
A CRITIQUE OF THE NIGERIAN PROCEEDS OF CRIME (RECOVERY & MANAGEMENT) ACT 2022

TOCHUKWU ONYIUKÉ

Accendo-law (Barristers, Solicitors & Notary), Lagos*

Abstract

Organized crime is a hazard to national security and the realization of institutional principles. Any society plagued by this menace must stir itself up to leave no safe space for any individual or entity seeking to surreptitiously transfer, conceal or utilize the proceeds of crime and corruption or to evade sanctions. In past decades, Nigeria's effort expended on the anti-corruption war, although commendable, has not been met with commensurate outcome. This article examines Nigeria's anti-corruption legislation in respect of the Proceeds of Crime (Recovery and Management) Act 2022 by providing legal analysis of this legislation in comparison with international best practices in the acquisition and disposal of these assets of crime. With the enactment of the Proceeds of Crime (Recovery and Management) Act 2022, the recovery of assets from the proceeds of crime remains the first priority of this legislation to meet the Government's ambition to steadily increase the value of assets denied to and recovered from criminals. It does appear that the jurisprudential basis for the enactment of the Act is for the recovery of these assets through civil proceedings.

Keywords: criminal liability; forfeiture; Nigerian legislation; non-conviction-based recovery; proceeds of crime; right to property; stay of proceedings.

* The author would like to acknowledge Marie Selwood for her immense contribution towards the final publication of this article, without which this work would not have been completed. The author would also like to thank Oseloka Brown for his contribution as a research assistant during the writing of this article.

[A] INTRODUCTION

The definition of asset recovery captures all activities to investigate (search, trace and identify) illicit finance that enables the process for the timely and successful recovery (freezing and seizure) of assets (Home Office 2019). A successful framework for combating financial crime and money laundering includes depriving criminals of the proceeds of their crimes. In the past, there was no known legislation for recovery of the proceeds of crime in non-conviction-based judicial proceedings. Now, however, in Nigeria asset recovery principally takes place using the Proceeds of Crime (Recovery and Management) Act 2022 (the Act), which generally provides for certain asset recovery powers which include confiscation of the proceeds of crime upon a finding that such realizable assets have been obtained through unscrupulous and questionable means worthy of attracting criminal sanctions. This takes place subsequently to the initiation of proceedings, civil or criminal, against any individual or a third party, although the Act empowers the court to grant preservative orders to preserve property reasonably suspected to have been derived from unlawful activities and represent instrumentality of unlawful activity or unclaimed property. The aim to be achieved, as contained in the relevant sections of the Act, is to demonstrate that a convicted person should not be allowed to benefit from the proceeds of their criminal activity.¹ Noteworthy is that ‘proceeds of crime’, according to article 2(e) of the United Nations Convention against Transnational Organized Crime, means any property derived from or obtained, directly or indirectly, through the commission of an offence. In some jurisdictions, the terms ‘profits of crime’ or ‘benefit derived from crime’² are preferred. Further, the Act aims to provide an effective process by which the total benefit from a person’s criminal activity is calculated and an equivalent amount, where recoverable, is confiscated on behalf of the Federal Government of Nigeria; to ensure the preservation of all realizable properties, as defined under section 53 of the Act; and to ensure that the said realizable properties are preserved and available to satisfy a confiscation order.

Further, the Act recognizes that any suspect who is detected by the ‘relevant organization’ and who may potentially face a confiscation or forfeiture order may attempt to dispose of the said properties before the determination of the criminal case pending against the suspect so

¹ Which would include enabling the relevant organization (as outlined in section 82 of the Act) to implement confiscation proceedings against a convicted person.

² ‘Benefit derived from crime’ or ‘criminal benefit’ means any property, service, advantage or benefit that is a constituent of a person’s wealth and which was directly or indirectly acquired as a result of the person’s involvement in the commission of an offence, whether or not the property, service, advantage or benefit was lawfully acquired. See UNODC 2012a.

that the law would not be able to deprive them of the properties. In this respect, the court³ has been empowered to make restraining orders such as an interim order of attachment or Mareva injunction, which have the effect of freezing the property thereby preventing the suspect, or accused person as the case may be, from dealing with the proceeds of crime held by that person or the third parties on their behalf (see parts IV, V and VI of the Act). The trend all over the world is to prevent the accused person from accessing the proceeds of their criminal conduct. The pertinent question at this juncture is whether the practice of temporarily depriving the accused person from dealing with the assets suspected to be proceeds of crime pending the final determination of the civil/criminal case against them is unconstitutional or otherwise (*Dangabar v FRN* 2012 *per* Bada JCA, 33–38, para D). There is no doubt that pursuant to sections 43 and 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (the Constitution) all citizens of Nigeria have the right to acquire and own property anywhere in Nigeria, and their property should not be compulsorily acquired without payment of compensation. However, there is a *caveat*: this right to property is not absolute. Section 44(2)(k) of the said Constitution creates an exception and it states as follows:

Nothing in sub-section (1) of this section shall be construed as affecting any general law; (k) relating to the *temporary taking possession of property* for the purpose of any examination, investigation or inquiry (emphasis added).

