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TECHNICAL PAPER

Handbook on money laundering identification, investigation and prosecution for Ukraine

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ABBREVIATIONS

AML	Anti-Money Laundering
CCU	Criminal Code of Ukraine
CFT	Combatting the Financing of Terrorism
CPC	Ukrainian Code of Criminal Procedure
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FPWMD	Financing of the Proliferation of Weapons of Mass Destruction
GDP	Gross Domestic Product
LEA	Law Enforcement Agency
LoR	Letter of Request
MLA	Mutual legal assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MSB	Money Service Bureau/Money Service Business
NABU	National Anti-Corruption Bureau of Ukraine
NCA	National Crime Agency (of the United Kingdom)
NCBAF	Non-conviction based asset forfeiture
SFMSU	State Financial Monitoring Service of Ukraine
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UWOs	Unexplained wealth orders
VC	Virtual Currency

1 INTRODUCTION

1.1 THE NATURE OF MONEY LAUNDERING

Money laundering is a huge international problem. Some of its impacts are as follows:

I. It funds organised crime and terrorism;
II. It encourages corruption in public and private institutions;
III. It reduces national tax revenues;
IV. It affects the integrity of businesses and financial institutions and encourages the public to lose confidence in them;
V. It undermines the public's faith in the country's democratic institutions and economy.

At a recent meeting of G20 leaders in Osaka some of the main issues discussed were the use of cryptocurrencies, the global fight against money laundering and terrorist financing. In particular the G20 leaders pledged to step up the fight against money laundering, terrorist financing and the proliferation of weapons of mass destruction. In this context, they welcomed the UN Security Council resolution, which emphasises the role of FATF in setting global standards on these issues.

As money laundering is illegal and, by its nature, secretive, it is difficult to estimate just how much money is laundered internationally. In 2009 the UNODC estimated that some 2.7% of global GDP or US $1.6 trillion was laundered. It is likely that the problem is now far worse than this.

Basically, the point of money laundering is to take money derived from criminal activity and move it through a number of transactions to disguise its origin and to integrate it into the financial system so that it can be used for the benefit of criminals without its illegal origin being known. It is usually regarded as having three stages:

Placement: This involves introducing cash into the financial system

Layering: This involves carrying out a number of financial transactions to disguise the illegal origin of the money

Integration: The money is introduced into the financial system to put it at the disposal of the criminals.

This is the classic view of money laundering. It is necessary for the criminal to carry out these procedures because of the anti-money laundering procedures and regulations in most economies that are designed to identify, prevent and report money laundering to the authorities. For example, a drug dealer taking a bag full of cash into a bank and hoping to deposit it in an account would hopefully be refused and would be reported to the law enforcement authorities.

It should be remembered that not all of these stages are necessary to form the basis of a criminal offence of money laundering. For example, in many jurisdictions it is an offence merely to **possess** property derived from crime (both the original criminal and anybody who

later possesses the property with the requisite state of mind). Similarly, it can be an offence to deal in some way with **any property** derived from crime, not just money.

Definitions of money laundering in national and international legal instruments often encompass concepts such as the conversion or transfer of property, concealing or disguising the nature and origin of the property as well as the acquisition, possession or use of criminal property. There will usually be a mental element to these offences that might be knowledge, suspicion, belief or negligence as to the criminal origin of the property. Participation or assistance in moving or using the property will often be an offence.

There are important definitions of money laundering in both the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention") and the United Nations Convention Against Transnational Organised Crime ("the Palermo Convention").

1.2 METHODS OF LAUNDERING, COMMON FORMS OF LAUNDERING IN UKRAINE

Money laundering investigations and prosecutions may involve a number of challenges such as:

I. The money laundering offence is often regarded as less serious than the predicate offence and the investigator and prosecutor may be encouraged to deal only with the predicate offence;
II. The money laundering offence may attract a comparatively small sentence after conviction;
III. In the past there has been a widespread view that a person could not be charged with a money laundering offence unless there had been a conviction for the predicate offence from which the laundered funds were derived or the predicate offence could be prosecuted at the same time as the money laundering offence;
IV. The money laundering may involve complex transactions, often crossing international borders;
V. There may be a lack of resources or a lack of expertise in topics such as financial investigation or forensic accountancy.

The Moneyval 5th Round Mutual Evaluation Report on Ukraine (Dec 2017) referred to the top five predicate offences in the period under review as being fictitious entrepreneurship, tax evasion, fraud, embezzlement and abuse of power. The report also stressed the danger of corruption.

Other issues covered by the report were the comparatively low sentences for money laundering and the importance of increasing confiscation and early restraint in proceeds of crime cases and the importance of using parallel financial investigations.

As a matter of good practice, it is important at an early stage of an investigation to consider whether it is likely that it will be necessary to freeze and, in the event of a conviction, to confiscate assets owned or controlled by the suspects. In the case of an investigation into

any substantial acquisitive crime, it is important to consider whether it is desirable and feasible to conduct a parallel financial investigation. (see below for financial investigations).

1.3 THE LAW OF UKRAINE ON PREVENTING AND COUNTERACTING THE LEGALISATION (LAUNDERING) OF THE PROCEEDS OF CRIME, FINANCING OF TERRORISM AND FINANCING OF PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

In 2020 this law introduced some important changes regarding money laundering into the laws of Ukraine.

The new Article 209:

"Acquisition, possession, use of property in respect of which factual circumstances indicate that it was received as a result of committed crime, including the execution of financial transaction, committing legal transaction with such property, or moving, changing the form (transformation) of such property or committing actions aimed at concealing, disguising the origin of or possessing such property, the right on such property, the source of its origin, location, if such actions were committed by a person that knew or should have known that such property was directly or indirectly, fully or partly, received as a result of committed crime."

1.3.1 Features of the new (2020) Article 209:

I. The predicate offence need no longer be a socially dangerous criminal offence. It can be any crime.
II. Under the old law the suspect had to know that the proceeds were the proceeds of crime. Now, he can be convicted if he knew or should have known that the property was the proceeds of crime.
III. It is now made clear that there is no need to prove the predicate offence. The criminal nature of the property can be proved by factual circumstances.
IV. The new law provides that the property can be regarded as criminal property if it was indirectly, as well as directly, received as a result of a crime.
V. The new law provides that the property can be regarded as criminal property if it was partly received as a result of crime, as well as being fully received as a result of crime.

Directly/indirectly

Under the new law the proceeds of crime can include property received both directly and indirectly as a result of crime. As an example, if a criminal obtains 5000 Euros and invests it in a company, the 5000 Euros is the direct proceeds of the crime. The indirect proceeds are the shares in the company. If they later increase in value and are sold for 10000 Euros then the indirect proceeds are 10000 Euros.

Mixed/Intermingled Funds

Issues may arise when the proceeds of c rime are mixed with legitimate property. This would have implications both for a prosecution for money laundering and in relation to confiscation.

Expert accountancy evidence may be required to deal with situations in which it is difficult to distinguish proceeds of crime from legitimate property. An example of how this type of situation was dealt with in England is the case of **Middleton and Rourke** (31st January 2008)

M was convicted of drugs offences and both M and R were convicted of two counts of money laundering by converting the proceeds of the drug trafficking.

The money laundering took place over 1999-2005. The police searched their home and garage and found drugs and cash. The police carried out an investigation to compare their legitimate income with their expenditure over the period 1999-2005. The two defendants and the prosecution each instructed an accountant to check the figures. The three accountants agreed an "unexplained income" figure of £44,698.

The prosecution alleged that M was a professional drug dealer and the two of them laundered between £44,698 and £173,000 over a five-year period, but accepted that the two had some legitimate income from employment and letting caravans. Evidence was given both of the fact of their drug dealing and the extent of their legitimate earnings.

The defence claimed that the money laundering charges were bad because they did not identify individual amounts of cash and only contained an estimate for the whole period.

The Court agreed with the prosecution that it was impossible to identify specific amounts received and converted over the 5-year period. The prosecution was entitled to use "general deficiency" charges rather than trying to identify individual amounts. In other words, they could roll up lots of acts of converting criminal property into a single allegation where it was not possible to show individual instances of converting property.

Several international instruments deal with this issue. For example, Article 31 of the UN Convention against Corruption provides that, where criminal proceeds have been mixed with legitimate property, the property can be seized up to the estimated value of the criminal proceeds. Similarly, if the property has increased in value then a percentage of the profit or increase in value can be confiscated in the same manner. Of course, proper consideration will need to be given to the interests of innocent third parties.

Article 1 of the Warsaw Convention contains similar provisions.

As stated above, the new provisions in Ukraine provide that there is no need to prove a specific predicate offence in order to convict a person of money laundering. In many cases it will be impossible or very difficult to prove the initial predicate offence.

Situations where it is impossible or very difficult to convict an offender for a predicate offence:

I. The offender is dead and so cannot be prosecuted.
II. The offender has left the jurisdiction, gone overseas and cannot be located or extradited.
III. Large scale money laundering where the money could be derived from a number of different crimes.
IV. The predicate offence has been committed outside a limitation period.
V. The predicate offence has been committed abroad.
VI. The witnesses to the predicate offence are overseas or are dead or are too afraid to give evidence.
VII. There is not sufficient evidence to prove who committed the predicate offence.
VIII. The suspected offender of the predicate offence has been acquitted.

Criminal Procedure Code Article 85. Adequacy of evidence

1. Evidence is adequate if it directly or indirectly confirms the presence or absence of circumstances to be proved in criminal proceedings and other circumstances which are important for the criminal proceedings, as well as credibility or non-credibility, possibility or impossibility of using other evidence.

It can be seen now that it is possible to prosecute money laundering as a stand-alone crime. This could be so in the eight instances outlined above. Here there would be no need to prosecute a predicate offence, even if that were possible. In some instances, even if it is possible to prosecute both a money laundering offence and a predicate offence, it might be desirable to prosecute the money laundering offence alone. This might be so, for example, if the money laundering involved a sophisticated and complex series of transactions, perhaps moving the money overseas. The particular features that the prosecutor might consider here are the possibility of obtaining confiscation and the likely sentence for the offence.

1.3.2 Relationship between money laundering, financing of terrorism, financing drug trafficking (Art 306 CCU) and handling/receiving (Art 198 CCU)

Money Laundering and Terrorist Financing Distinguished: Clearly, money laundering involves dealing in some way with property that has been derived from crime. The property must be derived from one or more predicate offences. However, terrorist financing may involve money or property that has a perfectly legal origin. It is the assistance and support given to terrorist objectives that makes this activity illegal. For example, money may be collected from members of the public, apparently for charitable purposes, or may be derived from various fund-raising activities in which the ultimate use of the money is disguised. It is the terrorist related uses to which the money is to be put rather than its origin that makes the activity illegal. Terrorism and terrorist financing are defined in a number of national and international instruments.

The new law of 2020 amends the Law on Combatting Terrorism (2003) and Article 258 of the CCU relating to terrorist offences.

Money Laundering and Financing Drug Trafficking: Here we must consider Article 306 of the Criminal Code of Ukraine. That article makes it an offence to **use** funds **obtained from** illicit drug trafficking **for the purpose** of **continuing** illicit drug trafficking. So here it is necessary both to prove that the funds were obtained from drug trafficking **and** that those funds are to be used to continue that drug trafficking. So, in Article 306 we need to be specific about both the origin of the funds and the use to which they will be put.

The new Article 306: "The use of funds obtained from illicit drugs trafficking, psychotropic substances, their analogues, precursors, toxic or potent substances or toxic or potent medicines

1. The use of proceeds from illicit drugs trafficking, psychotropic substances, their analogues, precursors, toxic or potent substances or toxic or potent medicines for the purpose of continuing illicit drug trafficking, psychotropic substances, their analogues, precursors, toxic or potent substances or toxic or potent medicines."

Features of the new (2020) Article 306:

I. The sentence range is now 7-12 years (8-15 if repeatedly or by prior agreement of a group of persons, or in large amounts).
II. Under the old law, the offence could be committed either:
    a. By placing the proceeds of trafficking into banks, enterprises, institutions and organizations or purchasing facilities and property designated for privatization or industrial and other equipment; and
    b. By using the proceeds and property to continue trafficking.

Under the 2020 law the activities in (a) are removed from the Article.

Money Laundering and Receiving/Handling Stolen Property: This requires consideration of Article 198 of the Criminal Code of Ukraine. This article makes it an offence to purchase, acquire, store or sell property that is known to be the proceeds of crime, where there is no evidence that the proceeds of crime have been legalised.

In the English case of **Wilkinson (2006)**, a mini motorcycle was stolen in a burglary. Two days later the 19-year-old defendant was found riding it. He was charged with an offence of possessing criminal property under the English proceeds of crime legislation. The court said that it would have been more appropriate to have charged him with an offence of handling stolen goods. It was for the prosecution service to decide the appropriate charge and, technically, it was not wrong to charge the proceeds of crime offence. However, the trial judge is likely to comment that the handling charge would have been more appropriate.

Prosecutors will want to consider whether there is any overlap between these various pieces of legislation.

It seems clear that, whereas money laundering under Article 209 can be proved by showing, on the basis of circumstantial evidence, that the property has been derived from some type of crime, without proving precisely which crime or type of crime, Article 306 will require evidence that the property was derived from drug trafficking. It is suggested that it is not necessary to prove a specific drug trafficking offence or conviction and that circumstantial evidence of drug trafficking will be sufficient.

The English case of Loizou (2005) indicates the importance of analysing when the money or other property actually becomes criminal property.

In that case the suspects were arrested after the handover of a large sum of money in a car park. There was some evidence that the money was intended as the price to be paid for cigarettes that had been imported without customs duty being paid on them.

There was insufficient evidence of the precise nature of the predicate offence so the defendants were charged with a money laundering offence of transferring criminal property.

The defendants were acquitted because, at the time that the money was transferred in the car park, there was no evidence that the money was actually criminal property. It might have become criminal property after it was transferred to buy contraband cigarettes but not before.

This principle might become important in relation to an offence that continues over a period of time. For example, if suspects are committing a fraud then the property obtained as a result of that fraud will not become criminal property until after the completion of the fraud.

1.3.3 The anti-money laundering scheme (a brief outline)

One way of looking at an anti-money laundering regime is to consider it as having three elements:

I. Measures to prevent money laundering by means of administrative provisions or regulations to ensure that institutions that might receive criminal property in the course of their legitimate businesses have proper procedures in place to ensure that suspicious transactions are recognised, identified, prevented and reported to law enforcement.
II. Administrative provisions to create offences for those involved in these institutions who do not comply with their legal obligations.
III. Provisions that create criminal offences of money laundering.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005 ("The Warsaw Convention") requires that parties to the Convention should adopt adequate measures to prevent money

laundering, taking account of international standards and, in particular, recommendations of FATF.

It is emphasised in the convention that legal and natural persons which engage in activities which are particularly likely to be used for money laundering purposes are required to do the following:

I. IDENTIFY and VERIFY the IDENTITY of their customers and, where applicable, their ultimate beneficial owners and conduct ongoing DUE DILIGENCE on the business relationship, while taking into account a RISK BASED APPROACH;
II. REPORT SUSPICIONS of money laundering, subject to safeguards;
III. take supporting measures, such as RECORD KEEPING on customer identification and transactions, TRAINING of personnel and the establishment of INTERNAL POLICIES and PROCEDURES, adapted, if appropriate, to their size and nature of business to identify and prevent money laundering.

Measures should also be taken to prohibit the disclosure of a suspicious transaction report made to the appropriate authorities by a reporting institution and to prohibit the disclosure of the existence or possibility of a money laundering investigation.

It is also a requirement that these legal and natural persons are subject to effective monitoring and, where necessary, supervision to ensure their compliance with the requirements to combat money laundering, on a risk-based approach.

Measures must also be taken as are necessary to detect significant physical cross border transportation of cash and appropriate bearer negotiable instruments.

Article 14 of the Convention refers to measures that should be adopted to enable a Financial Intelligence Unit or other competent authority, where there is suspicion that a transaction has been reported to it that is related to money laundering, to suspend or withhold consent to a transaction proceeding, to enable the transaction to be analysed. The maximum period of any such suspension or withholding of consent is to be subject to any relevant national law.

The Law on Preventing and Counteracting the Legalization (Laundering) of the Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction of 2020 contains provisions complying with Articles 13 and 14 of the Warsaw Convention, as well as amending the primary money laundering offence in Article 209 of the Criminal Code of Ukraine:

I. It deals with money laundering, terrorist financing and financing of weapons of mass destruction;
II. The law applies to individuals and legal entities that are engaged in financial transactions in Ukraine and abroad;
III. Article 6 refers to "**reporting entities**". This includes a long list of individuals and entities engaged in various areas of commerce, including banks, insurers, operators of payment systems, commodity brokers, accountants, advocates, real estate agents and dealers in precious metals and stones.

IV. Article 6 also refers to "**state financial monitoring entities**", which includes the National Bank of Ukraine (for banks and most financial institutions), the State Financial Monitoring Service of Ukraine and the Ministry of Justice (for lawyers and notaries etc.). They are responsible for ensuring compliance by the reporting entities that they supervise with their anti-money laundering responsibilities under the AML law of 2020.

V. The State Financial Monitoring Service of Ukraine is appointed as the "**Specially Authorised body**" to ensure overall compliance with anti-money laundering policy. When there are sufficient grounds to believe that transactions may be associated with money laundering (or any other crime) they must submit information to the appropriate law enforcement and intelligence agencies.

VI. Article 8 places a number of obligations on reporting entities that, depending on the type of entity, may include:

- appointing a **Compliance Officer** who is responsible for monitoring its activities to assess the risks of the entity being used for money laundering and providing initial and ongoing training to that officer;
- putting in place **procedures** to manage and mitigate the risks of money laundering and detect and report suspicious transactions
- **monitoring** the nature of the activities of new and existing customers and, within certain time limits, **reporting** to the specially authorised body transactions of a specified type or exceeding a specified limit or which are regarded as suspicious for some reason.
- assisting the specially authorised body in other ways in relation to the activities of the customer.
- keeping proper **records** of financial activities of customers and of measures taken to comply with AML/CFT requirements.
- suspending or monitoring transactions as required by the Specially Authorised Body.
- providing proper training to staff to ensure compliance with the entity's obligations.
- report to the Specially Authorised Body certain transactions over a certain financial threshold, as well as suspicions of money laundering

VII. Reporting entities which are financial institutions are prohibited to open and keep anonymous (numbered) accounts and establish correspondent relations with shell banks

VIII. Reporting entities must carry out "due diligence" on customers in certain circumstances to ascertain details relating to their identity and the nature of the transactions, depending on the risk that the customer is perceived to pose. This would occur:

- when establishing business relations
- where there is a suspicion of money laundering
- in relation to transfers and transactions or linked transfers/transactions above certain financial limits

- where there are doubts about the accuracy or completeness of customer identification information already provided.

IX. "Enhanced Due Diligence" may be required in relation to certain types of customer who are regarded as having the potential to be a higher risk (Article 12).

X. Article 32 establishes the liability for non-compliance with AML/CFT requirements. This includes failing to ensure the proper organisation and conduct of financial monitoring and failing to comply with obligations imposed under the Law. Article 33 and 34 provides penalties for a failure to provide information to a specially authorized body

XI. Amendments are made to the Code of Ukraine on Administrative Offences.

XII. The Law of 2020 introduced a new Article 209 (Laundering of Property from Crime) and Article 306 (Financing Drug Trafficking) to the Criminal Code of Ukraine.

In a typical situation we would expect the procedure to work as follows:

I. The reporting entity (bank, financial institution etc.) would make a suspicious transaction report to the State Financial Monitoring Service of Ukraine notifying them of any suspicions of money laundering and threshold transactions. They can ask for consent to carry out the transaction;

II. The SFMSU would consider the information provided to it, perhaps in conjunction with other information/intelligence available to it;

III. If the SFMSU needed more time to consider the issue, it can suspend the transaction for the time permitted by law. They should then notify law enforcement to carry out enquiries;

IV. The SFMSU would consent to the transaction if it did not consider that it constituted money laundering, terrorist financing or FPWMD;

V. If it was appropriate, the SFMSU would pass on the information to a law enforcement agency to investigate the matter further. The LEA would register an investigation.

VI. The investigator should consider whether there is a need to freeze any property in case special confiscation will be requested from the court after a conviction.

