

FATF Guidance Document

Best Practices
Confiscation
(Recommendations 3 and 38)

19 February 2010

Please note that this document refers to the FATF Recommendations as published in October 2004, and does not yet take into account the 2012 revision of the FATF Recommendations.

See www.fatf-gafi.org/recommendations for the 2012 FATF Recommendations, including the conversion table from the old Recommendation to the new FATF Recommendation.



THE FINANCIAL ACTION TASK FORCE (FATF)

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing. Recommendations issued by the FATF define criminal justice and regulatory measures that should be implemented to counter this problem. These Recommendations also include international co-operation and preventive measures to be taken by financial institutions and others such as casinos, real estate dealers, lawyers and accountants. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

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CONFISCATION (RECOMMENDATIONS 3 AND 38)

BEST PRACTICES

I. INTRODUCTION

1. A robust system of provisional measures and confiscation is an important part of an effective anti-money laundering and counter-terrorist financing regime. Confiscation prevents criminal property from being laundered or reinvested either to facilitate other forms of crime or to conceal illicit proceeds. In itself, this can significantly stifle organised criminal operations, break them or frustrate the movement of proceeds realised from crime. Reducing the rewards of crime, affects the balance of risk and reward, and the prospect of losing profits may deter some from crime. It may also allow the victim of the crime to be partially or fully compensated, even when the proceeds are moved around the world.

2. This paper sets out international best practices to assist jurisdictions in their implementation of Recommendations 3 and 38, and to address impediments to effective confiscation in the international context.

II. DEFINITION

3. For the purposes of this Best Practices Paper, the following definitions apply:

- a) The term *confiscation*, which includes forfeiture where applicable, means the permanent deprivation of funds or other assets by order of a competent authority or a court. Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to be transferred to the State. In this case, the person(s) or entity(ies) that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture loses all rights, in principle, to the confiscated or forfeited funds or other assets. Confiscation or forfeiture orders are usually linked to a criminal conviction or a court decision whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law.
- b) The term *non-conviction based confiscation* means confiscation for which a criminal conviction is not required.

III. TRACING AND INVESTIGATION

4. A core element of Recommendation 3 is that there should be measures in place to identify, trace and evaluate property which is subject to confiscation. Likewise, Recommendation 38 requires that there be authority to take expeditious action in response to requests by foreign countries to identify property which may be subject to confiscation.

5. The following best practices for jurisdictions help to strengthen legal frameworks and ensure that asset tracing and financial investigations can be conducted effectively.

- a) Ensure that appropriate procedures and legal frameworks are in place to allow informal exchanges of information to take place, including prior to the letter of request for mutual legal assistance being submitted. Such procedures and frameworks may include building relationships between practitioners. This practice can help to focus efforts and resources before the request reaches a formal stage.
- b) Competent authorities should also engage with foreign counterparts, from a bilateral or regional perspective, and utilise appropriate international bodies such as the Egmont Group or INTERPOL.
- c) Ensure that appropriate procedures and legal frameworks are in place to allow information deemed to be useful to be shared on a spontaneous basis, subject to controls and safeguards to ensure that the information is used only in an authorised manner, without a request being received to trigger this exchange. The practice of spontaneously exchanging information relating to asset tracing and financial investigation helps to facilitate a culture of reciprocity.
- d) Enter into general arrangements, including formal bi-lateral asset sharing agreements, with other jurisdictions. Having asset sharing agreements in place should not be a pre-requisite for co-operation, but may have a significant bearing on the resources allocated to facilitate asset tracing requests. Additionally, the existence of a formal bi-lateral asset-sharing agreement is often a significant incentive to the executing jurisdiction to execute requests for asset tracing.

6. The following best practices for jurisdictions help to minimise structural impediments to effective asset tracing and financial investigation.

- a) Ensure that foreign counterparts can easily identify appropriate points of contact.
- b) At the domestic level, implement mechanisms to co-ordinate asset tracing and financial investigations with a view to ensuring that such efforts are not impeded by regionalised or fragmented systems, or competing local priorities.
- c) Consider establishing specialised units or dedicated personnel with training in specialised financial investigation techniques. Such personnel should be adequately resourced and trained.
- d) Establish mechanisms that allow for rapid access to high quality information on the ownership and control of such property (*e.g.* land, vehicles, legal persons). Ideally, such information should be available without the need for a formal request.
- e) Explore mechanisms, in consultation with the private sector, that would facilitate more rapid access to financial information, including where the requesting jurisdictions has only minimal information (*e.g.* the specific account number is not previously known). For example, jurisdictions could consider, *inter alia*, the feasibility of establishing a central register of bank accounts or, alternatively, other mechanisms that would offer less fragmented access to financial information which is already being held in a centralised way.

7. The following best practices for jurisdictions help to streamline the processes and procedures for conducting asset tracing and financial investigations.

- a) In the case of both formal and informal requests, emphasise the importance of handling external requests in a timely way, as a policy objective. Setting targets and monitoring performance in executing asset tracing requests from overseas would be useful to ensure that such policy objectives are met.
- b) In the case of formal requests, reduce any unnecessary bureaucracy, both in terms of sending out the request (if requests are filtered through central points domestically) and in terms of receiving and processing incoming requests. For example, agreed standard formats and terminology for submitting requests between jurisdictions would go some way to reducing bureaucratic barriers.

8. To address cultural issues that may impede asset tracing and financial investigations, it is best practice for jurisdictions to promote a culture of reciprocity, based on a mutual level of trust and understanding, whereby each jurisdiction can expect to receive an acknowledgement that appropriate and timely action is being taken. This practice would help to strengthen asset tracing and financial investigations at the international level, particularly where effective bi-lateral agreements or informal networks currently do not exist, or where requests are given lesser priority on the basis that the requesting jurisdiction is poor at facilitating asset tracing.

IV. INTERNATIONAL CO-ORDINATION

9. Recommendation 38 requires countries to have authority to take expeditious action in response to requests by foreign countries, and arrangements for co-ordinating freezing, seizure and confiscation proceedings, which may include the sharing of confiscated assets, particularly when confiscation is directly or indirectly a result of co-ordinated law enforcement actions. Countries are also required to consider establishing an asset forfeiture fund into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes.

10. The following are best practices for jurisdictions to facilitate the development of effective arrangements for co-ordinating freezing, seizure and confiscation proceedings.

- a) Ensure that the authorities who co-ordinate such actions have sufficient expertise and resources. This practice will enhance effectiveness by addressing the specialist and time-sensitive demands of the confiscation process.
- b) Implement mechanisms to facilitate real-time co-operative joint law enforcement and prosecutorial efforts by subject matter experts in the requested and requesting jurisdictions. Regardless of who is responsible for orchestrating or supervising such co-ordination, this work should primarily be undertaken or driven by the actual subject matter experts who sought the assistance and those who are charged with executing the foreign requests. Such mechanisms should promote informal discussions between the requesting practitioners and the executing practitioners regarding all aspects of the assistance provided and to be provided in the future.
- c) In cases with an international element, where possible, treat confiscation efforts as joint-investigations with all the benefits that attach to such designations. Such benefits may include, for example, the possibility to target property and perpetrators located in other jurisdictions. Communications about these joint-investigations should be through secure networks, using standardized forms, agreed upon standards of practice and a common terminology.
- d) Enter into asset sharing agreements with other countries. Such agreements should be consistent with the appropriate compensation of victims. Jurisdictions should be willing to share the results

of their confiscations with other jurisdictions, which includes ensuring that such results are available for sharing.

- e) Designate a competent authority at the national level with responsibility for facilitating asset sharing requests, and liaising with local or regional law enforcement agencies. This could be a specialised competent authority or, alternatively, other mechanisms that would permit the jurisdiction to participate in asset sharing agreements.
- f) Recommendation 32 requires jurisdictions, among other things, to maintain comprehensive statistics on the property frozen, seized and confiscated. As it relates to provisional measures and confiscation, it would be useful if such statistics were broken down by year and included, as far as possible, the items below:
 - (i) the number of freezing, seizing and confiscation actions and the amounts or values involved, regarding money laundering, terrorist financing and the 20 designated categories of predicate offences, collected in such a way as to ensure that there is no double counting vis-à-vis statistics relating to the money laundering offence and the underlying predicate offence;
 - (ii) a breakdown of whether such cases are domestic or relate to a foreign request;
 - (iii) statistics on the general level of criminality in the jurisdiction in relation to the 20 designated categories of predicate offences;
 - (iv) a breakdown of the status and/or ultimate outcome of such actions (*e.g.* pending, property released, property or value confiscated);
 - (v) a breakdown of the amounts ordered in confiscation proceedings and actually recovered.

Such statistics will demonstrate whether provisional measures and confiscation are being systematically pursued and imposed, and whether proceeds are actually being recovered in order to assist the jurisdiction in assessing the effectiveness of its regime.

