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United Nations Office on Drugs and Crime



Manual on
**International Cooperation
for the Purposes of Confiscation
of Proceeds of Crime**

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

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I. Definitions of terms used

See also: *Asset Recovery Handbook: A Guide for Practitioners*¹

“Administrative confiscation” means a mechanism for confiscating assets used or involved in the commission of an offence that have been seized in the course of the investigation. It is invariably authorized by statute and commonly features in customs enforcement at borders. The urgency of seizing the implicated assets obviates the need for judicial authorization, although most jurisdictions permit challenges to the seizure.

“Assets”: see “property”.

“Asset recovery” is a term used to describe efforts by Governments to repatriate to the country of origin proceeds of crime hidden in foreign jurisdictions.

“Benefit derived from crime” or “criminal benefit” means any property, service, advantage or benefit that is a constituent of a person’s wealth and which was directly or indirectly acquired as a result of the person’s involvement in the commission of an offence, whether or not the property, service, advantage or benefit was lawfully acquired.

“Business accounting records” means all the documentation and books involved in the preparation of financial statements or records relevant to audits and financial reviews. Accounting records include records of assets and liabilities, monetary transactions, ledgers, journals and any supporting documents such as cheques and invoices. Many jurisdictions require financial and designated non-financial institutions to preserve accounting records for a specified period of time, usually six years.

“Central authority (for mutual legal assistance)” means an administrative entity designated by a State to be the central contact point for matters of international cooperation with other States. Treaties usually require States to create a central authority.

“Confiscation of assets or property”, also known in some jurisdictions as “forfeiture”, means the permanent deprivation of property by order of a court or other competent authority. See article 2 (g) of the United Nations Convention against Transnational Organized Crime.

“Controlled delivery” means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge of and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

“Conviction-based confiscation or forfeiture” means confiscation by the State of proceeds of a crime for which a conviction has been recorded. This is also called “criminal forfeiture” in some jurisdictions.

¹Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., World Bank, 2011).

“Extradition” means the formal process by which a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve his sentence in that State.

“Financial Action Task Force” is the name of an intergovernmental body whose purpose is to develop and promote national and international policies to combat money-laundering and financing of terrorism (see www.fatf-gafi.org).

“Financial Action Task Force mutual evaluation reports” are peer evaluations of a State by experts from other countries, prepared, reviewed and published online, which describe the State’s compliance and capacity to undertake investigations, prosecutions, mutual legal assistance, extradition and confiscation applications against proceeds of crime and instrumentalities.

“Financial institution” means any person or entity who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- (a) Acceptance of deposits and other repayable funds from the public;
- (b) Lending;
- (c) Financial leasing;
- (d) The transfer of money or value;
- (e) Issuing and managing means of payment (such as credit and debit cards, cheques, traveller’s cheques, money orders and bankers’ drafts, electronic money).

“Financial intelligence unit” means a central, national agency responsible for receiving (and, if authorized, requesting), analysing and disseminating to the competent authorities, disclosures of: (a) financial information concerning suspected proceeds of crime and potential financing of terrorism; or (b) financial information required by national legislation or regulation, in order to counter money-laundering and financing of terrorism.

“Forfeiture” means the permanent deprivation of property by order of a court or other competent authority. The term is often used interchangeably with confiscation. Forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to the State. The persons or entities that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture lose all rights, in principle, to the confiscated or forfeited funds or other assets.

“Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force” is a set of recommendations developed by the Financial Action Task Force providing a complete set of measures to counter money-laundering, covering the criminal justice system and law enforcement, the financial system and its regulation, and international cooperation. They have been recognized, endorsed or adopted by many international bodies. A revised version was issued in early 2012. (See Financial Action Task Force, *International Standards on Combating Money-Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations* (Paris, February 2012), available from www.fatf-gafi.org.)

“Freezing” means temporarily prohibiting the transfer, conversion, disposition or movement of property, usually on the basis of an order issued by a court or a competent authority. The term is used interchangeably with “restraining”, “attachment”, “preservation” or “blocking”.

“Freezing order” means an order (usually judicial) that leaves physical possession of the asset with the owner or a third party but imposes specific terms and conditions on their use of the asset, or prohibits any right to sell, lease, destroy or otherwise diminish the value of the asset while the order is in force. Also called “restraint”, “blocking”, “attachment” or “preservation” orders in some jurisdictions.

“Instrumentalities” means the assets used to facilitate crime, such as a car or boat used to transport narcotics.

“Know your customer” refers to the due diligence and bank regulation activities that financial institutions and other regulated entities must perform to identify their clients and ascertain relevant information pertinent to doing financial business with them.

“(Criminal) lifestyle” is a term used with reference to a defendant convicted of specified offences or of conduct that forms part of a course of criminal activity in the sense that either on a single occasion the defendant is convicted of four or more offences of any description from which he has benefited, or he is now convicted and has been previously convicted on at least two separate occasions within a specified period (for example, six years) of offences of any description from which he has benefited.

“Monitoring order” means a judicial order directed at a financial institution to disclose to an authorized person information concerning transactions carried out through an account held with the institution by a person named in the order. Such an order may require the financial institution to make the disclosure immediately after a transaction has been made; or on suspicion that a transaction is about to be made; or the order may direct the financial institution to refrain from completing or effecting the transaction for a specified period.

“Money-laundering” means any act or attempted act to disguise the source of money or assets derived from criminal activity. Money-laundering includes concealing the origins and the use of the illegal assets. It is often used to disguise the proceeds of corruption and is widely practiced by drug traffickers, traffickers in persons, kleptocrats and organized crime rings.

“Mutual legal assistance” is a process by which States seek and provide assistance in gathering evidence for use in criminal cases. See further the *Manual on Mutual Legal Assistance and Extradition* (United Nations Office on Drugs and Crime).

“Non-conviction-based confiscation or forfeiture” means asset confiscation or forfeiture in the absence of the conviction of the wrongdoer. The term is used interchangeably with “civil forfeiture”, “in rem forfeiture” and “objective forfeiture”.

“Organized crime” means a serious crime committed by a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing such crimes in order to obtain, directly or indirectly, a financial or other material benefit.

“Plea agreement” means an agreement in a criminal case between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. This may mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence; also called “plea bargain” or “prosecutorial immunity” in some jurisdictions.

“Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offence (see article 2 (*e*) of the United Nations Convention against Transnational Organized Crime). In some jurisdictions, the terms “profits of crime” or “benefit derived from crime” are preferred. (See meaning of “benefit”.)

“Production order” means a judicial order addressed to a specified person to produce for the inspection of an authorized person any document that identifies or locates any property subject to forfeiture or confiscation or that determines the value of the property or benefit derived by a defendant from criminal conduct.

“Property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets. (See article 2 (*d*) of the United Nations Convention against Transnational Organized Crime.)

“State-sanctioned reverse sting” (also known as “sting operation” or “controlled delivery”) means a proactive covert investigative technique involving the participation of law enforcement agents as agents provocateurs in the commission of offences.

“Tainted assets” means assets connected with a crime in the sense that they were used in committing the crime or were derived from it.

“Terrorist” means any natural person who: (*a*) commits, or attempts to commit terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (*b*) participates as an accomplice in terrorist acts; (*c*) organizes or directs others committing terrorist acts; or (*d*) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

“Terrorist act” means: (*a*) an act that constitutes an offence within the scope of, and as defined by one of the following treaties: Convention for the Suppression of Unlawful Seizure of Aircraft,² Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,³ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁴ International Convention against the Taking of Hostages,⁵ Convention on the Physical Protection of Nuclear Material,⁶ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,⁷ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,⁸ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,⁹ and the International Convention for the Suppression of Terrorist Bombings;¹⁰ and (*b*) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the

²United Nations, *Treaty Series*, vol. 860, No. 12325.

³*Ibid.*, vol. 974, No. 14118.

⁴*Ibid.*, vol. 1035, No. 15410.

⁵*Ibid.*, vol. 1316, No. 21931.

⁶*Ibid.*, vol. 1456, No. 24631.

⁷*Ibid.*, vol. 1589, No. 14118.

⁸*Ibid.*, vol. 1678, No. 29004.

⁹*Ibid.*

¹⁰*Ibid.*, vol. 2149, No. 37517.

hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act.

“Terrorist financing” means the financing of terrorist acts, and of terrorists and terrorist organizations.

“Terrorist organization” means any group of terrorists that: *(a)* commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; *(b)* participates as an accomplice in the terrorist acts; *(c)* organizes or directs others committing terrorist acts; or *(d)* contributes to the commission of terrorist acts by a group of persons acting with a purpose where the contribution is made internationally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

“Transnational organized crime” means organized crime, some aspects of which are manifest in two or more countries to such an extent that the courts of any one of such countries has criminal jurisdiction over the perpetrators.

“Value-based confiscation” means a method of confiscation that enables a court, once it determines the benefit accruing directly or indirectly to an individual from criminal conduct, to impose a pecuniary liability (such as a fine, usually in multiples of the profit or benefit derived from the crime), which is realizable against any asset of the individual.

II. Introduction

“Criminal groups have wasted no time in embracing today’s globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete.”

Secretary-General Kofi Annan

Source: Foreword to *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (New York, United Nations, 2004).

1. The focus of the present Manual is national efforts aimed at successfully preventing criminals from profiting from crime. Many international and regional conventions contain provisions on asset confiscation. Articles in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,¹¹ the United Nations Convention against Transnational Organized Crime¹² and the United Nations Convention against Corruption¹³ call for national efforts to criminalize conduct and prevent criminals from gaining profit, the most frequent motivation for crime. At the regional level, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;¹⁴ the African Union Convention on Preventing and Combating Corruption and the Inter-American Convention against Corruption,¹⁵ as well as the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions¹⁶ provide for various approaches to combating profit from crime.

2. Articles 12-14 of the United Nations Convention against Transnational Organized Crime and article 31 of the United Nations Convention against Corruption establish the measures that parties to the Conventions are expected to take on asset confiscation as a way of preventing profit from crime. The Organized Crime Convention responds to the reality that organized criminal groups function outside national or international law, ignoring, circumventing or frustrating domestic laws unless those laws work to their advantage, with assistance from experts. Since the modern world is based on the free movement of capital, there is a need to build international capacity to respond to organized crime. Simply stated, the organized criminal group is all too frequently better organized than the State.

¹¹United Nations, *Treaty Series*, vol. 1582, No. 27627.

¹²*Ibid.*, vol. 2225, No. 39574.

¹³*Ibid.*, vol. 2349, No. 42146.

¹⁴*Ibid.*, vol. 1862, No. 31704.

¹⁵E/1996/99.

¹⁶*Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

3. The serious problem of transnational organized crime and the need for improved mechanisms to combat its impact and facilitate the recovery of proceeds of organized crime led the international community to adopt the Organized Crime Convention, to which there are now 166 States parties. If those States were as organized as are sophisticated criminal organizations, there would be no need for a handbook on the confiscation and disposal of assets. The reality is that international cooperation is not as effective as it needs to be to prevent organized crime from being profitable.

4. Recognizing the serious problem of organized crime and the need for improved mechanisms to combat such crime and facilitate the recovery of its proceeds, the international community sought to provide for confiscation. States must live with the knowledge that the movement of capital (criminal or otherwise) generally flows unhindered across national borders, while States are bound by national laws to protect their citizens and maintain their sovereignty. Organized criminal groups fully appreciate that they can take advantage of border restrictions to shelter their criminal wealth. The Organized Crime Convention was designed to combat not only specific criminal acts but also to overcome the challenges to international cooperation facing States. The reality of money-laundering has been well understood for decades. The work of the Financial Action Task Force and its regional bodies in the area of recommendations to counter money-laundering, together with a State's adherence to the Forty Recommendations of the Financial Action Task Force through national laws implementing the provisions set out therein demonstrate an international commitment to combating money-laundering.

5. Recovering proceeds of crime or instrumentalities is complex. In federal States and large unitary States, this may involve coordination and collaboration with law enforcement and prosecutors who are spread throughout the country. In a less developed State, the financial implications of an anti-money-laundering regime can be difficult to justify. Every State must balance national priorities, while organized criminal groups will inevitably take advantage of national deficiencies to shelter their proceeds of crime. Other opportunities for organized criminal groups to protect their assets are created through divergent legal traditions, the dualist and monist traditions, relative to the incorporation of international law; the distinctions between the civil and common law systems;¹⁷ and the barrier created by diverse languages. As a result, States need to have the tools to investigate, cooperate and confiscate in routine cases of transnational organized crime, such as bulk cash smuggling, and more complex cases involving investor fraud and the movement of illicit wealth.

6. In relation to the disadvantage of States vis-à-vis criminals, in the Supreme Court of Canada's considerations in an extradition case, Justice La Forest observed that:

Modern communications have shrunk the world and made McLuhan's global village a reality. The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression.¹⁸

That case involved drug trafficking, but the problem described applies equally to all forms of organized and transnational organized crime. The issue is exacerbated by the simple fact that the crime may be local but the movement of the proceeds of the crime can easily be international.

¹⁷The *Manual on Mutual Legal Assistance and Extradition* issued to support international cooperation provisions in the United Nations Convention against Transnational Organized Crime summarizes the differences between systems in chapter 1.

¹⁸*United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469.

7. The United Nations Convention against Transnational Organized Crime, together with the work of the Financial Action Task Force and other initiatives such as the Stolen Asset Recovery (StAR) Initiative,¹⁹ provides broad guidelines on how to respond to the movement of criminal profits. Essentially, they illustrate how States should establish the tools to undertake organized crime investigations, prosecutions and confiscation applications that target the instrumentalities and proceeds of crime.

8. Specialized investigative techniques and the development of essential skills to “follow the money” beyond national borders, the ability to act quickly to avoid dissipation of the assets and the recognition of the need for asset management responses are a necessity. To ensure effectiveness, a national competent authority responsible for international cooperation requests between States must be established with the capacity to launch and conduct or coordinate with legal proceedings in domestic and foreign courts or to provide the authorities in another jurisdiction with evidence or intelligence for investigations (or both). All legal options, whether criminal confiscation, non-conviction-based confiscation, civil actions or other alternatives, must be considered. This process may be overwhelming for even the most experienced practitioners. Criminals do not have such problems—they are organized to take advantage of the situation.

9. The primary purpose of the present Manual is to facilitate asset recovery in accordance with the provisions of the Organized Crime Convention. It is to be used in close conjunction with the companion Manual on Mutual Legal Assistance and Extradition. The present Manual is organized into six chapters. Chapter III provides a general overview of the asset recovery process and legal avenues for recovery. Chapter IV presents some strategic considerations for developing and managing an asset recovery case, including gathering initial sources of facts and information, assembling a team and establishing a relationship with foreign counterparts for international cooperation. Chapter V introduces the techniques that practitioners may use to trace assets and analyse financial data, as well as to secure reliable and admissible evidence for asset confiscation cases. The provisional measures and planning necessary to secure the assets prior to confiscation are discussed in chapter VI. Chapter VII introduces some of the management issues that practitioners will need to consider during that phase. Confiscation systems are the focus of chapter VIII, including a review of the different systems and how they operate and the procedural enhancements that are available in some jurisdictions. The issue of international cooperation is dealt with in the Manual on Mutual Legal Assistance and Extradition.

¹⁹The Stolen Asset Recovery Initiative was developed through the process implementing the United Nations Convention against Corruption. It is an initiative jointly managed by the World Bank and the United Nations Office on Drugs and Crime (UNODC). Under the initiative, several excellent texts have been published, all concentrating on assets from corruption. The most recent was Kevin M. Stephenson and others, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., World Bank, 2011). See also a set of non-binding guidelines entitled “Best practices with respect to mutual legal assistance in relation to the tracing, restraint (freezing) and forfeiture (confiscation) of assets which are the proceeds or instrumentalities of crime” approved by the Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas of the Organization of American States in Bogota, held from 12 to 14 September 2007. Available from www.oas.org/juridico/MLA/en/best_pract_en.pdf.

III. A process for asset confiscation

10. An asset recovery case is an essential element of an effective strategy to obtain a criminal conviction (if possible) and recover the proceeds and instrumentalities derived from organized crime offences. Practitioners should not disregard the need for prosecutions and convictions for such offences. However, States also need to achieve confiscation of the profits and instrumentalities. A conviction does not automatically lead to confiscation. A criminal may be happy to serve time knowing that his or her assets will be available upon release, or that his or her family may continue to enjoy the proceeds of crime. The present Manual deals with confiscation of assets rather than the prosecution of offences, which is a matter for prosecutors.

A. Intelligence, evidence collection and tracing assets

11. Law enforcement officers gather evidence and trace assets. Officers may act alone or within a specialized investigative unit. They may, depending on national law and practice, operate under the supervision of or in close cooperation with prosecutors or investigating magistrates. In addition to gathering publicly available information and intelligence from law enforcement and other Government agency databases, law enforcement agencies can employ special investigative techniques. Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders and account monitoring orders), but others may not (for example, physical surveillance, information from public sources and witness interviews).

12. Officers assigned to investigate the substantive organized crime offence all too frequently concentrate on establishing the elements necessary to prove substantive offences. Subsequently, they may turn their minds to the evidence required to target assets. However, those assets can always be moved to frustrate law enforcement investigations, and the same assets can dissipate while the substantive crimes are being investigated. The goal should be to freeze the illicit assets of the criminal offence as early as possible in the context of the larger organized crime investigation. The need to simultaneously investigate assets and the substantive crime means that States should, wherever possible, consider the possibility of establishing specialized asset tracing or asset recovery units, perhaps in the form of an asset recovery office, as described in box 1, to work with their organized crime investigators. None of these suggestions are new.²⁰

²⁰Council of the European Union decision 2007/845/JHA of 6 December 2007, concerning cooperation between asset recovery offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, illustrates this development within the European Union.

Box 1. Desirable features of an asset recovery office

An asset recovery office should:

- (a) Have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and any other relevant services. These agencies should be able to exercise their usual powers and have access to all relevant databases in order to identify and trace assets;
- (b) Have access to a central bank account registry at national level, if available;
- (c) Have adequate resources;
- (d) Provide a central point for all incoming requests relating to asset recovery;
- (e) Collect all relevant statistics on freezing and confiscation;
- (f) Have the power:
 - (i) To access all relevant information;
 - (ii) To coordinate and correlate all relevant information effectively at the national level;
 - (iii) To access information using coercive means, where necessary;
 - (iv) To share the information both nationally and internationally, where appropriate;
 - (v) To protect this information and impose conditions on both its use and further transmission, nationally and internationally;
 - (vi) To issue a short-term administrative restraint order where funds that could be dissipated quickly are identified;
 - (vii) To conduct joint investigations internationally;
- (g) Where it does not directly manage seized assets, at least collect information on seized assets from competent authorities.

13. Surveillance on an organized crime target can provide information on the lifestyle of the suspects, while electronic surveillance can reveal the involvement of financial advisers or the movement of cash and assets. In addition to the collection of evidence on the substantive crimes, other evidence relevant to the target's proceeds of crime must not be ignored. Underlings who are arrested, informers and even media sources can be used to assist investigators targeting organized crime. However, not every criminal investigator is an expert in technology, surveillance or the art of successfully interviewing witnesses and investigative targets. Consequently, individual investigators are assigned different tasks, often on the basis of their strengths. The investigative team must manage its activities to maximize individual expertise. Investigators must be as organized as the criminals they investigate. If resources allow, it is useful to have a specialized team of asset investigators assigned to work with other investigators of organized crime.

14. The investigations undertaken by the larger team will often detect or suspect the movement of proceeds of crime across international borders. An example of this is described in box 2. The fact that authorities in another State may have to be involved in what appeared to be a local investigation is not a true barrier in an age when mutual legal assistance and convention obligations have been developed to assist investigators. Modern communications and cooperation should be seen as a benefit to every investigator rather than a barrier. Specialized practitioners and competent national authorities are available to help when an investigation moves beyond the jurisdiction where it was initiated. In France, specialized teams of asset investigators—*les groupes d'intervention régionaux* (GIR)—were first established in 2002. These teams work with other organized crime investigators on various cases such as money-laundering, tax evasion, embezzlement and illegal gambling. Different kinds of investigators work together within each GIR, analysing bank accounts and corporate statutes, tracing assets (especially cars and real estate) and seizing illegal assets. Other States, such as the United States of America and many others, work cooperatively to successfully combat organized crime.

Box 2. Case of Speed Joyeros

The Speed Joyeros case, considered a model of international bilateral cooperation between the United States and Panama, resulted in the confiscation of assets from a Panamanian firm and prosecution in a United States court. The final outcome of the case was that the United States and Panama used US\$52 million raised by auctioning assets confiscated from the Panamanian firm Speed Joyeros S.A. to establish a bilateral commission to combat drug trafficking and money-laundering.

Initially, gold, silver and other jewellery were seized as a result of a money-laundering investigation that identified two companies in the Colón Free Zone in Panama that were laundering narcotics proceeds from the United States. During the course of the investigation, more than US\$2 million was seized in the form of cashier and/or bank cheques. Four cheques totalling more than US\$862,000 had been issued to a Panama-based company identified as Speed Joyeros S.A. Numerous drug-related assets were identified in Panama and later seized by the Panamanian authorities in accordance with a seizure order issued in the Eastern District of New York as part of these cases.

The investigation resulted in the first United States indictment of an offshore business engaged in the illicit black market peso exchange, a money-laundering operation in which narcotics proceeds earned in the United States were exchanged for Colombian pesos and then used to purchase goods in the Colón Free Zone. During the course of the investigation, Yarden Hebroni and Eliahu Mizrani were identified as major money-launderers based in Panama. They used the Speed Joyeros S.A. wholesale jewellery business and a related company identified as Argento Vivo S.A. to facilitate their activities. Hebroni and her companies were involved in a money-laundering conspiracy that included coordinating and receiving drug proceeds from the United States through cash pick-ups, wire transfers, cashier cheques and third party bank cheques. Specifically, Hebroni and Mizrani operated and built Speed Joyeros S.A. and Argento Vivo S.A., whose combined business was worth more than US\$100 million annually, knowing that the primarily Colombian-based customers were laundering millions of dollars in drug money from the United States through bulk purchases of jewellery.

B. Consideration of another State's capacities

15. It is useful for a State wishing to cooperate with another on asset confiscation to have a local library of information on the other country's adherence to conventions, including the Organized Crime Convention. It is necessary to ascertain whether the other country implements its money-laundering and confiscation obligations effectively, whether it has effective record-keeping, banking laws, customer due diligence obligations, a financial intelligence unit, experienced organized crime investigative capabilities and actual prosecution experience, and whether the claims made are accurate or simply media assertions. These are valid concerns. It is also important to ascertain whether up-to-date information can be obtained quickly, which is possible through Internet access.

16. Consideration of another State's capacity should start with access to its laws. Internet-based resources offered by the United Nations Office on Drugs and Crime (UNODC) and other international organizations are a good starting point. The International Money-Laundering Information Network is a UNODC Internet-based network assisting Governments, organizations and individuals in the fight against money-laundering and the financing of terrorism. The Network was developed with the cooperation of the world's leading anti-money-laundering organizations. The Network site includes a database on legislation and regulations throughout the world (www.imolin.org). UNODC also has an Internet-based legal library containing the national legislation of most United Nations Member States implementing the United Nations international drug control conventions, the Organized Crime Convention, the Convention against Corruption and international conventions and protocols relating to terrorism. Another UNODC resource is the directory of competent national authorities, which is regularly updated and provides the contact details of authorities responsible for various forms of international cooperation in criminal matters. UNODC has also produced the Mutual Legal Assistance Request Writer Tool. The partner publication to the present Manual, the *Manual on Mutual Legal Assistance and Extradition*, also provides useful guidance to practitioners.

17. A further valuable source of information to be used in any case where a State needs to undertake an aspect of an investigation outside its own jurisdiction is the mutual evaluation reports of the Financial Action Task Force (FATF), which established well-recognized and accepted international standards through Forty Recommendations. The Task Force website (www.fatf-gafi.org) provides direct and indirect access to mutual evaluation reports for more than 155 countries. Those reports include the 36 FATF members.²¹ Countries that are not members of the Task Force are frequently members of FATF-style regional bodies and all participate in mutual evaluations of adherence to the Forty Recommendations, which are listed in and linked through the website. All reports adopt a similar evaluation methodology and provide a current peer-reviewed critique of a State's compliance with the Organized Crime Convention and its commitment to countering money-laundering. The mutual evaluation reports are the best evidence that States are slowly attaining a level of organization as sophisticated as that of criminal organizations. The reports are not a substitute for mutual evaluation and international cooperation but will provide States with the reassurance that its requests will not be ignored.

²¹The mutual evaluation reports and follow-up reports for FATF members are available from www.fatf-gafi.org/findDocument/0,3770,en_32250379_32236963_1_43383847_1_1_1,00.html. FATF-style regional bodies such as the Asia/Pacific Group on Money Laundering, the Intergovernmental Action Group against Money Laundering in West Africa, the Caribbean Financial Action Task Force, the Eastern and Southern Africa Anti-Money Laundering Group and others also undertake mutual evaluations and publish updated reports on their members' implementation of the Forty Recommendations, which are published on the websites of those bodies.

18. Further resources not to be disregarded are networks of law enforcement contacts, the most well-known of which is the International Criminal Police Organization (INTERPOL), and regional networks of contacts. Alternatively, a variety of specialized networks could be accessed. There is no one right network: it is important that investigators resort to their peer contacts. Increasing concerns about money-laundering have led to the corresponding evolution of international forums dedicated to fostering investigative cooperation. The Camden Asset Recovery Inter-Agency Network described in box 3 is an example of an informal network of contacts. UNODC has been involved in similar initiatives in other regions, such as the Asset Recovery Inter-Agency Network of Southern Africa, which brings together prosecutors and investigators to improve the tracing and confiscation of the proceeds of crime, particularly those associated with corruption.

Box 3. The Camden Asset Recovery Inter-Agency Network

In October 2002 a Dublin conference co-hosted by the Criminal Assets Bureau of Ireland and the European Police Office (Europol) recommended the establishment of an informal network of contacts and a cooperative group in the area of criminal asset identification and recovery. The agreed name for the group was the Camden Asset Recovery Inter-Agency Network (the Camden Court Hotel of Dublin was the original location of the workshops where the initiative started). In September 2004, the Network commenced its work by establishing an informal network of practitioners and experts with the intention of improving mutual knowledge of methodologies and techniques for the cross-border identification, freezing, seizure and confiscation of the proceeds from crime. The Network's stated objectives were:

- To establish a network of contact points
- To focus on the proceeds of all crimes, within the scope of international obligations
- To establish itself as a centre of expertise on all aspects of tackling the proceeds of crime
- To promote the exchange of information and good practices
- To undertake to make recommendations to bodies such as the European Commission and the Council of the European Union relating to all aspects of tackling the proceeds of crime
- To act as an advisory group to other appropriate authorities
- To facilitate, where possible, training in all aspects of tackling the proceeds of crime
- To emphasize the importance of cooperation with the private sector in achieving its aim
- To encourage members to establish national asset recovery offices

C. Securing assets

19. During the investigative process, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement or destruction. In a perfect world, this activity would be timed to conform to the needs of the larger criminal investigation. All too often that cannot occur. However, some sort of coordination is vital. Premature action to secure an asset could amount to a tip-off about an investigative interest in an individual or organized crime group.