2 INVESTIGATIONS

Article 7 of Warsaw Convention contains some relevant considerations:

(i) Each Party shall adopt necessary measures to enable courts or other competent bodies to order that bank, financial or commercial records are made available or can be seized for the purposes of freezing and confiscation of assets and associated investigations. A party should not be able to decline cooperation on the basis of banking secrecy.

(ii) Each party shall adopt necessary measures to enable it to:

a) determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;

b) obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;

c) monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts; and,

d) ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained or that an investigation is being carried out.

(iii) Each Party shall consider adopting necessary measures to enable it to use special investigative techniques to facilitate the identification and tracing of proceeds of crime and the gathering of relevant evidence (such as observation, interception of telecommunications, access to computer systems and order to produce specific documents).

As we have seen above, the procedure in Ukraine would be, where money laundering is suspected, for the reporting entity (bank etc.) to send a Suspicious Transaction Report to the SFMSU. After considering the matter in the light of any other information available to it (for example, reports from foreign FIU's) if the SFMSU thought that the matter should be investigated by law enforcement, it would send a report to the appropriate law enforcement agency. That agency would then register a criminal proceeding and begin its investigation.

2.1 UKRAINIAN PROVISIONS ON PRODUCTION ORDERS

Chapter 15 of the CPC provides the procedure for the provision of access to a party to criminal proceedings to objects and documents for the purpose of examination, copying and seizure. In the case of electronic information systems, mobile terminals of communication systems etc. the contents can be copied rather than the item being seized. Access can be granted either in the pre-trial investigation or during the trial. When applying for a court order the applicant must show the relevance of the material. If the object or document contains a legal secret (as defined in Article 162), the application must state how it is impossible to prove the facts without access to the secret material.

Material referred to in Article 162 contains some items that could be of particular interest to a money laundering investigation: confidential information (including commercial secrets), information which may constitute bank secrecy, personal correspondence and other notes of a personal nature, communications data. The 2020 law added financial monitoring secrets to the list in Article 162.

The usual procedure for obtaining evidential items from an individual or legal entity will be for the judge to summon the person in possession of the material to court. However, if there is a real risk of the items being altered or destroyed, the judge can consider the application without the person in possession being notified or may order the seizure of the material if there is a risk of its alteration or destruction.

The provisions of paragraph 6 of Article 163 are likely to be of particular importance in a money laundering investigation. This provides a procedure for an application to be made to a judge for provisional access to objects and documents containing secrets protected by law. Here the applicant must prove, in addition to the normal requirements in Article 162, the relevance of the material to the prosecution and the fact that it would be impossible to prove the particular point without access to these documents and objects.

This is likely to be relevant in a money laundering investigation in gaining access to items such as banking documentation, documents containing personal information, correspondence, financial information, communications data etc.

2.2 COVERT/SPECIAL INVESTIGATIONS

These are provided for in Chapter 21 of the CPC. Such actions may only be carried out if the information cannot be obtained otherwise. The most intrusive may only be carried out with the order of a judge and only in respect of grave and especially grave crimes. However, Article 250 allows investigative actions without a judge's order in certain exceptional circumstances.

Joint Investigation Teams are a useful means of investigating cross-border crime where a number of national jurisdictions are involved. These have been mainly used by the European Union but there is provision in Article 571 of the CPC for Ukraine to initiate the procedure. Examples of Ukraine's participation include an international Cybercrime investigation in 2015 and the Malaysian Airlines disaster.

One procedure that is very useful in investigating money laundering and other acquisitive crimes is monitoring bank accounts. This is permitted under Article 269-1 in certain circumstances with the authority of a judge's order. However, it is only available for investigations by NABU.

Judicial oversight and a proper legal framework are required to comply with articles 6 and 8 of the ECHR.

Article 8 relates to the right to a person's private and family life, home and correspondence. The ECtHR has emphasised the need for principles of proportionality and necessity to be applied in relation to special investigative means.

The ECtHR has shown that the article 8 right is not absolute and can be weighed against a number of public interest considerations. However, considerations of necessity and proportionality are vital.

The CPC requires that, before a judge authorises a covert investigation procedure, they must be satisfied that the evidence cannot be obtained any other way.

A number of decisions of the ECtHR have emphasised the following issues as being crucial where the situation comes within the scope of Article 8:

- Has there been an interference with a right under the article?
- Was there a legitimate legal structure for the activity?
- Did the activity pursue a legitimate aim as set out in the article (e.g., the prevention of crime)?
- Was the activity proportionate?
- Was the activity necessary?

Article 87 of the CPC confirms that evidence will not be admissible if it has been obtained through a significant violation of human rights and fundamental freedoms. This should ensure compliance with the principles of the European Convention on Human Rights.

The ECtHR case of **Robathin v Austria** is a useful example of the court considering proportionality. Robathin ("R") was a lawyer and was under investigation for fraud related offences. A judge issued a search and seizure warrant for his professional premises. The investigators copied all the files on his computer onto a number of disks.

The ECtHR found that there had been a breach of Article 8 in that it was not satisfied that the search was proportionate. The domestic court did not give adequate reasons for allowing all the data to be copied and did not give sufficient consideration to authorising only a more limited and targeted search of the data and so the exercise went beyond what was necessary to achieve a legitimate aim.

Vinks & Ribicka v Latvia (30/1/2020)

The suspect complained about the extent of a search warrant, saying it was too wide.

In rejecting the complaint, the ECtHR took account of:

I. Tax evasion and ML are serious offences
II. The scope of the investigation was very wide here as it involved 66 companies.
III. Moneyval reports on Latvia had highlighted the serious impact of ML there.

Article 20 of the United Nations Convention against Transnational Organized Crime, Article 20 of the United Nations Convention against Corruption and Article 23 of the Council of Europe Criminal Law Convention on Corruption encourage the use of special investigative techniques (such as undercover operations, surveillance and controlled deliveries) to deal

with corruption and organised crime. They also encourage international assistance along these lines.

2.3 INTELLIGENCE DISTINGUISHED FROM EVIDENCE

Investigators will acquire information and interpret it to give it value to the investigation. In many cases the intelligence will not be in a form that satisfies the legal tests for relevance and admissibility that would enable it to be placed before a court as evidence. As a matter of good practice, it is important that investigators and prosecutors have a clear view at an early stage as to any challenges that there may be in ensuring that investigation material can be rendered admissible. For example, issues of hearsay will need to be considered to ensure that any documentation can be used in evidence, particularly if it has been obtained from abroad. In some circumstances the material will be sensitive in that it contains information that would be damaging to a public interest or to the security of the state or it could compromise the safety of an individual. In such cases, careful consideration will need to be given as to alternative ways of admitting the evidence.

Important points in gathering intelligence are:

- Ensure the legal power exists to gather the material and consider principles of human rights;
- Ensure that sources and methodology are not compromised;
- Keep proper records of the authorisation (Court or senior officer), justification and execution of any covert or intrusive methods of investigation
- Ensure that the measures are proportionate, necessary and pursue a legitimate aim

2.4 SOURCES OF EVIDENCE FOR A FINANCIAL INVESTIGATION

Examples are:

- Evidence acquired from criminal records such as previous convictions and criminal associations
- Telephone and other communications
- Evidence acquired from surveillance, undercover officers and human intelligence sources
- Accounts of purchases from department stores, dealers in expensive items, hotels, airlines etc.
- Land and company registry information, vehicle records
- Financial evidence such as transactions on bank accounts, transfers to and from others, possession/purchase of real and personal property, tax records, social security records, unexplained wealth
- Offshore accounts and property
- Use/possession of large amounts of cash
- A lifestyle beyond the suspect's legitimate means
- Records of interview including admissions and statements that can be proved to be lies
- Use of false information and creation of false records

- Suspicious Activity Reports and other anti-money disclosures
- Records of cross-border movements of cash and currency declarations
- Social media, for example photographs of the suspect with expensive motor cars, luxury living accommodation, expensive holidays
- Information provided by foreign FIU's and law enforcement agencies (ensuring that you have authority from the provider to use it for a particular purpose. There may also be limits on whom you can share the material with)

(See the appendix to this handbook detailing indicators or "Red Flags" of money laundering.)

2.5 ADVANTAGES OF A PARALLEL FINANCIAL INVESTIGATION

Where there are resources available, particularly the availability of financial investigators, there are great advantages to have a financial investigation running in parallel with the criminal investigation. Clearly, all acquisitive crimes (drug trafficking, human trafficking, fraud etc.) will generate the acquisition of money and property and will lead to money trails via banking documentation and the physical movement of criminal cash and property that can lead to useful evidence for the investigation. Some of the advantages of such an investigation are:

I. identifying organised criminality
II. identifying the extent and structure of an organised crime group
III. locating assets
IV. identifying ownership and use of properties
V. evidencing offenders' lifestyles which can be useful evidence of involvement in crime
VI. tracking movements of people and money
VII. placing people at particular places at particular times, linking them to criminality
VIII. identifying additional offences and offenders
IX. revealing undiscovered criminality
X. helping to disrupt criminal networks by denying them the ability to finance further criminality
XI. possibly revealing links to terrorism and corruption
XII. evidence for restraint and confiscation

2.6 TEAM WORKING

An investigation into money laundering and the criminality on which it is based benefits greatly from a team working approach. Clearly criminal investigators and financial investigators will be involved but in addition experts such as accountants and computer technicians, other government employees such as customs officers, the national Financial Intelligence Unit, asset management department and tax inspectors may be involved. The prosecutor will often be involved in, depending on the position in the particular national jurisdiction, either advising on or directing the course of the investigation.

In such a situation it is suggested that there are broadly three basic requirements:

I. Legislation that permits "gateways" or a lawful avenue for information to be shared between the various departments and individuals.
II. Inter-departmental memoranda of understanding or service level agreements that detail how the departments will relate to each other e.g., how decisions are to be made, how any differences are to be resolved, how each department will allocate staff to the team etc.
III. A sound personal and individual relationship between team members, based on mutual trust and respect.

Example of gateways in the UK are in the Crime and Courts Act 2003 which provided a general procedure for information sharing involving the National Crime Agency; the Anti-Terrorism, Crime and Security Act 2001 which allowed revenue and customs departments to disclose information to assist criminal investigations and prosecutions in the UK and abroad and the Criminal Finances Act 2017 which allows the voluntary sharing of information between bodies in the regulated sector and between those bodies and the NCA, in connection with suspicions of money laundering.

Information sharing is often a challenge as it is not unknown in some jurisdictions for information to be retained rather than shared. It needs to be clear who will decide strategic issues in the course of the investigation and how any differences will be resolved.

As a matter of good practice, at an early stage of an investigation and prosecution a strategy should be agreed to include the target suspects, identity of the members of the team, their respective roles, the need for any specialist expertise, the need for any MLA, the likelihood of restraint/freezing/confiscation. There should be target dates set for specific stages in the investigation/prosecution and who is expected to achieve them. There should be regular meetings to review progress and to solve any problems at an early stage. The strategy will need to be kept flexible to take account of any developments such as new suspects coming to light and substantial new areas of criminality being identified.

An efficient information sharing system is essential.

2.7 INVESTIGATORY COMPETENCE FOR MONEY LAUNDERING OFFENCES (Art 216(9) CPC)

This article provides that, for crimes under Articles 209 and 2091 under the CCU, the pre-trial investigation is to be carried out by the investigator of the authority that commenced or had referred to it the predicate criminality that preceded the laundering, except for cases within the jurisdiction of NABU.

2.8 FINANCIAL INTELLIGENCE UNITS

These units are established to receive, analyse, and disseminate financial information to combat money laundering. They receive reports of suspicious transactions from financial institutions and other persons and entities, analyse them, and disseminate the resulting intelligence to law-enforcement agencies and foreign FIUs to combat money laundering. As they will be receiving most of their reports from and working with a variety of institutions in the private sector, it is essential that good working relationships exist with the private sector and that FIU's enjoy a high degree of trust with the various bodies that they work with. Security of information is a vital element in the functioning of an FIU.

There are several types of FIU:

Administrative-type FIUs which are separate from any law-enforcement or judicial authorities. They are often a separate agency under the administration of a government ministry. The role of this type of FIU is to analyse the suspicions provided to them and then to send the information to law enforcement if the suspicion is substantiated. The SFMS of Ukraine is of this type.

Law-enforcement-type FIUs. Here the FIU is part of a law-enforcement agency, such as that within the National Crime Agency in the UK.

Judicial or prosecutorial-type FIUs These are not common. They are part of the national judicial structure and sometimes come within the jurisdiction of a prosecutor. These are usually found in civil law rather than common law systems where prosecutors have control of investigations.

"Hybrid" FIUs in these cases attempts are made to combine a number of features of the other types of FIU described above.

Main Functions

I. Receiving Suspicious Transaction Reports from reporting bodies;
II. Analysing the information provided to them. This is to establish whether there are sufficient grounds to send on a report to an investigation or prosecution agency for further action. There are powers to suspend transactions to allow time for a decision to be made (Article 23 of the 2002 law)
III. Disseminating information to domestic and foreign agencies within a sufficient time scale for them to take appropriate action. As well as providing information and intelligence to law enforcement agencies FIU's will frequently provide useful financial information to regulators and supervisors.
IV. International information sharing with other FIU's overseas on a tactical and strategic level. There is a considerable flow of information internationally between FIU's to detect and deter money laundering and terrorist financing.
V. Monitoring compliance with AML/CFT requirements by reporting and supervisory bodies, providing feedback on performance, training staff of reporting entities and providing risk analyses.

It should be noted that most FIU's internationally receive large volumes of reports which provides a challenge to analyse the information within a desirable time frame. Here the FIU has to apply criteria to prioritise what they regard as the most urgent cases.

The State Financial Monitoring Service of Ukraine has an excellent website containing a vast amount of useful information about its functioning, the legal background and money laundering in general:

https://fiu.gov.ua/en/

2.9 TAX

The use of powers to investigate and prosecute for tax offences is extremely useful where a person is suspected of tax evasion, corruption or money laundering. It is generally accepted that even money obtained from unlawful activity is subject to taxation.

The power to prosecute for tax evasion has been used to prosecute criminals suspected of serious criminality if the evidence to prove the substantive offence is not available. In the case of organised crime, it is often difficult to find witnesses willing to provide formal evidence and testify in court. In these circumstances it may be possible to show that the suspect has far more wealth available to them than their lawful income would support. It would also be possible to prosecute a person for laundering their own or another person's proceeds of tax fraud.

In A and B v Norway (2016) the applicants complained under Article 4 of Protocol 7 (Right not to be punished twice) that they had been subject to administrative and criminal proceedings in respect of the same conduct. They had had surcharges imposed on them in administrative proceedings for failing to pay tax and were prosecuted in criminal proceedings for the same conduct.

The administrative penalty of a tax surcharge served as a general deterrent and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations. The criminal conviction served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud. It was particularly importance that, in sentencing the applicants, the domestic court had had regard to the fact that they had already been sanctioned by the imposition of the tax penalty.

There was no indication that the applicants had suffered any disproportionate prejudice or injustice and there was a sufficiently close connection, both in substance and in time, between the two sets of proceedings.

No breach of the Article

In the English case of IK (8/3/2007) the owners of a money service business were prosecuted for money laundering. There was evidence of large unexplained deposits into their business account, large sums of undeclared cash being deposited and false accounting documents. There was a discrepancy of £5.9m in their accounts that they could not account for. The prosecution had established a prima facie case of tax fraud and the Court decided that the jury could infer that a discrepancy of £5.9 million was the product of criminal conduct and so criminal property for the purpose of a money laundering charge.

2.10 VIRTUAL CURRENCIES

FATF Recommendations

In June 2019 FATF issued an Interpretive Note to Recommendation 15 on New Technologies (INR. 15) to clarify international standards and obligations relating to virtual assets to prevent their misuse for money laundering and terrorist financing and the financing of proliferation of WMD.

The obligations require countries to assess and mitigate their risks associated with virtual asset activities and service providers; license or register service providers and subject them to supervision or monitoring by competent national authorities (countries will not be permitted to rely on a self-regulatory body for supervision or monitoring) and implement sanctions and other enforcement measures when service providers fail to comply with their AML/CFT obligations.

Countries are required to ensure that service providers assess and mitigate their money laundering and terrorist financing risks and implement the full range of AML/CFT preventive measures under the FATF Recommendations, including customer due diligence, record-keeping, suspicious transaction reporting, and screening all transactions for compliance with targeted financial sanctions, among other measures, just like other entities subject to AML/CFT regulation.

The AML Law in Ukraine and Virtual Currencies

The new AML includes “virtual assets” and “virtual asset service providers” within its terms.

Article 1 contains the definitions:

Para 13 defines a virtual asset “a digital value that can be digitally traded or transferred and that can be used for payment or investment purposes”.

Para 51 defines virtual asset service providers as “any individual or legal entity exercising one or more types of such activities and/or transactions for other individual and/or legal entity or on its behalf:

virtual assets exchange;

virtual assets transfer;

storage and/or administering virtual assets or tools allowing to control virtual assets;

participation and provision financial services related to an issuer's offer and/or sale of virtual assets".

Article 6 includes Virtual Asset Service Providers as reporting entities. By virtue of Article 11 they are obliged to carry out the usual due diligence measures and by Article 14 are obliged to retain the usual range of information about their customers.

Their performance is monitored by the Ministry of Digital Transformation of Ukraine.

Virtual Currency

A virtual currency may be either convertible into national (or "fiat") currency or non-convertible. Currency issued by a number of administrators of games are non-convertible in that they can only be used within the context of the game (e.g. Warhammer). A virtual currency such as Bitcoin can be converted into fiat currency. For this reason it is usually convertible VC's that concern law enforcement.

Some convertible virtual currencies such as Bitcoin are not centrally administered and this creates problems with their regulation and supervision. Transactions are not overseen by a central administration but are carried out by the members of the network.

Convertible VC's can be bought and sold through VC currency exchanges. These transactions can be carried out through the same methods as other assets e.g., by credit/debit card, bank transfer, money service provider etc.

They may figure in crime in a number of contexts:

- The VC itself might be stolen or obtained by fraud
- They may be used to ensure anonymity in the purchase of items such as drugs and firearms.
- They might be used in blackmail e.g., requesting a company or government body to pay a ransom in VC to remove malware from their computer system.
- They may be used to launder the proceeds of organised crime and corruption, in particular, by swiftly moving assets across borders.

A VC transaction will usually involve communications that include the identity of the sender, the identity of the receiver, the identity of the digital item and the amount of the VC. A major impediment to law enforcement is that these transactions will be carried out using anonymous addresses/identities and are likely to be encrypted. It will be possible for one person to use a number of different identities/addresses on the particular platform. It will even be possible in this situation for a person to send a credit to themselves.

There will be little or no documentary evidence in the case of transactions of VC's as they will be carried out online. Therefore, it will be necessary for them to be investigated by specialist experts in computer forensics. In due course the prosecutor will need to ensure the admissibility of the evidence in the light of the relevant laws of evidence, as well as ensuring that the applicable laws relating to such matters as search and seizure orders and production

orders actually cover the material that it is desired to obtain. The use of expert witnesses to produce the evidence in court is likely to be necessary.

A likely source of evidence will be the suspect's computer, which may contain specialist software relating to the VC, evidence of transactions on the web browser, communications with other users etc. There may be evidence of the use of an anonymous web browser such as TOR, which is often used to anonymise unlawful transactions.

It may be desirable to seize items of VC for the purposes of confiscation. There may be difficulties of jurisdiction in that it is usually extremely complex to identify where a particular VC is located, given that it has no physical existence. It will often be expedient to seek the agreement of the owner of the VC to surrender it to the law enforcement authorities as part of the post-conviction confiscation process. There may be "sharing" issues with overseas jurisdictions. Clearly, expertise will also be necessary on the part of those receiving and managing the confiscated assets, particularly with regard to sale.

Red Flags relating to Virtual Currencies

There is an extremely useful publication by FATF entitled "Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing September 2020".

3 PROSECUTING MONEY LAUNDERING

The purpose of this section is to provide an overview of the main characteristics of the prosecution of money laundering, identifying the principal challenges and obstacles faced by practitioners together with a number of best practices, having regard to the applicable international standards.

3.1 INTERNATIONAL STANDARDS

Although we will refer later on in this section to the relevant provisions of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) ("the Warsaw Convention") [1] and the United Nations Convention against Transnational Organized Crime (2000) ("the Palermo Convention"), [2] specifically in connection with evidential issues, mentioned must be made first of all to the Financial Action Task Force (FATF), the global money laundering and terrorist financing watchdog. The FATF has developed a series of Recommendations or Standards which set the benchmark for national action to combat, inter alia, money laundering.

