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ATTORNEY GENERAL

# Practitioner's Manual for the Recovery of Proceeds of Crime in Ethiopia



August 2020

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## 1. Introduction

The manner in which the recovery of assets, whether they are derived from economic crime, corruption or some other illicit conduct, is managed has several important economic, legal and political implications.

The most significant and complex asset recovery cases involve large sums of money, occasionally running into billions of dollars. The assets, whether in their primary or derivative form, may be located in foreign jurisdictions, concealed in the names of agents or proxies. Their recovery can have a positive impact on the resources available to the state to deliver services to the public, and generally to run public affairs.

Finding and retrieving assets concealed outside Ethiopia inevitably involves working with foreign laws, institutions and possibly foreign corporations and practitioners. The resources, in terms of time, effort, expertise and finances to be committed may be considerable. It goes without saying that the discipline, and level of organisation required are high. A recurrent lesson from many parts of the world is also that the most complex asset recovery cases have political undertones, in that they are prompted by the alleged plunder of resources under current or previous political administrations. Public expectations, not just in the success of the asset recovery initiatives, but also in ensuring that the processes undertaken are efficient and free of corruption are often raised, but sometimes betrayed.. There is no point in recovering assets if the costs of recovering those assets far exceeds the value that can be recovered. At the same time, the public officials engaged in asset recovery efforts may often have to work in difficult or hostile conditions, in which sections of the public may perceive them to be pursuing partisan political interests.

Recovering the proceeds of serious crime, including corruption, is therefore a complex undertaking. The process can be overwhelming even for experienced practitioners because of the difficulty of asset recovery and skills required to—identify, trace, secure and confiscate criminal assets. There are strategic, organizational, resource (personnel, budgetary etc.), investigative and legal challenges to the recovery of criminal assets, whether through criminal confiscation, non-conviction based confiscation, civil actions or other processes. These challenges are enhanced when dealing with corruption and bribery allegations relating to politically exposed persons or influential individuals or groups. Money laundering, as a method of moving and concealing criminal assets, is a common obstacle. However, national endeavours are supported by strict international standards such as, Chapter V of the UN Convention against Corruption (UNCAC), requiring states to take measures to restrain, seize, confiscate and return the proceeds of corruption.

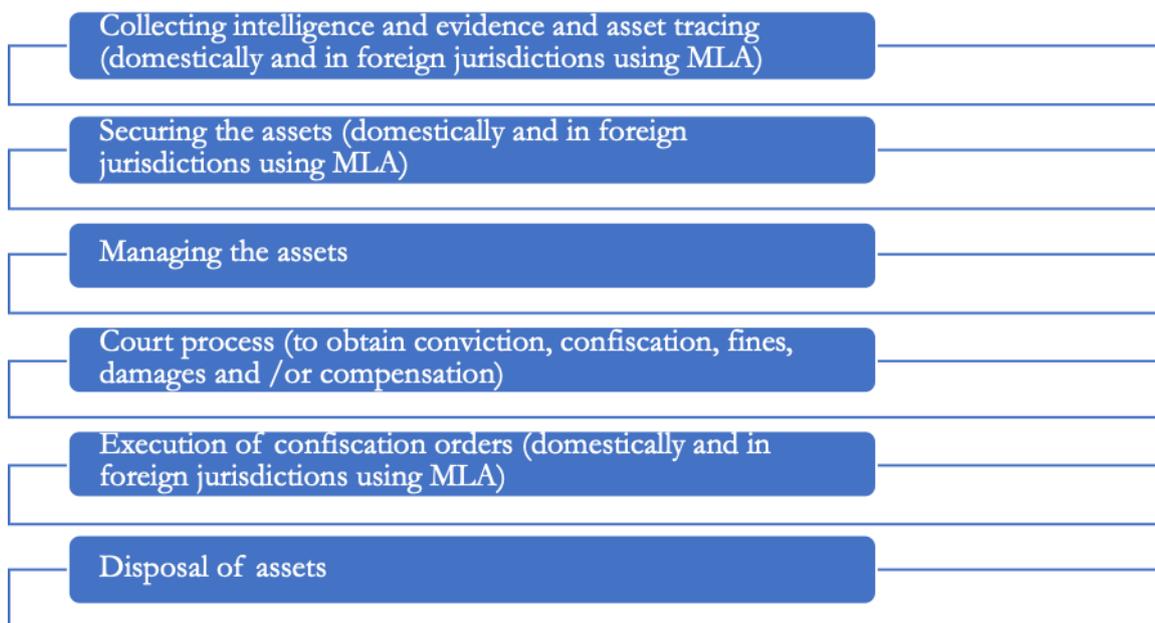
The main contributors of criminal proceeds are corruption, inward and outward commodity smuggling, tax evasion, drug trafficking, trafficking of persons, smuggling of migrants, trafficking of firearms and wildlife products.

Ethiopia has lately taken some important steps in improving and enhancing its asset recovery regime for complex cases, not least with the creation of the Asset Recovery Directorate (ARD) under the remit of the Office of the Attorney General. Going forward, the ARD is expected to be the driving force in pursuing important asset recovery cases, not least complex corruption cases.

This Practitioner’s Manual sets out and elaborates a check list of considerations that practitioners should go through when tracing criminal assets and investigating asset recovery matters. The Manual contains the following sections that address the asset recovery processes mentioned above:

- Strategic considerations in developing and managing a case
- Securing evidence and tracing assets
- Securing the assets
- Confiscation
- International co-operation in asset recovery

The Manual also follows the overall process for recovering criminal assets, which can be shown as follows:



The Manual has been prepared by Tana Copenhagen, a Danish consultancy implementing a comprehensive AML/CFT/IFF project, including an important asset recovery component, agreed upon by the Governments of Ethiopia and Denmark. The Manual is intended to reflect the reality on the ground, by taking into account the capacities and capabilities of Ethiopian agencies as well as the legislation that is in place in 2020. The Manual incorporates international good practice on asset recovery and has been compiled in cooperation with the ARD and other Ethiopian AML/IFF authorities. It is proposed to regularly revise the Manual to reflect changes as they occur.

The reader should note that actual management of seized assets is not covered in detail in this Manual, as legislation for asset management is required before standard procedures and processes can be defined. Moreover, managing of assets is a very different discipline compared e.g. to law enforcement actions and therefore merits its own analysis.

## **2. Strategic considerations in developing and managing an Asset Recovery Case**

Initial strategic considerations for developing and managing a complex asset recovery case in Ethiopia should include at least the following:

- Institutions and agents to be involved in the asset recovery case
- Sources of information – including reports received and asset declarations
- Access to information
- Legal avenues or processes to be invoked
- Skills required by the investigation and wider asset recovery team
- Composition of the investigation and the wider asset recovery team
- Resources required for the investigation and legal processes, and the means to secure the assets
- Identification of all subjects of the investigation and the applicable offence
- Management of the financial investigation

### **2.1. Institutions involved in a complex Asset Recovery Case**

Which agencies should be involved?

The Asset Recovery Directorate (ARD) of the Federal Attorney General (FAG) is the lead institution on asset recovery matters. The ARD can cause cases to be initiated, can instruct on cases and can review completed case files. The ARD also decides on indictments. The legal basis for this is Proclamation 943/2016.

The Federal Police Commission (FPD) has the power to investigate any threats and acts of crime, including corruption, tax fraud, money laundering and terrorist financing. It can receive instructions from the ARD. The legal basis for this is Proclamation 720/2011.

The Financial Intelligence Center is the Ethiopian national FIU. It was established by proclamation 780/2013 and Regulation No 171/2009. Its core functions are receipt, collection, analysis and dissemination of financial intelligence received from the reporting entities. It has an important role in collecting information/intelligence that can be relied upon or used by the ARD or the FPC.

The Federal Ethics and Anti-Corruption Commission (FEACC) is responsible for the implementation of anti-corruption laws in Ethiopia. Investigation and prosecutorial powers previously held with the FEACC were in 2016 transferred to the Federal Attorney General.

The Ministry of Revenue and the Customs Commission are both important as sources of information on tax and customs matters.

According to the Report of the High Level Panel on Illicit Financial Flows from Africa, Ethiopia, features in the top 10 African countries by cumulative illicit financial flows from 1970 to 2008 (AUC/ECA 2015). Global Financial Integrity estimated that Ethiopia lost US\$26 billion to illicit financial outflows between 2004 and 2013

An asset recovery case or a suspicion of an underlying crime having generated criminal proceeds can evolve in many ways, either through a report received by the FIC or directly through information received or held by law enforcement agencies. Regardless, ARD as the coordinating institution on asset recovery cases should without delay be informed by other institutions of criminal cases, especially those which involve large amounts of money or are complex. This will enable the ARD to act. Subsequently the ARD needs to decide which institutions and/or agents to involve in the particular case.

## 2.2. Sources of information

The ARD can decide to open an investigation based on different types of initial leads, some of them being:

- Criminal complaints (communications) and proceedings, e.g. reports of fraud, corruption, theft etc. filed by victims (including individuals, companies and other jurisdictions) or government agencies;
- FIU reports. On receipt of reports from the obliged entities the FIC can decide to analyze further and thereafter relay the report to law enforcement or prosecution. If the matter falls within the remit of the ARD the report should be send to this team;
- Civil or administrative proceedings;
- Mutual Legal Assistance (MLA) requests, which, in money laundering cases, may have been received by the FIC;
- Spontaneous disclosures. Foreign competent authorities and FIUs may spontaneously provide Ethiopian authorities, including the ARD, with information e.g. about corruption activities with a link to Ethiopia;
- Auditors. Examination of the annual statement of accounts of big companies might expose suspicions of corruption, embezzlement or other types of serious crimes;
- Whistle blowers;
- Media and civil society reports, for example disclosures in publications by the International Consortium of Investigative Journalists, or by the Global Financial Integrity
- Leads from intelligence services

The Asset Recovery Directorate needs to decide if the initial leads available are sufficient to open an investigation.

### 2.3. Legal Avenues and Processes

Which legal avenue should be selected for a particular asset recovery case?

There are several options:

- Domestic criminal prosecution and confiscation, followed by an MLA request to enforce orders in foreign jurisdictions, if the assets (proceeds and instrumentalities) are located in a foreign jurisdiction.
- Non-conviction based confiscation, followed by an MLA request or the other type of request to enforce orders in foreign jurisdictions discussed in the section on international co-operation
- Private civil actions, including formal insolvency process
- Criminal prosecution and confiscation or non-conviction based confiscation initiated by a foreign jurisdiction
- Administrative/civil confiscation

### 2.4. Skills Required and the composition of the Financial Investigation Team

The skills to conduct complex economic or financial crime investigations include understanding financial and tax fraud typologies, ability to analyse intelligence, identifying appropriate investigation tools (in line with domestic law), forensic accounting and information technology skills, specific expertise in undercover and surveillance operations, experience in interviewing witnesses, suspects and victims, and witness preparation. If the case has cross border dimensions, knowledge of international conventions, standards, and international cooperation mechanisms are a prerequisite.. At the minimum, the investigators should have report writing capabilities.

Familiarity with using the internet to search for information is basic, and can shorten investigations. Open source information can give critical pointers, and is available at relatively low cost.

A common practice in investigating grand corruption cases is to use multi-disciplinary task teams that can integrate information from different law enforcement and intelligence sources. Task forces leverage existing technologies and develop new technologies in order to provide cross-agency integration and analysis of various forms of data.(Relatively recent examples are the Chiluba investigation in Zambia, the Obori investigation in Nigeria and the UK and the Schabir Shaik/Jacob Zuma investigation in South Africa). In some countries setting up task teams requires changes in laws and regulations or formalized agreements among the institutions/agencies involved, such as Memoranda of Understanding (MoUs).

Multidisciplinary teams are also essential to ensure the effective handling of the case. Financial investigation teams should include expertise in the analysis of large volumes of financial documents, including wire transfers, financial statements, and tax or customs records. In order to investigate allegations of corruption committed during the period 1991 – 2001 in Zambia, the government of Zambia, with the assistance of a number of development partners (donor countries), established a Task Force. The manner in which this was done, and the challenges that had to be overcome, were outlined in a paper by Ryder titled ‘Making Hay while the Sun Shines’, which is available at <https://www.cmi.no/publications/file/4071-making-hay-while-the-sun-shines.pdf>

Multidisciplinary teams should, at a minimum, include representatives from the ARD, the FPD, the FIC and others. In the Zambian cases referred to above, the Task Force was ‘designed to be flexible so that personnel could be quickly assembled based on the changing needs of the investigations and legal proceedings. Experts were seconded from existing Zambian institutions, including the police, security intelligence, drug enforcement (for anti-money laundering expertise), the public prosecutor, and the Anti-Corruption Commission. Private lawyers were brought in as needed for additional support.’

If it is suspected from the outset of the investigation that the matter is of a cross-border nature, a joint investigation team with foreign authorities should be considered. In any case, it is always beneficial to establish early contact with foreign counterparts in cross-border cases, even if a joint investigation team is not eventually set up. This may facilitate later requests for Mutual Legal Assistance.

A joint investigation team is most relevant where different criminal actions under the same overall case are committed in different jurisdictions. An example is a case involving investigation teams and prosecution services across three European jurisdictions, namely Denmark, the Netherlands and the UK. The case involved bribery, in which the briber was a Danish citizen, the recipient of the bribe was Dutch and the subsequent money laundering was committed in the UK. The elements of a joint investigation team will depend on the legal basis of the respective countries, but in this case the main elements were:

1. A consolidated team of investigators and prosecutors and with representatives from all three countries was put together and approved by high level managers of the respective institutions,
2. Joint facilities were found where the team could work together (when not working separately),
3. A model (very) flexible exchange of information memorandum was drafted and approved. The intention of the model was to a certain degree to replace parts of mutual legal assistance,
4. A joint investigation plan was agreed upon,

5. An agreement regarding the sharing of costs and of the assets expected to be confiscated was signed.

## 2.5. Securing Support and Resources

Adequate funding of each stage of the asset recovery investigation should be ensured. Investigators should approach superiors to inform about the estimated need for resources throughout the entire investigation and should get confirmation from the hierarchy that the estimated resources are available and will remain available. Both personnel as well as financial resources should be addressed.

### **Forensic Investigation**

In considering the resources needed, it is necessary to understand the essentials of forensic investigation. Forensic investigation is 'the utilisation of specialised investigative skills in carrying out an inquiry conducted in such a manner that the outcome will have application (in other words, will be useful) to a court of law.' It is directed at organising and connecting a large amount of individual activities to construct the financial profile of the person or company that is being investigated, which shows funds, assets and income gained or lost by them.

The following case study shows (i) how funds for laundering accumulate (ii) how these funds can be transmitted across several countries through a relatively straightforward system (iii) the practical challenges of investigating illicit financial transfers, even where an 'audit' trail exists. The role of forensic accountants in corruption investigation and prosecution was prominent in the case.

### **Case Study 1: Lesotho Highlands Water Project cases**

The Lesotho Highlands Water Project resulted from a treaty concluded between Lesotho and South Africa in 1986. Its objective was to create a system of dams and tunnels to provide water to South Africa and electricity for Lesotho. The implementation of the project required the establishment of at least three new bodies, one of which was called the Lesotho Highlands Development Authority (LHDA), mandated to manage the entire project. Its Chief Executive Officer was Masupha Sole.

The construction of two dams, an essential part of the project, involved the LHDA in conducting business with a wide range of transnational corporations (TNCs), some of which had hitherto unquestioned credentials. Competition to gain tenders was stiff, and a flurry of intermediaries participated at various stages. During the course of the project, it emerged that a large number of TNCs had paid money into the bank accounts in Switzerland in the name of certain intermediaries, and that some of it had subsequently been passed on into bank accounts held by LHDA Chief Executive Officer Sole. In the case of key intermediary ZM Bam, investigations revealed a general pattern, in terms of which 60% of the money paid into Bam's account was transmitted to Sole within a very short period of time thereafter. It was established in court that

between January 1991 and April 1991 Sole received C\$493 000 and another C\$188 000 between June 1991 and January 1998.

The source of the bribe was Canadian corporation Acres International, to secure the contract for the construction of the Katse Dam. Sole also received bribes from other companies involved in the project. Firms implicated included the Highlands Water Venture Group, which comprised Impreglio Impresit Girola of Italy, Hochtief of Germany, Bouygues of France and Basil Read of South Africa. The consortium was alleged to have paid Sole US\$375 000 between 1991 and 1998. The Lesotho Highlands Project consortium, which included LTA-Grinaker from South Africa and Alston of the United Kingdom, was alleged to have bribed Sole with US\$660,000. Intermediaries charged included Jacobus du Plooy, Universal Development Corporation, Electro Power Corporation (both of Panama); Max Cohen, ZM Bam and Margaret Bam. ZM Bam died during the trial.

Sole was sentenced to 18 years in jail for receiving more than US\$750,000 from international contractors and consultants. This was reduced on appeal to 15 years.

### **The asset tracing**

The Swiss bank accounts were discovered in an investigation commissioned by the government of Lesotho, conducted by Ernst & Young, a global accounting firm.

In the course of the trial, the prosecution relied on the testimony of an expert from a forensic service unit of Price Waterhouse Coopers, another global auditing firm to analyse Sole's accounts and trace by whom, to whom and when payments had been made. The testimony was considered useful in substantively summarising and interpreting complex documentary evidence and making its contents intelligible.

The forensic investigations revealed a trail of money leading from the TNCs to six intermediaries, all of whom managed banking accounts outside Lesotho, and further on to a second tier of intermediaries, and ultimately to Sole's accounts in (Geneva) Switzerland. Transfers were traced further to an account in Sole's name at Standard Bank in Ladybrand, a small town just across the border in South Africa. During the period in question ZAR406 985.79 was deposited in the Standard Bank account. In addition, Sole also deposited £298 620 and US\$812 406 in foreign currency denominated accounts. Small transfers were recorded between the ZAR account and Sole's account with Barclays Bank in the Lesotho capital of Maseru. (By the time of the trial, Barclays Bank had transferred its interests in Lesotho to Standard Bank)

As far as is known, the amount recovered from Sole in a civil judgment awarded against him in October 1999, and confirmed on appeal in April 2001, was ZAR8.9 million (US\$890,000) In addition Acres International was fined ZAR22 million (US\$2,2 million) upon conviction.

## **2.6. Potential Legal Issues and Obstacles during the initial phase**

Which potential legal issues and challenges need to be addressed during the initial phase?

There are several legal issues and obstacles/challenges that can arise during the early stages of an investigation, for instance:

### *Jurisdiction*

Before any action is launched in Ethiopia, the ARD or another competent authority involved needs to verify that whatever court is to be approached can claim jurisdiction. If part of the offence is committed abroad it might be relevant to check the jurisdictional rules of that particular country.

### *Immunities*

In Ethiopia there are rules of immunity in respect of heads of state, members of parliament, judges and other high ranking officials. There are also certain personal and functional immunities extended for example to foreign diplomatic staff. Considerations regarding a possible lifting of immunities are relevant during the initial stages of an investigation.

Under Art 54(6) and 63(2) of the FDRE Constitution, members of the House of Peoples Representative and the House of Federation cannot be prosecuted for any criminal liability except with the permission of the Houses or unless they are caught red handed in committing crime. Diplomatic staff may also not be prosecuted, on the basis of international conventions. However, in case of asset recovery, especially on NCBC, since the procedure and the process is of a civil nature, it may be possible to proceed with civil forfeiture even if the subject enjoys immunity from criminal prosecution.

### **Case Study 2: Political immunity – financial investigation into banks operating abroad – use of civil recovery**

The following case demonstrates the issue of confiscation of proceeds from corruption committed by high-level public officials or politicians who have been granted immunity from prosecution. It also demonstrates the importance of international co-operation in asset recovery cases, in particular the repatriation of funds to the country of origin, i.e. where the funds were initially stolen:

Joshua Dariye was Governor of Plateau State, Nigeria from 1999 through 2007 and subsequently became a Federal Senator. In 2004 London's Metropolitan Police seized over 100,000 pounds in cash from Dariye and a money laundering prosecution was initiated. The defendant fled to Nigeria and was protected from prosecution there by a constitutional immunity while in office. The state legislature removed him from office by impeachment but he was reinstated by court decisions. Investigation revealed that within months after being elected, Dariye began transferring state funds into bank accounts in London and Nigeria, which eventually totalled over 5 million dollars. Money from a state ecological fund was diverted to purchase a London property in an assumed name. Successful civil suits were brought by the Federal Republic of Nigeria to recover a London property and rental proceeds owned by Dariye and for recovery of nearly 3 million pounds in two London banks.

### *Statute of limitation*

Most crimes are subject to statute of limitation, meaning that criminal or civil proceedings are no longer possible after a given number of years. However, the clock can be suspended e.g. by

law enforcement actions. In case the prosecutor initiates the case, the time for limitation may start fresh. However, in case of money laundering, as per Article 53 of 780/2013, criminal actions and penalty based on ML/TF crimes are not bared by limitation. Hence, the demand for the recovery of assets due to these crimes might proceed at any time without regard to any period of limitation.

### *Standards of proof*

Very early during the investigation process the investigation team needs to assess which evidentiary standards are required. The decision will guide the team in determining the evidence required to prove the case.

## 2.7. Identification of all subjects of the Investigation and the applicable offence

Against whom should the investigation team direct the asset recovery efforts?

There are several strategic considerations that need to be thought through to answer the above question. It needs to be assessed whether to target parties who facilitated the transfer of proceeds or who received illicit assets for complicity, conspiracy or fraudulent omissions. It also needs to be decided whether to investigate only the personal criminal liability, and thereby the recovery only of personally gained assets, or whether to expand the inquiry to corporate criminal liability as well, if a corporation is involved. This will all depend on the facts of the case. Reference may be made to Case Study 2.

Targeting receiving or facilitating parties can have the advantage of increasing the chances of claiming compensation. On the other hand, if the person/corporation in question is not made subject to the investigation, this person might be more willing to give incriminating information about the principal offender.

It can also be a strategic consideration which offence the investigation should pick as the basis of the investigation, in case more than one offence in principle would be possible. Corruption related cases could e.g. play out as misappropriation of funds, bribery, embezzlement, money laundering and facilitating crimes. Choosing a particular crime as the basis for the investigation can have an impact on the statute of limitation, on the investigative tools applicable, on the possibilities of mutual legal assistance, on the level of evidentiary challenges etc.

## 2.8. Management of the Financial Investigation

There are a lot of different elements of importance to the proper management of investigations. The team needs to observe the following:

- All processes and procedures need to be conducted or applied punctually, e.g. in relation to documentation of charges, gathering of evidence, outreach for MLA etc.

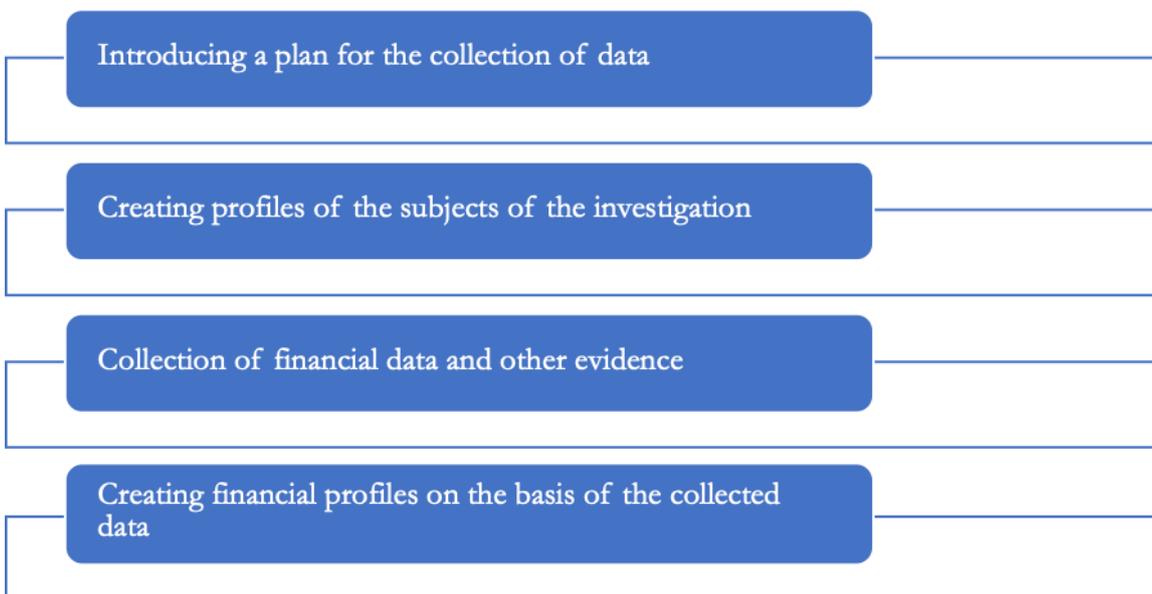
- The investigation requires strategic planning and leadership. This means that an operational head of the investigation needs to be appointed. This person should be tasked with drawing up an investigation plan with specific timelines for investigative steps. This person is responsible for deciding who in the team does what, when and how. For large and complex cases the operational head should regularly report into a high-level group of managers from the involved institutions on the progress of the investigation.
- The team should consider appointing a media inquiries contact person if the media is paying an interest into the investigation. This will ensure that a well-considered common position is communicated to the public, and that public statements do not compromise future litigation.

### 3. Securing Evidence and Finding or Tracing the Assets

#### 3.1. Planning of Data Collection

This section introduces some of the information collection disciplines, i.e. sources of information to better understand what has happened to the assets and create a better foundation for securing the assets, e.g. through seizure.

Investigators should not embark on data collection blind folded. A sequence of considerations is necessary:



#### 3.2. Basic Information about the subjects

The financial investigation team should start by collecting the following basic information:

##### In the case of natural persons -

- Date and place of birth of the subjects, copies of birth certificates, passports and national ID cards.
- Names and birth dates of spouses, children, parents and other immediate relatives (this is of relevance in case the subject attempts to transfer assets to relatives).

- Relevant phone no (business, home, mobiles), e-mail address and contact details of any other Internet or social media communication.
- Recent photographs of the subjects
- Criminal record search
- Open source intelligence (OSINT) search to expose further business and social relationships

In the case of legal entities:

- The memorandum and articles of association,
- Trade registration and licensing documents,
- Audit reports that may be relevant to the period covered by the investigation ,
- A profile of the Beneficial Owners,
- Financial transaction records.

### 3.3. Information from Ethiopian Government Agencies

The financial investigation team should be aware of information that can be provided by different Ethiopian agencies, some of which are:

*Customs Commission*

What is it?	How can it assist asset recovery?	Responsible agency?
<p>The Ethiopian Customs Commission holds records relating to the importation and export of goods, duties paid and is the authority managing the Ethiopian cash declaration whereby travellers will have to declare significant cash when crossing the national borders. Legal basis for this is the AML/CFT 780/2013 Proclamation.</p>	<p>Assist in identifying assets, bank accounts and duties liable on imports or exports, all of which provide opportunities for developing further evidence/intelligence and may uncover additional avenues for disruption. Cross-border cash declaration can uncover attempted money laundering.</p>	<p>The Customs Commission is the executing agency and can deliver data to the financial investigation team</p>

*The Ministry of Revenue*

What is it?	How can it assist asset recovery?	Responsible agency?
<p>The Ministry of Revenue holds a substantial amount of information on an individual or corporation.</p>	<p>The Ministry of Revenue can assist in identifying assets, bank accounts and declared income, all of which provide opportunities for developing further evidence/intelligence and may uncover additional avenues for disruption if, for example, untaxed income is identified. The Ministry of Revenue has agreements with tax administrations of other countries to share tax information which may also assist in identifying overseas assets.</p>	<p>The Ministry of Revenue. The FIC should enquire the Ministry if it holds relevant information to the analysis being produced by the FIC. The financial investigation team can also enquire the Ministry directly for information.</p>

### *Legal profession*

By its nature, the legal profession places lawyers in a special position, in which they assist to establish legal entities, and facilitate high value economic and financial transactions. Some of the legal entities can be used in committing money laundering. For this reason, AML policies and strategies generally require that lawyers understand and comply with obligations to be vigilant to possible money laundering activities, and to report attempts to commit money laundering.