20. In certain civil law jurisdictions, the power to order the restraint or seizure of assets subject to confiscation may be granted to prosecutors, investigating magistrates or law enforcement agencies. In other civil law jurisdictions, judicial authorization is required. In common law jurisdictions, an order to restrain or seize assets generally requires judicial authorization, with some exceptions in seizure cases. Asset restraint and seizure is discussed in detail in chapter V, below. Each legal system may have strict obligations to give notice to investigative targets, such as when a search or production order is served on a third party such as a financial institution. That third party may be obliged to advise their client of the existence of such orders, which means that the client would be forewarned about an investigative interest. That must be taken into consideration when taking steps to secure assets or use coercive investigative measures.

D. Asset management and enforcement of orders

21. The need to recognize that specialized teams of investigators and practitioners need to develop an asset-focused approach to proceeds of crime or instrumentalities is briefly discussed above. Authorities may seize and remove movable property they identify as either an instrumentality or the proceeds of crime. Seizure frequently requires a court order. Alternatively, the authorities may identify and seek to target immovable objects, such as money deposited in a financial institution or land. In all cases where the targeted asset is outside the jurisdiction of the State, mutual legal assistance processes must be considered and, in all appropriate cases, used.

22. When a court has ordered the freezing, seizure or confiscation of assets, steps must be taken to enforce the order, using a mutual legal assistance request for assets located in a foreign jurisdiction. In every case authorities need to consider how the targeted assets will be managed from the moment of seizure or freezing to and beyond the issuance of a confiscation order. Property does not manage itself.

23. Authorities may determine that the owner should be left in control. Terms and conditions in the court order could ensure that the owner continues to manage the property at their own expense. However, if there is real concern about asset dissipation, since the true owner of the tainted property is probably a criminal or criminal organization, the authorities may need to assume management responsibility.

24. Equally, a mutual legal assistance request may be submitted and then enforced by authorities in the foreign jurisdiction by either directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or issuing a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement). In such a case, the *Manual on Mutual Legal Assistance and Extradition* should be used to facilitate the request. This will be accomplished through the mutual legal assistance process. It is also important to understand that in the mutual legal assistance scenario the property, especially if it is immovable, remains in the requested State, and asset management costs need to be evaluated.

25. Finally, once a confiscation or value-based penalty order is issued, both orders must be enforced. Consideration should be given to whether the criminal could be allowed to serve time in lieu of paying a fine or penalty order. Alternatively, if an order confiscating substituted property is issued, that order needs to be enforced. The cost of enforcing such orders and the asset management costs required to preserve seized assets are usually considered by the criminal investigators. Such issues need to be delegated to an authority. This is discussed in chapter VI below.

E. Confiscation application

26. Article 12, paragraph 1, of the Organized Crime Convention states:

“1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

“(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

“(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.”

27. There are a variety of procedures used throughout the world to achieve the confiscation of instrumentalities and proceeds of crime. Administrative confiscation, property confiscation and value-based confiscation are the three predominant types of processes used to confiscate property.

Administrative confiscation. Administrative confiscation is a process that is often associated with customs law and customs seizures. It is frequently an available option in the form of bulk cash seizures at a border, but it can also apply where the nature of the item seized (such as explosives or contraband) justifies an administrative confiscation approach. Law or policy may require giving notice to the owner or person with an interest in the seized property. Those parties would then have an opportunity to object to the confiscation through administrative processes or through the courts.

Property confiscation. Property confiscation relates specifically to tainted property. The Convention defines “proceeds of crime” and national law implements article 12, paragraph 1 (a), by specifically targeting such property through confiscation of that property. However, the same subparagraph also refers to “property the value of which corresponds to such proceeds”, which supports a value-based approach to confiscation. Such value-based confiscation may be achieved in the criminal trial process through a fine in lieu of confiscation or by means of a separate application.

Value-based confiscation. A value-based approach can provide for an application in a court on the basis of a civil court’s standard of proof, which is frequently lower than the standard required to obtain a criminal conviction. The court determines the value of the benefit realized from the crime or crimes and issues a judgement allowing the State to enforce the order against the person.

28. Finally, there are additional refinements such as a substituted assets process to deal with scenarios where the tainted property is unavailable for forfeiture. That is a response to the very real scenario in which the targeted asset is unavailable, for example because it is located outside the jurisdiction or has been fully dissipated.

1. Administrative confiscation

29. Administrative confiscation generally involves a summary mechanism for confiscating assets used or involved in the commission of the offence that have been seized in the course of the investigation. It may occur by operation of statute, most often seen in the field of customs enforcement at borders but also sometimes seen in the enforcement of illicit drug laws, when the possession of the property seized is the offence. This process is effective when the seized item can be moved and taken under the State's control. It is less viable when the property is a bank account or similar immovable property.

30. The confiscation is carried out by an investigator or authorized agency (such as a police unit or a designated law enforcement agency) and often follows a process in which the person affected by the seizure can apply for relief from the automatic confiscation of the seized property. Confiscation would occur after notice of the risk has been served on the owner or person in physical possession of the property and a public notice of potential confiscation has been issued.

31. The advantage of administrative confiscation is the speed of the procedure and the fact that it minimizes the costs associated with preserving the property for subsequent confiscation applications. In addition, administrative confiscation can be used in scenarios where the lawful owner or person in possession prior to seizure abandons the seized property. However, mechanisms are required to eliminate the risk of investigative abuse of this approach.

2. Property confiscation

32. Criminal confiscation is a common approach to asset confiscation. Practitioners must gather evidence, trace and secure assets, conduct a prosecution against an individual or legal entity, and obtain a conviction. After obtaining a conviction, confiscation can be ordered by the court. The standard of proof required, normally proof beyond a reasonable doubt, to achieve a confiscation order in criminal confiscation jurisdictions may be the same as that required to achieve a criminal conviction or, if the law accepts that the proof required to establish a criminal conviction has been established, a lesser standard, such as proof on a balance of probabilities, could be allowed. Other jurisdictions require the same standard of proof for both conviction and confiscation.

33. Article 12, paragraphs 2-4, of the Organized Crime Convention states:

“2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

“3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

“4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.”

34. Generally, unless substitute asset confiscation provisions apply, confiscation legislation will provide for confiscation of proceeds and instrumentalities that are directly or indirectly traceable to the crime.

35. In some jurisdictions, the confiscation order applies to property owned by the offender that is not physically located within the jurisdiction of the court. The court may elect to confiscate that property wherever it is. In such a scenario, the issue after confiscation is how such an order is to be enforced. If the State where the property is located has effective mutual legal assistance legislation, the matter can be straightforward. The requesting State should obtain a local confiscation order and send it, through mutual assistance channels, to be enforced in the other jurisdiction.

36. If the property is outside the jurisdiction of the court and confiscation is precluded for that reason, some States have provisions for substitute asset confiscation orders. In such a case the order, once issued, must then be enforced against the offender's untainted assets. Those assets may be within the jurisdiction of the court, or the person may be obliged to repatriate the asset for local enforcement action. The latter option may be difficult depending upon local law in the jurisdiction where the property is located.

3. *Value-based confiscation*

37. Some jurisdictions elect to use a value-based approach. Value-based confiscation is a system whereby a convicted person is ordered to pay an amount of money equivalent to the value of their criminal benefit. The court, competent authority or jury calculates the benefit to the convicted offender for a particular offence. Value-based confiscation allows for the value of proceeds and instrumentalities of crime to be determined and assets of an equivalent value to be confiscated. Others have adopted an independent non-conviction-based confiscation response. On 15 February 2012, recommendation 4 of the Forty Recommendations of the Financial Action Task Force was adopted, slightly modifying the previous recommendation 3 and succinctly summarizing the non-conviction-based approach. It reads:

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

38. This approach could operate using deeming provisions and assumptions to create an ascertained value of the proceeds of crime following a conviction. Those provisions can be used within the criminal confiscation process. However, another approach is to take the confiscation issue entirely out of the criminal court process. This approach has come to be called "non-conviction-based confiscation".

39. Non-conviction-based confiscation achieves the recovery of the proceeds and instrumentalities of crime. However, the jurisdiction to issue an order may be limited by the territorial jurisdiction of the court. In addition, it is not clear whether non-conviction-based can be considered to be criminal proceedings for the purposes of mutual legal assistance in criminal matters. On 15 February 2012, the Financial Action Task Force updated its Forty Recommendations, including recommendation 38 (see below), by expanding the scope of the enforcement of foreign confiscation orders. Recommendation 38 reads:

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money-laundering, predicate offences and terrorist financing; instrumentalities

used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

40. Obtaining a confiscation order from a criminal court as opposed to a civil court may be considered too difficult in the light of the higher standard of evidence required for a criminal conviction or confiscation. Even if the standard of evidence required to secure a confiscation is lower after conviction, the concern may remain that the criminal trial itself is too onerous. This is premised on the need for a criminal trial and conviction, followed by the confiscation proceedings. Non-conviction-based confiscation, however, frequently relies upon a civil court's expectation of proof based on a balance of probabilities standard, depending on the jurisdiction.

41. What is important here is that there is no requirement for criminal charges to have been instituted or a conviction obtained to undertake non-conviction-based confiscation. The procedure allows for a confiscation application in cases where the offender is unavailable for any number of reasons, such as being deceased, being a fugitive from criminal justice or claiming prosecution immunity. However, the application may still result in an order that may not be enforceable using the mutual legal assistance provisions. If that is the case, the effectiveness of this approach can be limited whenever a criminal uses national borders to frustrate law enforcement and judicial authorities.

F. International cooperation

42. International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the implementation of provisional measures, and the eventual confiscation of the proceeds and instrumentalities of organized crime. The topic of international cooperation is fully covered in the *Manual on Mutual Legal Assistance and Extradition* published to assist implementation of the Organized Crime Convention. It is important to appreciate that article 18, paragraph 1, of the Organized Crime Convention was designed to respond to the threat of international crime through the establishment of a national central authority, as fully discussed in the *Manual* in chapter 4, paragraphs 68 to 72. The need to rely upon peer contacts was discussed in section B above. It is equally important for a State to acknowledge and utilize the expertise developed in its own central authorities. Peer-to-peer contacts can only go so far, and central authorities are essential whenever coercive measures, such as search, production and freezing or confiscation measures, are required. A State's central authority should be the home of all information pertaining to the conduct of any sort of international legal cooperation with another State. As a result, early and regular discussions and reliance on the national central authority for mutual legal assistance are essential.

43. A fundamental issue to recall, in the case of asset investigations and confiscations, is that requests to seize or restrain property in another country must include specific consideration of the domestic law regime in the requested State. Assets that are seized or frozen under a request do not magically move to the requesting State. Similarly, those assets do not manage themselves. Targeted assets must be managed until they are finally forfeited under the domestic law in the requested

State. The issue of the cost of enforcing a request is discussed in the *Manual on Mutual Legal Assistance and Extradition*, but the cost of managing property can also be significant. As a result, attention must be paid to pre-request planning and consideration of such costs.

44. Asset recovery experts in both the requesting and requested States must consult, in a manner that is in tune with and includes each relevant central authority, to seamlessly coordinate the expectations of each jurisdiction. It is not helpful if the requesting State issues an order or has an expectation that the assets (whether money on deposit in a foreign financial institution or a movable object such as a car or real estate) will be immediately returned to the requesting State's court for its control and forfeiture when that is not provided for in the domestic law of the requested State.

45. The example in box 4 focuses on the corruption of foreign public officials by Siemens. This case illustrates successful international cooperation that led to a \$450 million dollar fine being levied.

Box 4. The United States v. Siemens case

In November 2006, the Munich Public Prosecutor's Office conducted raids on multiple Siemens offices and the homes of Siemens employees in and around Munich, Germany, as part of an investigation of possible bribery of foreign public officials and falsification of corporate books and records. The scope of the internal investigation conducted by Siemens was unprecedented and included virtually all aspects of its worldwide operations, including headquarters components, subsidiaries and regional operating companies.

Internal investigation uncovered evidence of corruption by Siemens spanning several decades in many operating groups and geographical regions. Equally if not more important, the internal investigation revealed knowing failures to implement, and circumvention of, internal controls up to the most senior echelons of management.

The internal investigation and the Department's investigation also revealed evidence of corrupt and improperly recorded payments with a strong nexus to the United States by two Siemens subsidiaries, Siemens Bangladesh and Siemens Venezuela (Bolivarian Republic of), as well as evidence of improperly recorded payments with respect to an additional subsidiary, Siemens Argentina.

From on or about 12 March 2001 to in or about 2007, Siemens made payments totalling approximately US\$1,360,000,000 through various mechanisms. Of this amount, US\$805,500,000 was intended in whole or in part as corrupt payments to foreign officials for information.

Bribes were accounted for as payments to consultants, who subsequently channelled them to the public officials. Siemens and its subsidiaries in Argentina, Bangladesh and Venezuela pleaded guilty to charges of conspiracy and violations of books and records and internal controls provisions in a plea agreement that resulted in a US\$450 million fine.

The entire case and the plea agreement may be accessed at www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf.

G. Confiscation alternatives

46. There are alternatives to asset confiscation. One option is a criminal fine in lieu, with incarceration in default of payment. In addition, the skilful use of a State's taxation laws and the imposition of tax assessments can be considered. The issue common to both alternatives is that any fine or tax assessment is only as good as the State's authority to enforce the fine or assessment. If the offender can declare insolvency or subsequently leaves the jurisdiction, the possibility of achieving payment of the fine or assessment is, at best, remote.

IV. Designing the investigation

A. Overview

47. In his forward to the published volume *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, Secretary-General Kofi Annan described the Convention as providing a new tool to address crime as a global problem, and noted that enhanced international cooperation would have a real impact on the ability of international criminals to operate successfully. That observation is a clarion call for States to become organized.

48. Articles 19 and 27 of the Organized Crime Convention illustrate that a State's investigative agencies need to become organized to adequately respond to the problem of organized crime. It bears reiterating that an organized criminal can use modern technology to facilitate crimes. All too often, law enforcement is focused on a specific offence and specific offenders, while in fact many offenders may work together and use their combined expertise to commit many crimes. If law enforcement look only at individual crimes, they risk losing sight of the scope of the criminal organization.

49. Law enforcement officials must appreciate the fact that a criminal organization operates on many levels, much like law enforcement. A focus on underlings that ignores the organizational hierarchy will never have a serious impact on the problem created by organized crime. However, concentrating on the hierarchy without regard for the profit motive underlying the existence of the organized criminal group could lead to other criminals quickly moving in to fill any void and replace convicted masterminds. Law enforcement agencies must be as organized as the groups they investigate. They must also look beyond the specific crimes and target the organizations' instrumentalities and proceeds of crime.

B. Investigative structure

50. Law enforcement organizational structures should not become a barrier to effective investigations. There is no perfect model for the investigation of organized crime. One problem may be that the financial capabilities of a State are such that it is difficult or impossible to justify the establishment of dedicated and specialized investigative units. Pursuant to article 19 of the Organized Crime Convention, States are to consider measures to support joint investigations.

51. In the past 20 years, States have invested in significant anti-money-laundering obligations. These obligations are specifically recognized in conventions but more often they are based on the Forty Recommendations of the Financial Action Task Force. As a result, a number of major financial and non-financial sectors in a country must undertake new record-keeping and customer due diligence obligations in the interests of combating money-laundering. In addition, financial intelligence units are established to receive, analyse and report on suspected money-laundering activities. Finally,

international conventions have addressed the issue of bank secrecy and international cooperation by means of mutual legal assistance. A lot of these tools are relatively new, and they cannot replace experienced investigators.

52. Ideally, there would be a seamless connection between the anti-money-laundering obligations imposed in those sectors and the financial intelligence unit and law enforcement. However, commercial reality, contractual relationships, personal privacy obligations and other impediments, in combination, mean that the situation is not ideal. Some countries have placed their financial intelligence unit within a law enforcement agency. Others have elected to establish a stand-alone unit. Whatever the approach, financial intelligence is one of the keys to the effective investigation and confiscation of profits from crime.

53. Law enforcement files often include disparate amounts of intelligence gathered in unrelated cases. In addition, national laws may permit the use of wiretaps, search warrants, the seizure of evidence and the use of informers. If those laws contain restrictions on the subsequent use of the intelligence or evidence in other cases, the capacity to investigate organized criminal groups needs to be addressed. In addition, laws may exist protecting personal information in the possession of business sectors, banks and other institutions. All are fully justified but, unfortunately, laws can impact upon organized crime investigations. Enforcement and prosecutors must work in a manner consistent with national law while using those laws wherever possible to advance investigations into organized crime. In the European Union, a Council framework decision on joint investigations²² illustrates the significant development of such an approach.

C. Investigative barriers

54. The past 15 years' experience with the Internet has generated concern about the protection of personal information. Data protection and controls on disclosure of personal information data have been established.²³ In addition, revenue laws frequently rely on self-reporting obligations, which include strong provisions on the non-disclosure of personal information. Cumulatively, non-disclosure provisions or informed disclosure upon consent, while they serve a valuable role in data protection, can have an unexpected impact on criminal investigations, including the following:

- A victim of a crime committed by a criminal organization may provide the first piece of evidence, but if the complaint or evidence is restricted ("siloed") to the investigation of one specific crime, it may be lost or misplaced in a larger organized crime investigation.
- Data protection concerns surrounding personal information may restrict normal voluntary cooperation with law enforcement by the private sector.
- Professional privilege obligations, such as those granted to lawyers and other professionals, will impede investigations.
- The movement or placement of information and data in foreign jurisdictions, with the need for mutual legal assistance procedures, will impede investigations.

²²Council of the European Union framework decision 2002/465/JHA of 13 June 2002 on joint investigation teams.

²³Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the European Union's data protection directive, illustrates this development. The Data Protection Act 1998 of the United Kingdom of Great Britain and Northern Ireland or the Personal Information Protection and Electronic Documents Act of Canada illustrate a response to this issue.

55. None of the above are absolute barriers to a criminal investigation, especially one involving assets. In addition, law enforcement officials must work within the law and effectively manage their files to ensure that pieces of the puzzle are not misplaced. An example of early cooperation between jurisdictions, in this case, the United Kingdom of Great Britain and Northern Ireland and Spain, leading to the obtaining of vital evidence for tracing assets for confiscation can be seen in the case of Operation Ghast, described in box 5 below.

Box 5. Operation Ghast

In Operation Ghast, two of the main defendants had been convicted of fraud on the public revenue in the amount of £17 million. Restraint orders had been obtained in the United Kingdom, which had also been registered in Spain. In order to establish the extent of their assets in Spain and elsewhere, search and seizure warrants were obtained under the United Kingdom Proceeds of Crime Act 2002, and the Spanish equivalent pursuant to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, in both jurisdictions simultaneously, and executed at the same time to prevent any information from being destroyed before the authorities were able to seize it. This was possible as the prosecutor in the case had been liaising with the liaison magistrate in Spain to establish the necessary requirement in the Spanish domestic law to draft the letter of request. Similarly, law enforcement officials were also in dialogue with their counterparts to advise them of the nature of the case and the type of material that they were hoping to find. As a result of the rapport built up between law enforcement counterparts, and given the time constraints to execute the warrants, the Spanish authority agreed that the United Kingdom officers could be in attendance when they executed their warrant on the Spanish villa. This was the first time that Spain had executed a search and seizure warrant under a United Kingdom confiscation investigation as defined under section 352 of the United Kingdom Proceeds of Crime Act 2002.

56. Law enforcement officials and prosecutors must be vigilant in addressing the problem created by their own systems. A victim complaint to a regulatory, anti-corruption agency or financial intelligence unit may never leave the agency or never come to the attention of organized crime investigators and prosecutors. That is a systemic problem that must be resolved through internal mechanisms with awareness of domestic law on maintaining and sharing information both internally and internationally, especially confidential information. This is usually resolved by the crime exception gateway in most legislations, thereby allowing law enforcement agencies to share information with others, as required by a criminal investigation.

57. There are other significant information sources for law enforcement and prosecutors. A State's financial intelligence unit, which was established to receive, compile, analyse and report on cases of suspected money-laundering,²⁴ will provide disclosures of suspicious transactions from any

²⁴A financial intelligence unit is an integral and important requirement of the Forty Recommendations of the Financial Action Task Force. Recommendation 13 mandates the establishment of such a unit. Additional information on the expectations for a financial intelligence unit is available from the international Egmont Group of Financial Intelligence Units (see www.egmontgroup.org) where a summary of the purpose of a financial intelligence unit is given:

“A Financial Intelligence Unit (FIU) is a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) Concerning suspected proceeds of crime and potential financing of terrorism, or (ii) Required by national legislation or regulation, in order to counter money laundering and terrorism financing.”

number of the sectors obliged to report suspected cases of money-laundering. Through a network of financial intelligence units within the Egmont Group of Financial Intelligence Units and other networks, the same agency will also receive reports of suspicious transactions that may be connected with another country. Prosecutions and evidence submitted in other cases can provide additional intelligence or evidence for organized crime investigators. Media reports of prosecutions, possibly in another State, could reveal unexpected affiliations or connections to investigative targets. Finally, a State's central authority may obtain requests for assistance that justify an independent or joint domestic investigation. The point to note is that a State must be ready to act on the basis of such information, whatever its source.

58. The examples above are not individually or cumulatively exclusive. Other examples, such as a corporate auditor discovering bribes (as seen in the Siemens example in chapter III), fraud, embezzlement or other transactions should come to mind. In addition, the issue of professional privilege may be a barrier unless exceptions to such privilege exist in appropriate cases. If those exceptions are challenged, what began as a roadblock can become more like an impassible chasm. A State's legal experts must be ready to attempt to overcome such barriers as necessary. Finally, private complaints received from citizens should not be minimized or ignored. All sources of information should be used to ensure well-organized investigations.

D. Investigative cooperation

59. One of the most complex considerations to make in an investigation is how law enforcement officials and prosecutors can work together to advance the case. In many civil law jurisdictions this is not seen as a significant problem due to the close working relationship between law enforcement and prosecutors or instructing officials. Yet even such an approach may create frustration if targeting organized criminals is accorded less priority than the need for an immediate prosecution and conviction. In other jurisdictions, the traditional practice is to separate law enforcement from prosecutors. A criminal organization does not suffer the same limitations and has a self-interest in cooperating to defeat law enforcement.

60. The problem may be that specialized investigative units already exist within a State's jurisdiction, but each jealously guards its territory. That is unfortunate simply because it fosters unnecessary competition. This issue takes on additional importance whenever two agencies are investigating the same group for different offences. An example could be an investigation into income tax evasion, with a separate law enforcement investigation into participation in a criminal organization offence or grand corruption. If investigators do not work together or consult closely, there is a real risk that evidence will be missed or misunderstood. In France this issue is specifically addressed through the establishment of a central file on police investigative targets designed to prevent multiple investigations of the same target.

61. A solution to this problem is suggested in article 19 of the Organized Crime Convention, which was designed to provide for transnational joint investigations, but the same principle could be applied to domestic investigations. Subject to domestic law, it is a good practice for specialized investigative agencies within a country to cooperate through domestic joint investigations. Each agency will have experts who are knowledgeable about the activities normally assigned to the individual agency and who can share their expertise with their partners in a joint investigation. In addition other experts, such as property managers, forensic accountants and others could be recruited to the joint investigation. Finally, if the investigation takes on an international dimension, prompt assistance from an international assistance group and/or joint investigations with

foreign jurisdictions could be undertaken. The only deterrent to this approach is budgetary, and there is a need to move beyond institutional competition by sharing budget costs, an issue that can be resolved.

E. International investigations

62. Some investigations will go beyond national borders. In those cases, States should consider working with foreign counterparts in a joint investigation and may also receive requests from them. Article 19 of the Organized Crime Convention specifically deals with international joint investigations, which may be limited to a specific criminal group or be more generic, ongoing investigations. The article also stipulates that States parties shall ensure that the sovereignty of the State party in whose territory the investigation is undertaken is respected.

63. An international joint investigation entails unexpected costs and joint obligations. The partnership between the States parties may be unequal due to the different size and experience of the investigative agencies in the cooperating States. Also, an unhealthy competitive focus and self-interest must be foreseen and resolved. There may be different laws, different investigative authorities, significant disparity in technological capacity and different investigative interests. Everyone needs to accept such differences and work through them to effectively combat organized crime.

64. One State party may be investigating substantive organized crime offences while the other is concentrating on following criminal assets wherever they might be located. A confiscation-focused investigation by one party may conflict with an investigation by the other party focused on predicate offences. Both sides must appreciate the other's interests and resolve differences. The two parties must work together if their goal is to target assets effectively. Consistent with European Union framework decision 2002/465/JHA on joint investigation teams, discussed above, France has relied extensively upon joint investigations, as shown in table 1 below.

Table 1. French joint investigation teams involving other member States of the European Union

<i>European Union member State</i>	<i>Number of joint investigation teams with France^a</i>
Belgium	17
Bulgaria	1
Czech Republic	1
Estonia	1
Finland	1
Germany	3
Netherlands	3 ^a
Romania	2
Spain	17 ^a
Sweden	1 ^a
United Kingdom	2 ^a
TOTAL	47

^aIncludes a joint investigation team involving more than two member States. All Member States contributing to joint investigation teams are included in the table.

65. In addition to the benefit they bring, joint investigations also give rise to obstacles, as shown in table 2 below. Conflict may also arise in relation to post-confiscation expectations regarding assets, as discussed in chapter VII, below.

Table 2. Obstacles arising in joint investigations and corresponding benefits

<i>Obstacle</i>	<i>Benefits</i>
Differences in national laws on asset tracing, seizure and confiscation	Recognition of territorial sovereignty issues
Dual criminality preconditions	Investigative “buy-in”
Conflicting proceedings	Indication of the reason for laundering
Length of proceedings in multiple jurisdictions	Fostering of judicial cooperation
Differing third party protections	Protection of national interests
Asset management costs	Spreading of costs between jurisdictions

66. None of the obstacles mentioned in table 2 are to be understood as having arisen in connection with the French joint investigations listed in table 1. Yet such obstacles need to be considered in developing any effective joint investigation. One of the most challenging difficulties mentioned in table 2 is potential conflict between national laws on asset tracing, seizure and confiscation. One State may have a certain confiscation process such as a value-based approach, while the other’s is property-based, requiring a conviction in advance of confiscation. The approach of yet another may rely upon non-conviction-based confiscation with no need for criminal charges or criminal convictions. This problem may be compounded if a joint investigation involves multiple States. All parties must understand the different confiscation approaches of the others. It is not a solution to suggest that one approach is better than another. It is essential to keep in mind that criminals spread their illicit assets around because they want to take advantage of just such a conflict in confiscation approaches and that cooperation among States can be effective, as shown in the example described in box 6 below. This is why article 19 of the Organized Crime Convention specifically recognizes the need to respect the sovereignty of the State party in whose territory the joint investigation is to take place. The best response is for States to work together to target assets for successful confiscation.

