

## Mutual Legal Assistance

### G20 ACWG Note prepared by the OECD and the UNODC

*G20 countries committed in action point 8 of the G20 2013-2014 Anti-Corruption Action Plan adopted November 2012 to “strengthen international cooperation to assist our own and others’ efforts to tackle corruption and bribery and facilitate asset recovery.” Following up on these commitments, the G20 Anti-Corruption Working Group, at its 25-26 February 2013 meeting in Moscow, asked the OECD in collaboration with UNODC, to prepare High Level Principles on Mutual Legal Assistance in Corruption Cases.*

*The present note builds on the Manual on Mutual Legal Assistance and Extradition published by the UNODC in 2012, the Typology on Mutual Legal Assistance in Foreign Bribery Cases adopted by the OECD Working Group on Bribery (the WGB) in November 2012,<sup>1</sup> the 2013 Thematic Report for the implementation of Article 46 of UNCAC.<sup>2</sup> It also builds on information collected through the first review cycle of the Mechanism of Review of Implementation of the United Nations Convention against Corruption (UNCAC), as well as Phase 3 monitoring reviews of Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).*

*It provides background information on practices in G20 countries and beyond to address the various challenges in the provision of mutual legal assistance, and identify High-Level Principles on MLA in Corruption Cases, presented in Annex.*

### Introduction

1. Mutual legal assistance in criminal matters is a process by which countries seek and provide assistance in gathering evidence for use in criminal cases. Article 46.1 of the UNCAC provides that “State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.” Article 9 of the Anti-Bribery Convention acknowledges that an important element in the battle against foreign bribery is countries’ ability to obtain information and evidence from one another through mutual legal assistance (MLA) mechanisms.

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<sup>1</sup> The full text of this Typology is accessible on the OECD website at:  
[www.oecd.org/corruption/typologyonmutuallegalassistanceinforeignbriberycases.htm](http://www.oecd.org/corruption/typologyonmutuallegalassistanceinforeignbriberycases.htm)

<sup>2</sup> See  
[www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-31May2013/V1382127e.pdf](http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-31May2013/V1382127e.pdf)

2. For several years, different legal and operational aspects of MLA have been the subject of discussions in international fora, amongst practitioners from States participating in the United Nations congresses on crime prevention and criminal justice, the annual sessions of the United Nations Commission on Crime Prevention and Criminal Justice, and the intergovernmental bodies supporting the implementation of the United Nations conventions against corruption and transnational organized crime. MLA in corruption cases has been the specific object of discussions among prosecutors and law enforcement officials from the OECD WGB member countries and observer countries, focusing on the particular problems that hinder MLA in foreign bribery cases. As a result of these problems, investigations and prosecutions may, for example, be halted or forced up against statute of limitations deadlines or convictions declined due to lack of evidence. Through its discussions in the context of the Typology exercise and its monitoring work, the WGB was able to identify potential solutions and best practices to overcome such MLA challenges. In addition, the meetings of the United Nations bodies mentioned above have generated, over the years, a corpus of useful recommendations to promote best practices and enhance efficiency of MLA mechanisms. These form the basis of the Principles identified below. Many of the Principles identified here are applicable to MLA generally and are not specific to foreign bribery investigations.

#### **I. Legal basis for providing MLA in bribery cases**

3. An effective legal basis is the first step to ensuring that countries can effectively, give, receive and use MLA. The legal basis for MLA can be found in multilateral or bilateral treaties, as well as in domestic legislation. Assistance may also be afforded on the basis of the principle of reciprocity:

- ***Multilateral anti-corruption treaties***

4. In the area of anti-corruption, several treaties create a binding obligation to cooperate among States Parties. Ratification of these treaties can drastically simplify the provision of MLA, as these instruments may provide a legal basis for international cooperation among Parties.

5. Article 46 of the UNCAC – which has been ratified by 166 Parties as of the time of this paper – provides a legal basis for MLA in relation to all offences covered under the Convention. This includes the offence of bribery of domestic (Article 15) and foreign public officials (Article 16). If two State Parties are not bound by a relevant MLA treaty or convention, the UNCAC operates as a legal basis for affording such assistance. The UNCAC details the types of assistance that may be requested as well as the conditions and procedures for requesting and rendering assistance.

