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Guideline 2: Restraining assets

Involved jurisdictions should promptly consider various options for preventing the untimely dissipation of assets, such as government freezes or delaying transactions for predetermined periods.

Asset recovery efforts are of little value if, ultimately, no assets remain available for confiscation and restitution. Given that assets can be hidden or moved out of a jurisdiction quickly and that investigation and confiscation processes may be lengthy, it is critical that measures be taken at the very outset of an investigation to secure any assets that may become subject to a confiscation judgment.

Available provisional measures (e.g., government freezes, consent regimes, other restraint orders or delaying transactions for predetermined periods) to prevent the dissipation of assets, should be identified and employed where possible. Involved jurisdictions should consider initiating actions against the proceeds of corruption located in their jurisdiction when requests for MLA have not yet been presented in order to preserve the assets. Involved jurisdictions should inform other relevant jurisdictions of any provisional measures taken, any limitations on such provisional measures (e.g., time limitations, notification provisions) and the additional steps necessary to maintain the provisional measures in place.

In certain cases, it may be decided not to implement provisional measures as part of the investigative strategy to monitor the asset to develop new avenues of inquiry (see [Guideline 3](#) [1]), or where the exercise of provisional measures may tip off the subject and allow for the movement of assets in other jurisdictions. In such instances, involved jurisdictions, should seek to coordinate their actions and/or consider whether alternative means of restraining or delaying transactions are possible (see [Guideline 4](#) [3], [Guideline 5](#) [4], and [Guideline 7](#) [5]).

Steps 1 Identify and secure assets

Take steps to identify and secure assets as early as possible through domestic coordination and use of international and regional partners or networks (see [Guideline 6](#) [6]). Assess relations with financial institutions to enhance trust between them and law enforcement for the purposes of inter alia identification of assets and potential delay of transactions.

Explanation of step 1

Available mechanisms that allow for the temporary freezing of assets should be used to the widest extent available and as swiftly as possible, before a formal MLA request is filed. A formal MLA request may be required to retain the freeze.

Depending on their legal systems (civil or common law), jurisdictions will have different approaches to mechanisms for temporary freezes. However, a common priority is to determine whether assets exist at all. Some jurisdictions have no consent regimes as administrative practices to ensure that freezes may be put in place for a certain time or possibly open-ended when a suspicious transaction report has been filed. In other jurisdictions, prosecutors must file specific applications for judicial orders, though these may be done on an urgent basis. Independent from the applicable legal system, efforts to identify and freeze assets should be made to the maximum extent possible.

If provisional measures are not available or desirable at such time, alternative means of restraining or delaying transactions should be considered. For example, in many jurisdictions, anti-money laundering legislation may provide avenues to secure assets. FIUs may have the administrative authority to restrain or refuse consent to release funds if a STR has been filed, thereby providing authorities with some time to obtain a formal court order. Financial institutions may exercise voluntary and independent restraint to avoid implication in money laundering offences. Other options include requesting the financial institution to delay the suspicious transaction and to inform law enforcement authorities upon receipt of payment instructions relating to the envisaged transaction. This allows

for more time to gather information to determine whether a case can be built. Law enforcement should build trust with the relevant financial institutions in order to facilitate cooperation.

Involved jurisdictions should use available contacts, networks of practitioners and international organisations to reach out at an early stage and obtain advice or facilitation for communications. Databases of central authorities and focal point networks are useful in this respect and can establish direct channels of informal communication and consultation between practitioners (see [Guideline 6](#) [6]).

Asset management concerns should also be identified and an asset management plan developed, preferably prior to executing provisional measures.

Step 2 Discuss temporary freeze options

Communicate among the involved jurisdictions to determine the available options for the temporary freeze of assets, based inter alia on timing issues, expected outcomes, likelihood of prosecution. Where temporary freezes are not available, discuss the most effective mechanisms available to freeze the assets, e.g., non-conviction based forfeiture (NCB), and parallel proceedings (see [Guideline 6](#) [6]).

Explanation of step 2

Once assets are identified for possible seizure, involved jurisdictions should discuss the timing for applying the provisional measures, taking into consideration, e.g., possible tipping off of the target. Lack of coordination and early action in one of the jurisdictions involved may allow the target to move assets, reducing the overall efficacy of the measure. Involved jurisdictions should moreover assess the timing of communication, e.g., if it jeopardises potential freezes (see [Guideline 4](#) [3] and [Guideline 7](#) [7]).

The different timelines in involved jurisdictions may determine whether prosecutors seek to open a case and if there is a sufficient level of suspicion to impose coercive measures, in particular if the underlying offences were committed abroad. The use of domestic routes or focus on international requests should be discussed. Jurisdictions using NCB may maintain provisional measures including freezes for extended periods of time.

Step 3 Sequence of communication

Involved jurisdictions should maintain regular communication with each other once provisional measures have been taken. Communication should include mutual understanding of applicable time limits to the provisional measures, any legal challenges to these measures and avenues to proceed with the case.

Explanation of step 3

Provisional measures taken should be promptly communicated among involved jurisdictions.

Involved jurisdictions should detail their requirements and the different steps expected from their counterparts (see [Guideline 5](#) [4] and [Guideline 6](#) [6]). Confidentiality requirements should be carefully explained, especially with a view to disclosure requirements in other jurisdictions prior to transmitting the requested evidence (see [Guideline 6](#) [6]).

Step 4 Dual criminality

The summary of facts provided should enable the requested jurisdiction to match the alleged conduct to a criminal offence under its legal system.

Explanation of step 4

The criminal nature of the conduct in the requesting jurisdiction should be verified in the requested jurisdiction, in order to avoid the object of the request for MLA falling outside the scope of assistance in the requested jurisdiction. Prior contact should be made with the central authority of the requested jurisdiction and draft requests for MLA should be shared with it, where applicable, to seek advice informally, bearing in mind any confidentiality or disclosure requirements.

Step 5 Prevent leaks

Prevent leaks or premature disclosure of information that may hinder further action.

Explanation for step 5

Involved jurisdictions should promptly and proactively communicate their own domestic confidentiality and disclosure requirements to ensure these have no negative impact on the investigative strategies (see [Guideline 7 Step 2 Provide the requested jurisdiction\(s\) with any relevant information that impacts the execution of the request for MLA \(e.g. confidentiality, timing and other procedural issues\)](#) [5]).

Further reading

- UNCAC, Articles 31, 54 and 56
- [Technical Guide to UNCAC](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf) [8], Article 31, available at http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf [8]
- [FATF International Standards on Combatting Money Laundering and the Financing of Terrorism \(Recommendations\)](http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html) [9], Recommendations 4 and 38 available at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> [9]
- FATF, [Best Practices on Confiscation](http://www.fatf-gafi.org/dataoecd/39/57/44655136.pdf) [10], available at <http://www.fatf-gafi.org/dataoecd/39/57/44655136.pdf> [10]
- Stolen Asset Recovery Initiative (StAR), [Asset Recovery Handbook: A Guide for Practitioners](https://star.worldbank.org/publication/asset-recovery-handbook) [11] (see Section 4: Securing the Assets) available at: <https://star.worldbank.org/publication/asset-recovery-handbook> [11]
- StAR, [Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action](https://star.worldbank.org/publication/barriers-asset-recovery) [12] (see Barrier 10: No Quick Freeze or Restraint Mechanisms), available at: <https://star.worldbank.org/publication/barriers-asset-recovery> [12]

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Source URL (modified on June 2018): <https://guidelines.assetrecovery.org/guidelines/guideline-2-restraining-assets>

Links

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