



FATF PRESIDENT'S PAPER

Anti-money laundering and counter terrorist financing for judges & prosecutors

June 2018





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, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

For more information about the FATF, please visit www.fatf-gafi.org

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Foreword



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The work of judges, prosecutors and other investigative authorities is crucial for stable institutions, transparency and the rule of law, which are all pillars of an effective AML/CFT system.

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It is a pleasure to introduce the FATF President's Paper "Experience, Challenges and Best Practices" on anti-money laundering and counter terrorist financing (AML/CFT) for judges and prosecutors.

Under the Argentine Presidency, the FATF initiated a global outreach programme to the criminal justice systems given the crucial role it plays in the effective implementation of FATF Standards. The work of judges, prosecutors and other investigative authorities is crucial for stable institutions, transparency and the rule of law, which are all pillars of an effective AML/CFT system. The objective of the outreach programme was to reinforce the effectiveness in the investigation and prosecution of ML and TF offences and in the recovery of the proceeds of crime.

This initiative allowed us to learn about the experiences, challenges and best practices in investigating financial criminality from judges and prosecutor from across the globe. The initiative aimed to improve international co-operation and maintain an up-to-date understanding of the methods that are used to launder money from organised crime or to fund terrorism.

The FATF, in a joint effort with the FATF-Style Regional Bodies (FSRBs) and other international organisations, gathered knowledge through six regional workshops which brought together almost 450 judges and prosecutors from more than 150 jurisdictions and observers organisations.

We invited relevant institutions such as the Organization for Security and Co-operation in Europe (OSCE), the International Prosecutors Association, the International Magistrates Association and Asset Recovery Networks to join the conversation and add value to the project considering their unique perspective.

I would like to express my gratitude to the judges and prosecutors that participated in the project; to Argentina, Ecuador, China, Tunisia and Guyana for hosting the workshops; to the Financial Action Task Force of Latin America (GAFILAT), the

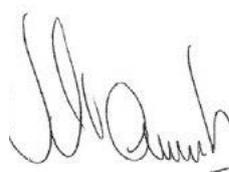
Caribbean Financial Action Task Force (CFATF), the Asia/Pacific Group on Money Laundering (APG), the Eurasian Group (EAG), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Inter Governmental Action Group against Money Laundering in West Africa (GIABA), the Task Force on Money Laundering in Central Africa (GABAC), the Middle East and North Africa Financial Action Task Force (MENAFATF), the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the OSCE and FATF Training and Research Institute (FATF TREIN) for co-organising and supporting the events; to FATF Delegations for their input on this paper and to the FATF Secretariat for their assistance.

At the FATF Plenary in June 2018, I presented the conclusions of this exercise, which are outlined in this paper. FATF members supported them and agreed to broadly disseminate and publish them through the FATF Global Network and among relevant institutions and organisations.

This paper identified challenges and highlights useful elements and best practices in the conduct of investigations, prosecutions and convictions of money laundering, terrorist financing, and in confiscations of proceeds of crime. It also highlights the need for international cooperation, a key element when investigating criminal networks and recovering assets that are often spread over multiple countries.

Based on these findings, the US Presidency of FATF will continue this joint effort to enhance the effectiveness of the criminal justice system.

I am glad to deliver this important outcome which I hope will help us to produce results in this global fight against money laundering and terrorist financing.



Santiago Otamendi

Executive Summary

FATF global anti-money laundering and countering terrorist financing efforts are focused both on effective prevention and disruption and on achieving convictions and asset recovery for the benefit of States and victims. Although FATF has had some interaction in recent years with prosecutors and similar experts on various issues, the relationship between the FATF and the criminal justice sector needed to be strengthened. For these reasons, the Argentine Presidency of the FATF initiated a global outreach programme to Criminal Justice Systems.

The main objectives of the project were:

- to prepare a report which identifies the experiences and challenges in relation to money laundering (ML) and terrorist financing (TF) investigations and prosecutions and the confiscation of criminal assets, and the good practices to deal with these issues;
- to enhance the FATF outreach to judges, prosecutors and investigators from different regions, boosting current and potential networks of collaboration, and getting practitioners and relevant actors in close contact to discuss their common challenges and possible solutions, generating a framework to enhance international working relationships; and
- to get FATF and FSRBs countries to work together on these key elements of effectiveness for a successful AML/CFT system.

Through several regional workshops, the FATF in a joint effort with the FSRBs and other international organisations¹ brought together almost 450 judges and prosecutors from more than 150 jurisdictions and observers to share experiences and best practices. This FATF President's paper presents the conclusions from the workshops. Some of the main findings are listed below.

1. Relevant organisations were invited to participate and contribute to the discussions such as the Organisation for Security and Co-operation in Europe, the International Prosecutors Association, the International Magistrates Association and Asset Recovery Networks

Underlying and Supporting Elements

ML and TF investigations and prosecutions and the confiscation of criminal assets are supported by a range of important underlying elements in the wider AML/CFT regime:

- A comprehensive understanding of the jurisdiction's ML and TF risks sets the foundation for an effective AML/CFT regime.
- Effective and timely domestic co-operation and co-ordination is fundamental. Some good practices in this area include setting up a permanent multi-agency coordinating committee on ML/TF and establishing robust inter-agency working relationships based on mutual trust.
- The creation of multidisciplinary agencies/units that focus on ML/TF and/or on asset confiscation, or at a minimum having expert staffs that are dedicated to this role within larger agencies or public prosecution services.
- Collaborating with the private sector to both provide and obtain information related to ML/TF.
- Provide specialised training for investigators and prosecutors – particularly focusing on building skills in gathering information and evidence, financial investigative techniques, and presenting complex cases to judges or juries.

Money Laundering: Investigation, prosecution and convictions

Investigating and prosecuting money laundering (ML) offences presents a distinct set of challenges for jurisdictions. The overall results of the assessments conducted to date demonstrate the significant challenges that countries face in obtaining convictions. Among the good practices mentioned in the report, some that could be highlighted are:

- Properly criminalising the offence: expand the scope of predicate offences to the broadest list of serious offences or to adopt an all-crimes approach, which may provide clarity and more flexibility for the prosecutors, especially when combined with a system that also incorporates the principle of opportunity.
- Establish, whether through legislation or case precedent, that the predicate offence need not be proven in order to convict for ML, as established in the FATF Recommendations.
- Fixing plea bargaining and deferral prosecution agreements as a legal possibility, subject to judicial control and oversight.
- Having internal guidelines, handbooks, or in-person trainings to teach investigators how to begin and pursue a basic financial inquiry. Also, to have policies or directives which establish the mandatory requirement of opening a parallel financial investigation in every investigation of a predicate offense of ML.

Terrorist Financing: Investigations, prosecutions, and convictions

Investigating and prosecuting terrorist financing (TF) offences presents a distinct set of challenges for jurisdictions. The majority of the reviewed jurisdictions had not prosecuted TF offences or obtained TF convictions at the time of their mutual evaluation. Among the good practices mentioned in the report, some that could be highlighted are:

- Comprehensive criminalisation of TF is directly related to the jurisdiction's ability to investigate and prosecute TF effectively. Drafting the offence to be as broad as possible: for example, structuring the offence in a way that the suspect's intent to finance specific terrorist acts does not need to be proven.
- Ensuring that a TF investigation can be launched without an underlying terrorism case, and that the TF investigation can continue even where the linked terrorism investigation has already been concluded.
- Having legislation or judicial procedures that specifically deals with the use or introduction of classified material or intelligence (e.g. laws or rules may permit judges and/or defence counsel to review information, redactions may be made, information can be "declassified" by the state, etc.).
- Involving the prosecutor at an early stage to determine what pieces of intelligence

may be admissible as evidence, or what steps would need to be taken for it to be admissible.

- Having a designated special court to deal with terrorism and terrorist financing cases that often include classified information.



Confiscation: freezing, seizing, and recovering assets

Tracing, freezing and confiscating the proceeds and instrumentalities of crime is fundamental to the effectiveness of measures to combat money laundering and terrorist financing. Serious crime generates a vast amount of proceeds every year. However, the level of implementation of an effective confiscation regime among the assessed countries is modest at best. Some practices particularly useful for asset confiscation are:

- Ensuring that criminal asset confiscation is a policy priority, with a linked strategy that sets out how all relevant authorities can work to achieve the objectives/goals that are set.
 - Having a full range of powers to trace, freeze and confiscate criminal proceeds and instrumentalities, including the ability to quickly seize assets of the defendant and associated third parties, confiscation powers that rely on civil standard of proof, or are non-conviction based or where there are appropriate provisions to reverse the burden of proof.
 - An effective framework to manage or oversee the management of frozen, seized, and confiscated property, including by competent authorities that are freestanding or part of an LEA, and, as needed, the ability to hire outside vendors or contractors for complex assets.
- Working in co-operation with international partners was seen as a key ingredient of success, especially early outreach to freeze criminal assets subject to confiscation.



International co-operation: mutual legal assistance, extradition & other co-operation

International co-operation is often critical to the success of ML/TF investigations and prosecutions and also for asset recovery. ML and TF networks are often spread over multiple countries and foreign jurisdictions may have the missing pieces of information or evidence which facilitate a successful prosecution.

- Devoting sufficient resources to rapidly process and respond to requests, including having mechanisms and technology that allow authorities to engage in a dialogue with the requesting countries to facilitate case consultations.
- Considering informal methods of international co-operation such as FIU-FIU, police-police or prosecutor-prosecutor co-operation before submitting a formal MLA request.
- Using networks as such as EUROJUST or CARIN and ARINs prior to making a formal request to facilitate international co-operation and target the assistance that will be sought.
- Making contact with overseas authorities and sending a draft copy of a proposed MLA request, so that they can advise on the content and wording of the request.
- Using the Mutual Legal Assistance Request Writer Tool (MLA Tool) that has been developed by UNODC to assist states to draft requests with a view to facilitate and strengthen international co-operation.

FATF/MONEYVAL/OSCE Workshop for Judges and Prosecutors
March 2018, Strasbourg, France

FATF/GAFILAT/CFATF Workshop for Judges and Prosecutors
September 2017, Quito, Ecuador



Introduction



FATF is committed to maintaining a comprehensive understanding of how criminals launder money and how terrorists raise, move, and use funds with the key objective of ensuring up-to-date and effective global standards and their effective implementation.

While the supervisory and regulatory agencies and the private sector play a critical role in preventing money laundering and terrorist and proliferation financing, there is agreement that if global AML/CFT efforts are to be effective, countries must have strong operational authorities to bring prosecutions and obtain convictions, as well as to seize and confiscate the proceeds and instrumentalities of crime for the benefit of states and victims.

As shown through the Mutual Evaluation Reports conducted on the basis of the 2012 FATF standards and 2013 Methodology, many countries have enacted the necessary legislative measures to criminalise money laundering (ML), as well as terrorist financing (TF), however, the results obtained in terms of convictions and confiscations are modest overall. Achieving results in this area of the AML/CFT regime is mainly an issue for prosecutors, judges and investigators, as part of the criminal justice system. From the initiation of an investigation through the sentencing of a defendant, the criminal justice system can involve many governmental actors with different roles who need to coordinate among domestic authorities and international partners to fight ML and TF threats which are increasingly global in nature.

Additionally, financial institutions and DNFBPs covered by the FATF Standards are subject to laws and regulations at the national level. Generally, supervisors ensure compliance with AML/CFT measures, but in exceptional cases, compliance failings may also be dealt in the criminal justice system.

The correct functioning of the criminal justice system must be supported by foundational elements such as stable institutions, accountability, integrity, transparency and the rule of law. These are all pillars of an effective AML/CFT system.

Although FATF has had some interaction in recent years with prosecutors and similar experts on various issues, the relationship between the FATF and the criminal justice sector needed to be strengthened. An enhanced engagement, collaboration and effective communication with the prosecutorial services, investigating judges and some other elements of the criminal justice system is vital given the crucial role they play in the effective implementation of the FATF Standards.

For these reasons, the Argentinean FATF Presidency decided to bring forward an initiative intended to share experiences, and to identify the challenges and good practices which can be critical for improving jurisdictions' effectiveness in terms of ML/TF prosecutions and confiscating criminal proceeds.



Objectives

The main objective of the project is to produce a report that identifies those experiences and challenges, and good practices to deal with them. The paper focuses on the factors that can result in an effective system for prosecution and confiscation, and less on technical legal requirements, although the report also seeks to identify legal powers that appear to lead to effective results.

