entities (e.g., trusts, offshore companies, foundations, NPOs, shell companies), including how to trace assets through individuals or entities operating as receiving parties, facilitators, accomplices, or abettors, whether willing or negligent;

d. the banking system and financial context, relevant legislation, and available recovery tools, including how to trace assets abroad; and

e. available IT tools and how best to use and exploit this technology (see below).

101. The FATF Guidance on Financial Investigations[26] provides a useful reference point by highlighting tools and skills needed to follow the money and trace assets. The guidance

[26] FATF *Operational Issues: Financial Investigations Guidance* (June 2012).

notes that identifying proceeds of crime, tracing assets, and using temporary measures such as freezing and seizing, when appropriate, are key objectives of financial investigations. A section is devoted to asset recovery, and highlights a number of challenges and best practices. The FATF has also adopted a non-public Guidance on Financial Investigations Involving Virtual Assets, which addresses challenges with investigations and confiscation specific to those assets. The guidance contains a detailed section on seizure, confiscation, and disposal of virtual assets. Both sets of guidance should be distributed to all relevant authorities involved in tracing assets as part of asset recovery training.

3.2.3. Providing asset recovery agencies with necessary IT resources

102. In addition to human resources, LEAs involved in asset recovery must have the IT systems and tools necessary to support their functions, including undertaking bulk data analysis. Due to the volume of electronic information gathered in financial investigations, particularly large and complex ones, IT systems and tools are critical for assisting investigators in their analysis. Technology can also help demonstrate schemes and tracing to various parties in a digestible format, such as charts, flow charts, link charts, and other graphics. This can help investigators explain the scheme and financial tracing to prosecutors in a distilled and simple manner, so prosecutors can, in turn, make legal determinations and charging decisions based on the relevant facts. These recreations and representations can also be used in witness interviews, in obtaining search warrants and in other legal processes involving a judge, including prosecuting a case.

103. Required technology includes:

a. Up-to-date and powerful computer hardware, including hardware with scanning and printing capabilities (including for producing colour and oversized charts). Scanning hardware is critical to digitise and review massive quantities of bank records. Investigators also need access to a "cold computer" unlinked to any government IP address, so that open-source research can be conducted anonymously.

b. Spreadsheet and relational database software, along with a word processor.

c. Software and programmes for data and information analysis, including link analysis and analysis of banking material (e.g., BankScan, IBM's i2, Excel, SAS, Tableau, and Palantir). Programmes should be available to review large volumes of electronic information; detect patterns and nodes; map financial flows, including amounts, parties and counterparties; identify common phone numbers, addresses, and bank accounts; and generally perform in seconds what it might take a human days or weeks to accomplish.

d. Access to third-party databases. This includes electronic legal discovery databases and commercial databases useful in asset tracing (e.g., CLEAR, Dun & Bradstreet, Sayari, WorldCheck, Lexis Advance).

e. Access to a programme providing blockchain analysis for virtual assets.

f. "Dummy" social media accounts to search open and public information (i.e., not to engage in undercover work per se, but for viewing purposes).

g. Software for information storage and management.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

International framework to facilitate cross-border asset recovery

104. Given the ease and speed with which criminals are increasingly able to move proceeds between jurisdictions, effective asset recovery is dependent on prompt and effective cross-border co-operation and collective action.

4.

105. Cross-border co-operation in asset recovery matters, however, can be complicated and labour-intensive. A number of overarching factors contribute to the difficulty. Jurisdictions must devote sufficient political will and prioritise asset recovery and co-operation (see Chpt.2). Institutions and personnel must have adequate expertise to effectively respond to asset recovery requests for identifying and tracing assets (see Chpt.3). Measures must also be put in place to respond to asymmetric legal frameworks and mitigate the speed with which assets can be disguised or moved. Finally, effective co-operation requires clear, global channels for communication and information-exchange, as well as robust domestic measures to allow countries to rapidly and comprehensively respond to requests for assistance.

4.1. Measures to rapidly provide co-operation on AR

106. The FATF standards currently require countries to have certain domestic measures in place to provide rapid co-operation on asset recovery. R.38 requires countries to "take expeditious action" to respond to requests relating to asset tracing and recovery. However, the Standards do not provide a clear definition of "expeditious" and FATF precedent has not provided a clear answer. As a result, the vast majority of MERs do not mention a specific timeframe for responding to requests relating to asset tracing when covering R.38[27]. R. 40 requires countries' competent authorities to be able to "rapidly, constructively and effectively provide the widest range of international cooperation," including to identify and restrain assets. However, as the focus of R. 40 is very broad, MERs do not go into detail on an assessed jurisdictions' ability to provide rapid co-operation in specific areas, for example, on tracing assets. The FATF may also consider a country's ability to provide effective co-operation on asset recovery as part of IO2 (on international co-operation). However, the MERs do not consistently cover co-operation on asset recovery specifically,[28] and where considered, they generally focus on asset repatriation. At the same time, the MERs do demonstrate that jurisdictions face challenges in responding quickly to cross-border requests, which can exacerbate asset flight.

Box 4.1. International standards requiring rapid co-operation on asset recovery

[27] In a sample of 59 jurisdictions evaluated during the current round, 92% did not refer to a specific timeframe for R.38.

[28] Of a selection of FATF and FSRB reports, 41% did not touch upon the assessed country's effectiveness in its co-operation on asset recovery.

FATF Recommendations

Recommendation 38

"Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. …"

Recommendation 40

"Countries should ensure that their competent authorities can rapidly, constructively and effectively provide the widest range of international cooperation in relation to money laundering, associated predicate offences and terrorist financing. Countries should do so both spontaneously and upon request, and there should be a lawful basis for providing cooperation. Countries should authorise their competent authorities to use the most efficient means to cooperate. Should a competent authority need bilateral or multilateral agreements or arrangements, such as a Memorandum of Understanding (MOU), these should be negotiated and signed in a timely way with the widest range of foreign counterparts.

Competent authorities should use clear channels or mechanisms for the effective transmission and execution of requests for information or other types of assistance. Competent authorities should have clear and efficient processes for the prioritisation and timely execution of requests, and for safeguarding the information received."

Interpretive Note to Recommendation 40

"Competent authorities should be able to conduct inquiries on behalf of a foreign counterpart, and exchange with their foreign counterparts all information that would be obtainable by them if such inquiries were being carried out domestically." (para.5).

107. In complying with the Standards, countries should ensure that they execute requests relating to asset recovery in a timely manner. In particular, jurisdictions should strive to respond to requests for information and preliminary freezes within a matter of days of receiving the request. Jurisdictions should also execute MLA requests for freezing, seizure and confiscation as quickly as possible to prevent the movement or dissipation of assets, particularly if there is a risk that criminals might move the assets. Ideally, jurisdictions should respond to such MLA requests within a month or so of official receipt, unless the request is urgent and clearly identified as such. In those cases, jurisdictions should complete a preliminary review and feasibility assessment as soon as possible, and respond back to the requesting jurisdiction, within around 72 hours of receipt of the request if possible. The sooner that responses are processed and a dialogue is initiated, the faster the process will be overall, as information cooperation and dialogue in support of MLA requests is required in almost all cases. At the same time, jurisdictions may require the information to be checked or verified, which can take several days, in particular in more complex cases.

