

STATES OF JERSEY



RATIFICATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF JERSEY REGARDING THE SHARING OF CONFISCATED OR FORFEITED ASSETS OR THEIR EQUIVALENT FUNDS

**Lodged au Greffe on 3rd March 2015
by the Chief Minister**

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

to ratify the Agreement between the Government of the United States of America and the Government of Jersey regarding the sharing of confiscated or forfeited assets or their equivalent funds, signed on 28th January 2015, as set out in Section 4 of the accompanying report.

CHIEF MINISTER

REPORT

1. Introduction

Under the 1959 Council of Europe Convention on Mutual Legal Assistance, which was extended to Jersey in 2008, there is a legal obligation to provide assistance in accordance with that Convention. The expression “mutual legal assistance” is used to describe the formal way in which countries request and provide assistance in obtaining evidence located in one country, to assist in investigations or proceedings in another country, including proceedings in relation to seizing assets derived from criminal activity.

The assistance of other jurisdictions is often required in order to bring a successful prosecution in Jersey; and Jersey regularly assists other countries in obtaining evidence in the Island for use in criminal proceedings abroad. Following conviction, the relevant law enforcement or prosecution authority may obtain a confiscation or forfeiture order to relieve the defendant of the proceeds of his or her crimes, and countries can give effect in some cases to confiscation orders made abroad. There are also cases in which civil asset recovery orders are made in respect of a person’s proceeds of crime. These do not rely upon a conviction having been obtained, but the process will depend upon the civil forfeiture legislation of the jurisdiction concerned.

Jersey has legislation in place which enables external confiscation or forfeiture orders to be enforced, whether these are based on criminal convictions or on civil forfeiture proceedings. The legislation imposes the obligation on H.M. Attorney General to seek registration and enforcement of such external orders on behalf of jurisdictions. The legislation also allows Jersey to enter into formal or *ad hoc* asset sharing agreements with other jurisdictions for the sharing of proceeds that have been confiscated as a result of mutual legal assistance.

2. The purpose of Asset Sharing Agreements

The international community encourages asset sharing for the following reasons –

- Asset sharing takes into account and rewards work carried out by a country in obtaining evidence to assist with prosecutions in another jurisdiction and recognises that, in some instances at least, the prosecutions and confiscations that follow would have been unsuccessful without that evidence.
- It allows for money to be repatriated to the countries requesting the enforcement of external confiscation orders. This is considered particularly important if a confiscation order relates to the proceeds of corruption, stolen from the Government of the country seeking assistance, or where money recovered is to compensate the victims of crimes. It also recognises that significant levels of work will probably have taken place in the requesting country in order to obtain the initial confiscation order there.
- Asset sharing also takes into account the fact that the enforcement of such orders can be time-consuming, and utilises the resources of the country seeking to enforce the order.

In order to comply with international standards in this area, it is necessary for Jersey to have the ability to share some of the confiscated monies where it is appropriate.

A recent example of an *ad hoc* asset sharing Agreement came to fruition in October 2014, when Jersey received \$2.5 million (U.S. dollars) in recognition of the assistance provided to the United States in the investigation and prosecution of Gary Stephen Kaplan for running a multi-million dollar illegal offshore betting business. The monies received were paid into the Criminal Offences Confiscation Fund, from which they can be applied to initiatives and projects connected with the prevention, detection and prosecution of crime. Therefore, the ability to confiscate and share assets also contributes towards building a significant fighting fund to aid future investigations and prosecutions in Jersey.

3. The Agreement

Asset sharing Agreements have previously only been made in relation to individual cases on an *ad hoc* basis by the Attorney General acting on behalf of the Island. However, in part a reflection of the significant international co-operation that already exists between Jersey and the United States in the fight against financial and other cross-border crime, it is considered beneficial to enter into an Agreement that governs all future asset sharing with the United States. Such an Agreement avoids the resource and time implications of having to negotiate Agreements on a case-by-case basis.

The nature of this Agreement means that it would have the status of a treaty, as it governs a continuing relationship with the U.S. in relation to the sharing of future confiscated or forfeited proceeds. Therefore, in order for Jersey to enter into such an Agreement, it must be made under an Entrustment. A letter of Entrustment was sent by Lord McNally in August 2012, which allowed the Government of Jersey to commence negotiations and conclude an agreement with the U.S. regarding the sharing of legally confiscated or forfeited assets.

The form of the Agreement is closely based on the U.S./U.K. equivalent. It provides that, in most cases where a confiscation or forfeiture judgment was obtained by one party primarily by the investigative and litigating efforts of the other, the sharing of assets will be in equal proportions.

