

G8 BEST PRACTICE PRINCIPLES ON TRACING, FREEZING AND CONFISCATION OF ASSETS

Introduction

The Lyon Group has long recognised the importance in fighting international organised crime and terrorism of effective provisions in national law for the speedy and effective freezing of criminal assets with a view to their later confiscation. Moreover it is vital such provisions should be made available for the benefit of other countries seeking judicial assistance in the criminal law area.

The States of the G8 have therefore concluded that to assist in this objective it would be valuable to identify some basic principles of good practice which they commend among themselves and more widely. It is recognised that national legislation and in particular constitutional provisions differ as between states but the Lyon Group would urge all countries to, where necessary, consider urgently how the principles identified below can best be modified to meet such legal requirements.

The principles are divided into four sections: general principles, traceability, freezing, and confiscation. With each of these sections are principles directed at domestic laws and procedures within States to facilitate effective action and those directed at improving international co-operation. One important factor common to most of the principles is the need for a multi-disciplinary approach between for example, legal, law enforcement and financial and accountancy experts if work in the complex and important area of restraint and confiscation is to be most effective.

It should be stressed that these principles in no way replace or amend the obligations States may be under by virtue of obligations they may have undertaken in international instruments such as the 1988 Convention on Narcotic Drugs and Psychotropic Substances, 1990 Council of Europe Convention on the Laundering, Search, Seizure and confiscation of the Proceeds from Crime and the 2000 United Nations Convention on Transnational Organised Crime, as well as their commitments pursuant to the recommendations of the Financial Action Task Force.

Best Practices

I. General Provisions

Domestic measures

1. States should examine their domestic frameworks and, as far as this is permitted by constitutional and other requirements, ensure that sufficient resources are made available by Government agencies and, as appropriate, other public bodies to identify the extent and whereabouts of assets which are subject to freezing or seizing. Consideration should be given to establishing authorities dedicated for these purposes.

2. States should designate experts on asset tracing, freezing and confiscation to provide specialised advice and expertise, either within, or readily available to, the Central Authorities for mutual legal assistance. They should meet with their other national counterparts regularly and acquire knowledge of the particular legal systems and requirements of those States with whom they need to co-operate most frequently. This might include short term secondments. Contact points to facilitate the traceability, freezing and confiscation of assets should be identified and made known to the appropriate authorities of other states. Where the component providing specialised advice and expertise is not located within the Central Authority for mutual legal assistance, the components concerned should coordinate in order to ensure effective international cooperation.

International co-operation

3. All countries should, where they have not already done so, review their laws and procedures for the purpose of enhancing their abilities to assist other States in the tracing of assets, in the provision of evidence, and with respect to enforcement of freezing and confiscation orders.

4. Common action among States in conducting the investigative and prosecution activities referred to in these principles can facilitate a more effective law enforcement response against terrorism and other crimes. In appropriate cases, States should co-ordinate their actions where they and authorities from other States are investigating the same or related offences, and should cooperate accordingly in appropriate cases.

II. Traceability

Domestic Measures

5. States should be able to provide expeditious access to necessary financial information in order to assist domestic investigations and prosecutions and to trace assets for the purposes of confiscation. States should ensure their abilities to compel production of relevant bank, business and personal records for such purposes.

6. States should also, at a minimum, permit the expeditious identification of the existence of bank accounts of named individuals and corporate bodies. In particular, States are encouraged (where the banking and other arrangements permit, and to the extent consistent with the fundamental principles of their domestic law) to provide domestic mechanisms for the locating of bank accounts without the need for bank account numbers and branch identification, at minimum with respect to an appropriate range of serious crimes. Sufficient information should be provided to confirm that the correct accounts have been located.

7. Lack of transparency of legal arrangements, such as corporate vehicles, can impede effective investigation and locating of assets. States should, in a manner consistent with the relevant FATF recommendations, take the necessary measures so that their domestic law provides for adequate transparency of arrangements such as corporate vehicles.

8. States should, where they have not already done so, review their relevant legislation relating to liability of legal persons (whether criminal, civil or administrative) in order, inter alia, to provide an effective basis for asset tracing and freezing.

International co-operation

9. States should have the necessary mechanisms and arrangements in place to facilitate the expeditious providing to the appropriate authorities of foreign States of financial information as described in principle 5. They may consider entering into agreements with appropriate foreign States for purposes of reciprocal application of the measures referred to in principle 6.

10. Consideration of requests for assistance seeking bank records or analogous information important for the purpose of eventual freezing or seizing and confiscation of assets should be expedited to avoid dissipation of assets. States should, having regard to the rights of the parties concerned, review their procedural frameworks for adjudication of freezing and confiscation requests (e.g. the appeal process) with a view to reducing opportunities for unreasonable delays that frustrate the objectives of freezing and confiscation programs. States should also ensure that their judicial authorities are alert to such risks.