108. In addition to flagging requests as "urgent," authorities should also identify matters of greater priority as part of the request and provide details on why the matter is considered a priority. This will help requesting countries prioritise responses on their side. Response timelines may also hinge on the type of asset – requests related to real property, for example, may be less urgent than those involving cryptocurrency.

4.2. Strengthened mechanisms and tools for international information-sharing and co-operation on asset recovery

109. Finding a legal basis upon which to co-operate on asset recovery is not usually a roadblock, given the proliferation of bilateral treaties and multilateral conventions containing asset recovery-specific clauses and general provisions for assistance, as well as the myriad of agreements and MOUs providing for information exchange.

110. There are three core international conventions supporting cross-border asset recovery efforts: the United Nations Convention against Corruption (UNCAC); the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the United Nations Convention against Transnational Organised Crime (UNTOC). The FATF Recommendations require jurisdictions to take immediate steps to be a party to and fully implement all three.[29] A number of regional treaties and conventions also exist, including the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism and the Inter-American Convention against Corruption. In addition, a large number of bilateral treaties exist between jurisdictions, which the first phase of this project underlined as particularly importance in cross-border asset recovery.

111. Despite this framework, international co-operation on asset recovery remains a key challenge. International cooperation generally involves a two-step process. First, countries make informal contact to identify and trace assets. Then, MLA requests are sent to freeze and seize the assets (and later, to confiscate). In terms of international cooperation, responding to MLA requests, however, are often problematic, with requests often not acted upon or actioned with significant delays. These delays or failures to respond may be due to the time needed and significant resource often involved in responding to MLA requests, with the lack of support from the competent authorities' hierarchy devoting resource in support of responding to MLA requests a common problem. Delays may also be caused by inconsistencies of legal framework or the many other practical challenges assessed during phase one[30]. Ultimately, important weeks and months can be lost in the formalities of MLA request drafting, exchange, and approval.

112. For countries that are not routinely involved in international asset recovery, MLA requests pose many challenges. For example, such countries often fail to articulate the connection between the assets and the alleged criminal scheme (i.e., they do not explain why the assets are thought to be derived from crime or connected to the listed suspects). This is a common problem that considerably slows the already-lengthy MLA process. Even in experienced countries, requests from individual investigators or prosecutors can vary widely in quality in the absence of adequate oversight by knowledgeable central authorities or co-ordinating offices. Other challenges identified during phase one included problems with language and terminology.

113. Another structural challenge is in the area of non-conviction-based confiscation. The presence or absence of non-conviction-based confiscation mechanisms is an important asymmetry between national systems that can create roadblocks to cross-border cooperation in asset recovery efforts. As noted above, non-conviction-based confiscation can be an effective method of recovering criminally derived property, and especially so

[29] R.36 of the FATF Methodology states that countries should become a party to and fully implement the Vienna Convention, the Palermo Convention, the United Nations Convention against Corruption (the Merida Convention) and the Terrorist Financing Convention.

[30] See FATF/RTMG(2019)11

where the wrongdoer has moved the property across borders to shield it from law enforcement's recovery efforts. Nonetheless, if non-conviction-based confiscation is not available in the jurisdiction that receives a cross-border asset recovery assistance request, the request may be denied on that basis alone. If these jurisdictions can take steps to recognise and enforce such requests – even if they opt not to pursue non-conviction-based confiscation domestically – more bad actors would be deprived of their criminally deprived property.

114. While there is no acute need for new legal instruments on international co-operation on asset recovery, there is room for a strengthened, expeditious way of executing the existing agreements and exchanging information. Several informal practitioner networks exist to support informal co-operation and facilitate formal MLA requests on asset recovery. These mechanisms are vital in supporting the cross-border exchange of information, including the ongoing bilateral exchange of information necessary for the preparation and execution of MLA requests. The primary group of networks involved in this work is CARIN, and the ARINs. The StAR/Interpol Global Focal Point Network provides a separate network for points of asset recovery experts for corruption cases.

115. While the existing networks provide useful mechanisms that enable the exchange of information, they are not global in nature and they do not cover all countries and topics, which limits the information that can be shared and assistance provided. While 164 of the 205 FATF and FSRB members participate in existing asset recovery networks (particularly CARIN and the ARINs), there are gaps in coverage. Over 40 jurisdictions lack their own regional ARIN or are not connected to an established ARIN. The StAR/Interpol Network, meanwhile focuses primarily on cases related to corruption only. There is no singular, universal channel for secure information-exchange and communication between and among jurisdictions on asset recovery.

116. The rest of this section focuses on the aspects of a strengthened network, aimed at addressing the various practical and operational challenges identified during phase one, some of which are cited above. The nature of each challenge is not restated again under the specific proposals.

Table 4.1. Practitioner networks on asset recovery

Network	Countries	Contact point(s)	Function and scope
CARIN	61 jurisdictions covering most of Europe, as well as the US, Canada and Russia.	LEA officers and/or judicial experts.	CARIN contacts provide their peers support on information-exchange, MLA drafting, training and experience sharing related to all aspects of asset recovery, and initiating exchanges through standards channels (e.g. via email and phone) for operational information exchange using existing secure channels or encrypted communication.
ARINs	Regional ARINs exist in: • Southern Africa • East Africa • West Africa • Asia Pacific • West and Central Asia • The Caribbean • South and Central America	LEA officers and/or judicial experts.	Like CARIN, the ARINs contact points support information-exchange, MLA drafting, training and experience sharing related to all aspects of asset recovery, initiating exchange through standards channels (e.g. via email and phone) for operational information exchange using existing secure channels or encrypted communication such as SIENA, I24/7 and IT platforms of RAGG and ARINSA

	Certain major jurisdictions and regions do not participate in any ARIN. Gaps exist inc the Middle East and North Africa, Central Africa, and Asia.		
StAR/Interpol Global Focal Point Network	133 jurisdictions, open to all INTERPOL members.	LEA officers	The StAR/Interpol network supports information-exchange and experience sharing. Originally set up to respond to help share information relating to the recovery of assets linked to corruption. For particular cases, information can be exchanged using Interpol's secure SECON. SECOM was launched in July 2013 although cannot be used for exchange of personal data. Secure exchange via the Interpol channel I24/7.
Egmont Group	164 jurisdictions. Membership is required under the FATF Standards (R.29).	FIUs	Egmont supports co-operation and intelligence sharing, including the sharing and exchange of financial intelligence for the purpose of tracing and recovering assets. Egmont also provides training and technical assistance and contributes to policy development. Member FIUs abide by information-sharing principles and exchange information using Egmont's secure channel. Some FIUs have a direct role in asset recovery while others do not.
International Anti-Corruption Co-ordination Centre (IACCC)	6 jurisdictions (Australia, Canada, New Zealand, Singapore, the UK, and the US)	LEA officers	The IACCC supports information-sharing, training and experience sharing on grand corruption and related asset recovery.

117. In light of the problems mentioned above, and given the global nature of both money laundering and the challenges faced with confiscating assets, it is critical that jurisdictions work to develop an expanded point-of-contacts system, information-sharing mechanisms, and other tools – discussed below – allowing for operational communication and co-operation between as many countries as possible to help ease the process of seeking and providing confiscation assistance. These efforts would lay the groundwork for the eventual development of a one-stop-shop for asset recovery, in the form of a truly world-wide network covering stolen assets arising from all predicate offences. As above, there is currently no such mechanism that fully plays this role. To be most effective, the vast majority of countries would need to use the network, with the major destination countries actively participating and the most experienced countries in international confiscation leading the way. The network could be built on the network already provided by the CARIN and ARINs, with affiliation (similar to RRAG[31] and GAFILAT and some of the other networks) to the FATF and each of the FSRBs.