For the purposes of prosecuting money laundering, the most important FATF Recommendation is R 31, entitled "Powers of law enforcement and investigative authorities". This recommendation provides that, when conducting money laundering investigations and associated predicate offences, competent authorities (including investigators and prosecutors) should be able to access all necessary documents and information for use in their investigations and prosecutions. This includes powers to use compulsory measures for the production of records held by financial institutions and other natural or legal persons, for the search of persons and premises, for taking witness statements, and for the seizure of evidence.

Recommendation R.31 also requires jurisdictions to be able to use a wide range of other investigative technique suitable for the investigation of money laundering, such as undercover operations, intercepting communications, accessing computer systems, and conducting controlled deliveries. Some of those techniques will be considered in more detail below.

Also worthy of note is Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, applicable throughout the European Union. [3] The idea behind that directive is to ensure the effectiveness of criminal law measures to combat money laundering by making it possible to obtain a conviction for money laundering without it being necessary to establish precisely which criminal activity generated the property, or for there to be a prior or simultaneous conviction for that criminal activity, while taking into account all relevant circumstances and evidence.

[1] Council of Europe Treaty Series No. 198. Ukraine has ratified this convention.

[2] United Nations Treaty Series, vol. 2225, p. 209. Ukraine has ratified this convention.

[3] Official Journal 2018 L 284, p. 22.

3.2 CHALLENGES FACED BY PROSECUTORS IN MONEY LAUNDERING CASES

3.2.1 General remarks

In the prosecution of any offence, once the investigation stage has concluded, the prosecutor will need to analyse the evidence gathered when bringing a prosecution and determine the most appropriately way to present the case at trial.

This looks straightforward on paper, but money laundering cases in particular give rise to a number of challenges in the field of evidence.

In many jurisdictions, it is common practice for prosecutors to focus on the prosecution of the predicate offence and to ignore or deprioritise the prosecution of related money laundering. The reasons for this vary. In some cases, it might be easier to secure a conviction for the predicate offence, for instance where the prosecutor has already gathered sufficient evidence to proceed with predicate charges but has not fully developed the financial evidence needed to bring money laundering charges. Prosecuting money laundering as well as the predicate offence is often resource-intensive and time-consuming. In some jurisdictions, there is little if no incentive to bring money laundering charges because the resulting sentence would be essentially the same if the accused were prosecuted for the predicate offence alone.

Under international standards, it should be possible for money laundering to be investigated and prosecuted as a standalone offence. Building on unexplained wealth or a tax inconsistency, investigators are able to trigger a money laundering investigation even though there is no direct evidence of a specific predicate offence.

Money laundering cases often present difficulties in terms of gathering evidence linking assets to the criminal activities or proving that laundered funds are the proceeds of a crime. This linkage frequently has to be proven at trial, and as luck would have it, it is also one of the most difficult to prove, requiring in-depth investigation. To do so, investigators and prosecutors must identify and trace assets or "follow the money" until the connection between the predicate offense and the assets can be established.

Substantiating the existence of a nexus between a financial transaction and a predicate offence may also be essential for investigative measures, such as production orders, search warrants, wire-tapping orders and surveillance orders.

In line with the FATF Standards, it is imperative to be able to use circumstantial evidence (described in more detail in Section1.2.3 below), especially with regard to the knowledge or intent of the defendant and showing that the money laundered, was, in fact, dirty. FATF has noted that it is good practice to have legislation admitting a test of reasonable grounds to prove that proceeds have a criminal source.

3.2.2 International provisions on evidence

Article 6 of the Palermo Convention, entitled "Criminalization of the laundering of proceeds of crime"', provides, in paragraph 2(f), that in money laundering cases, "knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 [which includes money laundering] may be inferred from objective factual circumstances".

For its part, Article 9 of the Warsaw Convention, entitled "Laundering offences" stipulates that "the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions", must be established as an offence when committed intentionally (paragraph 1(a)). For the purposes of that provision, knowledge, intent or purpose required as an element of money laundering may be inferred from objective, factual circumstances (paragraph 2(c)).

Furthermore, Article 9(3) of the Warsaw Convention provides that each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 (including money laundering) in either or both of the following cases: (i) where the offender suspected that the property was proceeds, (i) where the offender ought to have assumed that the property was proceeds.

3.2.3 Direct and indirect evidence

When addressing the issue of evidence in money laundering prosecutions, a distinction must be drawn between direct and indirect evidence (or circumstantial evidence).

Direct evidence is evidence which, if believed, establishes the existence of a particular fact without the need for any inference or presumption in order to connect the evidence to the fact. A clear example would be the direct testimony on a witness or a document demonstrating that a bank account is held by a particular person.

Indirect evidence relates to a fact or matter other than the particular fact that is sought to be proved. The party relying on it claims that the indirect evidence is so closely associated with the fact to be proved that it is possible for the fact to be proved to be inferred from the existence of what is circumstantial. Indirect evidence therefore requires the court to draw an inference in order to establish a fact. In other words, it does not directly point to a fact, but must be used to piece together a puzzle in order to arrive at an inference, which must be an inescapable one.

In money laundering cases, there may be very little, if any, direct evidence proving the provenance and/or destination of funds, with the result that indirect or circumstantial evidence is particularly important. Of course, sometimes it will be possible to link a specific financial transaction directly to the alleged criminal conduct. Sometimes it will not. In those cases, in the absence of such a direct link, evidence of money/asset movements, of purchases, or of cash-based business transactions may, in themselves or in conjunction with other items of evidence, enable an inference to be drawn that the funds in question are the laundered proceeds of crime.

3.2.4 Admissibility of evidence

Chapter 4 of the Ukrainian Code of Criminal Procedure, entitled "Evidence and proving" contains specific provisions on the notion of evidence, relevance and admissibility. The most important provisions are set out below:

> Article 86: Admissibility of evidence:
>
> 1. Evidence is found admissible if obtained through a procedure prescribed in this Code.
>
> 2. Inadmissible evidence may not be used in taking procedural decisions and, court cannot refer to those while taking court decision.

This provision is also of relevance in the field of international cooperation where an MLA request is made to another country for the collection of evidence to be used at trial in Ukraine. The appropriate letter of request must ensure that the requested authorities are aware of the legal formalities which must be complied with so that the evidence collected in the requested State will be admissible in Ukraine.

> Article 87: Inadmissibility of evidence obtained through significant violation of human rights and fundamental freedoms:
>
> 1. Inadmissible shall be evidence obtained through significant violation of human rights and fundamental freedoms guaranteed by the Constitution and laws of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, as well as any other evidence resulting from the information obtained through significant violation of human rights and fundamental freedoms.
>
> …

Paragraph 2 of that article list the situations in which the court will be required to make a finding of significant violations of human rights, resulting in the inadmissibility of the evidence collected. These are:

- taking procedural action not authorised by the court or in disregard of the conditions of such authorisation;
- obtaining evidence as result of torture, cruel, inhuman or degrading treatment or threats to apply such treatment;
- infringing the rights of the defence;
- obtaining testimony or explanations from a person who has not been advised of his right to remain silent;
- violating the right to cross-examination.

Paragraph 3 of Article 87 also lists other situations in which evidence will be deemed inadmissible e.g. evidence given by a person as a witness who is later accused in the criminal proceedings.

Article 89. Recognition of inadmissibility of evidence

1. The court shall decide on admissibility of evidence during their evaluation while rendering a court decision in consultation room.

2. Where evidence has been found manifestly inadmissible during trial the court shall declare such evidence as inadmissible, which shall entail impossibility of its examination or termination of its examination during the court hearing if such an examination was commenced.

…

Article 94. Evaluation of evidence

1. Investigator, prosecutor, investigating judge, court evaluates evidence based on his own moral certainty grounded on comprehensive, complete, and impartial examination of all the circumstances in criminal proceedings being guided by law, evaluates each evidence from the point of view of relevance, admissibility, reliability and aggregate set of collected evidence from the point of view of sufficiency and correlation, in order to take a proper procedural decision.

…

These national provisions must be read in conjunction with the international standards established by the European Court of Human Rights on respect for fundamental rights in the gathering of evidence. Section 1.4 on the use of special investigation techniques contains an overview of a number of judgments concerning evidence collected in breach of fundamental rights, the consequence being that such evidence would be inadmissible.

3.2.5 Interaction with the presumption of innocence and the freedom from self-incrimination

It is very common for attempts to be made to have a court disregard indirect or circumstantial evidence by claiming that its use runs counter to the presumption of innocence or the freedom from self-incrimination.

Let us recall that the presumption of innocence and the freedom from self-incrimination are enshrined in the Ukrainian Code of Criminal Procedure:

Ukrainian Code of Criminal Procedure

Article 17: presumption of innocence:

1. An individual shall be considered innocent of the commission of a criminal offence and may not be subjected to a punishment under criminal law unless his/her guilt is proved in

accordance with the procedure prescribed in the present Code and is established in the court's judgment of conviction which has taken legal effect.

2. No one shall be required to prove their innocence of having committed a criminal offence and shall be acquitted unless the prosecution proves his/her guilt beyond any reasonable doubt

Article 18: freedom from self-incrimination:

1. No one shall be forced to admit their guilt of a criminal offence or to give explanations, testimony, which may serve a ground for suspecting them or charging with a commission of a criminal offence.

2. Everyone shall have the right to keep silence about suspicion, a charge against him or waive answering questions at any time, and, also, to be promptly informed of such right.

3. No person may be forced to give any statements or testimonies, which may serve a ground for suspicion, accusation of committing a criminal offence by his close relatives or family members.

To ensure that an appropriate balance is struck between the protection of these rights and the use of circumstantial evidence in the prosecution of money laundering offences, reference must be made to how those rights have been interpreted by the European Court of Human Rights. [4]

The presumption of innocence is a procedural guarantee in the context of the criminal trial itself and imposes requirements in respect of, inter alia, the burden of proof (Telfner v. Austria), legal presumptions of fact and law (Salabiaku v. France) and the privilege against self-incrimination (Saunders v. the United Kingdom).

It is closely linked to the right not to incriminate oneself (Heaney and McGuinness v. Ireland).

It is violated where the burden of proof is shifted from the prosecution to the defence (Telfner v. Austria). However, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused (Telfner v. Austria). Thus, for instance, the drawing of adverse inferences from a statement by an accused which is found to be untrue does not raise an issue under Article 6(2) (Kok v. the Netherlands).

A person's right to be presumed innocent and to require the prosecution to bear the burden of proof is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention (Falk v. the Netherlands). Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (Salabiaku v.

[4] Article 6(2) of the European Convention on Human Rights provides that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

France, concerning a presumption of criminal liability for smuggling inferred from possession of narcotics).

However, States must confine these presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (Zschüschen v. Belgium, concerning money laundering, also see below).

Having outlined the general scope of those rights and the protection they afford, it is appropriate to take a closer look at how the European Court of Human Rights has interpreted them specifically in connection with the use of circumstantial evidence in the prosecution of the offence of money laundering: Zschüschen v. Belgium.

Zschüschen v. Belgium (application no. 23572/07) concerned criminal proceedings which led to Mr Zschüschen's conviction for money laundering. He had opened an account in a Belgian bank and, within two months, paid a total of EUR 75 000 into it. Questioned by the authorities about the origin of the money, he remained silent throughout the proceedings. Mr Zschüschen complained of a violation of his right to be presumed innocent, his right to remain silent and his defence rights more generally.

The Court held that this complaint was manifestly ill-founded, taking the view that the approach of the trial courts, which did not find it necessary to define the predicate offence in order to convict a person of money laundering, had not had the effect of shifting the burden of proof from the prosecution to the defence. The Court noted in particular that the domestic courts had convincingly established a body of circumstantial evidence sufficient to find Mr Zschüschen guilty, and that his refusal to provide the requisite explanations about the origin of the money had merely corroborated that evidence.

Mr Zschüschen also complained of a violation of his right to be informed promptly of the accusation against him, as the predicate offence underlying the money laundering had not been described in the summons to appear before the criminal court.

The Court again held that this complaint was manifestly ill-founded, considering that the summons contained a comprehensive and detailed description of all the suspicious transactions and referred to the legal characterisation of the facts, such as to enable Mr Zschüschen to be aware that he was charged with money laundering and to exercise his defence rights-

In short, reversing the burden of proof after a prima facie showing does not infringe the principles of presumption of innocence and freedom from self-incrimination, provided that the accused is able to defend himself or herself against money laundering charges.

3.3 PROSECUTION OF MONEY LAUNDERING IN OTHER JURISDICTIONS

It is often useful to take a comparative look at other jurisdictions to see how different countries have established the threshold of evidence enabling prosecutors to secure convictions for money laundering.

3.3.1 Spain

In Spain, the Supreme Court has held that, in order for indirect or circumstantial evidence to be valid in court proceedings for money laundering, three requirements must be met:

I. There must be unexplained increases in wealth or anomalous financial transactions. Examples:
   a. Acquisition of boats and vehicles paid for by a third party.
   b. Acquisition of numerous properties by different members of the same family or for a price higher than that recorded in the purchase deed (where payment is made in in cash or in instalments, the origin of which is unknown).
   c. Transportation by plane of large sums of money.
   d. Possession of EUR 300 000 in cash in personal vehicle.
   e. Purchase of winning lottery tickets.

II. There must be no lawful economic or commercial activities which explain such increases. Note:
   a. This does not reverse the burden of proof: it is not about proving one's innocence.
   b. What it is about is demanding an exculpatory explanation, an excuse, which cancels out the inculpatory effect of the evidence.
   c. It is necessary to assess all unusual, atypical or irregular circumstances from a financial, commercial and trade-related standpoint

III. There must be links to criminal activities. Note:
   a. Need for a logical connection: not enough for the court to say that it had a "moral conviction".
   b. Need to take into account, for instance, personal contacts and relations with persons convicted of drug trafficking.
   c. No account should be taken of the fact that, for instance, the accused was arrested alongside a drug trafficker, had been convicted of drug trafficking 14 years ago, or had a police record for other offences.

As to the factors which point to the criminal origin of assets, the Spanish Supreme Court has identified, the following, among others:

I. Links to criminal investigations.
II. Seizure of drugs or other unlawful items.
III. Content of telephone conversations.
IV. Lack of lawful business activities which justify the transactions or increases in wealth.

V. Accounting records concerning hidden transactions (off-the-book accounting) or documents related to possible criminal operations (maps, marine coordinates enabling vessels to meet up, codes for radio communications, etc)

3.3.2 The Netherlands

The Supreme Court of the Netherlands has made it clear that in, money laundering cases, it is not necessary to prove who committed the predicate offence, where it was committed and when.

In a judgment handed down in 2013, the Court of Appeal in Amsterdam summed up the domestic assessment framework for money laundering without a known predicate offence in the so-called "6-step judgment". [5]

- **Step 1**: No direct evidence of a specific predicate offence. The specific predicate offence is unknown or cannot be proved.
- **Step 2**: A suspicion of money laundering on the basis of facts and/or circumstances.
- **Step 3**: If there is a suspicion of money laundering the suspect can be expected to make a statement about the origin of the object that is suspected to originate from money laundering, in other words, the facts and/or circumstances "call for an explanation". The refusal of a suspect to make a statement may also be taken into consideration to conclude that an object constitutes the proceeds of crime.
- **Step 4**: The suspect's statement about the origin of the object must be specific, capable of verification and not highly unlikely.
- **Step 5**: If the statement meets the criteria in step 4, the onus is on the Public Prosecution Service to investigate the alleged alternative origin of the object.
- **Step 6**: If on the basis of the investigation referred to in step 5, it can be ruled out with a sufficient degree of certainty that the object in question to has a legal origin, it can be argued that it "originates from crime".

3.3.3 Belgium

The Belgian Supreme Court held on 17 December 2013 that the burden of proof of illegal or criminal origin is met when, on the basis of factual information, any legal origin can be excluded with certainty. The illegal origin of the assets must be established but the criminal court need not be aware of the specific offence that resulted in the financial benefits. It is sufficient for the court to be able to exclude any lawful origin on the basis of the facts of the case.

3.4 THE USE OF SPECIAL INVESTIGATIVE TECHNIQUES IN THE PROSECUTION OF MONEY LAUNDERING

The investigation and prosecution of money laundering are especially complex endeavours because they usually require several types of investigative measures to be run in parallel, often conducted by different authorities, with recourse to international cooperation tools. Against

[5] Amsterdam Court of Appeal, 11 January 2013, ECLI:NL:GHAMS:2013:BY8481.

this background, special investigative techniques play a key role in dismantling money laundering structures, due to the fact that, on many occasions, the offence is committed by sophisticated criminal networks.

Most countries have taken steps to strengthen the system of preventing and combating organised crime – money laundering in particular – by equipping their authorities with legislative, institutional and procedural tools. Since criminal groups employ many counter measures when engaging in or preparing criminal activities, in order to evade detection or deflect the attention of law enforcement agencies, traditional methods of investigation are often inadequate. From a strategic, tactical and operational perspective, recourse must be made to special investigative techniques.

The use of such techniques often involves a breach of the right to private life, which will have to be justified by those carrying out/authorising the operation as being proportionate and necessary.

Let us take a closer look at some of them:

3.4.1 Technical/electronic surveillance

In most countries, the interception of telecommunications (telephonic and internet-based), the use of bugging or listening devices, and the deployment of tracking devices are covered by the concept of "electronic surveillance".

The **interception of telecommunications** entails a breach of the right to confidentiality of communications, enshrined in Article 14 of the Ukrainian Code of Criminal Procedure.

Ukrainian Code of Criminal Procedure

Article 14.2:

Interference in the confidentiality of communication shall be possible only upon court's ruling in cases prescribed in the present Code, in view of preventing the commission of grave or especially grave crime, finding out its circumstances, and identifying the individual who committed the crime, if achieving this objective is impossible by other means.

This is a powerful and useful tool for investigators and prosecutors. That said, it has the potential to be highly intrusive and therefore requires the application of stringent safeguards to prevent misuse. The case-law of the European Court of Human Rights provides guidance in that respect. [6]

[6] Article 8(2) of the European Convention on Human Rights provides that 'There shall be no interference by a public authority with the exercise of [the right to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Since the surveillance of telecommunications in a criminal context represents a serious interference with the right to respect for correspondence, it must be based on a "law" that is particularly precise (Huvig v. France) and must form part of a legislative framework affording sufficient legal certainty (Huvig v. France). The rules must be clear and detailed (the technology available for use is continually becoming more sophisticated), as well as being both accessible and foreseeable, so that anyone can foresee the consequences for themselves (Valenzuela Contreras v. Spain). In such a sensitive area, the competent authority must state the compelling reasons justifying such an intrusive measure, while complying with the applicable legal instruments (Dragojević v. Croatia). The Court must be satisfied that there exist guarantees against abuse which are adequate and effective (Klass and Others v. Germany). This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law (Roman Zakharov v. Russia).

Wire-tapping operations can only be ordered on the basis of suspicions that can be regarded as objectively reasonable (Karabeyoğlu v. Turkey). The Court has also underlined the importance of an authority empowered to authorise the use of secret surveillance being capable of verifying "the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures" and "whether the requested interception meets the requirement of "necessity in a democratic society" … for example, whether it is possible to achieve the aims by less restrictive means" (Roman Zakharov v. Russia).

The European Court of Human Rights has also found that GPS surveillance interferes with the right to respect for private life under Article 8 of the Convention, but that it may be permitted under certain circumstances.

UZUN v. Germany (application no.35623/05) concerned the GPS surveillance of a person suspected of having committed a serious crime. The authorities had systematically collected and stored data determining Mr Uzun's whereabouts and movements in public. They had also used it to draw up a pattern of his movements, to conduct additional investigations and to collect additional evidence at the places to which he had travelled, which was later used at the criminal trial.

The Court found those factors sufficient to conclude that the GPS observance of Mr Uzun had interfered with his right to respect for his private life under Article 8. As to whether that interference had been in accordance with the law, the Court considered that the surveillance at issue had a basis in the German Code of Criminal Procedure. **The Court underlined that surveillance via GPS of movements in public places was to be distinguished from other methods of visual or acoustical surveillance in that it disclosed les information on a person's conduct, opinions or feelings and thus interfered less with**

his or her private life. The Court, therefore, did not see the need to apply the same strict safeguards against abuse it had developed in its case-law on the interception of telecommunications, such as the need to precisely define the limit on the duration of such monitoring or the procedure for using and storing the data obtained.