Also the initiative is designed to enhance the FATF outreach to judges, prosecutors and investigators from different regions. The aim was to, establish networks of collaboration and facilitate discussion among practitioners about common challenges and possible solutions, generating the opportunity to build valuable work relationships. Thus, jurisdictions could learn from each other not just in a theoretical sense as well as make contact with regional and inter-regional counterparts that could be useful in operational matters.

The project also had the benefit of bringing the FATF and FSRB countries together to work more effectively on the investigation and prosecution of ML and TF and the recovery of assets. This is an important element considering that through the mutual evaluation process, it has been observed that most of the countries that are part of the FATF Global Network had had challenges in these particular areas.²

Finally, this initiative provided an opportunity for the FATF to extend the outreach and scope of collaboration to other relevant international or inter-governmental organisations.

² See the analysis of the results of IO7, IO8 and IO9 in each of the dedicated sections.

Methodology

The primary source of information for the exercise was the series of workshops for investigating judges and prosecutors, which were organised by the FATF on a regional basis, in conjunction and with the support of FSRBs and the hosting countries/organisations. These workshops provided a venue to gather experiences and views from a wide perspective of different practitioners on the challenges and difficulties they face in combating ML and TF, and on effective mechanisms and good practices to deal with these.

The information on the experiences drawn from the workshops was supplemented by a desk review of relevant reports and material on these issues and on a horizontal review of all the published Mutual Evaluation Reports, focusing on the country results on the relevant immediate outcomes, as further described below.

Based on the information and views expressed during the workshops, combined with the results of the desk review and the horizontal study, the FATF Secretariat with the support of FATF TREIN, conducted an analysis and identified challenges and good practices, including issues specific to particular regions or type of legal system, and areas for potential further work. That information and analysis is the basis for this report.

FATF President Santiago Otamendi
FATF/MONEYVAL/OSCE Workshop for Judges and Prosecutors
March 2018, Strasbourg, France





The workshops

In order to ensure that experts in all regions had an opportunity to input into the project, and to gather the full range of experiences and views that included a regional perspective, FATF conducted an evolving process of regionally-based workshops in co-ordination with each of the FSRBs:³

- Americas - GAFILAT and CFATF
September 2017
- Asia/Pacific - APG and EAG
January 2018
- Africa/Middle East - ESAAMLG, GIABA, GABAC and MENAFATF
February 2018
- Europe - MONEYVAL and the Organization for Security and Co-operation in Europe (OSCE)
March 2018
- FATF wrap up workshop
May 2018⁴

Through workshops in different regions, the FATF brought together almost 450 judges and prosecutors from more than 150 jurisdictions to share experiences and best practices. In addition to the FATF and FSRB Secretariats and FATF TREIN, relevant international organisations such as the OSCE, the International Prosecutors Association, the International Magistrate Association and the various Asset Recovery Networks participated and contributed to the discussions.

³ There were another two workshops conducted by CFATF (May 2018) and by GAFILAT (April 2018). Both FSRBs sent a report setting out the topics discussed, the participation and conclusions, which were considered for this report.

⁴ With the support of FATF TREIN.

Scope

The topics for discussion during the workshops were generally the challenges and good practices around:

- investigating and prosecuting money laundering cases,
- investigating and prosecuting terrorist financing cases,
- seizing and confiscating criminal proceeds and instrumentalities and
- providing international co-operation and mutual legal assistance.

Participants in each of the workshops included investigating judges and magistrates, prosecutors, and investigators with experience and expertise in investigating and prosecuting ML and TF, or seizing and confiscating assets. Participants from FATF members attended various workshops, while those from the FSRBs were involved with the workshop in their region.

Participant at the FATF/ GAFILAT/CFATF Workshop for Judges and Prosecutors
September 2017, Quito, Ecuador



Underlying and Supporting Elements



Identifying risks, strategic policies and priorities

A comprehensive understanding of the jurisdiction's ML and TF risks sets the foundation for an effective AML/CFT regime. Properly identifying the risks and common ML/TF methods also assists investigators and prosecutors in detecting and ultimately proving criminal activities. The workshops for judges and prosecutors highlighted the good practice of involving investigators and prosecutors in the risk assessment process. These actors can provide information that feeds into the countries' overall understanding of risk by participating in the process.

In addition to helping authorities identify criminal threats, a good understanding of ML and TF risks contributes to the setting of national strategies and priorities for combatting ML and TF. Knowing the level and type of risks in the country helps to allocate resources for agencies charged with investigation and prosecution, including resources that can be used to hire personnel, train them, and build specialised capacity. In the case of TF, the jurisdiction should integrate counter-terrorism and CFT strategies, to the extent possible.

The strategies should clearly articulate why criminal prosecutions and asset confiscation are desirable outcomes. They should also be used to incentivise investigations, prosecutions, and confiscation of assets. For example, many jurisdictions have set up asset forfeiture funds which can be used to fight crime, benefit society, or compensate the victims of crime. If appropriately used, these mechanisms can provide useful incentives for action. Strategies can also inform the budgetary process and ensure adequate resources for the law enforcement authorities (LEAs), including prosecutorial authorities and asset confiscation units. Finally, the involvement of the criminal justice sector in the risk assessment or even strategy-making process can promote legislative change, as those who work with the law most closely are in a good position to identify loopholes or areas for potential changes and updates.

ML and TF investigations and prosecutions and the confiscation of criminal assets are supported by a range of underlying elements in the wider AML/CFT regime. This section explores the FATF and FSRB jurisdictions' experiences related to certain aspects of the wider framework surrounding the work of investigators, prosecutors and judges. It also highlights specific challenges and good practices.

Institutional framework

Investigating and prosecuting ML/TF cases often involves broad set agencies with differing skills. It is therefore important to ensure that the institutional framework to investigate and prosecute these offences incorporates the appropriate range of agencies and facilitates the use of specialist expertise where necessary.

One of the key good practices discussed in the workshops is the “task force” model of investigation. This may include setting up multi-disciplinary teams to conduct ML or TF investigations and collaborate on the development of cases. Effective task forces can consist of a mix of investigators, specialised LEAs (such as drug, tax, anti-corruption, or customs agencies), prosecutorial offices, intelligence authorities, and financial analysts, to include the FIU. The exact composition of the task force depends on national practice, but the intention of the task force model is to leverage expertise, resources, tools and authorities in an interagency setting to achieve the best results. Such models also help avoid operational conflicts and bring all relevant authorities together, potentially with the effect of speeding up the completion of cases and simplifying tasks.

Another good practice is setting up specialised ML/TF investigation units and designating specialised prosecutors to focus on ML/TF and asset confiscation cases. The task forces and special units should be sufficiently resourced, including staff with the requisite skill-sets. A good practice is to use special expertise such as forensic accountants, financial analysts and experts in computer forensics in investigations. If necessary, this expertise can be employed from external sources outside of the unit or task force.

Domestic co-operation and information sharing

The workshops highlighted the importance of effective and timely domestic co-operation and co-ordination. This is particularly critical in TF cases. Some good practices in this area include setting up a permanent multi-agency coordinating committee on ML/TF and building up trust between domestic agencies.⁵

Involving multiple agencies in the investigative process also increases the need to share information across institutional borders. This can be acute where the investigative and prosecutorial authorities are separated – such as in common law jurisdictions. Where the authorities are separated, involving the prosecutor in the investigation at an early stage has proven to be a useful practice. Practitioners mentioned that such early involvement can guide investigators to develop useful, admissible evidence that can prove the elements of the offense and that prosecutors may be necessary in seeking the authority to use certain investigative techniques. Additionally, in jurisdictions where authorities have prosecutorial discretion, working hand-in-hand with investigators can increase the chances that the police “referral” will result in charges.

In 2017, the FATF finalised a guidance paper to improve co-operation and exchange of information within jurisdictions: *Inter-agency CT/CFT information sharing: good practices and practical tools*. While not publicly available, the guidance is accessible to agencies involved in combatting terrorism and its financing, as well as agencies not traditionally involved in CFT activities.

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5. In terms of TF, the MER of the United States notes that the task force environment in that country is particularly useful for enhancing information-sharing and expertise and helping the authorities to conduct financial investigations effectively. The U.S. approach consists of 104 multi-jurisdictional (i.e. federal, state, and local) Joint Terrorism Task Forces (JTTFs) led by the Federal Bureau of Investigation.

Engagement with the private sector

Many jurisdictions participating in the workshops highlighted the importance of collaboration with the private sector to both provide and obtain information related to ML/TF. Some good practices include:

- Setting up public-private partnerships to facilitate information sharing, and producing typologies together with the private sector⁶.
- Sharing sanitised information about real cases and other contextual data.
- Supporting the private sector in identifying ML/TF cases by providing red flags, risk indicators and feedback on suspicious transaction reports.
- Particularly for TF, engaging with a broad range of private sector entities beyond the financial sector, such as airline and rental car companies and retail stores.

Capacity and experience

Many of the practitioners noted the lack of capacity and experience to investigate and prosecute ML/TF cases and confiscate assets in their jurisdictions. Jurisdictions have found it beneficial to provide specialised training for investigators and prosecutors – particularly focusing on building skills in gathering information and evidence, financial investigative techniques, and presenting complex cases to judges or juries. The capacity building was often triggered by a risk assessment, or when ML/TF issues were prioritised at a national level.

It was noted during the workshop that many jurisdictions with only a few TF investigations and often no TF prosecutions face particular challenges in building expertise and capacity in the TF field. This can be problematic because when TF expertise is required, it is usually at a very short notice. Joint investigations, if the facts permit partnering with a foreign LEA, could partly alleviate this issue through “case mentoring”. The workshops also highlighted the importance of having capacity to not only respond to TF cases, but to proactively look for and identify potential TF activity, especially in jurisdictions where there is a low risk of terrorist attacks.

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 6 The joint typologies work completed by authorities in the Netherlands with the private sector was noted as a useful example.

Money Laundering

Investigation, prosecution and
convictions



Results of the FATF/FSRB Mutual Evaluations

Immediate Outcome 7

Immediate Outcome 7 of the FATF Methodology measures the extent to which ML offences and activities are investigated, prosecuted and subject to effective, proportionate and dissuasive sanctions. In line with the FATF Methodology, the jurisdictions' effectiveness is determined by considering five core issues⁷:

- How well and in what circumstances potential cases of ML are identified and investigated;
- Whether the types of ML activity being investigated and prosecuted are consistent with the country's threats and risk profile and national AM/CFT policies;
- Whether different types of ML cases are prosecuted (e.g. foreign predicate offences, third-party laundering, stand-alone offence) and offenders convicted;
- Whether the sanctions applied against natural or legal persons convicted of ML offences are effective, proportionate and dissuasive;
- Whether countries apply other criminal justice measures in cases where an ML investigation has been pursued but where it is not possible, for justifiable reasons, to secure an ML conviction.

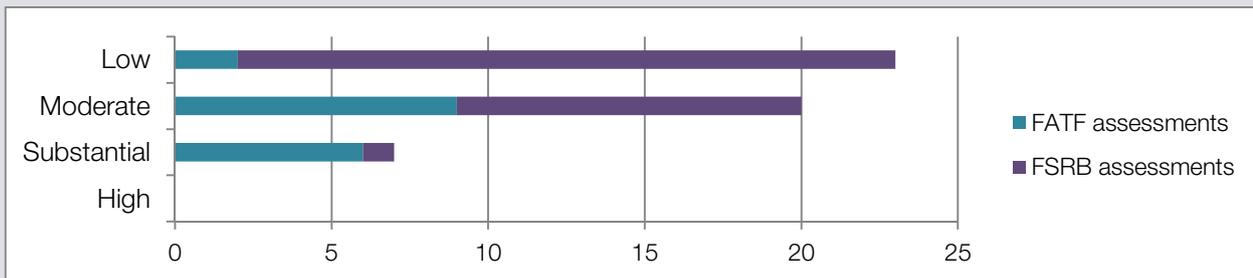
Of the 50 country assessments completed in the current round of mutual evaluations, only 7 countries achieved a substantial level of effectiveness while none were able to demonstrate a high level of effectiveness.

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7. The full text of the core issues can be found in the FATF Methodology, as well as examples of information and specific factors that a country may use to demonstrate effectiveness. See <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>

This section is intended to provide targeted analysis regarding the implementation of an effective criminal system response to money laundering offences. It is based on the findings of the discussions conducted during the workshops and on the horizontal and the literature reviews done by the FATF Secretariat with the support of FATF TREIN. It also discusses the legislative basis and of other core elements of effectiveness, such as the proper use of parallel financial investigations, the production and use of evidence and the specific investigative powers and techniques that could be useful to obtain successful results in this area.

Table 1. Effectiveness results under Immediate Outcome 7

| | Number | High | | Substantial | | Moderate | | Low | |
|------------------|--------|--------|----|-------------|-----|----------|-----|--------|-----|
| | | Number | % | Number | % | Number | % | Number | % |
| FATF assessments | 17 | 0 | 0% | 6 | 33% | 9 | 53% | 2 | 12% |
| FSRB assessments | 33 | 0 | 0% | 1 | 3% | 11 | 33% | 21 | 64% |
| All assessments | 50 | 0 | 0% | 7 | 14% | 20 | 40% | 23 | 40% |

Figure 1. Comparison between FATF and FSRB member countries on effectiveness with Immediate Outcome 7

Note Table 1 and Figure 1: Results from the 4th Round of Mutual Evaluations as at 15 May 2018

Source Table 1 and Figure 1: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.

While FATF countries obtained better results on effective implementation, the overall results demonstrate the significant challenges that countries face. Also, where jurisdictions had obtained convictions, the sanctions were often not considered effective, proportionate or dissuasive. This is another indication of the challenges that countries are facing in investigating and prosecuting ML offences.

Overall, these very modest results across the Global Network demonstrate the significant challenges that countries around the global network have experienced in effectively combatting ML activity through investigation and prosecution. These results suggest that countries could improve how they investigate and prosecute ML offences. The results may also signify a variety of other realities and country circumstances, such as a lack of data and statistics, an insufficient priority placed on ML, inadequate resources or weak institution, corruption that impacts the criminal justice system, or even poor preparation or presentation in connection with the mutual evaluation process.

Technical compliance

On the technical compliance side, the assessments of Recommendations 3, 30 and 31 show that countries generally had established the necessary legal and institutional frameworks for investigating and prosecuting ML in their national system.

Recommendation 3 requires countries to criminalise money laundering on the basis of the United Nations Convention against Illicit

Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (Palermo Convention). It also establishes that countries should apply the crime of ML to all serious offences, with a view to including the widest range of predicate offences.

The level of compliance with Recommendation 3, throughout the Global Network, is substantial.

Figure 2. Technical compliance with Recommendation 3 (money laundering offence)

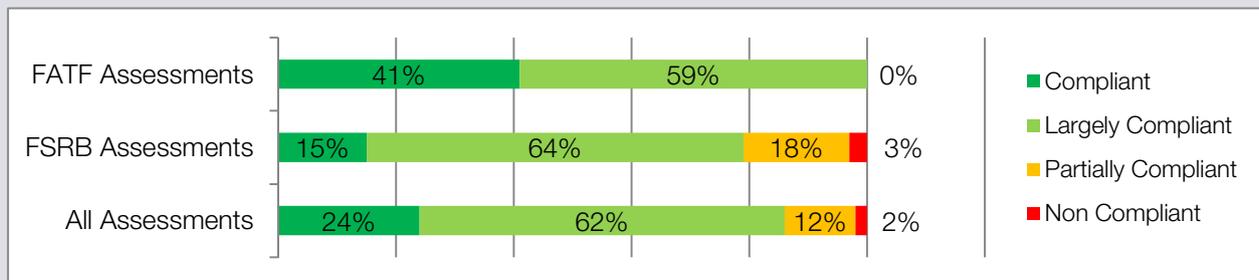


Figure 3. Technical compliance with Recommendation 30 (responsibilities of law enforcement and investigative authorities)

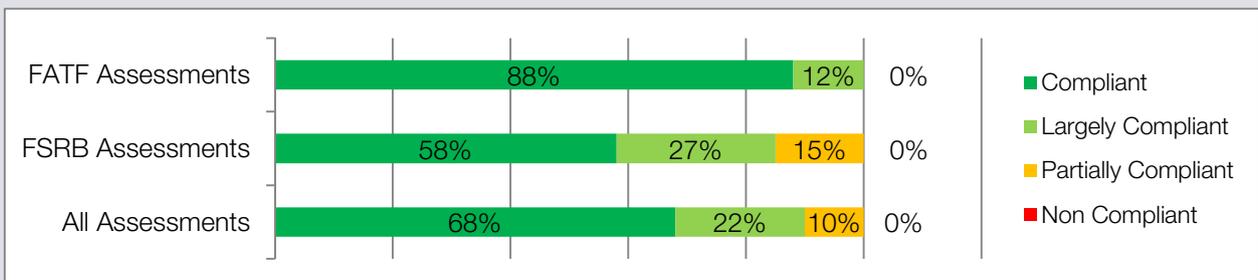
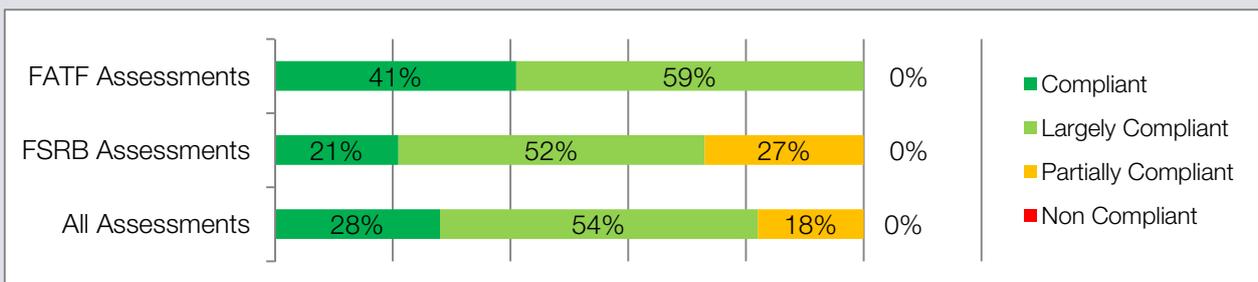


Figure 4. Technical compliance with Recommendation 31 (powers of law enforcement and investigative authorities)



Note Figures 2-4: Results from the 4th Round of Mutual Evaluations as at 15 May 2018

Source Figures 2-4: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.

Around 86% of the assessed countries have no shortcomings or minor shortcomings. This demonstrates that there is a good technical implementation of this standard.

Recommendation 30 sets the responsibilities of law enforcement and investigative authorities, demanding that countries should ensure that designated law enforcement authorities have responsibility for ML and TF investigations within the framework of national AML/CFT policies.

The level of compliance with recommendation 30, throughout the Global Network, is very positive. Around 90% of the assessments revealed that countries have no shortcomings or minor shortcomings. This demonstrates that most countries have clearly designated authorities that are responsible for investigating ML/TF offences.

Finally, recommendation 31 establishes the basis of the powers that law enforcement and investigative authorities should have in order to carry out their missions. This includes the possibility to: access all documents and information needed during an investigation; compel the production of records held by financial institutions, DNFBPs, and other natural or legal persons; search persons and premises; take witness statements; and seize and obtain evidence. It also establishes that competent authorities need to be able to use a wide range of investigative techniques, including special techniques that are suitable for the investigation of ML, associated predicate offences, and terrorist financing.

The level of compliance with recommendation 31, throughout the Global Network, is largely good. Around 82% of assessments reveal that countries have no shortcomings or minor shortcomings. This demonstrates that generally most countries have the necessary investigative powers and tools to pursue ML/TF offences.



Legislative basis

To effectively investigate and prosecute money laundering, countries must start with properly criminalising the offence. FATF recommendation 3 (R.3) sets out the specific elements required to comply with the obligation to criminalise money laundering based on the Vienna and the Palermo conventions. In addition, R.3 contains other elements which go beyond the various obligations in the international conventions.

- Experts from several jurisdictions highlighted challenges they face in utilising their domestic ML offences.
- Some participants reported that their national legislation still contains a requirement to prove the predicate offence beyond reasonable doubt in order to be able to convict for ML.
- Other participants from countries without an “all crimes” approach to predicate offenses expressed a desire for simpler legislation that clearly defined the crimes which can be the basis for money laundering charges.
- Also, participants signalled that it could be problematic when legislation does not define properly the extent of subjective knowledge that is sufficient to prove the offence, considering that an unclear standard of proof can cause difficulties in relation to the principle of presumption of innocence and how the defendant can use that to his advantage.
- Finally, it was mentioned that in several countries, the criminalisation of self-laundering is not possible due to constitutional issues and that limits the capacity to investigate and prosecute those types of cases. It should be noted though that in all FATF evaluations where jurisdictions have argued that criminalising self-laundering is contrary to fundamental principles of domestic law, this has been rejected by the Plenary.

It is a common practice in many jurisdictions to focus on the prosecution of the predicate offence and to ignore or deprioritise the prosecution of related ML. This is reportedly done for various reasons: the evidentiary thresholds under other legislation may be easier to meet, or the prosecutors may be more familiar with prosecuting predicate offences and have not been sufficiently trained on the benefit or importance of pursuing ML charges. In some cases, it might be easier to convict on the predicate offence, as the prosecutor has already accumulated enough evidence to proceed with predicate charges but has not fully developed the financial evidence needed to bring ML charges. There are many justifications for the pursuit of predicate offenses at the exclusion of ML related to convenience. Prosecuting ML in addition to a predicate offence is often resource-intensive and time-consuming. In some countries, the laws did not properly incentivise ML charges because the sentence would be essentially the same if the defendant were only prosecuted for the predicate offense.

While there are differences in legal traditions and the way legislation is drafted in jurisdictions, some good practices related to criminalising ML can be identified:

- It was recommended during the workshops to expand the scope of predicate offences to the broader list of serious offences or to adopt an all-crimes approach, which may provide clarity and more flexibility to the prosecutors, especially when combined with a system that also incorporates the principle of opportunity. It should be noted that Recommendation 3 does require coverage of all serious crimes as predicate offenses, to include, at a minimum, those listed in the Glossary to the FATF Recommendations (i.e. a range of crimes within 21 different categories).
- It was also stated as a good practice to elaborate the definition of subjective knowledge, either in the law establishing the ML offense or through case law.

Practitioners felt it was better to work with a lower threshold on the mens rea element, such that they would only need to demonstrate that the defendant had a belief or suspicion of the possible illicit origin of the funds. The ability to show “willful blindness” or that the defendant should have known that the funds or assets were criminally derived, was also deemed useful.

- Several practitioners agreed that it was helpful to establish, whether through legislation or case precedent, that the predicate offence need not be proven in order to convict for ML, as established in the FATF Recommendations. Some practitioners noted that their domestic laws have removed the obligation to prove that money laundered comes from a criminal act altogether.
- Some participants mentioned that it is sufficient for the prosecutor to demonstrate that the defendant has unexplained wealth, which then places the burden on the defendant to provide an objectively reasonable explanation for why he has or dealt with funds under investigation. This was presented by the Dutch delegation as the consistent approach they take for ML cases; being this one of what they call the “6 steps approach.”⁸ This means that building on unexplained wealth or a tax inconsistency, investigators are able to start an investigation for ML even though they do not have direct evidence of a specific predicate offence. After an initial showing by the state, the Dutch system reserves the burden of proof to the indicted, requiring him to explain the licit origin of the funds. Other delegations noted that while prosecutors must show that the proceeds have derived from some criminal offense, they need not show which specific act

generated them, or, in other words, a crime committed on a certain day, by a certain person.

The European Court of Human Rights in a recent decision⁹ found that reversing the burden of proof after a prima facie showing is in line with the conventional law. The Court agreed that the practice is respectful of the principles of innocence and of fair trial, as long as the defendant has the possibility defend against the ML charges.

A good practice which has proven useful in some jurisdictions is plea bargaining, or the process of settling a criminal case with a defendant in exchange for him pleading guilty to some crime in addition to providing co-operation. Often, this can result in the defendant admitting guilt to less serious or fewer offenses than those alleged in the indictment. Thus, the defendant may receive a lower sentence than would have been otherwise possible.

The “bargain” benefits the defendant because, if he had gone to trial, he could have been found guilty of all charges against him (particularly in a country with a high conviction rate) and/or faced a much stiffer sentence. The government benefits from economy of not putting on a full trial, and, more importantly, the government could stand to gain valuable co-operation from the defendant, who may provide evidence or testimony which can be used against other, higher-level targets in the criminal organisation or conspiracy.

