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Organization of American States

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Secretariat for Multidimensional Security

**XLIV Meeting of the Group of Expert
For the Control of Money Laundering
September 25 -26, 2017
Asunción, Paraguay**

**OAS/Ser.L/XIV. 4.44
DTC/LAVEX/doc.7/17
September 22, 2017
Original: Spanish**

**STUDY ON BEST PRACTICES FOR THE COORDINATION BETWEEN ADMINISTRATIVE AND JUDICIAL
AUTHORITIES WITH THE SPECIALIZED AGENCIES FOR THE ADMINISTRATION OF SEIZED AND FORFEITED
ASSETS**

2017



Background

The Sub-Working Group on Forfeiture and International Cooperation in compliance with the current triannual strategic plan from the Group of Experts, worked in the line of action on *Coordination between the administrative and judicial authorities for the management and administration of seized assets* and for that purpose the present study was made: “*Study on best practices for the coordination between administrative and judicial authorities with the specialized agencies for the administration of seized and forfeited assets*”.

The study aims to explore and provide information on best practices for the proper reception of assets that are subject of seizure by the competent authorities, considering that the success of the management and administration of the assets depended on the measures that can be anticipated and implemented by the intervening authorities during the patrimonial investigation, during the reception of the assets and its subsequent administration.

The experience of some States has shown the importance of establishing a strategic planning between the agencies that makes the seizure and the entities in charge of the administration of the assets. Such coordination actions will make it possible to anticipate expenses, and the necessary logistics according the nature and particularities of the assets, as well in making accurate decisions, especially in the case of assets of complex management¹, because in these cases a special operational and logical coordination is indispensable, especially if it is intended to continue with the economic activity with the purpose of maintaining the assets productivity and generate sources of employments and anticipating claims against the State in an eventual return or sale of a productive asset in case of its seizure.

For this reason GELAVEX has identified the need to work in the subject and considers that the experiences of the States, the work material and the legislations of the countries that have progressed in this subject are valuable and therefore in this study it is intended to do a recompilation and an analysis that will be shared within the Group and to serve as a reference to the Member States.

¹ Hotels, livestock, shopping centers, farms, businesses, companies in operation, agricultural activities, among others.



GENERAL OBJECTIVE

To Identify the best practices to promote the coordination between administrative and judicial authorities with the specialized agencies for the administration of seized and forfeited assets or with the entity in charge of this function, aiming to optimize and develop procedures to identify the relevant and necessary information to efficiently transfer seized assets, maintaining the productivity of the assets and preserve its physical condition until its final destination is determined by the competent judicial authority and consequently, strengthen the rule of law.

SPECIFIC OBJECTIVES

1. Identify which are the actors who must coordinate actions to ensure the overall process of reception of the assets.
2. Explore the duty of collaboration of the actors who intervene previously and during the seizure process, until the delivery of such assets to the specialized agencies or the entity in charge of such function.
3. Determine the juridical responsibilities of the specialized agencies to participate in coordinated actions along with the different authorities that intervene in the financial investigation, asset seizure, and after the delivery and reception of the assets.
4. Highlight the importance and need for an effective collaboration between the different actors to ensure the reception of the assets or active businesses and minimize future difficulties in the administration of such assets.
5. Determine what are the main aspects that must be coordinated during the financial investigation, prior to the seizure, during the reception of the assets and until their definitive delivery to the entity in charge of its administration and disposal.



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6. Promote the implementation of rules or legal revision, protocols and/or manuals that settle the procedure to facilitate the coordination between the administrative and judicial authorities with the specialized agencies for the administration of seized and forfeited assets or with the entities in charge of such function.
 7. To promote the normative implementation or legal reforms, actuation protocols and / or procedures manuals that benefit the coordination between the administrative and judicial authorities with the specialized agencies in the administration of seized and forfeiture assets or with the authorities in charge of that function.