### **Case Study 3: Investigation into transfers to corporations – investigation into the role of lawyers**

This case shows how Politically Exposed Persons, i.e. high level public officials or politicians holding senior government positions can be involved in corrupt behaviour. The case also demonstrates the importance of being able to penetrate corporate vehicles and identify beneficial owners.

Former Nigerian state governor James Ibori pleaded guilty in the United Kingdom in 2012 to the offences of conspiracy to defraud and money laundering. Three of the charges related to the sale of Delta state’s share in a mobile phone company to a neighbouring state. Ibori and his counterpart in the neighbouring state were both on the company’s corporate board.

To generate funds from the sale they used a London solicitor to establish a consultancy called Africa Development Finance. Both the solicitor and the consultancy then charged fees for fictitious services to generate funds for the conspirators. The resulting 37 million dollars in proceeds were diverted to the conspirators.

### **PEPs under Ethiopian law:**

Article 2(11) of the AML/CFT Proclamation defines a politically exposed person (PEP) as “any natural person who is or has been entrusted with prominent public functions in any country or in an international organization, as well as a member of such person's family or any person closely associated with him or her.”

According to article 2(20) of the FI Directive 1 and article 2(14) of DNFBP Directive 2, this includes Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State-owned corporations, political party officials and persons/companies closely associated with them. The concept includes persons who are or have been entrusted with a prominent function by an international organization and includes members of senior management such as directors, deputy directors, and members of the board or equivalent functions other than middle ranking or more junior individuals.

One indicator of PEP status is whether a person is obliged to formally declare their assets and/or liabilities. Asset disclosure registries can be useful in determining who is a PEP and in detecting their asset holdings for comparison with legitimate sources of income. They have also been used in monitoring transactions attributable to PEPs, and can help financial intelligence units in their analysis of suspicious transaction reports.

### *The Financial Intelligence Centre*

What is it?	How can it assist asset recovery?	Responsible agency?
<p>SARs/STRs: Suspicious Activity Reports (SARs) and Suspicious Transaction Reports (STRs) are reports that detail a given transaction or several related transactions that the obliged entity under the AML/CFT Proclamation has reason to believe could be linked to a crime. In addition, there is a cash reporting system whereby any cash transaction exceeding 300.000 birr (USD 15.000) needs to be reported to the FIC. The FIC also holds KYC and CDD information</p>	<p>SARs/STRs form the basis for the FIC referring a case to the Federal Police Commission or another law enforcement agency, ideally generating a viable lead and resulting in an explicit case. Information captured includes transactions, names, addresses, telephone numbers and e-mail addresses and potentially IP address information. FIC is not transferred the SAR/STR as such but carries out an analysis on the basis of the information received</p>	<p>The FIC</p>

### **Case study 4: Suspicious Activity Reports – financial investigation of corporate entities**

This case shows that suspicious activity reporting, not only from banks, but also from other obliged entities such as lawyers is an important source of information to the retrieval of criminal

funds. In this case, however, the lawyers acted as conspirators. The case also demonstrates the importance of establishing the beneficial ownership of legal or corporate entities, as a tool in the identification, , tracing and recovery of proceeds of crime. The role that lawyers can play to facilitate the concealment of proceeds of corruption is well illustrated in the case brought by the Attorney General of Zambia against former President Chiluba and others, including London solicitors Bimal Thaker, Bhupendra Bhailal Thaker and their firm Messrs. Cave Malik and Thaker, as well as solicitor Mohammed Iqbal Meer and his firm of Messrs. Meer, Care & Desai. This was one of the cases initiated by the Task Force, referred to above. It was pursued as a civil recovery case.

The case sought asset recovery from the law firms for assisting in the diversion of Zambian government funds. The funds were paid to the firms without being justified by any legal services, and transferred by them through numerous corporate vehicles. This led to a court finding that Bimal Thaker was liable to repay USD3 million for - turning a blind eye to obviously suspicious transactions when he had a duty to inquire and must have known that he was facilitating the diversion and laundering of government funds

### *Immigration Authority*

What is it?	How can it assist asset recovery?	Responsible agency?
<p>The Ethiopian Immigration Authorities hold information on foreign nationals entering or leaving the country. Details of visa applications may be also held.</p>	<p>Immigration information assists in locating individuals, identifying associates and offers opportunities to exploit all the data held.</p>	<p>Immigration authorities can provide information on request by the financial investigation team</p>

### *The Central Bank of Ethiopia*

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>•Financial institutions including banks are subject to regulation and supervision by the Ethiopian financial regulator</li> </ul>	<ul style="list-style-type: none"> <li>•The regulators will have a good understanding of the financial institution and it's key staff. This information can assist with investigations – and with the growing popularity of online banking and fintech offerings, financial institutions increasingly have access to valuable data beyond simple transactions, for example IP address information.</li> </ul>	<ul style="list-style-type: none"> <li>•The FIC would typically acquire this information as part of its analysis before disseminating its reports. The police can also approach the regulator directly.</li> </ul>

### 3.4. Information from the Financial Sector

A financial investigation targets the financial transactions that can be linked to a person or persons. It can also involve the detailed examination of the finances of a business or a corporation. A financial investigation can determine where money comes from, how it is moved and how it is used. It is always useful in detecting the proceeds of crime.

It is important for the Financial Investigator to know and constantly remind him/herself of the purpose of a specific investigation into proceeds of crime(s). Key motivations for the investigation are:

- To identify the assets of an individual/entity;
- To identify the legal ownership of an asset;
- To identify the beneficial owner of an asset, assuming that he/she/it is separate from the legal owner;
- To establish the link between an asset and an individual or entity;
- To establish the value of an asset;
- To determine a direct and/or indirect connection between the asset, the owner and the criminal offence;
- To identify possible criminal offence(s) related to the finances of the suspect or entity;
- To differentiate between the assets, liabilities, income and expenses of an individual in order to discover if there is hidden income which justifies further and more detailed financial investigation

The financial investigation team can get a lot of important data from the financial sector. In some instances, the data can only be acquired with a court order, so in essence the acquisition is a coercive measure.

## Production orders of banking records

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"><li>• An order from a court to a financial institution (or any other person/entity) to provide the data required by the law enforcement agencies. This can be copies of banking records but can also be information clarifying who is the account holder of a particular account of what accounts does a particular individual or corporation hold.</li></ul>	<ul style="list-style-type: none"><li>• This activity forms the basis of most financial investigations. Access to the banking records or other account related data of an individual or entity will assist in the identification of assets, associates, travel history, concealed income and lifestyle patterns.</li></ul>	<ul style="list-style-type: none"><li>• Asset Recovery Directorate under the AGO supported by the Federal Police Commission and the FIC</li></ul>

Production orders are often essential in combatting crime. They are required in order to force the holder of documents to hand them over to law enforcement agencies, whether it is the police, the Revenue and Customs Authority or the Asset Recovery Directorate. In most cases, production orders are obtained without giving notice to the holder of the information or the subject of the investigation. The hearing before a judicial officer is one-sided (*ex parte*) in order to avoid tipping off the suspects. It will be necessary to secure a production order where the evidence is not voluntarily surrendered, often because the bank or other organisations holding it (such as a legal professional or accountant) considers themselves to be under a professional duty not to disclose any client material without a court order.

### **Case study 5: Centralized registration of ownership of valuable assets – production orders directed at banks**

This case demonstrates the importance of having centralized registries of the beneficial ownership of valuable assets such as real estate, motor vehicles, boats etc. These registries are essential in conducting parallel financial investigation and tracing of assets. The case also demonstrates the importance of having access to bank account data.

In France petitions alleging the possession in France of the proceeds of crime by politically exposed persons resulted in a November 2010 decision by the French Court of Cassation that non-governmental organizations were entitled to participate as civil parties in an inquiry to be conducted by an examining magistrate. The case involved three heads of state and their families, who were alleged to have spent large sums of money in acquiring assets, including multiple properties and automobiles. Now-deceased President Omar Bongo of Gabon was the object of a complaint in France by NGOs alleging that he and his relatives, including his son who has

succeeded to the presidency, used proceeds of corruption to acquire thirty-nine real-estate properties, primarily in Paris and on the Riviera. In addition, there are seventy identified bank accounts, eleven of which are registered in name of Omar Bongo, and a fleet of nine automobiles with a value of 1.5 million Euros. President Sassou Nguesso of the Republic of Congo (Brazzaville) and relatives were alleged to be in unlawful possession of extensive assets, including 24 real estate properties, one hundred and twelve bank accounts and a fleet of automobiles including at least one vehicle estimated to be worth 172,321 Euros. President Teodoro Obiang of Equatorial Guinea and his son were also alleged in the private party criminal complaint to be in possession of unlawful proceeds, resulting in the February 2012 seizure of 11 luxury vehicles as possible proceeds of crime.

See <https://www.transparency.org/en/news/the-legal-right-to-fight-corruption-in-france>

### *Account monitoring*

Account monitoring is done in order to find evidence of ML/TF or to trace proceeds of crime with the authorization of the court, and is generally considered to be one of a number of special investigation techniques, most of which are discussed in section 3.5 below.

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>On-going monitoring of financial transactions of suspected individuals or corporates. The power given to the investigative authority to monitor bank accounts follow from Art 25 (1) (a) of AML/CFT Proclamation 780/2013. Another provision provides the FIC with the power to obtain from anyone subject to the reporting obligation of proclamation 780/2013 any additional information it deems useful for the accomplishment of its functions.</li> </ul>	<ul style="list-style-type: none"> <li>Monitoring of suspects' bank accounts and transactions is effectively financial surveillance, which will identify daily financial activities and can be used to identify 'trigger' activities such as significant deposits, withdrawals of transfers which can provide a lead for gathering evidence, identification of assets or more overt action.</li> </ul>	<ul style="list-style-type: none"> <li>Law enforcement to take the lead, i.e. Federal Police Commission of Ethiopia. Account monitoring requires a court order, so the Attorney General's Office needs to be involved. FIC can assist in formulating the requirements</li> </ul>

### *International credit/debit card providers*

What is it?	How can it assist asset recovery?	Responsible agency?
<p>International credit/debit card providers have international networks to facilitate the use of their customers cards across the world.</p>	<p>International card providers enable surveillance across the network in their jurisdictions. Known cards can be monitored and transactions identified even when the card holders account is in another country and details of the account holder are unknown.</p>	<p>The Federal Police Commission as part of the financial investigation team. The FIC can assist and will in any case benefit from the data as a member of the financial investigation team.</p>

### Money Transfer Companies

What is it?	How can it assist asset recovery?	Responsible agency?
<p>Money transfer companies provide both individuals and legal entities with alternative methods for sending funds on a national, regional and/or international level in a variety of currencies. Whereas Western Union and MoneyGram are the most commonly known companies, with the advent of financial technology (“FinTech”) there are now a host of companies that provide services.</p> <p>M-birr is a mobile money transfer service operated by several Ethiopian financial service companies</p>	<p>At it’s simplest the database allows transactions related to suspected individuals to be identified. But this can be taken further, for example by identifying other transactions to the same recipient, building up a more comprehensive picture and potentially identifying wider criminal networks. Further, if the transaction involved an on-line element, IP address data can provide an additional layer.</p>	<p>The Federal Police Commission as part of the financial investigation team. The FIC can assist and will in any case benefit from the data as a member if the financial investigation team.</p>

### 3.5. Special Investigation Techniques (SITs)

Through the use of SITs, financial investigators can identify and collect important intelligence and even evidence, depending on the circumstances. Below are examples.

SITs are an important investigation tool. At the same time, they may violate the rights of the targeted individuals or legal entities, for instance the right to privacy, freedom of expression,

right to acquire and hold property etc. The invasion of rights needs to be justifiable in terms of the law.

It is important for investigators and judges who may authorise SITs to keep a detailed record of the technique deployed, the Human Rights considerations involved, and the reasons for deploying SITs, as well as the particular technique(s) deployed. For example, if interception is to be used then what is the legal justification for it, is it necessary and is it proportionate?

SITs in Ethiopia are deployed only with the approval of a court. Article 25 of the AML/CFT proclamation authorizes the use of SITs. The use of intelligence, surveillance, and undercover operations, such as infiltration by an informant or wiretaps, can produce valuable evidence. However, in case a person is suspected for ML/TF crimes, SITs shall only be used when there are serious indications that such accounts, computer systems, networks and servers, telephone lines or documents are or may be used by persons suspected of participating in money laundering or the financing of terrorism.

### *Interception of communication*

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>•Coercive measure whereby the communication of the subject(s) of the investigation is being intercepted without the subject knowing this. To allow this to happen a court order is required from an Ethiopian court of justice.</li> </ul>	<ul style="list-style-type: none"> <li>•Authorities get insights into communication between the subjects of the investigation and other persons of relevance, e.g. financial sector representatives, travel agencies, persons intended to aid and abet on the disguising of the proceeds of the crime. All this can expose where to find the assets.</li> </ul>	<ul style="list-style-type: none"> <li>•The Asset Recovery Directorate of the AGO is responsible to get the court order. The Ethiopian Federal Police Commission is responsible for carrying out the operation.</li> </ul>

### **Case Study 6: Use of investigation tools subsequent to conviction – interception of communication**

A Scandinavian businessperson was convicted for serious tax (Value Added Tax) fraud and with the conviction the court issued a confiscation order of approx. USD 8 million being the proceeds of the crime. The proceeds were, however, never fully identified, which is why the national Asset Recovery Offices continued tracing the funds. Post-conviction investigation capabilities did not by then include interception of communication but only steps such as production orders in banks. Nonetheless, by establishing a new money laundering offence due to the fact that the businessperson continued transferring funds, the authorities were able to intercept communication and thus identify the proceeds.