A delegation from the United States Justice Department visited Jersey on 28th January 2015. The Agreement was signed by Kenneth Blanco, a Deputy Assistant Attorney General of the United States. H.M. Attorney General, Timothy J. Le Cocq, Q.C., signed on behalf of Jersey, having been given the necessary authority to do so by the Chief Minister.

The Agreement is not effective until both Jersey and the United States have completed their internal procedures in order to bring it into force (Article 12 of the Agreement). In Jersey, this requires the ratification of the States.

4. The terms of the Agreement are as follows:

The Government of the United States of America and the Government of Jersey (hereinafter referred to as “the Parties”)

Recognising that the Government of Jersey (“Jersey”) has been entrusted by the United Kingdom of Great Britain and Northern Ireland to negotiate and conclude this Agreement with the United States of America;

Recognising the longstanding co-operation between Jersey and the United States of America in the field of mutual legal assistance;

Recognising that the Parties have been active in international efforts in the fight against financial and other cross-border crimes; including the targeting of terrorist financing and money laundering;

Desiring to improve still further the effectiveness of law enforcement in both jurisdictions in the investigation, prosecution and suppression of crime and in the tracing, freezing, seizure and forfeiture or confiscation of assets related to crime; and

Desiring also to create a framework for sharing the proceeds of the disposition of such assets;

HAVE AGREED as follows:

ARTICLE 1
INTERPRETATION

For the purposes of this Agreement:

- (a) “*assets*” shall mean money and property of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such property, including the proceeds from a crime, or assets of an equivalent value if provided for by law, and the instrumentalities of a crime, which are in the

possession of a Party, and which comprise the net proceeds realised as a result of a confiscation or forfeiture, after deduction of the costs of realisation and/or such other deductions as the laws or Courts of that Party require;

- (b) “*confiscation*” or “*forfeiture*” shall mean any action under domestic law resulting in:
- i) in the case of the United States of America, a judgment which extinguishes title to assets of any description related to, or proceeding from crime, or a judgment for a sum which amounts to the value of such assets, and the vesting of such title in the government pursuing the action;
 - ii) in the case of Jersey, a confiscation order or forfeiture order which is made by a court in respect of crime or the proceeds of crime in criminal or civil proceedings and which is not, or is no longer, capable of being the subject of any form of appeal proceedings;
- (c) “*co-operation*” shall mean any assistance, including intelligence, operational, legal or judicial assistance, and shall include the enforcement of a confiscation or forfeiture order of the other Party, which has been obtained by one Party and which has contributed to, or significantly facilitated, a forfeiture or confiscation in the territory of the other Party;

and the provisions of this Agreement are to be interpreted accordingly.

ARTICLE 2

SCOPE OF APPLICATION

This Agreement is intended solely for the purposes of mutual assistance between the Parties and does not give rise to any rights in favour of third parties.

ARTICLE 3
CIRCUMSTANCES IN WHICH ASSETS MAY BE SHARED

In any case in which a Party is in possession of confiscated or forfeited assets and it appears to that Party (“the Holding Party”) that co-operation has been given by the other Party, the Holding Party may, at its discretion and in accordance with domestic laws, share those assets with that other Party (“the Co-operating Party”) based upon a request received pursuant to Article 4 or based upon its own initiative.

ARTICLE 4
REQUESTS FOR ASSET SHARING

1. A Co-operating Party may make a request for asset sharing from the Holding Party in accordance with the provisions of this Agreement when its co-operation has led, or is expected to lead, to a confiscation or forfeiture. In any case, a request for asset sharing shall be made in writing no later than one year from the date the Co-operating Party became aware of the entry of the final order of confiscation or forfeiture of the assets, unless otherwise agreed between the Parties in exceptional cases.
2. A request made under paragraph 1 of this Article shall set out the circumstances of the co-operation to which it relates, and shall include sufficient details to enable the Holding Party to identify the case, the assets, and the agency or agencies involved.
3. On receipt of a request for asset sharing made in accordance with the provisions of this Article, the Holding Party shall –
 - (a) consider whether to share assets as set out in Article 3 of this Agreement, and
 - (b) inform the Party making the request of the outcome of that consideration and the reasons underlying same.

4. In appropriate cases where there are identifiable victims, consideration of the rights of victims may take precedence over asset sharing between the Parties.