The Court considered that the German courts' unanimous findings that GPS surveillance was covered by domestic law had been reasonably foreseeable and set strict standards for authorising GPS surveillance; it could be ordered only against a person suspected of a criminal offence. It therefore served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. It had only been ordered after less intrusive methods of investigation had proved insufficient, for a relatively short period of time.

The Court found that the GPS surveillance of Mr Uzun had been proportionate.

3.4.2 Physical surveillance and observation

This type of surveillance is generally less intrusive than technical surveillance. It involves placing a target under physical surveillance by following him or videoing him. It may also cover monitoring bank accounts or some computer activities. However, more sophisticated methods generally require some form of technical surveillance.

3.4.3 Undercover agents

The use of undercover agents, which may or may not be part of an overarching "sting operation", enable investigators to gain access to the core activities of criminal gangs and networks.

The undercover operative may be a law enforcement agent or a member of a criminal organisation who has been given law enforcement or judicial authority to continue within the group, whilst, at the same time, reporting back to the law enforcement services. The evidence of these "insiders", is likely to be significant in any subsequent prosecution. Furthermore, the effect of such conclusive evidence frequently brings offers of cooperation and pleas of guilt from defendants, thereby eliminating the need for lengthy and expensive trial processes.

The case-law of the European Court of Human Rights, although not as extensive as in connection with surveillance, provides some guidance on the use of undercover agents in criminal proceedings.

The case of **Van Wesenbeeck v. Belgium** concerned the use of special methods of searching, observation and infiltration during an investigation against the applicant. The Court found that there were serious grounds to justify the refusal of the Belgian courts to call the undercover officers for examination by the defence. While the admission of their written statements might have caused difficulties for the defence, those difficulties had been counterbalanced by adequate procedural safeguards.

While the Court has established that the surveillance of communications and telephone conversations is covered by the notion of private life and correspondence under Article 8 (Halford v. the United Kingdom, Malone v. the United Kingdom), that does not necessarily extend to the use of undercover agents (Lüdi v. Switzerland).

The Court has also provided guidance on the assessment to be carried out when determining whether the activities of an undercover agent may actually have incited the commission of a criminal offence.

In **Baltins v. Latvia** (Application no. 25282/07), the Court considered the activities of undercover agents from the perspective of Article 6 of the Convention (right to a fair trial). Specifically, the case concerned a complaint by a man convicted of acquiring drugs that he had been incited by an undercover police agent to commit the offence.

The Court assessed whether the investigative activity of the police officers had gone beyond that of undercover agents (Teixeira de Castro v. Portugal and Ramanauskas v. Lithuania), in other words, whether the offence would have been committed without the authorities' intervention. In that regard the Court examined, inter alia, whether the investigating authorities had good reasons to suspect the applicant of prior involvement in particular unlawful activities (Teixeira de Castro v. Portugal), at what stage of the offence the undercover agents carried out the undercover operation (Vlachos v. Greece), and whether the conduct of the undercover agent was essentially passive (see Malininas v. Lithuania and Ramanauskas v. Lithuania).

In this case, the Court found that the Latvian courts had not properly addressed Mr Baltins' incitement complaint, in particular since they had failed to scrutinise the prosecutor's decision to authorise the undercover operation.

3.4.4 Controlled delivery

One of the special investigative techniques that has stimulated international cooperation between police and judicial authorities in the fight against criminal networks and money laundering is controlled delivery. Controlled delivery is generally defined as the technique whereby illicit or suspect consignments, which can include cash, are permitted to enter, move within and exit the territory of one or more States, with the knowledge and under the supervision of the competent authorities, with a view to investigating an offence and identifying the persons involved in the commission thereof.

Controlled deliveries are regulated at both UN and EU level. They first appeared in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) ("the Vienna Convention"),[7] with a view to combating drug trafficking. They were

[7] United Nations Treaty Series, vol. 1582, p. 95.

subsequently included in the Palermo Convention and the United Nations Convention Against Corruption (2003). [8] At EU level, provision for controlled delivery was first made in the Convention implementing the Schengen Agreement (1985), [9] followed by the Convention on Mutual Assistance and cooperation between Customs Administrations (1997) [10] and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000). [11]

Unlike other special investigative techniques, controlled deliveries do not interfere with fundamental rights in the same way as, for example, wire-tapping. However, the use of this technique may be problematic in some countries because it facilitates the transit of illicit goods through the territory of a State which would otherwise be intercepted by law enforcement authorities. As controlled deliveries involve the movement of illicit goods across one or more countries there is a high associated risk of losing track of them.

On balance, the added value of this investigation technique outweighs the risks associated with its implementation, in particular where the illicit goods are transported through different countries. Consequently, the use of this technique has become widespread among law enforcement agencies when dealing with drug offences, both domestically and internationally.

Controlled deliveries may enter both in the sphere of police cooperation, as well as in the judicial proceedings, given that in a number of Member States for the execution of such operations is required a judicial authorisation, and in others only the permission of the heads of the national police units.

3.5 BEST PRACTICES TO ENHANCE THE EFFECTIVENESS OF MONEY LAUNDERING PROSECUTIONS

When prosecuting money laundering, it is advisable to prepare a prosecution strategy at the investigation stage in line with the following principles.

3.5.1 Identifying the targets of the investigation

Prioritisation is key. Identifying the targets, both natural and legal persons, will serve as a guide to enable us to prepare the indictment at the end of the investigation. A standard form or model data sheet should be drawn up and allocated to each of the targets we have identified. Each data sheet should contain details of the surveillance carried out on the target, relevant conversations if we have tapped their communications, the accounts they hold, and any other information to support the prosecution.

[8] United Nations Treaty Series, vol. 2349, p. 41.

[9] Official Journal 2000 L 239, p. 19.

[10] Official Journal 1998 C 24, p. 2.

[11] Official Journal 2000 C 197, p. 1.

3.5.2 Involvement of legal persons

Criminal liability

Under the FATF Standards, it must be possible to prosecute legal persons for money laundering offences. There should also be effective, proportionate and dissuasive sanctions for any legal person.

Article 96 of the Ukrainian Criminal Code provides for criminal liability for specific offences, including money laundering, when committed on behalf of and in the interest of the entity. This can include both the receiving of an advantage and evading a legal liability. Criminal liability may also be incurred where the legal entity fails to ensure that its authorised persons take measures to prevent corruption that results in the commission of offences. Criminal sanctions may include fines, confiscation or liquidation of the legal person.

Beneficial ownership

The involvement of legal persons in money laundering cases often throws up challenges when identifying their **"beneficial owners"**, i.e. the natural person who exercise control over legal persons and their transactions. Those challenges include:

- lack of accurate and up-to-date information on beneficial ownership because companies failed to update their beneficial ownership information or inform the company registry when there was a change of beneficial ownership.
- difficulties in identifying information on beneficial ownership when complex structures are involved.
- where information on beneficial ownership is lacking because of the involvement of a foreign owner.

Ukrainian law contains a comprehensive definition of ultimate beneficial owner in a number of situations: legal entities, trusts, other legal arrangements. There are also provisions in corruption legislation in Ukraine for person obliged to make declarations of their assets to provide details of any legal persons in which they are the ultimate beneficial owners.

"Fronts" and genuine businesses

Targets frequently establish or use companies to conceal the proceeds of their illicit activities. It is necessary to determine whether the companies [12] pursue a genuine business activity or whether they are simply "fronts". If they pursue a genuine activity that, in turn, enables them to conceal funds of illicit origin, it will be necessary to identify what proportion of the company's funds is illegitimate.

To that end, we can examine, for instance, invoices, contracts and cash deposits in accounts without any discernible origin or accompanying documents justifying the transaction in

[12] Article 10(2) of the Warsaw Convention makes the following provision in respect of corporate liability: '... each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences ... for the benefit of that legal person by a natural person under its authority'.

question. We may also identify transfers between the companies of the person under investigation as a way of concealing the true origin of the funds. Ultimately, expert reports will serve as the basis for identifying what proportion of funds come from unexplained sources.

3.5.3 Asset tracing

As the same time as identifying the target, it is also necessary to identify the assets which may potentially derive from criminal activity, bank accounts, real estate and vehicles etc. It is vitally important that all of the target's assets are clearly identified so that, where appropriate, when the time comes to arrest the target, we can also immediately block his or her accounts. Best practices in connection with the identification of assets moved abroad can be found in section 2.5 below in the context of international cooperation.

3.5.4 Expediting your investigation

It often occurs that the investigation into a particular target leads to the identification of one target, then another, and so on and so forth. If, in addition, we factor in the possibility of some of the assets being located abroad, so that recourse will have to be had to international cooperation, it is wise to set a time limit on the investigation and prioritise the most important targets.

3.5.5 Circumstantial evidence: documentation

When a target is arrested, it is very important to pay close attention to all the documentation seized from the suspect during the search of his or her home or office premises, at the time of arrest and in his or her vehicle etc. That documentation may reveal the target's relationship or dealings with other suspects, assist in identifying assets or even demonstrate that the target was aware of the illicit origin of funds.

3.5.6 Prosecuting money laundering in court

Once the investigation has been concluded, the next step is to prepare the prosecution. This involves identifying our main witnesses and the main types of evidence we plan to use. It also requires a strategy to be drawn up on how to present the evidence in court which anticipates possible objections to our evidence that the defence teams might raise. Possible infringements of fundamental rights are particularly important if we have used certain special investigative techniques.

The main types of evidence are (i) examination of the accused; (ii) witness evidence (this also includes the testimony of investigators); and (iii) expert evidence. It should be borne in mind that these three types of evidence are not separate but interconnected and share a common objective: substantiate or prove a working hypothesis i.e. that the accused committed the offence of money laundering. Let us examine each of them in turn:

I. Examination of the accused

In the light of the significance of indirect evidence in money laundering cases, the prosecutors must ensure that, when examining the accused, he or she shows that the accused was aware of the illicit origin of the assets. To that end, the prosecutor must draw out any internal contradictions arising from the accused's examination as well as any contradictions with the testimony of other witnesses. The prosecutor must also produce as evidence at trial documentations from which it can be inferred that the accused was aware of the illicit origin of the assets.

II. Witness evidence

Witness evidence in money laundering cases is essentially composed of testimony from the police investigators who, for instance, were responsible for the surveillance of the accused during the investigation and who are capable of attesting to his or her high standard of living, such as eating in expensive restaurants or driving luxury cars. Such surveillance may also relate to the headquarters of a company with no real business (e.g. no customers). Police investigators involved in the implementation of special investigative techniques are also very valuable witnesses (e.g. undercover agents).

III. Expert evidence

Expert evidence is, in general terms, the most important evidence in the prosecution of money laundering cases. The testimony of financial experts is in order to secure a conviction, since their expert reports will cover matters such as the net worth of the accused: the accused's bank accounts; the commercial activity of a company; the relationship between the different companies of an accused; and income or transfers of unknown origin. Just as important is the manner in which this evidence is presented at trial, so that the court can understand its content. With that in mind, prosecutors should prepare the presentation of such evidence alongside financial experts.

4 INTERNATIONAL COOPERATION

The purpose of this section is to provide an overview of the main tools and mechanisms available to practitioners in the field of international cooperation, with specific emphasis on money laundering.

4.1 MUTUAL LEGAL ASSISTANCE

4.1.1 Formal and informal mechanisms

Mutual legal assistance (MLA), sometimes known as "judicial" or "formal" assistance, is the formal mechanism by which one State, the "requesting State", asks another State, the "requested State" for assistance in obtaining evidence located in the requested State to assist in criminal investigations or proceedings before the courts of the requesting State.

MLA is usually based on bilateral and multilateral treaties such as the Vienna, Palermo and Merida UN Conventions. However, MLA can also take place without a treaty basis:

Article 544 of the Ukrainian Code of Criminal Procedure

1. In the absence of an international treaty of Ukraine, international legal aid or any other cooperation may be provided upon the request from another state, or requested on the basis of reciprocity.

In general, requests must be channelled through central authorities e.g. Ministry of Foreign Affairs or Ministry of Justice, and must be drafted in such a way that complies with treaty requirements and makes it easier for the requested state to understand and comply with the request.

MLA is designed for the gathering of evidence, not intelligence or other information. Requests for intelligence/information should be made through informal channels, i.e. contacts between police officers in the relevant countries. Such informal requests do not involve the issuing of a formal letter of request as in MLA requests. That being said, informal assistance can also be used (and indeed should be used) when making evidence-gathering requests to a State where no coercive power (e.g. a warrant or court order) is required in order to obtain the evidence. Such an approach reduces the risk of delay and will be welcomed by most States.

Information mechanisms are also a useful way to avoid "fishing expeditions" at the stage of sending a letter of request: they make it possible to ascertain whether or not given information exists in the requested State at an early stage, for instance, information on the existence of a bank account, the movements on that account and the account particulars.

Against that background, it is important to recall that, although this type of assistance may be described as "informal", it does not mean that the evidence obtained is informal or lacks probative value. This type of exchange of information and the spontaneous exchange of information between practitioners is enshrined in Article 18(4) and 5 of the Palermo Convention.

The Warsaw Conventions also contains a specific provision on the spontaneous exchange of information.

Article 20 of the Warsaw Convention

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under this chapter.

Prosecutors and investigators sometimes have recourse to formal MLA without exploring whether informal assistance would meet their needs. The State receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously for both sides. Prosecutors should therefore always ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

The extent to which States are willing to assist even with formal requests varies and much depends on their domestic laws, the nature of the relationship between the requesting and requested State, and the general disposition of the officials concerned.

Networking between practitioners based on building trust is therefore a very important tool to complement MLA channels, both in terms of preparing MLA requests and ensuring they are fully implemented, and to promote information exchanges.

4.1.2 Challenges for prosecutors in MLA procedures

Some of the key challenges concern central authorities, which should be proactive and arrange for direct consultation between operational authorities if required. It is widely thought that the better results are obtained when the requesting State and requested State have shared draft requests before sending final versions, when requests are actively followed-up, when questions from the requested State are answered promptly. In essence, it is better to engage in a dialogue instead of blindly mailing documents back and forth. The system of treaty-based assistance can also be speeded up using technological aids, such as video-teleconferencing, and emailing advance copies of MLA requests.

Other challenges concern the nature of international cooperation itself. Some authorities may choose not to seek formal cooperation such as mutual legal assistance (MLA) at all if they consider it unlikely they will receive a response. A bilateral or multilateral treaty basis maybe lacking. Authorities might not have the knowledge to draft a quality, actionable request, or might have very rigid standards for seeking international co-operation.

Lastly, one major obstacle to effective international co-operation is sometimes the lack of a clear political commitment to cooperate, especially when one country's nationals are being investigated in another country.

4.1.3 Preparing letters of request (MLA)

The letter of request (LoR) should provide the requested State with all the information needed to decide whether assistance should be provided. One major hindrance to money laundering investigations is often the inability of States to make or execute MLA requests in a timely and effective way. A level of specialisation in international cooperation matters should therefore be developed, as well as the establishment of international networks between prosecutors and investigators that will enable requests, both formal and informal, to proceed without delay.

It is often a good idea to prepare the LoR together with experts from the international cooperation unit so that all the challenges at international and investigative level can be addressed.

The format and contents of a LoR are therefore of fundamental importance as a badly written or incomplete letter is unlikely to result in assistance. It should contain the legal and practical information as summarised below:

LoR "essentials"

- An assertion of authority by the author of the letter.
- Identification of relevant treaties and conventions.
- Contact details in the requesting State so that the requested State can make direct contact and clarify issues if necessary.
- Assurances as to reciprocity, dual criminality etc.
- Assurances that the material collected will only be used for the purposes set out in the LoR.
- Indication of any specific formalities that must be complied with in the collection of evidence to ensure its admissibility at trial.
- Identification of defendant/suspect.
- Status of investigation or proceedings in the requesting State.
- Crimes under investigation or subject to prosecution.
- Summary of facts and how they relate to the request. The description of the facts must be sufficiently detailed and should indicate in what way the evidence sought is necessary for the purposes of the investigation/prosecution.
- Enquiries to be made and assistance required.
- Signature of the author of the letter.

4.2 EXTRADITION

Extradition procedures are also very important in relation to money laundering offences with a view to the surrender of a suspect or to have a convicted person returned to the State of conviction in order to serve his or her sentence there. Authorities should take all possible measures to ensure that they do not provide safe havens for individuals charged with money laundering.

It should be borne in mind that Ukraine does not extradite its own citizen (Article 589(1) of the Ukrainian Code of Criminal Procedure). However, the Ukrainian are empowered to prosecute their own nationals in those circumstances where it is deemed appropriate to do so (Article 595(1) and (2) of the Ukrainian Code of Criminal Procedure).

In line with the FATF Recommendations, countries should (i) ensure that money laundering is an extraditable offence; (ii) ensure that it is possible to execute extradition requests in a timely manner; (iii) not place unreasonable or unduly restrictive conditions on the execution of requests; and (iv) to ensure they have an adequate legal framework for extradition.

Extradition guidelines should be drawn up to ensure that prosecutors are fully aware of the requirements for extradition and the different steps in extradition procedures with a view to expediting the implementation of extradition requests in line with the needs and time-frames of the prosecution.

As indicated relation to MLA, it a good idea for the prosecutors responsible for the money laundering investigation to work together with experts in the international cooperation units to ensure the success of the extradition request.

4.3 JOINT INVESTIGATION TEAMS

A joint investigation team (JIT) is one of the most advanced tools used in international cooperation in criminal matters. JITs are based on a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations and are typically made up of prosecutors, law enforcement authorities and judges. They are established for a fixed period, between 12 and 24 months, as is necessary to successfully conclude an investigation.

Once a JIT has been set up, the partners can directly exchange information and evidence, cooperate in real time and jointly carry out operations. They also allow for practitioners to be present during investigative measures in their partner' territories, enabling a more efficient sharing of technical expertise and human resources more efficiently. Such direct contact and communication make it possible for JIT members to build personal relations and trust, leading to faster and more efficient cooperation.

From an operational perspective, JITs present a number of advantages over formal MLA but the circumstances in which they may be used are narrower: JITs really come into play when a number of parties are conducting difficult and demanding investigations into criminal offences and the circumstances necessitate coordinated and concerted action.

The key differences between JITs and MLA may be summarised as follows

MLA	**JITs**
➢ No investigation in executing State	➢ Parallel proceedings

	➢ Importance of coordination (common operational objectives and agreement on prosecution strategies)
➢ Limited participation of requesting authority	➢ Active participation of seconded members
Request or reply to request ➢ Cooperation limited to specific request ➢ Additional measures require a fresh request	Joint initiative with a common purpose ➢ Partners on equal footing; no lead role ➢ Single written agreement [13]
Information/evidence transmitted after execution of MLA	Unlimited, real-time exchange of information/ evidence

Ukrainian law makes specific provision for the formation and functioning of JITs in the Code of Criminal Procedure. Specifically:

Article 571 of the Ukrainian Code of Criminal Procedure

1. Joint investigative teams may be set up to conduct pre-trial investigative action in respect of circumstances of criminal offences committed in the territories of several states, or where the interests of such states were affected.

2. The Prosecutor General's Office of Ukraine must consider and make decisions about setting up joint investigative teams, upon request of Ukrainian pre-trial investigation agency's investigator, prosecutor, and foreign competent authorities.

3. Members of a joint investigative team shall directly interact, agree between them the basic vectors of the pre-trial investigative action, the conduct of procedural actions, and exchange of information obtained. Activities of joint investigative team must be coordinated by the initiator or by one of the members.

4. Investigative (detective) and other procedural actions shall be carried out by members of the joint investigative team from the state where such actions are conducted.

[13] The model agreement to set up a JIT can be downloaded at the following address: https://www.eurojust.europa.eu/model-agreement-setting-joint-investigation-team-0

4.4 INTERNATIONAL ACTORS IN THE SPHERE OF INTERNATIONAL COOPERATION IN MONEY LAUNDERING INVESTIGATIONS

There are a number of operational and policy actors in the sphere of international cooperation which may prove useful in the context of money laundering investigations and prosecutions and which practitioners should be familiar with.

4.4.1 Eurojust

Eurojust, the European Union Agency for Criminal Justice Cooperation, is a hub based in The Hague, Netherlands, where national judicial authorities work closely together to fight serious and complex organised cross-border crime, including money laundering. Its role is to help coordinate the work of national authorities – not only from the 27 EU Member States, but also from third States – in investigating and prosecuting transnational crime, when two or more countries are involved.

