

U4 Expert Answer



Mutual legal assistance and corruption

Query

This is an update to a U4 Expert Answer from 2008 on how a mutual legal assistance treaty can help combat money laundering. The scope of the query was extended beyond money laundering to corruption in general.

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resources and expertise, limited available information, lack of coordination, etc.). Fortunately, countries and international organisations have developed solutions, recommendations and good practices to overcome those barriers. “Informal” assistance can also be a valid alternative to MLA in some circumstances.

Summary

Mutual legal assistance (MLA) is an indispensable tool for law enforcement judiciary authorities handling corruption cases with international aspects (foreign bribery and money laundering cases are typical examples). In order to facilitate international cooperation, countries have tried to regulate mutual legal assistance through their domestic legislation and international instruments.

Despite those efforts, some countries still refuse to provide MLA on legal grounds such as the absence of dual criminality, immunity, bank secrecy or for procedural reasons. In addition to those legal barriers, practical challenges at the institutional and operational level hinder the timely and effective provision of MLA (insufficient

Introduction

In our globalised economy and digital era where international transactions only need a few “clicks”, corruption offences are becoming increasingly complex, with elements occurring in several countries. For example, a company in country A bribes a public official in country B; the corrupt official then launders the proceeds of this bribe through country C before depositing or investing those proceeds in country D. This textbook example shows that to successfully investigate, prosecute and punish corruption offenders, as well as recover the illegally obtained assets, a country increasingly needs the cooperation and assistance of other states.

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U4 is a resource centre for development practitioners who wish to effectively address corruption challenges in their work. Expert Answers are produced by the U4 Helpdesk – operated by Transparency International – as quick responses to operational and policy questions from U4 Partner Agency staff.

International cooperation is typically obtained through mutual legal assistance (MLA). “MLA in criminal matters is a process by which states seek and provide assistance in gathering evidence for use in criminal cases” (UNODC 2012a). MLA can be required to summon witnesses, locate persons, produce documents and other evidence as well as issue warrants.

1. The legal basis for MLA

The provision of MLA necessitates a legal basis for cooperation. This legal basis can come from domestic law, the use of rogatory letters, as well as from multilateral and bilateral treaties. Those avenues for MLA are not mutually exclusive and a country may use more than one to request MLA.

Domestic legislation

In some countries, domestic law only regulates the procedures to be followed when receiving or issuing an MLA request. In others, it goes further and also grants the authority to accept those requests. It is then used as the legal basis for MLA requests in the absence of an applicable treaty between the requesting and requested countries. However, cooperation in this context is not mandatory for the requested country and thus presents a lot of uncertainty (Brun et al. 2011).

Letters rogatory

A letter rogatory, or letter of request, is a formal request from the judiciary of one country to the judiciary of another country to provide MLA. They are traditionally used in the absence of applicable treaty or domestic legislation. This approach has many disadvantages. First, the provision of MLA based on the execution of letters rogatory is non-mandatory.

Second, this is a complex and extremely lengthy process as it involves many procedural requirements and the communication between the judiciary of the requesting and requested states needs to go through diplomatic channels.

Third, letters rogatory are limited to court-to-court assistance and as a consequence are not available in some countries in the investigative or early stages of the prosecution if criminal charges have not been filed and the case brought to court (Chêne 2008; Esquivel 2009).

Multilateral treaties

Multilateral treaties that can be used as a basis for MLA usually target either a certain type or group of offences, or a specific region, and sometimes both.

Indeed, several multilateral treaties regulating particular criminal offences have dispositions on MLA, such as the United Nations (UN) Convention against Transnational Organized Crime (article 18), the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (article. 7), the Council of Europe (CoE) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (articles 8 to 10), the CoE Convention on Cybercrime (title 3), the Inter-American Convention against Corruption (article XIV), the OECD Anti-Bribery Convention (article 9) and of course the UN Convention against Corruption (UNCAC, article 46).

In addition, several regional conventions are especially dedicated to MLA in criminal matters, such as the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU, the European Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Arab League Convention on Mutual Assistance in Criminal Matters and the Southeast Asian Mutual Assistance in Criminal Matters Treaty.

The most applicable multilateral treaty for MLA requests in corruption cases is of course the UNCAC. It requires its 176 states parties to “afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings in relation to the offences covered by this convention” (article 46). It even encourages international cooperation in civil and administrative matters relating to corruption (article 43). This convention also extends MLA to the recovery of assets (article 46(3)(k)). The UNCAC has been invoked and served as the legal basis for the provision of MLA on numerous occasions (United Nations 2015).

Using a multilateral treaty as a basis for MLA presents several advantages. First, they are legally binding instruments: the states parties are obliged to provide each other MLA in connection with the offences covered by the treaty. There are grounds upon which a country can deny the provision of MLA but they are usually strictly listed

in the convention, making the process more predictable. Second, multilateral treaties help harmonise the states parties' legislation relating to the provision of MLA but also relating to particular offences, making the provision of MLA for those offences easier. Third, multilateral treaties often designate or establish organisations that will facilitate cooperation between states parties (Chêne 2008; UNODC 2012b).

Bilateral treaties

Like multilateral treaties, bilateral treaties are binding instruments, making the provision of MLA between the two signatory countries mandatory. But they have many other advantages.

First, they can make the provision of MLA as predictable as possible by, for instance, defining the procedure to follow when sending and receiving MLA requests and designating a central authority for direct communication, but also by listing the kind of assistance that can be provided, the rights of the requesting and requested states (scope and manner of cooperation) and the rights of the alleged offenders.

Second, bilateral treaties can be tailored to the needs of the two countries. They can thus resolve the complications that might arise between states with different legal systems or foresee types of cooperation not available under other avenues. For example, the US and Switzerland have agreed on a special procedure to obtain bank records of organised crime leaders and the treaty between the Philippines and the US contains specific provisions to facilitate the recovery of stolen assets from the Marcos era.

Third, bilateral treaties tend to create a privileged relationship between the two countries and when a state receives a lot of MLA requests, priority is often given to requests from a country with a bilateral treaty. Finally, during the negotiation process, the countries get the opportunity to become familiar with each other's legislation, which will facilitate cooperation later.

Because of all those advantages, many multilateral treaties, such as the UNCAC, encourage countries to enter into MLA bilateral treaties to enhance cooperation. However, it should be mentioned that negotiating bilateral treaties can be costly and time consuming, especially when the two countries in question have different legal systems. Realistically, a

country cannot have a bilateral treaty regulating MLA with every state in the world. They should thus target countries from which they will most likely need assistance. The UN Office on Drugs and Crime (UNODC) developed a Model Treaty on Mutual Legal Assistance in Criminal Matters that countries can use when negotiating bilateral agreements (Chêne 2008; UNODC 2012b).

2. Challenges and lessons learnt for effective MLA

In order to be accepted by the requested state, an MLA request must meet certain requirements, which vary depending on the requested jurisdiction, the applicable treaty, or the practitioner's domestic central authority.

In general, an MLA request must be made in writing, in a language acceptable to the requested country and contain certain information such as the identity of the authority making the request, the subject and nature of the criminal proceedings, a summary of the facts, a description of the assistance sought, the identity and location of the persons concerned (if possible) and the purpose for which the evidence, information or action is requested. A country can refuse to execute an MLA request that does not respect the applicable requirements (Esquivel 2009).

But there are other obstacles to the timely provision of MLA. For example, a country might be reluctant to execute an MLA request when there is a doubt as to whether the information and evidence provided will be used to convict the corrupt individual and not for, for example, political gain. General barriers such as a lack of trust in the requesting country's system, or a lack of political will, can be very difficult or even impossible to overcome. Other challenges – legal, institutional or operational – can be surmounted (Stephenson et al. 2011).

Lifting the legal barriers

As mentioned previously, all the avenues to obtain MLA traditionally provide for grounds for refusal. The UNCAC limits the grounds for refusal to the sovereignty, security or public interest of the requested state or if its law prohibits the action requested in this context. On this basis, many countries will refuse MLA for human rights considerations – if the provision of assistance may

for instance result in the imposition of cruel, inhuman, degrading punishments or torture, or in the violation of a person's right to a fair and public hearing (United Nations 2014; UNODC 2012b).

But even though there is a clear trend towards limiting the scope of any conditions to the provision of MLA or towards making mandatory conditions optional ones, many legal barriers remain (G20 ACWG 2013).

Dual criminality

Some countries condition the provision of MLA to dual criminality: they will execute a request only if the offence under investigation also exists under their domestic legislation. This can become a serious impediment in corruption cases. For instance, many countries have not criminalised private-to-private corruption, bribery of foreign public officials or illicit enrichment, or do not recognise the liability of legal persons. Even when they do, the requested states might use different definitions or categorisations.

The UNCAC adopts a flexible and proactive approach to dual criminality: it is deemed fulfilled when the conduct under investigation is considered a criminal offence in both countries, even if the category of the offence or the wording differs. For example, the conduct that results in the illicit enrichment may constitute another offence under the domestic law of the requested country (such as accepting a bribe) and the conduct qualified as foreign bribery in the requesting country can be considered bribery of a *national* official, not a *foreign* official in the requested country (Brun et al. 2011).

In addition, in the absence of dual criminality, the UNCAC requires countries to provide MLA through non-coercive measures (such as taking voluntary witness statements, sharing intelligence or obtaining criminal records) and encourage them to adopt measures allowing them to provide a wide scope of assistance (United Nations 2015).