Another similar legal power is a deferred prosecution agreement, which is an agreement reached between a prosecutor and an organisation which could be prosecuted, permitting a prosecution to be suspended for a defined period provided that the organisation meets certain specified conditions. Both legal powers should be subject to judicial control and oversight.

.....
8. The 6 steps are: 1) no direct evidence of a specific predicate offence; 2) a suspicion of ML; 3) obtaining the statement of the suspect; 4) abiding by the requirements for a suspect’s statement; 5) investigation by the Public Prosecution Service; 6) drawing a conclusion.

.....
9. Zschüschen v. Belgium (application no. 23572/07)

However, it was also mentioned that the practice of plea bargaining or deferred prosecution agreement would be challenging or impossible in those criminal systems that rely on the principle of legality and do not give the prosecutor the power to negotiate.

Furthermore, it was also stated that the principle of opportunity is a very important tool considering the primary importance of choosing the best or most impactful cases to investigate and prosecute and not having to prosecute all crimes, which can be very resource intensive. Prosecutorial discretion was widely regarded as a good feature, especially in light of the risk of setting bad judicial precedents or prosecuting those not truly worthy of punishment.



Burden and standard of proof

The issue of the burden of proof was discussed during the workshops as a potential challenging area for the prosecution of the ML offence. While several countries' laws permit a reversal or shifting of the burden of proof, other countries' laws or constitutions contain a principle or presumption of innocence. This means that the prosecution has the responsibility to prove that the defendant committed the crime beyond reasonable doubt. In the context of ML, it also means that the "proceeds" element must be proven as well: the funds involved must be shown to be derived from an illicit source. Countries that permit a shifting, or dynamic, burden of proof have expressed that this has proven to be very useful.

Evidence

One of the biggest challenges in ML cases is gathering the evidence linking the assets to the criminal activities or proving that assets/funds that were laundered were derived from an offence (either committed by the accused or a third party). It is not uncommon for this element to be required to be proven at trial, and it is also, ordinarily, the element requiring the deepest investigation.

To establish this link, practitioners must identify and trace assets or "follow the money" until the connection between the predicate offence and the assets can be determined.

Establishing this nexus between a financial transaction and a predicate offence may be essential for certain investigative measures in some countries (e.g. production orders, search warrants, wire-tapping orders, and surveillance orders). Other legal systems may require a lesser showing (e.g. probable cause or relevance), but investigators and/or prosecutors in many countries must seek judicial authorisation when obtaining evidence via more intrusive methods.

Furthermore, competent authorities expressed that they may have difficulty showing that the defendant knew he or she was dealing

with criminal proceeds or that he intended to conceal or disguise them, depending on national requirements.

During the workshops, participants agreed that, in line with the FATF Standards, it is imperative to be able to use circumstantial evidence, especially with regard to the knowledge or intent of the defendant and the showing that the money laundered, was, in fact, dirty. Also, it was noted as a good practice to have legislation admitting a test of reasonable grounds to prove that proceeds have a criminal source.

ML investigations are often driven or reliant on financial intelligence provided by the FIU. Workshop attendees discussed how prosecutors could be tempted to utilise that information directly in the process instead of obtaining the underlying evidence upon which the financial intelligence report was based. This temptation could be especially strong when the case has cross-border elements (i.e. in situations where information is exchanged through the Egmont Group channels). In this regard, it was noted as a good practice to train practitioners on the characteristics of the information-sharing system, the powers and capacities of the FIUs, and on the guidelines and limitations on use for information obtained through the Egmont Group.¹⁰ Also, close engagement between the investigators and the FIU may help to have a clear understanding of the possibilities and the limits of the financial intelligence that the FIU can provide.

It was mentioned that financial intelligence is an excellent source of lead information, but in many countries, it should not be used as evidence. In some countries, the FIU may be able to participate as a party to the prosecution, and in rare cases, the defendant may be able to access financial intelligence if it contains evidence tending to exculpate him.

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10. <https://www.egmontgroup.org/en/document-library>



Powers and techniques

Recommendation 31 provides a framework for the powers that law enforcement and investigative authorities should have. Experts stressed the importance of competent authorities conducting investigations of ML, associated predicate offences, or TF should be able to access all necessary documents and information for use in those investigations and prosecutions. This should include available compulsory measures to: obtain records held by financial institutions, DNFBPs and other natural or legal persons; search of persons and premises; take witness statements; and seize and obtain evidence.

The FATF Standards also requires jurisdictions to be able to use a wide range of other investigative techniques, some of which entail more specialised expertise, such as undercover operations, intercepting communications, accessing computer systems, and conducting controlled deliveries. Participants from certain regions stated that the use of particular investigative techniques was more or less common, but their use, generally, seemed to be on the rise. Some challenges were mentioned with regard to a lack of capacity to conduct forensic investigations (e.g. of computer hard drives), accessing evidence held by foreign service providers, or limited technical tools to intercept communications. Some practitioners mentioned successful experiences in co-ordinating controlled deliveries with international partners.

Other tools and techniques emerged the workshops discussions as being effective for combatting ML were: the capacity to conduct electronic surveillance or location tracking, phone geolocation and communication trends analysis, and having the capacity to do audio or video recordings in public spaces. Also mentioned were several new tech-related tools such as monitoring internet use and gathering forensic information from the dark web (e.g. block-chain analysis technologies). Finally, it was signalled that being able to access and intercept social media communications and to monitor other web-based chats and chat rooms could potentially provide important inputs to the investigations.

Encrypted communication channels were deemed problematic by the participants.

It was noted during the workshops that investigators should ensure that the tools and techniques are not a substitute for conducting financial analysis, which can often be thought as difficult to conduct, but which can be aided by technology such as automated bank record scanning systems or intelligent link software.

It was mentioned that some techniques are resource intensive and in that regard it is important to undertake their use with a defined purpose, knowing exactly what evidence can be produced and how that evidence can go towards proving the case. Finally, the importance of good co-ordination between law enforcement and prosecutors was stressed so as to avoid possible defence strategies, the unlawful obtaining or retaining of evidence, and collection of information belonging to non-suspects.

Finally, as noted in the FATF's 2012 financial investigations guidance, ongoing law enforcement collaboration and exchange of information with FIUs should play an important role in investigations. This can lead to the FIU providing additional financial intelligence to the investigative team, thus contributing to a fuller picture of the financial modus operandi of an organised criminal group. In doing so, care should be taken to ensure that any action by the FIU does not unduly jeopardise or hinder the criminal investigation.



Terrorist Financing:

Investigations, prosecutions,
and convictions





Investigating and prosecuting terrorist financing (TF) offences presents a distinct set of challenges for jurisdictions. TF cases often involve classified intelligence, can span multiple jurisdictions, and require rapid responses from the investigative and prosecutorial authorities. The authorities may also need to find a balance between gathering sufficient evidence to obtain TF convictions and disrupting the activity to prevent a terrorist act from occurring. As an initial matter, participants in the workshops noted that TF investigations can be initiated in many ways, and that TF investigations do not simply pre-date or post-date a terrorist act or require a link to an attack. Donor networks

operate constantly and shift methods; states sponsor and fund terrorist organisations; terrorist organisations generate revenue from the territory they control; and individuals may be inspired to provide material, resources, or other support, including themselves.

This section draws from FATF and FSRB members' experiences in conducting TF investigations and prosecutions. It identifies common challenges as well as good practices from jurisdictions that have successfully dealt with TF cases.

Results of the FATF/FSRB Mutual Evaluations – Immediate Outcome 9

Immediate Outcome 9

Immediate Outcome 9 of the FATF Methodology measures the extent to which TF offences and activities are investigated and persons who finance terrorism are prosecuted and subject to effective, proportionate and dissuasive sanctions. In line with the FATF Methodology, jurisdictions' effectiveness is determined by considering five core issues¹²:

- The extent to which different types of TF activity are prosecuted and offenders are convicted, and whether this is consistent with the country's risk profile.
- How well cases of TF are identified and investigated.
- Integration of the investigation of TF with national counter-terrorism strategies and investigations.
- The effectiveness of sanctions or measures applied against natural and legal persons convicted of TF offences.

- Whether other criminal justice, regulatory or other measures to disrupt TF activities where it is not practicable to secure a TF conviction.

The review of MERs highlighted the nearly direct correlation between the jurisdiction's understanding of TF risk and its level of effectiveness under IO 9. This illustrates the importance of understanding TF risks: for example, whether the country experiences activity such as collecting, transferring or using funds intended for terrorist purposes.

12. The full text of the core issues can be found in the FATF Methodology (<http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>)

Table 2. Effectiveness results under Immediate Outcome 9

| | Number | High | | Substantial | | Moderate | | Low | |
|------------------|--------|--------|----|-------------|-----|----------|-----|--------|-----|
| | | Number | % | Number | % | Number | % | Number | % |
| FATF assessments | 17 | 1 | 6% | 11 | 65% | 4 | 23% | 1 | 6% |
| FSRB assessments | 33 | 0 | 0% | 7 | 21% | 14 | 43% | 12 | 36% |
| All assessments | 50 | 1 | 2% | 18 | 36% | 18 | 40% | 13 | 26% |

Note: Results from the 4th Round of Mutual Evaluations as at 15 May 2018

Source: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.

Relevant data from the mutual evaluations

The majority of the reviewed jurisdictions had not prosecuted TF offences or obtained TF convictions at the time of their mutual evaluation. Only 14 (29%) of the reviewed jurisdictions had prosecuted any TF offences, and only 10 (20%) had obtained convictions. For a large majority of countries that reported charging or convicting for TF, the numbers are in the single figures and sanctions were often not considered effective, proportionate or dissuasive.

To some extent, these numbers highlight the challenges that countries are facing in investigating and prosecuting TF offences. However, they do not necessarily fully reflect the rate of TF prosecutions and convictions because:

- Many jurisdictions had prosecuted TF conduct by using alternative offences in addition to, or instead of TF charges. These included association with a terrorist organisation or aiding and abetting a terrorist act.
- In some cases, the TF charges formed a part of a wider terrorism case, but these cases did not contribute to the total number of TF prosecutions in the country.
- In some cases, the low numbers were simply indicative of the lower TF risk profile of certain jurisdictions.

Technical compliance

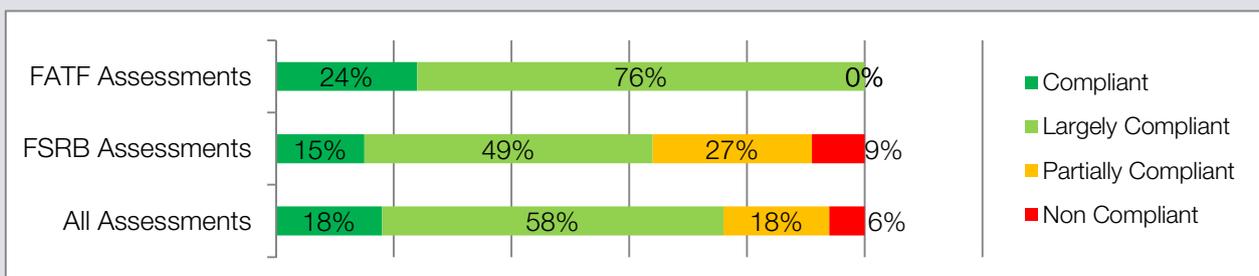
A foundational aspect for effective investigation and prosecution of TF activity is the criminalisation of TF as a separate offence.

FATF Recommendation 5 (R.5) provides measures to assist countries in fulfilling the legal requirements of the International Convention for the Suppression of the Financing of Terrorism (1999) (The Terrorist Financing Convention), and, indeed, contains elements which deliberately go beyond the existing international legal obligations.

The level of compliance with R.5 was reasonably high across the assessed jurisdictions, particularly after the FATF's global review of compliance with recommendations 5 and 6 (relating to targeted financing sanctions) after the terrorist attacks in Paris in November 2015. Globally, 76% of the reviewed jurisdictions were either compliant or largely compliant with the R.5, to include all the FATF members and 64% of the FSRB members. Common deficiencies included the lack of criminalisation of the funding of an individual terrorist without a link to a terrorist act and the low level of available sanctions. Other deficiencies range from exemptions to the definition of terrorism or a list of terrorist acts which is too narrow in scope and which, in turns, narrows the scope of the TF offence.

Figure 5 shows the technical compliance ratings on R.5 from the 50 MERs conducted to date.

Figure 5. Technical Compliance Recommendation 5 (Terrorist financing offence)



Note: Results from the 4th Round of Mutual Evaluations as at 15 May 2018

Source: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.



Legislative basis to investigate and prosecute TF

Comprehensive criminalisation of TF is directly related to the jurisdiction's ability to investigate and prosecute TF effectively. For example, the lack of criminalising the financing of an individual terrorist without a link to a terrorist act can prevent a jurisdiction from prosecuting the financing of travel of a foreign terrorist fighter.

The FATF has focused on improving the global level of criminalisation of TF in recent years. For example, in 2015 the FATF launched a fact-finding initiative to determine whether 194 jurisdictions around the world had implemented measures to cut off terrorism-related financial flows, including adequately criminalising TF¹³. The results of the initiative prompted the FATF to design a follow-up process to ensure countries were making the required changes. In 2016, the FATF also issued *Guidance on the criminalisation of terrorist financing* – a guidance paper aiming to assist countries in implementing the requirements of R.5¹⁴.

In the various workshops, practitioners noted that the key challenges related to the criminalisation of TF and self-financing and the difficulties in defining terms such as “terrorism”, “terrorist” or “terrorist organisation” in legislation. In many jurisdictions TF offences are also relatively new compared to money-laundering offences, some of which have been set in law for decades. The good practices discussed and identified in the workshops included:

- Drafting the offence to be as broad as possible: for example, structuring the offence in a way that the suspect's intent to finance specific terrorist acts does not need to be proved¹⁵.
- Involving prosecutors in the drafting of the offence to ensure the provisions are workable in practice.

13. The FATF's report to G20 leaders with the results of the review can be found at www.fatf-gafi.org/media/fatf/documents/reports/Terrorist-financing-actions-taken-by-FATF.pdf

14. www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Criminalising-Terrorist-Financing.pdf

15. For example, the MER of the United States notes that the offence of knowingly providing material support or resources to a designated Foreign Terrorist Organisation is the most often charged TF offence. Specialist prosecutors confirmed that this is because this offence allows for effective TF prosecution and conviction without needing to prove any specific intent on behalf of the defendant to fund terrorist activity/acts.



Core elements of effectiveness

Parallel financial investigations

Practically speaking, counterterrorism and TF investigations are often linked (however, it is important to note that they do not need to be). To ensure that all the relevant actors in the network are discovered, it is important to conduct systematic parallel financial investigations in every terrorism-related case. The investigation can either be a standalone TF investigation, or where applicable, form a part of a wider terrorism investigation.

Many jurisdictions face challenges with the investigative capacity and capability to conduct parallel financial investigations. Experts at the workshops reported that often, financial investigations are not pursued if the underlying terrorist activity appears to be primarily self-funded or if the sums involved are very small.

The workshop identified good practices, which include ensuring that a TF investigation can be launched without an underlying terrorism case, and that the TF investigation can continue even where the linked terrorism investigation has already been concluded. Another useful practice is to issue manuals and procedures for identifying and investigating TF.

In addition, the FATF Guidance on the criminalisation of terrorist financing has a specific section on terrorist financing investigations, providing further information on good practices. For example, it notes that financial investigations should be viewed not only from a prosecution-oriented perspective, but also from an intelligence standpoint.

Evidence

Many of the challenges in TF cases relate to the availability and admissibility of evidence. Some particular challenges related to proving the elements of the TF offence include:

- Proving mens rea, i.e. that the defendant intended or knew that the funds were to be used by a terrorist, a terrorist group, or for a terrorist act – especially where the defence claims the funds were meant for personal expenses such as rent or food or charitable purposes.
- Proving that the recipient of the funds or assets is a terrorist or a terrorist organisation, especially where they have not been designated by the United Nations Security Council or national authorities as such or before a terrorist attack is planned or committed.
- Proving TF when the funds are sent overseas or may not ever actually be used to finance an attack.

TF cases may be initiated by or rely on classified pieces of intelligence. The defendant may also know from personal experience information that is classified and thus pose a disclosure risk to the national authorities. There are particular challenges related to “converting” classified intelligence into admissible evidence:

- The prosecution may have to find a way to recreate or corroborate information that is otherwise only found in classified material.

- The prosecution may find itself in a position where it would have to reveal secret information if it intended to prosecute, and therefore, it may decline to pursue the charges or dismiss the case.
- Sentences may be lower as not all elements of the TF activity can be taken into account due to the inadmissibility of evidence.
- Additional, burdensome steps may need to be taken to keep the sources and methods of intelligence gathering confidential.
- Different levels of intelligence may be accessible to different people – such as the intelligence service, police, or the prosecutors – which can complicate co-operation among agencies.
- Developing jurisprudence to enable the use of circumstantial and indirect evidence to prove knowledge and intent.
- Using the defendant’s own words and activities, such as on social media, to help prove intent or finding witnesses who can testify to the defendant’s behaviour or beliefs and changes thereto.
- Implementing all UN-required terrorism and related designations and establishing a system of domestic designations to help prove that an individual is a terrorist or an organisation is a terrorist organisation, or developing jurisprudence which gives weight to foreign designations¹⁶.
- Using the 24/7 electronic evidence system under Article 35 of the Budapest Convention to obtain and offer immediate assistance concerning the collection of electronic evidence.¹⁷

While gathering and using evidence is one of the most challenging areas in TF prosecutions, there are also some good practices in the area:

- Having legislation or judicial procedures that specifically deal with the use or introduction of classified material or intelligence (e.g. laws or rules may permit judges and/or defence counsel to review information, redactions may be made, information can be “declassified” by the state, etc.).
- Having a designated special court to deal with terrorism and terrorist financing cases that often include classified information.
- Using administrative powers to freeze or seize assets based on confidential intelligence that could not be used to support a prosecution.
- Involving the prosecutor at an early stage to determine what pieces of intelligence may be admissible as evidence, or what steps would need to be taken for it to be admissible.
- Steering the investigation in a way that the confidential intelligence is supplemented or supplanted with admissible evidence, such as financial records or records of communications obtained through judicial authorisation.

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16. In particular, many workshop participants noted that they monitored closely the Specially Designated Nationals and Blocked Persons List of the U.S. Office of Foreign Assets Control (OFAC).

17. Article 35 of the Budapest Convention on Cybercrime (24/7 Network) states that Each Party shall designate a point of contact available on a twenty-four hour, seven-day-a week basis, in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Powers and techniques

Special investigative techniques, such as the use of wiretaps, monitoring internet use, intercepting social media communications, or using confidential human sources (informants) or undercover agents, are often important sources of evidence in TF cases. It is imperative that competent authorities have a wide variety of techniques available to them.

In terms of confidential informants, jurisdictions have experienced challenges in trying to protect the identity of the informant. Further, it is often necessary to change the sources and find new informants.

Social media can often be an important source of evidence in TF cases. There can, however, be challenges in obtaining evidence from social media platforms: intercepting communications may require a pre-authorisation from the court or it can be challenging to obtain social media content from overseas. Social media content may also not be admissible as evidence.

Some good practices related to using social media content as evidence include:

- LEAs might create profiles on social media platforms, enter into closed groups, and communicate with suspects to produce direct evidence (i.e. screen shots)
- Using the law enforcement agent who participated in the communications with suspects as a witness.
- Communicating with the social media platforms and their law enforcement sections directly. Early engagement – even before a TF investigation is opened – can be useful to find out what type of information or evidence is available and how it can be obtained. One example is to use preservation orders to ensure the social media content is not routinely deleted while the investigation is ongoing.



Prevention & Disruption

TF cases are often time-sensitive and there is a difficult balance between allowing the TF activity to continue to gather further evidence and disrupting the activity to prevent a possible terrorist attack. Many jurisdictions have opted for disrupting the activities early instead of pursuing a TF prosecution. This is often done in the interest of public safety, or where it has been clear that the available evidence would not be able to support a TF prosecution.

The need to disrupt TF activities is also reflected in the FATF Methodology. In addition to prosecuting TF offences, IO 9 takes into account jurisdictions' use of the other criminal justice, regulatory or other measures to disrupt TF activities where it is not practicable to secure a TF conviction.

It should be noted that disrupting the terrorist or supporting network fully can be very challenging. This is particularly true in cases where the identity of the recipient is not known, and the funds have been sent to an unstable conflict zone. Authorities may be able to cut off one part of the network but other financiers are able to continue their activity and keep transferring funds to the same recipient.

Common methods to disrupt TF activity identified in the workshops include:

- Targeted financial sanctions to freeze the funds of designated terrorists and terrorist organisations – the burden of proof to designate is often lower than to prosecute, yet the desired disruptive impact can often be reached¹⁸.
- Non-conviction-based asset seizure and confiscation.
- Withdrawal of passports, extradition, and deportation; although such measures should be coordinated or coupled with advanced notice to the country where the suspect is sent.
- Taking a broader view, the workshop participants also highlighted the

importance of de-radicalisation efforts in jurisdictions both to prevent TF activity and prevent recidivism.

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 18. See 2013 FATF International Best Practices on Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6) which outlines the importance of an effective freezing regime.

Investigating and prosecuting terrorism offences vs. TF offences

It is a common practice in many jurisdictions to prosecute alternative offences such as association with a terrorist organisation, money laundering or fraud instead of prosecuting TF offences. Common justifications for doing so included: the evidentiary thresholds under other legislation can be easier to meet or the prosecutors may be more familiar with other legislation. In some cases, there may be an urgent need to disrupt the activity, and the prosecutor has enough evidence already to charge another offence instead of TF.

Discussions during workshops highlighted that prosecuting TF cases can often be labour-intensive and time-consuming and add to the workload of the prosecutors without necessarily increasing the sentence. In some cases, TF prosecutions are not pursued because the suspect has been self-funding their terrorist activities and a terrorism prosecution is pursued instead. Still, prosecuting non-terrorism related offences can lead to lower sentences because these other offences do not fully reflect the gravity of terrorism-related charges. Some experts reported that, in fact, the inclusion of TF charges as part of a larger prosecution might be the only charge of conviction if the direct participation of the accused in terrorist acts is not proven.

However, despite the challenges, seeking TF prosecutions is important, especially where there is any suspicion of TF activity, for example, based on a suspicious transaction report or information provided from another country. Investigating and eventually prosecuting TF offences can lead to discovering and disrupting a wider network financing the same terrorist organisation. It may also uncover criminal activity that generated funds used for TF or the laundering of assets derived from TF. Finally, although TF can occur in formal financial systems and through informal channels, and may be accomplished in comparatively small amounts, the ultimate impact of the financing can be hugely detrimental. While the political will to prosecute persons that commit acts of terrorism is strong, those who financially facilitate and support terrorism are just as critical to the terrorist ecosystem as those who carry out heinous acts. Prosecuting TF was also recognised for its deterrence value, as national financial systems can be vulnerable origin or transit points

for TF even if terrorism does not occur within particular countries' borders.

Confiscation:

freezing, seizing, and recovering assets





Tracing, freezing and confiscating the proceeds and instrumentalities of crime is fundamental to the effectiveness of measures to combat money laundering and terrorist financing. Serious crime generates a vast amount of proceeds every year. Some of the main reasons that criminals launder their proceeds are to prevent competent authorities from detecting their illegal conduct, prevent authorities from depriving them of their ill-gotten gains, and to use these ill-gotten gains to promote ongoing criminal activity. Confiscation strangles the operational budgets of criminal organisations, ensures that crime does not pay, and recovers value which can be used to compensate the victims of crime.

This section draws from FATF and FSRB members' experiences in identifying and tracing, seizing and freezing, and ultimately, confiscating and recovering, criminal assets. It identifies common challenges and good practices from FATF and FSRB jurisdictions.

Results of the FATF/FSRB Mutual Evaluations – IO 8 & R.4/R. 38

Immediate Outcome 8 of the FATF Methodology measures effectiveness of the confiscation regime - the extent to which proceeds and instrumentalities of crime are confiscated.

This can be contrasted with the legislative and other measures that are required pursuant to Recommendation 4 (domestic confiscation and provisional measures) and Recommendation 38 (mutual legal assistance for freezing and confiscation), which set out several elements that underpin for an effective confiscation (or forfeiture) regime.

These ratings demonstrate that, to date, the level of implementation of an effective confiscation regime among the assessed countries is modest at best. According to all assessments, almost three-quarters of jurisdictions are not succeeding in this area. Although the Methodology for the current round of assessments dates from 2013, the concept that criminals should be deprived of their proceeds is one that has been a core element of the FATF Recommendations since the original 1990 Recommendations.