6. The OECD Anti-Bribery Convention is another international instrument containing provisions on MLA, in its Article 9, requiring Parties to provide prompt and effective assistance to other Parties to the fullest extent possible. The Anti-Bribery Convention is focused on bribery of foreign public officials, and thus only addresses assistance in relation to foreign bribery.

7. The United Nations Convention against Transnational Organized Crime (UNTOC), may also be relevant in transnational corruption cases. The UNTOC requires States Parties to criminalise the active and passive bribery of domestic public officials (Article 8.1) and further asks countries to consider criminalising bribery of foreign public officials (Article 8.2). The Convention provides the legal basis for MLA in relation to offences established in accordance

with the Convention (Article 18). The scope of application of 3 18 of the UNTOC is fairly broad since States Parties are also obliged to “*reciprocally extend to one another similar assistance*” where the requesting State has “*reasonable grounds to suspect*” that one or some of these offences are transnational in nature, and that they involve an organized criminal group. The UNTOC requires only reasonable possibility and not evidence based on facts with respect to transnationality, as well as involvement of an organized criminal group, thus establishing a lower evidentiary threshold. The UNTOC thereby intends to facilitate MLA requests for the purpose of determining whether the elements of transnationality and organized crime are present and assessing whether international cooperation may be sought for the necessary investigative measures, prosecution or extradition.

8. Several regional anti-corruption instruments also address the topic of MLA among their members in relation to corruption offences. These include the African Union Convention on Combating and Preventing Corruption, the Council of Europe Criminal Law Convention on Corruption and the Organization of American States’ Inter-American Convention against Corruption. In Southeast Asia, the Treaty on Mutual Legal Assistance in Criminal Matters, although not specifically focused on corruption, also obligates Parties to render to one another the widest possible measures of MLA in criminal matters, subject to domestic law. A number of regional treaties regarding MLA (not specifically for corruption-related offences) may also apply to investigations/prosecutions of corruption.

- ***Bilateral treaties***

9. Bilateral MLA treaties (MLATs) between two countries are increasingly being concluded as the need for more certainty in international cooperation has grown. An MLAT can be an efficient way to facilitate MLA, not only because such an agreement is designed to meet the specific needs of the parties, but also because the consensus of only two parties is required to amend the treaty.

10. Their general purpose is to be specific enough to ensure that evidence obtained between the parties to the MLAT is obtained quickly and efficiently, in a form that is admissible in the courts of the requesting country. To this end, an MLAT should, inter alia, set forth the channel by which communications regarding MLA should be sent, establish the types of offences for which MLA is available and the types of MLA available to the parties, as well as address potential obstacles to MLA, such as whether the dual criminality requirement must be met (see below).<sup>3</sup>

- ***National MLA legislation***

11. Countries usually have national legislation to complement multilateral or bilateral treaties, or to serve as a legal basis where no treaty relationship exists with requesting

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<sup>3</sup> The United Nations has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolutions 45/117, annex, and 53/112, annex), which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States representing different legal systems. See [www.unodc.org/pdf/model\\_treaty\\_mutual\\_assistance\\_criminal\\_matters.pdf](http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf).

countries. In developing or reviewing such legislation, countries should ensure the greatest possible flexibility to enable prompt and effective assistance.<sup>4</sup>

- ***The principle of reciprocity***

12. The principle of reciprocity may be a general requirement under domestic law on international cooperation, or a legal basis for cooperation in the absence of a treaty. Where reciprocity is the legal basis, then MLA may be refused where the promise of reciprocity cannot be made by the requesting country.<sup>5</sup>

- ***Limiting the grounds for refusal of MLA***

13. Many countries traditionally provide for grounds for refusal of MLA where public interest or the security of the State may be affected, or, more generally, where this would be contrary to domestic laws. Risks for the liberty or life of the targeted person, or grounds related to the protection of human rights may also be invoked. In addition, some countries include requirements of dual criminality and/or reciprocity. As States have become more familiar with the provision of MLA and more appreciative of its importance, there has been a clear trend towards limiting the scope of any such conditions or towards changing formerly mandatory conditions into optional conditions.

14. Dual criminality may be a reason to refuse MLA altogether or, in some instances, only to refuse access to certain coercive measures.<sup>6</sup> By allowing for a broad interpretation of the dual criminality requirement, countries can greatly facilitate the provision of MLA. Such interpretation should be based on the *conduct* that is being prosecuted, and not the technical terms or definitions of the offence.<sup>7</sup>

15. Where, as mentioned above, the principle of reciprocity is relied on for providing MLA, countries should aim to interpret this principle as broadly as possible, by considering a country's expressed willingness to provide reciprocal assistance in the future as sufficient to respond to the initial MLA request.