Box 6. An example of cooperation among States in South America

Practical examples of joint investigations can be found in South America, where Argentina, Brazil and Paraguay have developed a close investigative and judicial relationship as neighbouring States. This cooperation occurs in the “triple frontier” tri-border region involving the cities of Puerto Iguazú of Argentina, Foz do Iguazú of Brazil and Ciudad del Este of Paraguay. The region is an important commercial centre, and the circulation of people and goods is extremely high, which creates a typical environment for the development of transnational organized crime. During the investigation process, the law enforcement agencies of Argentina, Brazil and Paraguay cooperate effectively to combat organized criminal groups that are active in this region. Intelligence activities are performed by the three countries to support the fight against organized crime, and international legal assistance is provided in close coordination with the central authorities.

67. Difference in approaches is an issue to be addressed. The onus of proving the connection between the asset being targeted and the crime is always an issue. Both parties in a joint investigation must explicitly resolve any conflict of approach to confiscation well in advance of issuing a request to undertake asset-seizing activities in the jurisdiction of another State. Otherwise, the only result will be a delay or refusal to act by the State where the targeted property is located.

68. Dual criminality, an issue that is integral to the question of mutual legal assistance in criminal matters, is addressed in the *Manual on Mutual Legal Assistance and Extradition*, not the present Manual. The central authorities of a State will be best situated to advise on this issue and develop effective solutions, such as the one described in box 6.

69. Another significant issue that the parties must discuss is the cost of the management of seized assets. This issue, which is reviewed in greater detail in chapter V, is raised now simply to flag its importance.²⁵ The fundamental reason to remove assets from criminal organizations is to attack the profit motive for the organization's activities. If the seized assets are diverted to local law enforcement use or if the cost of managing the assets to preserve them until or after they are confiscated becomes significant, this is a matter of concern for the State where the assets are located.

70. Other potential obstacles to a joint investigation into organized crime assets are delays, third-party protection and post-conviction expectations, which are discussed in chapters VII and VIII. In all asset-tracing and confiscation investigations, it is important that each party fully appreciate the legal expectations and local laws in the jurisdiction where the asset is discovered. Any requirement for a formal mutual legal assistance request must be honoured. If a domestic investigation and prosecution is required in another State, the other parties must provide any necessary evidence they possess, leaving the prosecution and confiscation applications to the other State.

F. Feasibility of international investigations

71. In order to determine whether a joint international investigation is feasible, any country considering such an approach should assure itself that the other country has the political and institutional will to undertake such a difficult agreement. This could be determined by ascertaining whether the other jurisdiction conducts domestic joint investigations. Discussions on the margins of international meetings or international training may provide helpful information. In the same vein, police-to-police networks and meetings between investigators or central authorities provide further opportunities to foster cooperation. The Internet is another publicly available source of valuable information.

72. As indicated above, mutual evaluation reports from the Financial Action Task Force, the World Bank, the International Monetary Fund and FATF-style regional bodies will contain useful information. The same reports will critically examine the national resources allocated to law enforcement, prosecutors, the State's central authority for mutual legal assistance and the country's financial intelligence unit. That information should allow the other State to make a reasonable assessment of the capacity of their potential partner in a joint investigation. The reports will also contain an analysis of the sufficiency of the country's laws with respect to confiscation in criminal organization

²⁵Canada has been enforcing a foreign request to freeze a large tract of land on behalf of another State since 2006. Its asset manager has been paying for the management of the land without compensation from the requesting State. Assuming a successful confiscation order in the requesting State, the land will be confiscated. However, if there is no confiscation, the land must be returned to the owner's possession and control. Costs will be lost and future cooperation between the two jurisdictions may be negatively impacted.

or illicit drug cases, with the added advantage that the primary focus in such reports is on enforcement and confiscation. Frequently the annexes to the reports also contain excerpts from the relevant national law.²⁶

G. Consideration of the other jurisdiction's authority

73. Parties to a joint international investigation must also consider the other country's investigative authority and capacity. Tracing assets is not simply an investigation into registration systems, bank documents and financial relationships. The investigation may require the use of authorized intrusion techniques (wiretaps, production orders, informers and other complex techniques). There may be a requirement to open operating bank accounts or to delay prosecutions in the interest of the larger investigation. All these measures may create problems in another jurisdiction.

H. Jurisdiction

74. Each country must determine the jurisdictional authority to investigate, prosecute and enforce requests coming from another country. The Organized Crime Convention deals with criminal justice issues. Territorial jurisdiction for offences committed, as described in articles 15 and 19, is within the exclusive control of the State. In some instances, if a national in the other cooperating State has committed criminal offences outside his or her country, the authorities of the other State may impose jurisdiction over such offences. Indeed, they may be obliged to institute an independent investigation and prosecution.

75. This may create timing problems in any international investigation. If the domestic investigation is commenced, local law may require early notice of an investigative interest. This is a common problem in many civil law jurisdictions. It can only be resolved through early consultation and coordination.

I. Technical surveillance

76. In the twenty-first century, there are global telecommunication, banking, Internet and electronic mail capabilities that a criminal organization can always use to its advantage. It is possible to use covert surveillance techniques to access most or all of these capabilities. However, some jurisdictions permit only some of those techniques to be used for intelligence purposes. Others may not have adequate laws to allow the use of interception capabilities or they may not have the technical capacity to undertake such work.

77. The capacity to actually use surreptitious techniques may exist in a cooperating State. Joint investigations are an obvious means for sharing the expertise and equipment needed to allow the collection of evidence or intelligence that would be available only by means of such techniques. However, the ability to rely upon another State to assist will depend upon the statutory authority in the State where the techniques are being used. That should be considered when a joint international investigation is being planned.

²⁶Legislation can also be obtained via the Internet, for example, through the International Money-Laundering Information Network (www.imolin.org).

J. Investigative techniques

78. The use of informers, cooperating witnesses, plea agreements where possible and similar proactive investigative conduct (such as a State-sanctioned reverse sting) may be a standard operating technique in one jurisdiction but a foreign concept or even unacceptable in another. It is important that no party assume that their standard techniques can be used in another jurisdiction. This must be discussed with investigators and their legal experts.

K. Statutes of limitation and prosecution immunity

79. Most countries establish specific limitation periods for criminal offences, which may have an unexpected impact on the ability to trace assets. If, for example, a fraud committed by a criminal organization is no longer subject to prosecution because of the time that has elapsed since it occurred, the time lapse might similarly frustrate confiscation applications against those criminal assets. A possible simple solution is to identify an offence not subject to the statute of limitation, such as money-laundering or possession of the proceeds of crime. Alternatively, the act of moving and concealing funds to acquire the assets could be criminalized. There are a wide variety of arguments that can be advanced by the State in which the asset is located. This is an issue for discussion with that State's investigators and their legal experts.

80. The concept of immunity from prosecution may be applicable in an organized crime investigation because the cooperation of the investigative target's underlings might be obtainable through plea agreements, where possible, or promises of leniency or immunity. This may be a common practice in some States, while it may be contrary to the legal traditions and laws in another. This must be discussed with investigators and their legal experts.

L. Standard of proof expectation

81. Legal experts, after consulting with investigators as required, must consider the sufficiency of any evidence submitted to support asset-tracing or confiscation requests. The nature of any coercive measures required is an important consideration in determining this. In the case of a joint domestic investigation, it is reasonable to assume that investigators and practitioners are fully cognizant of the requirements and evidence needed to support asset-tracing or confiscation proceedings in their country.

82. In a joint international investigation, the differences between the countries' standard of proof expectations or experiences will often be irrelevant. However, the legal expectations in relation to a targeted property, asset or piece of evidence depend on the law of the country where those are located, in accordance with the provisions of article 12 of the United Nations Convention against Transnational Organized Crime.

83. In a joint international investigation involving two common law jurisdictions, both may have similar understandings. The two jurisdictions may have identical confiscation regimes or it may be possible to apply a combination of criminal and value-based or non-conviction-based confiscations in both. In both jurisdictions, authorities would appreciate the distinction between a criminal conviction with a post-conviction confiscation application based on proof beyond reasonable doubt and a non-conviction-based confiscation application where a balance of probabilities standard of evidence is sufficient.

84. In a civil law jurisdiction, the evidence required for tracing or instituting provisional measures against assets may be less or different in some other way from that required in a common law jurisdiction. In addition, the standard of the evidence to obtain a confiscation order may be the same as that required for obtaining a conviction.

M. Corporate criminal liability

85. The concept of corporate criminal liability is touched upon in some conventions. Article 10 of the Organized Crime Convention provides for the establishment of the criminal liability of a legal person—that is, a corporation—whether criminal, civil or administrative. Every mutual evaluation report on a jurisdiction by the Financial Action Task Force contains an evaluation of how that jurisdiction deals with this issue. This matter creates considerable debate between common and civil law jurisdictions. Where such criminal liability exists, it provides a means to respond quickly in cases where the offender has used a corporate vehicle to shelter their assets and then either fled the jurisdiction or died.²⁷ The Siemens case described in chapter III is an example of corporate criminal liability. This does not mean that every State must implement such an approach. There are many alternatives, just as there are various domestic laws in the jurisdiction where the property is located.

N. Investigative priorities and case management

86. In every joint international investigation involving asset tracing and confiscation, the issue of investigator priorities is crucial. The same applies to a domestic joint investigation where competing investigating agencies may have differing positions on case priorities and on proactive public investigation proceedings such as searches, arrests or the institution of provisional orders against assets.

87. Equally, decisions will have to be made on who will hold key supervisory and management positions and on establishing sound procedures to control evidence to ensure that it is available to the prosecutors and court.

88. Distinct from the question of the continuity of the evidence, the issue of asset management of property subject to provisional orders pending confiscation applications must be considered. This is not cost-free, as will be discussed in chapter VI below.

O. Timing

89. Any joint international or domestic investigation could be confronted with a premature decision by one of the partners to undertake a proceeding that results in the premature disclosure of an investigative interest in an organized crime target. Unfortunately this happens all too frequently. Early consultations on this issue are required.

²⁷In Canada, one of the first money-laundering cases involved a criminal organization that trafficked in illicit drugs in the southern United States yet laundered the profits into a future retirement business in Canada through a corporate holding company. The corporation was charged in Canada while the principals were charged and convicted in the United States. The corporate assets were confiscated as proceeds of crime and the corporation was wound up following its criminal conviction.

90. There is a clear distinction between covert and public investigative measures. An investigative target may suspect wiretaps but that suspicion does not have to be immediately confirmed while the investigation is proceeding. It is preferable that such confirmation occurs only as the investigation winds down. However, an arrest, search or any other investigative activity could result in inadvertent notification of an investigative interest. This issue is sensitive whenever third parties are the subject of a request or order to provide information.

91. Coercive investigative measures, mutual legal assistance requests, the institution or the issuance of provisional measures against assets must all be coordinated between the partners in a joint investigation. A coercive disclosure measure issued against a third party may not be as intrusive as a provisional measure served upon an investigative target. If the law requires immediate notice to the third party's client in advance of or following compliance with the disclosure or production order, obviously the target will be alerted to the investigation. Jurisdictions must coordinate and consult on this specific issue.

92. In addition, in light of the nature of criminal organizations, the joint investigation must be concerned with witness security issues.²⁸ It is also important to note that this security concern can develop at any time during the investigation. It is of little comfort to an endangered potential witness to know that their reasonable security concerns will be dealt with only when prosecution commences. Witness security can become a long-term, expensive obligation. Yet such security is frequently a vital aspect of any organized crime investigation, including asset-tracing investigations.

²⁸Article 24 of the Organized Crime Convention specifically recognizes this issue, calling on parties to take appropriate measures for witnesses, their relatives and other persons close to them.

V. Tracing assets

A. Overview

93. The asset confiscation investigation may be more difficult than the investigation into a criminal organization's substantive crimes. This is because confiscation, be it value- or property-based, must establish that the targeted assets derive directly or indirectly from the commission of a crime. Not many criminals admit such a fact, and most take steps to launder their assets in the hope of defeating or deflecting investigative interests.

94. Not every crime results in the receipt of money. In some cases, preparatory crime can be committed for a variety of reasons, such as creating fear or instilling loyalty. Criminal organizations are investigated for all of the serious offences that may be tied to them, but the ultimate purpose of the group's activities is the aggregation of wealth, especially for the group's leaders. As a result investigators must always remember that they need to patiently "follow the money".

95. Following the money trail will often be difficult for any investigator. This is why it would be a good practice for specialized asset-tracing investigators to be assigned to the investigation of assets targeted for confiscation. Such investigators need to maintain close contact with the other organized crime investigators. Either team may inadvertently hamper an investigation.²⁹ The asset confiscation investigator may institute proceedings that inadvertently tip off targets, so investigators need to coordinate with each other.

B. Existing investigative information

96. Chapter IV contains a brief discussion of the processes of the overall investigation. They should include targeted surveillance, sophisticated technical approaches such as wiretaps, computer and Internet service provider searches, and other activities. The reports generated by the larger investigation will provide invaluable information for an asset investigation. They may also reveal deficiencies.

97. A possible deficiency could occur where the surveillance conducted is so remote that potentially valuable information is missed. For example, watching a target use an automated teller machine through binoculars may not reveal the type of bank card used. Perhaps surreptitious searchers of targets' refuse,³⁰ which is a useful tool in looking for evidence or discarded property, may have concentrated only on items that are not relevant to an asset investigation.

²⁹A required advance in the substantive criminal investigation may be seen as a premature irritant by other investigators.

³⁰Where the law permits, collecting and analysing any target's refuse or abandoned property is useful. Discarded financial records should be regarded as potentially useful evidence on a par with suspected weapons or drugs that a target is seen to abandon or hide; shredded documents may be reconstructed.

98. It may be necessary to refine, freshly investigate or review earlier investigative activities with asset tracing in mind. It may be necessary to review wiretapped conversations for any discussions of financial activity since those may not have been regarded as important while the substantive investigation was developing. Equally, the monitors (the persons assigned to listen to the intercepts) should be aware of the possible relevance of intercepted conversations or messages for asset tracing. The same applies to the interception of Internet (e-mail) communications.

C. Planning an asset investigation

99. While law enforcement officials will be justifiably concerned with the need to end a crime spree, they must also be concerned with the money obtained from such criminal activity. In most investigations of organized crime, all team members, be they enforcement, a prosecutor or another expert, soon realize that the criminal group appears to be involved in a variety of schemes to either undertake additional crime or move their money. No investigator is an expert on everything. A seasoned investigator will quickly acknowledge a need to call on specific experts to investigate the complexities involved in moving money, in exactly the way that a sophisticated criminal does. This is why asset investigators are part of the team.

100. A situation should not arise where investigators assigned to target crimes disregard assets as the province of asset investigators who will look at the files later. Asset investigators should work alongside other investigators and should be brought into the larger investigation immediately or relatively quickly.

101. The need to organize and plan the entire investigation must be a dynamic compromise between investigators and prosecutors. The criminal group may be hijacking trucks, committing armed robberies or selling drugs. Surveillance activities and the public interest may lead to a need for early intervention and arrests. Yet that all too likely scenario does not mean that an asset investigation is frustrated. If the money is not followed, crime pays. A convicted criminal could serve time, leaving others to carry on in the knowledge that their family is being cared for and their proceeds await them upon release.

102. Extensive surveillance of the criminal group may have been undertaken, and valuable information can be extrapolated from the surveillance reports. If the information or evidence from surveillance is evaluated only to establish patterns to prove the organization's substantive crimes, an opportunity to follow the money may be lost. The asset investigators may have to undertake that analytical function or reevaluate earlier reviews of the same material for the larger team, and timing can be important.

103. If a surveillance target frequents financial institutions, unless they are a bank robber, it is reasonable to assume that they may be using the financial institution for a variety of reasons. That becomes an opportunity for an asset investigator. If the surveillance reports reveal that the target is using automatic teller machines, the type of bank card used may have been noticed, and the use of credit cards and other financial instruments may also have been observed. While it is true that the cards may be stolen, in many instances they are the target's own and are valuable asset leads. The investigation is likely to yield a variety of pieces of intelligence that can be used by an asset investigator. It is essential that the team's surveillance operatives appreciate the value of apparently trivial information and look for and note it, provided that the surveillance records are not destroyed. This type of detail is important in an asset investigation. The early participation of asset investigators in a larger investigative unit ensures that they can enrich the investigation through their expertise and areas of interest.

104. In any investigation into a criminal organization, identifying the parties in the criminal group is essential. In relation to all aspects of an organized crime investigation, including asset-tracing, it is important to routinely ask “Who? What? Why? Where? How?”.

D. Knowing the target

105. In an asset investigation, the investigators must quickly determine which individuals in the criminal organization they need to concentrate on to advance their goal of following the money. An asset investigator must know their target, because on the one hand, if the target is seen to immediately spend money on leased fast cars and an extravagant lifestyle, there may be no justification for any asset investigation. On the other hand, if they are believed to be moving and concealing assets, there is a need for an investigation.

106. This is especially true in organized crime groups, where the lower level criminals may spend significant amounts of money on consumables, but most of the profits are directed upwards to the group’s leaders. An obvious suggestion is that investigators need to follow the money up the organization’s chain. This may be difficult to implement but not impossible. The difficulty lies in the need to become familiar with the target’s associates and family members since the target may use them to shelter assets.

107. The underlings of organized criminal groups are often arrested, and the fear of losing their possessions may induce them to provide information, upon arrest or prosecution. If sufficient inducements (such as a reduced sentence and witness protection) are available, loyalty to the group may falter. Everyone in an organized crime investigation must know the targets and assess the extent to which they are likely to yield to self-interest.

108. The main target, assuming it is the group leader, will frequently use underlings, straw men and family to hold assets. Just as frequently, they will use corporate vehicles to shelter their assets. Finally, they will use the financial world to move their assets. These investigated targets are sophisticated, knowledgeable individuals who often retain experts to advise them on how to move assets and money. As a result, as a first priority, any asset investigator should consider targeting the principal group members exclusively.

109. International work over the past 30 years has led financial institutions to appreciate the need for or, as a minimum, be obliged to establish, sound “know-your-customer” policies and procedures. International anti-money-laundering standards have been imposed upon the broader financial sector.³¹ The investigator can reasonably assume that, in compliance with such obligations, records will be kept that can often become the basic investigative tool for every asset investigation. However, the first step is for the investigator to know their target so that they know which records they need to obtain from financial institutions and can make optimal use of those.

110. Essentially, the approach taken to knowing the target in an asset investigation should be the same as that of the larger investigation but, for an asset investigation, the details are vital in order to follow the money effectively. The details that must be known about the target include:

³¹These standards do not apply only to financial institutions. The Forty Recommendations of the Financial Action Task Force are quite broad and they are intended apply to both bank and non-bank sectors. See the revised recommendations 10, 22 and 23, in which the Financial Action Task Force calls upon States to require financial institutions and specified businesses and professions to undertake the necessary customer due diligence, record-keeping and transaction reporting obligations.

- (a) Name and known aliases;
- (b) Date and place of birth, with copy of any birth certificate, passport and national identity card;
- (c) Names and dates of birth of spouse(s), including ex-spouses, children, parents (including those of a spouse or ex-spouse) if known, and those of other members of the extended family;
- (d) Telephone numbers (business, home and mobile), e-mail and Facebook or similar group connections (if known);
- (e) Recent photograph.

All of this information is useful even if not immediately available—the asset investigation need not be put on hold because one of the details is missing. Information that creates a picture of the target can and must be supplemented as the investigation proceeds. This is an ongoing issue for the asset-tracing investigator. This observation is important since a target will use a variety of devices, such as corporations, trusts and other business relationships to shelter their assets.

111. One of the main instruments that criminals might use to conceal their assets is a trust—an example of this is provided in box 7 below. Discretionary trusts, which tend to give the appearance of removing a defendant's interest in the assets, are always popular. Discretionary trusts are administered by the trustees, who must administer and control the trusts pursuant to local laws. In the same way that companies can be used as a vehicle for the crime, thus making it necessary to go behind the corporate veil of the company, so trusts are set up to hide assets. When a trust is investigated, it will be necessary to establish whether it has been properly set up according to the laws of the country where it was incorporated. If it is properly set up, it will be necessary to show that the true controlling mind behind the trust is the criminal or criminals under investigation and not the trustees. This can be done by looking at the conduct of the trustees and how they have administered the trust, through trust papers such the letters of wishes.

Box 7. An example of tax evasion using discretionary trusts

In a major case prosecuted by the United Kingdom authorities in respect of value added tax evasion (VAT fraud), the two principal defendants who defrauded the State of £16 million channelled most of the money through discretionary trusts, first in Jersey in the Channel Islands and then to Liechtenstein and the British Virgin Islands. In order to access the money and still keep their distance from the administration of the trusts, the defendants received advice from the trustees on how they could access the funds by writing to them through letters of wishes using a set format. The letters were typically requests for funds to be granted in the form of loans to them or family members either for a particular business venture or the purchase of properties. The way in which the requests were set out in the letters gave the impression that the trustees were exercising their discretion as to whether or not to provide the funds as requested. There was no evidence of the trustees not complying with the letters of wishes, and at no stage did they ever bring an action to recover the “loans”. Similarly, properties actually bought by the defendants were bought in the names of the trusts, concealing the defendants' interest in the properties.

112. Investigators must build up a file on the target throughout the investigation, taking every opportunity to add to it. For example, when the target enters or leaves the country or opens a new bank account, his or her passport becomes available for inclusion in the file. If the target's fingerprints are on record or become available during the investigation through a charge or arrest on a minor charge, they should be added to the file. Information available from public sources must also be included. The extra information will inevitably help with the investigation into the criminal's assets. A comprehensive and accurate file will prevent time and resources from being wasted on obtaining irrelevant documents, pursuing leads on unrelated or irrelevant individuals or on a mistakenly identified individual when cooperating with financial institutions. Various techniques that may be used to get to know a target are described in box 8 below.

Box 8. Various techniques for getting to know a target (from *Asset Recovery Handbook: A Guide for Practitioners*)

Law enforcement officers in the United Kingdom became aware of allegations of corruption and misappropriation of assets by former Plateau State (Nigeria) Governor Joshua Dariye, and they suspected that assets could be located in the United Kingdom. Using investigative techniques, they were able to trace and link the assets to the offence:

1. *Technique.* Investigators conducted public record searches for information on Dariye in the United Kingdom (through property, vehicle and corporate registries) and sought intelligence on Dariye from other governmental agencies, including the financial intelligence unit.

Result. No link to Dariye was found.

2. *Technique.* Investigators identified Dariye's family and associates and checked for links to the United Kingdom.

Result. Investigators discovered that Dariye's children were attending a private school in the United Kingdom.

3. *Technique.* Investigators made inquiries to the relevant bank (a permitted authority of financial investigators).

Result. Investigations revealed that Dariye operated a Barclaycard account and that the account was being paid off each month through the bank account of Joyce Oyebanjo. Oyebanjo was effectively Dariye's banker in the United Kingdom, paying fees and utilities on behalf of Dariye, including the fees paid to a private school for his two children.

4. *Technique.* Investigators obtained a production order to access the school files.

Result. Investigators confirmed that school fees were paid by Joyce Oyebanjo.

5. *Technique.* Investigators searched publicly available information and other governmental agencies for information on Oyebanjo. They also obtained a production order for her bank accounts.

Result. Oyebanjo, employed as a housing officer in the United Kingdom, was found to have 15 bank accounts with funds totalling roughly £1.5 million (approximately \$2.3 million), and £2 million (approximately US\$3.1 million) worth of real property. Furthermore, she was managing one of Dariye's properties in Regents Park Plaza, a property purchased in the name of "Joseph Dagwan" and paid for by the Plateau State Ecological Fund through various companies.

6. *Technique.* Investigators made credit reference checks, and those revealed bank accounts operated by the targets. Assets were traced from the bank account to other bank accounts, property and vehicles. Production and search orders were used to obtain additional information and to trace assets.

Result. Investigators discovered that Dariye had one bank account registered to a particular address in London. Examination of Dariye's and Oyebanjo's bank accounts revealed large electronic credits from various banks in Nigeria.

7. *Technique.* Investigators used a production order to obtain the conveyancing solicitor's file for the London address.

Result. The file revealed that property had been purchased using a false name, and had been paid for from a Nigerian company's London-based bank account.

8. *Technique.* A mutual legal assistance letter of request was sent to Nigeria to determine the origins of the funds received.

Result. It was established that an ecological grant obtained by Dariye had been diverted and concealed in his own company bank account, with the assistance of bank staff. The funds were diverted to a company and associated bank account set up by Dariye in Nigeria and subsequently transferred to London for his use. The Nigerian company that purchased the London property was also linked to the ecological grant theft because the company had received £100 million (approximately US\$157 million) of the stolen funds. The company had paid £400,000 (approximately US\$626,800) for the London property after Dariye had authorized a Plateau State government contract for the installation of £37 million (approximately US\$58 million) worth of television equipment in the Plateau State.

This example illustrates that it is imperative for practitioners to "know their subjects" and to identify all close relatives, business associates and other persons who could assist a target in stealing funds and moving them into foreign jurisdictions. Practitioners must use all techniques available (for example, other Government agencies, public sources and coercive measures), for they never know the origins of the next lead.

Source: Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., World Bank, 2011), pp. 46-47.

E. Financial records and data

113. Any asset-tracing investigation starts slow and speeds up as data (intelligence) or evidence are accumulated. An initial starting point is obtaining legal access to a target's bank accounts. The asset investigator's goal should be to compile a complete asset picture of their target's assets. In any jurisdiction where the admissibility of evidence must be established, that picture must include the means used to acquire the evidence.

114. The data or evidence may come from a variety of sources. The Internet and public records are always useful. As the investigator goes further, Government records, financial records, records in the possession of professionals such as an accountant, lawyer and financial advisers all create data for an asset-tracing investigation. They also create different expectations relevant to the investigator's authority to access records. In some jurisdictions, provisions require the citizen to cooperate and honestly respond to questions that support an investigator's enquiry. In other jurisdictions, an investigator's requests for cooperation may be declined. It may be that a formal order of some type is required. There is no one best approach to this type of investigation other than to appreciate that national law must be consistently applied wherever the investigation is undertaken, because an investigative miscue or sharp practice (conduct only barely within the law) could have an unexpected negative impact on a subsequent confiscation application.

F. Information from open sources

115. Data mining through the Internet is a commercial reality. Entering a name into a search engine reveals that personal privacy has been eroded over time. In addition, there are commercial websites such as credit agencies where significant personal and financial information can be accessed for a fee. An asset investigator should use such sites where possible.