ARTICLE 5

SHARING OF ASSETS

1. Where the Holding Party proposes to share assets with the Co-operating Party, it shall:
 - (a) determine, at its discretion and in accordance with its domestic law and policies, the proportion of the assets to be shared which, in its view, represents the extent of the co-operation afforded by the Co-operating Party; and
 - (b) transfer a sum equivalent to that proportion to the Co-operating Party in accordance with Article 6 of this Agreement.
2. The Parties agree that it may not be appropriate to share assets where the value of the realised assets or the assistance rendered is *de minimis*, subject to previous consultations between them.
3. To the extent permitted by domestic law and policy, the Parties anticipate that in ordinary cases in which the Holding Party has executed, enforced or otherwise recognized a confiscation or forfeiture judgment that was obtained primarily by the investigative and litigating efforts of the Co-operating Party, sharing will be in equal proportions. However, if a Party has expended extraordinary resources to execute, enforce, or otherwise recognize the other Party's confiscation or forfeiture judgment, or provided substantial evidence or investigative resources to support or obtain that judgment, then the Holding Party may take such efforts into account in making a determination in accordance with paragraph 1(a) of this Article.
4. The Party sharing the confiscated assets may add interest or other increase in value accrued since the restraint and deduct the expenses required to obtain and maintain the order and the assets as well as to enforce the order.

5. Where there are identifiable victims of the criminal conduct underlying the confiscation or forfeiture judgment, unless otherwise agreed by the Parties, consideration of the rights of those victims is expected to take precedence over asset sharing between the Parties, except: (a) where the number of victims and the value of confiscated assets is such that each victim's portion would be *de minimis*; or (b) where the value of confiscated assets exceeds the victims' losses, in which event, the excess may be shared. When a money laundering offense gives rise to a confiscation or forfeiture judgment and involves a predicate offense with identifiable victims, those victims will be deemed victims of the money laundering offense for the purposes of implementing this paragraph.

ARTICLE 6
PAYMENT OF SHARED ASSETS

1. Unless otherwise mutually agreed, any sum transferred pursuant to Article 5(1)(b) of this Agreement shall be paid –
 - (a) in the currency of the Holding Party, and
 - (b) by means of an electronic transfer of funds or check.
2. Payment of any such sum shall be made –
 - (a) in any case in which the United States of America is the Co-operating Party, to the United States of America, and sent to the pertinent office or designated account of the U.S. Department of Justice or the U.S. Department of Treasury as specified in the request;
 - (b) in any case in which Jersey is the Co-operating Party, to the Treasurer of the States and, in the case of a check, sent to Her Majesty's Attorney General, Jersey, or, in the case of an electronic payment, notified in writing to Her Majesty's Attorney General;

- (c) or to any such recipient or recipients as the Co-operating Party may from time to time specify by notification for the purposes of this Article.

ARTICLE 7

TERMS OF TRANSFER

1. In making the transfer, the Parties recognize that all right or title to and interest in the transferred assets has already been adjudicated and that no further judicial proceedings are necessary to complete the confiscation or forfeiture. The Party transferring the assets assumes no liability or responsibility for the assets once they have been transferred and relinquishes all right or title to and interest in the transferred proceeds of crime or property.
2. Unless otherwise agreed, where a Party transfers assets pursuant to this Agreement, the other Party shall use those assets in accordance with its domestic legislation or rules governing the disposition of domestically forfeited assets.

ARTICLE 8

CHANNELS OF COMMUNICATION

All communications between the Parties pursuant to the provisions of this Agreement shall be conducted by:

- (a) on the part of the United States of America, the Office of International Affairs or the Asset Forfeiture and Money Laundering Section U.S. Department of Justice, or the Executive Office of Asset Forfeiture of the U.S. Department of the Treasury;
- (b) on the part of Jersey, Her Majesty's Attorney General, Law Officers' Department, Jersey; or
- (c) such other nominees as the Party may from time to time for their own part specify by notification for the purposes of this Article.

ARTICLE 9
TERRITORIAL APPLICATION

This Agreement shall apply –

- (a) in relation to Jersey, to criminal or civil proceedings in the Royal Court of Jersey resulting in a confiscation order or forfeiture order in respect of crime or the proceeds of crime; and
- (b) in relation to the United States of America, to federal proceedings resulting in a forfeiture order and occurring in any State of the United States of America, the District of Columbia, or any Commonwealth, territory or possession of the United States of America.

ARTICLE 10
AMENDMENTS

This Agreement may be amended when both Parties have agreed in writing to such amendment.

ARTICLE 11
CONSULTATIONS

The Parties shall consult promptly, at the request of either Party, concerning the interpretation, application or implementation of this Agreement, either generally or in relation to a particular case.

ARTICLE 12
ENTRY INTO FORCE

This Agreement shall enter into force on the date of the later notification in writing between the Parties indicating that each has completed its internal procedures for entry into force. This Agreement will apply to assets confiscated or forfeited before (if not yet disposed of) or after that date.

ARTICLE 13
TERMINATION OF AGREEMENT

Either Party may terminate this Agreement, at any time, by giving written notice to the other Party. Termination shall become effective six months after receipt of the notice.

IN WITNESS whereof the undersigned, being duly authorised by their respective governments, have signed this Agreement.

Done at [city], in duplicate, this, day of [month],
Two Thousand and Fifteen.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF
JERSEY:
