ACWG International Cooperation Think Piece: Asset Recovery
Practical Enhancements for Mutual Legal Assistance

Summary: This note is an outcome of the Scoping Paper on International Co-operation dealing with Economic Crime, Offenders and Recovery of Stolen Assets and G20 Action on International Cooperation on Corruption and Economic Crimes, Offenders and Recovery of Stolen Assets finalized by G20 Anti-corruption Working Group in 2020. The note proposes several practical enhancements for mutual legal assistance to strengthen cooperation in asset recovery.

1. As criminals and the proceeds of crime cross borders, anti-corruption efforts depend on assistance from foreign jurisdictions, a process that is impeded by differences in legal traditions, laws and procedures, resources, and capacities. Mutual legal assistance (MLA) in criminal matters is the process by which countries seek assistance from foreign law enforcement and prosecution authorities to gather information and evidence, as well as to restrain and confiscate the proceeds of crime. In cases of grand corruption, asset recovery is unlikely in the absence of effective MLA.

2. Under UNCAC Article 46, countries should provide the widest range of MLA in relation to corruption investigations, prosecutions and related proceedings. However, the realities of existing MLA processes often reduce these provisions to aspirational statements. The lack of timely provision of MLA was the greatest barrier to formal cooperation highlighted by G20 countries in the G20 Anti-Corruption Working Group (ACWG) 2020 Accountability Report (the Report).

3. The Report identifies several positive steps taken by G20 countries to improve MLA, including, the adoption of legal measures to enable greater flexibility in the execution of MLA requests, the development of tools which allow for the rapid locating and freezing of assets, the establishment of focal points for formal and informal cooperation, the participation in platforms and networks for informal international cooperation, and the increased level of technical assistance provided to developing countries. Among other initiatives, the G20 adopted High Level Principles on Mutual Legal Assistance in Corruption Cases (an outcome of the 2013 Russian G20 Presidency), and a Step-By-Step Guide to Requesting Mutual Legal Assistance from G20 Countries (an outcome of the 2012 Mexican G20 Presidency), and welcomed the Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE) (an outcome proposed by the 2020 Saudi G20 Presidency).

4. To sustain the relevance of previous work by the G20 and other fora, this note proposes measures to improve the performance of both requesting and requested countries in the execution of MLA requests. Given the diversity of legal systems among G20 countries, the proposals are broadly framed as potentially non-binding approaches and offer flexibility to enable countries to use or adapt the proposals as appropriate within their institutional and legal contexts.

Reasons underlying the lack of timely provision of MLA

5. Reasons underlying the delay in the timely provision of MLA vary, but generally fall in two categories: (i) the quantity of MLA requests exceeds available resources and capacities; and/or (ii) the MLA process is misunderstood or perceived by many jurisdictions to be too complicated.
Globalization leads to an increase in MLA requests

6. With increasing cross-border criminal activity, an increase in MLA requests is to be expected and welcomed as an indicator of international cooperation among law enforcement and prosecutors. Globalized communications have also led to significant electronic and personal data held in other jurisdictions. For example, evidence from servers of a social media company in one country may be relevant in the prosecution of an otherwise wholly domestic crime in another country. Consistent with the international imperatives for countries to provide the widest range of MLA, there is a need to identify areas for improvements to manage the increase in MLA requests.

Quality concerns with many MLA requests

7. Exacerbating the increase in quantity, is continued concern with the poor quality of many MLA requests. Some requested jurisdictions assert that many MLA requests do not comply with (i) treaty requirements, (ii) threshold procedural, form or language requirements, or (iii) requirements that are in place to ensure formal law enforcement cooperation complies with domestic legal and regulatory criteria, including due process. Requests may also fail to consider important distinctions between legal systems (e.g., civil vs. common law traditions) which may be especially relevant in requests for the use of coercive powers. Poorly written or insufficient MLA requests may lead to delays in execution due to a lack of clarity or omission of required information. If requests do not contain the required information and/or are not clearly drafted, they cannot be executed in a timely manner, or at all. Attempts to cure defects in the requests if possible, contribute to the delay in the execution of other valid MLA requests and require resources, including staffing with expertise in MLA and criminal law and procedure.

8. The ACWG and other fora have sought to address these quality concerns through the publication of MLA guides (e.g., the G20 MLA Guide and beneficial ownership guides (an outcome of the 2016 Chinese G20 Presidency), 2014 Arab Forum on Asset Recovery and the 2017 Global Forum on Asset Recovery) (available on the StAR website), and the provision of technical assistance and other tools such as UNODC’s Mutual Legal Assistance Writer Tool. Given the continued quality concerns with many MLA requests, continued technical assistance by G20 members and wider promulgation of these resources is needed.