11. International assistance in the provision of information should be on as wide a basis possible available in respect of corporate institutions as well as that relating to private individuals. This should be independent of whether in the requested state there is criminal liability for legal persons.

III. Freezing

Domestic measures

12. Within States' legislation, freezing or seizing action should be available at an early point in the criminal investigation.

13. States should, consistent with the protection of individual rights, adopt procedures aimed at minimizing the opportunity for persons claiming an interest in property to hide or dispose of it prior to it being frozen or seized. Where a judicial order is required for freezing or seizing, all applications for freezing orders, at a minimum with respect to movable property, must be capable of being made on an ex parte application to a judge.

14. Such applications, whether domestic or in response to foreign requests, must be given as high a priority as possible in order to prevent the dissipation of the assets in question.

15. States' legal frameworks governing discharge or variation of a restraining order by a person claiming an interest in the affected property, should take into account the need avoid or minimize dissipation of the property pending final order of confiscation, including whether there are other funds available to pay necessary expenses. Particular regard should be given to the bona-fides of those applying for discharge or variation.

16. States should examine their domestic law to ensure that any provisions relating to the maximum period for which property can be frozen or seized pays due regard to operational requirements as well as the protection of personal rights. For example, the period of restraint should not be unrealistically short in light of various evidentiary and procedural requirements.

17. States should ensure that their law provides for as wide a definition of «assets» and «property» as possible, e.g., by including instrumentalities. - so as to avoid gaps in the categories of material which can be frozen.

18. States should have a comprehensive range of predicate offences for which freezing or seizure is available, by either adopting an all serious crimes approach or an expansive list of predicate crimes, consistent with conventions and international standards.

19. States should have measures in place to facilitate preservation of the maximum value of property that may depreciate while frozen or seized, to protect the respective interests of the parties concerned. States are therefore encouraged to consider to the extent consistent with the fundamental principles of their domestic law, providing for the appointment in appropriate cases of specialist accountants or receivers for the management or selling frozen/seized property and holding the proceeds of the sale in escrow pending a final determination as to confiscation.

20. States should, consistent with the protection of individual rights, adopt procedures to enable the voiding of conveyances or transfers of property designed to defeat freezing or confiscation.

International co-operation

21. For the same reasons as in Principle 12, States upon request should maintain the confidential nature of requests for mutual legal assistance for a sufficient period of time to permit freezing or seizing.

22. In an ongoing proceeding considering freezing or seizure in response to foreign requests, the requested State's procedure should permit - while the property continues to be held - additional time to amend minor technical errors in the request or obtain foreign gathered evidence to support restraint, rather than requiring dismissal of the proceeding and release of moveable property. If under States' national law such property cannot be restrained until the proceeding is complete, States' should ensure that the confidentiality of the application in response to the foreign request will prevent the property in question from being dissipated.

23. States should as far as possible ensure that their law permits them to comply with any special request by the requesting country (procedural or otherwise) regarding the application for, and execution of, the freezing or seizing of property, e.g. by coordinating simultaneous freezing or seizing in different jurisdictions of property implicated in the same course of criminal conduct.

24. International co-operation with respect to freezing or seizing with a view to confiscation, should be available on behalf of a broad range of appropriate foreign competent authorities, if necessary by means of a judicial order. In addition, orders made by examining magistrates should have the same legal validity as those made by «courts.»

IV. Confiscation

Domestic measures

25. Confiscation orders, as with freezing orders, should be available for proceeds and instrumentalities relating to a comprehensive range of offences. In addition to availability with respect to appropriate serious offences, States should consider including offences that have the capacity to generate significant proceeds.

26. Where they have not already done so, States are encouraged to examine the possibility to extend, to the extent consistent with the fundamental principles of their domestic law, confiscation by: permitting the forfeiture of property in the absence of a criminal conviction; requiring that the lawful origin of alleged proceeds of crime or other property be demonstrated by the claimant.

27. States should ensure that their legal systems provide for the effective and fair resolution of competing proprietary claims in respect of the same assets, such as forfeiture, compensation and restitution to victims.

International co-operation

28. States are encouraged to consider according the fundamental principles of their domestic law and the nature of the judicial or other proceeding, adopting the appropriate arrangements to permit the enforcement of freezing and confiscation orders of another State, in appropriate circumstances, irrespective of whether or not a criminal conviction was obtained in the requesting State.

29. Where necessary, States are encouraged to amend their national laws and procedures to permit the sharing of confiscated assets with those other countries which have provided assistance in this process. In entering into a bilateral agreement of this kind, States should have regard to the G8 model asset-sharing agreement of 1999.