G. Information from Government sources

116. All Governments collect significant amounts of personal and financial information from their citizens. The issue for an asset investigator is how to obtain access to that information. For example, if the jurisdiction has a law on public disclosure of assets by public officials and senior public servants, depending upon the scope of that law and the ability of law enforcement to access the information, this may provide a source of basic financial information. For example, in France, by national law, a record of every bank account is maintained within a databank known as the *Fichier des comptes bancaires* (FICOBA), which is maintained by the fiscal administration but is accessible by investigators, at least to verify the existence of an account relationship. Access to the specific account information would then be available in the same manner as for any law enforcement investigation.

I. Tax information

117. Most States depend on tax collection in one form or another to finance their activities. The amount of personal or financial information in tax records varies widely, such that they could constitute an open or controlled source of valuable information. There may be strict non-disclosure

obligations imposed upon taxation authorities.³² This is especially the case in countries where self-reporting of income or an asset is required.

118. In any jurisdiction where tax information is freely available on request, investigators should obtain such information on their target at the earliest opportunity. In jurisdictions where a legal process is required, that process should be undertaken as soon as possible. Targeted individuals may lie about their true income or wealth when reporting their taxable income; such false information is a valuable starting point for an asset-tracing investigation and becomes even more valuable when the target is interviewed or prosecuted. However, since this information would normally be confidential, care must be taken to ensure confidentiality requirements are met throughout the investigation.

2. *Travel information*

119. As identity documents must be shown during international travel, customs and border control agencies may possess information or evidence on an investigative target that may not have been available to investigators from other sources. A bank of information about the target's travel history may be available, providing a valuable source for investigators, whether the information is available on request or whether a procedure must be followed.

120. There is now an obligation for those crossing an international border to report whether they are carrying a large amount of cash or monetary instruments. In addition, customs may have the authority to search postal items or shipments for contraband, including cash or monetary instruments. The larger investigation may reveal that the investigative target will be crossing an international border. That would provide an opportunity for investigators to work with customs authorities to obtain data, such as a copy of a passport or identity card, or conduct a search that would not create suspicion prematurely yet result in the discovery of valuable evidence.

H. **Public records**

121. In many jurisdictions, public records offices are custodians of invaluable property ownership information. It is useful to obtain the name of the registered owner of land in any jurisdiction where such records are maintained, and further useful information may be obtained. Related or unrelated associations of partnerships recorded in records offices can be linked to land registrations and corporations to assist in developing links to the investigation target or targets. Other public records offices can hold notices of mortgages and security liens filed against targets' property or valuable conveyances. In addition, vehicle registration systems often include information on the ownership of vehicles, including pleasure boats, ships or aircraft. These are additional information sources available to the public and law enforcement.

122. In the same fashion, corporate, business and licensing bodies maintain public records that are valuable for an investigator. For example, if the land or vehicle records reveal that a property is registered to a corporation, information on the identity of the registered owners or incorporating

³²In Canada and the United States, a court order is required to access tax records. In Nigeria, access is available for certain types of investigation, such as those into economic crimes or drug trafficking, while Brazil and France permit access without a court order. Jamaica requires the authorization of the Minister of Finance for access, and if the access is sought as part of a mutual legal assistance request, reciprocity is required.

individuals can be obtained from the licensing body. Those individuals may not be investigative targets but may become investigative leads.

123. In some jurisdictions, a registry of civil records is maintained. The civil registry system should provide information on an investigative target's family members, such as a spouse, siblings, parents and other relations.

I. Court records

124. The investigator should consider whether the target has been prosecuted or convicted in the past. Private litigation, such as a vehicle accident lawsuit, breach of contract lawsuit or bankruptcy and insolvency filings result in court records that may be accessed. The asset investigator should try to locate all such records. Obtaining access to some of those records may require undertaking specific procedures, but the information is invaluable in establishing intelligence relating to the target's activities and contacts. In addition, criminal court records would provide similar information.

J. Utilities

125. All homes and businesses use a number of utilities, requiring registration with gas, electricity, telephone and Internet providers. An examination of utility companies' files will reveal who the customer is and how the bills are paid, and may even identify a situation where an investigative target is not the registered owner of a property but pays the utility bills.

K. The Internet

126. One unexpected impact of the Internet has been the proliferation of social networks enabling instant communication. In some countries, asset-tracing investigators should check whether their investigative targets maintain social or similar networks. All efforts should be made to obtain information from such networks, by means of a court order if required by domestic laws. Most of the information may be irrelevant yet can be a source of intelligence and investigative leads.

L. Information from specialized Government sources

127. Tax authorities and border agencies may actually be categorized as specialized Government sources. In that case investigators should treat them as such, bearing in mind that the important issue is to obtain the necessary information or leads wherever they may be found. At any rate, there are two important specialized Government sources that should not be ignored.

I. The financial intelligence unit

128. The development of financial intelligence units is recent in many areas.

129. A financial intelligence unit is a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information of two types:

- (a) Information concerning suspected proceeds of crime and potential financing of terrorism;
- (b) Information required by national legislation or regulation, in order to counter money-laundering and terrorism financing.

130. While the Egmont Group provides a description of financial intelligence units and information about different types (see chap. IV.C, above), there is no standard global model. The unifying feature of all units is that they are the designated recipients of suspicious transaction reports, known as suspicious activity reports in some jurisdictions. In some countries, the financial intelligence unit may be a part of law enforcement, while in others where the unit is a single office for centralizing the receipt and assessment of financial information and sending the resulting disclosures to competent authorities, it may be a separate independent agency. Both types are an essential source of intelligence for an asset investigator.

131. Investigators need to be familiar with the structure, role and authority of the financial intelligence unit in their own jurisdiction. In addition to obtaining suspicious transaction reports, many financial intelligence units are authorized to collect and maintain reports on currency and large cash transactions. Wire transfers (sometimes known as electronic funds transfers) for amounts of money in excess of a relatively low threshold may also be reported to a financial intelligence unit. The point to note is that a financial intelligence unit is a centre holding significant financial data.

132. As the Egmont Group description reveals, the function of a financial intelligence unit is to use the data it receives to analyse patterns of financial activity. In essence, it is then required or expected to disseminate its analyses whenever money-laundering or the financing of terrorism is suspected.

133. The obligation to disseminate a report does not mean that the information accumulated by the financial intelligence units is included with the report. That information would comprise the suspicious transaction report and related reports (such as currency transactions and electronic funds transfers) or additional information that may have been received by allied financial intelligence units. Such information may be embargoed or restricted.

134. The asset investigator therefore needs to consider if it is possible to obtain the background information to the report from the financial intelligence unit. Investigators must take full advantage of the opportunity to obtain the information on request or apply for a court order immediately if required. Whatever process is necessary, the information that may be obtained is invaluable.

2. Government information related to national security and suspected financing of terrorism

135. Since 2001, the issue of the financing of terrorism has generated significant reporting obligations relative to transactions suspected of involving property or financial instruments that may be of assistance to terrorist groups. A State's financial intelligence unit and most financial entities and citizens are now required to notify authorities of their knowledge of the existence of terrorist property or financial transactions in support of terrorism. Not every such report concerns a terrorist or terrorist group.

136. The problem is that the movement of money is fairly anonymous. Where an analysis conducted by a financial intelligence unit leads to suspicion of the funding of terrorism, the unit is obliged to report to the law enforcement agencies responsible for investigating terrorism and maybe also the national security agency in the jurisdiction. However, the unit will not automatically share the information with an organized crime team or law enforcement agencies. It is possible that their investigations have eliminated the possibility of terrorism, although the initial concern will remain on record. The point is that the financial intelligence unit may have information that is relevant to an organized crime investigation or to the tracing of assets in relation to organized crime. Asset investigators should ensure that they at least attempt to obtain such information from the authority investigating terrorism.

M. Using the information

137. The information provided by a financial intelligence unit or terrorism investigation is not the end product or the magic answer for the asset investigator. In many instances, such information comes with caveats and restrictions on its use. The reports provided by financial intelligence units are based on information from other sources, and asset investigators must refer to the original sources for concrete evidence to support their asset-tracing work.

138. The financial intelligence unit report will invariably provide the names of the financial institutions or entities that were the sources of the information.³³ Asset investigators must determine how they can obtain access to the original material in the possession of the reporting entity.

139. The simplest approach may be to ask the entity to cooperate and voluntarily provide copies of the original records identified by the financial intelligence unit, an approach that may not work in practice. The financial institution may be concerned that voluntary cooperation would contravene privacy laws or contractual privacy obligations between the entity and its customer. If so, a proper order should be obtained to compel the entity to turn over the requested information. If such an order can contain provisions to prevent the investigative target from being tipped off, the court should be asked to include these. An order issued at an early stage in the investigation could result in the entity consulting with their client or advising the client of their obligation to comply with the order. If the risk is worth taking or if the investigation is close to being finished, that may not be a concern. Otherwise, consideration should be given to minimizing that risk.

N. Monitoring or production orders

140. Apart from asking for cooperation and receiving such assistance, investigators could obtain the necessary documents by means of a subpoena power or similar provision. There may be national legislation permitting the issuance of subpoenas by counsel through application to the court or under the investigating agencies or instructing official's own authority to obtain documents or copies of the documents. This is another issue that must be considered in the light of the provisions in each jurisdiction. The risk of tipping off the target of the investigation must always be considered.

³³This could be a casino, money exchange service or other business or profession that is obliged to report to the financial intelligence unit, although not necessarily to a law enforcement agency.

141. It should be borne in mind that under most common law jurisdictions, evidence or information obtained from the suspect or accused on a compulsory basis cannot be used against the individual in the criminal investigation or prosecution. Where restraint orders are obtained in the United Kingdom, for example, with an ancillary order such as a disclosure order requested as part of the restraint order, the information obtained under the disclosure order will not be passed on to the law enforcement tasked with the investigation of the offence. It will be passed on only to the prosecutors to enable them to consider their disclosure obligation to the accused. If the accused discloses any information under the disclosure order forming part of the restraint order and the prosecutor wishes to use that information, a court order will be required. The disclosure information can be used against the accused only in respect of a charge of perjury or in the confiscation proceedings because those gave rise to the restraint orders. Operation Ghast, a case prosecuted in the United Kingdom and described in box 5 above, is a good example of how early cooperation between international partners, in that case Spain and the United Kingdom, can secure vital evidence for the purposes of confiscation in establishing the wealth of the defendants.

142. Yet another way to obtain the necessary documents could be through a monitoring or production order.³⁴ (A sample production order can be seen in annex IV and a sample monitoring order is provided in annex V). The purpose of such an order is to compel the person or entity named in the order to turn over information or copies of documents to a specified officer within a specified time. Going beyond that, an anticipatory order compelling the disclosure of material for a specified period in the future is useful if provided for in a given jurisdiction.

143. The benefit of such an order is that the investigator need not conduct a search of the relevant entity. The entity is compelled by the order to locate the specified documents in its records and turn them over within the specified time.

144. A court or judicial officer normally issues these orders on the basis of an application in writing in an *ex parte* process (that is, without notice to the entity or its customer). The onus required to satisfy the court of the need for such an order varies from one jurisdiction to another. It may be less than or equivalent to the onus required for a search warrant. That is unimportant since the scope and purpose are different from a search order. In the case of a monitoring or production order, the entity is responsible for locating and producing the material. In the case of a search warrant, investigators generally undertake the work and the search normally ends once the required information has been found. The material obtained under such orders can provide timely notice of unexpected financial transactions.

145. One aspect of a monitoring or production order is that the entity might request or demand payment for implementing the order. Those costs could be significant if the entity sees this obligation as an opportunity to profit. In this case, the budget for the investigation must cover such costs since they may be significant. This will vary between jurisdictions.³⁵ Finally, where a monitoring or production order cannot be issued, a search or equivalent order would be a good alternative, even if that means that enforcement would have to inconvenience the other party to exercise its authority to search effectively.

³⁴Nothing turns on the terminology used.

³⁵This issue was considered by the Supreme Court of Canada in *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, 2008 SCC 12, where the court held that no costs could be or should be ordered.

O. Search orders

146. One way to obtain evidence or intelligence is by means of a coercive search order. Like a monitoring or production application, a search order application is generally an ex parte procedure before a court instituted by the authority responsible for approving such requests. The disadvantage of any search is that it is publicly visible and the entity being searched might be required to report the existence of the order to its customer. The investigative target would normally become aware of the investigation fairly quickly. Searches are disruptive and may have a significant impact on either the larger organized crime investigation or the asset-tracing investigation. The issue is significant if the search order is issued against the investigative target rather than a third party, but in both cases it will be a matter of public knowledge that an investigation is being conducted.

147. This issue must be considered in the light of the law in each jurisdiction. In civil law jurisdictions, requirements for obtaining a search order vary. The authority for a search warrant is generally found in the enabling law. The issue of premature disclosure of an investigative interest in a target is as important in civil law jurisdictions as it is in common law jurisdictions.

148. In common law jurisdictions, a search order is generally obtained through an application in writing, including supporting material.³⁶ The first document is the warrant requested. This will include the terms of the order, such as the location to be searched, what can be searched in the specified location, the subject of the search (such as bank documents, opening an account for documents or signature cards), the time and duration authorized for the search and other limiting conditions, such as how the search is to be undertaken. The court may elect to impose strict conditions upon officers in their execution of the signed search order. The second component of an application is the material satisfying the issuing judicial officer of the justification for the order. The second document contains the applicant's justification for their request for a search order. In essence, the supporting document contains full, fair and frank disclosure of the facts justifying the issuance of the order and may be brief or voluminous. In many jurisdictions it is also relevant in the event of any challenge to the decision to issue a search order. Normally, the standard required to satisfy the issuing judicial officer is termed "reasonable grounds to believe" or "probable cause", which are equivalent, and the term chosen has no influence on the outcome. If the statements supporting a request for a search order are successfully contested, the court may set aside the order and consider whether the evidence obtained pursuant to the order can be used in subsequent proceedings. Therefore the supporting documents must be carefully prepared.

149. If a sealing order can be obtained from the court issuing the search authorization, it will prevent the premature disclosure of the search order and could be used to shelter some or all of the material included in the supporting documentation. The formalities described above apply in common law jurisdictions. In civil law jurisdictions, these may be unnecessary, and the prosecutor or instructing official may authorize searches to establish truth.

150. There is no prescribed best way to obtain a search order. Whatever method is used, the practical aspects of the search must be planned with regard for the fact that the search is being conducted in connection with an investigation into an organized crime group. If computers are to be searched, the search team should include computer experts. The team needs to have a plan for dealing with any depreciating assets that may be seized. The searchers will have to justify their

³⁶A separate search authorization may not be required in the case of arrests, customs inspections and searches at a border or seizures of items in plain view. This issue is specialized, and each jurisdiction will be familiar with its domestic law.

decision to use the authorization conferred by the search order to seize items or documents. All post-search procedures must also be followed. This can include a search report to the issuing judicial officer or relevant prosecutor and the need to obtain a preservation order for items seized.

151. In drafting the search warrant, the organized crime investigator must think beyond the substantive offences and consider the profit motive for crimes. A request for the authorization to search for financial and other records must be justified with reference to the need to trace assets.³⁷ It is equally important to specify that computer equipment, including peripheral equipment such as flash drives and cards or encryption material may be searched for and seized. The scope of the information or documents specified in any search order will depend upon local law and practice. In common law jurisdictions, more specifications are required than for civil law jurisdictions. In both types of jurisdiction, the investigators need to be aware of the need to secure information that will enable the tracing of assets.

152. In the course of many searches, investigators will come across personal computers and peripheral devices.³⁸ If they are authorized to search and seize that equipment, they must exercise extreme care since it may have unexpected safeguards. Experts should be available to ensure that the authority to seize such equipment is not rendered ineffective by the inability of an unsophisticated investigator to retrieve information. Particular care should be taken not to inadvertently delete data, and computer forensic experts should be consulted.

153. Finally, it is important to distinguish between searches of private residences and those of business premises for documents and electronic devices such as personal computers. If the search location is the premises of an operating business with computer networks and servers, or the premises of a professional such as a lawyer, the order should contain terms and conditions on how privileged communications are to be dealt with. Investigators plan their searches taking into account the locations, persons and items being searched. A personal computer can easily contain the equivalent of a storage room full of paper documents, with the result that the scope of the search can be extensive.

154. Once the search has been executed, ancillary and related proceedings can develop. If privileged documents are seized, the relevant professional or client can immediately challenge the order or seizure. In other cases, the execution of a search order and seizure could trigger a timetable for commencing proceedings or returning the seized items. Finally, the execution of a search will make it apparent that an investigation is under way, and assets may start to disappear as a result.

155. An analysis of the material seized during a search is vital. The seized material will rapidly become dated. It could also provide information on other locations that should be searched. It should give invaluable historical and confirmatory information. It will also provide information about bank and other financial records, foreign connections and the next steps for the asset investigators. In essence, investigative seizures provide leads to follow in further locations, including various businesses.

³⁷The items that need to be searched for in the context of asset tracing are books, records, receipts, notes, bank statements, phone records, tax assessments, investment records, business transactions and business plans or real estate records. In addition, safe deposit records or keys, credit card bills and information and passport and travel documents should be listed as items that may be at the target's location, which may be sought out and seized.

³⁸A flash drive is a device commonly found in the course of a search and, if seized, the amount of data that may be stored on a 1.2 GB device (a common size) is staggering: it can hold the equivalent of 374,400 pages of facts or information.

I. Searches involving third parties

156. An investigator may be authorized to obtain information or evidence from third parties that may be innocent or complicit in the criminal organization's activities.³⁹ The specific facts of the investigation will determine how investigators approach such third parties. If the investigation is covert, the search will be conducted in a different way from how it would if the investigative target were aware of the investigation. The risk that the third party may inform the target that law enforcement is looking into information that would otherwise be confidential must always be weighed up by an asset-tracing investigator, and that consideration should inform the timing of the search.

157. Some jurisdictions have provisions or laws that delay verification of the receipt of investigative orders for disclosure, production or seizure; it is important to remember that they can do no more than bring about a delay.

158. A search of a business may be conducted in a similar way to a search of a private place or it may be less intrusive. In the case of a more intrusive search, law enforcement, under the authority of an order or pursuant to their statutory authority, enters, searches and seizes. In the case of a less intrusive search, law enforcement serves the order requiring disclosure or production, leaving it to the business to comply with the order.

159. If a disclosure or production order is required, the application process is substantially similar to that required to obtain a search order. Great care should be exercised in drafting the terms of any disclosure or production order. Broad requirements to produce "all documents that may be connected to the specified offence" may be a common expectation in some jurisdictions but could result in the receipt of thousands of irrelevant documents.

160. In some cases, a business may routinely discard data after a specified period of time. An example of this is the storage of e-mail messages by Internet service providers. The problem is not as significant for financial institutions, as the Financial Action Task Force recommendations and normal banking laws impose stricter obligations on retaining records. If an investigation has an order to search any business that has a short-term retention period for records, additional terms or applications should be used to implement an order requiring such a business to retain the records for a longer period of time, such as until prosecution is concluded. Investigators must discuss this matter with their State's central authorities whenever they determine that a request to another country is required.

P. Disclosure of financial records

161. Asset-tracing investigators will discover links to financial institutions or financial advisers through various sources of information collected in the course of the broader investigation. Perhaps the initial source is a financial intelligence unit's suspicious transaction report or an analysis of discarded documents found in the target's refuse. Whatever the source, the investigator may decide to search or use another order to gain information from banks or similar non-banking businesses.

162. The basic starting point could be a request for voluntary compliance and assistance. In taking such an approach, investigators need to consider their jurisdiction's data protection laws and

³⁹A third party might be for example a lawyer, solicitor, accountant or a business, including a financial institution.

other laws imposing anti-money-laundering obligations on banks and non-bank entities. The work of the Financial Action Task Force, relative to non-bank entities or banks, together with the Bank for International Settlements should be acknowledged in any analysis of this issue. Collectively, these organizations and their associate organizations have established rigorous obligations for customer due diligence and related expectations, including record-keeping.

163. It is essential that an order to obtain information from any relevant financial entity, including non-bank entities, request access to the account opening and customer due diligence records for the account or client.⁴⁰ There is an obligation to maintain an anti-money-laundering compliance programme and undertake periodic updates of its “know-your-customer” information. Separate from the need to obtain specific financial transactions, information accessing and examining “know-your-customer” data provides essential confirmation that the correct account for the target has been identified.

164. In some instances, the anti-money-laundering compliance programme may include information collected by the bank on the source of funds for specific transactions. In other cases, those files could identify witnesses or additional sources of information.

165. Next, disclosure or production orders or, if necessary, search orders need to be obtained for all relevant account activity. This information should be closely examined for wire transfers, debit card activity, credit card activity, including payments on such cards, and similar cash flow through the account. In the case of debit card activity, the locations where the activity occurred can form a travel trail for the investigative target. That information can corroborate or supplement any surveillance undertaken against the target. Information regarding corresponding banking activity tied to the account also needs to be requested and obtained. This will provide future leads for investigations and may provide contradictory evidence of beneficial ownership of an asset.

166. Information or evidence regarding relevant deposits or withdrawals from the account should be obtained. Money going into the account should be identified and copies of cheques obtained (front and back) since they may reveal unknown targets of investigative interest. There may also be additional notes on such cheques that could be relevant to the investigation.

Q. Wire transfers

167. Any wire transfer should be a red flag for an asset investigator.⁴¹ The movement of money by means of wire transfers is safe and effective. They allow the organized criminal group to use the global financial structure to shelter, conceal and launder money. Such transfers provide the asset investigator with several crucial pieces of information or evidence. They reveal other financial institutions connected with their investigative target. The transfer document itself must set out the originator and the beneficiary institutions.

⁴⁰The scope of those records and institutions’ obligations will vary, depending on the customer. This point is illustrated by the concept of foreign politically exposed persons and the development of responses to address that obligation in revised recommendation 12 of the Financial Action Task Force.

⁴¹Financial Action Task Force recommendation 16 on wire transfers replaced special recommendation VII on terrorist financing. It states: “Countries should ensure that financial institutions include required and accurate originator information, and required beneficiary information, on wire transfers and related messages, and that the information remains with the wire transfer or related message throughout the payment chain. Countries should ensure that financial institutions monitor wire transfers for the purpose of detecting those which lack required originator and/or beneficiary information, and take appropriate measures.”

168. The wire transfer process is summarized in the *Asset Recovery Handbook: A Guide for Practitioners*⁴² produced under the Stolen Asset Recovery initiative, which states:

By far the most common way for banks to communicate transfer instructions to each other is by accessing a special financial telecommunications system known as the Society for Worldwide Interbank Financial Telecommunication (SWIFT). Where the actual movement of money is concerned, the two major wholesale interbank payment systems available are the Clearing House Interbank Payments System (CHIPS) and Fedwire Funds Service (Fedwire). In addition, direct bank-to-bank and other intermediary payment systems are frequently used by banks to move customer funds between institutions.

...

An actual funds transfer takes place through a “book transfer” and may involve a correspondent bank. A book transfer is essentially an accounting process that physically moves funds from one account to another. If both the originating customer and the beneficiary customer have an account at the same financial institution, then an internal book transfer can take place between the two customer accounts. When funds are transferred between two unrelated financial institutions, a book transfer occurs through a correspondent or intermediary bank.

169. The actual wire transfer message is crucial to a full analysis of the transaction and the authors recommend that practitioners obtain wire transfer information in both spreadsheet format and advice statement form. That information can then be used with reference to information obtained through customer due diligence and customer profiles.

170. Reference is also made to the use of different SWIFT name variants:

A review of the separate SWIFT gateways used only for private banking clients within the bank and its various branches may uncover a separate and potentially special permission transaction originating through these gateways. SWIFT name variants used by the financial institution may reveal transfers through different avenues. A bank may have different wire transfer departments, addresses, or internal ways of identifying itself. To ensure that the gateways and name variants are listed in the order to produce bank records, practitioners should consider gathering this information through interviews with bank officials (for example, compliance officials).⁴³

171. The issue of international wire transfers is complex. It may be beyond the experience of many asset investigators. As a result, they should consult with a local expert, such as their banking supervisor, for assistance. Ultimately, they must use the records to follow the money, however complex the money trail becomes.

R. Business accounting records

172. The financial records obtained using orders issued against banks and other institutions will provide a large volume of evidence and intelligence regarding an investigative target. If the target

⁴²Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., World Bank, 2011), p. 64.

⁴³*Ibid.*, p. 66.

used corporate vehicles and businesses, those businesses should have accounting records that, in due course, should be cross-referenced against the financial records obtained from banks.

173. Cross-referencing business account records can be a complex yet essential undertaking for many asset investigators.⁴⁴ It is suggested that an organized crime task force include a forensic accountant, who would be best able to analyse business account records in detail.

174. That analysis should result in questions about fictitious invoices or suspect transactions. Those invoices and transactions will provide additional leads for the asset investigator.

S. Ownership documentation

175. In the course of the tracing investigation, questions about property ownership will inevitably arise. Any ownership and mortgage documents obtained need to be analysed for relevant information. Checks on property and vehicle registration records may have revealed lien notices; the liens should be obtained, assuming it is an appropriate time in the larger investigation, and examined for relevant financial information, including the name and identification of the lien holder. If the asset is a vehicle and there is no lien, it may be possible to determine how the target paid for the vehicle, for example in cash. The same applies to jewellery or expensive collectibles or repair bills relevant to the asset. If the target pays for repairs to an asset, that may be evidence that they own it. Otherwise, the payment method for the bill (for example, cash) may provide additional avenues for investigation.

176. This type of investigative work can be time-consuming but it is invaluable. It is especially relevant if the asset investigator is making a determination to seize or freeze the assets for subsequent confiscation proceedings. He or she may discover that the debts owed against the asset negate any potential confiscation value. They may also discover additional persons to question. The same considerations apply to any asset registered in another person's name should the investigative target appear to actually control the asset.

177. Finally, these issues should also be considered wherever investigators determine that close family members, friends or relatives may be holding assets on behalf of the target. This work is as important as the efforts undertaken to access financial and business records.

T. Collating the evidence

178. The practice of developing a file of information about the target was discussed above. At the conclusion of any asset-tracing investigation, a careful and structured asset and financial profile is essential. The investigator must develop a comprehensible analysis of how the various financial records and targeted assets interrelate. This document must be prepared in such a way that the prosecutor or instructing official can quickly determine the evidence indicating tainted property. Alternatively, in a value-based confiscation system, the net worth of the target and the value of the target's entire estate must be established. A forensic accountant can develop such an analysis with the assistance of the asset-tracing investigators.

⁴⁴The internal audit analysis in the Siemens case (see box 4, above) illustrates the value of such material.

179. An asset profile assists in developing a confiscation or value judgement case. Such a profile must include the names of all relevant institutions, all relevant bank account numbers and types, relevant account opening and “know-your-customer” information and account activity and related information. Spreadsheets, charts, organization charts, PowerPoint presentations or similar tools can be used to summarize the information effectively for the prosecutor or instructing official.

180. It is the investigators’ responsibility to marshal all the evidence and intelligence for the prosecutor and instructing official. This might mean that the investigator needs to establish the target’s net worth, with the assistance of the forensic accountant.⁴⁵ A link chart or net worth analysis of the target could be created for that purpose.

