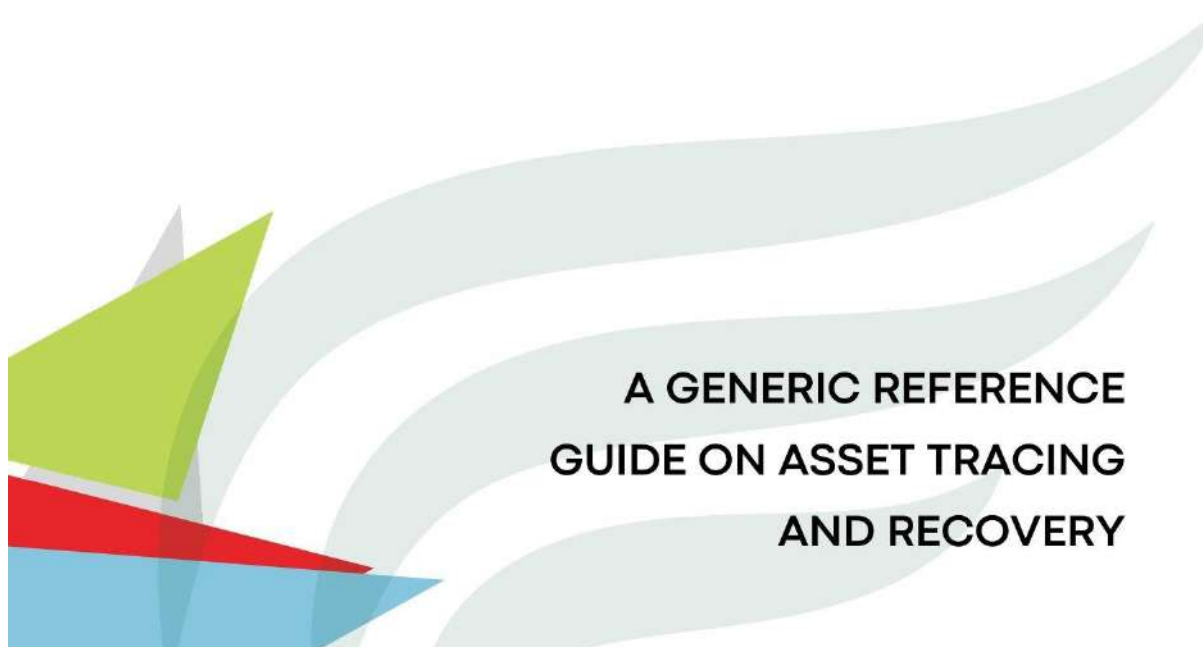




ARINEA

ASSET RECOVERY AND MANAGEMENT GUIDE



**A GENERIC REFERENCE
GUIDE ON ASSET TRACING
AND RECOVERY**

Asset Recovery & Management Guide

A GUIDE FOR ARINEA PRACTITIONERS



ACRONYMS

ARINEA	Asset Recovery Interagency Network for Eastern Africa
ARO	Asset Recovery Office
CTR	Currency Transaction Report
EFIC	Ethiopian Financial Intelligence Centre
EU	European Union
FATF	Financial Action Task Force
FIA	Financial Intelligence Authority
FIC	Financial Intelligence Centre
FIU	Financial Intelligence Unit
HoFIU	Heads of Financial Intelligence Units
INTERPOL	International Criminal Police Organization
IO	FATF Immediate Outcome
MLA	Mutual Legal Assistance
ML/TF	Money Laundering/Terrorist Financing
LEA	Law Enforcement Agency
R	FATF Recommendation
RO	Restraining Order
SRF	Le Service de Reneseignements Financiers (Djibouti FIU)
StAR	World Bank – Stolen Asset Recovery Initiative
STR	Suspicious Transaction Reports
UNCAC	United Nations Convention Against Corruption 2003
UN Palermo Convention	United Nations Convention against Transnational Organised Crime 2000
UN Vienna Convention	United Nations Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances 1988

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1. Introduction

The concept of asset recovery is not new, forfeiture provisions were introduced into the Kenya Penal code in 1956, which allowed for the forfeiture of property that passed in connection with an offence or if the property could not be forfeited or found of such sum assessed by the court to be the value of that property. However, there were limitations of the law of forfeiture in that it was limited to property used in or obtained from an offence. This led to further legislative developments which provided for the assessment of and the confiscation of the profits and proceeds of crime.

Targeting the proceeds of crime is an effective tool in the fight against serious and organised crime. The global reach of organised crime presents a threat to societies throughout the world and for this reason; the international community has reacted by focusing attention on the confiscation of the proceeds of crime. The Financial Action Task Force (FATF) has set standards for jurisdictions to have in place legal and institutional frameworks to allow for the investigation, prosecution, and recovery of the proceeds of crime. Jurisdictions are also expected to achieve high levels of effectiveness in putting their asset recovery laws and procedures into practice and to be seen to be recovering the proceeds of crime.

For asset recovery to be successful, a multi-agency approach must be adopted that will allow for the integrated financial investigation, from the suspicion of a criminal offence to the assets. The financial investigation should be conducted in parallel to the criminal investigation to:

- Identify the material benefit or proceeds from the offence or offences.
- Identify the property of the suspects or third parties from whom confiscation is possible.
- Seize and freeze property.

Asset recovery legislation will only disrupt criminality if its use becomes routine as part of the investigation and prosecution of a wide range of criminality.

2. International Standards

In response to and recognition of the vast amount of money being generated by crime from within a country and internationally, the international community responded by setting standards by which countries should comply:

- United Nations Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances 1988 (UN Vienna Convention)
- United Nations Convention against Transnational Organised Crime 2000 (Palermo Convention)
- United Nations Convention Against Corruption 2003 (UNCAC)
- FATF 40 Recommendations and 11 Immediate Outcomes.

In relation to asset recovery, the FATF Recommendations (R) and Immediate Outcomes (IO) are of relevance.

National cooperation and coordination (FATF R2, Immediate Outcome IO 6)

The member states of the Asset Recovery Interagency of Eastern Africa (ARINEA) should ensure that policymakers, the Financial Intelligence Unit (FIU), Law Enforcement Agencies (LEAs), supervisors, and other relevant competent authorities, at the policy-making and operational levels, have effective mechanisms in place which enable them to cooperate, and, where appropriate, coordinate and exchange information domestically with each other. IO6 requires that financial intelligence and all other information is appropriately used. Financial intelligence is often the precursor to an investigation, prosecution, and asset recovery and it is therefore essential that the intelligence received is analysed and disseminated promptly to LEAs. Intelligence can also be utilised during the investigation, prosecution, and recovery process and an inter-agency approach must be adopted and maintained throughout the life cycle of the case.

The ARINEA member states all have FIUs, however not all have used the term Financial Intelligence Unit:

- | | | |
|----------------|---|--|
| 1. Burundi | - | Financial Intelligence Unit |
| 2. Djibouti | - | Le Service de Reneseignements Financiers (SRF) |
| 3. Ethiopia | - | Ethiopian Financial Intelligence Centre (EFIC) |
| 4. Kenya | - | Financial Intelligence Unit |
| 5. Rwanda | - | Financial Intelligence Centre (FIC) |
| 6. South-Sudan | - | Financial Intelligence Unit |
| 7. Tanzania | - | Financial Intelligence Unit |
| 8. Uganda | - | Financial Intelligence Authority (FIA) |

Within the guide the acronym FIU will apply to all the above.

Financial investigation (FATF R30 & 31, IO7)

For investigations into money laundering and other acquisitive crimes to be effective, investigators need to have sufficient powers to be able to obtain the necessary evidence. The powers must enable investigators to compel individuals, companies/businesses, and organisations to provide evidence to further their investigation, e.g., production orders. ARINEA member states should ensure that in all cases related to money laundering and other acquisitive crimes, LEAs should conduct a parallel financial investigation alongside the criminal investigation. The purpose of the parallel investigation will be to obtain evidence of the assets owned by the suspect, their provenance, and the suspect's lifestyle.

Ancillary orders (FATF R4, IO8)

For asset recovery to be successful there must be assets available to satisfy an asset recovery order at the end of the proceedings. To achieve this, ARINEA member states must have the power to freeze/restrain/seize property together with the power to manage the property. It is preferable to have ancillary orders available from the investigation stage to prevent the suspect from moving or dissipating an asset.

International cooperation (FATF R38, IO2)

Criminals have no respect for international borders, and they will use all options available to move their money and assets overseas to disguise their true origin. To counter this, ARINEA member states must understand the importance of international cooperation both in respect of making requests for assistance from other countries and responding to such requests. Practitioners need to be aware of the available options to make requests through informal means e.g., Asset Recovery Interagency Networks (ARINS) and formal means, e.g., Mutual Legal Assistance.

Criminal confiscation/forfeiture (FATF R4, IO8)

The types of assets that can be subject to confiscation/forfeiture vary according to the type of asset recovery being deployed by a jurisdiction. International standards also vary from requiring the confiscation/forfeiture of instrumentalities, direct and indirect proceeds from an offence; property that has been mixed with legitimate property, property transferred to third parties, benefit, and extended benefit to being subject to confiscation/forfeiture.

Non-conviction-based forfeiture (FAFTF R4, IO8)

FATF defines non-conviction-based forfeiture as forfeiture through judicial procedures related to a criminal offense for which a criminal conviction is not required. This is still a relatively new procedure that has not been widely implemented internationally.

Asset Recovery Offices (ARO) (FATF R30)

FATF requires that jurisdictions 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. Jurisdictions should also make use, when necessary, of permanent or temporary multi-disciplinary groups specialised in financial or asset investigations. The European Union (EU) has produced 11 indicators against which an ARO should be assessed:

- Direct or indirect powers to freeze assets.
- Level of access to existing databases and registers
- Ease of access to financial information, formally or informally, without a court order.
- Access to a secure system of information exchange
- Level of involvement in asset management (ensuring the cohesion of the confiscation chain)
- Success in regularly meeting time limits stipulated in the Swedish initiative (this sets down, time limits in which requests for assistance from other AROs should be dealt with)
- The ability to keep statistics on their activities and access to judicial statistics.
- Resources & capacity (concerning needs e.g., capacity to act as a central contact point, minimum number of financial investigators)
- Availability and participation in appropriate training
- Level of multi-disciplinarity in ARO composition.

Statistics (FATF R33)

FATF R33 requires countries to maintain comprehensive statistics on matters relevant to the effectiveness and efficiency of their Anti-Money Laundering/Countering the Finance of Terrorism systems. This should include statistics on the Suspicious Transaction Reports (STR) received and disseminated; money laundering and terrorist financing investigations;

prosecutions and convictions; on property frozen, seized, and confiscated; on mutual legal assistance or other international requests for cooperation.

3. What Is Asset Recovery?

Asset recovery derives from the integrated investigation and litigation of predicate offences and the consequent assets. Without a collective approach, each agency tries to achieve the objective separately. This has proved extremely difficult, time-consuming, and ultimately not very successful in many jurisdictions across the world and is therefore not unique to ARINEA member states.

It is important to note that there are different types of asset recovery with their own unique characteristics.

Property-based

This is the traditional and most common form of asset recovery, and it involves recovering the assets that are the instruments or products of crime. This requires that a link be established between the identified assets and an offense. It is most useful when identified assets can be linked with evidence of an offense - for example, money seized from a drug dealer (proceeds), or the vehicle used to transport drugs (instrumentality).

Instruments and products of an offence are recovered either from the scene of the crime or from the person accused of committing it, or both. They are seized to provide evidence of the crime and who committed it. The recovery of these items is just a consequential action from the prosecution and conviction of the defendant and does not take much application to achieve.

Value-based

This form of asset recovery involves recovering assets that are the proceeds of crime. A modern interpretation of asset recovery is that it now means the identification of the proceeds of crime, something that used to be beyond the capabilities of law enforcement and the judiciary, and which requires a different approach.

Value-based asset recovery requires quantification of benefits that flowed to the defendant from the offence (direct benefits) and most often any increase in value due to the appreciation of the assets (indirect benefits). At sentencing, the court will impose a liability equal to that benefit on the defendant and this will require the defendant to repay this

amount within a set period. The responsibility is on the defendant to realise assets and repay the amount of the order.

Practitioners are now being asked to do something entirely different. Not only are they being tasked with investigating/prosecuting the predicate offending, but they must investigate the assets and lifestyle of the suspect which requires a lot more resources, both financial and human.

Both property and value-based asset recovery follow the conviction of the defendant of an offence or certain types or categories of offences, depending on which law/legislation is used.

Non-conviction-based forfeiture

A relatively new form of asset recovery that provides for a claim based upon civil law and procedures against property that has derived from unlawful conduct. Non-conviction-based forfeiture can make an important contribution to the reduction of crime where:

- It is not feasible to secure a conviction.
- A conviction is obtained but a confiscation order is not made.
- The suspect or defendant has died before the conviction.
- A defendant is acquitted.
- The relevant authority takes the view that there is insufficient evidence to prosecute.

Non-conviction-based forfeiture will involve an investigation into whether property is recoverable property, i.e., it has been obtained through criminal conduct. The focus changes from the person to the property.

No allegation of a specific criminal offense is required; a description of a particular kind or kinds of criminal conduct through which the property is obtained will suffice.

The terminology is different from a criminal case. In a civil case, the claimant brings the action, and the respondent would be the person arguing the property does not come from criminal conduct.

4. The Asset Recovery Interagency Network of Eastern Africa (ARINEA)

ARINEA is comprised of 8 member states:

1. Burundi
2. Djibouti
3. Ethiopia
4. Kenya
5. Rwanda
6. South Sudan
7. Tanzania
8. Uganda

On 4th July 2013 at the 4th Global Focal Point Meeting on Asset Recovery held in Bangkok, a decision was taken to establish an informal Network of Agencies for Asset Recovery in Eastern Africa with the mandate to ensure efficient and effective asset tracking/tracing and subsequent recovery within the Eastern African region and beyond: and to cooperate with other asset recovery networks globally.

The aim of ARINEA is to exchange information on individuals, companies, and assets at the regional and international level with the intention of facilitating the pursuit and recovery of proceeds of unlawful activities and depriving criminals of their illicit profits. Through this informal network of practitioners and experts, requests for transnational cooperation will be channeled to relevant domestic agencies directly, leading to more expeditious asset recovery. ARINEA recognizes the need to promote cooperation at the regional level as well as in international fora to effectively track/trace and recover stolen assets within and beyond the territorial boundaries of Eastern Africa, in collaboration with relevant partners.¹

¹ ARINEA Statement of Intent March 2022

5. The Asset Recovery Guide

The Asset Recovery Guide is intended to be a generic reference guide on asset tracing and recovery which will provide LEAs within ARINEA member countries with details of the requirements and procedures for asset tracing and recovery. This will therefore boost the effort in the recovery of the stolen Assets within and outside the ARINEA region for effective countering of Illicit Financial Flows, Anti-Money Laundering, and Terrorist Financing.

The guide should be read in conjunction with the domestic legislation and practices of the ARINEA member countries.



Part I – Criminal Confiscation/Forfeiture

6. Initial Planning

Asset recovery will only be successful if practitioners devise a plan for each stage of the process, which will encompass:

- Sources of information
- Assembling a team
- Case management
- Asset management
- Communication with partner agencies domestically and internationally.
- Identify legal, practical, and operational challenges.

Sources of Information

Practitioners will need to analyse intelligence, information, and facts from various sources:

- Financial intelligence
- Criminal complaints - Reports of criminal offences such as fraud, corruption, theft, or other offences filed by victims or government agencies. In addition, investigations into other criminal activities may reveal corruption.
- Company registers – details of those associated with a company, directors, secretary, and the ultimate beneficial owner.
- Court records – relating to both criminal and civil matters. Records from civil and family litigation can be important especially when parties to the litigation must disclose financial information and/or pay sums into court.
- Government records – data held by government departments can assist in tracing assets and analysing the travel movement of those under investigation.
- Open source/social media – various websites and application will hold information about individuals such as Facebook, Tik Tok among others.

Assembling a Team

Cases will often require different skill sets and legal powers that are unique to certain LEAs or government departments, for example, customs and tax.

Investigative teams should include investigators with experience in gathering business and financial intelligence; identifying complex illegal schemes; following the money trail; and

using such investigative techniques as electronic surveillance, wiretapping, search warrants, and witness interviews. Some cases may require experts or consultants who have knowledge and expertise in financial analysis, forensic accounting, or computer forensics. Prosecutors also require similar expertise and experience to effectively present the case in court.

ARINEA member states could consider forming a joint task force comprised of the various agencies:

- LEAs
- Representatives from the private sector
- Tax
- Customs
- Foreign affairs
- Immigration
- FIU
- Regulatory authorities
- Central authority (for cases involving international inquiries)
- Asset management authority

When such task forces are established, it is important to clarify which agency will take the lead role and the respective roles of the team members. How intelligence and information are handled and shared will also be an important factor.

Standards of Proof

Practitioners should also consider whether the evidence is sufficient to meet the standard of proof required for tracing, provisional measures, confiscation, civil actions, or conviction. Although the applicable standard will vary among jurisdictions, it is generally true that the more intrusive the investigative technique or measure, the higher the evidentiary standard of proof²:

	Tracing Measures	Investigation and provisional measures	Confiscation; Civil Recovery	Conviction
Common Law (Ethiopia; Kenya;	Reasonable grounds to suspect	Reasonable grounds believe	Balance of probabilities	Beyond reasonable doubt

² Figure 2.1 Standards of Proof – page 33 Asset Recovery Handbook – A Guide for Practitioners 2011

Tanzania; Uganda)				
Civil Law (Burundi; Djibouti; Rwanda; South Sudan)	Evidence needed to establish the truth	Evidence needed to establish the truth	Intimate conviction	Intimate conviction

In cases where assets are in other countries, it will be important for practitioners to understand the differences in the legal frameworks and what assistance can be provided. The Asset Recovery Inter-Agency Networks will be a valuable source of information in these cases.