In 2016, Ukraine signed a cooperation agreement with Eurojust which led, in 2018, to the appointment of Ukraine's first liaison magistrate within Eurojust. In 2019, the Ukrainian liaison magistrate was involved in 77 cases, 23 coordination meeting, 2 coordination centres and 9 JITs.

Eurojust offers operational support throughout the different stages of cross-border criminal investigations, providing:

- prompt responses;
- an on-call coordination centre that is operational 24 hours a day, 7 days a week;
- links to key counterparts; and
- assistance with the preparation of judicial cooperation requests, including official translations.

It can also accommodate complex forms of assistance and coordination mechanisms to support major operations. For example, Eurojust can:

- coordinate parallel investigations;
- organise coordination meetings involving the judicial authorities and law enforcement concerned;
- set up and/or fund joint investigation teams (JITs) (see section 2.3) in which judicial authorities and law enforcement work together on transnational criminal investigations, based on a legal agreement between two or more countries; and
- plan joint action days, steered in real time via the coordination centre at Eurojust, during which national authorities may arrest perpetrators, dismantle organised crime groups and seize assets.

4.4.2 The Financial Action Task Force (FATF)

As mention in Section 1.1 above The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog that sets international standards that aim to prevent these illegal activities and the harm they cause to society. As a policy-making body,

the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

The FATF has developed a series of Recommendations or Standards which ensure a co-ordinated global response to prevent organised crime, corruption and terrorism. They help authorities go after the money of criminals dealing in illegal drugs, human trafficking and other crimes.

The FATF keeps money laundering and terrorist financing techniques under constant review, with the result that its standards are not static but rather evolve to address new risks, such as the regulation of virtual assets, which have spread as cryptocurrencies gain popularity. The FATF monitors countries to ensure they implement the FATF Standards fully and effectively, and holds countries to account that do not comply.

4.4.3 Europol

Europol – the European Union's law enforcement agency based in The Hague – has a broad mandate in the area of combating money laundering. To that end it provides Member States with intelligence and forensic support to prevent and combat international money laundering activities. Europol promotes the information exchange of information between practitioners, investigators and FIU staff by means of the following mechanisms.

The Europol Criminal Assets Bureau (ECAB) assists Member States' financial investigators in tracing the proceeds of crime worldwide, in cases where assets have been concealed beyond their jurisdiction. It also hosts the secretariat of the Camden Asset Recovery Inter-Agency Network (CARIN), which focuses on all aspects of confiscating the proceeds of crime.

In addition to maintaining the FIU.net, the decentralised network for FIU information exchange, Europol is also the seat of the permanent secretariat of the Anti-Money Laundering Operational Informal Network (AMON), established in 2012 as a group for anti-money laundering investigators. Comprising practitioners from 21 jurisdictions and 3 international organisations, AMON's objective is to improve the effectiveness of cross-border investigations into money laundering by providing fast responses and pooled expertise.

The Financial Crime Information Centre (FCIC) is a secure web platform for law enforcement practitioners dealing with money laundering, asset recovery and financial intelligence, allowing its 1 200 members (as of 2015) to share and retrieve knowledge, best practices and non-personal data on financial intelligence.

4.4.4 The Egmont Group

The Egmont Group, a united body of 166 Financial Intelligence Units (FIUs), provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing. Given their unique position, FIUs are well-placed to be able to cooperate and support national and international efforts to counter money laundering (and terrorist financing) in line with global standards.

The Egmont Group supports international partners and other stakeholders to give effect to the resolutions and statements of the United Nations Security Council, the FATF and the G20 Finance Ministers. It contributes to improving the understanding of money laundering and terrorist financing risks amongst its stakeholders and, drawing upon its operational experience, has an important part to play in the development of policy in the area.

4.4.5 CARIN

CARIN is an informal, inter-agency, network of law enforcement and judicial practitioners with a focus on asset tracing, freezing, seizure and confiscation. Each member state of the network is represented by a law enforcement officer and a judicial expert (which may be a prosecutor or investigating judge, etc. depending on the legal system in question).

CARIN's contact points support the complete asset recovery process, from the steps taken to trace of assets, to their freezing, seizure, management and ultimately forfeiture/confiscation. They also provide support on the issue of asset sharing between jurisdictions.

It currently has 54 registered member jurisdictions, including 28 EU Member States and nine international organisations. It is also linked to the other five regional asset recovery inter-agency networks (ARINs) across the globe.

4.4.6 Asset Recovery Offices

Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime requires Member States to set up or designate national Asset Recovery Offices ("AROs") as national central contact points which facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime. It allows AROs to exchange information and best practices, both upon request and spontaneously, regardless of their status (administrative, law enforcement or judicial authority).

4.5 BEST PRACTICES IN THE FIELD OF INTERNATIONAL COOPERATION TO ENHANCE THE EFFECTIVENESS OF MONEY LAUNDERING PROSECUTIONS

When prosecutors detect a transnational component in the investigation of money laundering, there are several best practices that may assist them in speeding up international cooperation and help to ensure that money laundering offences are prosecuted effectively.

- Consider using informal methods of cooperation such as direct contact between prosecutors, prosecutor-to-prosecutor cooperation, before submitting a formal MLA request.
- Prioritise MLA requests that have a ML or a TF element or seek urgent action to seize assets.
- Provide assurances about the penalties that are being sought by the prosecution in certain cases to facilitate extradition.
- Make use of networks such as EUROJUST or CARIN and ARINs or specialised networks of practitioners such as the Black Sea Prosecutors Network (of which

Ukraine is a member) prior to making a formal MLA request. This facilitates international cooperation and enables the content of the assistance to be sought to be defined more precisely.

- Make sure that the fact you have made an MLA request and the contents of the request remain confidential.
- If countries use central authorities, the secondment of confiscation, ML specialists or liaison magistrates to such authorities provides added value.
- Consider using investigative tools such as JITs in transnational parallel investigations.
- Take steps to build trust and informal connections between jurisdictions to facilitate MLA and more informal channels of international cooperation and information exchange.
- Use the Mutual Legal Assistance Request Writer Tool (MLA Tool) which was developed by UNODC to assist States in drafting requests with a view to facilitating and strengthening international co-operation.
- Develop guidelines for international legal assistance (may also include the recovery of assets)
- Making contact with foreign authorities and arrange to send a draft copy of your proposed MLA request, so that they can advise on the content and wording of the request.

4.6 CASE STUDY ON INTERNATIONAL COOPERATION

The following case study looks at the use of mutual legal assistance, the role of Eurojust and joint investigation teams as an effective tool in transnational investigations.

As part of the Ukrainian FIU's analysis of the STRs involving a prominent local politician, Anton K., transfers of money are detected to an account located in France in the amount of 20 000 EUR every three months. These transfers are not itemised.

After becoming aware of those transfers, the Ukrainian Public Prosecution Office decides to open an investigation because recent media reports suggest that Anton K. is involved in corruption, specifically the concession of land for the construction of a shopping centre.

The prosecutor with responsibility for the investigation wants to obtain information from the French Public Prosecution Office, but does not know what mechanisms should be used to obtain information on the accounts located in Cyprus and on other accounts or property held by Anton K. in Cyprus. The prosecutor thinks that he could use the UN Convention on Corruption ('Merida Convention).

After consulting with a colleague, the prosecution in question decides to contact the Ukrainian International Cooperation Unit within the Prosecution Office. That Unit helps the prosecutor to draft a request for mutual legal assistance in order to gather information on (i) ownership of the account identified, (ii) the movements on the account, (iii) any other account held by the beneficiary of the transfers which may conceal Anton K. assets. The

legal basis for the request is the 1959 Convention on mutual legal assistance in criminal matters[14].

While waiting for a response to that request, Ukrainian investigators establish on the basis of open sources (Facebook and Twitter) that Anton K. has visited Marbella in Spain six times over the past two years. During those visits, Anton K. has always stayed at *Villa Lujo*, a housing complex for multi-millionaires.

In order to obtain information on those visits, the prosecutor contacts Ukraine's liaison magistrate in Eurojust who promises to contact the Spanish Desk. In the meantime, the prosecutor thinks how to channel the exchange of information with the Spanish authorities and finds an Agreement signed with Spain in Kiev on 7th November 2001 that covers the exchange of information to fight against criminality.

One month later, the Ukrainian liaison magistrate informs the prosecutor that the Spanish Special Anti-drug Prosecution Office is investigating activities involving money laundering and drug trafficking. After discussion, Eurojust organises a virtual meeting between the Ukrainian Public Prosecution Office and the Spanish Special Anti-drug Prosecution Office, from which it transpires that the owner of *Villa Lujo* is a straw man who offers his services to various criminals. The name of the owner also appears in the *Panama Papers*.

As a result of the coordination meeting, Eurojust suggests that a Joint Investigation Team (JIT) should be set up between Ukraine, Spain and Cyprus, after the Ukrainian prosecutor mentions the existence of bank accounts in Cyprus. Eurojust supports the JIT providing legal advice to fill the model agreement[15].

The Joint Investigation Team, led by the prosecutors of each of the countries involved and staffed by forensic experts and police officers work together for a six-month period on the analysis of the bank accounts, on surveillance operations in the three countries and on the interception of communications in Spain. As a result of the real-time exchange of this information, Eurojust organises an 'action day' simultaneously in the three countries with a view to arresting the suspects searching premises and seizing property. In total, EUR 3 million were seized and, according to the documentation also seized, that sum belongs to Anton K.

All the evidence gathered in Cyprus and Spain related to Anton K. is made available to the Ukrainian Public Prosecution Office for the purposes of preparing Anton K.'s prosecution in Ukraine.

[14] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030

[15] https://www.eurojust.europa.eu/model-agreement-setting-joint-investigation-team-0

5 CONFISCATION

Generating profit is one of the principal incentives behind criminal activity and enables criminals to continue their illicit businesses. That is particularly so in the case of criminal networks, which require significant funds for their day-to-day functioning and operation. In consequence, curtailing criminal gangs' access to their illegally obtained funds effectively starves them of oxygen and, if successful, eliminates them from the field. It is therefore a key aspect of disrupting the functioning of criminal groups.

Confiscation also ensures that assets deriving from criminal activity are recovered and reinstated to society, thus mitigating the loss suffered by the victims of crime and the economies from which the assets were taken.

Given the ease with which assets can be moved across borders with the intention of concealing their illicit origin, asset recovery initiatives should take account of that cross-border aspect so that States and practitioners are equipped with the right tools to identify, trace, seize and confiscate them, applying mechanisms for the repatriation and sharing of confiscated assets where appropriate.

5.1 INTERNATIONAL STANDARDS ON CONFISCATION

The FATF Recommendations establish the basic standards for the confiscation of proceeds of crime and instrumentalities, such as ensuring that provisional measures are available, that it is possible to cooperate with foreign jurisdictions, and that national authorities are equipped with adequate powers to be able to apply the measures at national level and cooperate on an international level.

The Warsaw Convention sets out a number of measures for the effective confiscation of assets, combining measures at national and international level. The measures at national level include:

- Measures aimed at identifying, tracing, freezing or seizing rapidly property which is liable to confiscation, in order to facilitate the enforcement of a later confiscation (Article 4).
- Investigative measures to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized (Article 7)
- Measures to ensure the proper management of frozen or seized property (Article 6).

The Warsaw Convention also provides some useful definitions in this context:

Useful definitions set out in the Warsaw Convention

Proceeds: any economic advantage, derived from or obtained, directly or indirectly, from criminal offences.

Property: includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Instrumentalities: any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

Confiscation: a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.

Predicate offence: any criminal offence as a result of which proceeds were generated that may become the subject of an offence.

Freezing / seizure: temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

Some important principles can be derived from those definitions. In particular, the proceeds of crime can include any property, not just money. Property in this context is very broad and includes (i) an economic advantage, for example, not paying tax that is owed, obtaining legal aid that one is not entitled to; (ii) property derived directly or indirectly from a criminal offence; (iii) incorporeal property (shares, patents, mortgages, leases etc.) as well as corporeal property; (iv) immoveable property (such as land) as well as moveable property; and (v) legal documents or instruments evidencing title to property.

In the sphere of mutual legal assistance, the Warsaw Convention establishes the obligation to provide the widest possible assistance upon request to identify and trace instrumentalities. Such assistance includes measures to secure evidence of the existence, location or movement of property: The Warsaw Convention also establishes provisions for the issuing of requests intended to have assets that have been moved abroad confiscated. In particular, requests for cooperation with this specific objective should include the following information. [16]

- The authority making the request and the authority carrying out the investigations or proceedings;
- The object of and reason for the request;
- The matters, including the relevant facts (such as date, place and circumstances of the offence) to which the investigations or proceedings relate;
- Insofar as the cooperation involves coercive action:
    - the text of the statutory provisions or, where this is not possible, a statement of the relevant law; and
    - an indication that the measure sought or any other measures having similar effects could be taken in the territory of the requesting State under its own law;
- Where necessary and possible:
    - details of the person or persons concerned, and, in the case of a legal person, its seat; and

[16] Article 37 of the Warsaw Convention.

- details of the property in relation to which co-operation is sought, its location, its connection with the person or persons concerned, any connection with the offence, together with any available information about other persons, interests in the property.

5.2 UKRAINIAN LEGISLATION ON CONFISCATION

Prosecutors and investigators will be familiar with Article 961 of the Ukrainian Criminal Code relating to special confiscation. We can see that:

- It relates to money, valuables and other property;
- It relates to serious crimes and a list of other offences. Articles 209, 2091 and 306 are included;
- Article 962 describes the circumstances in which the property is liable to special confiscation, including property received from crime, income from criminal property, an inducement for a person to commit crime, financing a crime, a reward for a crime, instruments of crime.

There is protection for the lawful owners of property who were not aware of the unlawful use of the property.

Where property has been fully or partially converted into other property, then the converted property is to be subject to confiscation. If, for whatever reason, it is impossible to separate unlawfully acquired property from lawfully acquired property, then the court must make a decision on its disposal on a monetary basis corresponding to the value of the criminal property.

Criminal property may be subject to special confiscation if it is in the hands of a third party if they knew or could have known of the criminal nature of the property. It is specified that the knowledge of the third party as to the criminal nature of the property should be decided on the basis of evidence presented in a judicial proceeding.

Special confiscation is not to be applied to the property of a bona fide purchaser. Priority is also to be given to the award of compensation for crime and the return of property to its rightful owner before special confiscation.

The Ukrainian **Code of Criminal Procedure** also contains a number of provisions relevant to confiscation.

- Article 91(6) of the CPC provides that one of the factors that must be proved in criminal proceedings is the circumstances by which it is to be shown that cash or other property that is subject to special confiscation is the proceeds or instrumentalities of crime.
- Article 100 describes the procedure for special confiscation. It provides protection for innocent owners or holders of property who were not aware of its unlawful origin. It also gives priority from the proceeds of confiscated property to restitution to any lawful owner and compensation for victims.

- Chapter 16 of the CPC lays down a procedure for the provisional seizure of property during an investigation. This is the temporary deprivation of a suspect's right to possess, use and dispose of certain property pending a court decision as to its confiscation or return. It covers property (objects, documents, money etc.) that are the instrumentalities of crime, the subject matter of a crime, property obtained as a result of the commission of a crime, the proceeds of crime, as well as property.
- The power of provisional seizure may be exercised by anyone who has lawfully apprehended a person under Articles 207 or 208 of the CPC or by a person conducting a search.
- Articles 170-175 deal with the attachment of property. Any such attachment must be aimed at preserving exhibits, securing special confiscation, allowing the deprivation of the property of a legal entity or the compensation of a victim. The property of third parties (that is, persons other than the perpetrator of the criminal offence) can be attached in certain limited circumstances. There can be a provisional attachment of property for up to 48 hours without the authority of a court in urgent cases.

There is a procedure in Articles 290-292 of the Civil Procedure Code in relation to actions for the recovery of unjustified assets. The application can be made by a prosecutor after a public official has been convicted of a crime, corruption or money laundering. The procedure can be used against related legal entities. If only a part of the assets is unjustified then the respondent can be ordered to pay a sum of money equivalent to the unjustified part of the property.

5.3 NON-CONVICTION BASED ASSET FORFEITURE

Two types of forfeiture may be used at international level to recover the proceeds of crime: non-conviction based asset forfeiture (NCBAF) and criminal forfeiture. Both pursue the same objective, being the confiscation of the proceeds of crime, and the same rationale: persons who engage in unlawful activities should not be permitted to profit from their crimes, with the result that the proceeds of those crimes should be confiscated and used to compensate the victim, whether that victim is society as a whole or an individual. Confiscation also acts as a deterrent and ensures that confiscated assets cannot be used for further criminal purposes.

However, criminal forfeiture and NCBAF differ in terms of the procedure to be used, since the former requires a criminal trial and conviction whereas NCBAF does not. The differences can be summarised as follows:

Criminal forfeiture	**NCBAF**
➢ Applied against a person (part of the criminal charge against the person)	➢ Applied against the asset
➢ Imposed as part of the sentence in a criminal case	➢ Can be sought before, during or after conviction ➢ No need for a criminal charge against a person
➢ Criminal conviction required	➢ Criminal conviction not required

➢ High standard of proof (beyond a reasonable doubt)	➢ Lower standard of proof ➢ There may also be a shifting burden of proof i.e. when the prosecutor has established a basis to show that the property is criminal then the burden of proving that it has been lawfully acquired then shifts to the persons claiming ownership. If they fail to discharge this burden then the property will be deemed to be unlawfully acquired

NCBAF is can be useful where:

I. the only known criminality is overseas and there is no extra-territorial jurisdiction to pursue a criminal case in the national courts;
II. there is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction;
III. proceeds of crime can be identified but cannot be linked to any individual suspect or offence;
IV. a law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction;
V. a criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction;
VI. a prosecution has been conducted but has not resulted in a conviction.

5.4 UNEXPLAINED WEALTH ORDERS

There are different forms of unexplained wealth orders (UWOs) in a number of jurisdictions. One example is in the UK, where it is a procedure to obtain evidence on which to base other proceedings, such as the civil forfeiture of property.

The procedure enables a law enforcement agency in the UK to obtain information from a person about the way in which they have financed property that appears to be inconsistent with their lawful income/wealth. It applies only to persons believed to be involved in serious crime and to politically exposed persons. Once the information has been obtained it can be used in civil recovery proceedings.

The most important example is that of Zamira Shirali qizi Hajiyeva, wife of a former chairman of the International Bank of Azerbaijan who had been jailed for financial crimes. The UWO for £30m was made in the UK in 2018. Since arriving in the UK, she had spent over £16m in the Harrods department store, bought a house for £11m and bought a golf course for £10m and an aircraft for $42m.

Using the information provided as result of the UWO, the National Crime Agency reached an agreement with Mrs H for the forfeiture of an undisclosed sum.

5.5 EXTENDED CONFISCATION

In the UK, there is a system of extended confiscation. Briefly, this means that in the case of a person convicted of certain types of "lifestyle" crimes (drug trafficking, human trafficking etc.), when considering confiscation, the court can look back six years and assume that any property held by the offender, any expenditure incurred by them and any property received by them over that period was the proceeds of crime. This will be regarded as their benefit from crime unless the offender can prove that any of it has a legitimate origin. The confiscation order will be in a sum of money, after the court has calculated how much the offender has "available" with which to pay the order.

The European Court considered this very specific measure in **Phillips v. UK**, among others: [17]

Phillips had been convicted of being involved in the importation of a large quantity of cannabis. An inquiry was then conducted into the applicant's means. At the confiscation hearing, the court applied the UK provisions on extended confiscation entitling it to assume that all property held by a person convicted of drug-trafficking within the preceding 6 years represented the proceeds of crime.

Phillips complained that the statutory assumption violated his right to be presumed innocent and that the confiscation order breached Article 1 of Protocol No. 1.

The Court considered that a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her formed part of the general notion of a fair hearing under Article 6(1).

However, the Court observed that the statutory assumption was not applied in order to facilitate finding the applicant guilty of an offence, but, instead, to enable the national court to assess the amount at which the confiscation order should properly be fixed.

Further, the system was not without safeguards. The assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence.

Overall, therefore, the Court found that the application to Phillips of the statutory assumption was confined within reasonable limits, given the importance of what was at stake, and that the rights of the defence were fully respected. There was no breach of Article 6(1).

As regards Article 1 of Protocol No. 1, the Court noted that the figure payable under the confiscation order corresponded to the amount by which the UK court had found Phillips to have benefited from drug trafficking over the preceding six years. According, given the

[17] See also *Van Offeren v. the Netherlands*, *Geerings v. the Netherlands* and *Grayson v. United Kingdom*.

importance of the aim pursued, the Court did not consider that the interference suffered by the applicant with the peaceful enjoyment of his possessions was disproportionate.

5.6 ASSET MANAGEMENT

5.6.1 International standards

In line with the FATF Recommendations, an asset management framework should have the following main characteristics: [18]

- There must be a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing the management of) such property. It should also include the legal authority to preserve and manage such property.
- There must be sufficient resources in place to handle all aspects of asset management.
- Appropriate planning should take place prior to taking freezing or seizing action.
- There should be measures in place to:
    - properly care for and preserve as far as practicable such property;
    - deal with the individual's and third-party rights;
    - dispose of confiscated property;
    - keep appropriate records; and
    - take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
- Those responsible for managing (or overseeing the management of) property should have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
- Those responsible for managing the property should have sufficient expertise to manage any type of property.
- There should be statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
- It should be possible to permit the sale of property with the consent of the owner.
- Property that is not suitable for public sale should be destroyed. This includes any property that is likely to be used for carrying out further criminal activity, for which ownership constitutes a criminal offence, that is counterfeit or that is a threat to public safety.
- In the case of confiscated property, there should be mechanisms in place to transfer title, as necessary, without undue complication and delay.
- To ensure transparency and assess the effectiveness of the system, there should be:
    - mechanisms to track frozen/seized property;

[18] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf

- assess its value at the time of freezing/seizure, and thereafter as appropriate;
- keep records of its ultimate disposition and in the case of a sale, keep records of the value realised.

5.6.2 Main principles of asset management

The way in which assets are managed will vary considerably depending on whether the assets are subject to interim freezing or seizure or subject to final confiscation. The following important principles should be borne in mind:

Record keeping: maintaining accurate records of the details of property subject to seizure and final confiscation through the use of a comprehensive database, to include, not only details of the property itself (location, owner, etc.) but also details of the court proceedings that affect it is vital.

Interim management: property will be managed where it is subject to interim restrictions such as freezing or seizure. This will often involve considerable challenges, particularly as the property might ultimately be returned to the owner if acquitted.

- Property will have to be stored, valued and managed. Sometimes this is contracted out by the management authority to private sector bodies, for example, specialist managers or auctioneers A prime consideration here is the cost of such services, which could, in certain cases, exceed the value of the asset.
- At the interim phase, it is important to preserve the value of the asset, pending final disposal. This might involve costs (e.g., specialist storage facilities, letting a residential building.
- Some goods may be perishable and it is desirable that they are disposed of at a reasonable price before they spoil. Some goods deteriorate at a rapid rate, with their value diminishing.
- Some items require specialist treatment e.g. an aircraft.
- A business that has had its assets frozen or seized may no longer be able to operate profitably. This may cause issues if the property is ultimately not subject to a confiscation order and needs to be returned.
- Hazardous items such as chemicals might need to be sold to avoid a danger to those in possession of it.

Legal and other costs: the person whose assets have been frozen or seized may need to have some of the property released so that they can pay legal expenses. The owner of real property might need funds to continue paying a mortgage and the wages of those involved in its management. A business owner may need to pay employees. This might require the release of some of the property for these purposes.

One solution may be to obtain the consent of the owner of the property to sell some or all of it either to avoid its loss in value or to enable other property to continue to be used profitably. In the absence of consent some jurisdictions permit a court to allow sale.

Third party rights need to be kept in mind. Also, compensation to victims may be awarded by a court after final determination of a confiscation order.

After a final determination by a court the property might need to be sold in pursuance of a confiscation order. (Some jurisdictions, such as the UK, have a system of value-based confiscation i.e., the order is made in a sum of money and it is for the defendant to decide how to pay it. In other jurisdictions it is the actual property that is confiscated and sold or disposed of to satisfy the order.)

In the latter case the court is likely to make an order that the property can be disposed of and the profits become the subject of the confiscation order. This may require the services of a body in the private sector such as an auctioneer. Again, there may be exceptional types of property such as the assets of a company, an aircraft or a ship, that require specialist skills to ensure their disposal.

There may be cases where criminal assets are to be returned to another jurisdiction and there are a number of multilateral and international agreements that give a basis for this procedure.

Before considering how assets are managed in other jurisdictions, it should be noted that, in Ukraine, the management of seized/forfeited/confiscated property is in the hands of ARMA (https://arma.gov.ua/pytannya-vidpovid). See also the Law of Ukraine On the National Agency of Ukraine for Identification, Tracing, and Management of Assets Derived from Corruption and Other Crimes.

5.6.3 Management of assets in other jurisdictions

Belgium

In Belgium, the Central Office for Seizure and Confiscation (COSC) was created within the Public Prosecutor's Office to assist judicial authorities with seizure and confiscation.

The COSC also plays a role in asset tracing investigations after conviction to achieve the full realisation of value-based confiscation orders. In particular, it manages of seized cash (e.g. intercepted cash transfers at airports in cases of suspected money laundering) and cash realised from interim sales.

Prosecutors, who are responsible for decisions on interim sale and destruction of seized assets and for obtaining confiscation orders, are required to notify the COSC of such decisions and court orders. The Belgian Ministry of Finance and Ministry of Justice, responsible for enforcement of confiscation orders, must notify the COSC of all executions related to confiscated assets.

Netherlands

In the Netherlands, the Criminal Assets Deprivation Bureau (Bureau Ontnemingswetgeving Openbaar Ministerie) (BOOM) is located within the Public Prosecution Service and is the country's designated Asset Recovery Office. It performs the typical functions of an ARO in the EU such as asset tracing, providing expert knowledge and advice, and serves as a contact

point for international cooperation in asset recovery. The BOOM also prosecutes some of the more important non-conviction based asset recovery cases.

Within the BOOM, a small team of asset managers, called the Asset Management Office (AMO), is responsible for managing assets subject to non-conviction based seizure orders.

The Public Prosecution Service executes property confiscation orders by transferring realised funds to the public treasury. Confiscated property, such as weapons and drugs, are destroyed by the Dutch National Police Services Agency and movables such as cars and computers may be destroyed or sold by the Service for State Property in the Ministry of Finance. The Central Fine Collection Agency (CJIB) collects value based confiscation orders and other criminal fines.

United States

The United States Asset Forfeiture Programme prosecutes and coordinates complex, multi-district, and international asset forfeiture investigations and cases. Its tasks include providing legal and policy assistance and training to federal, state, and local prosecutors and law enforcement personnel, as well as to foreign governments, assisting policymakers in developing and reviewing legislative, regulatory, and policy initiatives, distributing forfeited funds and properties, and deciding on victim claims for compensation from forfeited properties.

The Marshals Service, one of the law enforcement agencies of the federal government, is the primary custodian of property seized by federal law enforcement agencies nationwide. It manages various types of assets, including real estate, vehicles, commercial businesses, cash, financial instruments, jewellery, art, antiques, collectibles, vessels and aircraft. The Marshals Service manages the distribution and equitable sharing of proceeds with state and local law enforcement agencies that participated in investigations leading to forfeiture as well as payments to victims of crime and innocent third parties and in some cases plays a role in making forfeited property available for social re-use.

5.7 CASE-LAW ON CONFISCATION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Over the years, the European Court of Human Rights has provided instructive guidance on the interaction between confiscation and Article 1 of Protocol No. 1 of the European Convention on Human Rights enshrining the right to property.

The Court has held that States have a wide margin of appreciation in implementing policies to fight crime, including confiscation of property that is presumed to be of unlawful origin (Raimondo v. Italy), proceeds of a criminal offence (Phillips v. the United Kingdom), property that was the object of the offence (Agosi v. the United Kingdom), or property that had served, or had been intended to serve, in the commission of a crime (Andonoski v. the former Yugoslav Republic of Macedonia).

In Gogitidze and Others v. Georgia, the Court held that common European and even universal legal standards can be said to exist which encourage the confiscation of property

linked to serious criminal offences, such as corruption, money laundering and drug offences, without the prior existence of a criminal conviction. The onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted to the respondents in such non-criminal proceedings for confiscation, including civil proceedings. Confiscation measures may be applied not only to the direct proceeds of crime, but also to property, including incomes and other indirect benefits.

Where confiscation was imposed independently of a criminal charge against third parties, the Court accepted that the authorities may apply confiscation measures not only persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage illicitly obtained property informally on behalf of the suspected offenders, or who otherwise lacked the necessary bona fide status (Raimondo v. Italy)

A confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities, and also ensures that "crime does not pay" (Denisova and Moiseyeva v. Russia).

Article 6 of the Convention generally does not prevent States from having recourse to presumptions. In proceedings concerning various forms of confiscation or fiscal repression the public authorities may act on the presumption that the assets were acquired unlawfully (Salabiaku v. France).

In Balsamo v. San Marino, the Court found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Whenever a confiscation order was the result of civil proceedings in rem which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.

5.8 BEST PRACTICES IN THE FIELD OF ASSET CONFISCATION

In the course of a money laundering investigation, there are a number of best practices which should be followed with the aim of ensuring that the proceeds of crime can be successfully confiscated. These are summarised below.

- Identifying illicit assets in a timely manner (see section above on best practices in prosecution).
- Systematically applying provisional measures at early stages of investigations and criminal proceedings.
- Enabling final confiscation of proceeds of crime upon conviction, as well as proposing ways to enable non-conviction based confiscations.
- Enforcing confiscation orders effectively.

- Managing assets effectively: ensuring that confiscated assets are used in an adequate manner (see the relevant section above).
- Taking account of the cross-border aspects of confiscation (see section on international cooperation). Promoting informal exchanges of information with foreign counterparts, including prior to the submission of a letter of request for mutual legal assistance (e.g. use of appropriate international bodies such as the Egmont Group, INTERPOL, Europol and Eurojust).
- Providing training to prosecutors on specialised financial investigation techniques; establishing specialised units with financial investigators.
- Establishing mechanisms to allow for rapid access to high quality and up-to-date information on the ownership and control of property (e.g. land, vehicles, legal persons).

ANNEX I: TYPOLOGIES/CHARACTERISTICS OF MONEY LAUNDERING

International bodies (e.g. Moneyval, FATF) and national law enforcement agencies (e.g. SFMS of Ukraine, Netherlands Fiscal Information and Investigation Service) and case law have identified typologies or red flags in relation to money laundering. These can be regarded as characteristics or indicators of money laundering and might be capable of providing evidence that money laundering is present. These indicators may not be illegal in themselves, but the use of a number of them could support a prosecution for ML.

Examples from the above sources that might occur in money laundering investigations include:

- Beneficial owners of companies difficult to identify and/or located in off-shore jurisdictions
- Cash transactions in large amounts and use of high denomination banknotes
- Use of a "straw man" or nominee to be the registered official of a legal entity
- Unusual international routing of funds: involvement of many jurisdictions in the flow in or out of money
- Use of alternative remittance systems (although not in themselves illegal)
- Use of Money Service (Transmission) Bureaus when bank transfers would be cheaper (again, the use of MSB's themselves is not illegal)
- Transactions that are not consistent with a person's income/wealth or their normal activities
- Transactions that are not consistent with a company's size or value or their normal activities
- There is no economic or logical explanation for the transaction
- The suspect or their associates has criminal convictions (see CPC Art 88)
- There is some indication that a predicate offence had been committed, although no precise offence can be proved
- The currency used is unusual for the location e.g. Euro notes in the UK, Scottish banknotes in the Netherlands
- The money takes a circuitous route via different bank accounts/jurisdictions
- Large amounts of cash are possessed/carried (ignoring security issues)
- Cash stashed in unusual places e.g. in the garage, under the sofa
- Use of "money mules" (e.g. persons with a low income such as students or elderly people may be asked to make their bank account available to money launderers. Dirty money will be deposited into their accounts and they will be allowed to keep a %).
- "Smurfing" – a large amount of money will be split into smaller amounts below the country's reporting levels. These will be separately paid into the same or different bank accounts within a short period of time.
- A large number of small denomination notes may be exchanged for larger denominations to make their transport easier.
- A lack of explanation for the possession/movement of cash or transfers of money.
- After a cash seizure, nobody comes forward to claim the money

- Large amounts of cash handed over but no receipts given
- Unusual locations/time for a cash handover
- Suspicious arrangements for a cash handover e.g. single use of phone for the meeting, location given as a postcode (Zip code), use of false names, money in plastic carrier bags
- Traces of illegal drugs on cash and phones
- Use of cash couriers to transport cash
- Money sent to countries near drug producing areas
- Use of foreign bank accounts without a logical reason
- False and inadequate business records
- Use of shell companies
- Use of Bitcoin or other virtual currency (again, not in itself illegal but its use can ensure anonymity)
- Registering a company in a location that has no connection with the suspect
- A business entity that does not have sufficient or appropriate staff or equipment to carry out their usual or declared activity
- No or inadequate accounting records
- Large number of different individuals paying money into the same bank account
- Large amounts of cash where payment in cash would not be usual for that entity or its activities
- Frequent deposits in the same amount from the same source
- Use of charitable organizations (non-profit bodies) to receive donations that are then moved abroad
- Changing the ownership of shares to transfer value across international boundaries
- Investing in a long-term financial product and redeeming it in a short time
- Shares or an insurance product are bought with untraceable sources of funds, such as cash, money orders, traveller's cheques etc.
- Deposits are made by a number of legal entities into a bank account and transferred to another account the same day
- Use of cash-based businesses e.g. restaurants, hairdressers, car washes. Payments are often made in cash. Criminal cash can be banked with the legitimate profits to disguise their origin

Trade based ML

This was defined by FATF as 'the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origins.'

Examples are:

Over/under invoicing of goods

The objective is to transfer value from one criminal to another without a physical movement of cash between them

- Over-invoicing. Here B (importer) wants to transfer value to A (exporter). A agrees to sell 100 tons of coal to B. Its value is 10 Euros per ton, so the value is 1000 Euros. A provides an invoice to company B showing the price to be 2000 Euros. B can now transfer 2000 Euros to company A. A has received 1000 Euros is criminal property which appears legitimate
- Under-invoicing. Here A (exporter) wants to transfer value to B (importer). A sends 100 tons of coal valued at 1000 Euros to B, but provides an invoice to B for 500 Euros. B transfers 500 Euros to A and sells the coal to a legitimate customer for 1000 Euros. B has received 500 Euros in value from A.

Multiple invoicing of goods

- Multiple invoicing. Here a number of invoices are issued for the same goods. Payment will usually be made from different banks to hide the ML.

Over/under shipments of goods

- Here either to little or too much of the product is shipped.

Falsely described goods

- The goods shipped are misdescribed so that they can be under or overvalued.

Alternative Remittance Systems- Hawalla Banking (a brief outline)

Hawalla is one example of an Alternative Remittance System that is largely associated with the Indian sub-continent.

It is an unofficial means of transferring value without formalities and at a low cost, although the system may be used for high value transfers, particularly if it has been used to transfer criminal funds.

It is a means of transferring value without a movement of cash.

It is often used by expatriate workers to send money home to their families.

It can be a lawful means of transferring money but, like the formal banking system, it can be used to launder criminal proceeds or fund terrorism.

The persons involved in the Hawalla system may also offer other services such as currency exchange and deposit taking.

The traditional way of operating is:

- X in Dubai approaches the person offering the Hawalla service (A) and asks A to transfer money to Y, X's relative in, say, Pakistan.
- X pays A the money, plus a commission.
- A contacts another person (B) who operates Hawalla services in Pakistan.
- B then pays Y.

- The value has been transferred from X to Y and A then owes money to B.
- There has been no movement of cash.

Payment to B can be made in a number of ways:

- As they are both in the business and there are a large number of transfers going backwards and forwards, payments that A makes on behalf of B may equal payments made by B on behalf of A.
- If there is an imbalance after their accounting period (say, each month), the difference can be made up by, for example, trade-based transactions undervaluing or overvaluing goods.
- It may be made up by one part sending trade goods to the other.
- Alternatively, if A owes B then A may pay an invoice or bill that B owes, wherever in the world it is situated.
- The difference could also be made up by a formal transfer by MSB.

A will send information to B to identify and confirm the person who is to receive the money, for example, their name, phone number and a password. There may also be some token such as a bank note with a particular number on it to confirm identity.

The advantages of Hawalla for the customer are:

- It is usually cheaper than a formal bank or MSB transfer
- It can be done quickly
- It avoids money control systems (e.g. in some countries foreign currency entering the country must be paid into the national bank and converted into the local non-negotiable currency)
- The customer may feel more comfortable dealing with people from their own ethnic background
- The sender may not have access to regular remittance facilities where they are e.g. they may not have a bank account
- There may not be banking or MSB facilities where the money is sent to e.g. it may be in a remote part of the country.
- The customer may be an illegal immigrant

Although not in itself established for criminal purposes, Hawalla may be abused for money laundering, tax evasion and terrorism.

Launderers may collect criminal proceeds, place them in a bank account in small deposits and then transfer them out of the country. Alternatively, them may take cash to an MSB and transfer it out of the country. This is criminal laundering and not Hawalla banking.

Sometimes when suspects are arrested passing money in a suspicious way, they will claim that they are operating Hawalla banking and that they cannot provide any records to prove the legal origin of the money because Hawalla does not use records. This is not correct and the Hawalla system does use detailed records and these should be requested.

Indicators of the criminality are much the same as those described above for general money laundering typologies.

ANNEX II: CASE STUDIES

ECtHR Caselaw:

Zschüschen v Belgium (2/5/2017) (decision in French only)

This was an important case showing that it is not necessary to prove a predicate offence in order to prosecute an offence of money laundering.

- Z is a Dutch national.
- In March 2003 he opened an account in a Belgian bank and deposited a total of 75,000 Euros into it in five instalments.
- When questioned he said it came from undeclared work over four years, without giving the name of his employers.
- He did not give any further explanation of the origin of the money
- He had a record in the Netherlands for drug-related offences
- He had no income in that country.

He was convicted and imprisoned in Belgium and the 75000 Euros was confiscated.

Decision of the ECtHR:

Article 6(1) and (2) (right to a fair trial/presumption of innocence):

- Z had provided some initial statements when questioned but he did not wish to provide any further information on the money.
- He had been able to remain silent throughout the proceedings and had not been under duress.
- Although the trial court had taken into account Z's refusal to justify his vague and unconvincing statements about the origin of the money in deciding that the money did not have a lawful origin, this did not constitute a breach of his right to remain silent and not to incriminate himself.
- The ECHR does not prohibit a court from taking into account the silence of an accused person in finding him or her guilty, unless the conviction was based exclusively or essentially on his silence.
- The domestic courts had convincingly established a body of circumstantial evidence sufficient to find Z guilty. His refusal to provide the requisite explanations about the origin of the money had merely corroborated that evidence.
- It was not incompatible with the notion of a fair criminal trial that the person concerned should be obliged to give credible explanations about their assets. If Z's account about his financial transactions had been truthful, it would not have been difficult for him to prove the origin of the money.
- The conclusions drawn from his refusal to give a convincing explanation about the origin of the money in his Belgian bank account were based on common sense and could not be regarded as unfair or unreasonable.
- The fact that the trial courts did not find it necessary to define the predicate offence to convict a person of money laundering, had not had the effect of shifting the

burden of proof from the prosecution to the defence, in breach of the principle of the presumption of innocence.

Daniela Staiano v San Marino (3/9/2019)

- DS was convicted in Italy of conspiracy (agreement) in relation to both drug trafficking and laundering the proceeds of drug trafficking.
- The conspiracy involved her husband and nine others importing large quantities of cocaine into Italy.
- The court found her role in the conspiracy was to transfer the proceeds abroad from Italy.
- Large sums were transferred to San Marino.
- She took no part in the drug trafficking itself.
- The money transferred to San Marino was seized there.

(1) The Italian Criminal Code provided that a person could not be convicted of ML if they had aided and abetted the predicate offence.

(2) The Italian court found that conspiracy was not capable of aiding and abetting the predicate offence as no criminal profits were generated from a simple conspiracy (an agreement to commit a crime).

The ECtHR found that it was for national courts to interpret their national legislation.

The ECtHR was only concerned with whether there was a breach of the Convention.