118. The contact points, mechanisms, and tools discussed in this section would all help jurisdictions better share leads and locate assets; specify the details of those assets; facilitate communication among designated points of contact; and provide pre-written guidance on how to send actionable requests for freezing or confiscation. Eventually, as these areas coalesce into a global asset recovery network, the network could become the vehicle for formal requests, thus collapsing the two-step process of searching for and actually securing and confiscating assets under one umbrella. The rationale for an eventual global network

[31] Red de Recuperacion de Activos del GAFILAT or GAFILAT Asset Recovery Network.

is two-fold: it is the natural outgrowth of the success of the existing regional networks, and early adopters would bring more members, which would expand the network and increase the utility of the group over time.

119. The networks already in place demonstrate the potential impact of a global network, with the capacity, breadth of mandate, and truly global membership to support cross-border asset recovery on a day-to-day basis. The number and significance of the challenges faced also demonstrates the need for a single consolidated body with the resources and mandate to actively overcome these challenges on an ongoing basis.

4.2.1. Establishing clear points of contact for asset recovery requests

120. The starting point for improved cross-border asset recovery – and an eventual global network – is the identification of a contact point in each jurisdiction that has the ability to securely exchange information between and among other contact points. This network of contact points could build on those already used by the regional and other networks. These points of contact should have the powers of prosecutors and police directly or indirectly. In some countries, this may be an ARO. Designating such a contact point across all jurisdictions would allow countries to better gather information, including to identify and trace assets and advance investigations. Formal production of evidence generally requires an MLA request – at least for the medium-term - so it is critical that the contact points co-ordinate with the central authority, if one exists.

121. The contact points should have the resources (human, financial, and technological) to actively participate in asset recovery efforts in accordance with their jurisdiction's risk and context. Without staff possessing sufficient legal and investigative authorities, and without personnel dedicated to responding to foreign requests, backlogs can ensue, preventing timely action. When it comes to asset recovery, the burdens of incoming work are not evenly distributed. Countries considered 'destinations' for criminal proceeds are likely to receive a much higher number of requests, and thus require sufficient expertise and resource to prevent unresponsiveness or delays. The key jurisdictions that are magnets for illicit proceeds are well known, and efforts should be made to help ensure that these countries have the necessary resources, capacity and will to provide assistance. As a matter of second priority, all countries, but especially those categorised as 'transit' points, should strengthen their capability to swiftly restrain assets flowing into and out of their jurisdictions.

122. Taking this approach would attack the problem at two ends: the so-called havens would have the expertise and bandwidth to recover assets, as the factors that make those countries attractive for criminal investment may take time to change, while the corridors, given their role in preventing dirty money from reaching its destination, would also need to slow down the flow of criminal assets. In fact, some jurisdictions are used by criminals precisely because their financial sectors have weak controls or, they have poor records of international cooperation. These countries represent black holes where a money trail can go cold, even if the assets are not likely to remain long in such places.

123. The individuals staffing the contact points can also serve as a repository for global expertise, including the sharing of best practices. This would allow for upskilling and facilitation of knowledge-sharing on legal systems and laws related to financial investigations and asset recovery procedures. The practical experiences of this group of contacts may also help inform the international work including development of standards associated with asset recovery, including the FATF Recommendations.

4.2.2. Systems and tools for secure information-exchange and improved collaboration

Existing networks do not all provide a dedicated, secure platform for exchanging information. For exchange of operational information, many rely on email and use SIENA, a platform which enables the swift exchange of operational and strategic crime-related information among Europol's liaison officers and experts, EU Member States, and third parties with which Europol has cooperation agreements (Europol, 48 jurisdictions)[32]; and I24/7, a secure global police communications system that links law enforcement in all Interpol member countries and enables authorized users to share sensitive and urgent police information with their counterparts around the globe (Interpol, 194 jurisdictions)[33]. This limits the speed and information that can be confidently exchanged through the networks. An expanded, secure system for rapid information exchange on assets, similar to the secure platforms operated by certain ARINs (e.g., RRAG, ARINSA[34], and ARIN CARIB[35]) is critical for improving cross-border asset recovery. By permitting the secure sharing of information, members would be better able to collaborate and determine whether assets are located in a certain jurisdiction and whether a formal MLA request is justified. Updates and information could also be securely shared via the system during the execution of any MLA request. By providing a platform for secure, rapid information-exchange, the system could minimise asset flight by alerting agencies to potential criminal assets and prompting swift freezing or seizure of the assets, where appropriate.

124. In addition to its use during asset tracing and MLA requests, a secure information-sharing system could also help countries recover assets at the end of the process. It could provide a platform for countries to share information on outstanding confiscation orders, in order to identify additional assets for realisation. This would serve to close the gap between judgments achieved on paper and results obtained by the state.

125. Additionally, such a system could incentivise and enforce timely responses to requests. By making requests through this platform, countries could automatically track how long a request was pending, and countries would be alerted to lagging requests. The ability to make affirmative requests could also be tied to the ability to respond to valid and well-constituted requests from other counties, making the system mutually beneficial.

126. A common problem in asset recovery co-operation is a failure to adequately identify necessary elements in the request, e.g. the connection between the assets and the suspected criminality. Standardised templates could help to address this issue by laying out the key information needed, both to make a request and to respond to one. For submitting requests, the model could be as simple as an online form with a drop-down menu of countries (and, eventually, treaty and other legal bases for the request) to which the request could be sent electronically. This model, would allow requests to follow a predictable pattern, thus facilitating the making and executing of requests. Such a template could include information on whether the requesting country has previously sought any information from the requested country (and if so, the agency requested and any specific contact point, the response, the dates and timeframes, etc.) to prevent duplication in the requested country.

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[32] See: https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena

[33] See: https://www.interpol.int/en/How-we-work/Databases

[34] Asset Recovery Inter-Agency Network for Southern Africa.

[35] Asset Recovery Inter-Agency Network for the Caribbean.

127. Similarly, templates could be developed for certain types of responses. For example, when responding to a request for asset-tracing or information on potential assets, requested countries could fill in a standard template covering whether the asset was present in the jurisdiction and available for restraint or confiscation (and if the asset has been moved, assistance on further tracing); whether the asset was viable (and if not, why not); information on any third parties, and information on any suspicious ownership transfers.

128. Additionally, and as part of the development of these templates, jurisdictions could establish standard terminology for use during international co-operation to ensure countries have a shared and collective understanding of the relevant terms. Such standard terminology across jurisdictions would facilitate requests, even if domestically, usage and terminology were different.

129. Standard templates and terminology could help overcome common difficulties in incomplete, confusing, or poor-quality requests. To further mitigate this issue, and to help countries focus and streamline their requests, each jurisdiction could develop guidance, using a standardised format, on the assistance each country can provide. This possibility exists under established networks, but it is not done or available more broadly. This guidance could cover, among other things:

a) what information is available (including where information is publicly available without prior request);

b) how to request information (including language requirements);

c) to whom the request should be sent and how (ideally, the answers to the who/how questions are simply that requests should be sent through the network itself);

d) what information to provide (utilising standard templates);

e) the circumstances under which information can be provided; and

f) general information on asset-sharing and repatriation (e.g., whether an agreement or treaty is required, whether the country deducts costs and at what rate, whether victim restitution is prioritised over repatriation, etc.).