Selecting the Appropriate Charges

Practitioners should ensure that the charges that are investigated and prosecuted will provide the best results for confiscation. The legislation in ARINEA member countries will require convictions of certain offences or categories of offences to allow for extended confiscation to be applied (**Djibouti; Ethiopia; Kenya; Tanzania; Uganda**). Therefore, it is essential that prosecutors are involved in the investigation at the earliest opportunity to provide guidance on the direction of the investigation and the potential offences.

7. Confiscation Investigation

The challenges in a confiscation investigation will depend on the asset recovery legal framework. In property-based confiscation, evidence will be required that links the assets to the criminal offence/s, whilst in value-based confiscation proving that assets are a benefit derived from the particular and/or general criminal conduct of the defendant. To establish this link, practitioners must conduct a parallel financial investigation that will run alongside the investigation into the offence/s.

At the beginning of a confiscation investigation, it is important to devise the following plans:

- An investigation plan in respect of the criminal offence/s – will identify the offence/s under investigation and the evidence that will be required to prove the case in court.
- A parallel financial investigation plan – to compile a financial profile of the suspect and to identify their assets and the source of funds used to purchase them.

- An asset management plan – once the assets of the suspect have been identified this plan will determine whether the assets will be seized and/or frozen and what is the most effective method to preserve the asset and maintain their value.

No matter how complex the case, the procedure that should be followed from the inception of the intelligence or allegation will always be the same.

In any confiscation investigation and at any stage, the investigator and prosecutor should always consider the following questions:

- Has the suspect/defendant obtained property and/or a benefit from the criminal conduct?
- If so, what, and how much?
- What is recoverable?

A parallel financial investigation is an investigation that is conducted alongside the criminal investigation into the predicate offence/s. The investigation will concentrate on the assets and lifestyle of the criminal to determine whether they have been obtained from legitimate sources or whether the criminal is living beyond their means.

The investigator conducting the parallel financial investigation should keep in contact with the investigators investigating the offence/s so that relevant intelligence, information, and evidence are shared. Once the suspect has been charged, the investigator should contact the prosecutor to make them aware of the parallel financial investigation, the freezing/restraining order, and that an application for confiscation will be made following the conviction.

The confiscation investigation can be divided into two stages:

- Intelligence and pre-investigation
- Investigation

Intelligence and Pre-Investigation

At this stage intelligence and information should be obtained to support both the criminal and the parallel financial investigation. Whilst investigators will have powers to obtain information and evidence these can often take time as a court order is often required. The most efficient way in which an investigator can obtain intelligence and information is through the FIU. The FIU will have powers from its governing legislation to compel those from within the regulated sector and government departments to provide information. The FIU will also be able to request information from FIUs in other countries.

The building of a financial profile concerning a suspect should commence as soon as the suspect has been identified. The financial profile will become an extension of the generic profile and will continue to be developed and built upon through the investigation. A comprehensive and detailed financial profile will be fundamental to any financial investigation. To compile the financial profile of a suspect and identify their assets the investigator should obtain information/intelligence from the following sources:

FIU

The primary function of the FIU is to act as the national centre for the collection, analysis, and dissemination of information regarding money laundering and the financing of terrorism. FIUs will receive intelligence from various sources:

- STRs from the regulated sector which will include financial institutions (banks), non-financial institutions (e.g., insurance companies), designated non-financial businesses and professions (e.g., lawyers, accountants, real estate agents).
- Cash declarations either entering or leaving a country.
- Intelligence received from FIUs in other countries.
- LEAs

LEA Intelligence

All LEAs will hold intelligence and therefore the investigator should make inquiries as to whether any intelligence is held in respect of the suspect, their families, and associates.

Checks should also be made as to whether the suspect, their family, or associates have any previous convictions or whether they have been previously investigated.

Immigration

Has the suspect been travelling to other jurisdictions? How often? With which airline? How were the tickets purchased?

Customs

Has the suspect ever been investigated by customs? Has he imported or exported any goods? If so, what? Where were they imported from or exported to?

Has the suspect made any cash declarations when leaving or entering the country?

Tax

What records are held in respect of the suspect, if there are then this will indicate their legitimate income. If no records are held, it will be difficult for the suspect to claim that

assets were legitimately purchased or deposits into a bank account have come from legitimate sources.

Registrar of lands

Does the suspect own land? If so, when was it purchased and how was the purchase funded? If a loan was obtained, from whom and how has it been repaid? If the suspect does not own the property where he resides, who does? Is it rented? If so, what is the rent, and how is it paid?

Vehicle & Marine Registries

These registries can provide title information and summary data on the vehicle/boat/vessel at transfer or sale dates.

Company Register

If companies are linked to the suspect, what is the relationship? What position does he hold? Have accounts been filed?

Some registries will provide the practitioner with ownership information; names of an agent of record (typically a lawyer or accountant), shareholders, directors, and beneficial owners; and company financial statements. This search should be conducted for all types of businesses—sole proprietorships, partnerships, limited liability partnerships, and corporation.

Civil Records

They can provide information about current and previous spouses (marriage and divorce records), siblings, parents, grandparents, and other relatives.

Court Records

These can reveal whether the suspect or other targets have been involved in any sort of dispute, family, or divorce proceedings. The court records could reveal information about financial matters and/or assets.

Telecommunication and Utility Records

Who is paying for these services and how?

Banks

Obtain account opening documents; these will indicate the purpose of opening the account and the anticipated activity on the account. Obtain bank statements and analyse deposits and withdrawals, particularly those that are unexplained.

Open source

Facebook; Instagram; Tik Tok; etc. Whilst criminals can often be elusive and secretive, they often cannot resist the temptation of showing their wealth and activities on social media and this can often be a valuable source of information.

The Financial Profile

Once the intelligence and pre-investigation inquiries have been concluded, the investigator should have enough information to compile the financial profile of the suspect. It should be noted that this is a living document and can be amended throughout the investigation.

A financial profile will include the following:

- Date and place of birth (include aliases).
- Copies of birth certificates, passports, and national identity cards.
- Names and birth dates of spouses, children, both parents (and new partners, if divorced, separated, or widowed), siblings, spouses of siblings, and immediate relatives (uncles, aunts, cousins, grandparents, grandchildren).
- Relevant telephone numbers (business, home, mobile), e-mail addresses, and contact details of any other Internet or social network communication. In some jurisdictions, it may be possible to obtain subscriber information from the service provider.
- Recent photographs of all targets and associates (preferably government-issued identification).
- Results of a criminal record search.
- Results of public-source searches on targets and associates, using Internet search engines, social networking sites, local media reports, and libraries.
- Information from other government agencies
 - Land, vehicle, and utility information.
 - Business records.
 - Court records.
 - Tax records.
 - Border crossings and customs declarations.
 - Immigration records.
 - Salary statements – what is the suspect's legitimate income?
 - Real estate records, including purchase agreements, mortgages, loan applications, and appraisals.

- Information identifying banks or bank accounts and other entities that may hold business records.

The identification of assets is a critical aspect of the asset recovery process, and all assets should be located, their ownership established, and any evidence that can link them to criminality. As much information must be obtained at the information/intelligence gathering stage as this will assist in determining what further action is required:

- What information/intelligence needs to be converted into evidence?
- Whether the assets need to be seized?
- Whether the assets need to be frozen?
- What type of management will the asset need?

Investigation

Within the review of the information/intelligence, the investigator should concentrate on identifying the assets of the suspect and their legitimate sources of income. This is a very important exercise as it will assist in any seizure, freezing, management, and confiscation of assets. The review will also enable the investigator to determine what intelligence needs to be converted into evidence that can be used to support an application for freezing and confiscation orders.

Points to consider once assets have been identified are:

- Who owns the asset? - Search for the title or ownership to identify legal and beneficial ownership. Identify other interests in the asset such as existing or potential liabilities against property or the interests of bona fide third parties, e.g., secured loans or spousal interest.
- Establish the asset value – There should be a full financial analysis of the asset, to assess whether it is likely to depreciate and to ensure that it has a value and that negative or marginal net equity assets do not become a liability if seized or frozen/restrained.
- Where is the asset located? – Is it in another jurisdiction? Consider whether it will need to be transferred to safe storage, how will it be transported, whether there are security requirements, and ultimately what resources are required to deliver these requirements and the cost involved.

- How will the asset be dealt with? – Establish whether the asset should be seized immediately or if a freezing/restraint order is sufficient. Assess whether it requires specialist resources to maintain it and its value, or if it could be disposed of in an interim or pre-confiscation sale.