The Financial Task Force on Money Laundering (FATF) adopted the same approach in its 2012 Recommendations for International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation (Recommendation 37).

Burdensome procedural and evidentiary laws

Many jurisdictions have overly burdensome procedural and evidentiary laws that can hinder

the provision of MLA. For instance, some countries condition MLA on the imposition of criminal charges in the requested country. To ensure efficient international cooperation, the existence of a criminal investigation should be enough.

Another example is the requirement to inform the person targeted by the MLA request. It gives the person investigated the opportunity to, for example, tamper with evidence or move targeted assets, as well as to block the execution of the MLA request for months, or even years, until all appeals are exhausted (and the statutes of limitations has expired). To protect the integrity of the investigation, such notification should not be necessary in cases where only investigative and asset preservation measures are involved (provided that sufficient protections of due process rights are present).

Many requesting countries have also complained about the amount of evidence required by requested countries in order to provide MLA. However, requested countries have complained about the quality of evidence provided in MLA requests. It seems that a balance needs to be found, taking into account the type of actions requested and whether they are coercive or not (Martini 2014; Stephenson et al. 2011).

Immunities

International immunities constitute a significant barrier to criminal proceedings against officials and thus against the provision of MLA. Although immunities are important to enable foreign officials to freely perform their duties, they should not shield them from criminal proceedings when they are suspected of corruption. The protection should be balanced against the public interest of combatting corruption.

Thus, countries should not recognise immunities beyond the scope defined by international law. This principle allowed the UK to prosecute Nigerian governors for corruption-related money laundering offences even though national immunities were in force (Brun et al. 2011).

Obstacles can also be resolved through a waiver of immunity: in the Ferdinand Marcos case, the Philippines waived the immunity of their former president to enable Switzerland to freeze, and later return, his ill-gotten assets (Stephenson et al. 2011).

Other legal barriers: fiscal matters, bank secrecy and economic interest

Some countries will not provide MLA for offences that involve a fiscal offence, such as tax evasion or tax fraud. Both the UNCAC and the FATF 2012 recommendations prohibit the refusal of MLA on the sole ground that the offence also involves fiscal matters.

Another major obstacle to international cooperation in corruption cases is bank secrecy laws. The UNCAC contributes to overcoming this barrier by explicitly excluding bank secrecy as a ground for refusing to provide MLA for cases involving UNCAC offences (Chêne 2011).

Similar to the issue of bank secrecy is the lawyer-client privilege. Legal privilege is an important safeguard, but it should only apply when lawyers are providing legal advice. It should not prevent investigators to look into financial transactions facilitated by lawyers (Stephenson et al. 2011).

Finally, countries are often reluctant to execute an MLA request that relates to a company of national importance (even when economic interest is not listed in domestic legislation or applicable treaties as a ground for refusal).

Lifting the operational and institutional barriers

The laws of the requested state are not the only potential obstacles to the provision of MLA. On average, requested countries need one to six months to respond to an MLA request, but in some cases it can take more than a year. The amount of time required depends greatly on the complexity of the matters or on whether coercive measures are requested. But often, deficiencies in the drafting of the MLA requests are the main reason for delays in processing and responding (or even for refusing) (United Nations 2015).

Lengthy delays in the provision of MLA can have serious consequences for the investigation or prosecution of a corruption case: the evidence can grow stale, witnesses can die or go missing, requesting states might even be forced to dismiss charges or allow asset freezing orders to lapse. To minimise the risks of deficiencies, countries should have an effective institutional framework and mechanisms in place for the provision of MLA.

Institutional framework for MLA

To ensure the smooth provision of MLA, it is essential that countries establish an effective institutional framework for MLA. The first step is the designation of a central authority to whom requests can be sent. The OECD and UNODC recommend to designate a single central authority, with a general expertise in MLA, rather than several authorities specialised in various types of offences. This will allow the requested countries to easily identify which institution to send their MLA request. Many international conventions require the designation of a central authority and provide for a directory of central authorities in charge of MLA (G20 ACWG 2013)

Those central authorities should be staffed with practitioners with training and expertise in MLA and should have sufficient resources to request and provide MLA. The lack of expertise and resources, in the requesting or the requested country, is indeed a major obstacle to MLA and affects many countries, even the most developed ones. In 2013, the US Justice Department reported 4,500 pending MLA requests and warned that the backlog would likely grow to more than 16,000 by 2020 if they did not receive more funding and hire more staff (Messick 2014a).

Traditionally the requested country is the one bearing the cost associated with the execution of an MLA request, but the countries involved can agree on a different arrangement if the requested country does not have the necessary resources. Similarly, a requested country can provide assistance to a requesting country for the preparation and drafting of an effective MLA request if the latter lack expertise. (G20 ACWG 2013)

Mechanisms for the prompt provision of MLA

Another barrier to the timely provision of MLA is the missing information in MLA requests and the necessary back and forth between the requesting and requested states that follow. Countries should have clear procedures in place for the submission, reception, execution and follow-up of MLA requests and make this information available in a clear and accessible way.

The OECD and UNODC recommend the creation of a website containing all those requirements. The [UK](#) and [Singapore](#), among others, have published online detailed guidance for MLA requests, as well as forms and templates for MLA requests. Australia's Attorney General's [website](#)

provides information on the procedure to follow for both foreign requests to Australia and Australian requests to foreign jurisdiction. Many international networks also collect this information and make it available to its members or even publish it online, such as UNODC, the [Stolen Asset Recovery Initiative](#), the [European Judicial Network](#) or the [OAS Criminal Network](#) (G20 ACWG 2013).

Delays in providing assistance can also be caused by a backlog of MLA requests at the central authority responsible for transmitting them to the appropriate executing authorities. And delays then become lengthier because those executing authorities often do not give the same degree of priority to MLA requests as domestic investigations and prosecutions. In addition to the adoption of policies addressing those issues, the FATF recommend the use of a case management system to monitor progress on requests.

Case management systems allow central authorities to follow the handling of the request by the executing authority and to give up to date information to the requesting country on the status of its request. Switzerland has established a website to keep track of the status of MLA requests in real time: a practitioner can enter a docket number and obtain immediate information, regardless of the time of day (Stephenson et al. 2011).

3. Informal assistance

Informal assistance designates official assistance provided without a formal MLA request. It typically includes non-coercive investigative measures (such as collecting publically available information), spontaneous disclosure of information, conducting joint investigations or requesting the authorities of the other country to open a case.

Exchange of information through other mechanisms

Informal assistance can be sought through various channels. Law enforcement officials, prosecutors or investigative judges as well as financial intelligence units (FIU) may contact their counterpart in the other country either directly or through existing international and regional network of agencies (such as INTERPOL, EUROPOL, ASEANPOL, the World Customs Organization for law enforcement or the Egmont

Group for FIUs). One of the challenges of informal assistance is to identify the appropriate counterpart when a country has multiple law enforcement agencies (for example, federal and state police, or specialised agencies).

Informal cooperation is encouraged by several multilateral treaties, including the UNCAC (article 48 and 49), as it is the fastest and most effective way to obtain the required information. The European Union permits direct transmission between judicial authorities for a wide range of informal assistance matters, including investigative actions and freezing and confiscation orders (Stephenson et al. 2011).

However, it should be noted that contrary to the evidence collected through the execution of an MLA request, information gathered through informal assistance may not be admissible in court. It is thus usually mainly used as intelligence or background information to take an investigation forward (Brun et al. 2011).

It is also highly recommended to explore informal channels before submitting a formal MLA request in order to collect information on what will be needed to execute the request and secure an advance opinion as to whether the requirements are met. This will allow adjustments to the MLA request before it is formally submitted and thus address potential barriers (G20 ACWG 2013).

Parallel or joint investigations

The UNCAC encourages states to enter into agreements or arrangements to conduct international joint investigations, prosecution and proceedings, when several countries have jurisdiction over offences (UNODC 2012a).

Parallel or joint investigations can be a viable alternative to MLA requests when law enforcement authorities of two or more countries are investigating the same or closely related offences. The law enforcement authorities of those countries can either maintain separate but parallel investigations with agreed levels of cooperation and information sharing, or form a joint investigation team that will conduct a single investigation. In the latter approach, evidence is usually freely shared between the members of the team (G20 ACWG 2013).

Finland, who is an active user of joint investigation teams (it has taken part in a total of 28 such

teams between 2004 and 2010), reported that establishing a joint investigation team with two other countries in a corruption case removed the need for the mechanism of MLA between them (UNODC 2011).

The creation of an international task force even beyond the investigation phase can also prevent the creation of obstacles to MLA because of a lack of coordination. Indeed, it happened that a country involved in an international corruption case entered into a settlement on a lesser offence that precluded the other countries involved in the case to obtain the evidence needed for their own investigation. Those joint task forces also have the advantage of facilitating skills and knowledge transfer between their members from different countries.

To conclude, MLA in the fight against corruption remains a challenge, with issues at both legislative and practical levels. Regional organisations have helped improve judicial cooperation by developing regional instruments and mechanisms for cooperation but many issues remain. More research is needed on ways to streamline the MLA process. Civil society could make a contribution to MLA by, for example, compiling an MLA index, providing technical assistance to requesting states, as well as by collecting and publicising data on how quickly countries respond to requests (United Nations 2014; Messick 2014b).

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