130. Countries could share this guidance bilaterally with requesting countries as an initial step, to help make requests as fruitful as possible. Eventually a global network could serve as a central repository for this guidance. By sharing general stances and information on asset-sharing and repatriation, jurisdictions could incentivise requesting parties to co-operate fully to achieve timely assistance.

131. Feedback on requests and information shared could also help countries improve future requests and responses, and it promotes accountability. Existing networks do not typically require feedback, but this could be built into the information-sharing system and templates discussed above. Countries would thus be required to provide feedback as part of the request process, including on the quality of the request or response, the use of the information provided, and the eventual outcome of the case.

132. Finally, jurisdictions could consider ways to streamline the sharing of assets after final confiscations. Although a range of bilateral agreements are in place for international asset sharing, they are not comprehensive, as noted above. Jurisdictions could develop a bank of sample, ad-hoc agreements that could be used to suit their needs. Eventually, an expanded global network could serve as an escrow party, if requested, including for the proceeds of interlocutory sales. The network might explore and offer blockchain-based asset sharing, for which it could –maintain VA wallets and cold-storage facilities, and establish relationships with reputable and regulated exchanges for countries that may not have expertise in virtual asset recovery.

4.2.3. Agreeing on rules and principles for co-operation and information exchange

133. Existing networks do set principles for co-operation, increasing the accountability of members. Similarly, jurisdictions would need to agree to principles or rules of behaviour, including confidentiality requirements, as a condition of using each of the mechanisms and tools discussed above – and for membership in the eventual global network. Breaches of such principles could result in jurisdictions' losing their access to these mechanisms, tools, and the eventual global network. .

134. As part of these principles, and among other things, countries could agree to abide by set timeframes for responding to requests, whether informal or formal. This would ensure timeliness, help manage expectations, allow predictability in domestic investigative plans, and set a clear point at which the request is considered "delayed" and should be revisited by the requesting country.

135. A strengthened network could also incentivise and enforce timely responses to requests. By making requests through the network's platform, countries and the network itself could automatically track how long a request was pending, and alert countries to lagging requests.

136. In sum, stronger mechanisms and tools, such as information-sharing systems, templates, and other mechanisms and tools, would help to centralize and streamline asset recovery operational exchanges and casework and enable the better execution of MLA requests on asset recovery. This would help address the practical and operational challenges with international cooperation for asset recovery identified during phase one. Eventually, these efforts would coalesce into a strengthened global network, which would be nearly universal, be staffed appropriately at the country level, have strong incentives for timely participation (with consequences for inadequate participation), and be tied to compliance with the international AML/CFT Standards (e.g., the way Egmont Group membership is now incorporated into the FATF Recommendations). The network would also aim to eventually be the venue for formal MLA requests, helping to provide a new-streamlined system for international cooperation that could overcome the inflexible and drawn-out nature of treaty-based assistance and better address the rapid movement of criminal assets in the modern world.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

4.2.4. Enabling the direct enforcement of foreign freezing and confiscation orders

137. In addition to the mechanisms and tools above, cross-border asset recovery could benefit from a more widespread use of direct enforcement of foreign freezing and confiscation orders. The ability to directly enforce orders from certain foreign jurisdictions is a measure seen in some higher-performing countries, often subject to certain limitations (e.g., dual criminality requirements or restrictions on the countries to which this measure applies) (see Box 4.2). Judicial orders, or approvals by senior officials, for example, are likely to be necessary in many jurisdictions, an important part of due process. Regardless of these and other required processes, direct enforcement of foreign orders is one of the most efficient ways to act on behalf of another country and makes countries much more

effective at providing confiscation assistance when compared with the opening of a domestic case.

Box 4.2. Direct enforcement of foreign confiscation orders

The United States has two ways to assist other countries with, "coercive measures" like restraining, seizing, and confiscating or forfeiting (these are not mutually exclusive):

i. by taking actions on behalf of the foreign authority to advance the foreign asset confiscation proceedings; or

ii. by initiating its own forfeiture action as part of a criminal case or a non-conviction-based forfeiture (in rem action), often based on evidence provided by the foreign jurisdiction."

In Canada, the legislation on mutual legal assistance permits the enforcement of foreign confiscation orders subject to the approval of the Minister of Justice. "Upon approval by the Minister, the Attorney General may file the judgment with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as the judgment of that court and may be executed in Canada pursuant to domestic law." As to the evidentiary requirements, "Foreign confiscation judgments may be enforced in Canada if the affected person has been convicted of an offense in the requesting country, if the offense would be an indictable offense under Canadian law, and if the judgment is final. The judgment may extend to any offense-related property or any proceeds of crime."

Source: MERof the US (para.430); Stephenson et al. *Barriers to Asset Recovery* (2011), pg.115.

138. Whether a particular order can be directly enforced will depend on whether the request meets the receiving country's criteria and will be decided on a case-by-case basis. Countries should also have procedures for enforcement that require the merits of a case, such as whether the property is subject to confiscation, to be challenged in the requesting country; as opposed to in the enforcing countries. Moreover,

a. **Judges are asked to respect the findings of their counterparts in other countries**. They should not be asked to give recognition to non-judicial orders, unless there is no alternative in the legal system that generated the order and it is done only with respect to provisional, non-final measures (i.e., the issuing authority is whoever is competent under the law of that country, but there should be a preference for review or ratification by a neutral finder of fact).

b. **The merits of the case are addressed in the country where the underlying prosecution or confiscation action is occurring**. The evidence, the witnesses, the underlying facts, and the investigators most familiar with the matter will be found in the requesting country, so it is more appropriate for the country which initiated the proceeding to be the one to make the substantive decisions on the defendant's guilt or innocence, whether the assets are traceable to crime, and whether the assets are therefore subject to confiscation. The enforcing court may be bound by the findings of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment.

c. **Opportunities to defeat enforcement can be limited to procedural grounds**. The enforcing court should not decide the question of forfeitability under foreign law; these threshold issues should be decided in the home forum. Conversely, procedural questions as to the due process or fairness afforded by the foreign

proceeding should be ripe for consideration by the enforcing court. Issues that might be decided by the enforcing court could range from whether there was a criminal or confiscation proceeding properly initiated abroad; whether and how the order shows compliance with foreign law and procedure; whether the order was obtained by fraud or through corrupt means; whether it is flawed on its face; whether the affected persons are or will be given sufficient opportunity to challenge the order; whether the court or other issuing authority has proper jurisdiction over the case or the defendant; and for a final judgment, whether it is final and not subject to appeal; etc.

d. The competent authority in the **requested state retains discretion** as to whether the order requested should actually be enforced, which is separate from the question of whether it meets technical requirements for enforcement. Treaties may be the basis for assistance, but each jurisdiction retains discretion over whether to enforce an order from a particular country, considering the specific facts of the case, the violations of law, and the circumstances of the judicial system that produced the order. For example, a criminal justice system with insufficient protections for defendants' civil rights, or which uses confiscation for political purposes, may find its orders less frequently enforced abroad.

e. Countries that frequently exchange confiscation-related requests and enforce each other's orders could decide to establish a fast-track status or a process for **automatic recognition**. For example, countries in a supra-national group or sharing similar legal traditions may be able to speed up and streamline direct enforcement.

f. **Efficiency over initiating a domestic case**. While close co-ordination between experts in both jurisdictions is necessary, a direct enforcement may only require a written process or limited oral hearing, without requiring appearances from foreign witnesses or officials.

g. **The litigation burden on the requested state should be lighter if direct enforcement is used**. The country receiving the request is able to avoid using resources on the filing of a domestic case, which may otherwise be difficult, impractical, or impossible. The enforcement of a request also does not detract from national confiscation efforts.

h. **Benefit to the requested state**. In receiving and enforcing foreign orders, the requested country may experience the added benefit of learning how to structure its own orders and requests so that foreign countries act upon them. It also is able to extract and confiscate criminal proceeds present within its jurisdiction, which pollute its financial system, with less effort.