The investigator has specific powers available to them to convert intelligence into evidence and careful consideration should be given as to what power should be used and when. At the initial stages of the financial investigation, as much evidence should be obtained as possible covertly to avoid the suspect/s becoming aware of the investigation. The use of the powers can be divided into those that are covert and those that are overt.

Covert Powers

Orders for Disclosure or Production of Documents

Possibly one of the most used investigative orders in parallel financial investigations. Obtaining business documents will be essential to an asset recovery case. Data, documentation, and other information held by banks, lawyers, accountants, real estate agents, insurance companies etc will require a judicial order compelling them to provide what is required for the investigation. The requirements for obtaining such orders will vary according to the legal framework of the ARINEA member country. In practice it would be advisable to request a precise list of data, documents and information and conclude the list with the general phrase requesting any other relevant information. Vague requests are likely to be rejected.

It is important for investigators to pay careful attention as to what they are requesting as general requests can lead to large amounts of irrelevant information. It is better to start with narrow parameters and then widens them as the investigation progresses.

When requesting information from banks or financial institutions, investigators should consider obtaining the following:

- All account-opening documentation.
- Client due diligence and know your customer documentation.

- Loan documentation and in particular the loan application and supporting information
- All bank account statements for the period under investigation and if possible, for the maximum period allowed by legislation prior to the commencement of the investigation.
- Credit card information, including application, statements, payment history, transaction logs covering any interaction with credit card staff, and other cards under the umbrella of a target's account but in another person's name.
- Safe deposit information, including contracts, visiting records, and video surveillance of relevant areas (not usually box-contents viewing areas).

Examination of Financial Records

Through the covert and overt inquiries, the investigator would have obtained various types of financial records which will need to be analysed to establish:

- legitimate sources of income
- potential illegitimate income
- assets
- source of funds for the purchase of assets

This evidence can be used to support an application for a confiscation order, as the court can infer that property held by the defendant is the proceeds of crime where there is no evidence of legitimate income to account for the acquisition of that property. This will apply to ARINEA member countries that have legislative provisions for extended confiscation (Djibouti; Ethiopia; Kenya; Tanzania; Uganda).

Bank account opening records

These can be excellent sources of information and should always be requested by the investigator as the documents produced by the person who opened the account can:

- identify individuals involved
- provide a better understanding of the source of funds
- identify potential witnesses
- highlight the proposed purpose of the account and the type and amount of funds expected to be deposited

Bank account statements

These will often reveal valuable information concerning the source of money and the subsequent movement of that money within the financial system and beyond. The

examination will identify the methods used, debits, credits, withdrawals, wire transfers, loans, bonds, and the dates and timing of the transactions. Investigators should consider whether they would draw on expertise from other stakeholders in analysing the accounts, e.g., the FIU.

Accounting records

These can relate to individuals, businesses, or companies. This analysis can often help to identify hidden illicit transactions, the study and comparison of account entries, payments, and supporting documentation will reveal any manipulated or falsified records.

Insurance policies

Insurance policies may reveal the existence of valuable assets, e.g., cars, jewellery, or other items of value. Life insurance policies are methods to launder money, especially those that are purchased with a single initial payment; some policies have a *cash-in* option allowing for money to be withdrawn at a late date.

Documentation of sales and purchase

This will include:

- purchase and sale of tangible assets – vehicles; jewellery; property; antiques
- purchase and sale of intangible assets – stocks; shares; bonds
- the payment of mortgages; tax returns; insurance policies; credit cards

Investigators should pay attention to the ancillary information that will be available including the date of sale/purchase, the method of payment, currency, and the recorded details of the purchaser.

Proving illegal income

There are two ways that can be used to prove illegal income:

i. Specific items method

This can be used where there is information available that can show the movement of illicit funds, e.g. an individual or company makes a monetary payment as a bribe to a public official, and this is sent via a bank transfer from the company or person's bank account to that of the corrupt official.

This can also occur when a subject uses a legitimate business to conceal the proceeds of crime with legitimate funds to disguise and present it as legitimate business profits:

Total Deposits

Minus (-) known income and deposits

Equals (=) non-income deposits

Minus (-) known fund income

Equals (=) criminal proceeds

Total Deposits	\$1,000,000
Known Income and Deposits	- \$800,000
Non-Income Deposits	= \$200,000
Known Fund Income	- \$60,000
Criminal Proceeds	= \$140,000

Indirect methods of proof

Payments in cash can be difficult to trace and prove. The investigator should try and identify any significant cash transactions; these can include cash purchases or cash deposits into accounts.

These transactions should be correlated in date against the time of suspected cash payments or withdrawals.

The spending profile of the subject can be examined. If the subject has spent greater amounts than s/he had available for other disclosed legitimate sources this can be indicative of illicit funds.

The use of cash can also be exposed through the examination of the subject's spending patterns, including cheques and credit card expenses over a period. From this examination, a lack of use of debit and credit cards to make payments for items can raise the question, how has this expenditure been met? Areas of expenditure to be examined will include routine expenses – utility bills; fuel costs; food shopping; entertainment and leisure.

Once the investigator has created the financial profile of the suspect and identified their assets, this information should be shared with the criminal investigation team so that decisions can be made as to whether the assets should be seized/frozen and how they should be managed.

ii. Source and Application of Funds Method - Basic Formula

Total Applications *Minus* Known Source of Funds = Funds from unknown sources.

Funds from unknown sources = Proceeds of Crime

Total Applications	\$2000,000
Less Known Source of Funds	- \$110,000
Funds from Unknown Sources	= \$900,000

Expanded Formula

Asset purchases (real estate, auto, boats, apartment, business etc.)

Plus (+) incurred debt (loans and other liabilities)

Plus (+) other expenditures (rent, travel, phone, vacation etc.)

Equals (=) total expenditures

Minus (-) income from known sources (salary, loans, sale of assets, cash on hand)

Equals (=) funds from unknown sources = The proceeds of crime.

Asset Purchases	\$3,000,000
Incurred Debt	-\$700,000
Expenditure	\$600,000
Total Expenditure	= \$2,900,000
Sources of Income	-\$900,000
Criminal Proceeds	= \$2,000,000

This Source and Applications of Funds method of determining the amount of illegal income can be used when there is no available direct evidence, and the investigation reveals that the suspect has spent funds over their legitimate income.

Net Worth and Expenditure - Basic Formula

The net worth method is generally used where there is a requirement to study a longer period, and in cases where it is suspected that the subject of the investigation has acquired a substantial number of assets over several years. Net Worth also considers

the non-asset expenditures (applications of funds) of a subject into an account in proving the proceeds of crime.

The first stage of the process is to identify and value at the *cost, not market value*, of all current assets, when this is calculated the following steps are taken:

Value of assets

Deduct (-) current liabilities

Equals (=) current net worth

Deduct (-) prior years' net worth

Equals (=) net worth increase

Plus (+) living expenses and non-asset expenditures

Equals (=) income or expenditures

Deduct (-) known income-funds

Equals (=) Funds from unknown sources the proceeds of crime

Value of Assets (at cost)	\$9,000,000
Current Liabilities	-\$2000,000
Net Worth	= \$7,000,000
Prior year's net worth	-\$2,000,000
Net worth increases	\$5,000,000
Expenses and Expenditures	+\$200,000
Income or Expenditure	= \$5,200,000
Known Income Funds	- \$800,000
Criminal Proceeds	\$4,400,000

The investigation must exclude all legitimate sources of funds that might exist or be claimed by the subject. This usually requires an interview of the subject, where there is an opportunity to establish from the subject, the identity of all financial accounts and assets and to describe the source of all funds, particularly cash.

Account Monitoring Orders

This is an order which compels a financial institution to provide information concerning activity on an account or accounts for a set period, usually thirty days. This type of order can provide investigators with real-time financial surveillance of the ongoing transactions in an account that practitioners can use to establish typologies of activity and identify new accounts. Large withdrawals from the account could provide opportunities for cash seizure.

Overt Powers

Search and Seizure

A properly planned search of premises will provide investigators with an excellent opportunity to obtain information and evidence relating to the criminal and parallel financial investigation. It would be best practice for financial investigators to accompany those officers who are investigating the criminal offences if this is permitted by the legal framework of the ARINEA member country.

Due to the intrusive nature of a search warrant, jurisdictions will require either senior officer approval and/or authorisation from a Judge.

Common law jurisdictions (**Ethiopia; Kenya; Tanzania; Uganda**) will require a written application and an affidavit in support which must set out the reasonable grounds to believe that the search will uncover evidence/information to be used in the investigation and prosecution.

Civil law jurisdictions (**Burundi; Djibouti; Rwanda; South Sudan**) will require similar information, but without the formality and with a standard of proof that may differ from reasonable grounds to believe. Law enforcement officers will be authorised by a prosecutor or investigating magistrate to conduct all necessary searches to establish the truth.