181. Using this information, appropriate applications may then be sought to seize or freeze assets for subsequent confiscation or value judgement applications. In an ideal scenario, the asset investigation winds up at the same time as the substantive investigation. In practice, this may not always occur, but a value-based confiscation procedure could be implemented post arrest.

⁴⁵Net worth is calculated by taking account of the value of the assets and income discovered during the investigation alongside the income or wealth officially declared by the target in, for example, taxation records and filings. More information on this is provided in annex II to the present Manual.

VI. Provisional measures to preserve assets pending confiscation

A. Overview

182. Assets will be discovered throughout the course of an asset-tracing investigation. Investigators may observe targets living an extravagant lifestyle and spending money and view the group as an opportunity to target valuable assets for confiscation. That prospect, while interesting, is secondary to the more important investigative aim of disrupting and shutting down the organized crime group. However, asset confiscation is one of the objectives of the Organized Crime Convention, set out in article 12 of the Convention, which includes a requirement for measures designed to freeze or seize the proceeds and instrumentalities of crime.

183. Chapters IV and V above discussed the use of joint task forces and asset investigators to trace the proceeds and instrumentalities of crime. While the goal in theory is to seize and ultimately confiscate all proceeds and instrumentalities, the reality is that over the course of any investigation some assets will be lost or consumed, or depreciate to such an extent that confiscation is not feasible. In spite of this, there may be an opportunity to seek a value-based order or financial penalty as a substitute for the dissipation of either proceeds or instrumentalities. That will be discussed in chapter VII below. In the present chapter, consideration needs to be given to the fact that organized crime and asset-tracing investigations may take months or years to complete, and interim preservation measures, usually referred to as provisional measures, may be used to secure the assets until confiscation proceedings can be instituted.

184. It is entirely understandable that an organized crime target, their friends, relatives or innocent third parties are likely to have strong objections to provisional measures tying up their assets. The provisional measures provided for in the Organized Crime Convention, which will have been implemented in States' jurisdictions under national law, may be administrative⁴⁶ and available at any stage of the investigation,⁴⁷ or in many instances they are available only once criminal charges are instituted. It is vital that such measures be undertaken as quickly as possible, consistent with the larger investigation, to secure targeted assets. The protection of innocent third parties and the protection of the persons affected by the orders are among the essential matters to consider, whatever approach is taken.

B. Terminology

185. Article 12 of the Organized Crime Convention calls upon States parties to adopt measures to enable them to seize or freeze assets, in accordance with the provisions of domestic law. The first

⁴⁶A seizure and a law specifying confiscation, such as in many customs seizures, can include a confiscation feature.

⁴⁷An example of a measure available at any stage of the investigation is non-conviction-based confiscation, for which charges are also not required. Some conviction-based confiscation regimes also allow for the early institution of provisional measures, well before charges are instituted.

concept, seizure, is well understood. The property is taken into the possession and control of the State, and the property's owner loses physical possession. A seizure could result directly from an action by law enforcement, or it could come about as a result of an official order directing an investigator to seize. Whatever the case, the owner always loses control but not ownership of the asset.

186. Freezing, on the other hand, is more specialized. A freezing order could leave the owner in physical possession of the asset but impose specific terms and conditions on their use of the asset, or prohibit any right to sell, lease, destroy or otherwise diminish the value of the asset while the order is in force. Such an order may be known as a "restraint", "blocking" or "preservation" order depending on the jurisdiction. For the purposes of the present chapter, the term "preservation order" will be used. Normally, judicial authorities issue a preservation order, although some jurisdictions permit prosecutors or perhaps an agency (such as a financial intelligence unit) to issue short-term preservation orders.

187. Whether a given jurisdiction issues a preservation or seizing order in relation to a bank account, the important point is that the effect of the order is to remove control of the asset from the owner for the time specified in the order.

C. Preservation or seizing order requirements

188. If issued by a judicial authority, applications for both preservation and seizing orders must be supported by evidence. If the authority to seize or preserve is granted, investigators or an agency must implement the order. It needs to be served, perhaps registered against property and the terms or conditions in the order must be implemented. If an authority other than law enforcement is required to implement the order, the enabling legislation often restricts their authority, which could be augmented by the terms of the preservation order.

189. Issuing an order might be problematic for a court due to the fact that the specified assets are not, per se, evidence in a criminal prosecution. In the case of assets targeted for confiscation as a result of criminal activity, preservation is justified to ensure that a value judgement recovery process can be implemented in the future. Criminal instrumentalities may be seized because they are evidence of the crime, yet they are also the subject of a preservation order for subsequent confiscation, either in the context of the authority to seize or pursuant to a post-conviction application to confiscate.

190. When considering whether to issue a preservation or seizing order, the court will be conscious of the requirement that a crime has been committed that generated proceeds or that there is a link between the asset and criminal activity or the individual's lifestyle. The material filed in support of the application for the order must satisfy the standard of proof for an interim order. Since the preservation or seizing order is an interim measure in the sense that a criminal or civil trial has not yet commenced, the standard of proof required may be less stringent than the onus of proof in an actual trial. In addition, there may be a statutory precondition that criminal proceedings have commenced or are about to commence. This would have a significant impact upon any decision to obtain a preservation order.⁴⁸ However, any suggestion that such a precondition could hinder asset tracing and confiscation is speculative. This is because any preservation order, whenever issued, would tip off investigative targets.

⁴⁸Some jurisdictions allow preservation orders at any time as long as the court is satisfied that the specified asset may be confiscated.

191. In addition to using provisional measures for domestic investigations pursuant to article 12 of the Organized Crime Convention, investigators must take full account of the mechanism of international cooperation for the purpose of confiscation pursuant to article 13. They should work closely with the State's central authority, using the *Manual on Mutual Legal Assistance and Extradition* as a tool and source of information. The obligations created by article 13 are focused and reinforced by the Financial Action Task Force Forty Recommendations, especially recommendations 37 and 38, cited below.

Recommendation 37 states the following:

“Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money-laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings... In particular, countries should:

“(a) Not prohibit, or place unreasonable or unduly restrictive conditions on, the provision of mutual legal assistance.

“(b) Ensure that they have clear and efficient processes for the timely prioritization and execution of mutual legal assistance requests. Countries should use a central authority, or another established official mechanism, for effective transmission and execution of requests. To monitor progress on requests, a case management system should be maintained.”

Recommendation 38 states the following:

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

D. The application

192. The differences between common law and civil law jurisdictions with respect to applying for a preservation order, which is similar to the search or disclosure orders described in chapter V, relate more to form than substance. Under common law, an application in writing supported by an affidavit or witness statement is required. That affidavit will set out the investigator's factual information (evidence) and the investigator's belief in the accuracy of that information. The affidavit can include information obtained from third parties if the person making the affidavit believes that such information is accurate. Civil law jurisdictions may have a different obligation to recite the facts supporting their application but the ultimate decision by the judicial officer is similar in both systems.

193. One reasonable assumption in any application for a preservation order is that a subsequent confiscation order may not succeed. Costs and damages may result. Some jurisdictions require an undertaking to the court that such costs and damages, once determined by the court, will be paid by the State. This must be considered at the stage of planning the preservation of the asset. In

other jurisdictions with no requirement for such an undertaking, the same issue should be discussed before commencing an application for a preservation order since the payment of such damages will inevitably be requested if an application for confiscation or judgement is unsuccessful.

194. It is good practice, given the nature of the targeted assets, that applications for their preservation be instituted *ex parte* (without notice) since the concern is that the owner or a criminal target may immediately dissipate or move the asset upon receiving advance notice. A good practice is not tantamount to an obligation. Practice varies between jurisdictions since some mandate a specific *ex parte* procedure while others permit this if the supporting documentation gives reason to suspect that the assets may be dissipated. Other systems could allow for a short-term freeze or seizure pending an open hearing on the issuance of a longer-term preservation order.

195. The question of *ex parte* as opposed to on notice applications for preservation orders has been subject to debate. That could be seen as merely speculative, since the affected party or parties (*bona fide* third parties) can quickly challenge the preservation order. In essence, making the application on an *ex parte* basis may only delay an inevitable challenge. Also, some jurisdictions require that a transcript of any *ex parte* proceeding must be served on the other party with any order issued with the result that it is easier to challenge the order. There are a wide variety of approaches, such as that in the United Kingdom, where external preservation orders are undertaken *ex parte*, but the defendant is then served with a transcript of the proceeding, while Jamaica allows for a 28-day preservation order upon an *ex parte* application, following which an *inter partes* hearing is required. Whichever approach is adopted, the point to remember is that challenges to preservation orders are inevitable.

196. The main difficulty with these applications is created by the nature of the order. The asset-tracing investigator, together with the asset managers and prosecutors, must consider the specific terms and conditions they wish the court to include in the preservation order. It is a mistake to blindly assume immediate adherence to any preservation order or a continued interest in maintaining targeted property once it has been frozen.

E. Early preservation planning

197. Preservation orders could be requested at any time in asset-tracing investigations, especially if there is a reasonable concern that a target's assets could disappear, be dissipated or lost. However, as mentioned in chapter V above, premature preservation orders create a risk that the investigative targets may learn or confirm a suspicion that a law enforcement agency has an interest in their activities. As a result, investigators, prosecutors or instructing officials must carefully judge the timing of any preservation application.

198. In addition, as discussed below, some assets may be outside the jurisdiction yet be relevant for a subsequent confiscation application.⁴⁹ In such cases careful consideration of the possibility of enforcing a preservation order in another jurisdiction, through mutual legal assistance procedures, should be evaluated.⁵⁰ Article 14 of the Organized Crime Convention partially addresses this issue.

⁴⁹This is especially true in the case of major organized crime groups: the group or its leaders may have global investments and property that are derived directly or indirectly from the group's crimes.

⁵⁰In the case of a joint investigation with other States parties, investigators and prosecutors should provide this information relative to their own countries. If there are no such investigators or prosecutors, any mutual evaluation report prepared and published by the Financial Action Task Force and its regional associate bodies must be consulted. The analysis required under recommendations 3, 28 and 38 indicates whether the country where the targeted asset is located can assist.

It has also been addressed in some international and bilateral agreements.⁵¹ The important point to appreciate is that investigators must not abandon their interest in the confiscation of assets outside their own jurisdiction.

199. If a given jurisdiction uses a value-based confiscation approach or property-based approach, the decision to apply for a preservation order could be affected. A value-based order need not depend upon a specified tainted property in order to satisfy the court. However, if there is evidence that a property is tainted, a preservation order against the property should be considered to ensure that court requirements can be met. Presumptions that assets are tainted can also be used to justify a preservation order.

200. Such presumptions could be made in relation to gifts, transfers of property in return for a low price or assets held on behalf of an investigative target. Local law will determine how this issue is approached. Facts will play an important role and the asset-tracing investigation should provide some evidence to support any presumptions and rebut the inevitable claims of the target's friends, relatives, corporations or business partners that they own the asset. At this stage, it is sufficient merely to consider this point, which will arise during any confiscation proceeding or through an application to challenge the issuance of the preservation order. Investigators, the prosecutor and the instructing officials must determine if a preservation order application is justified.

201. Box 9 below details some considerations for asset preservation.

Box 9. Asset preservation considerations

Investigators should ask the following questions when considering asset preservation procedures

- What are the legal requirements in the requested jurisdiction?
- Is the asset of sufficient value to warrant preservation?
- Are bona fide third parties involved and unnecessarily impacted?
- If the asset is outside the jurisdiction, will another country cooperate in enforcing the preservation order?
- Is there a requirement to consider providing allowances or expenses that can be taken from the preserved asset (for example, business, living and legal expenses)?
- Are there privilege, evidence or immunity issues for witnesses or the target?
- How quickly will charges be instituted, or is there a specified time requirement for instituting charges?
- Can criminal charges be instituted? (For example, limitation periods may need to be taken into consideration.)
- Are there potential asset management cost issues particular to the targeted asset? (For example, what does the State plan on doing with the property.)

⁵¹Council of the European Union framework decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property and Council of the European Union framework decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders illustrate such an approach.

At this stage, it is also important for investigators to take the time to dispassionately evaluate the need and their justification for seeking a preservation order. A checklist of considerations that may individually or collectively impact upon that decision can be found in annex I.

202. Two equally important questions, the first related to bona fide third parties and the second on potential asset management costs should be the first priorities for this review process. Bona fide third parties should not be unduly impacted by a preservation order. If they are, the investigators will invariably be subject to prompt yet unnecessary litigation or requests for compensation that they may not be in a position to honour prior to confiscation. Also, depending on the facts and the terms of any preservation order, asset management costs might be greater than the value of the property following a successful confiscation application. These can both be significant reasons for deciding against for preservation, taking the risk that the asset will be unavailable for subsequent confiscation.

203. If the concerns are flagged in relation to the other questions in box 9, the investigators, prosecutors and instructing officials should reconsider their interest in undertaking a preservation application. The bottom line is that confiscation and alternatives thereto are always available measures. There is no need to preserve an asset as a precondition to achieving a confiscation order.

F. Asset management

204. The cost of asset management can become an unexpected issue at any time. A common assumption seems to be that assets manage themselves and that asset preservation can be achieved simply by ordering the owner not to sell or dissipate the asset pending any subsequent confiscation application. If the asset is a house, it will deteriorate unless the owner maintains it. If the asset is a business it may deteriorate if it is inadequately managed and financed. If the owner was maintaining the asset or business through their illicit activities, it is safe to assume that they will stop using those resources to maintain the asset. In such a case, is post-preservation management by an asset manager, without the input of illicit money, even feasible? Is the asset manager wasting money by attempting to maintain such a business? It is also common for targets to abandon such property or lose interest in maintaining it to the same extent as prior to the preservation order.

205. In addition, when management of an operating business is taken over under a preservation order, the loyalty of existing employees or management could be an issue. The asset-tracing investigation may have shown that the business was generating income. However, the same investigation could also demonstrate that the expenses were subsidized by criminal activity. That subsidy could end at any time. Indeed, public policy considerations suggest that no State would condone the continuation of such a subsidy.⁵²

206. This question is even more difficult to evaluate if the business involves truly innocent partners. The preservation order could apply to the target's interest, yet the consequences may have a negative impact on that business and the interests of innocent third parties.⁵³ There may be solu-

⁵²In the Canadian case referenced in footnote 25 above, the offenders were the owners of the corporation operating the business. They immediately stopped funding expenses. Once the asset was frozen, a decision had to be taken on whether to operate or close down the business. A privately retained receiver operated the business under the terms of the order. Capital to fund operating expenses had to come from the Government. This case led to the establishment of a public sector asset manager for seized property.

⁵³This is not an irrelevant issue. Article 12, paragraph 8, of the Organized Crime Convention requires that the provisions of that article should not be construed to prejudice the rights of bona fide third parties.

tions to such problems but the issues are fact-sensitive and must be analysed by the investigators and any asset manager prior to preservation.

207. There will be other assets that may not entail asset management considerations, such as a bank account. The assumption would be that the bank would merely freeze the account pending an application for confiscation. However, outstanding payment instructions, mortgage obligations, loan payments and similar obligations would be impacted by a rigid preservation order. Bonds, share certificates, and similar intangibles⁵⁴ may also be placed in jeopardy through inadequate management terms in a preservation order. If the order is obtained on behalf of another State, consultation and a clear management plan are essential. The consultation should include concise deadlines for subsequent action in the requesting State.

208. Finally, it is important to understand yet reject arguments by some investigators that preservation orders should be obtained against all relevant property. While it might seem desirable to seize every car, boat or aeroplane used or owned by the investigative target, confiscation applications might be implemented with such a time delay that the depreciation of the asset means their confiscation is not justified. As a result, some jurisdictions establish value thresholds for assets that are of low value or could depreciate.⁵⁵

209. The question of pre-planning and asset management involves the preservation order and all subsequent dealings with the targeted property. This issue should be considered in light of the criteria listed in box 10 below.

Box 10. Best practices in asset management

“E. Management of frozen, seized and confiscated property“

“26. To enhance the effectiveness of confiscation regimes, it is a matter of best practice for jurisdictions to implement a programme for efficiently managing frozen, seized and confiscated property. Depending on the nature of the property or the particular circumstances of the case, the best method of managing it might be through any one of (or a combination of) the following: the competent authorities; contractors; a court-appointed manager; or by the person who holds the property subject to appropriate restrictions on use and sale.

“27. Ideally, an asset management framework has the following characteristics:

“(a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property;

⁵⁴Canada has some cases where the organized crime group laundered money by purchasing (that is, redeeming) winning lottery tickets. Such tickets become worthless a year after the lottery draw. The tickets were seized as proceeds of crime and held for a subsequent confiscation application. However, if a management order did not allow for the tickets to be cashed in within the year, the confiscation application would have applied only to worthless lottery tickets.

⁵⁵In the case of assets such as drug houses, clandestine laboratories or gambling places, public policy may mandate that they be shut down and preserved for confiscation.

Box 10. Best practices in asset management (continued)

“(b) There are sufficient resources in place to handle all aspects of asset management;

“(c) Appropriate planning takes place prior to taking, freezing or seizing action;

“(d) There are measures in place to:

“(i) Properly care for and preserve as far as practicable such property;

“(ii) Deal with the individual’s and third party rights;

“(iii) Dispose of confiscated property;

“(iv) Keep appropriate records; and

“(v) Take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.

“(e) Those responsible for managing (or overseeing the management of) property have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property;

“(f) Those responsible for managing the property have sufficient expertise to manage any type of property;

“(g) There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating;

“(h) There is a mechanism to permit the sale of property with the consent of the owner;

“(i) Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety;

“(j) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay;

“(k) To ensure the transparency and assess the effectiveness of the system, there are mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realized.”

³Source: Financial Action Task Force guidance document entitled “Best practices: confiscation (recommendations 3 and 38)”, 19 February 2010, pp. 10-11; based on an original text of the Camden Asset Recovery Inter-Agency Network.

210. Asset management is also covered by the United Nations Convention against Corruption which states, in article 31, paragraph 3, “Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.”

211. Once asset management issues and the justification for a preservation order have been properly considered, the preservation order application and supporting documentation should be submitted to the court for it to issue the necessary orders.

212. In some instances, where the jurisdiction provides that investigating magistrates or equivalent officials can issue the necessary preservation orders, they should consider asset management issues. If such issues are not detailed in the relevant preservation orders, additional applications and revisions of the preservation order will occur as circumstances change or as management concerns develop.

213. Finally, in every case where a preservation order is sought against property jointly owned by innocent third parties, the order should specify that the target's interest is the subject of the preservation. That would allow bona fide third parties to protect their interests.

G. Execution of preservation orders

214. In order to be effective, a preservation order, once obtained, must be served on the owner and any third party and must be made or included in some type of public notice. This is important whenever the asset is registered in the name of the investigative target. In other words, the order must be served on institutions such as banks, brokerage firms and similar relevant organizations. A notice also needs to be filed in land registry offices and any public registry system where liens and security interests may be registered. That gives the general public notice of the court's preservation order. This prevents the target from transferring ownership to another party who could claim receipt and payment without notice of the existence of an order.

215. There are three possible scenarios for the execution of a preservation order. Under the first, the preservation order is equivalent to a seizure order. In the second scenario, the preservation order either freezes the owner's control, while leaving the property in the possession of the owner, or transfers possession and control from the owner or person in possession to another party: the named asset manager. The third scenario covers situations where the asset is located outside the jurisdiction that issued the order.

I. First scenario

216. The first scenario will generally apply in the case of tangible and movable assets. In this scenario, investigators or the person named in the order, such as an asset manager, physically seize the assets unless the court orders the owner to turn them over and the owner complies. In any case where someone other than an investigator undertakes seizure, careful coordination between the named person and law enforcement should be considered in the interests of personal security.

217. In any case where assets such as expensive artworks, cars, jewellery or antiques are specified and removed from the owner, the seizure must be implemented with care. Given that they are subject to a preservation order, they have been deemed to be sufficiently valuable to justify a subsequent confiscation or judgement application. Seizure does not confer ownership on law enforcement or the State: the asset remains the property of the owner until confiscation. Seized assets must be safeguarded by means of adequate security and transportation to a secure storage facility.

218. Since there may be a significant interval between seizure and confiscation, additional measures should be considered and implemented. One such measure is that the asset manager should obtain an expert opinion on the value of the seized asset. Given the problem of the proliferation

of counterfeit goods, it is important to ascertain at this stage whether, for example, a seized designer watch is a worthless counterfeit. Failing to conduct such an inspection could lead to the undesirable consequence of an unsuccessful confiscation order with the need to return the watch from the secure storage facility and applications for damages.

219. Some jurisdictions could use a seizing order to take control of a bank account. A bank account is an intangible asset based on a relationship between a creditor and debtor but could be seized by means of an order specifying that the account must be closed and the money credited to a court or Government account. Such an order may be difficult to establish where the account is outside the jurisdiction wishing to seize the asset. In such a case, the law of the requested jurisdiction will apply and the issue will have to be dealt with in the context of the mutual legal assistance application.

220. Livestock is another type of asset that may be seized under a preservation order. The order needs to take account of the expense and time needed to manage this type of asset, and the asset manager needs to draw up a detailed plan. It may be useful to develop a checklist of considerations, such as that given in annex I, to determine whether a preservation order is warranted.

2. *Second scenario*

221. In the second scenario, the owner is left in possession of the property but prevented from transferring the title, further encumbering (that is, creating debt against the property) or intentionally dissipating the value of the property. The preservation order in such a scenario should include specific terms requiring the owner to maintain insurance coverage, pay all taxes levied on the property, pay utility bills and maintain the property in its present condition, subject to fair use expectations. In such a scenario it may be reasonable, subject to privacy concerns, to permit periodic inspections of the property by a named asset manager.

222. Alternatively, it may be determined that the owner should not be left in possession of the property. In this case, the terms and conditions of the order will have to be tailored to reflect asset management considerations. Those considerations in the case of a residential property, depending upon the use at the time of the order, could require tenants to occupy the property and pay rent at a fair market rate to the asset manager. Their rent could then be used to maintain the property with any surplus deposited into an interest-bearing account for future confiscation or other use.

223. If the property is an operating business, the asset manager, consistent with the preservation order, could leave the business's current manager in place or personally undertake management responsibility. Management responsibility could also be delegated to a contractor or other expert. The business expenses could be covered by business revenue and any profit deposited into an interest-bearing account for future confiscation or other use. In this type of scenario the asset manager and officials, including the court, need to ensure that the terms and conditions in the preservation order allow the business to function.

3. *Third scenario*

224. In the third scenario, a preservation order relating to an asset in a different jurisdiction may be viewed as the equivalent of an injunction against a target in the same jurisdiction prohibiting the target from transferring their ownership of the property. It may also claim control over the property subject to the preservation order. However, the property is within the control of the laws of the State where it is located.

225. Just as attempts by a State to conduct investigations, interviews or seizures in the other State are regarded unfavourably, States should also not issue preservation orders for other jurisdictions. This does not mean that preservation orders should not be issued against offenders in other jurisdictions. Rather, it is a good practice to ensure that the order against the individual is also enforced within the jurisdiction where the property is located. This can be accomplished through mutual legal assistance, pursuant to the Organized Crime Convention.

226. The issue of mutual enforcement of freezing and seizing orders is canvassed in the Financial Action Task Force mutual evaluation methodology. Mutual evaluation reports consider the issue specifically so that it will be apparent from a report whether mutual legal assistance is a viable option in a given jurisdiction.

227. One of the issues that must be carefully considered in this scenario is how long it will take the requesting jurisdiction to finalize any confiscation application. This is relevant in any case where the request is to enforce the other jurisdiction's preservation order pending a confiscation order in the requesting State. That request contemplates a subsequent confiscation application and request to enforce the foreign confiscation order.

228. Some jurisdictions do not have the authority to directly enforce foreign preservation and confiscation orders. In such cases, the only viable option is to request that they use their domestic law to freeze or seize such property. The requesting State must then provide sufficient evidence to support their domestic confiscation application against the property.

H. Payment of expenses

229. Expenses incurred through the management of property subject to a preservation order should in theory be recovered once the property is confiscated. However, this is not possible if confiscation is not successful. If, however, the property is an operating business, the revenue generated could cover management costs. The question of the full recovery of asset management expenses is discussed fully in chapter VII, below, but perhaps such costs are simply a price that must be paid for asset tracing and confiscation work.

230. Many jurisdictions specifically provide that the business, living and legal expenses of the owner or some innocent third party may be funded using the preserved property. Some argue that this is bad policy.⁵⁶ Since the local law in the jurisdiction issuing the preservation order must apply, it is useful to ascertain how that obligation might be met using preserved assets.

231. In some cases, such a provision will be abused to strip the asset of its value. There is no point in debating that concern just as there is little point in suggesting that the owner of the asset should use publicly funded legal aid. Some jurisdictions have responded to abuses by specifying that legal expenses may be recovered only at the legal aid rate, or by setting a maximum amount for the legal expenses that can be claimed.⁵⁷ Others leave it to the discretion of the court as the case develops.

⁵⁶Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, D.C., World Bank, 2009), p. 74.

⁵⁷Canada's non-conviction-based confiscation approach in the Province of Ontario's Civil Remedies Act illustrates such a modified approach to the legal expenses issue.

232. Consideration must always be given to the source of the funds to cover expenses. If the preserved asset is, for example, residential property, there may be no money available to pay expenses unless the property is sold or mortgaged. If the preservation order does not allow for an interim sale to deal with this expense issue, questions arise as to how the expenses might be met. There is little purpose in suggesting that the preserved real property can be encumbered to create a pool of money to cover the expenses, because of the difficulty of finding a lender. Not only might legal expenses become excessive, but business and living expenses may also be significant. The court must consider the question of the amount of such expenses and how reasonable they are in the context of the applicant's other assets. The applicant should be expected to look to their other assets that may not be subject to a preservation order. The court should also periodically review its expenses order should circumstances change.

233. Sometimes court-ordered payments of business, living and legal expenses can be funded only by selling the property. The property may be depreciating rapidly in spite of prudent management. Aside from property, it may be prudent for the court to order the sale or modification of other preserved items such as a stock portfolio in a speculative market or foreign currency that may be falling in value. Therefore the possibility of modifying or selling such assets should be provided for in the asset management plan and the preservation order. If an application for expenses is made, the applicant should have an expectation that the court may order the interim sale of preserved assets to obtain the funds.

I. Bona fide third parties

234. Dealing with innocent third parties could be deferred until confiscation proceedings are carried out, but that may not be possible given that a significant amount of time could elapse after the preservation order is issued and innocent mortgage holders, judgement creditors and other third parties may have an interest relating to the property or the offender. If their interest relates to the property under preservation, the court will have to ensure they are compensated, perhaps by ordering an interim sale. Alternatively it could decide to defer the issue to the final confiscation proceedings. In such cases, expenses may also have to be paid with respect to the third party's interests. If so, the management order must be flexible enough to deal with the payment of such expenses.