Underutilization of open source information and informal networks

9. Many MLA requests are submitted prior to the full utilization of information available through open sources or through informal cooperation networks (e.g., EGMONT Group, CARIN and other Asset Recovery Interagency Networks). Often these sources could be used to obtain information during the investigative stages in lieu of MLA, or to confirm that the requested information is not available within a requested jurisdiction. These sources also provide the foundation to ensure that any eventual MLA request includes essential information and provides specificity in the requested assistance. Thus, it is more likely that such MLA requests can be executed efficiently, and by foreign counterparts with a better understanding of the case.

10. “Open Government” and other transparency/accountability initiatives, as well as technological advances, have increased the quantity of public records available online. Property records, asset registries, company registries, tax and, increasingly, beneficial ownership information may be available through open source databases or informal cooperation networks. However, the availability of this
information online may not translate into a reduction in MLA requests due to a lack of awareness of relevant databases by foreign practitioners. Further, even though publicly available or as information exchanged through informal cooperation networks, foreign public records (or copies thereof) must be authenticated to be admitted as evidence in domestic courts. The authentication requirements vary among jurisdictions but may necessitate MLA requests from the perspective of requesting jurisdictions.

Differing MLA avenues have developed over time resulting in a lack of standardization

11. Delays in execution also arise from the diversity and complexity of MLA processes developed over time. The original form of MLA, letters rogatory, are still used in the absence of other bases for assistance. Bilateral MLA treaties were first negotiated in the 1970s to facilitate drug enforcement. Although the treaties may use similar templates, or even the Model Treaty on Mutual Assistance in Criminal Matters, promulgated by UNODC, the treaties are individually negotiated, with differences among process, form or content requirements for MLA requests. The availability of MLA has been expanded through several international or regional conventions (UNCAC (2005), UNTOC (2003), OECD Anti-Bribery Convention (1999), inter alia). Despite the availability of such conventions, bilateral MLA treaties are needed to address, among other things, MLA for offenses not covered by multilateral conventions and requirements of domestic laws that can only be overcome by a bilateral treaty. Finally, the relevant obligations under bilateral and multilateral treaties must be incorporated into domestic legislation in each jurisdiction. Domestic legislation may impose additional procedures, leading to misunderstandings between jurisdictions.

12. These differing MLA avenues and requirements of domestic laws show the need to establish and/or strengthen central authorities with technical expertise, resources, and authority to make decisions on MLA, in order to: (1) provide a point of contact for direct communication to resolve issues; (2) agree on uniformity of procedures; and (3) authenticate requests. Properly resourced central authorities can also make decisions to update MLA practices to keep up with technological advancements. Criminals often use state-of-the-art technology to move assets across borders within seconds, while many countries still require paper originals transmitted through diplomatic channels, with properly notarized stamps or seals. The COVID-19 pandemic has shown that MLA cooperation among countries able to transmit MLA requests and receive responsive materials electronically, from central authority to central authority, has been virtually seamless and has overcome the inefficiency of paper originals. Modern technology has also proven to be especially reliable with digital signatures that cannot be forged.

Additional MLA procedural concerns

13. The Report and other studies have identified additional MLA concerns, including inter-agency delays within a jurisdiction (e.g., delays between the central authority and the executing authority); poor case management systems to monitor the status of MLA requests and maintain statistics; an absence of a prioritization system of requests; and unclear timeframes for the execution of MLA requests. These concerns may lead to distrust between requesting and requested jurisdictions, and difficulties in managing expectations for timely MLA responses to meet critical court-mandated
The lack of timely provision of MLA may allow restraint orders on assets to be removed, and assets lost to recovery.

II. Proposed Initiatives

14. This note proposes for the ACWG’s consideration seven measures to address the above concerns through prioritization, simplification, standardization and coordination of MLA requests.

(1) Prioritize MLA Requests for Expedited Response (including “Red Alert MLA Request”)

15. While all MLA requests are important, they are not all equally important. The Report, FATF Recommendation 37, and several MLA good practice guides recommend that jurisdictions prioritize MLA requests. However, specific guidance on prioritization of MLA has not been discussed. As a reform measure, the ACWG could identify criteria that would allow designation of an MLA request as a priority for expedited response – perhaps, a ‘red alert’ MLA request. Such criteria could include MLA requests pertaining to cases of national importance, involved assets exceeding a certain threshold, or likely dissipation of significant assets without timely action. Requests would state clearly As a non-binding commitment, G20 members could decide to seek to prioritize responses to such designated MLA requests, including acknowledging receipt of the priority MLA request within specified time period, providing a contact person for follow-up throughout the MLA process (a “MLA concierge”), and assisting to cure any defects, if possible.

16. General guidance on other good practices in prioritization for both requested and requesting jurisdictions could be shared by the ACWG. A better understanding of prioritization policies may help manage expectations for timely MLA responses.

(2) Consider standardization and greater use of mutual recognition (“MLA Fast Lanes”)

17. While all MLA requests are different, they are not all uniquely different. The ACWG may consider whether certain common and relatively simple MLA requests (e.g., service of documents, authentication of public records, or formal provision of bank account statements previously reviewed through financial intelligence) could be expedited through the use of a standard simplified MLA request template with checklist, as well as sharing of good practices by central authorities on management of these requests.

18. Expedition of certain MLA requests could also be enhanced through wider use of mutual recognition agreements between two or more countries to recognize a specific process or procedure of the other country. Under mutual recognition, an issuing authority may order the execution of an investigative measure in another jurisdiction, unless the executing authorities in that jurisdiction invoke one of the expressly indicated grounds for refusal. In the EU, mutual legal assistance mechanisms are progressively being replaced by mutual recognition instruments. As an example of good practice noted in the Report, the EU obligations on mutual enforcement of freezing and confiscation orders allow for such measures to be taken by countries within the EU without any procedural obstacles or delays. The ACWG could consider the possibility of the wider use of mutual recognition among G20 members, or on a bilateral basis, for certain processes (e.g., enforcement of freezing and confiscation orders, authentication of public records, service of documents). If the wider use of mutual recognition is not
feasible at this time, the ACWG may consider whether alternative avenues for streamlining are available for certain processes.

(3) Identify good practices for operational information systems to facilitate MLA

19. The lack of robust information systems or case management systems for managing MLA requests is a continuing challenge. The ACWG could consider identifying good practices for operational information systems that allow for managing requests for MLA and gathering comprehensive statistics.

(4) Expand awareness and admissibility of open source information

20. Requested jurisdictions that frequently receive MLA requests for open source information or public records available through informal information exchange networks may consider promoting awareness of the availability of such information through an update of their MLA guides. Links to publicly available databases could be provided through central authority websites or the Stolen Asset Recovery Initiative (StAR) website (a repository of MLA/beneficial guides for G20 members and many other jurisdictions).

21. A review of current rules and practices on the admissibility of public records as evidence could be undertaken as well to identify good practices. The ACWG could consider the support of the preparation of model rules on evidence or criminal procedure pertaining to the admissibility of evidence obtained from public official databases (foreign or domestic) or other open source information.

(5) Convene Expert Meeting among G20 Central Authorities

22. The ACWG may consider recommending an inaugural expert meeting among G20 central authorities, with potential outcomes such as the (i) identification of opportunities for streamlining MLA; (ii) identification of opportunities for the standardization of certain MLA processes, such as electronic transmission of requests and responsive materials; (iii) an understanding on benchmarking statistics; and (iv) the establishment of regular communications among central authorities. The expert meeting could consider reviewing and further promulgating the good practice guide for central authorities issued by the International Institute for Justice and the Rule of Law. If a live or virtual meeting is not possible, the ACWG could consider supporting a report from G20 central authorities addressing these topics.

(6) Update model laws and templates

23. The Model Treaty on Mutual Assistance in Criminal Matters (Model Treaty) was adopted by the UN General Assembly in 1990; with update by UNODC in 2007. A review of the Model Treaty could be undertaken to identify opportunities for expedition of MLA. As part of the review, the feasibility of creating a universal MLA template, or templates for certain types of MLA, could be explored.

(7) Ensure continued relevance of prior ACWG Actions

24. To ensure the sustained relevance of previous work, the ACWG should consider reviewing and updating previously provided information on domestic requirements for international cooperation, such as, inter alia, the MLA, asset recovery and beneficial ownership guides, and ensure their availability,
including on the StAR website. Subject to the agreement of other members, the UK intend to propose this as part of the UK Presidency of the G7 this year. The ACWG could also consider recommending additional information for inclusion such as prioritization measures, indicative timelines for response of categories of MLA requests, open sources, and informal channels for cooperation. Practitioners in requesting jurisdictions may also find sample or redacted MLA requests instructive as well as checklists for completion of MLA requests.