Both applications will need to specify the locations to be searched and the items to be seized, although the legislation will often permit other items to be seized if they are believed to be evidence of a crime or tainted property.

Planning and executing a search warrant is vitally important, for example, where multiple properties are to be searched at different locations it is essential that the search warrants are executed at the same time to ensure that evidence/information is not lost. There may also be a requirement for specialists to be part of the search team e.g., when computers/crypto-currencies are likely to be recovered. Certain types of premises may require an independent lawyer to be present, e.g., when searching the business premises of a lawyer or accountant when privileged or confidential information is likely to be located.

Important items to seize include:

- Financial records
- Computers and digital storage devices

- Crypto-currency seeds and cold wallets
- Items to identify associates or other leads. Photographs, videos, address books, calendars, and trash.
- Shredded paper can be reconstructed.

8. Securing and Managing Assets

The legal frameworks of ARINEA member countries provide wide powers for LEAs and prosecutors to seize, freeze and manage assets before conviction and asset recovery. Investigators and prosecutors should consider all the powers available to them and choose the most appropriate to ensure that assets are available at the end of the case to satisfy a confiscation order.

Once assets have been seized and/or frozen there will be a financial burden and duty of care on the state to preserve assets which will include, storage, valuation, and maintenance. A failure to manage assets carries with it a risk that compensation would need to be paid to the owner of the asset if the case did not proceed or if they were found not guilty. Therefore, the investigators and prosecutors need to consider the most efficient and economical way of preserving and managing the assets.

Pre-Seizure Planning

Pre-seizure planning is the process of evaluating assets and confiscation scenarios before freezing or seizing property. The potential for interim use or pre-seizure sale of the asset is also considered in this context. If a receiver or judicial officer is to be appointed, pre-seizure planning assists in framing the terms of the order sought and in determining the skills required to manage the asset e.g., a business or rented accommodation. If the asset is to be left in the custody of the owner, pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the asset within the terms of the freezing order as well as the measures needed to monitor compliance with such restrictions. If the asset is to be seized, pre-seizure planning will focus on determining the best way to avoid high costs for storing it and manage legal liabilities.

Questions and procedures for pre-seizure and pre-restraint planning

1. What is being seized? Perform a basic assessment of the condition of the asset (for example, arrange to drive by the immovable property to evaluate the state of repair and occupants and any observable challenges, such as security concerns).

2. Establish the location of assets and evaluate transport, security, storage, maintenance (as well as the expected duration of maintenance requirements), and management requirements, including costs and resources to be invested if the asset is seized
3. Determine who owns the asset. Conduct open-source ownership and title investigations to identify owners (both nominal and beneficial owners) and other interests in the asset, including potential or existing liabilities against the property and interests of bona fide third parties.
4. Ascertain the most up-to-date value of the asset, including whether it has a particular value to the owner and whether it could be replaced easily if liquidated.
5. What law enforcement benefits are to be derived from seizure? Are there possible alternatives to seizure, such as allowing the owner to retain control of the asset?
6. Consider law enforcement resources available to take custody and manage the asset?
7. What entity is best placed to take responsibility for managing the asset, pending the confiscation decision? Should a receiver or judicial officer be appointed?
8. Will the asset require significant amounts of management resources and oversight, specialist expertise or considerable investment of funds?
9. Will a receiver/trustee/asset manager need to be appointed?
10. In cases in which pre-confiscation sale is not permitted, consider methods of disposal and alternatives to taking custody of the asset if seizure will become too cumbersome and costly

“What should be noted is that not all assets have to be seized and addressing the above questions will assist in this determination. In common law jurisdictions it may be that the restraint order can be used to manage the assets by allowing them to be held in the possession of the owner on conditions outlined in the restraint order, e.g., up to date insurance and servicing of vehicles”.

Transparency & Accountability

The arrangements to manage and dispose of seized, frozen and confiscated assets must withstand intense public scrutiny. If a decision is made to remove tainted property from the control of its owner, the mechanisms to take care of such assets must be beyond reproach. Meticulous recordkeeping, the adoption of transparent procedures and compliance with the policies, procedures, court orders and laws that govern the asset management process is critical for its transparency and accountability.

The Asset Management Legal Framework

Within the legal frameworks of ARINEA member countries, practitioners will have some or all the following options to manage assets:

- i. Seizure (**Burundi; Djibouti; Ethiopia; Kenya; Rwanda; Tanzania; Uganda**)
- ii. Freezing/restraint Orders (**Kenya; Tanzania; Uganda**)
- iii. Appointing a management receiver/Trustee/State Management (**Djibouti; Kenya; Rwanda; Tanzania; Uganda**)
- iv. Pre-confiscation sale of an asset (**Burundi; Djibouti; Ethiopia; Kenya; Rwanda; South Sudan; Tanzania; Uganda**)
- v. Allowing the owner to retain the asset, subject to restrictions on use together with a positive obligation to maintain its value (**Kenya; Tanzania; Uganda**)

If there is an Asset Management Office in the jurisdiction it will be their responsibility to manage the asset, if not, the responsibility for managing assets will be with the LEA who has seized and/or frozen the asset.

Seized Property – Best Practices

- a. Take photographs of the property's condition at the time of seizure
- b. Determine the ownership of the property and whether there are any third-party interests, e.g., spousal interest, loans secured against the property
- c. Check whether the property is insured and whether the insurance will remain in place after the seizure. If not, then insurance should be put in place.
- d. Take steps to maintain the property. This will depend upon the type of property that has been seized:
 - i. Jewellery, fine art & antiques – the items need to be stored securely. For art and antiques, consideration should be given to the location of the storage and whether that could damage the property.
 - ii. Cars, boats & aircraft – are depreciating assets and should not be kept for long periods. When the asset is seized it should be valued and advice taken on how the asset's value will depreciate over time, even if it is maintained, serviced etc.

- iii. Land & properties – if the property has loans secured against it, consider how the repayments are going to be maintained. If the property is rented, allow the tenants to remain and have the rental payments paid into a frozen account. Can the owner continue to live at the property and maintain it?
- e. Estimate the approximate cost of keeping the asset and whether it can be sold either with the consent of the owner or by a court order.

Seizure & Restraint Orders

In both common and civil law jurisdictions, two mechanisms are used to control and preserve assets that may be subject to confiscation, seizure, and restraint.

Seizure involves taking physical possession of the targeted asset. Although court orders are generally required, some jurisdictions grant law enforcement agencies the right to seize assets. Such powers, often emanating from customs laws, are particularly useful for seizing suspicious cash that is transported across international boundaries in contravention of cash import or export reporting laws.³

Restraint orders are issued by a judge that restrains any person from dealing with or disposing of the assets named in the order pending the outcome of the case. The main difference between seizure and restraint orders is that the restraint order acts against the person (*in personam*) and does not cause property to be taken away from the owner. Restraint orders are obtained from a judge on the application of the prosecutor. Restraint orders are a very important part of the confiscation process and they should be obtained in all cases where there is a risk that assets will be dissipated or in cases where assets will need to be managed or monitored.

To obtain either a seizure or restraint order will usually involve the following:

- An investigation has commenced and it is believed that the suspect has benefited from the offence (value-based confiscation); the suspect has possession of tainted property (property-based confiscation).
- Proceedings have commenced against the defendant.

The applicable legislative and procedural rules will apply to the application process for seizure or a restraint order and this will confirm what must be established for the restraint order or seizure to be granted.

³ 4.1 Asset Recovery Handbook – A Guide for Practitioners 2011

The purpose of a seizure or restraint order is to preserve property to satisfy any confiscation order which may be made. Many months, or even years, may elapse between a criminal investigation getting underway and a defendant ultimately standing trial. The aims of the legislation would be defeated if a defendant against whom a confiscation order may be made could deal freely with his assets while awaiting trial as s/he would be able to dispose of their property to ensure they were effectively *judgment-proof* by the time the confiscation hearing took place.

Legal frameworks give the court jurisdiction to make a seizure or freezing orders to prevent a defendant from dealing with property pending the conclusion of the criminal proceedings.

A restraint order, coupled with disclosure provisions, will in most cases prove sufficient to preserve the value of property pending the making and enforcement of a confiscation order. Banks will immediately freeze a defendant's accounts on being served with a copy of the order and the registration of the order with the Land Registry (or equivalent) preventing any dealing with the property. As to the running of businesses caught by the order, conditions requiring the defendant to deliver accounts, bank statements, and associated documentation at regular intervals will normally be sufficient for the prosecutor to satisfy himself that the business is being properly run for legitimate trading activities. The defendant himself will also be aware that any dealing with the property will breach the order and commit an offence liable to imprisonment.

