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GUIDE FOR THE MANAGEMENT OF SEIZED BUSINESSES

(DRAFT)

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Introduction

In recent times, as part of public policy to combat organized crime, law enforcement agencies have set out to identify, locate, and seize assets that are the proceeds, object, means, or instruments of crime, for the purpose of neutralizing and debilitating the economic arm of criminal organizations.

To that end, the states have created legislation designed to seize these assets—in the form of laws on money laundering; organized crime; financing of terrorism; and termination, deprivation, or *in rem* forfeiture—and legal concepts such as forfeiture.

At the same time, some countries have created specialized asset management agencies, primarily to administer and allocate these seized and forfeited assets.

In this context, some of these agencies have strategically included, within their organizational structure, units or departments specialized in the management of operational businesses. This is so that they will have the operational and functional ability to take over a company that has been seized by the relevant authorities and whose management by law must be transferred to an agency so that, above all, the company's regular commercial activity can continue while the judicial process is still underway. However, a proper seizure requires specific expertise or best practices, which we will try to address in this document.

General Objective

This document is intended to share best practices involving the management and taking into custody of businesses seized by the appropriate authorities, and to serve as a reference so that the region's various agencies specialized in the management of seized and forfeited assets can develop manuals or protocols regarding the seizure of businesses that are still operating.

A. STEPS PRIOR TO SEIZURE

1. Planning between the appropriate authorities and the agency for managing seized and forfeited assets.

It is important for the Public Prosecutor's Office or the relevant authority in charge of the seizure to coordinate, some days in advance, how the takeover of an operational company will proceed. To that end, the authority should provide, at the very least, information on the commercial or business activity in which the company is involved, so as to be able to identify the specialized professionals or technical experts who can take charge of managing the company, depending on their line of business.

2. Obtaining information on the investigation from the appropriate authorities.

It is very important to gather information from the relevant agencies involved in the investigation, to identify the reasons or motives that led them to the decision to impose a precautionary measure on the operational company.

A qualitative analysis can help to identify, at the outset, whether this is a front company used for criminal logistics or an operational company with ongoing commercial activity which is being used for money laundering. This, along with other recommendations, may determine whether it is viable for the company to continue its normal operations or whether, on the contrary, this is a "company on paper" with no active commercial operations.

It is worth remembering that if the investigation and seizure of the business falls under the criminal category of money laundering, it is likely that the seized business has an influx of illicit capital, expressly to hide illicitly acquired capital and introduce it into the financial system through the company's activities. This information is extremely important, since it will determine the company's viability to be managed and to continue operating, inasmuch as cutting off this illicit source of income will ultimately have repercussions on the normal course of its commercial activities.

3. Identifying the business and commercial establishment.

The investigating authority must identify, physically and legally, the commercial business it plans to seize and turn it over as a working company to the specialized asset management agency.

The registered name or legal credentials of the duly established company must be identified, as well as its partners, board members, and legal representatives. In this case, there should be a precautionary measure to freeze, forfeit, or make

a notation in the appropriate business registry, in order to suspend the owners' rights to exercise control over the corporation.

In addition, it is important to identify the real property where the company operates and establish whether it is owned by the company or leased. In the former case, the appropriate precautionary measure should be requested and registered in the real estate registry.

These measures often require further action to identify and ensure the continued validity of all aspects involved in complying with a company's operating requirements and any permits related to health, fishing, the environment, commerce, mining, and in general government concessions for the exercise of certain commercial or industrial activities.

Likewise, it is important for the investigation to identify the company's bank account numbers in the national financial system and, if possible, other financial products such as investment certificates, safe deposit boxes, or others. This is for the purpose of requesting the relevant precautionary measures so that these items will also come under the management of the specialized agency for the management of seized assets so as to not affect the company's normal operations and to maintain its financial integrity.

This includes the identification of subsidiaries, agencies, and in general the physical plant and—most important for managing the company in the future—where and who may be in possession of the documents and accounting and administrative records.

B. STEPS DURING THE SEIZURE

1. Documentation one should try to secure in taking over a company

At the moment a company is taken over, it is extremely important to secure and obtain certain documents that are necessary for the company to function. This may be the last opportunity to identify and collect such documents for the investigation itself and for the agency in charge of receiving and managing the seized business.

The possibility should be considered that the documentation is not in the location or that it has been destroyed or removed; thus the steps that would be taken if this were to occur should be established.

The documents one should try to obtain include those involving:

- a) **Commercial or business aspects:** related to the identification of the company's commercial or industrial activity, its business strategy, clients, providers, way of operating, etc.
- b) **Organizational aspects:** related to the company's organizational structure, human resources, processes and means of production, assets in general.
- c) **Financial aspects:** related to the financial/ownership situation, record-keeping, accounting documents, cash flow, account and investment balances, loans, mortgages, collateral, in general the company's assets and liabilities.
- d) **Fiscal or tax aspects:** income-tax returns and billing documentation filed with the Ministry of Finance or the tax collection agency. These could provide important information on the financial returns reported for payment of the company's taxes.
- e) **Legal or juridical aspects:** evaluation of aspects involving compliance with operational requirements for the company, permits related to health, fishing, the environment, trade, mining, and in general state concessions for carrying out certain activities.

2. Preliminary analysis for the eventual management of the seized business.

Once the agency responsible for managing the seized assets receives an operational business, it should conduct an analysis of all the aspects mentioned above, in order to establish the viability of continuing the company's operations.

