PROCEDURAL DIFFERENCES BETWEEN MUTUAL LEGAL ASSISTANCE AND INTERNATIONAL INFORMAL ASSISTANCE

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Countries around the world face legal impediments when dealing with the recovery of criminal assets - especially developing countries that do not have the resources to deal with the skills and creativity of criminals. The scale of the problem is growing and shows us that a more effective approach is needed to recover stolen funds.

There is a perception that „international cooperation” in an investigation and recovery of assets refers to international legal assistance - the formal process of requesting assistance from a foreign jurisdiction. However, in practice, there is a step that should be earlier in the process, which is often ignored or forgotten and which is just as important, if not more so. This is mutual administrative assistance, often described only as „informal assistance”.

Almost all cases of corruption and embezzlement have a significant international dimension, whether it is foreign bank accounts and residences abroad or a chain of transactions circulating in several jurisdictions. To start informal international cooperation, all that is required is for an officer or prosecutor to pick up the phone or email his or her counterpart in another jurisdiction to request assistance in verifying the information to support a criminal investigation.

This informal cooperation helps the investigation team to develop a better and more complete picture of the case. It helps them to identify official evidence that may be required from abroad to successfully prosecute and, ultimately, to recover any criminal assets with limited resources at hand.

Keywords: legal assistance, recovery, confiscation, seizure, criminal assets, request for assistance, international cooperation.

https://doi.org/10.52327/1857-4440.2021.2(20).26
CZU: 341.4:343.272

Introduction. As long as illicitly acquired funds can be quickly transferred abroad - often at the touch of a button on a laptop or mobile phone - it can take months or years for law enforcement and prosecutors to trace and recover assets. Successful tracing and recovery efforts often depend on assistance from foreign jurisdictions, a process that is slowed and complicated by differences in legal traditions, laws and procedures, languages, time zones and varying capabilities. In this context, international cooperation is essential to the successful recovery of assets hidden abroad, and practitioners could benefit from international cooperation efforts at every stage of a case.

Many practitioners immediately resort to drafting a request for international legal assistance when they determine that international cooperation is needed; however, some important information can be obtained more quickly through informal channels.

Informal assistance can lead to a quicker identification of assets, confirm the assistance needed and provide the appropriate basis for a request for international legal assistance.

Main research ideas. A request for international legal assistance is a formal process by
which jurisdictions seek and provide assistance in gathering information and evidence for investigations; implement provisional measures; and enforce foreign orders and judgments. An MLA request is usually submitted in writing and must comply with procedures, protocols and conditions specified in multilateral or bilateral agreements or domestic law. During the investigation, these requests generally concern evidence, provisional measures or the use of certain investigative techniques (such as freezing a bank account, the power to obtain search and seizure orders, to take formal statements from witnesses and to seize documents). Generally, a request for international legal assistance is required for the execution of confiscation orders [1, p. 19].

The formal channels of international cooperation in corruption and asset recovery cases are in fact the international Conventions that form the basis of a request for international legal assistance, the Conventions on Corruption and Transnational Organized Crime are about the importance and necessity of signatories to cooperate and offer each other „the widest measure of cooperation and assistance”. We can refer to the United Nations Convention against Corruption (UNCAC) [4] and the UN Convention against Transnational Organized Crime (UNTOC) [3].

In practice, officials are often faced with the difficult problem of how individual states interpret conventions. The differences may be fundamental, such as a civil law versus a common law system, or just distinctions in the interpretation of specific provisions. Differences in a country’s laws are another barrier to the kind of cooperation envisaged by the conventions. For example, the lack of „double criminality” between the requesting and receiving state. In such cases, the elements of the offence may provide a solution between two parties and here informal channels of cooperation can provide the necessary building blocks to facilitate discussions. It should also not be forgotten that a jurisdiction may also refuse a request for assistance if it considers that the investigation or charges against the accused are politically motivated or likely to violate his or her fundamental human rights.

Informal assistance usually consists of any official support provided outside the context of international legal assistance requests. Although „informal assistance” compared to a request for international legal assistance, it still requires legal authorisation being offered by formal authorities.

Unlike international legal assistance requests, information collected through informal assistance is not admissible in court. This is basic information that can be used to assist the investigation and may lead to the preparation of an international legal assistance request. This process can take place by telephone between counterparts, through administrative cooperation or through face-to-face meetings with members of similar bodies in the other country. It may include non-coercive investigative measures, such as collecting public information and intelligence from law enforcement databases, conducting visual surveillance or obtaining information from financial intelligence units; it may extend to conducting joint investigations or requesting authorities in another jurisdiction to open a case. What can be requested through informal assistance versus what should be requested through the legal assistance request process may differ by jurisdiction and often information obtained informally should be confirmed and formalised through a formal request. [5, p.61]

The most common channels for informal assistance include practicing counterparts (in the case of the Republic of Moldova this would be the Criminal Asset Recovery Agency), financial intelligence units (in the case of the Republic of Moldova - the Service for the Pre-
vention and Combating of Money Laundering) and law enforcement authorities. Contact with these entities is often through direct personal contact or through networks of which the agencies are members. It should be noted that the Asset Recovery Agency of the Republic of Moldova has become an observer member of the CARIN (Camden Inter-institutional Asset Recovery Network) and BAMIN (Balkan Inter-institutional Asset Management Network) networks.