In some cases, however, a restraint order alone will not be an effective means of preserving the value of a defendant's assets pending the determination of the proceedings. The defendant may, for example, be in custody or have absconded leaving valuable assets unmanaged. In consequence, a house, often the most valuable asset in a defendant's estate available for confiscation, may be left unoccupied or fall into a state of disrepair. It may be left uninsured and mortgage payments may fall into arrears. Similar considerations may apply to other valuable assets including cars, boats, and light aircraft. A business or company under the control of the defendant may need closer supervision than that afforded by requiring the defendant to submit business records regularly. Further, the prosecutor has neither the qualifications nor experience necessary to make important decisions relating to the management of a restrained business. It would not, for example, be able to judge whether the release of a large sum of money from a restrained bank account to fund a particular business venture represents a good business risk or not.

In circumstances such as this consideration should be given to appointing a receiver/trustee/asset manager to take possession of and manage the property to ensure that it maintains its value. Managing property would also include the power to sell the

property, especially when it is depreciating. The legal frameworks in Kenya, Tanzania and Rwanda provide for the court to appoint an asset manager, whilst in Djibouti and Uganda there is an obligation on the state to manage the property.

Disclosure orders are also an important part of obtaining a restraint order, as they require the defendant to disclose the income and property owned directly or indirectly by the defendant. Such disclosures are important as they can be used by the court when considering an application for a confiscation order.

Third Party Interests

It will often be the case that assets that have been seized or restrained will have a third-party interest, e.g., a matrimonial home will be owned between the husband and wife. Investigators and prosecutors must be alive to this issue and such propriety rights can be identified during the initial stages of the financial investigation. International standards require that a jurisdiction's legal framework should protect the rights of third parties when seizing, restraining, or confiscating property. FATF R4 states that:

Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties.

The G8 Best Practices for the Administration of Seized Assets recommends that there should be mechanisms for those with a legal interest in seized property to apply to the court to modify a seizure or restraint order to permit the release of the property subject to adequate controls, including mechanisms to inform potential bona fide third parties about the seizure or confiscation of an asset in which they might have a legitimate interest.

Seizure

In cases where property has been seized on the grounds that it is tainted, a third party can make representations to have the property returned on the grounds that it is not tainted or that the third party had no knowledge that it would be used in an offence, e.g., a hire car company in cases where the car had been used in the offence.

Restraint

Restraint orders will apply to both tainted and realisable property (which is often not linked to the offence or offences) and will prevent both the defendant and any other person with

an interest in the property from dealing with or disposing of that property. However third parties can apply to have the terms of the restraint order varied to either allow them to have access to or use of the property whilst the case progresses or to have the restraint order rescinded or have the property removed from the order.

Types of Asset and Associated Problems

Crypto-currencies

Crypto-currencies are increasingly used by criminals, especially regarding cyber-crimes and money laundering. FATF has updated Recommendation 15 so that jurisdictions have guidance if they decide to regulate crypto-currencies and virtual asset service providers. Notwithstanding the fact that none of the ARINEA member countries have yet to regulate the use of crypto-currencies, it is certain that criminals will be using them. Websites such as <https://coinmap.org/view/#/map/6.66256154/-1.64039612/10> can be used to identify where crypto-currencies are being traded and accepted as currency.

Investigators need to be equipped to recognise and locate crypto-currencies, have the knowledge to know how to seize them, and then what to do once they are seized. A detailed explanation of crypto-currency seizure, retention, and management is outside the scope of this guide, however, investigators should have in place a cold wallet to which seized crypto-currencies should be transferred to prevent their dissipation by those who may have access to the seed key or the hosted wallet. Once the crypto-currency is in the possession of the LEA careful consideration should be given as to whether the crypto-currency should be kept in its current form or whether it should be converted to FIAT currency and held in an interest-bearing account. The other consideration for investigators is whether the definition of property within the country's legal framework will include crypto-currency. Case law has determined that a crypto-currency is a form of intangible or incorporeal property, and therefore if the definition of property within legislation contains this term, then it will mean that crypto-currency can be seized, managed, and realised like any other property.

Real Property (Land)

Land is a good asset to either restrain or seize for the purpose of confiscation as it will often be the most valuable of the suspect's assets. Generally, land will be straightforward to manage and will maintain its value. Issues can arise in the following circumstances and will require a greater degree of management:

- Mortgages and secured loans. Such liens will need to be paid otherwise the land maybe the subject of legal proceedings.
- Tenants. Where the land is leased to tenants it is important to ensure that their contractual rights are protected an honoured. Rents received will also have to be managed.
- Businesses may be using the land and will require management to ensure that the value of the land is maintained.

Motor Vehicles, Boats, and Airplanes

If these types of assets are seized, they can be expensive to maintain and will also rapidly depreciate in value. Where it is possible for the defendant to keep the asset, this should be the preferred option and the use of the vehicle etc could be controlled by the restraint order, which could impose conditions such as having the vehicle insured and serviced at regular intervals. Where this is not possible the asset must be maintained and should not be left exposed to the elements where its condition and value will deteriorate. The image below is a far too common occurrence where vehicles and similar assets are not maintained. If the case proves to be unsuccessful the asset should be returned in a similar condition to what it was in when it was seized. The preferred option should be to sell the asset and place the proceeds into an interest-bearing account. The sale could either be arranged by consent or ordered by the court where the legislation provides for this.



Businesses

Depending on the circumstances of the case there are several options relating to businesses. The easiest option is to allow the defendant to continue to operate the business providing that regular accounts and financial statements are provided to prove that the

business is being run appropriately. If this is not possible then a receiver/trustee/asset manager should be appointed to run the business. It should also be noted that it may not be possible to seize or restrain companies as they have their own legal identity. Where companies and their assets are involved in a case then careful consideration should be given to the legal framework and whether the corporate veil can be lifted to gain access to the company's assets.

Livestock and Farms

Farms can range from commercial enterprises to small holdings kept for personal use and livestock can range from cattle to racehorses. In whatever form the farm or livestock is in, they can be problematic to manage. Investigators should consider whether it is worthwhile seizing or restraining such assets and realistically should only do so where they will maintain a value and could be included in confiscation.

Perishable and Depreciating Assets

This will generally include:

- Highly perishable goods such as fish or flowers that will only last for a few days.
- Moderately perishable goods such as crops or livestock that will need to be harvested and/or sold at certain times
- Depreciating vehicles which can lose their value of between 15-20% per annum

Ideally, all of the above categories should be sold for their market value. This should either be done in accordance with legislative provisions, an order from the court or consent from the defendant.

9. Confiscation

Confiscation can be applied for at the conclusion of the criminal case when the defendant pleads guilty or is found guilty following a trial.

During the criminal case, it would be essential that the financial investigator and the prosecutor liaise to ensure that the appropriate offences have been used to as to maximise the confiscation of assets. This can be particularly important in jurisdictions that have either extended property-based or value-based confiscation where additional property can be confiscated or the court can make certain assumptions to extend the amount of benefit. Usually for such provisions to apply the defendant would have had to have been convicted of certain offences or categories of offences.

ARINEA member countries have different asset recovery regimes with some only having property-based confiscation (**Burundi; Djibouti; Rwanda; South Sudan**) whilst others have both property and value-based confiscation (**Kenya; Tanzania; Uganda**).

Property-Based Confiscation

This type of confiscation concentrates on property and is sometimes referred to as *in rem* confiscation. It confiscates property that was either used in the offence, is an instrumentality, or is the proceeds of the offence. In either instance, there must be a causal link between the property and the offence/s.

Example

A is arrested in his car and when this is searched the following is found:

- 1kg or white powder (cocaine) Weighing scales
- 3 burner phones (phones with only a SIM and no contract)
- \$5,000
- 25 ziplock plastic bags

The defendant is charged with the following offences:

- a. Possession of cocaine with intent to supply
- b. Money laundering – possession of criminal property.

The following property could be confiscated:

- i. The car as it was an instrumentality
- ii. Cocaine, weighing scales, burner phones and ziplock bags as instrumentalities
- iii. \$5,000 as the proceeds from money laundering.

The definition within the legislation of instrumentalities or proceeds will be important as it will determine how far the confiscation provisions can be applied.

Proceeds are normally defined as any property obtained directly or indirectly from the offence. In case of theft direct proceeds would be the amount that has been stolen and indirect proceeds could be interest that has been earned on the amount stolen if it had been placed in an interest-bearing account.

Assessing the amount of the proceeds from an offence can be difficult in certain types of cases, especially where the proceeds have been mixed with legitimate property.