If it was not possible, through this analysis, to identify an organizational structure (list of employees, payroll tables, accounting records, cash flow, providers); if the tax returns do not match the company's supporting documentation; or if there has been noncompliance with legal requirements for undertaking some type of commercial or industrial activity, these could be indicators that this is a front company and that therefore it does not have the capacity to operate.

If, on the other hand, some of the aspects mentioned above could be identified in full or in part, the viability of continuing the company's normal operations should be analyzed and evaluated.

The experience in seizing these businesses indicates that, in general, accounting or financial information is partial or nonexistent. The agency in charge of managing the company therefore needs to reconstruct, to the extent possible, its financial status to get an idea of the operating costs and identify the financial returns. This may be possible to identify only after the first few months of operation once the business is seized.

If in the initial analysis and evaluation or over a period of time in which the company is operating it is found that the operating costs are very high, or if it is determined that commercial or industrial operations definitely cannot continue because the company is not self-sustaining, a decision should be made to close the business, using the money in bank accounts to pay outstanding creditors and providers and settle obligations to the employees.

C. STEPS SUBSEQUENT TO THE SEIZURE

1. Process of taking over the seized business

- a) **Meeting with the company's entire staff:** At the time of the takeover, the company's employees may be confused about the seizure of the company and also impacted by the entry of authorities from the Public Prosecutor's Office, the police, and others.

Generally, the employees have nothing whatsoever to do with the possible illicit activity being carried out through the company; thus it is extremely important to hold a general staff meeting so that uncertainty about the closure of operations and layoffs of workers is not hanging in the air.

Such a meeting is essential to give notice that, as of that moment, the company has been taken over and falls under the management of the agency specialized in managing seized and forfeited assets, and that the cooperation of all employees is required so that the company can continue to operate normally. It is important to mention to the employees that their labor rights will be respected and that they will receive their regular salaries.

- b) **Company's self-sufficiency:** The agency specialized in managing seized and forfeited assets should attempt to make the company self-sustaining, based on the analysis of the factors explained above, ascertaining the operating costs and financial returns.

If it turns out, based on that examination, that the company cannot continue to operate, steps should be taken to close operations and to use the money in its accounts to start settling with the workers in accordance

with labor laws. Sometimes the need for this cannot be identified immediately but only after some months following the takeover; therefore, provisions have to be made for this step.

- c) **Infusion of capital to continue operations:** Sometimes the seized businesses need an infusion of capital to continue or to normalize their commercial and industrial activities. On this point, some specialized asset management agencies that have a specific structure in place for handling the administration of seized businesses consider it a best practice to use funds derived from forfeiture judgments for just that: to try to ensure that the management of seized and forfeited assets can be self-sustaining. This approach aims to reduce the use of public funds for this purpose.

Using this special fund for maintenance of the seized assets, in the case of businesses, involves the concept of a “reimbursable fund.” In other words, if the examination of the business determines the viability of continuing its normal activity and if its financial performance is favorable, the specialized agency can inject the necessary capital from the special fund, through a “bridge loan” to shore up the company so that it can continue or improve its operations. This should be reimbursed to the fund, calculating the time and monthly payment based on financial performance.

The aim of this is to preserve the company so as to ensure that it can be a source of jobs and boost the national economy, keeping in mind in any case that when a forfeiture or expiration of ownership is ordered, the economic benefits will be greater for an operational company.

- d) **Substitution of the company’s general manager or administrator.** Immediately after a company is seized, its general manager and/or administrator should be substituted by someone hired by the specialized asset management agency, taking into account the company’s field of specialty, in order to take financial and supervisory control of the company.

The salary of the new manager or administrator will come out of the company’s own financial performance. It should not exceed the salary the substituted manager or administrator was earning, since the person’s working relationship is with the company and not with the agency specialized in managing seized and forfeited assets.

In some countries, managers or administrators work under financial incentives tied directly to a company’s production, volume of sales, or financial performance.

D. STEPS INVOLVING FOLLOW-UP AND CONTROL

- a) **Taking financial and supervisory control of the company.** One of the most important factors in managing seized businesses is to take financial and supervisory control. This is done, first of all, through the involvement of the manager or administrator the appropriating agency decided to place in the job.

These professionals should send the accounting statements and supporting documentation to be audited and monitored by the specialized asset management agency. Controls should also be established with regard to management of cash, deposits, checks, payments, income from merchandise, product sales, etc.

In taking financial control of the company, the company's authorized signatures on bank accounts should be substituted for those of the director or person in charge from the agency specialized in managing seized and forfeited assets. In many cases, the relevant authority needs to be asked to unfreeze the bank accounts for them to be administered.

- b) **Identifying the company's danger areas and improving control.** One important factor to prevent theft or fraud in seized companies is the identification of danger areas, through a comprehensive analysis, to establish risk indicators and warning signs that enable timely detection of theft or fraud.
- c) **Establishing management indicators or other types of indicators.** In addition, it is important to identify and/or define a series of indicators in the seized business that make it possible to measure and control whether goals are being met and evaluate management so as to take corrective actions in a timely manner, if the intention is in fact to effectively and efficiently manage the business.

In any case, it will be necessary to establish and develop management indicators for control of operations, formulation of overall budgets, cash management and budgeting, financial audits, fraud prevention alerts, etc., in order to plan for the needed funds and create an efficient management of the seized business under the administration of the specialized agency.