**Information obtained through both channels.** So from here we can answer the question - what kind of informal information can states provide us with through these networks?

1. Investigative assistance (non-coercive):
   - suspicious transactions and activity reports;
   - records from state databases or information from registers (of vehicles, companies, real estate);
   - visual surveillance;
   - interviewing witnesses.

2. Other:
   - requesting to start an investigation abroad if the crime was committed in their jurisdiction;
   - joint investigative inquiry;
   - emergency provisional measures [2, p.127].

Thus, having accumulated the informal information, we can proceed to the phase of drafting a request for international legal assistance, based on the information acquired, namely:

1. Investigative (coercive) assistance and evidence for the court:
   - certified documents;
   - search or seizure warrant;
   - order to monitor bank account;
   - Interrogation of witnesses.

2. Provisional measures:
   - direct execution of the foreign restraint or attachment order;
   - indirect execution by domestic freezing or domestic attachment order.

3. Confiscation:
   - direct execution of foreign confiscation order;
   - indirect execution by domestic confiscation order [7, p. 4].

**The difference between a request for international legal assistance and informal information.** The difference is visible when we refer to its purpose. Informal information aims at obtaining information to support the investigation and for the application of emergency provisional measures in some jurisdictions. In the case of a request, we aim to obtain evidence for use in criminal prosecution and seizure or for the purpose of enforcing a detention order or seizure order [8, p. 8].

Another differentiation lies in the type of assistance. Informal information provides for assistance with non-coercive investigative measures; pro-active disclosure of information; joint investigation; initiation of a foreign investigation. A request provides for coercive investigative measures (such as search orders) and other forms of judicial assistance (such as enforcement of provisional measures or confiscation orders) [6, p. 10].

The process of contact also differs, in the case of informal intelligence we refer to direct contact between law enforcement, prosecutors or magistrates directly at the counterpart, between financial intelligence units, and banking authorities. Broadly speaking, a request in-
volves indirect contact of the central authorities in each jurisdiction with the specific contact point (law enforcement, magistrate, prosecutor or judge); letters rogatory through the Ministry of Foreign Affairs [7, p. 4].

The requirements also differ, for example in the case of non-formal information the requirement would be agency-agency contact; sometimes the basis being a memorandum of understanding and the information must be obtained according to the law in force in both states. In the case of the request, dual criminality would be required, ongoing criminal investigation or showing a link between the criminal property and the crime [7, p. 3].

Last but not least, the difference between advantages and limitations. Informal information has the advantage of obtaining information quickly; there is no need for the formality of a request (e.g. dual criminality), useful for verifying facts and obtaining general information to improve a request for international legal assistance. However, information cannot always be used as evidence; difficulty in determining individuals; few resources allocated to requests through networks, sometimes in a hurry and due to overload being unproductive; potential leaks. In the case of requests, the main advantage is the admissibility in court of evidence and allowing orders to be executed, while among the limitations we could list first of all the time consumed; then the resources consumed; many requirements that are often difficult to meet and the same potential leakages.

**Conclusion.** When a case involves multiple jurisdictions, it is important for practitioners to focus immediately on the international cooperation efforts that must be maintained throughout the case. Some authorities wait until confiscation orders or domestic convictions have been obtained before beginning the process of pursuing and securing criminal assets abroad - often with frustrating and negative results, such as when the delay gives the corrupt official ample opportunity to transfer funds to uncooperative jurisdictions. It is therefore imperative to involve authorities in other jurisdictions from the outset, at least through informal means.

Establishing pro-active contact early on can help practitioners understand the foreign legal system and potential challenges, obtain additional opportunities and develop a strategy. It also gives the foreign jurisdiction the opportunity to prepare for its role in providing quality cooperation.

Forming personal connections with foreign counterparts is the hallmark of successful criminal asset recovery cases. A phone call, email, video conference or face-to-face meeting with foreign counterparts will go a long way to expedite the case. It also helps counterparts build trusting relationships, evaluate strategies and learn about the requirements for filing international legal assistance requests so they are not rejected in the future.

Experience in asset recovery cases over the past 15 years has shown that it is more effective to focus on similarities rather than differences to unite two jurisdictions and facilitate cooperation between them. Beyond the broad legal framework of UN Conventions, jurisdictions may also choose to sign a bilateral agreement that formally sets out the terms of cooperation between two countries. There are many such examples. In addition to acting as a roadmap for cooperation between jurisdictions, these bilateral treaties represent something more fundamental, namely a recognition of compatibility, a meeting of minds between countries and a declaration of intent to reach a solution for the mutual benefit of states. It demonstrates a common interest in fighting crime and returning criminal assets to the respective jurisdictions of the victims.
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Presented: 2 august 2021.
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