The following example is taken from the World Bank publication – The Asset Recovery Handbook:

Mr. X is a corrupt official who accepted a cash bribe of \$100,000 to manipulate the process of awarding a government contract. A series of transactions subsequently took place to move and launder the funds:

- *Mr. X deposited the bribe into a bank account in his wife's name.*
- *Mr. X caused his wife to transfer the money into the trust account of a lawyer in another jurisdiction. This lawyer was already holding \$900,000 (the origins of which were unknown) on behalf of Mr. X.*
- *Mr. X instructed his lawyer to use all Mr. X's money to purchase a property worth \$1 million in the name of an investment company controlled by Mr. X.*
- *Three years later, Mr. X sold that purchased property for \$2 million and had the proceeds returned to an account he controlled in his home jurisdiction.*

When these corrupt activities came to light, prosecutors applied for a property-based confiscation order of \$200,000 from the bank account containing the \$2 million, on the basis that it constituted the proceeds of crime. This amount was calculated through the following analysis:

- \$100,000—the amount directly derived from the bribe. The fact that the property was converted to a different form of property and commingled with other assets did not affect its character as direct proceeds of the offense.
- + \$100,000—the capital gain on the sale of the house (doubled in value). The gain amounted to an indirect benefit of the corruption offense.
- = \$200,000—total proceeds of crime.

Value-Based Confiscation

In contrast to property-based confiscation, value-based confiscation concentrates on the benefit that a defendant has derived from his offending and/or his criminal lifestyle. In making a value-based confiscation order the court will place a value on the benefit and order the defendant to pay that amount in a set period of time or face a term of imprisonment in default. It is often the case that where a default term is imposed, service of that term will not prevent the defendant from having to pay the confiscation order. Therefore, the onus is on the defendant to pay the order and it acts against the person, *in personam*.

To increase the effectiveness of confiscation value and property-based can be applied for in the same case.

Prosecutors can effectively utilise value-based confiscation by the selection of the offences used in a case. In cases involving offending over a period, a prosecutor could consider the following options:

- Representative or sample offences
- A conspiracy where there is more than one defendant
- Offences that are committed over a period of time, e.g. between date A and B you stole \$20,000 by submitting false claims for expenses as detailed in Schedule I

Value-based confiscation will often involve rebuttable presumptions relating property held or received and expenditure made over a period of time leading up to the date that the defendant was charged with the offence/s. If the defendant is unable to prove (on the balance of probabilities) the provenance of the property held, acquired, or expenditure made then its value will be added to the benefit amount.

Part II – Civil Recovery/Non-Conviction-Based Forfeiture

10. Civil Recovery Process

Only Kenya has civil recovery of the proceeds of crime within its legal framework.

In civil recovery or non-conviction-based forfeiture, there is no requirement for any criminal investigation or prosecution to have occurred and the process will involve an investigation into the asset and obtaining evidence that it is either an instrumentality of the proceeds from an offence.

Non-conviction-based forfeiture can occur in one of two ways:

- i. Within the context of criminal proceedings but without the requirement of a finding of guilt or conviction
- ii. Confiscation through an independent statute that introduces a separate proceeding that can occur independently of or parallel to related criminal proceedings, and is often governed by the rules of civil procedure

A lower standard of proof will be required and the rules of evidence will be different, for example, hearsay and verified intelligence can be admissible.

For common law jurisdictions the case of ***SOCA v Gale and others* [2010] EWCA Civ 759**, can be used to explain the burden of proof:

The burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. While the claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

11. Civil Recovery Investigation

A civil recovery investigation will often be defined as an investigation into –

- (a) whether the property is recoverable, i.e. has come from criminal conduct of a specific kind or kinds;
- (b) who holds the property; and
- (c) the extent or whereabouts of the property.

The processes involved in a civil recovery investigation are very similar to a confiscation investigation, the main difference is that the investigation relates to property and not the person.

Civil recovery cases are often referred for a civil recovery investigation in the following circumstances:

- the individual has died, absconded, or is resident in another jurisdiction
- a person was acquitted of the offence
- the charge was withdrawn before a verdict was returned, or
- the proceedings have been stayed

In civil recovery cases that have been the subject of a criminal investigation, the financial investigator should request that all the evidence/information obtained by the investigators should be transferred to them.

A civil recovery investigation will be subject to different procedural and evidential rules and therefore evidence that may not have been admissible in a criminal case can be used in a civil case, e.g., hearsay evidence. The types of evidence that can be used in a civil recovery case are:

- Previous convictions.
- Evidence from failed prosecutions/investigations.
- Verified intelligence.
- Criminal Associations.
- Hearsay evidence is admissible.

Depending on the legislation the investigator should be able to use the same investigative orders that apply to confiscation investigations.

Example

A is stopped driving his car by the police, concealed within the car is \$950,000. It is suspected that the money is the proceeds from drug dealing, A is arrested and a

provisional charge is laid at court. A has stated that the money is legitimate and is a combination of savings, income from his employment at a garage, and the sale of cars.

The police have obtained the following information:

- the owner of the garage has confirmed that A works for him occasionally
- The national transport authority has records of A purchasing a car in 2018 for \$10,000 and selling it in 2019 for \$8,000
- A has a bank account

A decision is taken not to pursue the criminal case and the matter has been referred for civil recovery.

In civil recovery, it is not necessary to identify the specific offence that the property came from but the type or category of the offence/s must be specified.

As part of the investigation, the investigator needs to obtain evidence to disprove the account provided by A. The following inquiries should be made:

- i. Is he a registered taxpayer? If so, obtain his tax records
- ii. Obtain the records from the National Transport Authority or equivalent in respect of the car that was bought and sold.
- iii. Obtain his account records from at least January 2018. Analyse the activity on the account, are there any suspicious deposits and withdrawals?
- iv. Check whether A owns his address or rents it? If he owns it, when was it purchased, and how? If it is rented, who is it rented from, what is the rent, and how is it paid?
- v. Speak to the garage owner to obtain records of payments made to A.

Once this information is obtained and analysed, invite A to attend an informal interview and to produce any documentation that can support his assertion that the cash was legitimate.

As money laundering can often be prosecuted based upon the circumstances in which the property was handled giving rise to an irresistible inference that it had come from crime, it could be alleged in this case that the money had derived from money laundering.

There will be occasions when the recoverable property has been disposed of or transferred, and in such circumstances, the property can be followed into the hands of

the person who now owns it. The property can still be recoverable, unless the person who obtained it can show that they obtained it in good faith, for value and without notice that it was recoverable property.

12. Securing the Assets

Similar to confiscation investigations, where property has been identified and there are grounds to suspect, believe or there is a good arguable case that is recoverable then steps should be taken to secure the property and prevent it from being transferred or dissipated.

The legislation that provides for civil recovery should contain provisions to obtain a freezing order to prevent property from being transferred or dissipated. The difference between a freezing order and a restraint order is that a restraint order prevents a person or persons from dealing with property (acting *in personam*) whereas a freezing attaches to property (acting *in rem*).

Similar considerations should be applied when applying for a freezing or deciding whether to seize or manage property as those outlined in section 8.

13. Civil Recovery Order

An application for a civil recovery order should be accompanied by an affidavit and supporting evidence that outlines the belief that the property/properties are recoverable, i.e., derived from a criminal offence or offences.

There is no requirement for the claimant to pinpoint the exact crime that the property derived from, although if this can be done it should. The claim can be successful if the claimant is able to provide evidence on the balance of probabilities that the property derived from a crime of a particular type or different crimes.

If the court makes a civil recovery order the property will then transfer to the state and it can either be realised or used depending on the legislative provisions of the ARINEA member country.

Part III – International Cooperation

14. International Enquiries

Asset recovery cases will often involve an international element as criminals will transfer the proceeds of their offending across international borders.

In conducting financial investigations, investigators need to be able to trace, identify, restrain, and confiscate assets, no matter where they are located. Where assets are believed to be in other jurisdictions, investigators must be aware of the investigative techniques and procedures that are available to them.

There are two types of international cooperation:

- i. informal
- ii. formal

15. Informal cooperation

This term is generally used for assistance through means outside of the formal channels, often through direct communications between counterparts such as FIUs, police, prosecutors, or investigating magistrates sharing intelligence or data which is legally available to that agency through domestic databases.

Whatever is obtained through informal cooperation cannot be used as evidence and to obtain admissible evidence then formal international cooperation needs to be considered. However, there are some exceptions to this as evidence can be obtained through open source, an example of this would be company information or land records.

Informal cooperation should always be considered as the first option.

The following are examples of informal cooperation:

FIU

FIUs are likely to be part of the Egmont Group which recognises that financial intelligence sharing is of paramount importance and has become the cornerstone of international efforts to counter money laundering, terrorist financing, and associated predicate offenses.

Financial intelligence units (FIUs) are required by international standards to exchange information and engage in international cooperation.

The Egmont Group is a united body of 166 FIUs. FIUs are uniquely positioned to support national and international efforts to counter money laundering and terrorist financing. FIUs are also trusted gateways for sharing financial information domestically and internationally per global AML/CFT standards. The Egmont Group provides FIUs with a platform to securely exchange expertise and financial intelligence to combat ML/TF and associated predicate offences.

The FIU is uniquely positioned to provide investigators with information and intelligence from other jurisdictions which will assist in tracing assets and other useful financial intelligence.

International LEAs and Liaison Officers

International Criminal Police Organization (INTERPOL) - 94 member countries that will assist police in all member countries in their investigations and inquiries.