235. In some cases, the preservation order could cover only the target's interest in the asset, leaving third parties' interests outside the scope of the order. One consideration in connection with this approach is that once a preservation order is filed, a significant black mark against the asset is created. Such notice would have a negative impact upon the sale value of the asset until the time of final confiscation or the removal of the preservation order.

J. Ancillary proceedings

236. Jurisdictions also allow for additional secondary orders in preservation cases. In the case of non-conviction-based confiscation, party-to-party disclosure and discovery processes can be used to obtain pretrial disclosure of documents and testimony. In other cases, the secondary orders could require the investigative target to disclose details on the nature and location of their assets. They can also require the target to be interviewed.

237. These provisions are important tools to assist investigators in any complex asset case. They provide essential information that can assist with subsequent non-conviction-based confiscation proceedings.

238. The compulsory nature of such orders, in the context of the criminal justice system, means that the documents and evidence disclosed in such proceedings cannot be used in subsequent criminal proceedings, except in the case of perjury.

VII. Post-preservation issues

239. The processes of asset tracing and asset management do not end when preservation orders are issued. The ultimate goal must be that a confiscation order will result in the permanent transfer of ownership of the asset to the State. However, investigative work continues. Ancillary orders of disclosure and any follow-up with the owner of the asset continue. That work should not be left to the asset manager, whatever their status. Necessity will require any asset manager to work with the owner but the task of developing the confiscation investigation remains with the asset-tracing investigators. Another reason for continuing asset-tracing investigations is that additional assets may be discovered. Finally, case management and preparation for prosecutions or confiscation applications must be undertaken and need to continue with the larger investigative team. This work can be lengthy.

240. While all that work is being advanced, preserved assets do not manage themselves. Some jurisdictions are content to defer management responsibilities to the owner of the asset. Alternatively they may assume that open storage of seized property is sufficient or that investigators are adequate substitute managers. Such an approach is risky because a well-trained investigator will not necessarily be an adequate asset manager.

241. As a result of experience over the past 20 years, many Governments have recognized the need for professional asset managers, from the private or public sector.⁵⁸

A. A specialized asset manager

242. There is no perfect model for a specialized asset management structure. Whichever approach a jurisdiction adopts, certain requirements always apply. The manager should have legal authority, within the enabling statute of the jurisdiction, to preserve and manage property. That legal authority must, in any case where a court has issued a preservation order, be supplemented by the court's terms and conditions. The preservation order's terms and conditions will guide and restrict the general legal authority granted to an asset manager under its legislation.⁵⁹ The asset manager would have authority to retain subcontractors (such as appraisers or business managers from the private sector), and they would be responsible for the interim sale of preserved assets to satisfy orders of

⁵⁸In February 2010 the Financial Action Task Force issued a guidance document entitled "Best practices: confiscation (recommendations 3 and 38)" on 19 February 2010, which calls for the creation of specialized asset management programmes. In 2008, the Camden Assets Recovery Inter-Agency Network, at its annual meeting, adopted a similar recommendation. The Organization of American States has developed Model Regulations concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses, which were recently amended to update article 7 to establish "specialized administrative authority ... with the responsibility for administration, inventory and reasonable preservation of the economic value of assets" (see www.oas.sam.gov/lavado_activos/eng/Model_regula_eng12_02/REGLAMENTO%20LAVADO%20-%20ING%20neg%20jun%202006.pdf).

⁵⁹Since there is no requirement to select one type of manager over another, receivers and managers working under bankruptcy and commercial law authority could easily be retained as asset managers. The only restriction is that their broad authority would have to be subject to the specific terms of the preservation order.

the court (for example, to pay expenses). The asset manager, given their expertise, could preserve and perhaps improve the assets under their management prior to an application for confiscation.⁶⁰ Finally, the asset manager should continue to exercise their responsibilities following a successful confiscation order for the purposes of liquidating the confiscated assets and dealing with the proceeds in a manner consistent with domestic law.

243. The management of assets under a restraint order in the United Kingdom illustrates one approach. The prosecutor applies to the court for the appointment of a management receiver. The application is usually made at the stage when the restraint order is made or soon after, especially once the nature of the assets under restraint has been properly considered. Once appointed, the receiver becomes an Officer of the Court, and is thus answerable to the court for his actions in managing the assets. The cost of the receiver is paid using the assets under his control, even if the defendant is later acquitted.⁶¹ Guidelines on this procedure have been established.

244. The following management options should be considered:

- (a) A separate independent public asset management office;⁶²
- (b) An asset management unit or function within an existing law enforcement agency;⁶³
- (c) An agency within Government⁶⁴ or the private sector.⁶⁵

245. All asset management options require start-up resources and annual funding. The start-up capital for an agency may be significant since a pool of money will be required to cover unexpected management costs. It is wrong to assume that the preserved assets, as targets for confiscation, are all self-funding. The asset manager's start-up funding should be recovered using the amounts realized from the liquidation of assets following confiscation. However, some allowance has to be made for the possibility that confiscation may not occur or that confiscated assets may not realize their full potential. In addition, if the manager makes improvements to an asset subject to a preservation order, the direct costs for the improvement should be recoverable against the asset under law should the asset not be confiscated.

B. General management authority

246. The asset management enabling law and the terms and conditions in the preservation order should grant the asset manager the authority to pay costs and expenses incurred in implementing the preservation order. Provisions must also be made stating how the costs are to be met if only non-cash assets are under management. The owner may want to sell a preserved asset, resulting in more liquid assets for a subsequent confiscation hearing. In a fluctuating market it may make better business sense to ask the court to sell more rapidly depreciating and perishable assets to ensure costs can be met. This is an issue for an asset manager to consider and advise the legal practitioner on prior to any court application.

⁶⁰While this is not without risk, it may be necessary, for example, in the case of a house that is preserved while under construction or renovation. Preservation without continuing the construction may amount to no preservation. However, if confiscation is not achieved, the improved asset may be ordered to be returned.

⁶¹*Hughes v. Customs and Excise Commissioners* [2002] 4 ALL ER 633.

⁶²Canada's Seized Property Management Directorate operates under Canada's Seized Property Management Act.

⁶³The United States Marshals Service exercises this responsibility in the United States for federal confiscation cases.

⁶⁴Insolvency and Trustee Service Australia or the Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC) in France.

⁶⁵South Africa and the United Kingdom use private receivers.

C. Managing operating businesses

247. Every preservation order against an operating business must contain terms and conditions reflecting the nature of the business. If the asset-tracing investigation or the pre-application planning does not address this, serious concerns may develop. For example, a thorough analysis of the business structure by the asset manager may establish that the business is not viable. Existing employees or key managers may elect to leave the business, or if their loyalties are to the prior owners, it may be desirable to replace them. The business might not be viable without the inflow of proceeds of crime, in which case it should be shut down. That must be reflected in the preservation order.

248. However, if the business is viable the asset manager's function, relative to the business, should include the authority to terminate employees or hire private sector experts to manage the business. This is a common experience for private sector receivers and it will be an issue in any preservation order against a business. In addition, the terms and conditions should specify that the business operating expenses be recovered from revenue and profits realized frozen pending confiscation applications.

D. Rapidly depreciating and perishable assets

249. The authority to manage and dispose of assets may be complex and a potential point of contention since the assets have not yet been confiscated. Preservation orders should include terms and conditions to deal with this eventuality. This is a fact-sensitive consideration. For example, an operating agricultural asset is analogous to any other operating business, since the crops and livestock will depreciate if not harvested and sold as required. Many cases may also involve depreciating assets such as vehicles or perishable assets such as lottery tickets or foreign currency. Special consideration must be given to the management of a specialized asset such as an aircraft, where international standards on airworthiness require careful control and continual maintenance. The same may apply to boats. The terms and conditions in a preservation order should allow for management through interim sale. In addition, unexpected sales issues will develop. As a result, the manager or owner should have the authority to apply to the court for guidance or instructions as required.

E. The need for caution when assuming management

250. Given that an asset manager is specifically appointed to ensure proper management, it seems superfluous to advise caution. However, a specific need for caution arises in relation to specific cases.

251. When a target is arrested or their assets become subject to a preservation order, the value of the assets cited in a press release may be inaccurate. This may be because the law enforcement investigators have overstated their success in investigating a target's assets, or because the owner may have an unjustified or improper motive for inflating the value of their assets. In either case, adverse public interest will be created when an asset is found to be valueless or worth much less than originally claimed. An asset manager is not a case investigator and cannot be used as a substitute source of funds to preserve items that should not have been placed under management. The manager must provide an impartial evaluation of the value of the assets in order to eliminate any surprise when the asset is ultimately ordered to be confiscated and sold or returned to the lawful owner.

252. Once the asset is turned over to the asset manager, he or she must immediately record its condition and value. Expert appraisals, structural and business evaluations cumulatively protect the asset manager and serve the interest of justice. For example, a seized luxury watch, if counterfeit, although a functioning watch, is worthless. The asset manager should file a report with the court and provide a copy to the owner of the asset. If circumstances change such that the value of the asset as reported in the preliminary documents is modified, this should be reported to the court and the owner.

F. Investigative use of the asset

253. Assets under a preservation order do not belong to the State, law enforcement or the asset manager. Article 7 of the Model Regulations concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses of the Organization of American States contemplates “provisional use” of the asset in limited cases.

254. That is an issue for each jurisdiction to consider in light of potential ethical and other concerns that can develop. An exotic car that has been seized but not yet confiscated may be described as a future investigative tool for enforcement in unrelated investigations. The problem is that confiscation applications take a lot of time and it is unacceptable to delay such an application further while the asset is being used in unrelated investigations. That approach also conflicts with the owner’s interest in a determination on confiscation. It also raises potential cost issues should the asset be ordered to be returned after depreciating as a result of investigative use.

G. Unexpected problems

255. Many preservation orders involving land create unexpected problems. The owner may have been left in possession with an obligation to manage their land. The preservation order in such a case is simply filed with the land registration office advising of an interest and potential confiscation of the land. The owner may not maintain their land properly and may even decide to sabotage the property, since it will be confiscated. The owner may fail to obtain or cancel insurance on the property and may neglect to pay property taxes and mortgages.

256. The neighbours and community may complain about the condition of the property. In a worst-case scenario the property may have been a clandestine drug lab or similar public nuisance. Immediate steps to mitigate dangers associated with the property may be required yet the owner may refuse to act. In such a case, the asset manager must act, either under the authority of the terms in the order or by obtaining additional instructions from the court. In such a scenario, the court order or the legislation furnishing the asset manager’s authority should specify that the costs for such measures are recoverable against the property should it not be confiscated.

257. Seized currency and bank accounts or financial instruments must be effectively managed, for example by including in the order a stipulation that the funds be paid into a specified interest-bearing account. Financial instruments that could become dated or that require redemption should similarly be dealt with by including relevant terms in the preservation order. Funds in bank accounts could be left in the same institution or transferred, subject to the terms and conditions in the preservation order.

258. Status symbols such as vehicles, boats and aeroplanes are targets of interest for law enforcement because they are publicly seen to be instrumentalities or direct or indirect proceeds of crime. All too often, investigators disregard the fact that such equipment may be leased, with “asset envy” being the unstated reason behind the decision to seize it.

259. Whatever the case, such items are expensive to store and maintain. According to good asset management practice, they are ideal candidates for interim sales. In a situation where money must be found to meet a request from the owner for business, living and legal expenses and the asset manager is authorized to dispose of depreciating and perishable assets, such assets should be the first to be sold. If the owner applying for legal expenses objects, the court must resolve the issue.

H. Assets outside the jurisdiction

260. The investigation may have obtained preservation orders for assets held in other countries. The order may simply prohibit an owner in the jurisdiction of the investigation from dealing with or disposing of their foreign assets. The chances of enforcing such an order may be slim in the context of the global economy and communications.

261. It is a better practice for the orders to be sent from the jurisdiction of the investigation to the jurisdiction where the assets are located, requesting that the authorities of the requested jurisdiction enforce the order or obtain a domestic order. Asset management costs would arise, and hopefully, the requested jurisdiction has a dedicated asset management office that can work with the asset management office in the requesting jurisdiction. There may be significant cost implications for this type of enforcement activity, and that must be an issue for consultation between jurisdictions.

262. The fundamental issue to remember is that the domestic law in the jurisdiction where the property is located applies. Equally, the substantive crimes justifying the enforcement activity in the requesting State may have not occurred in the requested State, especially if it is simply responding to preservation orders. As a result, the request may not be a priority for the requested State, which is only assisting. A relevant confiscation order would be issued in the requesting State although it would be enforced in the requested State against the property in that State. Since such confiscations can occur at a date later than that of the preservation order, even years later, ongoing communication between central authorities is essential.⁶⁶

I. Management expenses

263. The asset manager must consider two distinct issues. The first is the manager’s year-to-year operating and capital costs. The second is specific case management costs for a large case and specific aspects related to that case. The expectation should be that the asset manager should plan to recover year-to-year operating costs (such as salaries and overhead) from the liquidation of the confiscated assets. In other words, the ideal scenario is that such costs are funded from all cases.

264. However, where that is not possible, as, for example, when the targeted asset requires significant remedial work before it can be sold or the expected proceeds from the sale are insufficient,

⁶⁶On this issue, consider the experience described in footnote 25.

there will be cases where the asset manager has to spend money that cannot be recovered. In such a case, the State indirectly pays unless such potential losses are budgeted for in its asset management programme.

265. The management approach of the United Kingdom is described in section A above. The cost of the Receiver is paid using the assets under his control, irrespective of whether the defendant is ultimately acquitted. However, as the costs of the receiverships can be high and in some instances disproportionate to the assets under their management, the Court of Appeal in the decision of *Capewell v. HM Customs and Excise Commissioners*⁶⁷ invited the lawyers to the proceedings to prepare a set of guidelines for the appointment of management receivers; the guidelines are set out as an attachment.

J. Costs of challenges

266. Every criminal prosecution proceeds with the assumption that the investigation will succeed and justice be done. In every case where asset tracing has led to the issuance of preservation orders, the goal is that a final confiscation order or a realizable value judgement order will be achieved. Circumstances change for a variety of reasons and the prosecuting authorities might determine that the prosecution should be abandoned. The asset could be confiscated through non-conviction-based confiscation if that remains a viable alternative.

267. However, circumstances can also change in non-conviction-based regimes. If a decision is made to advise the court or file an application to abandon or terminate the preservation orders, it is important that the asset manager be consulted. Any improvements to the property and compensation for the costs of such improvements must be brought to the attention of the court and the owner. In addition, in jurisdictions with undertakings on damages, consultation is essential if the asset manager is the agency responsible for the payment of such damages.

268. This last issue is not an insignificant consideration. Some asset confiscation regimes are set up to become the source of funds to pay damages or compensation when confiscation applications are unsuccessful. Pursuant to the enabling legislation, the asset manager could have maintained a fund to pay out court-awarded damages. Prosecutors and legal practitioners involved in non-conviction-based confiscation applications must appreciate that these types of damages can be a significant drain on the asset manager programme. Consultation is required even if the asset manager has no direct interest in the decision to abandon a confiscation application or a preservation order.

K. Post-confiscation issues

269. An example of a situation where asset management issues continue to arise after a confiscation order is issued is where the preservation order has permitted the owner, other family or tenants to occupy the property. The confiscation application process should include notice of the potential confiscation order to the owner and occupants. If the confiscation is successful, the property's management status may change. The owner should be required to deliver the property with vacant possession. Equally, there will be an obligation to serve notice of confiscation on various parties. There may be security concerns and law enforcement may have to assist the asset manager.

⁶⁷ *Capewell v. Customs and Excise Commissioners: Note* [2005] 1 ALL ER 900.

270. All confiscation regimes include appeal rights. Most include specific provisions protecting innocent third parties. Indeed, the confiscation order might confiscate only an applicant's specific interest in a property. In such a case, the subsequent authority to dispose of that interest may be difficult to exercise. If other interest holders do not wish to buy out the confiscated interest and there is no simple way to sell the State's interest, unexpected and continuing management and expense issues can develop.

271. In the United Kingdom and other jurisdictions using a similar model of value-based confiscation, an order that is made against a defendant specifies a sum of money calculated on the basis of the value of the property obtained as a result of or in connection with the criminal conduct: the benefit. The purpose of the confiscation hearing is to establish whether the convicted person has benefited financially from the offences of which he is convicted or connected offences. If so, the court must assess the amount of the benefit by aggregating the value of the defendant's benefit from criminal conduct, namely the benefit from:

- (a) The offence of which the defendant has been convicted;
- (b) Any other offences of which the defendant has been convicted in the same proceedings;
- (c) Any offences that the defendant agrees to have taken into consideration in the same proceedings.

272. Realizable property is widely defined. It includes any property in which the defendant holds an interest ("interest" includes rights) and any property that has been given by the defendant to another for little or no consideration. The court, in coming to the decision, may take account of any property held by the defendant wherever it is situated. If the court finds that the amount of realizable property held by the defendant is worth less than the amount of the benefit, the court must make a confiscation order against the defendant for the lower amount.

273. Another issue arises when creditors have a security interest against the property and expect payment of their interest from the property. The point to concentrate on is that the creditor's interest must be directly tied to the property or asset, as opposed to a debt owed by the investigative target or owner of the property. If the creditor's interest is directly tied to the asset, it can be sold to pay the debt. Otherwise, the creditor should be advised to look to the target for satisfaction of the debt. This is an issue for the court, either at the time of the issuance of a preservation order or a confiscation order.

274. In value-based confiscation systems, at the confiscation hearing, third party interests in the property are not considered by the court, only those of the defendant. The prosecutor considers any third party claims in respect of the property at the enforcement stage, when the third party will be required to show the extent of their interest. If they are able to satisfy the court as to their interest on the balance of probabilities, only the extent of the defendant's interest in the property will be used to satisfy the confiscation order.

275. In any proceeding for relief from either the preservation or confiscation order, the court should be sensitive to the issue of a criminal target attempting to launder his or her debts through property targeted for confiscation. Local bankruptcy and insolvency laws may apply, and the asset manager must be familiar with the relevant priorities created by those laws.

276. This last issue may not be as important in a value-based confiscation regime. It can, however, apply to the issue of the realization of a value judgement from an impecunious individual. The issue becomes a concern over priorities between competing creditors.

L. Final sale

277. There are distinct differences in every consideration of the sale of assets. In some cases, there is a need for the interim sale of assets subject to a preservation order to meet expenses ordered by the court or because the asset is perishable or depreciating. In many cases, the asset manager can work with the owner to maximize the sale of such property. In other cases, the owner may not be available or may object to the process. In either case, the court must be involved to resolve conflicting interests.

278. All confiscations of assets resulting in a sale, together with any confiscated cash or money on deposit, could be accumulated and available to cover asset management costs or any other obligations established in domestic law. This topic creates endless debates. Law enforcement frequently looks to these funds as a pool of available cash for sharing between enforcement agencies. Otherwise, the treasury may consider such funds as public money for redistribution through budget processes. This is a matter for each State to determine.

M. Use of confiscated property

279. There may be a need for public policy debates on the issue of the public use of confiscated property. The confiscation of an exotic car is different from a car being preserved for later confiscation proceedings. The same applies to residences and other assets that have been confiscated. This issue is partially covered by a framework decision in the Council of the European Union framework decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Pursuant to article 16, where money has been obtained through the execution of a confiscation order, if the amount is 10,000 euros or less, it remains with the executing State. Otherwise, 50 per cent of the amount obtained is transferred to the issuing State. The article does not cover the situation where more than two States are involved, but some compromise could be found to address this. Article 16, paragraph 2, covers property other than money. It appears that the law of the executing State holding the confiscated property applies, with the result that interesting discussions on the possibility of conversion to public use may develop.

280. However any debate on the use of confiscated property unfolds, the need to cover the asset management agencies' year-to-year operating expenses and losses must be considered. In addition, article 14, paragraph 3, of the Organized Crime Convention should be considered as the issue is evaluated by States. In other words, perhaps a portion of any confiscation realized through sale could be shared with an international organization or between the parties.

281. Property-based confiscation gives the State the property with all rights, privileges and obligations. The issue of what should be done with such confiscated property may become subject to considerable debate, especially if victims of the organized crime group look to the State for restitution or compensation.

282. If the property confiscated is cash, the State must determine how it allocates this. In theory, it could decide to recognize the work of law enforcement and augment the budgets of enforcement agencies. However, that approach may leave the victims of the crimes without recourse in a case where the criminal offenders are potentially violent or incarcerated. The criminal justice system may provide an effective process to obtain restitution orders to compensate victims of crime. Some jurisdictions give priority to the satisfaction of a restitution order from confiscated property. As a result, cash confiscations provide an immediate source of funds to distribute through restitution.

283. The issue becomes more complex if the property is land or valuable assets. An asset such as an exotic car or other conveniences may be desired by law enforcement agencies for investigative use. There is a risk that the diversion of confiscated assets to investigative use could be said to be the justification for the confiscation proceeding or the asset-tracing investigation, whereas the true justification should be to ensure that crime does not pay. Confiscating such assets would prevent them from being diverted, but the need to compensate victims and respond to other priorities cannot be ignored.

284. Competing interest in property obtained from confiscation has resulted in laws that require confiscated assets to be liquidated and the proceeds paid into a consolidated Government account or general treasury. A number of jurisdictions have established asset confiscation funds into which realized assets must be paid. There is no perfect solution to this issue but the equities involved in treating victims fairly and responding to all priorities of the State suggest that liquidation is preferable. Proceeds can then be placed in a fund or Government programmes. Any disputes can be resolved through the budget processes.

285. If a fund is set up, it can be used for restitution to victims. In addition, the work of investigative agencies could be recognized through the fund. That could include recognition of assistance by foreign investigative agencies and Governments. After such payments, the fund could turn over its yearly diminished balance (diminished through payment of expenses or sharing to a consolidated Government account or the general treasury).

VIII. The confiscation application

Article 12. (Confiscation and seizure) of the Organized Crime Convention

Article 12. Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

286. The Organized Crime Convention explicitly obliges States parties to adopt measures to enable confiscation of the proceeds of crime.⁶⁸ Confiscation⁶⁹ entails the permanent deprivation of either proceeds of crime or instrumentalities. However, as discussed above, these provisions should be implemented within domestic law to the greatest extent possible.

287. The approaches to achieving confiscation vary widely from State to State. On 19 February 2010, the Financial Action Task Force issued a guidance document entitled “Best practices: confiscation (recommendations 3 and 38)”.⁷⁰ Paragraph 14 of that document strongly endorses the emerging trend of the use of non-conviction-based confiscation. While the Financial Action Task Force is not an organization with authority to impose standards or best practices, it does have significant influence. As a result, there is significant pressure to provide for the alternative of non-conviction-based confiscation. That may impact on the mutual assistance obligations in the Organized Crime Convention. The Convention contemplates local domestic variations in confiscation approaches. As a result, some countries may be able to cooperate with non-conviction-based confiscation regimes (described below) or be restricted to cooperating only with the more traditional confiscation regimes.

⁶⁸The Organized Crime Convention defines “proceeds of crime”, including the related definition of “property” in article 2, subparagraphs (d) and (e), as follows:

“(d) ‘Property’ shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

“(e) ‘Proceeds of crime’ shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence.”

⁶⁹The Organized Crime Convention defines “confiscation” in article 2, subparagraph (g), as follows: “‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority”.

⁷⁰Recommendations 3 and 38 provide, as essential elements, that there should be measures in place to identify, trace and evaluate property that is subject to confiscation (recommendation 3), while recommendation 38 requires that there be authority to take expeditious action in response to requests by foreign countries to identify property that may be subject to confiscation.

288. Reluctance to accept a non-conviction-based approach may be attributed to a legal philosophy and traditional criminal law expectations surrounding guilt or innocence, constitutional considerations or the standard of proof, which varies from one jurisdiction to another. Essentially, if non-conviction-based confiscation cannot be accommodated, the solution is for jurisdictions to apply existing domestic law generously to deal with organized criminals' movements of assets through their territories.

A. Confiscation systems

289. In chapter III, three confiscation systems were described. Two are closely tied to the criminal justice system. If non-conviction-based confiscation, with its reduced standard of proof and ability to respond without any criminal proceedings or in the face of a criminal acquittal independent of any criminal proceedings, is acceptable as for the purposes of mutual legal assistance, the goal of the Organized Crime Convention is met.

290. Criminal confiscation within the criminal justice system almost always requires a criminal conviction, following which the court may be or is obliged to make a final order of confiscation. There are some jurisdictions that provide for criminal confiscation proceedings in cases where the offender has died or absconded after charges were instituted.⁷¹ Recourse to confiscation may be limited due to the fact that charges have to have been instituted while the individual was alive. In such cases, the onus to establish the link between targeted assets and crimes is the same as the onus to prove criminal guilt for the crimes.

291. One issue in criminal confiscation is the standard of proof needed for the confiscation portion of the criminal proceedings. The standard for the onus of proof to establish a conviction in the criminal justice system is rigorous. This onus is generally described as proof "beyond a reasonable doubt" or "intimate conviction". If the same standard is required to establish, for confiscation purposes, that targeted assets are tainted, the onus on investigators and prosecutors is significant.

292. Many jurisdictions have either reduced that onus to a lower standard since guilt is not the issue, or they have established rebuttable assumptions, which assist in achieving confiscations since the offender must respond to the assumptions. The specific onus of proof required to justify confiscation is a significant issue whenever the convicted offender or the property owner challenges the confiscation.

293. The evidence that asset-tracing investigators have accumulated and seek to present can be complex and difficult to understand. It may involve years of interrelated transactions, surveillance and testimony or supporting reports, all containing complex analysis. Frequently expert witnesses, such as forensic accountants, will be called to establish the confiscation case. In the same confiscation hearing, the offender or the owners of targeted property can challenge everything and present additional facts or arguments to counter the allegation of tainted property.

294. The court convicting the offender or offenders could be facing additional responsibility to consider further evidence on the confiscation application, leading to a significant drain on court resources. In addition, the court may not have the same interest in confiscation proceedings as it has in the determination of guilt or innocence. Finally, depending upon the confiscation law in the jurisdiction, it may be the court's discretion not to confiscate.

295. The alternative value-based confiscation regimes require the determination of a value obtained from the commission of the crimes. This application, which is succinctly described above, occurs

⁷¹This is possible in Canada.

in another court that is not saddled with lengthy criminal trials. This approach may limit confiscation to only value realized from the specific convictions against the offender, but it may be more than sufficient for the purposes of the Organized Crime Convention. Under such an approach, the same type of evidence as described above would be necessary. A value-based confiscation regime will often feature assumptions to assist the court in its determination of the value realized from the crimes. The principal distinguishing feature of this approach is that the court issues value judgements that can be realized against any assets of the offender, wherever those are located.