### Human Intelligence

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"><li>• A recognized SIT is the recruitment of informant in or around criminal groups. An informant handler with the relevant agency has the contact to the informant and receives information about the criminal group</li><li>• An agent is an intelligence officer or law enforcement officer infiltrating a criminal group</li><li>• The AML/CFT 780/2013 Proclamation provides the legal basis for "undercover operations and controlled deliberies"</li></ul>	<ul style="list-style-type: none"><li>• The use of informants or agents can provide valuable information about money laundering operations related to the assets in question.</li></ul>	<ul style="list-style-type: none"><li>• The Intelligence service and/or the Police</li></ul>

### Covert bag searches at ports

What is it?	How can it assist asset recovery?	Responsible agency?
Covert searches of hold baggage at airports.	Covert searches of hold baggage are normally used to detect the transport of illegal goods but can also be used to gather intelligence on the owners of the bags.	Intelligence or the police to request and the Customs Commission to execute

### Prisoner Intelligence Debriefing

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>• Intelligence only debriefing of convicted prisoners.</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary, intelligence only, debriefing of convicted prisoners to support specific tasked intelligence requirements can provide useful information on criminal methodologies and networks. Whereas prisoners may be unwilling to provide information on key associates or locations, often they can provide valuable background information on the processes behind a given network – for example how salaries function within the group, whether or not there are "liquidity cycles" to the organization's revenue streams, and other important aspects of the illicit network's business model.</li> </ul>	<ul style="list-style-type: none"> <li>• Federal Police Commission supported by the Prison Authorities</li> </ul>

### *Open Source Intelligence (OSINT)*

The search and use of OSINT is not made by a special investigation technique but it may involve deep dive searches that require special skills.

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>• Open Source Intelligence (or OSINT) is information that has been deliberately discovered from the public domain and can be obtained from a wide range of sources, for example the Internet, blogs, wikis, books, journals, maps, social media and broadcast material. Increasingly there is valuable open source information on the "dark web" as well.</li> </ul>	<ul style="list-style-type: none"> <li>• OSINT can identify associates, assets, travel, photographs and a wide variety of information on a suspect. Dark web sources can provide important alias and alternate identification information of suspects.</li> </ul>	<ul style="list-style-type: none"> <li>• In principle any agency, but the Intelligence Service is usually the best trained. The financial investigation team (lead by ARD) should decide the level of searches to be conducted</li> </ul>

*Collection of digital information*

What is it?	How can it assist asset recovery?	Responsible agency?
<ul style="list-style-type: none"> <li>• Digital information (which can become evidence) is not associated only with creating an email or writing a document on a computer. The following activities also create digital information (or leave digital records/traces):               <ul style="list-style-type: none"> <li>• Surfing the internet;</li> <li>• Driving a car equipped with a satellite supported Global Positioning System (GPS),</li> <li>• Paying accounts by debit or credit card or through an internet banking transaction</li> <li>• Using a video camera,</li> <li>• Withdrawing cash from an auto teller machine</li> <li>• Using a copy machine</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• The activities mentioned each create potential digital evidence, and even activities that are perceived as not producing electronic evidence are eventually digitized at some point. The following are therefore common sources of digital information:               <ul style="list-style-type: none"> <li>• Computers,</li> <li>• Mobile telephone devices</li> <li>• Removable media (flash discs) and external data storage devices,</li> <li>• Online banking software,</li> <li>• On line calendar(s),</li> <li>• Electronic-mail,</li> <li>• Telephone records,</li> <li>• Financial or asset records,</li> <li>• Electronic money transfers, accounting or record-keeping software</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Law Enforcement</li> </ul>

**Ethiopian law on the admissibility of digital evidence**

Digital information can be used in criminal investigations and in asset tracing. It has the potential to be used in legal proceedings. Its use requires that it be collected with care and in good time, preserved and analysed for presentation in court cases.

The rules relating to digital evidence are dispersed in different proclamations. The provisions on AML/CFT Law and on Anti-Corruption provide examples. Under Art 52 of Proclamation 780/2013 and under Art 45 and 46 (2) of Proclamation 434/2005 on Revised Anti-Corruption Special Procedure, it is provided that digital evidence may be admissible court. This includes evidence captured by the use of video camera, sound recorder, and similar electronic devices.

## 4. Securing the Assets

### 4.1. Types of Seizure and Restraint Orders

Efforts towards asset confiscation are of little value if, at the end of the day, no asset is available for confiscation. The previous section of this Practice Manual dealt with identifying the assets and all the different types of collection of information to help find the assets. This section is about securing the assets once traced and identified, through measures referred to as provisional measures. They include seizure and restraint of assets.

Seizure involves taking physical possession of the targeted asset. A court order from an Ethiopian court is required to seize an asset.

Restraint orders are a form of mandatory injunction issued by a court that restrains any person from dealing with or disposing of the assets named in the order, pending the determination of confiscation proceedings. Unlike seizure orders, restraint orders do not result in the physical possession of the asset.

Conceptually there are different types of seizures:

- Seizure of direct proceeds
- Seizure of an equivalent value to the direct proceeds
- Seizure of commingled proceeds
- Seizure of criminal proceeds
- Seizure of assets in the possession of third parties
- Seizure to secure assets that may be liable to non-conviction based confiscation
- Seizure of instrumentalities used in committing crime

### 4.2. Legal Basis for seizure and freezing under the AML/CFT Law of Ethiopia

According to article 36 of the AML/CFT Proclamation 780/2013 the court may, either at its own initiatives or at the request of the public prosecutor, issue an order of freezing or seizing, including other appropriate provisional measures, intended to preserve availability of funds or property and instrumentalities that may be subject to confiscation in accordance with Article 35 of the Proclamation.

Article 2(13) of the AML/CFT Proclamation defines asset freezing as “prohibiting the transfer, conversion, disposition or movement of funds or other property on the basis of, and for the duration of the validity of, a decision of the court or by the decision of the court”.

AML/CFT Article 2 (14) defined seizure as “prohibiting the transfer, conversion, disposition or movement of funds or other property on the basis of, and for the duration of the validity of the decision of the court and the administration of such funds or property by a receiver appointed and supervised by the court.”

The AML/CFT proclamation however does not provide when and how to use seizure or freezing and the grounds for accepting the request for seizure or freezing by the court. But, as stipulated under Article 55 of the AML/CFT proclamation, there is a possibility to use anti-corruption laws for the purpose of executing freezing, seizure and confiscation on AML/CFT purposes, the problem may be solved as the Anti-corruption laws has condition to use restraining orders.

### 4.3. Restraining Orders on Proceeds of Corruption

There are special provisions for corruption cases, which follow from the Anti-Corruption Special Procedures and Rules of Evidence Proclamation 434/2005 as amended by Proclamation 882/2015. As per Art 2 (4) of proclamation 434/2005, "restraining order" is an order that prohibits the offender from dealing with certain property and includes the right to transfer, use and destroy the property in any manner. An application for a restraining order may be brought to the court either before or after the criminal charge. In principle, restraining order will be implemented with the order of the court and the request for such order will be granted if the investigator or prosecutor submitted an application for restraining orders with affidavit claiming that the assets are properties acquired by corruption. The contents of an affidavit is provided under Art 11 of proclamation no 434/2005 that includes the facts of the case, the measures that have been taken, status of the case, detail description of the properties and their location, and information which shows that the property against which a restraining order is requested is acquired by the commission of corruption offence or the suspect is unlawfully enriched or damage followed as a result of the commission of corruption offence.

Article 8 of Proclamation 882/2015 provides that: "A court may issue a restraining order against any property acquired by the commission of a corruption offence and fruits thereof. An investigator or a prosecutor, by evidence supported by an affidavit, may apply to the court for a restraining order against any property acquired by the commission of a criminal offence and the fruits thereof." However, if, in a corruption case, the prosecutor (the Attorney General in the current structure) believes that the property to be confiscated might be dissipated while processing the court order, the prosecutor may give 48 hours' notice of the restraining order.

There is also Article 9 of the Anti-Corruption Proclamation, which provides for seizure of the equivalent value of the direct proceeds: "Notwithstanding that there is no evidence that the property is acquired as a result of the corruption offence, where an investigator or prosecutor made an application for a restraining order supported by an affidavit indicating that the suspect is enriched or others suffered damage as a result of the corruption offence being investigated or charged, the court may give a restraining order prohibiting the sale, assignment or transfer of any money or property deposited in any bank in the name of the suspect, his spouse or children (under the age of 18) or any other property of such persons proportionate to the amount of enrichment."

The investigation of assets connected to the suspect requires time and resources. In the process, the suspect might be tipped off about the investigation, and hide the assets and take

other measures to escape confiscation and prosecution. This provision gives a way not to lose the assets under investigation through disposal or transfer in any way. So, the investigator might use this provision to prevent the disposal of assets under investigation.

The simple question to be raised here is what if the suspect keeps his assets in the names of children that are above the age of 18? The provision only allows the restraining of assets in the name of minor children, which leaves the suspect free to assign assets to a child above 18.

The anti-corruption law has exempted certain properties from restraining orders as long as they are necessary to the livelihood of the accused. These might include:

- The necessary apparel, cooking vessels, bed and bedding of the suspect/accused and his family
- The amount of money or property that may suffice to him and his family for their survival for three months
- Instruments that may be used in his profession, art or trade and
- When the restrained asset is the only source of income, the court may allow a certain amount of money necessary for their basic needs.

Due to this exemption, the suspect may continue using the assets in the process of the litigation. However, there is no equivalent provision in the AML/CTF proclamation about properties exempted from restraining orders. But this provisions may be applicable on money laundering or terrorism financing cases as long as it does not contradict with provisions on the AML/CFT proclamation.

#### 4.4. Establishing Enrichment

##### 4.4.1. Cash flow analysis

The obvious source of information on the cash holdings of the suspect is the bank account under his/her control. If the account is held at a domestic financial institution, the records of this account should be requested early in the investigation.

If the salary and other income of the suspect have been deposited into this domestic account, it will be important to perform an analysis to establish how his/her legitimate salary has been spent. A cash flow analysis relating to any cash withdrawals or deposits should be prepared. Once these financial flows have been analysed, it will create a complete picture of the distribution of lawfully earned funds and show how much cash was available for purchases, which may provide significant indicators if there are expenses which are later identified as being settled from unknown or suspect funds. Large cash payments or purchases from unknown sources may be an important piece of evidence.

##### 4.4.2. The 'Source and Application of funds' analysis method

This simple analysis is based on the theory that the suspect currently has or has at some point in time had - more funds than are lawfully available to him/her. The Source and Application of

funds method of proving the amount of illegal income is used when direct evidence is not available and the investigation discloses that the suspect spent or received far more money during a period of time than his or her lawful income.

This period of time can be any amount of time that demonstrates an increase in spending or wealth far above the legal means of the suspect. For example: For the set period 1 January 2017 to 31 December 2017 the suspect expended 2,000,000 Birr. During this period, his known and legal sources of income provided him with 720,000 Birr. On the face of it, the unexplained income that accrued to him was 1,280,000 Birr.

In applying this method, the prosecutor or investigator should settle on a starting point, from which to determine how much cash the suspect had at the beginning of the investigated period. The investigator will thereafter track the income of the suspect through financial statements, taking account of any loan applications, financing arrangements, economic disclosures statements, and admissions made to investigators.

The suspect's expenditures for the given period should be calculated - the investigator or prosecutor should look for cash purchases made from the suspect's bank accounts, cheques written, rental payments, debit orders etc. If the ultimate expenditure bill exceeds his established income for the investigated period of time and the available cash at the beginning of that period, the excess represents the amount of unreported unlawfully-obtained income that constitutes the basis of the investigated corruption.

The cash expenditures that exceed the legitimate sources of cash for the investigated period, potentially represent the cash bribes, payoffs, or otherwise illegally obtained funds resulting from the suspect's corrupt conduct.

#### **Case study 7: Establishing illicit accrual of assets**

Jacob Selebi, who was the head of the South Africa Police Service (SAPS), was accused of having links to organised crime and of taking ZAR1,200,000 (USD 83,000) in bribes to 'turn a blind eye to' (in other words, to assist in concealing) drug trafficking. He was convicted of corruption but cleared of defeating the ends of justice.

The indictment alleged that at the relevant time there existed a corrupt relationship between Selebi (also referred to as the appellant) and one Glenn Agliotti, a drug trafficking kingpin. In terms of this relationship Selebi received from Agliotti sums of money and clothing for himself and, on one occasion, for his sons. It was further alleged that the appellant received the aforementioned payment (gratification) in order to act in a manner prescribed in s 4(1)(a)(i)-(iv) of the Prevention and Combating of Corrupt Activities (PCCA) Act and the appellant did so act, by way of quid pro quo.

It was alleged that the appellant:

- a) shared secret information with Agliotti regarding an investigation against him conducted by the United Kingdom law enforcement authorities;
- b) protected Agliotti from criminal investigation;

- c) shared with Agliotti information about SAPS investigations;
- d) shared secret and/or confidential information with him;
- e) agreed to and/or attempted to influence the investigative and/or prosecutorial process against one Muller Conrad Rautenbach; and
- f) assisted Agliotti and/or Agliotti's associates to receive preferential or special SAPS services.

Selebi pleaded not guilty to the charges. In his plea explanation, he alleged that the prosecution against him was not bona fide but was instituted with an ulterior motive. He said that the case against him was manipulated with the mala fide intention to discredit him so as to ensure the continued existence of the Directorate of Special Operations (DSO). The DSO was at the time under threat of closure and placement within the SAPS. The appellant denied that he had received any payments or gifts from Agliotti, either for himself or for any other person. He maintained that he and Agliotti were friends, and nothing more.

Ultimately, the key witnesses for the State on the question of payments and gifts to the appellant were Agliotti and one Dianne Muller. Agliotti's evidence was accepted only where it was corroborated in material respects by Muller and other independent evidence. The court had no hesitation in accepting the evidence of Muller whom it found to be a satisfactory witness.

It is convenient to commence the discussion of the question of payments by reference to an investigation by KPMG into the source of the funds from which Agliotti allegedly made payments to the appellant. The prosecution highlighted how funds were channelled from Johannesburg Consolidated Investments Limited (JCI) to Spring Lights 6 (Pty) Ltd (Spring Lights). Agliotti paid the appellant from the funds withdrawn from the Spring Lights account.

The trial judge described this aspect of the enquiry as follows:

In June 2006 JCI and Rand Gold and Exploration Company Limited reported certain suspected offences to the DSO. KPMG was then appointed by the DSO to assist them in an investigation which was called 'Empire K'. The Empire K investigation in turn led to a further investigation by KPMG which related to the appellant.

The results of the KPMG investigation were compiled in a report entitled 'Report on factual findings' dated 19 March 2009. The judge went on to describe how the paper trail led to the appellant. The portion of the report pertaining to him reflects the total income and expenditure as reflected in the appellant's bank account for the period 13 January 2003 to 4 January 2007.

According to forensic accountant Friedman (of KPMG), and as it appeared from that report, the income in the appellant's bank account exceeded the expenditure by R152 970.45. An amount of R400 000 which was reflected as an item of expenditure was utilised by the appellant to acquire a unit trust investment for his own benefit. Accordingly, at the end of that period the appellant was better off than at the commencement thereof by the value of the unit trust investment and the surplus of R152 970.45 received in his bank account during the relevant period (13 January 2003 to 4 January 2007). The investigation involved an examination of alleged payments to the appellant from cash drawn from the Spring Lights account, details of the transactions in the

appellant's bank account, details in the appellant's two credit card accounts and the appellant's and his wife's foreign exchange transactions and the source of information in respect of the latter. The forensic investigation also involved a monthly comparison, for the period February 2003 to December 2006, of receipts and expenditure from the appellant's bank account and credit cards.

The investigation then proceeded to focus on the period March 2004 to December 2005 with regard to cheque payments made from the appellant's bank account, cheques cashed on that account, cash withdrawals and the appellant's credit card expenditure. It revealed the following: (a) there were no cash withdrawals in January, February, March, June, July, October, November and December 2005 from the appellant's bank account; (b) no cheques were cashed on the account in April, May, July, October and November 2004 and from January 2005 to December 2005; (c) in January, February and October 2005 no cheque payments were made from that account; (d) there was a significant reduction in credit card expenditure in the months from January to April 2005 and July 2005. For example credit card expenditure was only R465.35 in January 2005 and R188.12 in February 2005; (e) for the ten-month period March to December 2004, the total of cash withdrawals from and cheques cashed on the account amounted to R126 048. For the 12-month period from January to December 2005 the total of cash withdrawals and cheques cashed amounted to only R358; and (f) the total expenditure from the appellant's bank account for the period March to December 2004 amounted to R430 899.90. It only amounted to R231 028.67 for the period January to December 2005. According to Friedman the pattern of reduced expenditure continued into 2006 and only started picking up during July 2006.

The trial judge then dealt with the evidence of Friedman who identified seven such cheques that corresponded to the allegations made by Agliotti in his draft affidavit. These are: (a) a cheque for R10 000 dated 14 June 2004 bearing the annotation 'JSGA'; (b) a cheque for R10 000 dated 8 November 2004 bearing the annotation 'COP'; (c) a cheque for R5 000 dated 18 November 2004 bearing the annotation 'COP'; (d) a cheque for R200 000 dated 13 December 2004; (e) a cheque for R100 000 dated 20 December 2004 bearing the annotation 'COP'; (f) a cheque for R55 000 dated 12 April 2005 bearing the annotation 'Gr Chief'; and (g) a cheque for R30 000 dated 28 September 2005 bearing the annotation 'Chief'. These cheques amount to R410 000 and were cashed between 14 June 2004 and 28 September 2005. They were set out in a schedule presented to the court.

Delivering the verdict, Judge Meyer Joffe said Selebi gave evidence that showed "complete contempt for the truth". The man once responsible for combating crime in South Africa was described by the court as "a liar, (and) a person of low moral fibre". Selebi was sentenced to 15 years imprisonment.

#### 4.5. Blocking of Transactions by Reporting Entities

In order to prevent the transfer of suspected criminal proceeds from institutions that are subject to reporting obligations under Proclamation AML/CFT 780/2013 (Article 19 of Proclamation AML/CFT 780/2013) obliges reporting entities to block any potentially suspicious transactions:

“Financial institutions and designated non-financial businesses and professions shall refrain from carrying out transactions which they suspect to be related to money laundering or financing of terrorism until they have reported their suspicion to the Center” and “Where refraining from carrying out transactions in accordance with sub-article (1) of this Article is impossible or is likely to frustrate the efforts to investigate suspected transactions, the financial institutions and designated non-financial businesses and professions shall execute the transactions and report their suspicions to the Center immediately afterwards.”

Article 20 of the proclamation prohibits the tipping off of the person whose transaction has either been blocked, or reported to the FIC. The Bank is expected to hold the transaction and refer such information to the FIC without informing the customer of the reference to the FIC. The customer may ask for an explanation why his transaction is delayed, which places the bank in a difficult position.

#### 4.6. Timing of Provisional Measures

Proper timing of provisional measures is one of the most challenging parts of asset confiscation work. If they are imposed too early, a target may be tipped off and cease activities (thereby making it difficult to gather evidence and identify other accounts, targets, or the typologies used). However, if the measures are imposed after a target is aware of the investigation, the likely result is that assets will be dissipated or hidden. As a result, practitioners investigating offenses must coordinate with practitioners seeking recovery of the assets, ideally through a joint investigation team. They must be attentive to the risk that a target may become aware of the investigation, and they should remain sufficiently agile to obtain provisional measures when needed. A target may be tipped off at any of the following stages:

- When certain investigative techniques are used in the course of an investigation; techniques such as search of residences or businesses, interviewing witnesses, production orders, or issuance of a MLA request. It will be important to ensure that assets are secured before (or simultaneously with) the use of these techniques.
- At the time a target is charged with a criminal offence.
- At the time an application for confiscation is made.

#### 4.7. Actions on Provisional Measures to be Taken by the Financial Investigation Team

When a cross-agency financial investigation team has been assembled to carry out a complex asset recovery investigation the following actions/considerations should be taken in relation to seizure/restraint:



### 5. Confiscation

Confiscation of assets or property is the permanent deprivation of property by order of a court which transfers the ownership of the assets to the State. The large revenues generated from economic and organized crimes can adversely affect the legitimate economy and in particular the banking system through untaxed profits and illicitly funded investments. Furthermore, even after having invested in the legal economy, organized criminal groups often continue to use illicit tools and methods to advance their business, potentially pushing other businesses out of the market.

Some criminals might be committed to take the risk and serve time in prison, if they know their assets will be available upon release, or that their families will continue to enjoy the proceeds of

crime. This is why confiscation of assets is such an important measure to prevent and combat organized crime. It is also an equally important tool to prevent the infiltration of the legal economy by organized crime.

## 5.1. Types of Confiscation

An asset confiscation system is a prerequisite to be able to deprive the offenders of the gains of their criminal activities.

Like the case with seizure also for confiscation conceptually there are different types:

- Conviction based confiscation (based on the conviction decision by the court)
- Non-conviction based confiscation (applicable without criminal conviction)

Conviction based confiscation is a common approach to asset confiscation in which investigators gather evidence, trace and secure assets, conduct a prosecution, and obtain a conviction. Upon conviction, confiscation can be ordered by the court.

A non-conviction-based confiscation does not rely on any criminal proceeding and conviction of the property holder/owner is not relevant. Non-conviction based confiscation will be used in certain circumstances prescribed by the law and when conviction based confiscation cannot be used for specified reasons.

Both kinds of confiscation share the same objective, namely the confiscation by the state of the proceeds and instrumentalities of crime. Both share common, two-fold rationales. First, those who commit unlawful activity should not be allowed to profit from their crimes. Proceeds should be confiscated and used to compensate the victim, whether it is the state or an individual. Second, unlawful activity should be deterred. Removing the economic gain from crime discourages the criminal conduct in the first instance.

In the process for either conviction based or non-conviction based confiscation, confiscation order may include the following properties:

- Confiscation of direct proceeds
- Confiscation of an equivalent value to the direct proceeds
- Confiscation of commingled or exchanged proceeds
- Confiscation of the criminal proceeds
- Confiscation of assets in the possession of third parties
- Confiscation of instrumentalities

## 5.2. Legal Basis for Confiscation in Ethiopia

The legal bases for confiscation in Ethiopia are not consolidated in a single legislation. It is possible to use the criminal code, the AML/CFT proclamation, the Anti-Corruption proclamation, Anti-terrorism Proclamation and other laws. For the purpose of this manual, the AML/CFT and the Anti-corruption proclamation are discussed.

### **Conviction based Confiscation under AML/CFT Proclamation**

Article 35 (1) of Proclamation AML/CFT 780/2013 states: “In the event of a conviction for money laundering or a predicate offence, or financing of terrorism, an order shall be issued by the court for the confiscation of:

- funds or property constituting the proceeds of crime, including property intermingled with or exchanged for such proceeds,
- funds or property constituting income and other benefits obtained from the proceeds of crime,
- the instrumentalities,
- funds or property referred to in paragraphs (a) to (c) of this sub-article that has been transferred to any party, unless the court finds that the owner of such property acquired them by paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds, and that he was unaware of its illicit origin; or
- property of the perpetrator of the offence the value of which corresponds to that of the proceeds of crime.”

From the provision stated above, it can be said that property subject to confiscation may be recovered on property-based or value-based confiscation principle.

1. Property - based confiscation: (also referred to as tainted property confiscation system) includes the confiscation of proceeds of crime, intermingled or exchanged assets with the proceeds and income or profit obtained from the proceeds as well as instrumentalities of crime. This confiscation presupposes a link between the identified asset and an offence and thus the court may order confiscation automatically with no need of assessing their value. Whatever the case, what constitutes proceeds or/and instrumentalities of a crime is left to be identified further by the investigator/public prosecutor through investigation. Further profits obtained from the direct proceeds of the crime and exchanged assets with the proceeds of the crime are considered as properties indirectly obtained from the crime and hence they are subject to confiscation. Intermingled assets are also subject to confiscation as long as the prosecutor proves that their legal asset is intermingled with the proceeds of the crime that the suspect is convicted. The concept of confiscating intermingled assets is complex debate. The apportionment of relative value between the legally acquired asset and the proceeds of the crime can be difficult. It is conceivable that, in some instances, the value of the lawfully held assets is greater than that of the proceeds of crime.. However, the idea behind confiscation of intermingled assets is to increase the deterrent effect of confiscation. To elaborate this with an example, if someone has received 2 million Birr through bribery, to which he added 1 million Birr of legitimate income, and used the money to buy a bus for 3 million birr, the bus may be confiscated as part of a deterrent penalty for corruption. This is because this kind of confiscation includes direct proceeds of crime, any assets that they may have been intermingled with, and profits derived from use of the proceeds of crime. In other words, the illegal income is regarded as having tainted the acquisition of the bus.

2. Value-based confiscation: this kind of confiscation is used when it is not possible to find the direct proceeds and the incomes made from the crime. This might be because the proceeds of the crime have been moved outside the country or hidden in different ways beyond the reach of law enforcement. Value confiscation is intended to prevent criminals from escaping confiscation by reason of the proceeds of the crime being for some reason inaccessible.. Value confiscation presupposes no connection between the offence and the property to be confiscated. In this category, property with equivalent value to the benefit gained or/and damages caused, but which was not derived from the crime may be subject to confiscation. The property may need to be quantified or its value assessed before the application for forfeiture is submitted by the public prosecutor. The effect of the confiscation order by the court is to render the respondent a judgment debtor to the value of the order.
3. As a general practice, in considering applying for confiscation, prosecutors should first consider property-based confiscation before considering value-based confiscation.

#### **Extended conviction-based confiscation in AML/CFT Law**

As per Article 35 (2) of the AML/CFT proclamation, the law provides for an extended confiscation based on conviction. The public prosecutor may request for the confiscation of assets directly or indirectly owned by the convicted person prior to five years of being charged with the offence on money laundering, terrorism financing or predicate offences.

In this case the court will give the order of confiscation if there are reasonable grounds to believe that such assets are the results of the offence of which the accused is convicted and unless the convicted person can prove that such assets are obtained legally. In this case, the prosecutor is expected to adduce a reasonable ground to show that the assets are the result of those crimes and hence technically speaking the burden of proof shifts to the accused. If the accused shows that the assets have been his belongings for more than five years, or if he can produce any other evidence that can disprove those reasonable suspicions of the prosecutor, it will save his asset from confiscation. This means an asset for more than five years would remain with the defendant as long as the public prosecutor cannot prove that these are proceeds of crime with sufficient evidence.

#### **5.3. Confiscation of Proceeds of Corruption**

As is the case with seizure, there are special confiscation provisions to be applied in corruption cases. The legal basis is the Anti-Corruption Proclamation no 434/2005 as amended by proclamation no 882/2015. Article 29 of the Proclamation provides: "Where the accused is found guilty of a corruption offence, the Court shall give a confiscation order on: a) property obtained from corruption offences or fruits thereof or any property proportionate to the benefits obtained therefrom, b) property of the accused proportional to the benefit procured by another person or damage caused by corruption offences on private, public or State interest or advantage of public organization even where the accused has not obtained benefits for himself from such offence."

### **Confiscation – Repatriation of funds**

There is a growing list of examples of proceeds of corruption or other economic crimes committed in African countries being recovered and returned to the victim jurisdictions. Nigerian cases involving former leaders are the most frequently cited, but there are other cases from elsewhere.

As the Abacha stolen funds case shows, one of the main challenges is that, if institutions of asset management and accountability in the use of public resources in the victim country are either non-existent or not working well, what mechanisms should be used to ensure that the repatriated assets money are not stolen again, and that they actually benefit the public, or sections of it, being the real victims of corruption.

Asset management is only briefly discussed in this manual.

### **Case Study 8: Confiscation – Repatriation of funds**

This case concerns confiscation of funds equivalent to funds used to pay bribes in several countries. The amount was subsequently repatriated to the countries where the bribes were paid.

At least three other cases of orders to make reparation or restitution payments have been reported in the United Kingdom. Steel and bridge construction firm Mabey and Johnson disclosed to the U.K. Serious Fraud Office that it had paid bribes in several countries. In addition to criminal sentences of executives and fines and costs of investigation, the firm was ordered to make reparations of approximately 658,000 pounds to Ghana, 618,000 pounds to Iraq and 139,000 pounds to Jamaica, together with confiscation of 1.1 million pounds.

Ananias Tumukunde, Science and Technology Advisor to the President of Uganda, pleaded guilty in the United Kingdom to laundering the proceeds of a corrupt arrangement with a provider of security services and equipment. For a contract worth 210,000 pounds, Tumukunde and a military associate received 83,000 pounds through accounts in London. In connection with his guilty plea 35 thousand pounds (or 117 million Ugandan shillings) were subsequently returned to Uganda by the United Kingdom.