It was open to the national courts of San Marino and Italy to find that the predicate offence was the actual drug trafficking and not the conspiracy (agreement) to traffic in drugs.

Huhtamaki v Finland (6/3/2012)

- H was convicted of an aggravated (serious) receiving (handling) offence.
- He was a professional agent who assisted A in bankruptcy proceedings.
- A was required to provide an inventory of his assets in the bankruptcy proceedings.
- The inventory missed out a particular property that should have been included which H later transferred on behalf of A.
- Both were convicted.
- Subsequently A's conviction was set aside as he had been compelled to file the inventory, which infringed his right to silence.

H applied to have his conviction set aside.

The court declined.

The right to remain silent only assisted A and H had committed the offence of handling.

The ECtHR would not criticise this approach. It was within the margin of appreciation afforded to the court.

Vinks & Ribicka v Latvia (30/1/2020)

The suspect complained about the extent of a search warrant, saying it was too wide.

In rejecting the complaint, the ECtHR took account of:

(1) Tax evasion and ML are serious offences

(2) The scope of the investigation was very wide here as it involved 66 companies.

(3) Moneyval reports on Latvia had highlighted the serious impact of ML there.

Confiscation Proceedings:

The ECtHR case of **Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria** involved the consideration of the rights of a third party in confiscation proceedings.

In 2007 the applicant company's lorry was stopped by customs officers. Drugs were found in the vehicle and the driver was prosecuted. The lorry was seized as evidence. The lorry driver later reached a plea agreement and was sentenced to a term of imprisonment and the lorry was forfeited.

The applicant company could not participate in the criminal proceedings against the driver but asked the court not to confiscate the lorry. The vehicle was worth more than the drugs and could not have been confiscated under domestic law. The court affirmed the plea agreement and the company had no right of appeal. The driver had no assets and so the company could not recover the value of the lorry from him.

The company applied to the EctHR on the basis of Article 1 of Protocol No. 1.

The ECtHR found that there was an interference with the company's property rights. The interference was based on the law, which were sufficiently accessible, precise and foreseeable. The confiscation had pursued the legitimate aim of fighting illegal drug-trafficking.

However, the national courts had not considered the legality of the confiscation under domestic law and, in particular, whether the value of the vehicle significantly exceeded that of the smuggled drugs. Also, there was no evidence of the company's knowledge of the smuggling and yet the domestic court did not consider this point. Under domestic law there was no procedure for the company's involvement in the crime, or lack of it, to be considered.

In the present case there was no procedure available domestically for the company to have its case heard. There had not been a fair balance between the legitimate interest of the state and the protection of the applicant's property rights.

In **Silickiene v. Lithuania** (2012) The applicant's husband committed suicide after he was charged with forming and leading a criminal organisation for smuggling. The authorities froze certain assets belonging to him and the applicant. The criminal proceedings were continued against the criminal group but discontinued against the deceased husband. The court ordered confiscation of certain property belonging to the applicant as it had been acquired as a result of her husband's criminal activities.

She appealed to the EctHR under article 6 and Article 1 of Protocol No. 1

In relation to Article 6(1), The applicant argued that she had been unable to defend her rights in the criminal proceedings against her husband which had resulted in the confiscation of her property. The Court had to determine whether, in the light of the severity of that measure, the domestic legal procedure had afforded the applicant an adequate opportunity to put her case to the courts.

Although she was not a party to the criminal proceedings there had been adequate safeguards: she could have sought judicial review of the initial seizure of property, she could have participated in the criminal proceedings and explained the origin of the property, the court had appointed a lawyer to represent the deceased husband in the criminal proceedings. Although, in principle, persons whose property was confiscated should be formally granted the status of a party to proceedings resulting in such measures, the Court accepted that in the particular circumstances of the applicant's case the Lithuanian authorities had afforded her a reasonable and sufficient opportunity to adequately protect her interests.

There had not been a breach.

In **Balsamo v. San Marino** the Court found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Whenever a confiscation order was the result of civil proceedings in rem which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.

In the case of **Philips v UK** the ECtHR was considering the system of extended confiscation available to the domestic courts in the UK. Here, if a person is convicted of certain types of "lifestyle" crimes (drug trafficking, human trafficking etc.) when considering confiscation, the court can look back six years and assume that any property held by the offender, any expenditure incurred by them and any property received by them over that period was the proceeds of crime. This will be regarded as their benefit from crime unless the offender can prove that any of it has a legitimate origin. The confiscation order will be in a sum of money, after the court has calculated how much the offender has "available" with which to pay the order.

The ECtHR said that it was not required to examine the compatibility of the provisions of the UK legislation with the Convention. Instead, the Court was required to decide whether the assumptions made by the British court were contrary to the basic principles of a fair procedure in Article 6(1). The Court observed that the assumptions were not made to assist in finding Philips guilty of a criminal offence. Instead, they were applied to assist the national court in assessing the amount in which the confiscation order should be made. Even though the confiscation order was in a large amount and he would have to serve two further years in

prison if he defaulted in payment, there was no question of him being convicted of another drug trafficking offence.

The ECtHR noted the safeguards in the system: the assessment was carried out by a court with a judicial procedure including a public hearing; advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised ("the available amount" that the respondent was actually in a position to pay). The principal safeguard was that the assumptions could have been rebutted if the applicant had shown, on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumptions if he considered that applying it would give rise to a serious risk of injustice.

The Court noted that there was no direct evidence that the applicant had engaged in drug trafficking prior to the events which led to his conviction. In calculating the amount of the confiscation order based on the benefits of drug trafficking, the judge relied on the statutory assumptions. In respect of every item taken into account, the judge was satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, that the applicant owned the property or had spent the money and that the obvious inference was that it had come from an illegitimate source.

The applicant was not able to provide any record explaining the source of the property in question and so the judge assumed that it was the benefit of drug trafficking. If the applicant's account of his financial dealings had been true, it would not have been difficult for him to rebut the statutory assumption. It was significant that the judge took into account only the house and the applicant's one-third share of the family business, specific items which he had found on the evidence still to belong to the applicant. The judge accepted the applicant's evidence when assessing the value of these assets. This was not a case of assuming the existence of assets on which to base the amount of the confiscation order (which might raise an issue relating to the fairness of the procedure). Rather, the order was based on assets whose existence in the ownership of the applicant was proved.

The application of the procedure in the UK legislation was confined within reasonable limits when balanced against what was at stake. The rights of the defence were fully respected. The assumptions in the legislation did not deny the applicant a fair hearing and there was not a breach of Article 6(1).

The Court went on to consider whether there was a breach of Article 1 of Protocol No. 1 (peaceful enjoyment of possessions).

The Court found that there was an interference with the applicant's property rights and so the Article applied to the situation. The confiscation order was also a "penalty" within the meaning of the convention. However, it was necessary to consider whether there was a reasonable relationship of proportionality between the means employed and the aim of the procedure. The court considered the importance of the fight against drug trafficking and the fact that the confiscation order was a deterrent to potential drug traffickers. It deprived a drug trafficker of his profits and removed the value of the proceeds from possible future use in drug trafficking.

The procedure was fair and respected the rights of the defence. In view of the important aim pursued, the interfere in the applicant's right to peaceful enjoyment of his property was not disproportionate. There was no violation of Article 1 of Protocol No. 1.

In **Van Offeren v the Netherlands** the applicant was charged with various offences, but was convicted of only four less serious offences: one weapon offence and three drug offences (transporting cocaine and possessing cocaine and mannitol to be used to dilute cocaine). However, the Dutch courts in separate proceedings concluded that he had engaged in cocaine trafficking and that the jewellery and cars, which he had held when he was in receipt of welfare benefits, were derived from cocaine trafficking (rather than an illegal trade in gold and cars, as he argued).

The issue went before both the Dutch Court of Appeal and Supreme Court and witnesses were heard. The confiscation was reduced in value slightly but it was not revoked. The applicant had argued that the confiscation order was based on an offence of which he had been acquitted, in violation of article 6(2) of the Convention and this argument was dismissed by the domestic court.

The applicant complained to the ECtHR that the confiscation order infringed article 6(2) "since it was based on a judicial finding that he had committed an offence of which he had been acquitted in criminal proceedings that had been brought against him".

The ECtHR followed the reasoning in Philips, saying that, although the confiscation proceedings were disconnected from the principal criminal proceedings, "only a criminal conviction can trigger off a confiscation order procedure", so that the latter "must be regarded as forming a part of the sentencing process under domestic law" It noted that it was for the prosecution, in the confiscation order procedure, to "establish a prima facie case that the convicted person has benefited from crime, i.e. from the offence(s) of which he has been found guilty and/or other offences of a similar nature". The onus was then on the convicted person to rebut that case. Although the Dutch Court of Appeal had concluded that the capital acquired by the applicant that was the subject of the confiscation order was made, must stem from drug trafficking, the purpose of the procedure was not the conviction or acquittal of the applicant for any other offences, but to assess whether assets clearly held by him were obtained by or through drug-related offences and, if so, to assess the amount at which the confiscation order should properly be fixed.

In these circumstances the confiscation order procedure is to be regarded on the same basis as the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a person properly convicted of one or more drug offences and did not involve the bringing of any new "charge" within the meaning of Article 6 § 2 of the Convention.

The confiscation order in van Offeren was based on specific evidence of benefit by and of proceeds from drug trafficking of which the defendant had not been convicted. The Dutch Court of Appeal saw and relied on extensive evidence from the prosecution, including financial reports drawn up both before and during the proceedings and evidence from seven witnesses. The Dutch law, permitted a confiscation order to be based "also on the similar offence(s) of which he has been acquitted but in respect of which the judge is satisfied, on a balance of probabilities, that there exist sufficient indications that he has committed them".

The ECtHR noted that "the prosecution must establish a prima facie case that the convicted person has benefited from crime, i.e. from the offences of which he has been found guilty and/or other offences of a similar nature" and that "It is then for the convicted person to rebut the prosecution's case by proving on the balance of probabilities, that the benefits in question were not obtained through such offences but have another origin not related to the offence(s) of which he was convicted or to any offence of a similar nature".

The Court accepted that it is legitimate for a confiscation order to be made to strip a defendant of benefits from other similar offences (than those of which the defendant has been convicted) established by reference to a civil standard of proof, despite the shifting of onus to the defendant. There was no breach of Article 6(2).

The case of **Geerings v Netherlands** (2008) was distinguished from the cases of Van Offeren and Philips. Van Offeren was accused of a series of thefts over a period of 14 months. He appealed and was acquitted of all but two thefts and one count of handling stolen goods. However, in subsequent confiscation proceedings the court decided that there were sufficient indications that he had committed them to justify a confiscation order based on their assessed benefit. The ECtHR held that there had been a violation of article 6(2).

The Court had in a number of cases been prepared to treat confiscation proceedings following on from a conviction as part of the sentencing process and therefore as beyond the scope of Article 6 § 2 (Phillips and Van Offeren). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant could be shown to hold assets whose lawful origins could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.

In this case the domestic court found that the applicant had obtained unlawful benefit from the crimes in question although it could not be shown that he was in possession of any assets for whose origin he could not give an adequate explanation. The Dutch Court of Appeal reached this finding by accepting a police report containing a mixture of fact and estimation which did not have a proper factual basis.

Confiscation following conviction is not appropriate to assets which are not known to have been in the possession of the person affected and more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This is not compatible with Article 6(2).

Unlike Phillips and Van Offeren cases, the confiscation order related to the very crimes of which the applicant had in fact been acquitted. The domestic court's finding went further than the voicing of mere suspicions. It amounted to a determination of the applicant's guilt without the applicant having been "found guilty according to law". Therefore, there had been a violation of Article 6(2).

In the case of **Grayson v The United Kingdom** The applicants had been convicted of drugs offences and then subject to confiscation proceedings. They complained that the English legislation had reversed the burden of proof.

The EctHR said 'it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. In each case, having been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. Such matters fell within the applicants' particular knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true.'

In **Gogitidze and Others v. Georgia**, the Court held that common European and even universal legal standards can be said to exist which encourage the confiscation of property linked to serious criminal offences, such as corruption, money laundering and drug offences, without the prior existence of a criminal conviction. The onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted to the respondents in such non-criminal proceedings for confiscation, including civil proceedings. Confiscation measures may be applied not only to the direct proceeds of crime, but also to property, including incomes and other indirect benefits.

Some Cases from the UK:

IK (8/3/2007) (EW)

The allegation was that between 1 April and 6 December 2003, a money service business called Kaz Money Exchange ("KME") was used to launder almost £5.96m criminal cash.

- IK was the son of the owner of KME and helped his father to run it.
- KME made transfers of money to Pakistan.
- Between 1 April and 6 December 2003, a total of £60 million was deposited into the KME account.
- Two men were stopped taking £197,000 in cash to KME.
- IK claimed it was money from his business and from an agent.
- He produced some false accounting documents.
- Later two men were stopped at the door of KME carrying a box of fruit. Hidden under the fruit was £100,000 in cash. The cash had come from a small grocery shop.
- There was evidence of another £100,000 in cash from the same shop.
- The £200,000 was undeclared takings from the shop, which had two tills.
- The shop keeper provided his accountants with the figures from only one till.

- KME records show £60m was actually deposited with them but the accounts declared £5.96m less.
- There were 2500 false customer records.
- There was a false reference to a business in Pakistan.

There was no evidence of the origin of the £5.9m. The sums of £200k were merely examples of criminal conduct.

The prosecution had established a prima facie case of tax fraud.

The Court decided that the jury could infer that the discrepancy of £5.9 million was the product of criminal conduct and so criminal property.

Craig (15/11/2007) (EW)

- C had cash, expensive motor vehicles, motorcycles, jet skis and other items, which could not be justified on the wages that he had earned.
- Between 30 March 2004 and 6 October 2005 he spent on motor vehicles, holidays or other transactions a total of £123,583. £92,303 was paid in cash [£1=33 Hryvnia]
- £23,790 in cash was found in his home
- Tax and National Insurance records showed he had not been employed or earning.
- He said he had saved money from earnings over the year
- He said he kept his earnings in the home of a former partner and a girlfriend.
- He agreed that he had paid no tax or National Insurance (Welfare).
- Prosecution called as witnesses some of his business partners and employers. These witnesses said he had either defrauded them or taken money for work not done
- An expert witness gave evidence of unusually high traces of illegal drugs on the cash and mobile phones.

The Court said that the prosecution need to prove that the property was derived from crime but did not have to prove a particular crime or a specific type of criminal conduct.

F (17/7/2008) (EW)

- 15th January 2002, the two suspects checked in at Heathrow Airport to board a flight to Iran
- They were to return on 17th January 2008.
- Had 4 bags
- A Customs cash dog indicated two of the bags.
- One suspect said she was carrying £600
- The other suspect admitted there was more money in the bags
- There was £1.18m in cash in the bags
- They were interviewed
- Had been asked by a friend to carry the money
- They had done it two or three times before and had been paid for each trip
- They did not know where the money was coming from but knew it was wrong

The Court noted that the prosecution could not identify any particular predicate offence but it is sufficient to prove evidence of the circumstances in which the property is handled which are such as to give rise to the "irresistible inference that it can only be derived from crime."

Anwoir (27/6/2008) (EW)

- Investigation into suspected drug dealers
- An undercover police officer tape-recorded conversations with suspect M
- Talked about getting rid of cash in very large sums
- Referred to £500,000 and £1m
- Referred to another suspect: said we "did" a million pounds through him last year
- referred to bringing large numbers of mobile phones into the country and not paying VAT
- Referred to another suspect who had "cleaned up millions for us."
- They were linked to a Bureau de Change in London, called Express FX
- £740,000 in cash was paid into M's bank accounts for the benefit of other suspects which was used for property transactions.
- Express FX had a turnover of approximately £70,000 a year before they bought it
- two and a half years later its turnover was £50m
- much of the money was changed into 500 Euro notes
- there were no records regarding £15m of this money
- there were large numbers of false invoices

The Court said that there was clear evidence from which it could be inferred that the money came from drugs and/or VAT fraud. M's explanation that the money came from legitimate trading was rejected.

There are two ways in which the prosecution can prove the property comes from crime, a) by showing that it comes from conduct of a specific kind or kinds and conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.

Ahmed (S) (24/6/2009)

This case involved a business that acted as a travel agency and Money Service Bureau.

The charges related to possession of £2.44m of criminal money and transfers of £2.25m to Pakistan, United Arab Emirates and China

- There was surveillance on the business. People were seen carrying large heavy bags from their car boots into the business. They left without the bags.
- About £200,000 was found in the safe in the company's premises
- A known criminal gave a courier for the business two plastic carrier bags in the car park of a burger bar.
- Two cars were seen outside the premises. A large bag was moved from the boot of one car to the other.

- A's home was searched - Two large bags were found in his wardrobe. They contained cash amounting to £384,760
- During the surveillance on many occasions A and Z took large sums of money to a bank. The money was carried in plastic carrier bags with no security.
- The money was handed over and international transmission forms were completed. On some occasions the money was routed through several banks in different countries before ending up in Pakistan. Bank staff gave evidence that sometimes large international transfers were made on the same day.

The amount of £2.25m was calculated by analysis of the company's records to show amounts possessed or transferred which were not part of the company's ordinary business.

The Court said that the prosecution does not need to prove a specific predicate offence or even the type of predicate offence.

Bains (20 April 2010) (EW)

B appealed against his conviction for drug trafficking. (Comment: Although the decision deals with drug trafficking rather than money laundering, I suggest that the same principles would apply and the same types of evidence would be admissible)

He was alleged to be controller of street dealers in drugs.

- He received large sums of money. He was on benefits (Welfare).
- There was no explanation for the money.
- He had a large number of mobile phones.
- He was in contact with convicted drug dealers
- There were suspicious text messages on his phones.
- He had some drugs scales

The prosecution alleged that the money came from drug trafficking.

The defence argued that the phone text messages were hearsay and not admissible.

The Court decided that it is possible to allow the text messages to be admitted in evidence as they were not intended to prove that the messages were true, but only that they were the type of messages used by drug dealers.

The Court also decided that the evidence of association with convicted drug dealers was admissible.

Gillies (6/9/2011) (EW)

- At 2130 G entered a car park at an underground (Metro) station in his van.
- He met B who arrived in a minicab. They sat in the van together.
- B left the car with a bag.
- They both drove out of the car park.
- B was stopped and searched. There was 200,050 in Euro notes in clingfilm and plastic bags in his car.

- G's fingerprints were on the bag.
- G was interviewed and made no comment.
- There was a financial investigation into G.
- The van belonged to G. It was his only asset.
- He was 21 years old, had no savings, was unemployed and on benefits (welfare).
- No one claimed the cash.

The jury were entitled to conclude that the cash was the proceeds of criminal conduct. The prosecution did not have to exclude every other possible inference from the facts.

Director of Public Prosecutions of Mauritius v Bholah (20/12/2011)

This was an appeal from the Supreme Court of Mauritius to the Privy Council in London.

(Comment: the case is interesting because it shows how widespread is the principle of not having to prove the predicate offence and the relevance of the Warsaw Convention, even to states not members of the CoE)

This case involved the transfer outside Mauritius of US $ 1.82 from a bank.

- B was a director of A company. This company had an account with the bank.
- On three occasions in 2001, large sums of money were transferred into this bank account from the account of N, a customer of the ABN Amro Bank in Miami.
- The transfers came via the Hong Kong and Shanghai Banking Corporation in New York.
- The money was then transferred to various bank accounts outside Mauritius.
- N had not authorised the transaction and the authorising signature was a forgery.

The Supreme Court of Mauritius decided that the accused had a right to know the details of the alleged predicate offence. The prosecution appealed.

The Privy Council decided that proof of a specific offence was not required.

The Court referred to the CoE Convention on Laundering (the Warsaw Convention) as persuasive. They also referred to the fact that money laundering laws in UK, Australia and NZ did not require proof of a specific predicate offence.

Assets Recovery Agency of Jamaica (19/1/2017)

This was an appeal from the Jamaica Court of Appeal to the Privy Council in London.

The Agency had applied to the Court for a Customer Information Order to serve on a bank to investigate money laundering. The order would give them bank account information about the suspect.

The Court in Jamaica refused the order on the ground that the agency must show that there had been a conviction for a predicate offence. The Jamaica Court of Appeal agreed with the Court.

The Agency appealed to the Privy Council in London.

The Privy Council referred to some of the circumstances where a predicate offence could not be proved:

- The suspect has died
- The suspect has absconded
- Money laundering has clearly been committed but it cannot be proved what the predicate offence was.
- Money laundering has clearly been committed but there is a mixture of predicate offences.

Proof of a particular predicate crime is not necessary in order to prove a charge of money laundering. It is not necessary to prove a conviction and not necessary to prove a specific predicate offence. Circumstantial evidence may be sufficient.

When the investigation order was applied for, the Agency does not have to prove that a suspect has committed a money laundering offence. They only have to prove that there are reasonable grounds for believing that a suspect has done so.

A conviction is only one way of proving that a predicate offence has been committed.

R v Kuchhadia (14/7/2015) (EW)

K was charged with fraud and converting criminal property.

- He had bought very high value motor vehicles.
- He paid no tax between 2004 and 2010.
- He did not provide tax declarations for himself or a company he ran.
- He had no legitimate income.

He made an offer of £3.8m for a house and produced company documents to show he had sufficient funds.

He was a cash buyer

H later told the sellers of the house that he had a £90m interest in commercial properties which generated an income of £4m per year.

He claimed to export motor vehicles to Malaysia and deal in diamonds

The seller's lawyer produced a note of their meeting with K's claims of wealth

K's phone call to a bank was recorded.

He claimed involvement in jewellery, diamonds and Greek agriculture, with an income of £650,000-£750,000.

In an application form for a mortgage he claimed he earned £610,000 and had a 35% share of a company.

He had convictions for fraud and theft but did not declare them in the mortgage application

The suspect was interviewed and later admitting telling lies in the interview.

At trial the defence submitted that

(i) the fact that the suspect owned expensive motor vehicles was not evidence of criminal conduct in itself;

(ii) a failure to account to the tax authorities for tax due from legitimate business trading was not a basis for alleging criminal conduct;

(iii) the prosecution could not quantify the amount of any alleged tax fraud and had to prove a specific sum.

The prosecution responded that the appellant had no lawful or legitimate source of income within the UK and had filed no tax returns for at least six years. The criminal conduct was tax evasion evidenced by the interview. The fact that there was no count on the indictment alleging tax fraud did not matter.

The Court decided that there was an identified criminal conduct which was tax evasion. Alternatively, the jury could draw an "irresistible inference" from the banking and other evidence that the property could only have been derived from some type of crime.

R v Singh (29/3/2017) (EW)

The charge was possession of £250,000 of criminal proceeds in cash.

- KS parked his VW Golf motor car behind JS's Ford Focus. JS took a holdall from the boot of the Ford and placed it on the rear seat of the Golf. They were arrested.
- KS claimed he was there to receive £40000 for a house he had sold in India. He was given a phone the day before the meeting and he was told that he would get a call from the person delivering the money.
- He used a false name: "Toni", on the phone and did not use the phone for anything else.
- The holdall in the Golf contained just under £250,000 in cash. Two further bags were seized from the Ford Focus, a leather bag containing £100,000 and a carrier bag containing two separate amounts of £11,000 and £32,370, making £43,370 in total.
- After KS was told by the police that there was £43,370 seized in the two bags, he changed his story to say it was £43000 and not £40000 that he was expecting for the house.
- KS said he was given the wrong bag. He should have been given the £43000, not the £250000.
- DS said he told KS twice that he was giving him £250,000. He said that the day before he was given the postcode (zipcode) of where he would meet KS.
- KS said that they were using the Hawalla system of money transfer and tried to explain why the money was coming from India via Germany.

The prosecution could not identify a specific crime or crimes resulting in the £250000. The Court decided there was an irresistible inference that the money was the proceeds of crime. It was highly unlikely that a cash courier would mistakenly give a man a bag containing £250,000 instead of £43,000.

R v Otegbola (7/7/2017 (EW)

There were three accused charged with the conversion of £39,650.

- All were working and earning.
- Mrs O held a business bank account for C company
- On a number of occasions money was received into C company's bank account. The payer was named.
- Mrs O transferred the money from C account to Mrs B's account. Mrs B then transferred the money to Mr O's account. The transactions were completed within a single day or over two days.
- As it was transferred, the money was sub-divided i.e. £1000 became two payments of £500.

The defence made the point that the prosecution did not check as to who the depositors were or what the transaction was.

Mr O said the money was loans to Mrs B. He could not explain why the loans were repaid the same day.

Mrs B said she was a money exchanger.

Mrs O said the money into the C account was loans from her husband but could not explain why the loan was paid back the same day.

The Court said that the sums transferred were large when compared with the legitimate business activity of the defendants. The explanations given were not adequate and the jury could infer the money was criminal.

The fact that the prosecution did not check on who deposited the money was a point the defence could raise in the trial but the prosecution were not obliged to investigate this point.

R v Solanki (24/1/2020) (EW)

- S was the only director of L company.
- They applied to be a Money Service Bureau. Their expected turnover was to be between £15,000 and £50,000.
- The amount of any transfer would be between £500-10000.
- L company used two larger MSB's to effect transfers (U company and WS company).
- WS processed in excess of £16m in L company transfers over three and a half years.
- P worked for S in the business
- S was stopped by police. They found a bag containing £33,000 cash, correspondence, two plastic carrier bags, two phones and another £2,730 in cash. He said it was takings from his restaurant
- S's home address was searched. P arrived carrying a large, empty plastic self-seal freezer bag. (to collect and transport cash?).
- Police found a bag under the sofa with £32,191 in cash, an envelope with copies of 27 Pakistani passports in different identities and three bank cards

- In the garage was another bag with £30,000 in cash and a bag containing forged Indian passports and bank documents.
- Enquiries at the banks showed that staff at two banks had allowed S to open fourteen accounts in the names on the Indian passports.
- L company was searched and police found cash, money transfer receipts in false names. P's fingerprints were on the documents.
- Phones seized from P and S showed messages referring to sums of money and "tokens" (suggesting Hawalla Banking)
- On the best figures available, during one period between 1st May and 22nd June 2014 L company was responsible for the transfer of over £3.3m.

Solanki answered "no comment" to all questions.

There was no evidence of a predicate offence.

The prosecution referred to

(1) The huge volume of transfers being processed in a short space of time and the high number of daily transfers;

(2) The creation of false customer records and transfer receipts;

(3) The lack of proper secure collection and delivery of cash;

(4) The circumstances of the seizure of £33,000 and £32,191 in cash from Solanki and the finding of £30,000 in cash at a garage owned by him; and

(5) The messages on the mobile phones of Solanki and Patel with "token" references.

P did not give evidence at trial.

The Court decided that the prosecution were entitled to rely on an irresistible inference that the money could only have been derived from crime.

A Case from the Spanish Supreme Court (29 April 2015)

This case provides an overview of all the case-law and legal reform on money laundering in Spain and sets out the main characteristics of the offence of money laundering.

The Supreme Court held that the principal feature of money laundering "is not the mere enjoyment of benefit of the illicit gains, but rather the procedure whereby those gains are returned so that the proceeds of unlawful activities are reintroduced into the economy".

The judgment identifies the types of conduct that should be caught by this offence, stating that mere possession or use of illicit funds for household expenses, for example payment of rent, does not in itself amount to self-laundering in the absence of an intention to conceal assets. In particular, the Court held that "the inclusion of this offence in the Criminal Code is an appropriate way to combat organised crime which is directly or indirectly supported by the generation of unlawful wealth and its concealed return to the legal circulation of capital".

A Case from the Republic of Ireland

Attorney General of Ireland v Davis (12/8/2016) (RoI)

This was an extradition hearing. The US authorities sought the extradition from Ireland to the USA of one of the administrators of a Silkroad website. They alleged conspiracy to traffic in drugs, conspiracy to commit computer hacking and conspiracy to launder money.

Davis administered a site known as "Libertas", which was part of the Silkroad organisation. Messages on the site proved his involvement. Private messages from Libertas show him organising the listing of drugs and other items on Silk Road. This included listings concerning cocaine, crack cocaine, crystal meth and other drugs. Other references concern the categorisation of "weaponry".

The owner and operator of Silk Road was as a U.S. citizen named Ulbricht. A computer was seized from him. It contained a folder of identification documents for his employees on Silkroad. It contained an image of Davis' Irish passport. (During Ulbricht's trial in the USA documents and chat logs from his computer were used to rebut his claim that he, Ulbricht, no longer ran Silkroad.)

Under United States law money laundering consists of conducting or attempting to conduct financial transactions involving property constituting the proceeds of specified unlawful activity including narcotic trafficking and computer hacking.

The Irish court agreed that the US offence of money laundering corresponded with the Irish offence and allowed the extradition.

(Comment: clearly, no specific predicate offences could be identified although under US law it would have to be proved that the money came from one or more of the predicate offences of the type specified in US law.)

(Silk Road was a hidden website allowing users to buy and sell illegal drugs, weapons, stolen identity information and other unlawful goods and services anonymously.

The anonymity of the service provided was designed to protect the anonymity of the customers and frustrate the tracing of payments.

It started in January 2011 and had over 100,000 buyers and several thousand drug dealers selling drugs.

It enabled sales of US $1.2 billion. Silk Road received US $ 80 million in commissions (at 8-15% of transaction value).

It operated on the hidden TOR network and accepted only bitcoins for payment. The users of bitcoins are identified only by anonymous bitcoin address.

Users were able to use a different bitcoin address for each transaction.

Each user held a bitcoin account with Silkroad.

To make a purchase, the purchaser credited bitcoin to their Silkroad account. The bitcoin would be held in a temporary escrow account until the transaction was complete. Then the bitcoin would be transferred to the seller's bitcoin address.

The payment was disguised by a series of dummy transactions to hide the transactions (a "tumbler").)

The Approach in the Netherlands:

The Courts in the Netherlands have developed what they refer to as the "Indirect Method of Proof" of money laundering where there is no direct evidence of a predicate offence. It has six steps:

1. There is no direct evidence of a predicate offence.

2. The Court decides whether there are facts or circumstances giving rise to a suspicion of money laundering. The Court can consider facts of general knowledge and of money laundering typologies.

3. If there is a suspicion of money laundering then the suspect can be expected to give an explanation of the origin of the property that is suspected to be derived from money laundering. If the suspect refuses to give an explanation then this fact can be considered in deciding whether there is evidence that the property is derived from crime.

4. Any explanation from the suspect needs to be specific, verifiable and capable of belief. The source of the money and the money trail need to be explained.

5. If a proper explanation that satisfies these conditions is provided then it is for the prosecutor to investigate the explanation given by the suspect.

6. The court needs to decide, as a result of the investigation, whether it is sufficiently certain that the property does not have a legal origin so that the criminal origin of the property is the only acceptable explanation.

Court of Appeal 11 -01-2013, ECLI:NL:GHAMS:2013:BY8481 (N)

The accused was acquitted of ML. The prosecution appealed.

The ML related to a number of high value cars (4 BMW's and 2 Mercedes). There was no direct evidence of the origin of the purchase price of the cars. He had been acquitted of offences of ram-raiding ATM's.

- The suspect bought the expensive vehicles but others used them.
- The vehicles were registered to him.
- Neither he nor the car users explained why other people were using the cars.
- The suspect had not explained why he was not paid for the use of the cars.
- There were cash flows to the suspect but they do not suggest that he was engaged in a legitimate business with the cars.
- There were no rental agreements
- There were also suspicious tapped telephone conversations.

The court noted that the cars would depreciate in value.

The user of a car is presumed to be the owner of that vehicle.

Here there was no lease agreement.

The prosecution could prove ML on this basis without proving a prior predicate offence.

ECLI:NL:HR:2019:1137 (N)

- The accused had three bank accounts in which cash sums totalling more than 300,000 Euros were deposited over about six years.
- The accused stated that he had acquired large sums of money from, inter alia, property sales, revenue from a snack bar, poker winnings, rent and the sale of figurines and gold.
- He said he kept the money at home and sometimes at his friends' houses.
- Sometimes he deposited money in bank accounts to make payments by bank transfers.
- Investigation into his tax returns showed that the accused did not have any income or assets which could explain the cash deposits.
- He provided no evidence or explanation of the cash flows.

The Court decided that as the accused had not provided a specific and verifiable explanation regarding the origin of the money there was no need for further investigation of the accused's explanation.

ECLI:NL:RBNHO:2014:4920 (N)

- The suspect was found at Schiphol airport with 4,215 Euros in a shoulder bag and US $81,600 in his suitcase.
- The money was hidden in the lining of the suitcase.
- He did not provide an explanation.

The Court considered characteristics/typologies of money laundering:

1. It is a general fact that Schiphol Airport is used for the import, export and transit of criminal proceeds.

2. The physical transportation of large amounts in cash is unusual and involves a security risk.

3. The money was hidden in the lining of the suitcase.

4. These facts result in a reasonable suspicion of money laundering.

5. The suspect's silence and the characteristics of ML noted above lead to the conclusion that the only reasonable explanation is that it is criminal proceeds.

ECLI:RBNHO:2014:4275 (N)

The suspect was suspected of laundering 33,000 Euros when apprehended at Schiphol airport.

He said he had borrowed the money from family and friends.

Three witnesses confirmed this.

There were some suspicious facts about the witnesses' explanations but this was not enough to make them highly unlikely

A written loan agreement between the suspect and the witnesses was made in writing after the arrest but his explanation could still be considered specific, verifiable and not highly unlikely.

The Court found there to be not enough evidence for money laundering.

ECLI:NL:HR:2014:3687 (N)

Here the suspect provided an explanation of the origin of some large sums of money in his home:

- part of the money came from the profits of a coffee shop that he owned
- part was sent to him by his family in Surinam who owned property there
- part came from his position on the board of an organisation that managed his parents' rice fields.

The explanation did not provide information as to which part of the money came from where.

The Court also decided that he had not been able to show that the money had a legal origin.

The explanation did not properly explain the money trail and so the explanation was not specific, verifiable and likely.

ECLI:NL:RBMNE:2014:2875 (N)

- The suspect was found in possession of 3,000 Euros when travelling from Poland to the Netherlands
- He said it was payment for his work as a mechanic
- The money was in sixty 50 Euros notes
- There were illegal drugs in the car
- He had been convicted of an offence in relation to opium in Germany

The Court did not find his explanation of the origin of the money to be concrete, verifiable and not highly unlikely.

ECLI:NL:RBROT:2014:3504 (N)

The suspect claimed that 82,900 Euros was the profit on his trade in bitcoins

The Court decided that the explanation that he bought the bitcoins from different sources was not verifiable and he was convicted.

The Court gave examples of when an explanation is required from a suspect:

1. If a suspect states that the origin of the property is legal and declared income, it is not required for the suspect to provide his payslips. The information as to earnings and tax will be available to the investigator through records at the revenue/tax authority.

2. If the suspect claims to have considerable income that has not been declared to the tax authorities then there is no obligation for the investigator to investigate this claim. There is not enough information for an investigation to be carried out.

ECLI:RBGEL:2014:4440 (N)

Here the suspect referred to a person in his explanation as to the origin of the money but that person could not be traced and so the explanation was not verifiable

The suspect was in business but was not able to provide statements from business partners or other employees of companies or individuals with whom he was doing business.

He did not provide sufficient verifiable detail of the origins of the money.

When does the Predicate Offence end and the ML Offence start?

There may be an issue as to when the predicate offence ends and the ML offence starts.

The predicate offence must be complete before the money or property becomes criminal property

(This could be particularly relevant in corporate offences such as insider dealing and market manipulation):

Two cases on the point from England and Wales:

Loizou (17/6/05) (EW)

- This was an allegation of transferring criminal property (£87,000 in cash). There were 5 defendants.
- The transfer took place in the car park of a Holiday Inn in Essex
- There was evidence that L was involved in transferring the money
- A mobile telephone was seized
- There were messages on L's phone referring to cigarettes and their prices

The prosecution argued:

- the money was payment for cigarettes that had been imported without customs duty being paid.
- The money became criminal property because of the criminal transfer of the money.

The Court disagreed:

- The prosecution did not allege or provide evidence that the money was criminal property before it was transferred in the car park.
- Therefore, it did not become criminal property until after the transfer.

- So, L had not transferred criminal property as it did not become criminal property until after she had transferred it.

The Court gave an example:

X receives cash lawfully as wages

X pays some of the money to Y for a car

X knows that Y has stolen the car

X commits the offence of receiving stolen property (the car)

X does not commit the offence of transferring criminal property as the money paid for the car was not criminal property, it was lawful earnings

Y is in possession of criminal property (the money) after the transfer from X, as the property has become criminal property because it is Y's benefit from crime.

Haque (23 May 2019) (EW)

H was prosecuted for acquiring criminal property.

- There had been frauds on a number of vulnerable and old people by other defendants.
- The fraudsters claimed to be police officers and persuaded the victims to transfer money to them either in cash or by bank transfer.
- The fraudsters told two of the victims to make bank transfers to an account of H and his wife.
- The payments were £22,000 and 30,000.

The Court accepted the defence argument that the property did not become criminal property until after the transfer. Therefore, H did not acquire criminal property as it was not criminal before he acquired it.

Jurisdiction

Rogers (01/08/2014) (EW)

R was charged with converting £715,000.00 of criminal property obtained by fraud in England and Wales by receiving money into his personal bank accounts in Spain and then withdrawing it.

- This involved a fraud operated from telephone call centres in Spain or Turkey. The victims were in the UK.
- British nationals were employed to deal with phone calls.

- People in the UK would see adverts on websites either promising a debt elimination service or dates with people who would pay them for the date. They had to pay a fee to the fraudsters for the service.
- The fees paid by customers were paid into UK bank accounts of bogus UK companies and used to pay expenses.
- The profit was transferred to Spain.
- R was based in Spain.
- The customers paid a fee but did not receive anything in return.
- The phone numbers used were British ones so customers did not know they were dealing with call centres in Spain or Turkey.
- A total of about £5.7 million was obtained.
- R received about £715,000 transferred into accounts in Spain in small amounts to avoid anti-money laundering provisions.

He was convicted of money laundering.

The Court decided that there was jurisdiction to try R.

- The money obtained by the fraud in the UK became criminal property once it reached a bank account in the UK controlled by the fraudsters.
- It was still criminal property when it arrived in R's bank account in Spain.
- By receiving the money into the Spanish bank account and then withdrawing it he was converting the property.

Middleton and Rourke (31st January 2008)

M was convicted of drugs offences and both M and R were convicted of two counts of converting the proceeds of the drug trafficking.

The money laundering took place over 1999-2005

Count 1 was converting £103,000 from 1999-2003

Count 2 was converting £70,000 from 2003-2005

- In 2005 the police searched their home and garage and found drugs and cash.
- The police carried out an investigation to compare their legitimate income with expenditure over the period 1999-2005.
- The two defendants and the prosecution each instructed an accountant to check the figures.
- The three accountants agreed an "unexplained income" figure of £44,698.
- The prosecution alleged that M was a professional drug dealer and the two of them laundered between £44,698 and £173,000 over a five year period.
- The prosecution accepted that the two had some legitimate income from employment and letting caravans. They alleged that the defendants had grossly inflated their legitimate income figures.
- The prosecution said the amount of drugs found showed that the trafficking was very large.

The prosecution evidence was:

- A police officer who gave evidence of the quantity of drugs and a drug dealer's list and drawings of a hydroponics unit found at their premises.
- A forensic account who produced some calculations but explained that there was a lack of information to be precise.
- A man from the caravan park who explained how the caravan business worked and expected profits.
- A customs officer who had stopped and questioned M on his way to Spain with £10,000 in cash.
- Two people who M claimed to have worked for. They had no record of employing him and would not pay in cash.
- Their interviews. They made no comment to some questions.

M gave evidence claiming to have underestimated the amount he earned legitimately.

The defence claimed that the two counts were bad because they did not identify individual amounts of cash and only contained an estimate for the whole periods.

The Court agreed with the prosecution that it was impossible to identify specific amounts received and converted over the 5-year period.

The prosecution was entitled to use "general deficiency" counts rather than trying to identify individual amounts and including a count for each. In other words, they could roll up lots of acts of converting criminal property into a single allegation where it was not possible to show individual instances of converting property.

Money Laundering and Handling/Receiving Stolen Goods:

Wilkinson (22/6/2006) (EW)

A 19-year-old was arrested riding a mini motor cycle that had been stolen in a burglary.

He was charged with possessing criminal property under ML legislation, not handling.

The appeal court said that it is a question for the prosecution service to decide what they charge a suspect with.

However, here they could charge under the ML legislation but the court was entitled to comment and suggest a charge of handling would be more appropriate.