EUROPOL which is headquartered in The Hague, the Netherlands, support the European Union (EU) Member States in their fight against terrorism, cybercrime, and other serious and organised forms of crime. They also work with many non-EU partner states and international organisations. They will be able to facilitate inquiries within the EU.

Embassies and High Commissions will often have law enforcement liaison officers and liaison magistrates who will be able to assist with inquiries with their home countries, e.g., the National Crime Agency for the United Kingdom and the Drug Enforcement Administration for the United States of America.

International Association of Prosecutors

Established in June 1995 to tackle transnational crime, particularly drug trafficking, money laundering, and fraud. It has 183 organisational members in over 177 countries representing every continent.

It provides a global forum through which prosecutors can exchange experience, identify common challenges & sharing best practice.

World Bank – Stolen Asset Recovery Initiative (StAR)

A partnership between the World Bank Group and the United Nations Office on Drugs and Crime that supports international efforts to end safe havens for corrupt funds. StAR provides platforms for dialogue and collaboration and facilitates contact among different jurisdictions involved in asset recovery. StAR works with partners around the world to develop the most effective tools to tackle and prevent the theft of assets critical to development.

Asset Recovery Networks

These are informal networks of law enforcement and judicial practitioners in the field of asset tracing, freezing, seizure, and confiscation. There are currently eight such networks around the world:

- Camden Asset Recovery Interagency Network (CARIN) – Europe
- Asset Recovery Interagency Network Asia/Pacific (ARIN-AP)
- Asset Recovery Interagency Network South Africa (ARINSA)
- Asset Recovery Interagency Network Eastern Africa (ARINEA)
- Asset Recovery Interagency Network West Africa (ARINWA)
- Red de Recuperacion de Activos del GAFILAT (RRAG) – Central and South America
- Asset Recovery Interagency Network Caribbean – ARIN-CARIB
- Asset Recovery Interagency Network West & Central Asia – ARIN-WCA

International Companies

International companies can be a useful source of information in respect of the products and services they provide. They will be able to provide information in respect of the sale and service of their products e.g., ROLEX, TAG HUER. Criminals will often spend money on high-end goods and these companies will be able to provide information to LEAs regarding their products. Money Service Bureaus such as Western Union and MONEY GRAM will also provide assistance.

Crypto-currency Exchanges

Reputable crypto-currency exchanges will provide know your customer and due diligence information to LEAs and will also freeze accounts pending mutual legal assistance (MLA) requests. Examples of exchanges who will provide such assistance are:

- Binance

- Coinbase
- Kraken
- Houbi

Open Source

Investigators will be able to obtain information and evidence from open sources. Government websites will often provide information regarding companies, land and vehicle ownership.

16. Formal cooperation & Mutual Legal Assistance Requests

Formal international co-operation is a means by which one country can assist another with providing evidence for use in an investigation/prosecution or extraditing suspects/prisoners.

If assets have been identified in another jurisdiction a request for mutual legal assistance would be required to do any of the following:

- obtain evidence for the investigation/case, e.g., bank accounts
- restrain/freeze assets
- enforce asset recovery orders

In asset recovery cases the purpose of the request for MLA will be for:

- To trace and locate assets.
- To obtain evidence in respect of an asset.
- To freeze/restrain the asset.
- To enforce a forfeiture/confiscation order.

The process of making a request for MLA can be complex and lengthy and practitioners will need to understand the procedures involved in their jurisdiction as well as understanding what assistance the receiving jurisdiction of the MLA can provide.

Pre-MLA

At this stage, the investigator and/or the prosecutor should consider the following?

- What evidence do you require and does this need MLA? Sometimes it maybe possible to obtain evidence without submitting an MLA. An example would be

obtaining company and land records from the United Kingdom, as both can be obtained from websites.⁴

- How can you ensure that the information you require is held within the jurisdiction? This can be achieved through informal cooperation and once it has been established that the evidence or asset exists in the jurisdiction then an MLA request should be made.
- If MLA is required always seek advice on how best to draft the request and where it should be sent. This can be obtained either from LEA representatives or liaison prosecutors from the jurisdiction base within Embassies or High Commissions or from an ARIN focal point.
- If possible, send a draft to the jurisdiction. This should always be considered to prevent a request from being rejected or returned for not being in the same format.

The following questions should also be answered at the pre-MLA stage:

- i. Legality - Is the requested measure legal in your own legal system? Is the requested measure legal and feasible in the requested state?

To answer this question, check the legislation/jurisprudence/practices of your and the receiving jurisdiction.

- ii. Proportionality - Is the requested measure proportional to the purpose of your investigation? e.g: police capacity, costs (bank data collect, phone data collect)

Collect the information regarding the legal system/practices of the requested state BEFORE you send the international request for legal assistance.

- iii. Time frame - Is the proposed time frame to collect the evidence (e.g. urgency) realistic regarding the legal rules of the requested state?

Speak to the receiving jurisdiction to ascertain what is achievable and in what time frame.

⁴ Companies House - GOV.UK (www.gov.uk); <https://www.gov.uk/government/organisations/land-registry>

The Legal Basis for MLA Requests

There must be a legal basis upon which the MLA request is made and this can come from any of the following:

- Multilateral conventions, treaties, or agreements containing provisions on MLA in criminal matters - Multilateral conventions, treaties, or agreements contain binding provisions that oblige signatories to provide MLA under international law. The provisions define areas of cooperation and contain governing procedures, thereby bringing clarity and predictability to the process. These agreements often permit more extensive forms of cooperation than the traditional promise of reciprocity or letters rogatory, such as communication between central authorities.⁵
- Bilateral MLA treaties and agreements - Similar to the multilateral treaties, bilateral MLA treaties contain binding provisions that oblige the signatories to provide assistance and that define the procedures for practitioners to follow. In addition, they may provide forms of cooperation that are not available under other arrangements, such as direct contact between the practitioners, competent authorities, and members of the judiciary.⁶
- Domestic legislation allowing for international cooperation in criminal cases - A number of jurisdictions have passed legislation that provides an MLA process for jurisdictions without a bilateral treaty, often on the condition of reciprocity.
- A promise of reciprocity through diplomatic channels (referred to as *letters rogatory*) - This traditional form of assistance may be useful if there is neither an existing treaty between the jurisdictions or domestic legislation in the requested jurisdiction

The form and content of the request for MLA (also known as an *International Letter of Request*) can differ from jurisdiction to jurisdiction, but the following information should be provided:

- i. The legal basis for the request and the assurance of reciprocity
- ii. The nature of the investigation or prosecution. A detailed case summary should be provided which should include the offence under investigation or being prosecuted. The sections or articles of the legislation should also be included.
- iii. Dual criminality – does the jurisdiction have the same or similar offences to those being investigated or prosecuted?

⁵ Page 139 - Asset Recovery Handbook - A Guide for Practitioners 2011

⁶ Page 140 - Asset Recovery Handbook - A Guide for Practitioners 2011

- iv. The assistance that is being requested
- v. The contact details for the investigator and prosecutor

The letter of request should be sent in the language of the requesting jurisdiction and the language of the receiving jurisdiction. A professional translator should be used to ensure that both letters are the same.

Requests for MLA should be sent to the Central Authority of the receiving country.

17. Return of Asset and Asset Sharing

FATF R38 states:

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. ...Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

Further in the interpretative guidance to R38, it states:

Countries should take such measures as may be necessary to enable them to share among or between other countries confiscated property, in particular, when confiscation is directly or indirectly a result of coordinated law enforcement actions.

The following UN Conventions also require signatories to engage in the return and sharing of assets:

Vienna Convention 1988

Art 5 requires States Parties to adopt measures allowing for the confiscation of proceeds from offences or property of corresponding value;

Art 5 (5) (ii) – provides for Requested party to give special consideration to the concluding of agreements on:

“Sharing with other Parties, on a regular or case by case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with domestic law [and] bilateral agreements etc”

Palermo Convention 2000

Art 14 (2) and (3)

States parties to give priority consideration to the return of the confiscated proceeds of crime or property to the Requesting State party so that it can give compensation to the victims of crime and or return such proceeds of crime to their legitimate owners OR

States parties give special consideration to sharing with other states parties on a regular or case by case basis such proceeds of crime or property or funds derived from sale of such proceeds of crime or property.

UNCAC 2003

Art 57 – provides for repatriation of assets in certain cases and (Art 57(5)) special consideration to concluding agreements or mutually acceptable arrangements on a case by case basis for the final disposal of property.

Further guidance on asset return and sharing can be found in the following publication:

[UNODC Confiscated Asset Returns and UNCAC - A Net for All Fish 2023.pdf](#)
[\(worldbank.org\)](#)

The return and sharing of assets will depend on how the MLA request has been drafted. The most common way will be to rely on provisions UN Conventions, treaties, bi-lateral asset sharing agreements or on a case by case basis agreement.