## **5.4. Non-conviction Based (NCB) Confiscation**

NCB confiscation is useful in various contexts, particularly when criminal confiscation is not possible or available as in the following examples:

- The offender is a fugitive. A criminal conviction is not possible if the accused is a fugitive.
- The offender is dead or dies before conviction. Death brings an end to criminal proceedings.
- The offender is immune from criminal prosecution.
- The offender is so powerful that a criminal investigation or prosecution is unrealistic or impossible.
- The offender is unknown and assets are found (for example, assets found in the hands of a courier who is not involved in the commission of the criminal offense). If the asset is derived

from crime, an owner or offender may be unwilling to defend civil recovery proceedings for fear that this would lead to a criminal prosecution. This uncertainty makes a criminal prosecution of an offender very difficult, if not impossible. The relevant property is held by a third party who has not been charged with criminal offense but is aware of, or is willfully blind to, the fact that the property is tainted. While criminal confiscation may not reach the property held by bona fide third parties, NCB asset confiscation can forfeit the property from a third party without a bona fide defense.

- There is insufficient evidence to proceed with criminal prosecution.

When this is seen from the Ethiopian perspective, the AML/CFT Proclamation no 780/2013 sets out the forms of non-conviction based confiscation. Art 35 (3) states:

“If, in case where an offence involving money laundering or a predicate offence, or financing of terrorism, is established by the court and the perpetrator thereof cannot be convicted because he is unknown, he absconded or died, the court may nevertheless order the confiscation of the seized funds or property if sufficient evidence is adduced that it constitutes proceeds of crime or instrumentalities.”

From this provision, the AML/CFT law of Ethiopia has accepted three reasons for non-conviction based confiscation i.e. when the accused dies, absconds or is unknown. However, except for this single provision, the law does not stipulate the standard of proof or the procedure to be followed in NCB confiscation.

For corruption cases the Anti-Corruption Proclamation 882/2015 does not have a clear provision related to non-conviction based confiscation. Rather, it allows resort to civil action. There is a basic difference between non conviction based confiscation and civil action. Generally in non-conviction based confiscation, the criminal conduct must be established on a balance of probabilities. This lowers the standard of proof required of the public prosecutor and that means it may be possible to obtain confiscation when there is insufficient evidence to support a criminal conviction. But in a civil action, you don't have to prove the criminal element; rather you are expected to show that the other person has caused damage that emanates from your contractual relationship. In case of an employee, this may be established from his duty imposed on his contract of employment.

For corruption cases, the 882/2015 Anti-Corruption Proclamation under Art 32 provides about recovery of proceeds by civil action. The provision states:

“Recovery of Property by Civil Action: The appropriate organ may institute civil action for purposes of confiscation of property obtained through corruption offences, or fruits thereof, or property proportionate therewith, or property proportionate to the damage caused thereby even where the criminal proceedings were terminated or no conviction was obtained for any reason. The appropriate organ may institute a civil action for purposes of payment of compensation proportional to property obtained as a result of corruption offences, or fruits

thereof, or property proportionate therewith, or property proportionate to the damage caused thereby.”

It is debatable whether this provision accepts non-conviction based confiscation. Rather it allows the public prosecutor to open a civil action on behalf of the person who suffered damage due to the act of the accused though the suspect is not convicted. It is possible to bring civil action when the criminal proceeding is terminated or no conviction is obtained for any reason. This is not actually a characteristic of non-conviction based confiscation. Non conviction based confiscation should be applied in strict terms and cases will be initiated on specifically explained grounds in case conviction base confiscation is failed. So it can be said that Article 32 of 882/2015 is referring about the regular civil action This argument may be further strengthened with the support of Art 32 (3) of the same. This provision allows the public prosecutor to delegate its civil action power to the government office, public enterprise or to the individual who lost their property to proceed with the asset recovery case by their own. In this case, these delegated persons cannot process criminal action and they are not expected to establish a criminal conduct unlike the case of non-conviction based confiscation and this will be purely a civil action.

Non conviction based confiscation is a new concept to the country and the law and practice is not well developed. The AML Proclamation at least includes three reasons to proceed for non-conviction based confiscation. However, similar provision is not available in other laws. The AML as well as the Anti-corruption Proclamation lacks details about confiscation. The requirements on standard of proof, the kind of property subject to confiscation in case of NCBC, the kind of procedure to be followed in NCBC and other basic details are remaining which makes its application confusing and difficult. The laws are even contradictory to one another. In terms of Article 34 (3) of the anti-corruption proclamation no 882/2015, when the property to be confiscated is merged with legal property, the property will be sold on auction and the amount will be handed over to the government. In this case, the extra amount from the sale will be given back to the accused. However, in the case of anti-money laundering law, if the asset is intermingled with the illegal asset, it will be confiscated in total. This discrepancy may leave criminals to be treated in different hands with in the same legal system.

Another important point and a practical challenge in the current system is the fate of confiscation issue in case the criminal matter is closed by pardon or amnesty. In such circumstances, even if the suspect is not convicted for the crime, the law should ensure that the accused didn't get a benefit from ones criminal activity. The AML/CFT law and other crimes has no mechanism to proceed for the property but Art 32 of the Anti-corruption Proclamation No 882/2015 may help to proceed for the asset on civil action based on civil liability of the accused as long as it is possible to show sufficient cause and vested interest of the prosecutor of the delegated organ by the prosecutor for the civil action.

#### **Case Studies 9 & 10: Non-conviction based confiscation**

**Case 9:** An example of non-conviction based confiscation involved the proceeds of bribery from Italian nationals Rovelli and Munari. Rovelli, who owned a chemical company in Italy, had sued an Italian bank for breach of an investment undertaking. In order to influence the outcome of the case, Rovelli bribed a judge. The result was that the company was awarded nearly \$400 million. With the assistance of Munari, their financial advisor, the heirs of Rovelli, who died before the conclusion of the case, invested the proceeds in various shell companies. When the corruption came to light, the Italian authorities requested mutual legal assistance from the US authorities, to trace the funds in four investment and bank accounts, confiscate them in the United States, and repatriate them to Italy. The funds were confiscated in a non-conviction process and subsequently returned to Italy for the benefit of the bank.

**Case 10:** In 2006 Belachew Reda sent 1 million birr in five transactions from Jijiga through United Bank using the names of different persons to Beyan Naser. The intended recipient of the transfer was in fact Seifedin Abdulshekur. Beyan withdrew the money and passed it on to Seifedin Abdulshekur. Seifedin claimed that this was because he had lost his Identity card. After receiving the money, Seifedin exchanged it for US dollars from the black market around the Gandi Hospital near the Stadium.

Seifedin bought 45,000 USD. Afterwards, he received a telephone call from a person called Desalegn, who instructed him to hand the dollars to one Mebratu whose phone numbers were given to Seifedin. Seifedin complied.

In addition, 900,000 birr was transferred to Addis Ababa from Jijiga in the name of Beyan Naser, but intended for Seifedin. Beyan withdrew the money. Soon after withdrawing it, both Beyan and Seifedin got arrested by the police, and the money was retained as an exhibit.

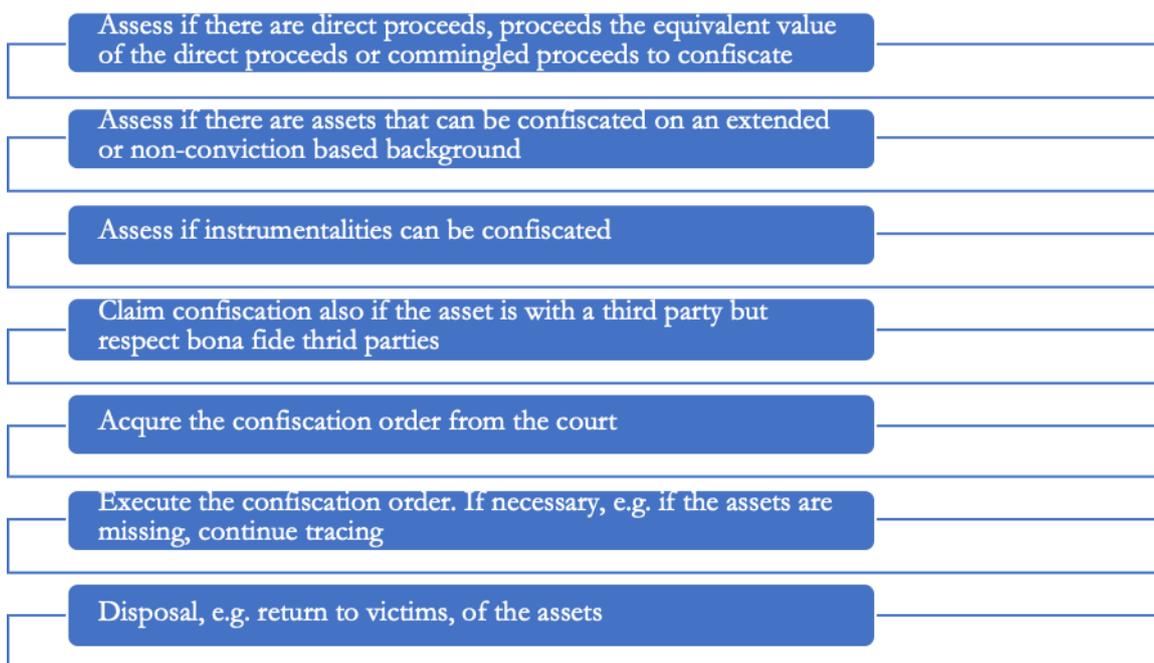
The accused Seifedin having been released on bail, he failed to appear in court and the file was closed.

In terms of Article 35 (3) of the AML/CFT proclamation, if the accused person has absconded before trial, the prosecutor can proceed with an application for confiscation of the 900,000 birr.

## 5.5. Execution of Confiscation Orders

If the evidence of a particular crime generating a certain amount of proceeds is sufficiently clear and the perpetrator has been convicted for the material crime, it is possible to get a confiscation order, even if the proceeds of the crime – or assets with a value equivalent to the direct proceeds – are not found. The perpetrator may have managed to hide the proceeds. In such a case the investigation team is allowed to continue trying to trace the assets, even after the conviction. The same type of investigative steps, e.g. interception of communication, can be used.

## 5.6. Actions to be Taken Regarding Confiscation



## 5.7. Question of Jurisdiction and Application for Confiscation

Jurisdiction (judicial, material, and local) of courts over criminal cases is generally governed by the criminal code and criminal procedure code of Ethiopia. Exceptionally, some proclamations which criminalize certain acts also determine jurisdiction. For instance, both corruption and money laundering crimes will be triable in the first instance by the high court.

Conviction based confiscation orders, normally, falls within the jurisdiction of the court which exercised trial jurisdiction over the criminal proceedings. Thus, the public prosecutor should file the application for confiscation to the court which convicted the accused.

However, when the application is of “a non-conviction based” nature, there is uncertainty as to where jurisdiction vests. As there have been no cases of non-conviction based confiscation, it is difficult to say with any certainty which court has competence or jurisdiction to hear the matter.

Jurisdictional issues may be material or local. Regarding material jurisdiction, the court which would have material jurisdiction over the criminal proceedings has a jurisdiction to decide on non-conviction based confiscation. Thereafter, the public prosecutor needs to identify the court with “local jurisdiction” over the matter.

Regarding application for confiscation, in some instances, confiscation orders may be given on the initiative of the court after conviction. There is no mandatory confiscation application under Ethiopian law. If the court does not order confiscation, it will be the responsibility of the prosecutor to apply for confiscation. The application is expected to contain the elements below. Contents of the application inevitably vary depending on the type of the confiscation.

In conviction based confiscation, the application incorporates the following elements:

- Name of the court
- Name and address of the applicant and the respondent

- Title of the application with legal provisions that the application relies on.
- The crime of which the respondent has been found guilty
- Benefits gained and/or damages which resulted from the crime and/or instrumentalities of crime
- List of the properties subject to confiscation including proceeds of the crime, proceeds of the proceeds, intermingled/exchanged assets, or corresponding value from the legal assets of the accused or if there is no property proposed for confiscation, the amount in terms of money to which the respondent will be a judgment debtor.
- The evidence

In non-conviction based confiscation, the content of the application may contain:

- Name of the court
- Name and address of the applicant and respondent
- Title of the application with the legal provisions that the application relies on
- The crime which is suspected to have been committed
- Participation of the respondent and benefits gained and/or damages caused by the crime and/or instrumentalities of crime, if the application is in *personam* or connection between the alleged property and the crime if the action is *in-rem*
- List of properties subject to confiscation or if there is no property proposed for confiscation, the amount in terms of money to which the respondent will be a judgment debtor
- The evidence

## 6. International Cooperation for Stolen Asset Recovery

Asset recovery beyond domestic borders generally introduces complexity, mainly because it involves requests for mutual legal assistance. Illicit funds can be moved abroad quickly, often with the click of a button in a transaction conducted on a laptop or a mobile telephone. Tracking and recovery of the transferred funds by law enforcement officials and prosecutors can take months or years. The success of tracking and recovery efforts often depends on assistance from foreign jurisdictions, a process that is slow and complicated by differences in the content of laws, legal traditions, procedures, language, time zones and capacity.

The Global Financial Integrity has estimated that Ethiopia has lost US\$16.5 billion between 1970 and 2008. Since 2010, between US\$ 10 billion and US\$ 26.5 billion has been lost due to illicit financial flows. International cooperation is therefore essential for the successful recovery of assets located abroad and practitioners could benefit from international cooperation efforts during each phase of a case.

The figure below highlights the elements of international cooperation.



## 6.1. Key principles

### 6.1.1. International cooperation should be incorporated into each phase of the case

When the case has a cross-border reach, practitioners should focus on international cooperation efforts immediately, and retain that focus until the conclusion of the case. This includes an understanding of the foreign legal system and identification of the potential challenges in obtaining information and formulating a comprehensive strategy.