B. Property confiscation

296. Property confiscation can occur through both criminal confiscation, as described above, and non-conviction-based confiscation. This total confiscation is in accordance with article 12 of the United Nations Convention against Transnational Organized Crime since article 2, subparagraph (e), defines the “proceeds of crime” as property derived directly or indirectly from the commission of an offence. Some jurisdictions establish criminal confiscation yet limit the authority to confiscate to the offence for which the offender was convicted. Other jurisdictions take a broader approach permitting confiscation relevant to the convicted offences as well as confiscation of any other proceeds of crime that can be tied to a serious crime or predicate offence beyond a reasonable doubt. In France, article 131-21 of the Criminal Code provides for the possibility of an even broader class of general assets. In addition, France is about to introduce the possibility of imposing an alternative fine or value judgement in lieu of confiscation where the property cannot be located or seized.

297. These approaches allow the confiscation application to use all asset-tracing evidence to support a broad confiscation of all tainted property. Whatever the scope of the confiscation law, the obligation is to confiscate assets derived directly or indirectly from crime. This distinction in the Organized Crime Convention and domestic law is important. “Direct proceeds of crime” would be the benefit realized specifically from the commission of the fraud, drug trafficking or related criminal activity by the organized crime group. “Indirect proceeds of crime” could also take the form of specific benefits (such as free tickets or a union vote) but are obtained only through a crime that provided the opportunity to obtain the benefit. An example would be a house that was purchased using money directly derived from the commission of the offence in addition to the increase in the value of the property subsequent to its acquisition.

298. The distinction between direct and indirect proceeds of crime becomes complex as a result of money-laundering or intermingling. It could be argued that the mere fact of intermingling amounts to money-laundering activity since bona fide assets are used to conceal illicit assets. Also, in a case where a criminal purchases a lottery ticket with money derived from crime and wins the grand prize, it could be hard to determine whether the grand prize should be classified as indirect proceeds of crime.

299. The confiscation law in a given jurisdiction may provide that the court can divide parts of an asset given that intermingling mixes tainted with untainted assets. That is not an inherently incorrect approach. In a case where tainted funds have been invested in a business but the business partner’s contribution is clearly untainted, it might be unfair to confiscate the entire business on the basis of a theory with respect to intermingled assets.

300. The problem in this area is that bad facts make bad justice. This issue requires the confiscation investigator to analyse the facts in business and partnership relationships to address the argument that the “untainted” assets should not be confiscated. A court will consider that issue once

raised by innocent third parties. Alternatively, the law in a given jurisdiction may have determined that confiscation against intermingled assets must include all of the assets. If that is the case, the issue is not as important.

301. Article 12, paragraph 1 (*b*), of the Organized Crime Convention requires States to confiscate property, equipment or other instrumentalities used in or destined for use in the commission of the offences covered by the Convention. It could be argued that intermingled property may be an instrumentality used in the offence of money-laundering.

302. Finally, the obligation of the court to order confiscation as a result of the evidence will depend upon the confiscation provisions in law. If the court is satisfied that the facts have been proven to the relevant standard of proof, it must then decide to confiscate. The confiscation law may be discretionary in some jurisdictions and mandatory in others. There may be variations, especially if the application applies to property tainted by other criminal conduct that was not prosecuted.

303. This may be an important consideration if the offences occurred in another country. Dual criminality may be a precondition for a successful application for confiscation.⁷² If domestic proceedings are required rather than the enforcement of a foreign confiscation order, the evidence required and the standard of proof can be onerous. If the confiscation authority includes discretion not to confiscate, the issue is more complex.

304. The common feature in both types of cases is that an asset-tracing investigation must establish that the targeted property is tainted. The evidence supporting an argument that the property is proceeds of crime or an instrumentality varies, but it can be established.

C. The use of assumptions in confiscation

305. Applications for confiscation, depending upon the offence charged, are often assisted by assumptions. The court determining the justification for a confiscation under either a property-based or value-based regime could confiscate in light of such assumptions.

306. Such assumptions are applied in the context of the value-based approach taken in the United Kingdom, which reflects that of similar jurisdictions. It is described in detail in box 11 below.

Box 11. Use of assumptions in confiscation orders in the United Kingdom

When a court in the United Kingdom is determining the defendant's benefit for the purposes of making a confiscation order, it must decide whether the defendant has benefited from either particular criminal conduct or general criminal conduct, which is sometimes also referred to as an extended benefit. The court's decision will be based on the offence for which the defendant has been convicted. For example, in the case of a conviction of a single count indictment of theft, the benefit is that from the specific criminal conduct and is equal to the monetary value of the stolen item.

⁷²Article 6 of the Council of the European Union framework decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders lists a wide range of offences for which a confiscation order shall be executed without verification of double criminality. Article 13, paragraph 7, of the Organized Crime Convention allows for the refusal of mutual legal assistance for offences that are not covered by the Convention.

However, where the defendant is convicted of offences such as drug trafficking, money-laundering, terrorism and arms trafficking, to name but a few, these are referred to as general criminal conduct, or “criminal lifestyle offences”, and the court must use the following four assumptions to determine the benefit. The assumptions in these cases are mandatory, and the court can displace them only if they are shown to be incorrect or there would be a serious risk of injustice if the assumption were made.

The four assumptions are as follows:

1. That any property transferred to the defendant at any time after the relevant date was obtained by him: (a) as a result of his general criminal conduct; and (b) at the earliest time he appears to have held it;
2. That any property held by the defendant at any time after the date of conviction was obtained by him: (a) as a result of his general criminal conduct; and (b) at the earliest time he appears to have held it;
3. That any expenditure incurred by the defendant at any time after the relevant date was met from property obtained by him as a result of his general criminal conduct;
4. For the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, that he obtained it free of any other interest.

The relevant date is the first day in a period of six years ending with:

(a) The date that proceedings for the offences concerned were started against the defendant; or

(b) If there are two or more offences and proceedings, which were started on different dates, the earliest of those days would be the relevant day.

307. One frequent assumption, found in the enabling legislation or judicial precedent, is a rebuttal inference drawn from the facts. The practitioner undertaking the confiscation application first establishes a specific or defined set of facts, which are drawn from the asset-tracing investigation or the trial evidence supporting a finding of guilt. In a value-based confiscation regime or non-conviction-based confiscation application, different provisions could require the presentation of facts to support an assumption because the criminal proceedings are conducted by another court or there may have been no prosecution or an acquittal. Alternatively, the law can mandate consideration of assumptions, such as a lifestyle assumption, as discussed above. The use of assumptions in specific delineated circumstances transfers the evidential burden to the other party, who must contest the assumption by providing alternative facts to rebut or challenge it.

308. A rebuttable assumption of fact, since the question of guilt or innocence in a confiscation application does not exist, is reasonable. Such assumptions in confiscations involving organized crime could include a variety of issues, such as:

- (a) Possession, which holds that assets found in the possession of a person at the time of the offence, or closely connected with the offence, may be deemed to be either proceeds

of the crime or instrumentalities of crime. If the definition of possession is sufficiently broad, it could include joint possession with another person so long as there is a sufficient degree of control over the asset. In an offence involving an organization, the scope of the definition of possession could also specify that possession by one party might be possession by all parties;

- (b) The association of the interconnected parties in a criminal group may be useful, justifying an assumption that assets controlled by one or more associates are deemed to benefit or be available for use by other participants in the organization for the purpose of confiscation application;
- (c) Lifestyle assumptions, such as those described above, regarding the transfer of assets or the nature of the group's criminal activities, are especially valuable in the organized crime context. Such an assumption applies to assets acquired before or after a criminal offence has been committed, since the assets could be deemed to be proceeds of crime unless the other party can establish that they were legitimately acquired;
- (d) Voidable transfers of assets provisions, while not a classic assumption, allow the practitioner seeking confiscation to apply to the court to void a transfer of property unless the transfer was for a valuable consideration to a person acting in good faith. The provision could be tied to transfers occurring within a specified time encompassing the offences. The party receiving the property would be obliged to satisfy the court that they obtained the property at a fair market value.

D. Extended confiscation

309. There are a variety of approaches to address cases where the targeted assets cannot be found or have been dissipated. Dissipation could include scenarios where the property had been the subject of a preservation order but was sold to satisfy orders to pay business, living and legal expenses. Some jurisdictions have established a substitute asset provision allowing the court to confiscate an asset of equivalent value to the dissipated property. Alternatively, the court might be able to impose a fine or monetary penalty, within the criminal confiscation proceeding, with mandatory time in default for failing to pay the monetary order. In that case, it is important to provide for a method to compel payment from the offender's other assets before the imposition of a period of incarceration. Otherwise, the offender could deliberately neglect to pay the monetary penalty, preferring to accept an additional period of incarceration.

310. The option of enforcing a criminal monetary penalty by treating it as a judgement of the court may be attractive. The State can then determine if the offender has property within the jurisdiction to satisfy the monetary penalty. That property could be sold through normal judgement collection proceedings. If the offender has property outside the jurisdiction and mutual assistance by bilateral agreements provides for a method to enforce a criminal fine, those could be used.

311. There is no need for a monetary penalty option in value-based confiscation regimes since the judgement in such a regime achieves the same result as a criminal monetary penalty. However, any monetary penalty option in a property-based confiscation regime could address the problem created by transferred assets where the transfer cannot be voided or dissipation of assets has occurred. Another approach, perhaps more draconian, is a confiscation regime providing for automatic confiscation without the need for a property-based confiscation application. Such an approach applies

as part of the criminal justice system following a conviction. The party affected by such a confiscation order would be obliged to apply to the court for relief from confiscation.

E. Protecting third parties

312. Article 12, paragraph 8, of the Organized Crime Convention specifically provides for the need to protect bona fide third parties. In the case of automatic confiscation, innocent third parties would have to use this type of post-confiscation relief process to protect their interests in the confiscated assets. Under other property-based confiscation approaches, third parties are usually entitled to notice of the confiscation application and the opportunity to protect their rights in the property during the confiscation proceedings.

313. The asset-tracing investigation should provide some indication of the existence of such third parties. For example, the property may be encumbered with mortgages or liens of one type or another, or the registration system may reveal a third party interest in the targeted property. A notice may also have to be published in local newspapers or the official gazette.

314. Notice to third parties could instruct such parties to attend the criminal confiscation application proceedings so that they can present their evidence against the confiscation of their interest in the property. The court could then confiscate the offender's interest, leaving the third parties untouched. Alternatively, if the court considers and rejects a third party claim against confiscation, a record of such a decision should be maintained, especially if the third party subsequently tries to advance the same claim in another State responding to a request to enforce a foreign confiscation order.

315. That process might increase the complexity of the confiscation proceedings, but it provides an early opportunity to determine the validity of the party's interest in the property. It could result in the immediate dismissal of claims by others who have an interest against the offender as opposed to the offender's specific property targeted for confiscation. Alternatively, third party relief could be a post-confiscation proceeding, or relief could have been achieved earlier in the case where a third party successfully challenged a preservation order against property that impacted upon their rights.

316. Third parties, whenever they raise their interest in targeted property, must establish that the legal interest in the property was acquired prior to the commission of the offence or with no knowledge at the time they obtained their interest of the fact that the property was acquired from the commission of an offence. One of the problems created by the court relieving confiscation of property to protect innocent third parties can occur where the State, when it obtains the confiscation of the offender's interest, inadvertently becomes a partner in indivisible property with the third party.

317. The inadvertent joint ownership of confiscated property may be an unacceptable outcome in a property-based confiscation regime. One way to resolve this is to provide that such property must be disposed of at a fair market value with the third party receiving their interest from the proceeds of the sale. Alternatively, in a case where the third party desires to retain the property, they would buy out the State interest at a fair market value.

318. The issue of third parties is of less concern under a value-based confiscation regime, since it adopts a judgement approach. That may change as the question of enforcement of any judgement is considered. In such cases, the customary law surrounding judgement enforcement will apply.

F. A value approach

319. Confiscation of the proceeds derived from a criminal act or from organized crime involves an application to the court to determine the benefit derived from the conduct in order to establish a monetary penalty equivalent to the benefit.⁷³ The individual's benefit could be directly tied to the conduct or it could accumulate and reflect a growing value (an indirect benefit). The court, once it determines the benefit, imposes liability against the individual by means of a judgement, which is enforced as a fine that is realizable against any asset of the individual.

320. On paper this sounds straightforward; in practice it leads to questions as to how the final judgement or fine is recovered. In any case, in determining the value of the benefit, there is no specific need to establish a taint against property. Rather, confiscation involves a forensic assessment of the benefit obtained from the offences committed by an offender and their "realizable assets"—the means at their disposal to pay the order.

321. A value-based approach can allow or require the court to make lifestyle assumptions. If a defendant has been deemed to have a criminal lifestyle the court is required to make four assumptions in relation to their property and expenditure. These are detailed in box 11 above.

322. These assumptions are set out in the law and assist the court to determine the value of the benefit derived from the criminal conduct of the offender.

323. One issue in such applications is that the underlying offence or offences may not be established. In addition, the value judgement is realized against the individual's assets yet such an individual may hide or shelter their assets, frustrating recovery. Another issue is how the court assesses the benefits, which may not be only financial. If assumptions, such as the lifestyle assumptions described above, are used, it is easier to determine the benefit.

324. There may be other unexpected restrictions in some value-based confiscation regimes. For example, if confiscation is restricted to the offences for which a conviction was obtained, the defendant may argue that broader criminal activity, with which he may not have been charged, may not be considered in evaluating the total value of the benefit from criminal activity. Another potential concern is if the method used to determine value only applies to the net benefit as opposed to the gross benefit, as the costs of undertaking the criminal conduct may be deducted.

325. In the context of offences by criminal organizations the issue of joint and several liability becomes pertinent. If the value judgement calculation allows for a similar judgement against each set of offences, the full benefit is assessed against each. In other words, the value judgement may be compounded.⁷⁴

⁷³The terminology is not accurate. This was addressed in the United Kingdom in *R. v. May* [2008] UKHL 28 as follows at paragraph 9:

"Although 'confiscation' is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the State. Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained. 'Confiscation' is, as Lord Hobhouse of Woodborough observed in *In re Norris* ... a misnomer."

⁷⁴This was approved in the United Kingdom: see *R. v. May*.

G. Foreign confiscation

326. The asset-tracing investigation will often result in mutual legal assistance requests to foreign jurisdictions. The Organized Crime Convention and the work of a number of international agencies, including the Financial Action Task Force, have established recognition of the need for cooperation on confiscation enforcement. Courts should confiscate assets, rather than using a fine in lieu alternative, if they are satisfied that a foreign jurisdiction will give effect to their confiscation order.

327. In other words, the domestic confiscation order can be enforced in the foreign jurisdiction. That is an excellent option since it brings the court's attention to a reciprocal expectation whenever targeted property is located within its jurisdiction. Since the globalized economy facilitates the activities of transnational organized crime, similarly global means must be used to combat such crime. States using mutual legal assistance for confiscation in foreign jurisdictions in tandem with domestic confiscation proceedings are simply recognizing this reality.

328. As a result, the tools and analysis found in the *Manual on Mutual Legal Assistance and Extradition* accompanying the present Manual are available to assist in drafting an order to achieve confiscation. Finally, even if the requested State confiscates and retains the confiscated assets, the investigative goal of taking assets away from organized crime, ensuring that there has been no profit from the crime, is achieved.

H. Disposal costs

329. Whichever approach is adopted with respect to confiscated property, there will be many cases where the property must be sold. The issue is immediately raised in every case where the State becomes an inadvertent joint owner of property with an innocent party. The confiscation orders could require sale for the purposes of satisfying the third party interest. The existence of an independent asset manager can allow the State to immediately respond to this type of scenario.

330. The asset manager would have the authority to dispose of confiscated property, in the same manner that they may have disposed of rapidly depreciating or perishable property earlier in the case. They could use public auctions or other procedures allowed in their enabling law to achieve disposal at the best possible value. In many cases the property, now owned by the State exclusively or with third party interests, has to be improved to prepare it for sale. The asset manager should have the authority to use funds to ameliorate, rehabilitate or improve the property for the purposes of sale. In such a case, the costs would be deducted from the proceeds of sale, leaving the remainder to first satisfy third party interests and subsequently to be paid into a fund or the general Treasury.

331. The same issue arises in the case of value-based confiscation, under which an attempt is made to recover assets based on any judgement issued by the court. Private sector receivers or experts could be retained to do this work. Alternatively, a dedicated asset recovery group could be responsible. In either case, the cost of asset recovery should be deducted from the money realized. The remainder could then be credited to a fund or to the general Treasury.

Annex I. Considerations for preservation or seizure of assets: a checklist

1. Preservation or confiscation proceedings should be instituted only for assets whose value exceeds a specified minimum net equity level, that is, the value of an asset after liens against it are deducted. Minimum net equity levels should be specified for different categories of assets, as detailed below:

- (a) Residential property and vacant land. In this case, the minimum net equity can be either a specified amount or a percentage of the appraised value, whichever is greater;
- (b) Vehicles. The value of multiple vehicles seized simultaneously may be aggregated for purposes of meeting the minimum net equity;
- (c) Cash;
- (d) Aircraft. Note: Failure to obtain the logbooks for the aircraft will reduce its value significantly;
- (e) Vessels;
- (f) All other personal property.

2. When residential and commercial real property and businesses are targeted for asset forfeiture, if the financial analysis indicates that the aggregate of all liens (including judgement liens), mortgages, and management and disposal costs approaches or exceeds the anticipated proceeds from the sale of the property, either (a) the seizure should not go ahead; or (b) the potential financial loss should be acknowledged and the circumstances that warrant the seizure and institution of the forfeiture action documented.

3. The proposed asset manager should always be consulted before seizure, if possible, and as a precondition for applying for a freezing order if management of the targeted assets is possible or required.

4. Owing to the complexities of seizing an operating business and the potential for substantial losses from such a seizure, greater internal planning is always required.

5. If a net equity analysis indicates that the property targeted for forfeiture has marginal or negative anticipated net sale proceeds, a plan should be established to protect innocent lien holders and to dispose of the property in a manner that will minimize potential loss.

6. In any business-freezing scenario, a concise description of the obligations of the proposed manager's or receiver should be included, consistent with the guidelines set out in annex IV, for submission to the court with the freezing application.

7. A trustee, receiver, manager or property monitor, depending on the property requirements, should be appointed only when absolutely necessary, when all other alternatives have been

considered and rejected, and if there is clearly sufficient net equity in the asset to cover the total estimated cost of the trustee or property monitor and staff.

8. Real property that is contaminated or potentially contaminated with hazardous substances may be subject to freezing or a subsequent confiscation application only upon determination that such action is fiscally sound or necessary to advance an enforcement purpose, exercising discretion as applicable in the jurisdiction in question. The pre-freezing or confiscation planning, discussed above, must include objective consideration of the disposal alternatives that may be available after confiscation, and the impact of any clean-up costs.

9. All currency seized that is subject to subsequent confiscation applications must be preserved in a secure manner in a public account under the control or approval of the court.

10. All conveyances, including aircraft or vessels, must be secured and preserved for any subsequent confiscation application without being diverted to any investigative use, except for any necessary forensic testing. If a jurisdiction's law permits pre-confiscation diversion in exceptional cases, court approval and controls must allow for such diversion.

11. Every seizure or freezing application involving rapidly depreciating or perishable assets must include court sanction provisions designed to specifically deal with the management issues relevant to such property.

12. Pre-confiscation disposal of frozen assets may occur only upon application to the court, with notice to the owner or person in possession at the time of the issuance of a freezing or seizure order.

Annex II. A model for a net worth calculation

Calculating net worth and available income

1. The formula for calculating net worth is:

$$\text{Net worth} = \text{analysed assets} - \text{liabilities}$$

Note: The historical cost of assets should always be used, not the market value.

2. Net worth increases over a fixed period (normally one year) represent income. Investigators should do the following to calculate this income:

- (a) Determine the subject's net worth on December 31 in two or more successive years;
- (b) Attempt to document at least three or more years;
- (c) Develop a "starting point" from which all net worth increases grow.

3. Expenditures (payments not used to buy assets or reduce liabilities) indicate the presence of additional income in a given period of time. Expenditures include the following:

- (a) Expenditures on food;
- (b) Clothing;
- (c) Rent;
- (d) Interest on mortgages (but not the principal);
- (e) Utilities;
- (f) Vacations;
- (g) Payments on credit cards.

4. The following formula is used to calculate all available income:

$$\text{Increase in net worth} + \text{expenditures} = \text{available income}$$

5. Legitimate sources of income must be deducted from all available income in order to establish income from unknown (or illegal) sources. Legitimate sources of income are:

- (a) Legitimate employment;
- (b) Inheritance;
- (c) Gifts;
- (d) Gambling winnings;
- (e) Proven cash hoards.

6. The formula for calculating income from unknown or illegal sources is therefore:
- $$\text{All available income} - \text{proven legitimate sources of income} = \text{income from unknown (or illegal) sources}$$
7. Investigators should consider and prepare to challenge explanations provided by the subject, such as that they have accumulated cash. The following should be considered:
- (a) Record of cash on hand at time of arrest or seizure;
 - (b) All leads to cash on hand (such as cash hoarded in a shoe box or mattress or buried in a backyard);
 - (c) Bill serial numbers, which should be compared with records of State funds expended in undercover operations or thefts (if maintained);
 - (d) Evidence of gifts;
 - (e) Inheritances;
 - (f) Insurance proceeds;
 - (g) Gambling winnings;
 - (h) Cash held for others;
 - (i) Cash held by others for the target;
 - (j) Evidence of a need to borrow substantial funds;
 - (k) Financial statements obtained that show cash receipts paid to target;
 - (l) Statements to business associates or third parties;
 - (m) Initial admissions to law enforcement officers or others.

Proof requirements

8. Investigators must prove the following:
- (a) Net worth with evidence of ownership of assets and liabilities for a given set of dates, as well as evidence of expenditures between the dates;
 - (b) Beneficial ownership of assets held by others. Investigators must obtain answers to the following questions, asking for statements, under oath if possible, from third parties, and have them reveal any family or investment relationship with the investigative target:
 - (i) Who provided the funds to buy the asset, or pay off the loan?
 - (ii) Who uses the asset and what is their relationship to the subject?
 - (iii) In whose name is the asset titled?
 - (c) Expenditures made for defendant by others. Investigators should obtain answers to the following questions:
 - (i) Who made the payment?
 - (ii) Who benefited from the payment?

Annex III. Sample freezing order

Disobedience to this order is a contempt of court which if you are an individual is punishable by imprisonment or if you are a body corporate is punishable by sequestration of your assets and by imprisonment of any individual responsible

IN THE CROWN COURT SITTING AT *[specify]*

Before His/Her Honour Judge sitting in private

No.

Dated

IN THE MATTER OF *[Name of person subject to the order]*

(Defendant)

AND

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

RESTRAINT ORDER PROHIBITING DISPOSAL OF ASSETS

TO: (1) *[Name]* (the Defendant)

PENAL NOTICE

If you, the Defendant, disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

Any other person who knows of this order and does anything which helps or permits the Defendant to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

IMPORTANT: NOTICE TO THE DEFENDANT

This order prohibits you the Defendant, from dealing with your assets.

The order is subject to the exceptions contained in the order. You should read it all carefully.

You are advised to consult a solicitor as soon as possible. Under paragraph 2 of schedule 2 of the Access to Justice Act 1999, as amended by paragraph 36 of schedule 11 of Proceeds of Crime Act 2002, you may be entitled to Community Legal Service Funding in respect of this Order. Your solicitor will be able to provide you with the appropriate forms. You should contact the Head Office of the Legal Services Commission (LSC), 4 Abbey Orchard Street, London SW1P 2BS, who will be able to advise you as to any public funding available. In relation to LSC funding (formerly Legal Aid), general enquiries may be directed to the LSC telephone helpline: 0800 085 6643.

If you are a defendant in criminal proceedings to which this Order is ancillary and you have the benefit of a Representation Order then your solicitor may be able to give you advice and assistance within the scope of that Representation Order.

You have a right to ask this court to vary or discharge this order, see paragraph [*Insert No.*] below. If you wish to do this, you must serve the application and the witness statement in support of the application on the Revenue and Customs Prosecutions Office and the Defendant at least two clear working days before the date fixed by the Crown Court for the hearing of the application.

There is an interpretation section at page [*Insert No.*] of this order.

THE ORDER

1. This is a Restraint Order made against [*Name*] (“the Defendant”) on [*date*] by His/Her Honour Judge on the application of the Revenue and Customs Prosecutions Office (“the Prosecutor”). The Judge read the witness statements listed in Schedule A and accepted the undertakings set out in Schedule B at the end of this order.

2. This order was made without notice to the Defendant. The Defendant has a right to apply to the court to vary or discharge the order—see paragraph [*Number*] below.

DISPOSAL OF OR DEALING WITH ASSETS

3. The Defendant must not:

- (1) Remove from England and Wales any of his assets which are in England and Wales; or
- (2) In any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales.

4. Paragraph 3 applies to all the Defendant’s assets whether or not the assets are described in this order or are transferred to the Defendant after the order is made, are in his own name and whether they are solely or jointly owned. For the purpose of this order the Defendant’s assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

5. (1) This prohibition includes the following assets in particular:

- (a) The property known as [*insert*], Title Number [*insert*] and registered in the name of [*Name*] or the net sale money after payment of any mortgages if it has been sold;

- (b) The property known as 69, [xxx], London, E[xxx], Title number EGL[xxx] and registered in the name of [name] or the net sale money after payment of any mortgages if it has been sold;
 - (c) The property known as Flat 16, [xxx] Avenue, London, [xxx], Title number EGL[xxx] and registered in the name of [name] or the net sale money after payment of any mortgages if it has been sold;
 - (d) The property known as Flat [xxx] Road, London, E[xx xxx], Title number EGL[xxx] and registered in the name of [name] or the net sale money after payment of any mortgages if it has been sold;
 - (e) Any money in the account numbered [xxx], Sort Code [x-x-x] at [insert] Bank [Address of bank] held in the name of [name]
- (2) If the total unencumbered value of the Defendant's assets in England and Wales does not exceed £[Amount].

[Optional—Rental income]

[Insert appropriate paragraph number, since these are optional powers] Any rent received by the Defendant in respect of the properties set out in paragraphs [...] above shall be dealt with in the following manner:

- (a) The tenant shall pay rent to the Defendant in the form of a cheque, standing order or other interbank transfer;
- (b) The Defendant shall pay the cheque or other payment into bank account number [insert details of account number, bank and branch address] in the name of [insert account holder's name(s)] ("the account");
- (c) The sums received shall be used by the Defendant each and every month to pay mortgage installments upon the properties set out in paragraphs [... to ...] in such amounts as the mortgagees shall require; and
- (d) Any surplus held in the account or accounts shall be held restrained in the account subject to this order.

[Insert appropriate paragraph number, since these are optional powers] The Defendant shall keep records of rent received and sums paid to the mortgagees, such records to include:

- (a) The name and address of the tenant from whom each sum is received and the date of receipt;
- (b) The amount paid to the mortgagee and the date of the payment;
- (c) Bank statements of the account or accounts into which rents are received and from which mortgage installments are made.

AND the Defendant shall supply to the Prosecutor each and every calendar month within 14 days after the end of the month a copy of the said records relating to that month.]

PROVISION OF INFORMATION

8. The Defendant must serve a witness statement certified by a statement of truth on the Prosecutor within 14 days after this order has been served on him setting out all his assets and all assets under his control whether in or outside England and Wales and whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The witness statement must include:

- (i) The name and address of all persons including financial institutions holding any such assets;
 - (ii) If the Defendant alleges that any third party or financial institution holds an interest in any such asset then he must identify the nature and extent of that interest, and the name and address of the person who is alleged to hold it;
 - (iii) Details of the Defendant's current salary or other form of income, identifying the amounts paid, by whom they are paid and the account or accounts into which such sums are paid;
 - (iv) The names and numbers of all accounts held by or under the control of the Defendant, together with the name and address of the place where the account is held and the sums in the account;
 - (v) Details (including addresses) of any real property in which the Defendant has any interest, including an interest in any of the net sale money if the property were to be sold. These details must include details of any mortgage or charge on the property;
 - (vi) Details of all National Savings Certificates, unit trusts, shares or debentures in any company or corporation, wherever incorporated in the world, owned or controlled by the Defendant or in which he has an interest;
 - (vii) Details of all trusts of which the Defendant is a beneficiary, including the name and address of every trustee;
 - (viii) Particulars of any income or debt due to the Defendant including the name and address of the debtor;
 - (ix) Details of all assets over £1,000 in value received by the Defendant, or anyone on his behalf, since 7 March 2003, identifying the name and address of all persons from whom such property was received;
 - (x) Details of all assets over £1,000 in value transferred by the Defendant, or anyone on his behalf, to others since 7 March 2003, identifying the name and address of all persons to whom such property was transferred; and
 - (xi) In the event that any Claim Form, Petition, Statutory Demand, Application Notice, Enforcement Notice, Seizure Notice or other civil court process is pending or is at any time during the currency of this order served upon him or brought to his attention, the Defendant shall forthwith provide a copy of the process to the Prosecutor.
9. (1) Subject to any further order of the court any information given in compliance with this order shall only be used:

- (a) For the purpose of these proceedings;

- (b) if the Defendant is convicted, for the purposes of any confiscation hearing that may take place; and
- (c) if a confiscation order is made, for the purposes of enforcing that order, including any receivership proceedings.

(2) Paragraph 9 (1) does not prevent the Prosecutor or counsel instructed by the Prosecutor from considering any information disclosed in compliance with this order for the purposes of discharging the Prosecutor's disclosure obligations in the criminal proceedings (to which these proceedings are ancillary) whether under the Criminal Procedure and Investigations Act 1996 or the common law.

(3) There shall be no disclosure of any material disclosed in compliance with this order to any co-defendant in the criminal proceedings.

(4) However, nothing in this paragraph shall make inadmissible any disclosure made by the Defendant in any proceedings for perjury relating to that disclosure.

[Optional—Disclosure orders]

Provision of information—Use if defendant is landlord of property or properties and rental income is used to pay mortgage on property or properties

[Insert appropriate paragraph number, since these are optional powers] The Defendant must serve a witness statement certified by a statement of truth upon the Prosecutor within *[Number]* days after this order has been served on him setting out the following matters:

- (1) the name and address of every tenant in the properties referred to in paragraphs [] to above; and
- (2) the amount of rent paid by each tenant, details of any arrears of such rent and the manner in which the rent is usually paid.

[Insert appropriate paragraph number, since these are optional powers] (1) Subject to any further order of the court any information given in compliance with this order shall only be used:

- (a) For the purpose of these proceedings;
- (b) If the Defendant is convicted, for the purposes of any confiscation hearing that may take place; and
- (c) If a confiscation order is made, for the purposes of enforcing that order, including any receivership proceedings.

(2) Paragraph 9 (1) does not prevent the Prosecutor or counsel instructed by the Prosecutor from considering any information disclosed in compliance with this order for the purposes of discharging the Prosecutor's disclosure obligations in the criminal proceedings (to which these proceedings are ancillary) whether under the Criminal Procedure and Investigations Act 1996 or the common law.

(3) There shall be no disclosure of any material disclosed in compliance with this order to any co-defendant in the criminal proceedings.

(4) However, nothing in this paragraph shall make inadmissible any disclosure made by the Defendant in any proceedings for perjury relating to that disclosure.]

REPATRIATION

[*Insert appropriate paragraph number, since these are optional powers*] (1) The Defendant must within 21 days after being asked to do so in writing by the Prosecutor bring any movable asset in respect of which he has an interest and which is outside England and Wales, to a location within England and Wales.

(2) The Defendant must inform the Prosecutor of the location of the assets within England and Wales within 7 days of their arrival.

(3) If the asset is cash or credit in a financial institution, it must be paid into an interest-bearing account, and the Prosecutor must be notified of the account holder, location and account number within 7 days.

EXCEPTIONS TO THIS ORDER

8. This order does not prohibit the Defendant, on the proviso that he is not in prison, from spending up to £250 a week on his ordinary living expenses, up to the date of the making of any confiscation order. Before starting to withdraw money for his living expenses, the Defendant must contact the Prosecutor to nominate a bank account or source of income from which such monies will be drawn and must obtain the written consent of the Prosecutor to use that account or income for that purpose.

VARIATION OR DISCHARGE OF THIS ORDER

9. Anyone affected by this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must serve the application and the witness statement in support of the application on the Prosecutor and the Defendant at least two clear working days before the date fixed by the Crown Court for the hearing of the application.

EFFECT OF THIS ORDER

10. A person who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

11. A person who is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE DEFENDANT

Effect of this order

12. It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned or fined. Any such person is also at risk of prosecution for a money-laundering offence.

Set off by banks

13. This order does not prevent any bank from exercising any right of set-off it may have in respect of any facility which it gave to the Defendant before it was notified of this order.

Withdrawals by the Defendant

14. No bank need enquire as to the application or proposed application of any money withdrawn by the Defendant if the withdrawal appears to be permitted by this order.

Cash in the custody of Her Majesty's Revenue and Customs/the Serious Organised Crime Agency

15. This Order does not apply to any cash while it is seized or detained by the Serious Organised Crime Agency under Part 5 of the Proceeds of Crime Act 2002, or while it is detained or forfeited by order of a court under that Part. "Cash" is to have the meaning given to it by section 289(6) of that Act.

Existing charges

16. This order does not prevent any financial institution or other charge holder from enforcing or taking any other steps to enforce an existing charge it has in respect of a property or properties so secured, providing that the said financial institution gives written notice to the defendant, the Prosecutor and any other affected third party no later than 21 days before any such application is made. If any evidence is to be relied upon in support of any such application, the substance of it must be communicated to the Prosecutor in advance.

Persons outside England, Wales, Scotland and Northern Ireland

17. (1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court, Scotland or Northern Ireland.

(2) The terms of this order will affect the following persons in a country or State outside the jurisdiction of this court, Scotland or Northern Ireland:

- (a) A person to whom this order is addressed or the officer or agent appointed by power of attorney of such a person;
- (b) Any person who:
 - (i) Is subject to the jurisdiction of this court, Scotland or Northern Ireland;
 - (ii) Has been given written notice of this order at his residence or place of business within the jurisdiction of this court, Scotland or Northern Ireland; and
 - (iii) Is able to prevent acts or omissions outside the jurisdiction of this court, Scotland or Northern Ireland which constitute or assist in a breach of the terms of this order; and
- (c) Any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or State.

Enforcement in Scotland and Northern Ireland

18. This order shall have effect in the law of Scotland and Northern Ireland, and may be enforced there, if it is registered under the Proceeds of Crime Act 2002 (Enforcement in Different Parts of the United Kingdom) Order 2002.

Assets located outside England and Wales

19. Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with:

- (i) What it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract to which it is a party; and
- (ii) Any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Prosecutor;

Unless those assets are situated in Scotland or Northern Ireland, in which case this order must be obeyed there.

UNDERTAKINGS

20. The Prosecutor gives to the court the undertakings set out in Schedule B to this order.

DURATION OF THE ORDER

21. This order will remain in force until it is varied or discharged by a further order of this court.

INTERPRETATION

22. Reference to the “Defendant” means Mr. [XXX]. Reference to an asset belonging to the Defendant includes any property in which the Defendant has an interest and any property to which the Defendant has a right.

23. A period of time expressed as a number of days shall be computed as clear days as defined in rule 57.2 of the Criminal Procedure Rules 2005.

COSTS

24. The costs of this order are reserved.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to the Crown Court at Southwark, 1 English Grounds, off Tooley Street, London, SE1 2HU, quoting the case number. The office is open between 9 a.m. and 5 p.m. Monday to Friday. The telephone number is 020 7522 7200

ADDRESS OF THE PROSECUTOR FOR SERVICE AND ANY COMMUNICATION IN RESPECT OF THESE PROCEEDINGS

All communications to the Prosecutor about this order should be sent to the Asset Forfeiture Division, Revenue and Customs Prosecutions Office (RCPO), New King’s Beam House, 22 Upper

Ground, London, SE1 9BT. The telephone number is 020 7147 7701 (when calling the give Defendant's name). RCPO is open between 9 a.m. and 5 p.m., Monday to Friday.

**SCHEDULE A
WITNESS STATEMENTS**

1. Witness Statement of [x] dated [date].

**SCHEDULE B
UNDERTAKINGS GIVEN TO THE COURT BY THE PROSECUTOR**

1. The Prosecutor will serve upon the Defendant:
 - (a) A copy of this order; and
 - (b) A copy of the witness statement containing the evidence relied upon by the Prosecutor, and any other documents provided to the court on the making of the application.
2. Anyone notified of this order will be given a copy of it by the Prosecutor.
3. The Prosecutor will pay the reasonable costs of anyone other than the Defendant which are incurred as a result of this order, including the costs of finding out whether that person holds any of the Defendant's assets, save that the Prosecutor will not without an order of the court be obliged to pay any legal or accountancy costs so incurred unless the Prosecutor first gives its consent in writing.

Annex IV. Model production order

Model document production order

The following model can be used for a production order for documents. Note that this should be adapted according to the local style for an application.

To: [Name of financial entity], to be served on an authorized official of [name of financial entity]

Regarding investigation into:

- Account number [number] at [name of financial entity] in the name of [name of subject]
- [Company name] incorporated in [place]
- Unknown beneficial owners of accounts or funds related to the persons and entities above

Order to produce documents

In accordance with [applicable law], the authorized representative of [name of financial entity] is commanded to produce the documents identified below to the [judge, investigating magistrate or other appropriate authority] on [date]. An intentional failure to comply with this document production order is a criminal offence punishable by fine, imprisonment or both.

(Where authorized by local law) [name of financial entity] is ordered not to disclose to anyone outside of [name of financial entity] the fact of this production order, the identity of the subjects of the production order or the documents ordered to be produced. Nor is it to disclose what is produced to the [judge, investigating magistrate or other appropriate authority] until further order.

This order shall cover the time period from [date] to [date] or beginning on the date this order is received by [name of financial entity].

This order shall cover all documents related to the individuals, legal entities and beneficial owners listed above, either individually or in combination with any other individual or legal entity; and documents for accounts for which these individuals are or were trustees, have or have had signature authority, power of attorney or the authority to transact business. The documents shall relate to account opening, client identification and instructions, due diligence documentation, account transactions and other transactions and include but are not limited to the following:

1. Account opening documents for any service or line of business provided by [name of financial entity], including but not limited to any subsidiary and correspondent institution; and, if applicable, closing documents for all accounts related to the individuals and legal entities listed above. For [company name], the documents should include full copies, front and back, of articles of

incorporation, corporate resolutions and minutes, partnership agreements, powers of attorney, and signature cards (front and back) related to any person or beneficial owner referenced above, which are in the possession of [name of financial entity].

2. Bank statements, periodic statements and transcripts of accounts for any person or beneficial owner referenced above.

3. The identity of the beneficial owner of any account related to any person referenced above and the documents in which this information appears. This is to include but is not limited to all copies (front and back) of the supporting documentation submitted by the contracting party or beneficial owner or prepared by any financial institution, employee or third party on behalf of the contracting party or the beneficial owner.

4. Information obtained by [name of financial entity] relating to the identification and verification of any person or beneficial owner referenced above.

5. National identity numbers, tax numbers, customer identification numbers, date and place of birth and any reference number or method (other than the account number) used by [name of financial entity] to identify any person or beneficial owner referenced above.

6. For any person referenced above, any safe deposit box contract, identity of all persons with access to the box, documents showing dates when the safe deposit was accessed and any video or other electronic medium showing the authorized person(s) who visited the safe deposit box area.

7. Client instructions regarding when and how account statements are to be delivered; and client instructions regarding mail, electronic or voice contact by [name of financial entity].

8. The identity of any [name of financial entity] employee who has or had any responsibility for dealing with or handling the accounts of any person or beneficial owner referenced above.

9. All records of charges for local and long-distance telephone calls, including telephone bills; and all records of charges for other communication services, telexes, courier and mail services incurred by or on behalf of any person or beneficial owner referenced above. In each case where there has been contact, the bank official who had the contact is to be identified; and any notes, documents and information given or received during the contact or the sending or receiving of packages, letters, faxes, and e-mails are to be produced.

10. The “know your customer” due diligence documents prepared by [name of financial entity] on any person or beneficial owner referenced above. Where a person related to a transaction, account, wire transfer, Society for Worldwide Interbank Financial Telecommunications (SWIFT) message or other action identified by this order has been identified by [name of financial entity] as a beneficial owner or a politically exposed person as defined in bank policies and procedures:

- (a) All due diligence and enhanced due diligence files created;
- (b) Documents identifying the rules and alerts placed in the processing and compliance systems of [name of financial entity] to identify and segregate transactions related to the clients, accounts, identified politically exposed persons, other public officials, those who have recently left public office and beneficial owners; and the documents related to any transactions or question that triggered an alert; and
- (c) The identity of any [name of financial entity] employee handling the due diligence files and the alert systems related to this order.

11. Documents related to incoming and outgoing, domestic or cross-border funds transfers (for example, by Fedwire (the electronic funds transfer system owned and operated by the United States Federal Reserve System), the Clearing House Interbank Payments System (CHIPS) or the Clearing House Automated Payments System (CHAPS)) for or on behalf of any person or beneficial owner referenced above, including but not limited to, wire transfer request forms, advice statements, confirmation statements, debit memos, journal entries or internal logs.
12. Documents related to SWIFT messages originating, terminating or passing through [name of financial entity] and any related intermediary or correspondent institution, for or on behalf of any person or beneficial owner referenced above, including but not limited to:
 - (a) SWIFT messages, including but not limited to those with the codes *SWIFTMT 100, MT 103, MT 202, MT 202 Cov, MT 199, and MT 299 and any other SWIFT message (including those related to securities and trade transactions);
 - (b) Fax, mail, e-mail or telephone instructions; wire transfer request forms; advice statements; confirmation statements; debit memos; journal entries; or internal logs; and
 - (c) Any “repair items” or rejected funds transfers or SWIFT messages; and any documents related to the repair and retransmission of the funds transfer or SWIFT message related to the persons, legal entities and beneficial owners referenced above.
13. SWIFT bank identifier codes (BIC) for [name of financial entity], including its business lines (for example, private banking), subsidiaries, and branches for which the codes differ from the main BIC code.
14. A document stating all names by which [name of financial entity] and its subsidiaries are identified.
15. Documents related to funds that went into or out of any [name of financial entity] account related to any person or beneficial owner referenced above, including client orders, deposit slips, deposit items (front and back), withdrawal slips and cancelled checks (front and back), debit and credit memos, book transfers and interbank transfer slips related to any person or beneficial owner referenced above.
16. Documents sent to or received from any intermediary or correspondent financial institution related to any person or beneficial owner referenced above.
17. Copies of certificates of deposit, including interest payments, redemption records and disposition of the proceeds regarding any person or beneficial owner referenced above.
18. Records of purchase or sale of bearer bonds or other securities by any person or beneficial owner referenced above.
19. Documents for purchase of manager’s cheques, cashier’s cheques and bank money orders, together with the cheques that were purchased by or on behalf of any person or beneficial owner referenced above.
20. [Name of financial entity] submissions to financial intelligence units (where authorized).
21. Cash transaction reports relating in any manner to the persons or beneficial owners referenced above.

22. Currency and monetary instrument reports relating in any manner to the persons or beneficial owners referenced above.
23. Suspicious activity or transaction reports filed, relating in any manner to the persons or beneficial owners referenced above.
24. All additional documents that may have a connection to the offence committed.

Terms

“Name of financial entity” and “company name” mean the business entity to which the order is addressed. It shall include all of the entity’s affiliates, joint ventures, subsidiaries, subdivisions and successors in interest; and all of its present and former directors, officers, partners, employees, agents and other persons purporting to act on behalf of any of the foregoing.

“Document(s)” means all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies thereof (whether different from the original by reason of any notation made on such copies or otherwise) in the possession, custody or control of the company, wherever located, including, without limitation, papers, correspondence, memoranda, notes, diaries, statistical materials, letters, telegrams, minutes, contracts, reports, studies, cheques, statements, receipts, returns, summaries, pamphlets, books, inter-office and intra-office communications, offers, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, credit matter, computer printouts, hard discs, flash drives, removable hard drives, floppy discs, mainframe and personal computer databases, telex materials, invoices, worksheets; all drafts, alterations, modifications, changes and amendments of any kind to the foregoing. Also included are all graphic and aural records or representations of any kind, videotapes, sound recordings and video pictures; any electronic, mechanical, or electrical recordings, including without limitation tapes, cassettes, discs, recordings and films.

“Document(s)” also means any container, file folder or other enclosure bearing any marking or identification, in which other documents are kept, but does not include file cabinets. In all cases where any original or non-identical copy of any original is not in the possession, custody or control of the legal entity to which this production order is directed, the term “document(s)” shall include any copy of the original and any non-identical copy thereof.

“And” should be interpreted as including “or”, and vice versa.

“Person” shall mean any natural person, legal entity, proprietorship, corporation, partnership, joint venture, unincorporated association, and governmental agency; or any subdivision, affiliate, officer, director, employee, agent or other representative thereof.

“Beneficial owner” includes the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf the transaction is being conducted. The term also covers those persons who exercise ultimate effective control of a legal person or arrangement and relevant third parties.

“Identity” shall mean the full name of an individual, including middle name; date of birth; place of birth; national identity or passport number; all positions held during employment; dates of service; responsibilities and duties in each position; termination date, if any; and the reasons for such termination.

“Public official” shall mean (a) any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (b) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.

“Wire transfer” and “funds transfer” refer to any transaction carried out on behalf of a person through a financial institution by electronic means, with a view to making an amount of money available to a beneficiary person at another financial institution. The originator and the beneficiary may be the same person.

“Cross-border transfer” means any wire transfer for which the originator and beneficiary institutions are located in different countries. The term also refers to any chain of wire transfers that involve at least one cross-border element.

“Originator” is the account holder; where there is no account, the originator is the person who places the order with the financial institution.

Claim of privilege

If any document is withheld by [name of financial entity] under claim of privilege, including the attorney-client privilege, [name of financial entity] shall furnish a schedule setting forth the date, the name and title of the author, addressee or recipient and the subject matter of each such document, the nature of the privilege claimed, the basis on which it is claimed and the paragraph of this order that refers to each such document.

Identifying documents

To facilitate the handling of documents submitted pursuant to this order, to preserve their identity and to ensure their accurate and expeditious return, it is requested that each document be marked with an identifying number and that the documents be numbered consecutively. Only the first page of multipage, bound documents should be numbered, and the total number of pages in a document should be noted. Documents should also remain within the file folders in which they were located at the time this order was served. Such file folders should also be numbered as if they were another document. Within each file folder, documents should remain in the same order as at the time this order was served. Multipage documents should remain intact.

Document production

The person appearing before the court, prosecutor or investigator in response to this order must be a person who is fully knowledgeable concerning [name of financial entity] search for the documents responsive to this order, as well as someone who can authenticate the documents as business records. Should there be no single person competent to perform both requirements, [name of financial entity] should designate such additional persons as may be necessary to appear on the same time and date.

Documents that exist in an electronic format should be produced electronically along with a paper copy certified by the [name of financial entity] custodian of records to be a true and accurate copy

of the electronic original. All electronic documents should be produced in a form that is reasonably usable and searchable without specialized software.

Requirement for original documents

This order requires the production of the originals of all documents ordered herein, except as particularly noted below. Submission of photocopies in lieu of originals shall not comply with this order.

Annex V. A sample account monitoring order

Ref. Number:

[Court Logo]

Account Monitoring Order

(Section 370 Proceeds of Crime Act 2002[UK])*

IN THE CROWN COURT at [...] Date [...]

Penal notice

A failure to comply with the terms of this order may constitute a contempt of court for which you may be imprisoned or fined

To: [Name of financial institution] at [address]

An application has been made in pursuance of section 370 of the Proceeds of Crime Act 2002 by [name] of [name of requesting agency].

I am satisfied, having heard the application, that the requirements for making an account monitoring order under section 371 Proceeds of Crime Act 2002 are fulfilled.

You are ordered to provide account information, specifically to immediately notify the applicant or any other specified Officer, of transactions involving the ordering or removal of cash/cheques above [specify £ amount] from the accounts and to notify the balance and any transactions daily relating to accounts:

Bank/institution	Account	Account Name
Bank of [X] 99999999		Mr. [X] & Mrs. [X]

For a period of [X] days, not exceeding 90 days from the date of this order, to [insert name of applicant and any other Officer] by telephone and fax to [specified number].

Court Stamp

Signature of Judge

Date: _____

1. It is an offence to prejudice a confiscation or money-laundering investigation or prospective investigation by making a disclosure about it or by tampering with documents relevant to the investigation. You should not therefore falsify, conceal, destroy or otherwise dispose of, or cause or permit the falsification, destruction or disposal of, relevant documents, nor disclose to any other person information or any other matter which is likely to prejudice any investigation into confiscation or money-laundering. The penalty for this offence on summary conviction is imprisonment

for six months or a fine or both and on conviction on indictment is 5 years imprisonment or a fine or both.

2. Anyone served with, notified or affected by this order may apply to the court at any time to vary or discharge this order (or so much as it affects that person), but they must first inform the applicant (giving 2 clear days' notice).

3. If you have any doubts or concerns about this order you should seek legal advice and/or contact [XXX] HM Revenue and Customs, Criminal Investigation Directorate, P.O. Box [XXX], England.

Annex VI. Sample guidelines on considering an asset manager or receiver application

Source: Re Capewell v. Customs & Excise & Ors.—Civil Division, December 02, 2004, [2004] EWCA Civ 1628)

Application by the Prosecutor

1. Within the witness statement [or local equivalent document] in support of the application to appoint a [manager or management receiver], the prosecutor should set out the reasons the prosecutor seeks the appointment of a receiver; and what purpose the prosecutor believes the order will serve.
2. The witness statement [or local equivalent document] in support of the application should also give an indication of the type of work that it is envisaged the receiver may need to undertake, based on the facts known to the prosecutor at the time of the appointment.
3. The witness statement [or local equivalent document] should specifically draw to the Court's attention the proposition that the assets over which the receiver is appointed will be used to pay the costs, disbursements and other expenses of the receivership (even if the defendant is acquitted or the receivership is subsequently discharged).
4. The letter of acceptance of appointment from the receiver [manager or management receiver], which must be exhibited to the applicant's witness statement, should contain the time and charging rates of the staff the receiver anticipates he may need to deploy.
5. In appropriate cases, where it is possible, and this will not be in every case, the receiver should give in his letter of acceptance an estimate as to how much the receivership is likely to cost.
6. The prosecutor's witness statement [or local equivalent document] in support of the application should inform the Court of the nature of the assets and their approximate value (if known), and the income the assets might produce (if known).
7. If the prosecutor or receiver is unable to comply with any of the above requirements the prosecutor should explain the reasons for the failure in the prosecutor's application to the court, and the matter will be left at the discretion of the court.

Upon appointment

8. Upon the appointment of a [manager or management receiver], the Judge should consider whether it is appropriate, in all the circumstances, to reserve any future applications to himself, with a view to minimizing costs.

9. Upon the appointment of a [manager or management receiver], the Judge should consider whether it is appropriate, in all the circumstances, to set a return date, balancing the need for such a hearing with the interests of the defendant, who ultimately will bear the costs of such a hearing.

10. The [manager or management receiver] should inform the parties by written report as soon as reasonably practicable, if it appears to him that any initial costs estimate will be exceeded, or receivership costs are increasing, or are likely to increase to a disproportionate level. Such a report should also be filed with the Court. In such circumstances the parties and the receiver shall be at liberty to seek directions from the Court.

Reporting requirements

11. Unless the Court directs otherwise, the [manager or management receiver], should report 28 days after his appointment and quarterly thereafter.

12. Unless the Court directs otherwise, the report should be served on the prosecutor and the defendant and filed with the Court.

13. Every report should set out: the costs incurred to date; the work done; the projected costs until the next report; a summary of how those costs attach to the matters that led to the appointment or to the matters that may have arisen; and, where appropriate, an estimated final outcome statement.

14. Every report should contain a statement that the [manager or management receiver] believes that his costs are reasonable and proportionate in all the circumstances.

15. If the [manager or management receiver] is unable to fulfill any of the above reporting requirements, he should give, as soon as reasonably practicable, an explanation, by way of written report to be filed at Court and served on the parties, of why this is the case, and those parties shall be at liberty to seek directions from the Court.

Lawyers and other agents

16. The parties should always be told that lawyers or other agents have been instructed unless it is not practicable or in the interests of justice to do so (for example, to make an urgent, without notice, application to secure assets).

17. If lawyers or other agents are instructed, the [manager or management receiver] may ask for monthly bills or fee notes. The [manager or management receiver] should endeavour to keep a close control on such fees and satisfy himself that the costs being incurred are reasonable and proportionate in all the circumstances.

18. The [manager or management receiver] should notify the parties as soon as reasonably practicable if it appears to him that any lawyers or other agents' costs are rising to a disproportionate level, and those parties shall be at liberty to apply to the Court for directions.

General

19. Nothing in these guidelines should be read as supplanting the appropriate rules of court, particularly [specific local provision], and the relevant statutory provisions.

20. Judges appointing [manager or management receiver] should always bear in mind that the costs of the receivership may fall on an innocent man. They should also bear in mind that the interests of justice dictate that management/receiverships are a necessary and essential tool of the criminal justice process for preserving and managing assets to satisfy confiscation orders if the defendant is convicted.

21. Management/receivership orders should be endorsed with the appropriate penal notice. It will be a term of most orders that defendants should cooperate with and comply with, as soon as possible and forthwith, directions and requests of the manager/receiver, so as to enable the manager/receiver to efficiently and cost-effectively carry out the duties, functions and obligations of his office. It is therefore in the defendant's interest to avoid, as far as possible, the need for the receiver to return to Court for further orders or directions, the cost of which ultimately fall on the defendant's estate.



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