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<sup>4</sup> Model legislation on MLA has also been elaborated by the UNODC in accordance with General Assembly resolution 53/112 of 9 December 1998.  
See [www.unodc.org/pdf/legal\\_advisory/Model%20Law%20on%20MLA%202007.pdf](http://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf).

<sup>5</sup> In most cases of the 34 States parties to the UNCAC covered by the Thematic Report on the implementation of Chapter IV of the Convention during the first and second years of the first cycle of its Review of Implementation Mechanism, MLA could be afforded in the absence of treaties based on the principle of reciprocity on a case-by-case basis.

<sup>6</sup> The UNCAC requires States parties, where consistent with the basic concepts of their domestic systems, to render assistance even in the absence of dual criminality, if such assistance does not involve coercive action (Article 46.9(b)).

<sup>7</sup> Article 43.2 of the UNCAC explicitly provides, in this respect that:  
*"In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties."*

Commentary 32 to Article 9 of the Anti-Bribery Convention similarly addresses the issue of dual criminality by providing that:

*"Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention."*

16. In corruption investigations, as with most economic crime, access to banking records and related information is crucial. For this reason, countries should not decline to render MLA on the ground of bank secrecy. This is explicitly prohibited under Article 46.8 of the UNCAC and Article 9.3 of the Anti-Bribery Convention.

## **II. Effective institutional framework for MLA**

### **• Designating a Central Authority and notifying treaty partners**

17. A first and essential step to establishing an effective institutional framework is the designation of a central authority. Many international conventions, with different areas of focus, require States Parties to designate a central authority for the purpose of providing MLA for offences covered by that particular Convention. Increasingly, MLATs require States Parties to designate a central authority to whom requests can be sent, thus providing an alternative to diplomatic channels. The judicial authorities of the requesting State may then communicate with the central authority directly. Today, to an increasing degree, direct channels are being used: in this case, officials in the requesting State may send the request directly to the relevant officials in the requested State.

18. Rather than adopting a fragmented approach, where a central authority is designated for its expertise in a particular field, it is preferable for countries to designate a single central authority, with expertise in the area of MLA generally, rather than a specific category of offences. In this way, law enforcement as well as other central authorities can more easily and immediately identify which institution to turn to in a foreign country when sending an MLA request.

19. The UNCAC and OECD Convention both specifically require each State Party to notify the Secretary General of each respective Organisation of the central authority designated by it to serve as a channel of communication for MLA purposes.<sup>8</sup> In addition to the name of the central authority, it is important that Parties ensure that the correct contact information is provided, including telephone, e-mail and fax details, and updated as necessary. The respective Organisations should make such information easily accessible to State Parties, to facilitate prompt contacts between central authorities.<sup>9</sup>

### **• Ensuring resources for the provision of MLA are adequate and efficiently used**

20. As noted above, central authorities should be staffed first and foremost with practitioners with training and expertise in the area of mutual legal assistance, rather than with a particular category of offences. Knowledge of the procedural requirements under their national MLA legislation, as well as of domestic criminal procedures will allow these practitioners to efficiently respond to, dispatch MLA requests to competent authorities in the country and monitor their progress (see discussion on timeliness below).

21. Consistency of personnel in the central authorities, as well as in law enforcement, is essential to building up sufficient trust and expertise. It is therefore a major contributor to the

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<sup>8</sup> See Article 46.13 of the UNCAC, Article 11 of the OECD Anti-Bribery Convention, and Article 18.13 of the UNTOC.

<sup>9</sup> See the Online Directories of Competent National Authorities maintained by UNODC at [www.unodc.org/unodc/en/legal-tools/directories-of-competent-national-authorities.html](http://www.unodc.org/unodc/en/legal-tools/directories-of-competent-national-authorities.html).

quick and successful cooperation between countries during corruption investigations. Such consistency eliminates delays caused by having to educate new personnel about the investigation. This is particularly true in the case of parallel investigations, which may often occur in cross-border corruption cases.

22. Sufficient resources should also be made available to the central authority and to law enforcement authorities for the purpose of requesting and providing MLA. However, where resources are strained in a particular country, solutions can be found to overcome the problem. A requested country may, for instance, provide assistance to the requesting country for the preparation and drafting of an effective MLA request. Similarly, a requesting country may consider providing personnel or equipment to assist with the process in the requested country (assuming this is permitted by relevant law). In this respect, communication is a key aspect to ensuring that resources are efficiently utilised in the context of MLA. Early discussions between countries regarding allocation of costs for responding to a request will prevent a potential break-down of a relationship later.<sup>10</sup>

### III. Mechanisms in place for timely responses to MLA

23. Fast and efficient responses to MLA requests can greatly increase the success of corruption investigations and prosecutions. When the MLA system works more efficiently, prosecutors and investigators have a greater chance of finding suspects, tracing and seizing proceeds, and bringing to justice those who participated in the crime. Conversely, and whatever their causes, MLA delays coupled with the lack of information about the status of requests can constitute significant impediments to the investigation and prosecution of corruption cases. Domestic laws do not contain, in general, a provision regarding the period in which requests are to be executed, and do not specifically provide that information be given on the progress made with the execution of requests. However, countries may develop policies and procedures to ensure timely responses to MLA.<sup>1112</sup>

- ***Providing clear, accessible information regarding the procedural requirements for MLA***

24. Effective domestic procedures are a first step to adding efficiency to the MLA process. Requesting countries should ensure awareness of procedures for submitting MLA requests and ensuring follow-up of submitted requests. Requested countries can enable efficient responses to MLA requests by ensuring that equally clear procedures are in place regarding who should receive and handle different types of requests. Such procedures should be developed bearing in

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<sup>10</sup> In this respect, Article 46.28 of the UNCAC provides:  
*"If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne."*

<sup>11</sup> Article 46.14 of the UNCAC provides for the possibility of urgent requests to be made orally, although such oral MLA requests must be followed up in writing.

<sup>12</sup> As reported by States Parties to the UNCAC in the context of the first two years of the first review cycle of the Mechanism for the Review of Implementation of the Convention, their domestic laws do not contain, in general, a provision regarding the period in which requests were to be executed and do not specifically provide that information be given on the progress made with the execution of requests. However, central authorities were found to often have appropriate case handling measures for the organization of their work internally. These, in some cases, include guidelines. According to these States Parties, the average time needed to respond to a request ranges from one to six months. However, several States parties to the UNCAC stressed that the time required would depend on the nature of the request, the type of assistance and the complexity of the case.

mind the principle of “*favor rogatoriae*”, according to which countries Party to a Convention assure one another of their best cooperation efforts.

25. In addition to establishing clear procedures for the handling of MLA requests, making such information clearly and easily accessible to practitioners in other countries can significantly reduce delays caused by a requestor’s failure to meet the procedural requirements. Establishing an Internet website that clearly sets these requirements is a relatively low-cost and simple way to help requesting countries avoid MLA delays. Countries can also provide this information through international law enforcement networks that compile such information.<sup>13</sup> Similarly, countries should disseminate information to their domestic law enforcement authorities by way of procedural manuals or guides on MLA law, practice, and procedures.<sup>14</sup>

- ***Ensuring prompt consideration of requests by the central authority before transmission to the executing authorities and developing case-management systems***

26. Significant delays may occur where the request is held too long by the requested central authority before transmission to the executing authorities. Mechanisms should therefore be in place to ensure that incoming MLA requests are promptly considered and passed on to the executing authorities. In particular, policies should address the maximum time allowed to respond to MLA requests, and encourage executing authorities to consider foreign requests with the same priority as domestic investigations and prosecutions.

27. A practical way to ensure prompt handling and follow-up of MLA requests is to set up case-management systems, such as an electronic database to keep track of the status of each incoming and outgoing MLA request, and compile global statistics. In this way, central authorities can maintain contact and ensure that MLA requests are promptly handled by its domestic executing authorities, as well as provide feedback to the requesting authorities on the status of its request. The use of case management systems within the central authorities is considered by a number of States Parties to both the UNODC and OECD Conventions as a very useful tool in monitoring the length of MLA proceedings for purposes of improving standard practice.

- ***Maintaining lines of communication open***

28. Procedures for the handling of MLA requests should include an acknowledgement of receipt to be sent to the requesting authority, including the name of the contact point in the central and/or executing authority. This should be followed-up with updates on the status of the request, including any obstacle or challenge experienced. Where the request cannot be executed, an oral or written explanation should be communicated to the requesting authority, and, where possible, suggestions on ways to resolve the difficulties.

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<sup>13</sup> Such networks include the OECD Working Group meetings of law enforcement authorities, the StAR Initiative of the World Bank and UNODC, the European Judicial Network, the Egmont Group, the IberRed network, the OAS Criminal Network, the Commonwealth Network of Contact Persons, CARIN, ARINSA, or the RRAG-GAFISUD.

<sup>14</sup> See the UNODC’s MLA Request Writer Tool, which sets out standard requirements for each type of MLA request and is a useful resource for countries. See [www.unodc.org/mla/en/index.html](http://www.unodc.org/mla/en/index.html).

- ***Allowing for procedural flexibility***

29. Since the procedural laws of States differ considerably, the requesting State may require special procedures for the provision of information (such as notarized affidavits) which are not recognised under the law of the requested State. Traditionally, the principle has been that the requested State should follow its own procedural law, which has led to difficulties, in particular when the requesting and the requested State represent different legal traditions. For example, the evidence transmitted from the requested State may be in the form prescribed by the laws of this State, but such evidence may be unacceptable under the procedural law of the requesting State.

30. Countries should therefore allow more flexibility regarding procedures. According to Article 46.17 of the UNCAC, a request shall be executed in accordance with the domestic law of the requested State. However, the provision also stipulates that, to the extent not contrary to the domestic law of the requested State and where possible, the request shall be executed in accordance with the procedures specified in the request. In the same context, the Model Treaty on Mutual Assistance in Criminal Matters provides for the execution of the request in the manner specified by the requesting State to the extent consistent with the law and practice of the requested State (Article 6).

#### **IV. Facilitating cooperation and coordination between jurisdictions**

31. Effective MLA between countries is often heavily based on trust and effective communication between countries. Facilitating coordination between law enforcement and central authorities can be beneficial in facilitating swift responses to MLA requests through advance consultation, and may also lead, in certain cases, to parallel or joint investigations that promote complete resolution of a case without duplication of effort. In this respect, a number of international networks and organisations can facilitate direct cooperation. Where feasible under a country's laws, direct cooperation between law enforcement agencies provides a variety of opportunities to combat corruption on a significantly faster timeline than traditional MLA.

- ***Facilitating direct personal contacts between law enforcement agencies and central authorities***

32. Fostering strong relationships and communication between law enforcement officials in different countries and between officials of different countries' central authorities can significantly reduce the delays that sometimes occur in the MLA process. Countries can encourage the formation of these relationships by appointing liaison magistrates, prosecutors and police officers in foreign countries, and by enabling their officials to participate in events where they can network with their counterparts in other countries. For example, law enforcement officials of OECD WGB countries, as well as observers, meet twice a year in connection with the OECD's Working Group meetings, as provided for under the 2009 OECD Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>15 16</sup>

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<sup>15</sup> Section XIV(iv) of the 2009 Anti-Bribery Recommendation includes voluntary meetings of law enforcement officials as an item in the ongoing programme of systematic follow-up to monitor and promote the full implementation of the Anti-Bribery Convention and related instruments.



33. Such relationships can also be established and enhanced by participating in international and regional networks that focus on issues pertaining to international cooperation in criminal matters, such as ARINSA, CARIN, the Commonwealth Network of Contact Persons, the Community of Portuguese Speaking countries Network, the Council of Europe's Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters, the European Judicial Network, the IberRed network, the OAS Criminal Network, the Assets Recovery Network (RRAG) of GAFISUD and the Stolen Asset Recovery (StAR) Initiative of the World Bank and the UNODC. Such networks facilitate the identification of counterparts abroad, and create an environment of open communication through which contacts of an informal nature may take place.

- ***Allowing, where possible, alternatives to formal requests for mutual legal assistance***

34. Before embarking on the creation of a formal MLA request, consideration should be given to whether current goals can be achieved through police-to-police cooperation or whether the documentation required is in the public domain of the requested State and is therefore something that does not require MLA, at least in the early stages of the investigation. Thought should be given to utilizing the options discussed below, especially during the initial phases of an investigation

35. Where legally acceptable, law enforcement officials and central authorities may be able to exchange preliminary background information or evidence. The UNCAC offers the necessary legal framework for the spontaneous transmission of information prior to an MLA request (Article 46.4 and .5). This may help in securing advance opinions as to whether the requisite requirements for assistance have been met, thus allowing for adjustment of the MLA request prior to its submission. Preliminary exchanges of information may also advantageously impact the time it takes to receive a response to an MLA request. Such exchanges should not be intended to circumvent the formal requirements of MLA, but to assist in clarifying and, where appropriate, narrowing the request. Overseas liaison officers, as well as international and regional cooperation agencies mentioned above may be able to provide assistance in obtaining this type of effective informal assistance.

- ***Developing mechanisms for parallel or joint investigations***

36. Law enforcement officials in different countries may need to co-ordinate their efforts more closely than through the occasional MLA request when they are investigating the same or closely related corruption cases. One approach is to maintain separate but parallel investigations of corruption cases committed in multiple jurisdictions on the basis of the same course of conduct, with varying levels of cooperation between the investigators and prosecutors in different jurisdictions. Another approach may be to form a joint investigation team to conduct a single multijurisdictional investigation during which evidence may be freely shared between the members of the team and the actions of the members of the team are thoroughly coordinated (Article 50 of the UNCAC).

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<sup>16</sup> The UNODC has also set up a Working Group on Asset Recovery (see [www.unodc.org/unodc/en/treaties/CAC/working-group2.html](http://www.unodc.org/unodc/en/treaties/CAC/working-group2.html)), an Expert Meeting on International Cooperation under the UNCAC (see [www.unodc.org/unodc/en/treaties/CAC/em-internationalcooperation.html](http://www.unodc.org/unodc/en/treaties/CAC/em-internationalcooperation.html)), and a Working Group on International Cooperation under UNTOC (see [www.unodc.org/unodc/en/treaties/CTOC/working-groups.html](http://www.unodc.org/unodc/en/treaties/CTOC/working-groups.html)).

## V. Allowing, where feasible, international exchange of information through other, mechanisms

37. As underlined in the G20 ACWG paper on “Enforcement of Foreign Bribery Offences”, corruption often entails other types of economic and financial crime. Thus inter-agency communication and cooperation, with, in particular, financial intelligence units (FIUs), tax authorities and securities regulators, is often key to effective enforcement, including across borders. Consequently, exchange of information with other authorities that deal with this type of crime may also contribute to effective investigations and prosecutions in bribery cases.

- ***Facilitating exchange of financial intelligence obtained by FIUs***

38. Money laundering often goes hand in hand with other financial crimes, with, for instance, participants in corruption offences seeking to launder the bribe itself or its proceeds. FIUs, as central agencies established specifically to receive and analyse financial information relating to potential money laundering and related offences, are in a unique position to facilitate the exchange of information internationally. FIUs are usually able, by law or through memorandums of understanding, to exchange information directly and quickly with their counterparts in foreign countries, either upon request or spontaneously. Countries could therefore significantly improve enforcement of corruption offences by facilitating the circulation of financial information communicated internationally through FIUs, notably by allowing direct exchanges of information between FIUs and law enforcement authorities, for instance through memorandums of understanding.<sup>17</sup>

- ***Facilitating exchange of tax information***

39. Tax authorities have the potential to play an important role in the detection and investigation of financial crimes, including corruption as they discover, in the course of their audits, potential corruption offences, for instance when a bribe payment has been disguised as a deductible expense. They also may be able to assist law enforcement officials investigating suspected offences by uncovering the traces of such crimes in tax filings.<sup>18</sup>

40. Although tax secrecy generally restricts the disclosure of tax information, specific statutory exceptions may allow, or even require, the disclosure of tax information to law enforcement authorities in certain cases, including to combat corruption.<sup>19</sup> At the international

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<sup>17</sup> Article 58 of the UNCAC encourages States Parties to establish financial intelligence units (FIUs) in order to increase the effectiveness of cooperation for asset recovery. In setting up FIUs, States Parties may consider different models, according to their legal frameworks and economic characteristics, for example:

- The administrative model, which is either attached to a regulatory/supervisory authority, such as the central bank or the ministry of finance, or as an independent administrative authority;
- The law enforcement model;
- The judicial or prosecutorial model, where the agency is affiliated with a judicial authority or the prosecutor’s office; or
- The hybrid model, which is some combination of the above

<sup>18</sup> Article 43.1 of the UNCAC enables States parties to expand their cooperation to cover not only criminal matters, but also civil and administrative matters relating to corruption. The explicit reference to the possible use of international cooperation mechanisms in relation to investigations of and proceedings in civil and administrative matters, which may also include tax matters, is a significant development.

<sup>19</sup> Recommendation II of the 2009 OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation) recommends Member countries:

level, in the absence of an agreement to the contrary, tax information exchanged between two countries must be kept confidential by the requested tax authority, which means it may not be disclosed to law enforcement authorities. However, a number of instruments, such as the Convention on Mutual Administrative Assistance in Tax Matters, recognise the growing need for tax information to be shared with foreign authorities for non-tax purposes, such as the investigation of corruption offences, and now allow sharing of certain tax information with law enforcement authorities.<sup>20</sup> Countries may wish to consider ratifying such instruments and/or including in their bilateral tax agreements language to a similar effect.<sup>21</sup>

- **Facilitating exchange of information with securities regulators**

41. Some countries have securities regulatory agencies with significant experience in detecting, investigating and prosecuting corruption offences or corruption-related offences (including accounting violations). Therefore, information that securities regulators have in their files may also be directly relevant to investigations of the related corruption offences abroad. Domestic law allows some securities regulators to exchange information informally with foreign securities regulators and foreign law enforcement officials on an *ad hoc* basis, without a formal information sharing mechanism. Countries should consider allowing in their domestic law for exchange of information by or with securities regulator to assist foreign securities regulators and foreign law enforcement officials depends, including on condition of confidentiality or reciprocity, as relevant.

## VI. Targeting the proceeds of bribery and corruption: MLA and asset recovery

42. One of the main motivations for the commission of crime, including bribery and corruption, is illegal profit. Domestic criminal law has traditionally sought to ensure that offenders do not benefit from the proceeds of crime. In international cooperation, on the other hand, the focus has essentially been on apprehending fugitives and bringing them to justice. Less attention has been paid, at least until recent years, to requests that other States take measures and provide assistance in relation to confiscation of the proceeds of crime and asset recovery. Confiscation, both within a jurisdiction and internationally, is made more difficult by the complexity of the banking and financial sector and by technological advances. The modern demand for ease in financial transactions and an efficient (and often self-regulating) banking system, with a minimum of controls, and the demand for the protection of the identity of the account holders come into conflict with investigative needs.

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*“in accordance with their legal systems, to establish an effective legal and administrative framework ... to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities.”*

<sup>20</sup> Article 22.3 of the Convention on Mutual Administrative Assistance in Tax Matters, which was developed jointly by the Council of Europe and the OECD, provides that “information received by a Party may be used for other [non tax-related] purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use.”

<sup>21</sup> To enhance cooperation between tax and other anti-corruption authorities, Recommendation I.iii. of the 2009 Tax Recommendation recommends that Parties to the OECD Anti-Bribery Convention consider including this language in their bilateral tax treaties of Commentary to Article 26 of the OECD Model Tax Convention on Income and on Capital. This Commentary provides optional language for contracting states that may wish “to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat money laundering, corruption, terrorism financing)”.

43. It has only been relatively recently that international agreements have begun to contain provisions on assistance in identifying, tracing and freezing or seizing proceeds of crime for the purpose of confiscation and asset recovery – which can be regarded as a special form of mutual legal assistance.

44. International cooperation targeting the proceeds of crime poses difficulties of its own for several reasons. In particular, considerable diversity remains in the domestic regimes in question. A second potentially problematic factor is the need to ensure the cooperation of the banking and financial sector. Finally, the concepts involved in this form of international cooperation are relatively new, tending to be unfamiliar to the authorities involved, thus causing problems and difficulties in practice.

45. Specifically in the anti-corruption field, the UNCAC contains a comprehensive chapter on asset recovery (Chapter V). Beginning with stating that the return of assets pursuant to that chapter is a “fundamental principle” and that States parties shall afford one another the widest measure of cooperation and assistance in that regard (Article 51), the UNCAC includes substantive provisions laying down specific measures and mechanisms for cooperation with a view to facilitating the repatriation of assets derived from offences covered by the UNCAC to their country of origin. Such measures also include a streamlined application of MLA mechanisms (Articles 54 and 55).