V. PROVISIONAL MEASURES (FREEZING/SEIZURE)

11. Recommendation 38 requires jurisdictions to have authority to take expeditious action in response to requests by countries to identify, freeze and seize property laundered, proceeds from money laundering or predicate offences, instrumentalities used or intended for use in the commission of these offences, or property of corresponding value.

12. As a matter of best practice, the mechanisms used to take this action should have the following features:

- a) The executing jurisdiction is able to take freezing or seizing action on the basis of requests submitted prior to criminal charges having been laid in the requesting state.
- b) The executing jurisdiction is able to take freezing or seizing action, within the short timeframes that are necessary to be effective, upon receiving a request for provisional measures. Such requests may be enforced directly or indirectly. However, it should be noted that, as a rule, to the extent that it is not inconsistent with the fundamental principles of a country's domestic law, direct enforcement (*i.e.* accepting/registering and directly instituting steps to enforce the freezing

or seizing order issued by the requesting jurisdiction) is a more effective and swift way to comply with foreign requests for provisional measures than indirect enforcement (*i.e.* the executing jurisdiction will obtain a domestic order using the evidence contained in the foreign request).

- c) The executing jurisdiction has a framework in place that would enable it to keep the freeze/seizure in place until the requesting jurisdiction has ruled upon the fate of the property concerned (either lifting of the freeze/seizure or confiscation of the property). This practice is intended to give to the requesting jurisdiction sufficient time to lead its criminal proceeding to a confiscation decision on the property seized pursuant to the mutual legal assistance request. However, it should be noted that the ability to uphold a freezing/seizing action may depend on how expeditiously the requesting jurisdiction is able to conclude its proceedings.
- d) The possibility of appeal from a decision to take provisional measures on the basis of a foreign request is limited to the minimum allowed by due process rules and, in case of an appeal, the freezing/seizing action is not suspended. This practice facilitates the maintaining of the provisional measure.

VI. NON-CONVICTION BASED CONFISCATION

13. Recommendation 3 states that countries may consider adopting measures that allow laundered property, proceeds or instrumentalities to be confiscated without requiring a criminal conviction to the extent that such a requirement is consistent with the principles of their domestic law.

14. To ensure that foreign confiscation orders are recognised and enforced in the widest range of circumstances, jurisdictions are encouraged to implement, to the greatest extent possible, measures that would enable them to carry out confiscation without the need to obtain a criminal conviction (non-conviction based confiscation).

15. Non-conviction based confiscation may be implemented in the context of criminal laws and proceedings, or through a separate system or law outside criminal proceedings.

16. Ideally, non-conviction based confiscation would be available, at a minimum, where property is found, but a criminal conviction cannot be obtained because the perpetrator:

- a) is dead (or dies before conviction);
- b) is a fugitive;
- c) is absent from the jurisdiction; or
- d) is unknown.

17. Additionally, non-conviction based confiscation would be a useful tool in numerous other circumstances. These may include, but are not limited to, situations where property is found:

- a) but a conviction could not be obtained for procedural or technical reasons (*e.g.* the statute of limitations is exceeded);
- b) but there is substantial evidence to establish that the proceeds were generated from criminal activity, but there is insufficient evidence to meet the criminal burden of proof;

- c) but a criminal investigation or prosecution is unrealistic or impossible;
- d) but the perpetrator has been acquitted of the predicate offence because of insufficient admissible evidence or a failure to meet the burden of proof;
- e) that was generated from other or related criminal activity of the convicted person (*i.e.* extended confiscation); or
- f) is immune from prosecution.

18. It is best practice for jurisdictions to explore ways to recognise the non-conviction based confiscation orders of other jurisdictions, even if they do not have the same such orders.

19. When evaluating a request for mutual legal assistance or international co-operation relating to non-conviction based confiscation, jurisdictions are encouraged to look beyond terminology and labels to the substance of the proceedings with a view to substantively evaluating the request. This ensures that such requests are not unreasonably refused due to confusion caused by the use of different terminology. For example, some countries are able to enforce orders for non-conviction based confiscation provided that the confiscation procedure can be likened to a case of criminal character even in the absence of criminal proceedings. In such cases, a request should not be refused on the basis that the requesting country uses the term “*civil forfeiture*”, provided that this precondition is met.

VII. OTHER AREAS

A. *Use of recovered property*

20. The Interpretative Note to Recommendation 38 requires countries to consider establishing an asset forfeiture fund into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes.

21. Regardless of whether an asset forfeiture fund has been established, as a matter of best practice, jurisdictions should endeavour to use confiscated property transparently to fund projects that further the public good.