In line with the FATF Methodology, jurisdictions' effectiveness in depriving criminals of the proceeds and instrumentalities of ML, TF, and predicate offences (or their equivalent value), is determined by considering five core issues:

- Whether confiscation is a policy objective in the country.
- If the country is confiscating proceeds/instrumentalities/equivalent value related to both domestic and foreign predicate offenses and where assets are located overseas.
- Whether falsely or non-declared currency or bearer negotiable instruments moved across the border are confiscated.
- How well confiscation results align with ML/TF risks and national AML/CFT priorities.

Many of the assessments reviewed cited deficiencies in the way that the jurisdiction addressed these following issues:

- Confiscation was only occasionally laid out as a policy priority, and this was mostly found in jurisdictions having specialised agencies or units dedicated to confiscations.
- Actions taken on false or non-declaration of physical cross-border transportation of cash and bearer negotiable instruments were limited and inconsistent. Not many cases were linked to ML/TF and many countries applied a small fine to these cases. It also appears that in many cases the cash declarations or disclosures are not used to their fullest extent as part of the AML/CFT system, due often to technical limitations.

Table 3. Effectiveness results under Immediate Outcome 8

| | Number | High | | Substantial | | Moderate | | Low | |
|------------------|--------|--------|----|-------------|-----|----------|-----|--------|-----|
| | | Number | % | Number | % | Number | % | Number | % |
| FATF assessments | 17 | 1 | 6% | 4 | 23% | 11 | 65% | 1 | 6% |
| FSRB assessments | 33 | 1 | 3% | 5 | 15% | 9 | 27% | 18 | 55% |
| All assessments | 50 | 2 | 4% | 9 | 18% | 20 | 40% | 19 | 38% |

Note: Results from the 4th Round of Mutual Evaluations as at 15 May 2018

Source: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.

- With respect to the linkage between confiscation and the risks faced by jurisdictions, MERs frequently noted that the results obtained were not in line with the risks faced, whether as regards the amount confiscated, or the nature of the results (e.g. limited confiscation in relation to predicates generating the most proceeds of foreign predicate offences).
- A misalignment between amounts subject to provisional measures (freezing, seizing) and amounts confiscated, or between amounts *ordered* confiscated and *actually* recovered.

Overall, too small an amount of money was confiscated considering the risks and contexts of the country or a lack of focus on parallel financial investigations such that assets which could be confiscated were not identified or traced.

Although both qualitative and quantitative information is important in determining effectiveness under IO 8, the amount of criminal proceeds and instrumentalities that are ultimately confiscated and recovered by the government (or where there is restitution to victims), is an important overall element. In an ideal world, competent authorities are able to identify and trace a significant proportion of the proceeds of crime located or generated within the jurisdiction, freeze or seize those assets, then confiscate and recover them. This is a significant challenge. Experts referred to a number of complications in the workshops, most often the inability to follow the money trail; the criminals' use of webs of companies, accounts, and nominees to hold assets; or the movement of assets abroad, potentially to non-cooperative countries.

Reliable or comprehensive data and statistics on confiscation, such as the number of cases and the value of the assets that were frozen, confiscated, and recovered, is variable or lacking across the MER reports. Furthermore, that data is not always consistent across agencies within

one country, and thus is difficult to interpret. Similarly, there are few estimates of the size of the criminal economy for jurisdictions, and any such estimates that do exist have to be treated very cautiously, thus making it more challenging to determine how well a country is doing in terms of the amount it confiscates. The lack of data also often makes it hard to identify the nature of the deficiencies or weaknesses that lead to results that defy expectations. Qualitative information, such as case examples, is presented across the MERs as well.

In terms of the amounts ordered to be confiscated, there are two FATF members that confiscate noticeably larger amounts (i.e. reaching into the low billions of USD/EUR annually). The amounts confiscated by other countries range from minimal amounts (less than a million) to 100-200 million. As regards the numbers of cases, this varies also from 0-20 cases a year (annual average) to several thousand. With respect to the number of cases and the value of the amounts confiscated, there can often be significant variations between jurisdictions (even ones of a similar size in terms of population or economy, legal systems etc.), with the reasons for this being less apparent.

Technical Compliance

There appears to be a large degree of technical compliance, with all FATF members being Compliant (C) or Largely Compliant (LC) on both Recommendation 4 and Recommendation 38, to date. For FSRBs members, the results show more than 80% are C or LC on R.4 and 70% C or LC on recommendation 38.

In general it appears that though there are a mix of deficiencies under both R.4 and 38, these are relatively minor, taking into account the requirements laid out in the FATF Standards.

The most frequently cited deficiencies are:

(a) Recommendation 4 – inadequate mechanisms to manage property, lack of equivalent value confiscation, gaps regarding instrumentalities and limitations in the range of offences where confiscation can be pursued.

(b) Recommendation 38 – similar deficiencies as for R.4, inability to enforce non-conviction based orders, lack of mechanisms to share confiscated assets or to co-ordinate actions with other countries.

Figure 6. Technical Compliance Recommendation 4 (Confiscation and provisional measures)

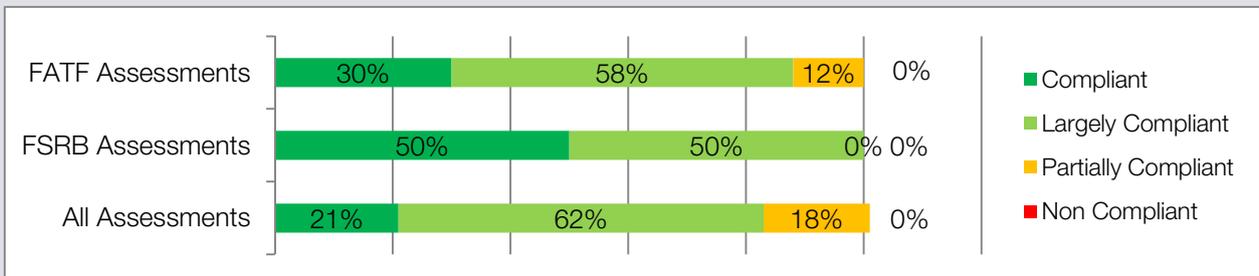
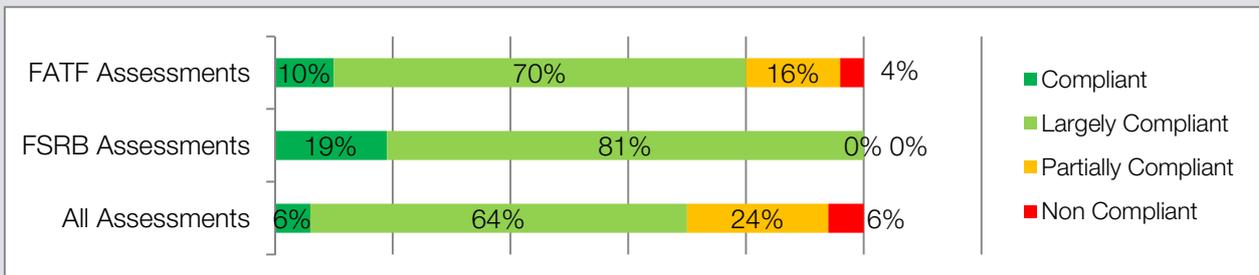


Figure 7. Technical Compliance Recommendation 38 (MLA: freezing and confiscation)



Note Figures 6 and 7: Results from the 4th Round of Mutual Evaluations as at 15 May 2018
Source Figures 6 and 7: Published assessment reports and the consolidated assessment ratings, available on www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html.

Core elements of effectiveness

The effectiveness of any confiscation regime (all aspects thereof) is based on a number of factors, which include the underpinning laws and regulations that provide a full range of powers, the institutional framework and competent authorities that have responsibility for taking action, and the mechanisms, processes and tools that are used. Some practices particularly useful and effective practices for asset confiscation are:

- Ensuring that criminal asset confiscation is a policy priority, with a linked strategy that sets out how all relevant authorities can work to achieve the objectives/goals that are set.
- The creation of multidisciplinary agencies/units that focus on asset confiscation, or at a minimum having expert staff that is dedicated to this role within larger agencies or public prosecution services. There is a need for expert lawyers, investigators, forensic accountants, financial analysts, and increasingly, IT experts.
- A framework to manage or oversee the management of frozen, seized, and confiscated property¹⁹, including by competent authorities that are freestanding or part of an LEA, and, as needed, the ability to hire outside vendors or contractors for complex assets. Judges were not seen by participants in the workshops as generally able to manage seized assets or dispose of them effectively in addition to their other duties.
- Unlike other aspects of the criminal justice system, confiscation can result in revenue for governments; this provides an opportunity for confiscation offices to be self-sustaining.
- Working in co-operation with international partners was seen as a key ingredient

19. FATF Best Practices Paper Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery.

of success, especially the early outreach seeking the imposition of provisional measures against assets subject to confiscation. Furthermore, the legal ability to domesticate or enforce foreign confiscation orders was regarded positively by practitioners.

Financial investigation and Asset tracing

As noted above, parallel financial investigations should be a routine part of any investigation into crimes that generate proceeds or where money or assets are being used for criminal or terrorist purposes. If effective action is to be taken against the proceeds of crime, it is critical that investigators can, in a timely way, identify all parties (whether natural or legal persons) involved in or linked to the criminal activity and/or the criminal, as well as identify all assets (and the persons holding or controlling those assets) which might be subject to confiscation or be an asset that could be used to meet a value-based confiscation judgment. As the practitioners in the workshops emphasised, where possible, as much financial investigation as possible of the criminal should occur before the arrest or before the point in time at which the criminal becomes aware he is being investigated, to include the tracing of assets and liabilities, net worth analysis, and understanding of income and expenditures, as appropriate. This will allow more effective results in terms of freezing/seizing. If there is more than one agency or body involved in the criminal investigation and the confiscation, then this requires a well-coordinated approach. It could also be effective to employ a task-force approach for certain types of investigations

Investigative powers - It is essential that authorities have a full set of investigative powers available to them to investigate the financial activity of criminals.

- At the most basic level, participants in the workshops mentioned this means that law enforcement/prosecutors should have the power issue to production orders or subpoenas (commonly used to require

financial institutions to produce financial records) or to conduct searches that allow documents, assets, or other items to be seized as evidence or even in view of confiscation. Such powers should have a purpose that extends beyond the traditional gathering of evidence for a criminal offence to the tracing and/or analysis of criminal proceeds.

- It is important that these powers, if used at a pre-arrest stage, are linked to provisions that prevent third parties from tipping-off the criminals or the owners of the assets. Experts noted that such authorities would normally be obtainable on relatively lower factual showing or such as “reasonable grounds to suspect”.
- Some of the other techniques and powers set out in R.31 such as undercover operations, intercepting communications, and accessing IT systems could also be useful for asset tracing.
- One power that exists in some common law jurisdictions and which was noted as useful in certain cases is a monitoring order power, whereby a court order requires persons (usually financial institutions) to report any transactions with the suspected criminals for a future period. This in effect provides real-time financial intelligence.
- With respect to accessing records, investigative authorities may use judicial processes to request a warrant to compel a search or seizure, or a subpoena to require testimony be given or records produced.
- The attendance of witnesses and the production of records may be required from any place or in any territory or other place subject to the jurisdiction where the investigation is taking place. In some cases, the prosecutor may also apply to a court for the issue of a search warrant to be executed upon a legal person. For example, an agent

of the court may “serve” the subpoena upon the recipient (e.g. bank, title company, registered agent, trustee, etc.).

- Standard investigative techniques can also be used to overcome investigative difficulties or impediments to understanding trusts, which may be used to hold or conceal criminal assets. Once the trustee is located, law enforcement may use compulsory measures to obtain records and identify those who exercise control over the trust such as a protector or a person with a general power of appointment. Competent authorities are able to “follow the money” to the non-trustee individual (if any) who ultimately benefits from the trust or similar structure.
- Various tools were cited in the workshops as useful in “following the money,” such as using records to trace funds through numerous accounts or institutions, developing informants or key witnesses; executing search warrants to obtain relevant documents including financial records and business records; cross-referencing business or travel records; the power to ask financial institutions to confirm whether they hold an account in a particular name; and utilising special investigative techniques such as electronic surveillance or monitored undercover operations to pierce the veil of legal entities to their true owners.