### 6.1.2. Personal connections should be established and maintained

Forming personal connection with foreign counterparts contributes to successful cross-border asset recovery. In transnational crime cases an early face-to-face meeting or contact among practitioners in various jurisdictions (who will be involved in the investigation) may assist to build trust, assess strategies, and learn about requirements for submitting MLA requests. It certainly facilitates the exchange of information.

### **Case Study 11: Connecting with people**

In September 2000, televised videos showed Vladimiro Montesinos, chief of Peru's intelligence service under President Alberto Fujimori, bribing an elected congressman. Switzerland subsequently used a spontaneous disclosure to alert Peru to the presence of frozen funds in Switzerland, and invited Peru to file an MLA request. The Peruvian prosecutor personally contacted the Swiss investigating magistrate conducting the case — both by phone and eventually in person in Zurich. Making the personal connection resulted in the following important outcomes:

**Enabled key strategic decisions.** Through discussions of the options for asset recovery, Peru ultimately decided to pursue the case domestically, and to use MLA and legislative waivers to recover the frozen funds in Switzerland.

**Clarified requirements for MLA requests.** Contact gave the Peruvians a better understanding of the Swiss system and an idea of what they needed to prove and provide to be successful in a request to Switzerland.

**Developed trust.** Personal contacts demonstrated the political will and commitment of both parties, and they helped promote trust between the parties.

These outcomes, enabled by personal connections, were central in the repatriation of \$93 million in two years.

6.1.3. Engage in informal assistance channels before, during and after transmitting an MLA request  
This kind of engagement is very useful rather than immediately resorting to drafting a request for MLA. Some important information can be obtained more quickly and with fewer formalities through direct contact with counterpart law enforcement agencies and financial intelligence units. Such assistance may lead to more rapid identification of assets, confirm the assistance needed, and provide the proper foundation for an MLA request. However, mutual or informal assistance can only be made for routine enquiries and does not require the country of whom the request is made to seek coercive powers.

There are certain key considerations which prosecutors/investigators must consider when deciding whether evidence is to be sought by informal/administrative means from abroad.

- It must be evidence that could be lawfully gathered in terms of the laws of the requesting state, and there should be no reason to believe that it would be excluded from evidence at the trial in the requesting state.
- It should be evidence that may be lawfully collected under the laws of the requested state.
- The requested state should have no objection.

The golden rule is: ensure that any administrative informal request is made and executed lawfully.

### **Contact Points for International Cooperation**

**Personal contacts:** Connections developed through previous cases, meetings, conferences, and so forth.

**Referrals:** Counterparts, personal contacts, liaison magistrates or law enforcement attachés, networks, and international organizations (for example, World Bank or the United Nations Office on Drugs and Crime) may have referrals based on their personal networks.

#### **Counterparts in foreign jurisdictions:**

- Law enforcement agencies (such as police and those involved in anticorruption, customs, drug law enforcement, and tax efforts)
- Financial intelligence units
- Regulatory authorities (banking, securities)
- Prosecutors
- Investigating magistrates
- Foreign counsel (Some jurisdictions will retain counsel who are more familiar with the procedures and requirements of the foreign jurisdiction.)

#### **Central authorities:**

- *Domestic:* The domestic central authority may be able to refer practitioners to contacts abroad and provide information on jurisdictions with which there are multilateral or bilateral agreements.
- *In requested jurisdiction:* The office of the central authority in the requested jurisdiction should be able to provide guidance on how best to proceed in light of the needs of the requesting jurisdiction and the laws of the requested jurisdiction. Many offices also provide assistance with drafting requests.

#### 6.1.4. Practitioners need to be aware of potential challenges

Practitioners may face many challenges in securing the international cooperation that they might require. It is important to be aware of the possible obstacles and take measures to overcome them. Among the challenges that practitioners will need to consider and take steps to overcome. Differences in legal traditions and confiscation systems, jurisdiction issues, procedural variations, legal obstacles and delays are among the main challenges that practitioners will need to consider. Cross border asset recovery cases often require some steps to be taken urgently, and some information to be regarded with sensitivity. The urgency stems from the real possibility of the tainted assets being transferred from one jurisdiction to another, or to be destroyed. The level of cooperation to be expected differs from jurisdiction to jurisdiction.

#### **Institutional Frameworks**

In Ethiopia the main actors directly or indirectly involved in international legal cooperation particularly for stolen asset recovery are competent authorities and central authorities.

A competent authority is a judicial, prosecutorial or law enforcement authority or agency within a state that is authorized under the law of the state to make and/or execute a request for MLA.

**Under article 2(22) of the AML/CFT Proclamation, Number 780/2013**

The competent authorities are ;

EFIC

National Intelligence and Security Agency

Police (regional, Federal, Addis Ababa, Dire Dawa)

Public prosecutor (regional or Federal)

Concerned regulatory authority

Other investigative bodies'

These institutions are directly or indirectly involved in the implementation of this proclamation for the purpose of investigation, prosecution ,confiscation orders and the execution of confiscation orders using different mechanisms for international legal cooperation if the subject of investigation is abroad.

A central authority is designated to receive requests for MLA, review and execute the requests, or transmit them to the competent authorities for execution.

**Under article 47 of Proc.No.780/2013**

EFIC has the responsibility and power to receive requests for MLA and for extradition from foreign counter parts in respect of Money laundering and terrorism financing, which it is required to transmit to the competent authorities for execution.

**Under article 6(12) of Proc.No.943/2016**

The Federal Attorney General may provide or exchange international cooperation in criminal and civil matters

**Under Article 58 of the UNCAC ;**

“State parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this convention and of promoting ways, and means of recovering such proceeds and ,to that end ,shall consider establishing a financial intelligence units to be responsible for receiving ,analysing, and disseminating to the competent authorities reports of suspicious financial transactions.”

From the above two provisions it can be seen that the Federal Attorney General (International Legal Cooperation Directorate) and the EFIC are central authorities for International legal cooperation. The directorate is the main contact point in handling out going international legal cooperation requests.

For the purpose of incoming international legal cooperation with respect to Money laundering and financing of terrorism, the EFIC serves as a contact point.

## 6.2. Legal Framework for International Legal Cooperation

The legal framework for international legal cooperation on asset recovery accords with the demands of the multilateral and bilateral conventions, treaties and agreements to which Ethiopia is a party. A competent authority in a foreign jurisdiction can request for assistance on asset recovery from Ethiopia based on Ethiopia's domestic laws (see art.38-51 of proc.no.780/2013) or the treaties and international conventions which Ethiopia has ratified. In the absence of such laws or treaties, the requesting country can ask for cooperation on the basis of reciprocity.

### **Main international and regional treaties and conventions that provide a legal basis for international legal cooperation that Ethiopia is signatory to:**

The UN Convention Against Corruption (art. 46)

The UN Convention for the Suppression of the Financing of Terrorism (arts. 12, 13-16)

The UN Convention Against Transnational Organized Crime (Palermo Convention) (art. 18)

The UN Convention against Trafficking in Narcotic Drug and Psychotropic Substance (Vienna Convention) (art. 7)

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition

AU Convention against Terrorism

IGAD Convention on Mutual Legal Assistance in Criminal Matters

IGAD Convention on Extradition

Bilateral agreements between Sudan and Ethiopia, between China and Ethiopia.

Soft laws, like the FATF 40 Recommendations.

The United Nations Convention against Transnational Organized Crime (UNTOC) and United Nations Convention against Corruption (UNCAC) include provisions on the confiscation of criminal proceeds. Their provisions can be used in obtaining international cooperation to identify, trace, freeze and confiscate such proceeds. The two instruments build upon a growing body of other relevant international legal instruments.

It should be noted that these conventions can only be used for international co-operation for the offences identified in them and not for other offences.

### **Key asset recovery provisions of the UNTOC and UNCAC**

Chapter 5 of UNCAC provides a comprehensive legal framework for international legal cooperation with a view to facilitating the recovery of proceeds of corruption offences and their return to requesting states. Article 51 of the convention established the return of proceeds of corruption as a "fundamental principle" of the convention.

Article 53 of UNCAC is designed to ensure that state parties have a wide range of legal remedies to recognize other state parties as having legal standing to initiate civil actions and other direct means to recover illegally obtained and exported property.

- As a plaintiff in civil action
- As a party recovering damages caused by criminal offences
- As a third-party claiming ownership rights in a confiscation procedure, being it civil or criminal. Article 54 of UNCAC, provides a mechanism for the recovery of property through international cooperation in confiscation. It obliges states:
  - To take measures necessary to permit their authorities to give effect to a foreign confiscation order.
  - To take such measures to permit domestic authorities having jurisdiction, to order confiscation by adjudication of an offence of money laundering and or other such offence.
  - To consider taking measures to permit confiscation of property without a criminal conviction in certain cases (NBC).

Article 54 provides mechanisms for the recovery of property through international co-operation in confiscation.

Article 55 obliges states to establish a regime for international co-operation in confiscation. It lays down specific criteria for engaging the requested state. Article 55 seeks to place an obligation upon the requested state to create specific procedures to be used upon receiving a request for recognizing and enforcing foreign confiscation orders and foreign provisional measures. The procedures apply not just to the proceeds of crime but also to property, equipment and other instrumentalities that have been used in the commission of the offences.

**Case study 13: Application of Article 55 of UNCAC**

In an effort to recover over \$200 million alleged to have been stolen and placed into overseas jurisdictions by former premier Khaled Zia's son, Arafat Rahman Koko, the Bangladeshi authorities cited successfully the provisions of UNCAC as a legal basis for exchange of critically important information and evidence in relation to this ongoing investigation in the absence of any formal bilateral treaty with Singapore.

The return and disposal of assets is covered by Article 57. In paragraph 3 it establishes the basis for returning and disposing of those proceeds confiscated under article 46 and 55 of the convention. In doing so, Article 57 distinguishes three situations.

- When the property in question is the proceeds of embezzlement of public funds or the laundering of such proceeds, the requested state shall return the confiscated property to the requesting state.
- Where the requested state waives such final determination
- In all other cases give priority to returning confiscated property to the requesting state party, returning such property to its prior legitimate owners or compensating the victims of the crime.

**Case study 14: Abacha case**

Based on Article 57 of UNCAC, what took place in the Swiss efforts to repatriate the millions of dollars of Abacha monies when in August 2004 the federal office of Justice agreed to transmit to Nigeria all assets in Switzerland, waiving the normal condition of a prior judicial forfeiture order. The decision was subsequently upheld by the Swiss supreme court in February 2005 on the basis that the assets were clearly the product of specific crimes (the theft of large amounts of monies from the central bank), that the accounts in Switzerland were largely in false names and, critically, that the accounts structure set up by Abacha, his cronies and family constituted a criminal enterprise under Swiss law.

Switzerland set new standards in the realm of asset recovery. In circumstances where the requesting state fails to reach a final judgment in certain situations, on account of:

The defendant having died or fled the jurisdiction

The time in which asset recovery action should be instituted having expired

The immunity from prosecution of the criminal

The corrupt officials remaining in power,

The corrupt manipulation of the prosecutions and judiciary.

Another important international instrument is Article 13 of UNTOC. In sub article 1, Article 13 imposes an obligation upon a state party to act in response to requests for confiscation from other states to the greatest extent possible within its domestic legal system. UNTOC suggests that this can be done either through direct submission of the request to competent authorities with a view to obtaining a confiscation order and executing it, or through the submission to its competent authorities with a view to giving effect to a confiscation issued on the territory of the requesting state.

## 6.3. Mechanisms of International Cooperation

### 6.3.1. Mutual Legal Assistance

What is it?	How can assist asset recovery?	Responsible agents
<ul style="list-style-type: none"> <li>•Mutual legal assistance (MLA) is a method of cooperation between states for obtaining assistance in the investigation or prosecution of criminal offences. This assistance can include banking records, requesting searches and interviews, restraint and confiscation of assets and extradition of a suspect.</li> </ul>	<ul style="list-style-type: none"> <li>•MLA is generally used for obtaining material that cannot be obtained on a police cooperation basis, particularly enquiries that require coercive means. Requests are made by a formal international Letter of Request (LOR). In civil law jurisdictions these are also referred to as Commission Rogatoire or Letter Rogatory. This assistance is usually requested by courts or prosecutors and is also referred to as 'judicial cooperation'.</li> </ul>	<ul style="list-style-type: none"> <li>•The appointed central authorities in Ethiopia; EFIC; International legal cooperation directorate in the AG's office and ARD</li> </ul>

**Article 46(3) of UNCAC,**

**Mutual legal assistance may be requested for any of the following purpose;**

- Taking evidence or statements from persons
  - Effective service of judicial documents
  - Executing searches and seizure and freezing
  - Examining objects and sites
  - Providing information, evidentiary items and expert evaluations
  - Providing originals or certified copies of relevant documents, and records including government, bank, financial, corporate or business records
  - Identifying or tracing proceeds of crime, property, instrumentalities, or other things for evidentiary purposes
  - Identifying, freezing and tracing proceeds of crime in accordance with the provision of Chapter 5 of the Convention
  - The recovery of assets in accordance with the provision of the Chapter 5 of the Convention
- .....see also article 39 of proc.No.780/2013

**Article 46(14);**

**A request for Mutual Legal Assistance shall contain;**

- The identity of the authority making the request
- The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution and judicial proceeding
- A summary of relevant facts, except in relation to requests for the purpose of service of judicial documents.
- A description of the assistance sought and details of any particular procedure that the requesting state party wishes to be followed

Where possible, the identity, location and nationality of any person connected  
The purpose for the evidence, information, action is sought.....see **article 48 of proc.No.780/2013.**

**Grounds for refusal of Mutual legal assistance,**

National and public interests

Severity of punishment

Human rights considerations

Double jeopardy

Absence of dual criminality

Please refer to Article 18, paragraph 21 of UNTOC, article 46(9)(b), 46(21), 55(7) and proclamation number 780/2013 article 40.

6.3.2. Informal assistance

- Practitioners should not immediately resort to drafting an MLA request when they determine that international cooperation is required. Some important information can be obtained more quickly through informal channels.
- Informal assistance can lead to a more rapid identification of assets, confirmation of the assistance needed, and provide the proper foundation for a formal MLA request.
- Informal assistance typically consists of any official support in support of the MLA request.
- Although the means of making the request is administrative or informal, the material that can be sought is evidential and potentially admissible. The word 'informal' is not being used in the present context in relation to the product itself, simply in relation to the way in which the request is made and the route by which it is communicated. The whole rationale is to avoid the delays very often inherent in the formal MLA procedure. The message is: administrative assistance is capable of being the appropriate route not just for information or intelligence, but also for gathering many types of evidence in proper admissible form to use before a court.

**Informal assistance may occur;**

Over telephone between counterparts

Through face-to-face meeting

Through administrative cooperation

**It may incorporate non coercive investigative measures such as;**

Gathering publicly available information

Securing information from law enforcement database

Conducting visual surveillance

Obtaining information from financial intelligence units, it may extend to spontaneous disclosure of information, conduct joint investigation, request for authorities in another jurisdiction to open a case.

**The most common channels for informal assistance**

Counterpart practitioners

Financial intelligence units

Regulatory authorities.

Contacts with these entities is often accomplished through personal contacts or through networks to which agencies are members.

See article.56 of UNCAC.

### 6.3.3. Reciprocity

Reciprocity is an international customary principle whereby a requesting state presents its request with assurance that it will provide similar cooperation to the requested state in a similar case in the future. It is the principle of comity, which refers to the “idea that actions and practices can be based on notions of good will and mutuality rather than strict application of enforcement of rules.”

## 6.4. Asset Recovery Networks

What are they?	How can they assist asset recovery?	Responsible agents
<ul style="list-style-type: none"><li>• Informal networks of competent authorities aimed at assisting asset identification and recovery.</li></ul>	<ul style="list-style-type: none"><li>• Asset recovery networks can provide asset tracing intelligence. They are a collection of regional bodies who can facilitate information exchange with the potential to identify assets held in other countries.</li></ul>	<ul style="list-style-type: none"><li>• The asset recovery directorate of AG officia and EFIC are responsible agents who use these informal networks.</li></ul>

### 6.4.1. FIU co-operation through the Egmont Group

The Egmont Group is a forum which supports member FIUs by:

- promoting and formalizing intelligence sharing among them
- encouraging greater collaboration between member FIUs
- increasing the security of communications exchanged between FIUs, for example through use of the Egmont Secure Web [ESW] system

What is it?	How can it assist asset recovery?	Responsible agents
<ul style="list-style-type: none"> <li>The Egmont is an informal networks of FIUs from around the world which promotes international co-operation and exchange of information. Egmont requests are requests for information sent by one national FIU to another.</li> </ul>	<ul style="list-style-type: none"> <li>The Egmont Group via Egmont requests, enable an FIU in one country to seek information, via secure internet platform, that is held by another FIU. This can assist investigators in identifying assets, associates, and other links in other jurisdictions.</li> </ul>	<ul style="list-style-type: none"> <li>EFIC</li> </ul>

#### 6.4.2. Interpol

What is it ?	How can it assist asset recovery?	Responsible agents and contact
<ul style="list-style-type: none"> <li>Interpol is the largest international Police Organization with 190 member countries. It assists in exchanging information and coordinating action</li> </ul>	<ul style="list-style-type: none"> <li>Interpol provides a secure mechanism for police to police cooperation and information exchange amongst member countries. It also holds a number of databases such as stolen, stolen property (vehicles, vessels and works of art) and a maritime piracy database. Such police to police information is for intelligence purposes and evidence would need to be obtained by a MLA request.</li> </ul>	<ul style="list-style-type: none"> <li>Ethiopian Federal Bureau of Investigation.</li> <li>contact..</li> </ul>

### 6.4.3. ARIN-EA(Asset Recovery Inter-agency Network for East Africa

What is it?	How can it assist asset recovery?	Responsible agents
<ul style="list-style-type: none"> <li>• ARIN-EA is an informal network which aims at informal exchange of information on individuals, assets and companies at regional and international level so as to facilitate effective tracing and recovery of proceeds of crime and the deprivation of criminals of their illicit gains.</li> </ul>	<ul style="list-style-type: none"> <li>• ARIN-EA recognizes the need to promote cooperation at regional level as well as internationally to effectively track/trace and recover stolen assets within and beyond the territorial boundaries of Eastern Africa, in collaboration with relevant partners.</li> </ul>	<ul style="list-style-type: none"> <li>• Asset Recovery directorate of AG office</li> </ul>

### 6.5. Challenges for Stolen Asset Recovery at International Level

Stolen asset recovery faces many challenges in practice, including legal, operational and institutional challenges. The main challenges are,

- Lack of political will to enforce recoveries
- Securing the repatriation of assets
- Lack of funding
- Lack of information
- Lack of technical capacity
- Inadequacy of remedial procedures
- The complex nature of international cooperation.

#### Case Study 14: Complexities of international cooperation

In 1998, as oil minister of Nigeria in the final weeks of the Sani Abacha military regime, Mr Dan Etete awarded the prospecting rights to the extensive OPL 245 block to Malabu Oil and Gas, a shell company in which he secretly held a major stake.

In April 2011, during the tenure of the government led by President Goodluck Jonathan, the rights were sold to a joint venture established by two corporations, the Royal Dutch Shell and the Eni Group, for \$1.3 billion. Royal Dutch Shell plc(Shell) has its corporate headquarters in The Hague, Netherlands, and its registered office in London, United Kingdom. The company's main business is the exploration for and the production, processing, transportation, and marketing of hydrocarbons. Eni Group (Eni), is a global oil and gas corporation with its headquarters and principal place of business in Rome, Italy.

The deal was structured so that Shell and Eni would make the payment to the Nigerian government. The government subsequently transferred \$1.1 billion to Malabu Oil and Gas.

Of the \$1.1 billion, Malabu initially received \$801.5 million, which was paid out from an account held in the London branch of JP Morgan Chase Bank to two Nigerian bank accounts in August 2011. A month later, Malabu transferred \$336.5 million of the funds received to the Nigerian bank account of a Nigerian-incorporated company called Rocky Top Resources Limited.

Within a relatively short period in September 2011, Rocky Top embarked on a spending spree. It paid \$54 million for a Bombardier private jet.

Over the next 18 months, some \$34 million were transferred from Rocky Top's account in Nigeria to various companies and individuals in the United Arab Emirates (UAE). The bulk of the money – \$21.5 million – was paid out to a UAE-registered company, Gunes General Trading LLC. Investigations by a consortium of investigative journalists showed that, among several assets, Gunes General Trading held interests in real estate, being an apartment worth between \$600,000 and \$1 million and a house valued at \$5 million. It was also involved in the currency exchange business. The investigation revealed that Gunes was recently cited for violating sanctions imposed by the US for business with Iran.

A long-running investigation into corruption and money laundering by prosecutors in Italy unearthed sufficient evidence for a judge in Milan, Italy, to order, in June 2019, the criminal trial of several senior former Shell and Eni executives, together with some intermediaries who had been working for Shell, a former Russian diplomat and former minister Etete. The Italian prosecution alleged that the transaction for the sale of the OPL245 block was corrupt and that various oil executives, intermediaries and Nigerian government ministers received tens of millions of dollars in personal kickbacks. It also alleged that Malabu, Rocky Top and Gunes were fronts for Dan Etete and his associates, including the former president of Nigeria.

Shell and Eni argued that they had “full confidence in the legality/appropriateness of its activities in acquiring the OPL 245 oil block”, which they say was “a completely legal and legitimate transaction conducted directly with the government of Nigeria”. Shell, Eni, Mr Etete and the other co-accused have denied any wrongdoing and are defending themselves in the Milan trial. Shell has said it “does not believe that there is a basis to convict Shell or any of its former employees”. Former president Jonathan, who has not been indicted to stand trial, has denied any wrongdoing.

### **Asset Recovery**

On his assumption of office in 2015, the incoming President vowed to act against any corruption committed by previous administrations. Immediately after being sworn in, the President instructed his deputy to set up a committee to guide the recovery of Nigerian assets stolen and stashed abroad. The committee was chaired by a lawyer and former attorney general for Lagos State. It promptly sought proposals from local and international asset recovery firms. Among other conditions, the committee set a relatively low cap on any success fees paid to the firms it appointed: being 5% of any assets recovered. It appointed a relatively inexperienced Nigerian

private lawyer, and a law firm based in London to lead the asset recovery efforts on behalf of government. Nigeria's public procurement regulations demand competitive bidding in government's purchases of goods and services, but are not always followed consistently.

The presidential committee and the Ministry of Justice, headed by the federal Attorney General, - which is in law responsible for appointing recovery agents and overseeing their work – have a difficult working relationship. There have been major disagreements between them over strategy and the implementation of the asset recovery process, especially over the appointment of private or foreign recovery agents, and the use of litigation funders. Litigation funders are investors who take a bet on promising cases by contributing money towards legal costs in return for a portion of any winnings.

Source: INVESTIGATION: Inside Nigeria's opaque multibillion-dollar asset recovery deals

The Premium Times, April 27, 2020, available at <https://www.premiumtimesng.com/news/headlines/389975-investigation-inside-nigerias-opaque-multibillion-dollar-asset-recovery-deals.html> [accessed 23 May 2020]

The key challenges evident in the Etete/Royal Shell/Eni case were:

- Delays in investigating the case attributed to the absence of political will – having facilitated the transactions by which the corrupt accrual of funds occurred to Etete, the government of the time could not be expected to lead the recovery of any proceeds. Indeed, no such efforts were made until after a change of government. Other cases, such as the Chiluba case in Zambia, and the Bongo case in Gabon, underscore this point. The delay in pursuing claims usually results in the loss of important evidence;
- A second challenge is the inadequacy of information on the basis of which to determine whether it is worthwhile to pursue the claims. Significant parts of the transactions occurred outside Nigeria, in the corporate boardrooms of Royal Dutch Shell and Eni, as well as of the companies set up in the United Arab Emirates. Any records would likely be inaccessible, where they ever existed;
- The third challenge is related to the possible abuse of the principle of sovereignty to derail international cooperation. If the Italian authorities commenced the investigations without consulting the Nigerian and other foreign counterparts, that could alienate the latter, resulting in non-cooperation or even resistance. The friction can only work in favour of the suspects
- The fourth challenge stems from a combination of inadequacies of technical capacity and remedial processes, mainly in the victim country. As the case study points out, the President appointed an ad hoc structure/committee to take charge of the recovery process – in the same way as President Mwanawasa appointed a Task Force in Zambia. The working relationship between the new committee and the Attorney General's office was a difficult one, marked by major disagreements between them over strategy and the implementation of the asset recovery process. There was friction over the appointment of private or foreign recovery agents, and the use of litigation funders. In the absence of a pre-designed asset recovery strategy for cross-border asset recoveries, such a challenge is bound to arise.

## 7. Asset Management

Once a property is frozen or seized, it may take time until a court gives a final decision. In the interim, the property should be managed properly in order for any decision on its fate to be effective. It is necessary to ensure that the seized property is properly managed. The main objective of asset management is to preserve the economic value of assets in an efficient, transparent, and flexible manner, to safeguard the assets until they are eventually confiscated or released. This requires skill, resources, and the performance of certain activities by asset managers.

Properties under provisional measures may be motor vehicles, boats and aircraft, business, livestock and farm produce, precious metals or perishables that require to be handled with expertise and knowledge. The asset management framework under Ethiopian law is not well developed, with the result that assets are at risk of being damaged due to mismanagement. The AML/CFT Law does not have provisions on asset management. However, Anti-Corruption Law proclamation No 434/2005 contains provisions, from Article 17 to Article 21. The court has power to appoint, remove or decide on the payments of a Receiver. The duties and responsibilities of the Receiver are also included in the provision. There are no designated or specialized individuals or organisations that offer their services as receivers for criminal asset management in Ethiopia. The court usually appoints a person recommended by the public prosecutor.

The practice in other countries is to appoint professional asset managers to administer assets. This essentially outsources criminal asset management to relatively experienced, well-organized institutions or professionals. The alternative to such an approach is to establish an independent government agency to manage assets that are under provisional seizure.

Improvement of asset management needs detailed consideration and development of the law, and the establishment and professionalization of the necessary structures.

## References

Ethiopian Legislation on AML/CFT, Corruption and Related Asset Recovery Issues

Proclamations, Régulations, and Directives on AML/CFT:

- Proclamation 780/2013 – AML/CFT legislation
- Proclamation 881/2015 - Corruption Crime Proclamation
- Regulation 171/2009 – establishment, powers and functions of the EFIC
- Regulation 306/2014 – Procedures for freezing of terrorist assets
- Proclamation 943/2016 – Establishment of the Attorney General
- Proclamation 414/2004 – Criminal Code
- Proclamation 185/1961 – Criminal Procedure Code
- Proclamation 434/2005 – Anti-Corruption Special Procedure and Rules of Evidence
- Proclamation 882/2015 – Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment)

- Proclamation 883/2015- Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment proclamation)
- EFIC Directive 01/2014 – Compliance directive for financial institutions
- EFIC Directive 02/2016 – Compliance directive for DNFBPS
- Proclamation 621/2008 – Charites and Societies Proclamation
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- Regulation 57/99 – Federal Court Advocates’ Code of Conduct
- Proclamation 847/2014 – Financial Reporting: established the Accounting and Auditing Board
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- Proclamation 980/2016 - Commercial Registration and Licensing
- Proclamation 678/2010 – Mining Operations
- Proclamation 53/1993 (as amended) – Mining Tax
- Proclamation 686/2010 – Commercial Registration and Businesses Licensing for Mining
- Proclamation 859/2014 - Customs Proclamation

#### **Additional Resources and Websites**

- “Best Practices: Confiscation (Recommendations 3 and 38),” adopted by the plenary of the FATF, February 19, 2010.
- Stolen Asset Recovery (StAR) Initiative, StAR: <http://www.worldbank.org/star>
- United Nations Convention against Corruption (UNCAC): <http://www.unodc.org/unodc/en/treaties/CAC/index.html>
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- United Nations Convention against Transnational Organized Crime (UNTOC): <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>
- G-8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets: [http://www.justice.gov/criminal/cybercrime/g82004/G8\\_Best\\_Practices\\_on\\_Tracing.pdf](http://www.justice.gov/criminal/cybercrime/g82004/G8_Best_Practices_on_Tracing.pdf)
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