METOLOGY

As mandated, the Sub-Working Group on Forfeiture and International Cooperation must present a *Study on best practices for the coordination between administrative and judicial authorities with the specialized agencies for the administration of seized and forfeited assets*.

The present study was carried out by the Sub-Working Group on International Cooperation and Forfeiture, which had the support and the experience of the BIDAL project for the elaboration of this document, as well as the experience and best practices indicated by the countries that sent their responses² to the questionnaire that was circulated among the delegations in advance and generated the necessary inputs for its development.

On the other hand and considering that the Group knows about the countries that have specialized offices for the administration of assets and there are other countries where the work is carry out by the prosecutor or judge, or another institution that does not dedicate itself exclusively to this work, but has valuable experiences in coordination. It was proposed to invite them to the prior meeting to participate actively in the presentation of their realities, and it was reserved a space on the plenary's agenda for a meeting to promote

² Costa Rica, El Salvador, Guatemala, Honduras, México, Monserrat, Panamá, Perú y Trinidad & Tobago.

the discussion on the subject and present a concrete case in order to complement the information of the present study and accomplish with the planned objectives.

RESULTS

At the beginning, in compliance with the recommendations of this technical hemispheric forum and with different international conventions of the United Nations against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the fight against corruption and transnational organized crime, the countries members of the Organization implemented national criminal policies with special attention on issues related to the seizure and forfeiture of the instruments and the proceeds of crime even developing special forfeiture processes inside and outside the criminal proceeding.

After years of experience on the implementation of these policies, countries have identified a missing link in the chain that would allow the improvement of physical conditions of seized assets, but especially those related to the efficient and effective management of complex assets; for this reason, the need to have an entity specialized in the administration of the assets was identified, in which most cases is different from the competent authority that conducts the investigation and executes the seizure of the assets, in order to generate more transparency and independence in relation to the institutional nature.

In this framework, this technical group of experts have identify the need to execute coordination actions between the authorities in charge of the investigation and assets seizure with the specialized agencies for the administration of seized and forfeited assets that would allow the improvement of the reception processes and avoid any problems in its subsequent administration. In this sense, the BIDAL Project identified in 2010 this important aspect of interinstitutional coordination, which was mentioned in the “Document of Best Practices for the Administration of Seized and Forfeited Assets”, remarking the importance of the early planning and the principle of discretion from the competent authority in the application of the precautionary measure, mentioning the following:

“Where possible, prior to restraint or seizure, assets should be valued and analyzed with a view to anticipating the costs and means required for their future management and so that the competent authority may

determine the appropriate preventive measure. This should be done according to the criteria of reasonableness, discretion, and objectivity.

The relevant authority should not be obliged to seize any identified asset, but should have sufficient discretionary power to determine which assets to seize, as well as to establish different mechanisms to limit the number of assets, thus preventing their transfer”.

However, there may be some questions in the practical application of above recommendation that should be taken into consideration, for example: 1) what kind of information can be shared among institutions without jeopardizing the investigation? 2) What kind of information considered vital is required for the adequate reception of complex seized asset? 3) With how much time of anticipation the precious coordination must be done? 4) It is possible to have other administrative authorities that collaborate with the proper reception of assets? 5) Is necessary the seizure of the physical assets in all the cases and its later a transference to the administrative agency?

In this regard, the majority of the countries affirm the existence of a coordination prior to the delivery-reception of a assets subject of seizure between the competent authority and the specialized agency for the administration of assets, however it is necessary to specify some important aspects that provide valuable information for countries to improve their relationship and interinstitutional cooperation. The responses of the countries surveyed categorially demonstrate that according to the assets’ complex nature, this coordination must be executed with **enough anticipation** so that the administration agency takes the pertinent provision in time for the proper reception and management of the asset that is intended to be delivered, especially in the case of assets of complex management like, for example, agricultural assets³, which the suspension of their activities is impossible without altering their productive phase or commercialization, especially those related to the breeding, feeding and production of bovine animals, equine⁴, poultry, pork⁵ or other productive activities of its derivate for commercialization. On the other hand,

³ Honduran experience with the production of plantations and commercialization of OKRA.

⁴ Costa Rican experience in the delivery and reception of horses and subsequent sale.

⁵ Experience of a case in Monserrat on the reception and subsequent auction of pigs seized.



any illicit activity from the companies of business in operation subjects of seizure⁶, which must be taken the necessary provisions to establish the financial statement or general balance in order to have this first “X-Ray” as an initial balance the “financial health” of the company or business in order to establish the financial conditions in which the company is received to make the management decision that correspond to maintaining its productivity and the employment sources or otherwise, initiate the process of technical, legal and tributary closure of the same according to the internal processes of each country.

In this matter, Mexico shared with us the following practical experience in the DELIVER-RECEPTION OF a MERCHANT COMPANY

“Under administration: March 2014 – June 2017

Main activity: Extractive industry

The Company was a contractor of the Mexican State that provided specialized services within the extractive sector. The Office of the Attorney General magisterially assured the company, which was made available to SAE⁷ for its administration while resolving its criminal proceedings.

In general, the administration of assured companies require to document all the possible actions that SAE performs within its different functions 1) administrate, 2) visitor, 3) conciliator and 4) syndic; in a way to obtain evidence of the conditions that the assured company was received. In this case, the company was received in critical situations that were not documented:

- *Disabled Company*
- *Worker’s Strike threat*
- *No cash or cash flow and therefore inability to pay*
- *General non-fulfillment of obligations*
- *Boats mostly chattered*
- *Operations on an existing contracts with a parastatal company*

⁶ Experience of Mexico in the reception of a contracting company of the Mexican State that provided specialized services in the extractive sector.

⁷ Service of Administration and Disposal of Assets (SAE), specialized agency in Mexico for reception and administration of insured assets.

- *Without an internal control system*

In order to attend these cases, the SAE has developed tools that allow to make an initial diagnosis to promote transparency and document the company's situation at the moment of reception. The diagnosis identified that the company was in a situation of non-compliance with obligations and insolvency, which was informed to the Attorney General's Office. This instance presented a resource to request that the company should enter to the Trade Competition. Subsequently, the Judicial Branch instructed the visit and the corresponding audit evidenced of the insolvency situation. Consequently, the mercantile authorities declared the Mercantile Competition in stage of conciliation in order to preserve the company. During the competition's phase the shareholders submitted a Conciliation Agreement in two occasions, which caused the prolongation of the court proceedings, exceeding the terms of the law.

During the company's reception, the initial diagnosis turned out to be extremely relevant because it allowed the identification, from an early phase, of all the difficulties faced by the company, as well as the available information. Also, thanks to the diagnosis and a constant communication, the SAE achieved an alignment with the interest of the agency that transferred the company and it was possible to reduce the contingencies by documenting the management in each of the roles.

The SAE's administration allowed obtaining settlements and releases of responsibilities, as well as to safeguard the Federal Government and its public workers due to its process of insurance and administration of the company, the execution of the commercial contest and its return. This ended the SAE's mandate".

On the other hand, the experience of the Office for the Administration of Seized Assets (OABI) of Honduras pointed out: *"Although it is vital that prior to the process of seizure of the asset a prior COORDINATION is needed, in Honduras, such coordination is done in a peculiar way, in order to not hinder the investigation progress, the coordination must be done a week before, not allowing for the necessary time to develop any type of strategy for the asset's reception, because often the content of the assets is not revealed and thus there are problems such as labor commitments, or a complete strategy is not correctly designed for giving continuity to the administration of Complex Assets or Companies."*



Not only is it important and indispensable to prepare previous coordination and planning between transferring authorities, but also that the **quality and precision** of the information shared, mainly focused in the identification and legal nature of the asset, its condition, detailed description, registration information and economic or commercial activity, and that is necessary for its reception and mainly to determine the correct administration strategies, timely and necessary so that the assets continue to being productive.

Other important aspect that must be considered is **limitations** according to the information that must be shared between the agencies and basically, it must not compromise the investigation but allow to obtain sufficient general information so that the entity in charge of the administration is prepared in an objective and technical way for the process of delivery-reception process. Costa Rica⁸ made the following statement: *“Respecting the confidentiality of the information, the specialized agencies for the asset administration receive data in first instance on the procedural interest of assets in relation to the general aspects of the investigation, modus operandi, existence of front men who gave their name as owners or administrators, and, if there already is information on the state of the assets, either because there is a photographic fixation or because the inspections carried out by the investigative authorities allow to report on their state of conservation, use and maintenance.*

...those aspect that are specific to the criminal conduct investigation, which have no relation to the assets administration. An adequate fragmentation of the information will allow, in case of leakage, the possible areas that have caused the leak to be identified”.

In the same way is interesting the information provided by the Service for the Administration and Disposal (SAE) of Mexico when it refers to matters of **validity, viability and diagnosis**, for the assets reception from transferring authorities *“... SAE coordinates with the ministerial / judicial authorities previously to the delivery-reception of seized and forfeited assets. Prior to signing of a delivery-receipt report on seized or forfeited assets, the coordination between SAE and the ministerial / judicial authorities’ concerns activities to validate the inventory of assets and ensure the viability of the transfer, among others.*

⁸ Costa Rican Institute on Drugs, Asset Recovery Unit, entity in charge of the administration of the assets seized from the crimes of money laundering, drug trafficking and organized crime.

As for the insured companies, SAE must implement an initial diagnosis to know its financial situation and also a viability diagnosis to determine if its activities are affordable. Both task can be develop by specialized third parties.”

The above must be understood that the act of delivery-receptions of the assets between transferring authorities must be **perfected** once the requirements are validated according to the nature of the assets that should comply with the transferring competent authority so that its administration to be viable and responsible. Another example is the Honduran case where a number of requirements needed must be accomplish by the Public Prosecutor’s Office to initiate the delivery-reception process indicated in the Regulation on the Administration of Seized and Forfeiture Assets of the Office for the Administration of Seized Assets (OABI).

Another important aspect from this analysis, according to the experience of the countries is the importance of the **timely** delivery-reception of the assets, that is the time elapsed between the physical seizure of the asset and the delivery-reception of the same, which must be in the shortest time possible in order to be **expedient**⁹ for its proper, efficient and effective administration; if the asset is not transferred in a timely manner, probably the administration, maintenance and the asset preservation will become complex or impossible to safeguard leading to loss or the asset’s destruction, in which every institution involved must face the administrative responsibilities, civils and criminals that correspond.

Besides of being timely, the measure must be **necessary**, some legislation have developed several applications forms for precautionary measures on assets subject to investigation, in accordance with the principles of reasonableness, proportionality and objectivity noted above. In some countries it is not necessary to execute the physical seizure of the asset in all cases, and legal figures such as preventive notation, seizure, assurance and immobilization, in the respective national registry, are sufficient to prevent their alienation and thereby preserve and subject the asset to the judicial process guaranteeing the results of the trial, without its administration being needed. This will avoid incurring administrative expenses, maintenance and its preservation. However, the application of such measure could be implemented only when the assets are not used for developing illegal activity or when a bad message it’s being sent to the

⁹ What is done or happens at the most appropriate time.

society, showing that the criminals continues to taking advantage from the assets, especially in cases related to corruption investigations.