Timely access to databases and other sources of information regarding assets – it is often essential to obtain information about a criminal’s assets very quickly, and an important issue in this regard is the capacity to search against a database(s) for different types of assets to know whether assets that may be subject to confiscation are held by the criminal, an associate or third party. For example all police forces would have access to registers of motor vehicles. There is currently also considerable debate about timely access to beneficial ownership records for legal



persons and arrangements, with an increasing amount of information being held within company registries.

- Many countries have one or more government registries for real property, and some countries maintain a central database of all bank accounts held in that country or have some capacity to query all reporting entities for relationships or transactions with specified individuals or entities ²⁰. Such databases or any rapidly accessible record keeping system showing assets and owner for important types of assets appears to be a very useful tool for authorities to trace assets in a timely way. However, any such systems should have measures to verify the accuracy and authenticity of the information it holds.
- Direct or indirect access to taxation records is also very important as a way to cross-check what a defendant or associate declared as legitimate income, assets etc. It is important that all databases are searchable in an effective way.

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20. In the European Union the Fifth Anti-Money Laundering Directive requires EU members to create a database of all bank accounts held in the country.





Seizing/freezing

Attendees at the workshops noted that it was essential that competent authorities are able to take action to freeze or seize assets that may ultimately be subject to confiscation. Depending on national law or procedure, or the facts of the case, this may entail measures affecting all assets of a defendant (e.g. a global prohibition on dealing with assets owned or controlled by the defendant, even if held by third parties) or only specifically enumerated assets (often those that are directly traceable to crime). Also, depending on the legal system, the power to order restraint or seizure may rest only with a court or judge, or the prosecutor or investigating judge may have certain powers. Important elements in an effective regime include:

- **Ability to take timely action** - As noted, it is important that there is the legal possibility and practical mechanism in place to freeze/seize most or all relevant assets before or at the same time as arrest. In jurisdictions where investigations can be conducted covertly, the seizures might be timed to the moment when the investigation becomes overt. Preferably, freezing and seizing this can occur after assets have been traced and some amount of financial analysis carried out, but this may not always be possible. Participants at the workshops agreed that the ability to act on an ex parte basis, without notice to the suspect, even for just a short period, was helpful to ensure the efficacy of provisional measures so that the suspect did not have a chance to move or dissipate assets. Practitioners agreed that an evidentiary requirement on the government to prove
- a risk of dissipation before it is possible to obtain an order was burdensome. Such a requirement is often difficult to prove in practice and would negatively impact the ability to freeze assets. With respect to practical mechanisms, action can be taken more swiftly if prosecutors are involved in the case at an early stage and either have appropriate powers themselves or can apply rapidly for a court order. It is also helpful for courts to have procedures permitting emergency or urgent applications.
- **Evidence and burden of proof** – Experts expressed the view that the evidentiary requirements and burden of proof should not be unduly onerous at the freezing/seizing stage of proceedings. Authorities were comfortable with standards such as reasonable grounds to suspect the defendant has assets derived from crime or probable cause to believe that there is property that would be subject to confiscation in the event of a conviction.
- **Third party property** – Frequently, the criminals that commit the predicate offences will seek to launder the proceeds and place the proceeds in the hands of third parties (family, associates, or legal persons or arrangements) that were not directly involved in the crimes. Prosecutors need to be able to trace and have the power to freeze such property, including in cases where equivalent value confiscation that will be sought because the proceeds are unavailable or have been spent. Countries

use different legal powers in this regard, and three mechanisms that were cited were: (a) directly tracing the criminal proceeds through any transactions/transfers into the property that is to be restrained; (b) producing evidence to show that the third party received a gift of property from the defendant or was not a bona fide purchaser of the asset; and (c) showing that the defendant has effective control of the property even if it is held in the name of a nominee. Of course, the rights of bona fide third parties should be appropriately protected.

- **Extent and nature of the provisional order** – Whichever authority is competent to issue preliminary orders should ensure that property will be preserved and available to satisfy any confiscation order that is subsequently made. Practitioners agreed that the scope of the order should be broad, and, if possible, include income derived from property that can be confiscated and equivalent value or substitute assets. The nature of proceedings giving rise to the order will vary. Depending on the legal system, they could be in rem or in personam, orders could be made against specific assets or all assets of a defendant, and they may have extraterritorial reach. According to the FATF Standards, courts or other authorities should be able to issue provisional measures covering assets located abroad, but of course mutual legal assistance would be required to give effect to the order in the foreign country. Practically, property could be:

(a) restrained in place (e.g. a financial institution may be ordered to simply freeze accounts) (b) subjected to conditions (e.g. a prohibition on the sale of real property may be ordered which does not evict occupants before conviction), or (c) seized and taken under the control of a law enforcement, the court, or other authorised body, if there is a concern that the nature of the property might lead to it being dissipated or hidden regardless of the court order, such as with cash, personal property, vessels, vehicles, or other movable assets.

- **Ancillary powers/orders** – Following the legal developments that have occurred around Mareva injunctions in a civil law context, many countries have also provided prosecutors with additional powers that can assist in ensuring that assets are located, effectively frozen and then available to meet any confiscation order. One such power is the possibility for a court to order that a defendant make a sworn declaration about all his assets. If obtained at an early stage of proceedings this can potentially provide useful additional information regarding assets, and place an onus on a defendant to be truthful about all the assets he owns or controls, or run the risk later of being shown to have perjured himself. Another option, available in some jurisdictions is that the government has the power to ask the defendant questions about things such as finances which the defendant is required to answer. Such a power must be carefully used, and should not negatively impact the defendant's basic right to not

be forced to incriminate himself, i.e. the answers could not be forced and also used as evidence of a criminal offence. A third mechanism that is used is for the defendant to agree, or for the court to order, that a defendant repatriate assets that are located in another jurisdiction.

- **FIU power to freeze** – A number of FIUs have the power to temporarily place a hold on (freeze) assets involved in suspicious transactions. Another similar mechanism is a “no consent” order whereby the FIU refuses to consent to a reporting entity’s processing of a suspicious transaction. Such administrative holds can be useful to expeditiously prevent monies from being transferred abroad, for example in fraud cases, where it can then be difficult to recover them. Freezes may only be available for certain types of transactions/assets and they are temporary—some lasting a matter of hours or days—but they give the prosecution sufficient time to gather evidence to seek stronger judicial orders.



Confiscation/forfeiture

Consistent with Recommendation 4, and various international Conventions, countries should have a full range of powers to confiscate (a) property laundered; (b) proceeds from, or instrumentalities used or intended for use in ML or predicate offenses; (c) proceeds or instrumentalities linked to TF; and (d) property of corresponding value. These are long-standing norms, and as noted above, most countries have the basic authorities in place in their laws. Surprisingly, quite a number of countries do not have adequate powers to ensure confiscation of equivalent value. Experts noted that it is important that the defendant is not incentivised to benefit from his criminality by spending proceeds first while retaining other property that was legally acquired.

Evidence and standard of proof - The nature of the evidentiary requirements and the burden of proof varies according to the type of confiscation (criminal, civil, administrative) and the jurisdiction and its legal system. The issue is not one that is discussed in many MERs, but is important in terms of the ultimate effectiveness of the regime.

- In all jurisdictions, there are laws allowing confiscation of proceeds and instrumentalities post-conviction, in particular for the offences of conviction. This is often viewed as part of the criminal sentence, and the procedural rules that apply for that purpose will also apply to confiscation; however, some jurisdictions apply a lesser standard of proof than the normal criminal standard (beyond reasonable doubt) to confiscation.
- Experts surmised that it could be effective if the burden were the normal civil standard of balance of probabilities or something similar.
- One issue where broader sentencing considerations are relevant relates to confiscation of instrumentalities, and the need to ensure that the nature and value of

the property being confiscated is somehow proportionate to the scale of the criminality involved.

- Workshop attendees also considered the issue of how the court will take into account the proceeds gained in circumstances where the prosecution does not include all possible charges, but a representative set, such as when additional offences are believed to have been committed, but it would not be cost-efficient to proceed with all charges. The benefits from this unindicted conduct might also be taken into account for confiscation purposes.

Non-conviction based (NCB) confiscation – An increasing number of countries have adopted NCB confiscation regimes in addition to their conviction-based laws. In such proceedings—which are sometimes also referred to as civil confiscation, civil forfeiture, or extinction of dominion—assets can be declared forfeited to the state without the condition precedent that the defendant has been convicted of a crime. The nature of the proceedings is in rem (against the asset itself rather than against a person).

- Some participants described situations where NCB is available in limited circumstances, such as when the accused has died or absconded, while other workshop participants discussed fuller NCB regimes in which the state proceeds on the legal fiction that the property is “standing in” for the defendant and is forfeitable due to its involvement in crime is separate from any criminal proceeding and the standard of proof is usually the same as or similar to the civil standard (e.g. the state must show by a preponderance of the evidence or on balance of probabilities that the property constitutes the proceeds or an instrumentality of crime).
- In some jurisdictions, Ireland, for example, NCB is the main mechanism used to confiscate criminal proceeds and

instrumentalities and is integrally linked to efforts to combat serious organised crime. Experts noted that the civil confiscation can backstop a criminal prosecution, or even succeed in the event of acquittal.

- A variation on NCB that is used in some jurisdictions is administrative confiscation/ forfeiture or abandonment. This is usually conducted by LEAs and authorised only for certain types of assets, e.g. assets under a certain value or amount or cash that is seized at the border. Assets can be forfeited by administrative notice if uncontested or can be heard in civil proceedings, if contested. The standard of proof in such cases is also lower.

Unexplained wealth orders, unjust enrichment offenses, and burden-shifting provisions

– Many countries have introduced additional powers, in both criminal and civil proceedings, that require the government to produce sufficient evidence that a person has assets that cannot be explained by his known legitimate income or legitimately acquired assets, and then place the burden on the defendant to show otherwise.

- Thus, for serious offences such as drug trafficking, where the convicted person does not have known legitimate income to explain his wealth, the prosecution present evidence of net worth or similar accounting evidence.
- There are also certain presumptions that may be triggered by the defendant's "criminal lifestyle" or lack of legitimate income over a period of time where he committed multiple offences. Similarly, unexplained wealth orders, originally conceived as useful in combatting corruption, are being used more broadly to attack criminal assets in civil proceedings. Practitioners at the workshops expressed a desire to learn more about these tools.

Other remedies, including tax and civil restitution

– Countries are also adapting their responses to profit-generating crime by looking to use the broadest possible range of powers. Increasingly, using tax collections, penalties, and assessments to recover assets is seen as an avenue of last resort. Tax recovery can be an option when prosecutors lack the evidence to show that the property is criminal proceeds that would meet a civil or criminal burden of proof, but they do have evidence that the defendant has engaged in tax evasion or fraud. While it is preferable to be able to obtain a criminal conviction and also deprive the person of their proceeds, having an option to impose a tax assessment, combined with penalties and interest, can have a similar punitive impact on the defendant in terms of the amount he must disgorge. Proving that assets came from legitimate income may be a much more difficult task for the defendant.

Also, many experts cited restitution as a worthy objective which can, depending on the legal system, be a complimentary power to and work in tandem with confiscation. Many financial crimes have victims, and persons that have been defrauded should receive full restitution, if at all possible. Experts discussed how their legal traditions encompass both restitution and confiscations; depending on the circumstances, it may even be possible to provisionally restrain assets and confiscate them, at which point the state can use the resulting funds to satisfy a restitution order. Some experts said that a combination of confiscation proceedings combined with a civil claim by the victim may accomplish the dual objective of depriving criminals of proceeds while also ensuring victims receive compensation. However, other jurisdictions noted that communication with potential victims is key, as legal claims filed by victims can slow or complicate confiscation where the prosecution intends to ultimately distribute money to victims who can demonstrate their pecuniary losses.

Asset management and recovery

Assessments to date demonstrate that many countries have inadequate legal powers, and lack the institutional frameworks and skill sets needed to effectively manage and/or realise assets that are frozen, seized, or confiscated.

The objective and intention in both Recommendations 4 and 38 is that countries should have mechanisms for managing and disposing of assets domestically and when the confiscation is co-ordinated with another jurisdiction. Assets, depending on the type, require preservation and safeguarding; some require active management; yet others should be sold on an interlocutory basis to maximise the value that can be obtained (or make sure that the defendant's value is maintained if he prevails and the property is not confiscated). Best practices in this area were identified as having dedicated agencies for asset management or else persons who can be charged with such tasks as part of their official duties. Some experts mentioned that they have found it effective to outsource this work to contractors or vendors through government contracting mechanisms, especially when specific expertise is necessary (e.g. to run an ongoing business operation or manage tenants, etc.).