4.2.5. Overcoming differences in legal systems for non-conviction-based forfeiture

139. Differences in legal systems pose significant challenges for cross-border asset recovery. For example, issues may arise where a requesting jurisdiction seeks assistance with a particular type of asset recovery that is not available in the requested jurisdiction. This barrier is particularly common for jurisdictions requesting assistance in executing non-conviction-based confiscation. To overcome this hurdle, countries need to have clear rules in place as to when and in what circumstances they will take action on requests for non-conviction-based confiscation. These may be set under domestic law, or based on bilateral or multilateral arrangements. Countries might re-evaluate whether assistance in non-conviction-based confiscation requests is actually contrary to fundamental principles of

domestic law. Many bilateral treaties and other international conventions have language permitting assistance to recover assets in criminal or "related" matters. Taking a broad view of what is "related to" a criminal investigation or a criminal case may very well include non-conviction-based confiscation. Essentially, in a non-conviction-based confiscation matter, a financial investigation has been conducted, there is a proven relationship between the assets sought for forfeiture and illegal activity, and the crimes that gave rise to the confiscation are described with some level of particularity. These fundamental tenets should be considered and given due weight.

140. To ensure a wide range of assistance can be provided, any assessment of a request for non-conviction-based confiscation should be based on the contents and facts of the request, not the nature or type of proceeding. The specific circumstances of a particular case should be considered before a country categorically rejects a request for assistance on the basis that it stems from a non-conviction-based confiscation proceeding. Jurisdictions should be urged to look beyond the "civil" nature of the case and examine the precise nature of the judicial proceeding and the specific allegations of criminal conduct. In some cases, the documentation to support a request relating to non-conviction-based confiscation may be more detailed and extensive than that relating to a typical criminal indictment. The differences between some non-conviction-based confiscation proceedings and some countries' criminal proceedings may not be significant. If a jurisdiction does not have its own non-conviction-based confiscation regime (see section 5.2.1), but is considering providing assistance in a non-conviction based confiscation matter, it should weigh the quality of the foreign court's process and the nature of the criminal allegations.

141. Another way to overcome limitations perceived as stemming from fundamental principles of law is to consider whether a charge in absentia, based, at least partially, on the evidence in the foreign request and gathered in the foreign non-conviction based confiscation proceeding, would be practicable. If there are assets present in the requested country, it is theoretically possible that ML activity, or some other violation of law, may have occurred, thus giving the requested country jurisdiction over some aspect of the conduct linked to the non-conviction based confiscation. If it is possible to charge persons in absentia in the requested country, it is likely that (1) the defendant will be located and eventually face justice, or (2) that the defendant may be convicted and sentenced while absent, and the assets could then be confiscated criminally. Trials in absentia are not permitted in many legal systems, but if they are, and there is a conflict with providing assistance in non-conviction based confiscation, this could be an alternative.

142. In general, in order to provide the widest range of assistance on asset recovery, countries should adopt a posture of flexibility and retain discretion to determine whether requests can be pursued, while endeavouring to accede to all requests. Countries should be flexible in terms of the classification of predicate offences and look for factual equivalency, rather than looking at the classification or title of the offence. To the extent possible, a country should consider the nature of the criminal conduct and the specific acts alleged and whether any offence (ML predicate or not) might have been chargeable if the same conduct had been committed within its borders. This may require looking beyond the four corners of the seizure/confiscation order and the relevant request – prosecutors and investigators may need to schedule calls, videoconferences, and meetings to exchange a sufficient amount of detail and develop a working knowledge of the factual background, evidence, and asset tracing. The requested country should think creatively about ways to meet any dual criminality requirement, especially if it has a limited list of predicate offenses.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

Legal powers to enable securing, freezing and confiscation of illicit assets

143. It is crucial that jurisdictions have in place a framework that provides them with the ability to secure, freeze, and confiscate assets effectively, while also giving law enforcement the tools to ensure that assets can be restrained, frozen and confiscated in a range of situations. That includes having tools such as value based confiscation in accordance with the FATF Standards. It may also include powers to rapidly postpone or pause transactions, to pursue non-conviction based confiscation when it is not possible to confiscate the proceeds of crime if the criminal has passed away or cannot be located, and to obtain orders that reverse the burden of proof when there are clear suspicions an individuals' wealth is not commensurate with their income.

5.

5.1. Effective powers to rapidly restrain assets

144. Currently, countries are generally not effectively freezing criminal proceeds. On average, FATF and FSRB countries restrain approximately just 1.44% of the estimated criminal proceeds annually[36]. Challenges in identifying and tracing assets are a key reason for the low level of proceeds restrained (see Chpt. 1 section 1.3). Another common challenge is a lack of effective legal processes to rapidly and easily freeze assets. If the legal process for freezing is lengthy, overly complicated, or limited in scope, assets may be easily dissipated before they can be effectively restrained.

145. In practice, countries should be able to employ freezing powers rapidly to mitigate the speed with which assets can be moved and to prevent dissipation. Freezing powers should also be used as early as possible, without risking the premature disclosure of the existence of the investigation to the target or their co-conspirators. Occasionally, investigators may hold off on freezing assets, for example, where there is no reason to believe they will be dissipated or where a freezing order may in fact lead to depletion through the suspect's ability to request allowances from restrained assets. In other cases, exogenous circumstances may require immediate action to secure assets (e.g., an arrest triggers a larger chain of events, a tip is received that assets are about to be transferred beyond the jurisdiction, the investigation is disclosed in the media, etc.). The investigators' and prosecutors' investigative strategy will largely dictate the timing of any steps to seize or restrain assets, and may be dependent on a range of tactical concerns.

5.1.1. Providing for an immediate, pre-emptive freeze to prevent dissipation

146. Funds in bank and investment accounts can be rapidly moved domestically or internationally, and the current system of restraint is no match for the speed of online money movement. In most countries, a formal freezing order can be obtained from a court where authorities can show reasonable grounds to believe that a suspect has benefited from crime. There are various factors, however, that might limit law enforcement's ability to rapidly obtain such an order. For example, there may be delays in preparing necessary documentation, time spent formalising or finalising the evidence to support authorities'

[36] Data from 62 MERs adopted during the current round.

suspicions, or practical delays in accessing the judge or court. Where the order is to be executed on behalf of another jurisdiction, there is often a delay between the informal contact to communicate the suspicion and identify the assets, and the receipt of an MLA request to support a formal order.

147. Unlike targeted financial sanctions, where action is expected ideally within a matter of hours after listing, national laws and procedures under-recognise the need for immediacy in freezing and restraint in the criminal context, translating into a loss of assets for future confiscation and their possible use in the commission of other offences. Access to an expedited, temporary freezing authority to pre-emptively freeze suspected accounts [or assets] can allow LEAs the time they need to seek and obtain court orders or other enforceable means to more permanently freeze or seize funds, pending confiscation proceedings.

148. This power already exists in many jurisdictions. In some systems, temporary freezing authority may be an administrative power granted to a government agency, such as the FIU or an ARO. The use of such a tool may be prompted by an urgent STR or a request from an FI of "consent/no consent" to engage in a transaction requested by a client. There is a growing trend towards FIUs having the power to impose immediate, temporary freezes on funds where they are suspected proceeds of crime (see Box 5.1). In other systems, the freezing authority may take the form of a temporary freezing order issued by a prosecutorial authority and entered by a court. In some jurisdictions this power is available informally. For example, certain financial institutions may be willing to inform law enforcement that funds are about to be transferred by a customer, but the bank's action is completely voluntary and may only last for a day. Access to a formal pre-emptive freezing power has a positive impact on jurisdictions' effectiveness in restraining assets. Jurisdictions that have the power to quickly order a freeze prior to obtaining a formal order from the court are able to freeze a higher share of the estimated proceeds of crime annually[37].

Box 5.1. Administrative FIU freezing powers in higher-performing jurisdictions

In Italy, alongside law enforcement measures, the FIU has the power to temporarily suspend suspicious transactions and to implement freezing measures. Between 2009 and 2014, the FIU suspended 238 transactions for a total value of approcimately EUR 314 million (USD 353 million).

In Latvia, the FIU has the right to issue binding freezing orders where there are substantiated suspicions that a criminal offence is being committed or has been committed. The orders have a time limit of 45 days and the FIU informs LEAs on a regular basis to initiate criminal proceedings to secure formal restraint. The FIU regularly and proactively uses its freezing powers, freezing an average of EUR 160 252 (USD 180 003) per case. The majority of confiscation decisions by prosecutors are based on investigations commenced through FIU information and freezing orders.

In Finland, one of the top criteria the FIU uses in prioritizing cases is the availability of freezing measures and opportunity for confiscating assets. Administrative freezing orders are systematically issued by the FIU at an early stage of the investigation to

[37] In the 62 MERs sampled, countries which have the power to quickly order a freeze prior to obtaining a formal order from the court freeze on average 2.05% of the estimated proceeds of crime annually while the sample average is 1.44%.

secure potential proceeds of crime and prevent them from being moved beyond the reach of authorities. In 2017, the time period for the FIU's freezing measures was extended from five to 10 working days. The FIU orders the freezing (and seizure) of significant amounts (an average of EUR 1.7 million [USD 1.9 million] annually).

Source: MERs of Finland (para.235, 238), Italy (para.180), and Latvia (paras.204, 214).

Box 5.2. Case study showing effective freeze by the FIU

In a 2013 case, several persons from Lithuania defrauded the U.S. based company Google of more than USD 23 million. The persons attempted to launder the funds through the Latvian banking sector. The FIU issued a report and initially issued a freezing order on the basis of which the authorities managed to trace, freeze, and confiscate the funds. The funds were subsequently returned to Google and the main actor was extradited to the United States for prosecution.

Source: MER of Latvia (paras.216).

149. Whether administrative or judicial, the pre-emptive freezing process must be highly expedited. The key characteristics of such a freeze requirement would be:

a) It is temporary—even a period as short as fourteen days would afford leeway to LEAs to gather additional evidence, conduct interviews, draft necessary pleadings, and liaise with different agencies or countries;

b) It is without notice to the suspect to prevent pre-emptive dissipation;

c) It is carried out in anticipation of a more permanent (e.g., judicial) freeze; and

d) As such, it would be based on a lower standard of proof than a longer-term freeze and could be obtained based on summary evidence, such as an affidavit.

150. Given the impact of freezing mechanisms on individual property rights, there should be appropriate leeway for affected persons to challenge a freeze order after a period of ex parte restraint or blocking.

151. In an international context, a pre-emptive freeze may buy necessary time for the requesting country to obtain a court order and make an MLA request to obtain a formal freezing order in the requested country. For pre-emptive freezing powers to be fully effective, every country must have similar tools to deploy, as wrongdoers will move funds to wherever they are least subject to restraint. The ability for law enforcement across the world to rapidly freeze accounts on a temporary basis would fundamentally address the current inability to prevent the movement of funds, especially in fast-moving money laundering, terrorism and terrorist financing[38], fraud, and cybercrime investigations.

5.1.2. Optimising the process for obtaining freezing orders

152. As with tracing, a slow and cumbersome legal process for freezing assets raises the risk that assets will be dissipated before they can be effectively restrained. Ensuring access

[38] Frameworks are also available under UNSCR 1373 and 1267 requiring domestic or international designation of individuals or entities.

to rapid freezing powers is accordingly a key element of an effective system. In addition, jurisdictions must avoid onerous or prohibitive legal requirements that prevent efficient freezing and increase the risk of dissipation. FATF and FSRB countries face a range of issues in this area, with 24% of countries receiving a recommended action to improve the legal framework for freezing. Common problems include high thresholds for securing a freezing order, an inability to freeze certain types of assets or assets of equivalent value to criminal proceeds, and delays in obtaining a freezing order from the court.

153. If the thresholds for obtaining a freezing order are too high, authorities will face difficulties meeting them, leading to a failure to freeze and recover assets. The factual showing for obtaining a freezing order should be reasonable and, in particular, should not require proof of prior dissipation or a risk of dissipation. A standard for freezing or seizure that requires indications of the dissipation or an intent to remove or sell the assets can pose serious challenges. This is because once such facts are known to LEAs, the suspects or defendants are already progressing toward making the asset unavailable. If the urgency is the very thing that triggers the need for provisional measures, the chances of a successful freeze are lessened. This requirement is somewhat common among jurisdictions, but if the property is legally subject to confiscation, no suspect's rights are better protected by waiting for them to potentially commit additional, chargeable laundering with the property. The best course is to catch dirty money where it is catchable, not to wait for an indication that a criminal might endanger the recovery.

Box 5.3. High legal thresholds for restraining assets

Austria's MER found that a "key deficiency" preventing more effective restraint and confiscation by authorities was "the step ('sequestration') required to freeze bank accounts and real estate to prevent their transfer or use. Sequestration can only be obtained if the prosecutor can prove to the court that there is a specific risk that the assets will disperse without such an order. This proves to be too high a legal burden to achieve, particularly in the Vienna region due to court decisions there. As a result of this and the need to focus on proving the predicate offence (as mentioned in IO7 above), prosecutors met by the evaluation team stated that they are reluctant to even to seize such assets." (para.171)

A similar issue was identified in the UK report: "To obtain a criminal restraint order, authorities must prove to a court that there is a real risk of dissipation. The [Crown Prosecution Service (CPS)] will consider a range of factors, which may include previous convictions, any evidence of preparations to move or dissipate assets, the accused's capacity and capability to move or dissipate assets (e.g. access to foreign bank accounts or corporate structures) and any actual dissipation. The CPS explained that where restraint is sought prior to or concurrently with the subject's learning of the investigation, risk of dissipation can be proved relatively easily by virtue of the nature of the offending. However, in the 57% of cases where restraint is sought at the post-charge stage, if the subject has not attempted to move or conceal the unrestrained assets, it can be more difficult to show risk of dissipation and meet the threshold for restraint. In such cases, the CPS would typically have to wait until some dissipation occurs before restraint can be pursued."

Source: MERs of Austria (para.171), the UK (para.191).

154. In terms of the scope of the freezing order, it is important that it extends to all assets potentially available for confiscation as required by R 4. This should include assets of

equivalent value, assets held by third parties, instrumentalities etc. If the scope of the freezing order is more limited than any potential confiscation order, there is a real and serious risk that assets are moved or dissipated prior to the confiscation order putting them out of reach of the authorities.

Box 5.4. Inability to restrain certain types of assets

The MER of the United States noted that the country's ability to use restraint mechanisms can be impaired by the fact that not all predicate offences include the power to forfeit instrumentalities. U.S. prosecutors have suggested that this barrier can be circumvented in some cases by starting a [non-conviction-based confiscation] action based on ML, or by entering into a plea agreement whereby the defendant gives up their rights to the instrumentality notwithstanding the lack of a legal basis to do this. Performance would be further enhanced by filling in the legislative gap in this area. Additionally, there is no general power to obtain an order to seize/freeze property of corresponding/equivalent value which may become subject to a value-based forfeiture order prior to conviction-. The result is that such assets are unlikely to still be available by the time a final forfeiture order is made. Addressing this shortcoming would further bolster asset forfeiture outcomes."

Source: MER of the United States (para.172).

155. The ability to obtain a freezing order without notifying the suspect is crucial to prevent the dissipation of assets. If the suspect is notified prior to freezing, they will immediately take steps to dissipate the assets or move them beyond reach of the authorities. R.4 requires that orders to freeze or seize property "be made ex-parte or without prior notice, unless this is inconsistent with fundamental principles of domestic law" (Methodology, footnote 14). It is critical that restraint be able to occur without notice to the targets of an investigation, recognising that the mere fact of the restraint can take an investigation from covert to overt, as at some point, the suspect will realise that their assets have been blocked.

156. While access to a pre-emptive freezing power will help ensure assets can be rapidly frozen, such a power will be temporary and may not be available in all circumstances. It is therefore important that the process for obtaining a formal freezing order can also be executed rapidly. Judicial approvals for restraint orders should be obtainable on an urgent basis when necessary, for example, when the pre-emptive freeze is due to expire. In such urgent cases, the orders should be obtainable within several hours. In non-urgent cases, these orders should be obtainable within 24 hours. Once the order is issued, the restraint should take legal effect and be served within 24 hours, or more quickly when needed to prevent the movement of funds. The legal execution of the order should be considered complete upon service on the custodian, so that any dealings after that point can be unwound.

157. As discussed in Chapter 2, contact points in the private sector can significantly facilitate the execution of freezing orders. Authorities should consider maintaining a register of contact points for private sector entities (financial institutions and DNFBPs) to help issue orders and request information. For major financial institutions, there should be a reliable asset freezing representative who is situated within headquarters, and not associated with a particular branch, to avoid any direct contact with the target or his/her funds. There should be clear and agreed upon procedures between the representatives and LEAs to ensure freezing orders are carried out swiftly and successfully. As private sector

institutions are not all equally familiar with the process and requirements relating to asset recovery, authorities should provide information and guidance for the private sector to ensure the process runs smoothly.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

5.2. Effective powers to confiscate assets

158. Data from FATF and FSRB MERs shows that globally, countries are struggling to effectively confiscate assets. On average, countries are successfully confiscating only 1.3% of estimated proceeds annually. The low amounts confiscated may reflect problems throughout the asset recovery process, including issues with identifying and tracing assets (Chpt.3), ineffective international co-operation (see Chpt.4), or insufficient powers and measures to restrain assets (see Chpt.5 section 5.1).

5.2.1. Ensuring assets can be recovered in the absence of a criminal conviction

159. A common trend across higher-performing countries is access to a range of different mechanisms for confiscation. In particular, the ability to confiscate assets in the absence of a criminal conviction appears to improve confiscation outcomes. Less than half of the countries evaluated (44%) have access to non-conviction-based confiscation. However, when looking at higher-performing countries (those that confiscate over 2% of estimated proceeds), the proportion of countries with non-conviction-based confiscation jumps to 69%. In contrast, in poorer-performing countries (those confiscating less than 0.1% of estimated proceeds), the number of countries with non-conviction-based confiscation is lower, at only 32%.

Box 5.5. Problems obtaining confiscation in the absence of a conviction

While non-conviction-based confiscation is not required under the current FATF Standards, 11% of MERs note that access to this type of confiscation may improve the assessed country's effectiveness and recommend that such measures be considered. For example, the report of Malta states that "Malta does not have a system for non-conviction-based confiscation, although the confiscation of proceeds is possible in certain circumstances even in the absence of a conviction (such as in the case of a perpetrator having absconded or being unfit for trial, as provided by Art. 23C, paragraph 3 of the CC; see further under IO.7, core issue 7.5). A non-conviction-based confiscation system could be an effective tool in a scenario where the proceeds are located domestically, but the offender is not. This seems to be frequently the case in the investigations undertaken by the Malta Police. The authorities interviewed by the assessment team would welcome such a system and underlined that there would be no constitutional or other legal impediments to introduce it." As a result, the report recommends that "Malta should consider introducing a system for non-conviction-based confiscation to achieve better results in the confiscation of proceeds of crime."

Source: MER of Malta (para.242, IO.8 Recommended Actions).

160. Experienced and sophisticated criminals may be able to avoid criminal investigation and prosecution. Non-conviction based confiscation – such as the preventive procedure used in Italy; the administrative FIIA procedure used in in Switzerland; and the civil Unexplained Wealth Orders used by common law countries including the UK, Ireland and Australia – enables the most serious criminals to be targeted without the need to obtain a criminal conviction before the proceeds of crime can be recovered. The ability to use both civil and criminal powers enables investigators, from the outset of a case, to consider all the available legislative options and determine the most effective way to tackle the identified criminal activity.

161. Non-conviction based confiscation does not require a conviction, or even criminal charges, and it usually depends on a lower standard of proof than a criminal case, in which a person is judged guilty or innocent of the crimes charged. Access to non-conviction based confiscation should be available by law, wherever possible, without limitation as to the underlying offences (i.e., all serious offences) or the type of asset(s) which may be pursued. Where limitations are imposed, non-conviction based confiscation should be available at least where a defendant is deceased, has fled, is unknown, or is subject to immunity (in particular immunity of prosecution of heads of state – a common challenge in corruption cases), or where there is no public interest in the prosecution. In practice, a decision should be made as to which form of asset recovery to pursue based on the chances of success and other tactical considerations. Sometimes, prosecutors may pursue both forms of recovery to keep all options open. Non-conviction-based confiscation could be run simultaneously with or parallel to a criminal prosecution, and then paused, if needed.

162. Non-conviction based confiscation has the advantage of reaching property generally involved in a course of criminal conduct, where a criminal conviction may only be based on a specific transaction, thus limiting criminal forfeiture possibilities. Non-conviction-based confiscation can also be initiated against property owned by third parties, not just the property of the defendant, and may be proven using evidentiary techniques such as unexplained wealth, net worth analysis, or criminal lifestyle. While rare, it may be commenced after an unsuccessful prosecution (perhaps if the failure did not relate specifically to the sufficiency of the evidence or the strength of the government's case).

163. Non-confiscation based confiscation may also offer resourcing efficiencies. Non-conviction-based confiscation can be a shorter process and achieved relatively quickly compared to confiscation completed in connection with a criminal prosecution. Specialised prosecutors can handle non-conviction based confiscation cases and potentially free up others to charge more criminal cases.

Box 5.6. Effective use of non-conviction based confiscation

Conclusions on non-conviction based confiscation in MERs

Malaysia's MER found that "Malaysia's key strength is its broad legal regime which allows it to consider of number of different options on a case by case basis; for example its use of non-conviction-based forfeiture and administrative methods are producing better results than the standard conviction-based forfeiture methods." In practice, "there is a strong preference to pursue non-conviction-based forfeiture in forfeiture cases. [AML/CFT Act] recovery is achieved primarily through non-conviction-based

forfeiture (85%) and [Dangerous Drugs Act] recovery had been solely non-conviction-based. This provides a good alternative where offenders cannot be prosecuted".

Case study: Effective use of non-conviction-based confiscation

In a case pursued by the Malaysian authorities, "500 investors suffered total losses of RM 250 million (USD 75 million). ML and cheating investigations were done in parallel. The investigation traced 288 properties and [the Police] issued orders to freeze them. The suspect absconded and could not be found, however [the Police] pursued the case for non-conviction-based forfeiture under [AML/CFT Act]. The properties and several bank accounts (RM 26 million (USD 6 million)) belonging to the suspect and his family were subsequently forfeited and returned to victims to partially compensate their losses."

Source: MER of Malaysia (para.182, 219).

5.2.2. Optimising the process for obtaining criminal confiscation orders

164. Asset recovery systems cannot be effective unless freezing efforts flow through to confiscation. A common issue in MERs is a large discrepancy between amounts frozen and amounts confiscated. A proportion of frozen assets will inevitably be released where cases are dropped, reasonable thresholds for confiscation cannot be met, or where funds are provided to the defendant as an allowance. However, deficiencies in the legal framework and process for criminal confiscation can also hamper authorities' ability to confiscate frozen property. Such issues are common, with almost half (45%) of all FATF and FSRB jurisdictions receiving a recommended action to improve the legal framework for criminal confiscation. Common issues include unnecessary delays in the judicial process for confiscation and high thresholds for obtaining confiscation orders. Access to non-conviction based confiscation can help authorities mitigate such issues (see above), but jurisdictions also need to ensure the legal process for obtaining criminal confiscation orders is efficient and without unnecessary hurdles.

165. Delays in the confiscation process can lead to asset dissipation, including through inflation, or where assets are released to the defendant as an allowance. There is no standard length of time in which a case should reach final confiscation (i.e. the permanent deprivation of assets to the state, by order of a court or competent authority, which eliminates the right, title, and interest of a defendant/prior owner). Each case is different and the scale of the confiscation or defence mounted is often the determining factor for the length of the proceeding. For value-based confiscation, an essential tool, the process of identifying substitute assets can take time. One useful measure to streamline this process is to provide for asset disclosures by the defendant, made under penalty of perjury. While the process is often inherently long and complicated, confiscation and recovery should nonetheless occur promptly. Countries should have clear time limits and procedural markers after property has been seized or restrained, such as a defined number of days between the seizure and the commencement of forfeiture (e.g., the filing of a complaint or other formal initiation), and time limits for owners or third parties to claim interest in property. The court should also set a clear timetable for confiscation, including when information should be produced by the defendant and prosecution, to ensure the case progresses in a timely manner. As the MLA request process can be time consuming, specific tolling statutes that build in a delay of the timelines can be helpful when evidence or witnesses are sought from abroad and an MLA request is used,.

166. Unreasonably high burdens of proof can also prove challenging in confiscation proceedings. One approach taken in a growing number of countries is the application of rebuttable presumptions. In such cases, the prosecution may need only show that the targeted assets did not stem from the suspect's legitimate activities, at which point the burden of proof shifts to the defendant to show that the assets were legitimately obtained. Reversing the burden of proof, or adopting a rebuttable presumption, is entirely appropriate. The burden may be placed on the defendant to show that the assets are not from the proceeds of crime either for all confiscations or in certain specific circumstances, e.g., where the defendant is carrying large amounts of falsely- or undeclared cash or has committed a drug-related offence. Alternatively, this burden shift may take place where the financial information is in the possession of the suspect, e.g., with regards to "tainted" assets in the possession of the suspect where the suspect claims that he/she did not grant permission to use the asset, the burden of proof should be shifted to the suspect to prove that indeed permission was not granted.

167. Shifting the burden of proof is particularly useful in cases involving organised and lengthy criminal activity. One of the main issues regarding confiscation in such cases relates to proving the scope of assets that stem from criminal operations or businesses that operated for years. It is unlikely for such an operation to maintain organised records or bookkeeping exposing the full sum of assets amassed over the years. Instead, LEAs may gain insight as to the extent of the operations during the conduct of the police surveillance over a period of limited duration such as one week, one month, or one quarter and extrapolate as to the profitability of the enterprise. Based on the information gathered during the surveillance period, LEAs are able to calculate the sum of the criminal assets amassed in that time and apply it to the entire period in which the criminal operation was active. In such cases, the burden of proof might be shifted to the suspect to prove that the scope of assets should be calculated differently. Alternatively, the necessary standard of proof for the scope of assets may be lowered to be a preponderance of evidence.

168. An issue encountered in some cases is that defendants flee prior to or in the course of confiscation proceedings or may not be present in the country in which the proceeds are located. To facilitate confiscation in such cases, countries should recognise the legal concept of fugitive disentitlement. This ensures that if a defendant is unwilling to face justice in the criminal courts of a country, he or she should not be able to then defend property rights through representatives (separate to the right of defence). In certain legal systems, a defendant is not required to attend trial or mount a defence, or may have arguments made on his or her behalf. This is distinct from the notion of disentitlement, whereby a defendant is barred from fighting for property subject to confiscation and availing himself or herself of the court and its protections, while at the same time fleeing from the reach of that very judicial system.

169. Asset management is a crucial part of the asset recovery process, but is outside the scope of the current project. Nonetheless, there are measures countries can take in the course of confiscation proceeds to prevent a reduction in the value of frozen assets. In particular, to preserve the value of assets, countries should have the ability to liquidate assets and substitute the liquidated value for the asset, prior to confiscation, to prevent depreciation or other costs. This is vital for particular categories of assets, for example, moveable goods, such as vehicles and boats. The inability to liquidate assets prior to confiscation when appropriate turns an asset into a burden, generating management and storage costs and depreciating the value of future recoveries. Real property may also need to be liquidated prior to confiscation if it is not being maintained, it lacks insurance, or tax or mortgage payments are not kept current. Interlocutory or interim sales may require permission of the court or may be subject to the mission and procedures of the relevant office.

Recommendations

This section will be drafted at a later stage. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

This section will summarise, in bullet form, the measures to be implemented.

Conclusion and recommendations

This section will be drafted at a later stage, with the conclusions consolidated from throughout the report. Delegations will have the opportunity to provide comments after a second draft of this report is circulated ahead of the February 2021 Plenary.

6.

ANNEX A: Case studies

7.

This section will be added in the final version of the report and will include all of the case studies from the main body.