An example of above is what Peru said about its practical experience. *“Not having complete information regarding the assets to be received is a limitation; as well as being summoned with a short-time to the expected date for the seizure, which doesn’t allow gathering enough supplies and specialized personnel”.*

All of the above, will allow the specialized agency for the administration of the assets to determine in time, the necessary technical staff to carry out the asset transference process and to anticipate the need to count on specialized staff from other governmental institutional or the hiring of specialized third parties to collaborate and support the process of transfer and subsequent administration of the assets. This happened in the majority of the countries surveyed, affirming the experience in Guatemala: *“It is coordinated with Ministry of Agriculture, Livestock, and Food when plantations or livestock is found, with the National Council of Protected Areas, in case of finding protected species; with the Registry of Cadastral Information, when the asset is not registered, also, with the National Geographic Institute to establish the geographical coordinates; as well the participation of the Criminal Prosecutor of the Public Ministry in certain cases”.*

In addition to the above, is important to remark that in case of companies or seized business, practical experience in countries such as Costa Rica, Honduras, Monserrat and Mexico mentioned that they have coordinated with other governmental authorities that have intervened in the delivery-reception of such assets such as tax and labor supervisory authorities, as well as public universities with an emphasis on agriculture and livestock, taking advantage of the infinity of subjects and specialties that the state has with all its institutions.

With respect to the above, Mexico points out in the explanation of the case study.

In order to develop the aspect mentioned above, the countries provided information on the limitations that exist, which we must take in consideration in order to improve the inter-agency coordination activities though practical experience and feedback.



Costa Rica: *"The information is not always provided with necessary time of anticipation that the agencies for the administration of assets requires, when they count on it. Sometimes, the information is not sufficient, since they have omitted relevant data that should have been obtained by the investigative authorities. Due to the urgency to carry out the seizure, decisions on seizure and reception must be done with incomplete information. Also it is necessary to count with adequate and uniform protocols in order to achieve a coordinated work between investigative national authorities in a national level and agencies for the asset administration."*

Honduras: *The time that is taken to coordinate all the operations, the amount of information on the properties' registration; to consider a strategy previous to the receptions of the assets are aspects that are really indispensable in order to improve the coordination of the operation."*

Guatemala: *"To have manuals for the delivery of assets"*

México: *"In the case of the DPP, in which the diligences are not remitted in which the probable defendants are involved in the commission or interventions on the crime investigated, nor resolutions in which their interventions in the commission of the relevant criminal acts are determined. By the nature of the inquiry, SAE considers as a limitation that there is not enough time to have a descriptive knowledge of the assets or companies. This implies complicated transfer for the assets' managements.*

Montserrat: *"The cost of the maintenance may be prove more costly thus there is nothing that can be confiscated. Adequate facilities"*

Panamá: *"In the exercise of each entity there is one (1) ingle limitation that might affect the development of this duty: LACK OF COMMUNICATIONS and LOGISTIC MISTAKES."*

Peru: *"Only when the investigation has already been prosecuted under the determinations provided by the Law, PRONABI as an administrator has received assets that instead of generating an economic benefit to the State through its administration, has generated costs. For example, when PRONABI receives seized mobile*

phones in poor preservation and operational condition; or when real states are delivered under the seized condition.”

All the previous national experiences reaffirm the need for the present study regarding the need for a previous coordination between the investigative authorities¹⁰ and those in charge of the administration of the seized and forfeited assets, with the sufficient anticipation so that the relevant, timely and necessary information is shared to execute the delivery-reception of assets in an efficient way and that allows as serious and responsible administration through established valid acts in internal regulations and a viable agreements for the initial diagnosis of the assets.

Finally we must remember and understand that the figures of seizure, forfeiture and any other special procedure such as in rem forfeiture and civil procedures entails a **process** that begins with the patrimonial investigation, the identification and seizure of assets and the efficient administration; during this process several institutional participate, establishing a chain of procedures between them that must conclude with the forfeiture or the return of the asset ordered by the competent judicial authority, so the interinstitutional coordination among the institutions turns out to be indispensable for the success and the preservation of the seized asset in the same or better conditions, so this processes chain must be developed as strong as its weakest link¹¹.

¹⁰ Prosecutors and investigators.

¹¹ Frase del filósofo escocés Thomas Reid en el siglo XVIII.