Additionally, in many countries, the value of property realised to satisfy confiscation orders is often considerably less than the value of the property ordered confiscated, or the property has depreciated considerably in value since it was first seized due to lack of maintenance. The issue of asset management and recovery has been looked at previously by FATF and other organisations/bodies, and good practices are detailed, as in the FATF Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for On-going Work on Asset Recovery (2012), or the study by the UNODC Open-ended Intergovernmental Working Group on Asset Recovery (2017)²¹.

21. <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf>



Institutional mechanisms – It is important that there is an effective and cost-efficient mechanism to manage assets and that there are professionals who can appraise and sell assets in a way that maximises the return to the state. In considering which mechanism could be most appropriate, there are numerous considerations such as the likely value and type of assets at issue, whether there are existing bodies that carry out similar functions, cost efficiency of a model, and the need for adequate transparency and accountability. Many different approaches exist, for example:

- In some countries there is no specialised agency or body that has this function, and it is left to general law enforcement or individual judges to manage seized assets, with court services being left responsible for realisation or recovery of assets. Neither entity is usually well equipped with the necessary powers and skills to handle this role for anything other than the most straightforward case.
- Another option which is used is that the Asset Recovery Office in a jurisdiction is not only responsible for asset tracing but also asset management, sometimes with support of other government agencies, as in Belgium and the Netherlands. There are also specialised law enforcement agencies responsible for managing and selling seized assets such as the U.S. Marshals Service, which also handles assets seized by other LEAs.
- There are free-standing government agencies that either solely manage seized/confiscated assets or do that along with other asset management functions.
- Receivers, trustees, or asset managers may be appointed by the court, such as private sector accountants or specialists in bankruptcy or liquidation; some experts cautioned that, fees and charges can sometimes raise issues.

- Additionally, specialised private sector firms have entered the market which can offer asset management and auctioneering services. Some have a particular focus on asset recovery, and many work on a commission basis.

Ultimately, the model or mechanism that is chosen should be cost-effective, with the maximum possible amount being paid into central revenue or specialised asset forfeiture funds, after costs for management and realisation are met. Whether confiscated funds enter the general treasury, budgetary process, or a special fund, practitioners noted at the workshop that it is advisable to use confiscated assets in a responsible, transparent, and accountable way, such as to finance crime-fighting efforts and initiatives or on projects which benefit the general public. Participants recounted the unique and lawful uses for confiscated assets in their jurisdictions and some explained the benefits of having a fund subject to auditing and other controls. Asset sharing with countries whose assistance has made the confiscation or return of assets possible should also be considered where appropriate and is encouraged by the FATF Standards.

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International cooperation: mutual legal assistance, extradition and other cooperation





International co-operation can be critical for the success of ML/TF investigations and prosecutions and also for asset recovery. ML and TF networks are often spread over multiple countries, and foreign jurisdictions may have the missing pieces of information or evidence which facilitate a successful prosecution. Where there are financial or other records located abroad, foreign witnesses whose testimony is critical, or suspects present in another jurisdiction, timely co-operation can be outcome determinative.

The FATF Standards deal with international co-operation in a holistic manner. As a baseline for co-operation, countries should become a party to and fully implement four important multilateral instruments²². Countries should also be able to execute extradition

requests in relation to ML and TF²³, have mechanisms in place for the rapid provision of a wide range of mutual legal assistance for ML/TF and associated predicate offences investigations, prosecutions and related proceedings; and be able to take expeditious action in response to requests for freezing and confiscation²⁴. Finally, Recommendation 40 states that countries should ensure that their competent authorities (to include FIUs and financial supervisors, and LEAs) can rapidly, constructively and effectively provide the widest range of international co-operation and exchange information in relation to ML associated predicate offences and terrorist financing.

22 See Recommendation 36. From an AML/CFT perspective, the most important international agreements are the Vienna Convention (1988), Palermo Convention (2000), Merida Convention (2003), and the TF Convention (1999).

23. See Recommendation 39.

24. See Recommendations 37 and 38.

Other forms of co-operation and information exchange

During the workshops, practitioners emphasised the need for international co-operation that is less formalistic. This may be conducted at an investigator-to-investigator level, among counterpart agencies, or even between agencies that are not direct counterparts (i.e. diagonally). Such informal co-operation—outside of MLA or diplomatic channels—was widely promoted as a beneficial first step to pursue international co-operation. Considering that formal mutual legal assistance is considered to be a slow and resource-intensive mechanism, it was agreed that this could be done more effectively having preliminary direct contacts between counterpart law enforcement agencies and financial intelligence units or from liaison magistrates or law enforcement/judicial attachés posted locally or regionally (agency-to-agency assistance).

As mentioned in the FATF operational guidance for financial investigations, such assistance could lead investigators into a rapid identification of evidence and assets, confirm the assistance needed and even more importantly provide the proper foundation for a formal MLA request (government-to-government assistance). Such contacts also offer an opportunity to learn about the procedures and systems of the foreign jurisdiction and to assess various options for conducting investigations, prosecutions and confiscation.

Workshop attendees also stressed the importance of forming personal connections with foreign colleagues and having close contact through different networks, such as those provided by Interpol or Europol or utilising the contact points of the Camden Asset Recovery Interagency Network (CARIN) and the other regional ARINs.

Finally, the FATF's financial investigations guidance highlighted that it is essential for financial investigators to discuss issues and strategy with foreign counterparts, and this should involve consideration of conducting a joint investigative team or providing information to foreign authorities so that they can conduct a parallel investigation.

Mutual legal assistance

Mutual legal assistance is one of the most decisive weapons states have to fight serious international crime. The need for a mutual legal assistance requests may arise quickly, but they need to be drafted in such a way that complies with treaty requirements and makes it easier for the requested state to comply with the request. Challenges to executing requests can arise when criminal justice practitioners from different legal systems attempt to work together.

Practitioners noted that central authorities should be proactive, communicative, and arrange for direct consultation between operational authorities if required. Countries noted that they had better results seeking co-operation when they shared draft requests before sending final versions, actively followed up on requests, answered questions from the requested state, and engaged in a dialogue instead of blindly mailing documents back and forth. Participants noted that the system of treaty-based assistance can be speeded up using technological aids, such as video-teleconferencing and emailing advanced copies of MLA requests.

There are, however, some particular challenges related to international co-operation. A jurisdiction may choose not to seek formal co-operation such as mutual legal assistance (MLA) where they consider it is unlikely to receive a response. Some obstacles to co-operation included a lack of bilateral or multilateral treaty basis, not having the knowledge or guidance to draft a quality, actionable request, or having very rigid standards for seeking international co-operation. Finally, during the workshops, one major challenge to effective international co-operation was the lack of a clear political commitment to co-operate, especially when one country's nationals are being investigated in another country.

International co-operation in a TF case may also be difficult where one of the cooperating jurisdictions may be seeking capital punishment in the case. There have also been issues with dual

criminality, especially in situations where the funding an individual terrorist is not adequately criminalised.

As detailed, good practices in this area include:

- Considering informal methods of international co-operation such as FIU-FIU, police-police or prosecutor-prosecutor co-operation before submitting a formal MLA request.
- Prioritising MLA requests that have a ML or a TF element or seek urgent action to seize assets.
- Providing assurances about the penalties that are being sought by the prosecution in certain cases to facilitate extradition (e.g., assurances that the death penalty will not be sought in a terrorism-related prosecution).
- Using networks as such as EUROJUST or CARIN and ARINs prior to making a formal request to facilitate international co-operation and target the assistance that will be sought.
- Making contact with overseas authorities and arrange to send a draft copy of a proposed MLA request, so that they can advise on the content and wording of the request.
- Demand to keep the fact or the contents of a MLA request remain confidential.
- If countries utilised central authorities, the secondment of confiscation, ML, and/or TF specialists to such a central authority was seen as advantageous.
- Using regional tools such as European Investigation Orders and Council of Europe Convention no. 198 (“Warsaw Convention”).
- Building trust and informal connections between jurisdictions to facilitate MLA and more informal channels of international co-operation and information exchange.
- Using the Mutual Legal Assistance Request Writer Tool (MLA Tool) that has been developed by UNODC to assist states to draft requests with a view to facilitate and strengthen international co-operation.



Potential next steps

The criminal justice system is a crucial component of effective anti-money laundering and countering terrorist financing systems (AML/CFT), and FATF places considerable importance on countries ensuring that criminals and terrorists are convicted and given dissuasive sentences, and deprived of their proceeds.

The findings from the process initiated by FATF President Santiago Otamendi to thoroughly examine the experiences, challenges and best practices in investigating and prosecuting money laundering (ML) and terrorist financing (TF), and in confiscating assets linked to criminal activity are laid out in this President's paper. The findings are laid out in detail above, with key points mentioned in the Executive Summary, and draw on both the experiences of national experts, but also on the review of mutual evaluation reports and other research.

The exercise has reinforced the FATF's focus on achieving effective results as regards the investigation and prosecution of ML and TF offences and on the recovery of the proceeds of crime.

The FATF programme of several regional workshops, carried out jointly with the FSRBs and other international organisations, has brought together almost 450 judges and prosecutors from more than 150 jurisdictions to share their experiences and best practices. This by itself has already provided real benefits with strengthened contacts and informal networking by the judges and prosecutors attending.

The FATF can follow up in a range of ways on the strong progress made under this Presidency initiative:

- **Dissemination**

The paper will be broadly disseminated, not only through the FATF and FSRB delegations, but also to other relevant international organizations such as the Organization for Security and Co-operation in Europe, the World Bank, the International Monetary Fund, the International Prosecutors Association, the International Magistrates Association and various Asset Recovery Networks, among others.

■ **Training needs**

The FATF may consider how further training and capacity building for investigators, prosecutors, and judges on ML/TF investigation and prosecution and asset confiscation can be provided. This could also involve increased action to effectively coordinate the efforts of countries and other donors and match the technical assistance provided with the specific needs observed.

■ **Networks for judges, prosecutors and investigators**

The value of international cooperation networks were highlighted during the regional workshops. Workshop participants considered that a network for judges and prosecutors focusing on ML/TF cases and asset confiscation would be very useful, and FATF may consider how to better ensure that adequate channels promoting informal information sharing are put in place.

■ **Enhanced participation and collaboration**

The expert input of judges, prosecutors, and investigators is vital to ensuring a good understanding of ML/TF risks and threats, and to the development of standards, policies, and new tools to effectively investigate and prosecute ML and TF. Strengthening this input will also provide an opportunity to have better informed policy decision making. FATF already works closely with many international partners, and will work to strengthen even further its engagement with relevant bodies and networks such as CARIN and the ARINs, EUROJUST, the International Association of Prosecutors, and the International Association of Magistrates.

■ **Further products**

FATF can also consider how it can work with partner organisations to create further products that will also be useful for practitioners. Workshop participants already identified potential value from products such as handbooks, checklists, investigative guides, and a model MLA request database.

The work undertaken over the year has reinvigorated and refocused FATF's attention on the criminal justice system, which is a fundamental underpinning to all national and international efforts to combat money laundering and terrorist financing. Based on these findings, the US Presidency of FATF will continue this joint effort to enhance the effectiveness of the Criminal Justice System.

ACRONYMS

| | |
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| AML | Anti-Money Laundering |
| ARIN | American Registry for Internet Numbers |
| CARIN | Camden Asset Recovery Inter-Agency Network |
| CFT | Countering the Financing of Terrorism |
| DNFBP | Designated Non-Financial Business and Profession |
| IO | Immediate Outcome |
| LEA | Law Enforcement Authority |
| MER | Mutual Evaluation Report |
| ML | Money Laundering |
| MLA | Mutual Legal Assistance |
| NCB | Non-conviction based Confiscation |
| OSCE | Organization for Security and Co-operation in Europe |
| R. | Recommendation (FATF 40 Recommendations) |
| TF | Terrorist Financing |
| UNODC | United Nations Office on Drugs and Crime |

FATF



FATF President's Paper: Anti-money laundering and counter terrorist financing for judges & prosecutors

This report presents the findings from the process initiated by FATF President Santiago Otamendi (2017-2018) to thoroughly examine the experiences, challenges and best practices in investigating and prosecuting money laundering (ML) and terrorist financing (TF), and in confiscating assets linked to criminal activity.

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