B. *Onus of proof*

22. Recommendation 3 states that countries may consider adopting measures which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

23. It is best practice for jurisdictions to implement such measures, consistent with the principles of domestic law. The following are two examples of how such measures may be structured.

Example #1:

When considering confiscation, the court can, on the basis of an action brought by the public prosecutor, in a procedure separate from the criminal case, decide that a convicted person must pay an amount of money to the State because of unlawful vested benefit. There are three conditions:

- (i) a person is convicted for a serious offence (punishable with the highest fine);
- (ii) during the criminal investigation against that person a criminal financial investigation was started; and
- (iii) the criminal financial investigation (report) shows it is plausible that the offence the person was convicted for

or other criminal offences resulted in any way to unlawful vested benefit.

The substantiated calculation of the unlawful vested benefit can be based on a comparison of property or a cash comparison for a certain period. That period can be based for instance on the start of criminal conduct and the arrest of the criminal for that conduct. It is then up to the convicted person to make a well reasoned case to refute the arguments of the prosecution.

Example #2:

When considering confiscation, the court must decide whether the defendant has a “criminal lifestyle”. A defendant will be deemed to have a criminal lifestyle if one of the three conditions is satisfied. There has to be a minimum total benefit for the second two of the three conditions below to be satisfied. The three conditions are:

- (i) it is a ‘lifestyle offence’ (for example, drug trafficking is a lifestyle offence);
- (ii) it is part of a ‘course of criminal conduct’ or
- (iii) it is an offence committed over a period of at least 6 months and the defendant has benefited from it.

The court is required to calculate benefit from criminal conduct using one of two methods:

(1) **General criminal conduct (“criminal lifestyle confiscation”)**: This method is used when the defendant is deemed to have a criminal lifestyle. The court must assume that:

- any property transferred to the defendant from after a date 6 years prior to the commencement of the criminal proceedings was obtained as a result of criminal conduct;
- any property held by the defendant at any time after the date of conviction was obtained as the result of criminal conduct;
- any expenditure over the 6 year period mentioned above was met by property obtained as a result of criminal conduct; and
- for valuation purposes, any property obtained by the defendant was obtained free of third party interests.

Where the criminal lifestyle condition is satisfied, the burden of proof in respect of the origin of the property is then effectively reversed (*i.e.* the prosecution has met its evidential obligation and the defendant has to prove on a balance of probabilities that a particular asset, transfer, or expenditure has a legitimate source).

(2) **Particular Criminal Conduct (“criminal conduct confiscation”)** : This method is used when the defendant is not deemed to have a criminal lifestyle. This requires the prosecutor to show what property or financial advantage the defendant has obtained from the specific offence charged. The law permits the prosecutor to trace property or financial advantage that directly or indirectly represents benefit (for example, property purchased using the proceeds of crime). There is no minimum threshold for this method of calculation of benefit.

C. *Participating in relevant networks*

24. As a matter of best practice, jurisdictions should ensure that their practitioners participate in relevant networks of mutual legal assistance and confiscation practitioners. These practices would enhance the ability of jurisdictions to provide swift international co-operation.

D. *Other steps to support implementation*

25. It is best practice for jurisdictions to do the following:

- a) Raise awareness that asset tracing and financial investigations should be a consideration at the commencement of an investigation of a proceeds-generating crime.
- b) Undertake asset tracing and financial investigations, on a systematic basis and at an early stage, in relation to investigations of proceeds-generating crimes.

- c) Endeavour that mechanisms for collecting comprehensive statistics, to the extent possible, result in statistics that:
 - (vi) are consistent and comparable across domestic agencies;
 - (vii) distinguish between property frozen, seized and confiscated in relation to domestic cases and international requests; and
 - (viii) reflect the outcomes in cases where freezing, seizure or confiscation was achieved.

E. Management of frozen, seized and confiscated property

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

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

- a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.
- a) There are sufficient resources in place to handle all aspects of asset management.
- b) Appropriate planning takes place prior to taking freezing or seizing action.
- c) There are measures in place to:
 - (i) properly care for and preserve as far as practicable such property;
 - (ii) deal with the individual's and third party rights;
 - (iii) dispose of confiscated property;
 - (iv) keep appropriate records; and
 - (v) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
- d) Those responsible for managing (or overseeing the management of) property have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
- e) Those responsible for managing the property have sufficient expertise to manage any type of property.

- f) There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
- g) There is a mechanism to permit the sale of property with the consent of the owner.
- h) Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety.
- i) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.
- j) To ensure the transparency and assess the effectiveness of the system, there are mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realised.