The above-stated provision shows the intention of the law-maker to validate any law such as sections 9, 19, 33, 34 and 43 of the Act which are in respect of property reasonably suspected to be the proceeds of unlawful activities, whether directly or indirectly, sought to be seized and placed under the control and custody of the relevant organization. Further, the intention of sections 9 and 19 of the Act is merely to obtain a preservative order on the property suspected to be proceeds of crime so as to prevent the accused person or suspect from dissipating the assets and thereby create a situation of a *fait accompli* at the conclusion of trial. The word ‘investigate’ is defined by *Black’s Law Dictionary* (Black 1991) to mean ‘to examine and inquire into with care and accuracy, to find out by careful inquisition, examination, the taking of evidence, a legal inquiry’.⁴ The same *Black’s Law Dictionary* defines ‘examination’ as it relates to crime as:

³ Section 82 of the Act defines ‘court’ as the Federal High Court, High Court of the Federal Capital Territory or State High Court.

⁴ See also, the *Legal and Commercial Dictionary* (Choudhury 1979) which defines ‘investigation’ as ‘Careful search, study, close inquiry, scrutiny, detailed examination, collection of facts, inquiry to ascertain facts, inquiry, exhaustive study, and systematic search’ (at 479).

an investigation by a Magistrate of a person who has been charged with crime and arrested or of the facts and circumstances which alleged to have attended the crime in order to ascertain whether there is sufficient ground to hold him to bail for his trial by the proper court; the preliminary hearing to determine whether a person charged with having committed a crime should be held for trial.

‘Enquiry’ as defined by *Legal and Commercial Dictionary* (Choudhury 1979) means ‘investigation of a matter from the various sources in order to find the truth’.⁵

After a careful examination of the above definitions, it would be clear that allowing civil forfeiture, confiscation and/or civil recovery of property, instrumentalities of unlawful activities and realizable assets for the purpose of examination, investigation or enquiry would unavoidably extend to the conduct of a criminal case whether or not a conviction has been pronounced. The writer is of the view that to do otherwise will give the constitutional provision a very narrow interpretation which will defeat the purpose of the Constitution itself.

Forfeiture to the state is a norm as it presupposes that defendants in an action brought pursuant to the Act must be prepared to face the might of justice. The court has a social duty to help in sounding a note of warning and frowning at criminals who think that the long arm of the law cannot reach them. It has been held that ‘an appellant cannot be allowed to enjoy the proceeds of his crime’ (*Nwude v FRN* 2015 *per* Ndukwe-Anyanwu JCA, 38-40, para A). There is no gainsaying that a criminal who is convicted ought not to be allowed to enjoy the proceeds of their crime. Therein is the justice of the law. Criminals must not be allowed to enjoy the proceeds of their crime in total disregard of the well laid-down norms and values of society and to the detriment of their victims. The sanctions of the court, for instance, forfeiture of proceeds, and other such mechanisms and tools provided by the law, would serve as a deterrent to intending criminals that the long arm of the law will always catch up with them.

[B] ANALYSIS OF THE ACT

Amongst its admirable objectives, the Act ensures that relevant organizations must establish the Proceeds of Crime (Management) Directorate to carry out the functions conferred on it under this Act.

⁵ ‘Enquiry’ covers the hearing of the case—ie recording evidence, admitting documents and generally completing the record upon which a finding would be based. It is only after all the material has been placed on record by both sides that the stage of reporting a find would arise. See *Dr MN Dasanna* (1973).

Seizures and forfeitures typically follow law enforcement activity by certain government organizations. Typically, these organizations derive their recovery powers from enabling provisions in their establishing statute, such as section 2(c) of the Economic and Financial Crimes Commission (EFCC) Act, which empowers the Legal and Prosecution Unit of the EFCC to conduct proceedings as may be necessary for the recovery of any asset or property forfeited. This is one respect in which the Act is innovative, in that the powers and duties under the Act are conferred not on individual agencies but on a group of diverse law enforcement and security agencies, which the Act describes collectively as ‘Relevant Organisations’.⁶

The relevant organization is to enforce and administer the Act. Specifically, the powers and duties of the relevant organization relate to property seized and placed under the control and custody of the relevant organization upon an order of court to that effect; the Act refers to these as ‘controlled property’.

The Act, in section 59(1)(a-d), mandates the relevant organization to do everything ‘reasonably necessary’ for preserving the controlled property, including:

- a. Becoming a party to any civil or criminal proceedings affecting the controlled property;
- b. Realising or otherwise dealing with controlled property that is securities or investments; and
- c. Where the controlled property is a business, (i) employing/terminating the employment of persons in the business; and (ii) doing anything necessary to carry on the business on a sound commercial basis.

Essentially, the Act gives the relevant organization the power to act and make key decisions in respect of the controlled property. In this regard, the Act empowers the relevant organization to exercise the right attaching to any of the controlled property in the form of shares, securities, stocks, bonds or debentures, and equally allows the relevant organization to destroy the controlled property (on grounds of public interest, health or safety) or dispose of the controlled property—by sale or other means—if it is susceptible to deterioration or is excessively burdensome or expensive to maintain.

⁶ The Act defines ‘Relevant Organisation’ to include, the EFCC, Nigeria Police Force, Armed Forces, Department of State Services, Independent Corrupt Practices and other Related Offences Commission, Nigerian Financial Intelligence Unit, Code of Conduct Bureau, Standard Organisation of Nigeria, Federal Inland Revenue Service, Nigeria Customs Service, National Drug Law Enforcement Agency, National Agency for Prohibition of Trafficking in Persons, National Agency for Food and Drug Administration and Control, Nigeria Ports Authority, Nigeria Immigration Service, Nigeria Maritime and Safety Agency, National Inland Waterways Authority etc and ‘such other organisation as the Attorney-General may designate’.

The Act also grants immunity to the relevant organization against (i) any loss or damage sustained by a person claiming interest in the controlled property, arising from the relevant organization taking custody of property; (ii) the cost of proceedings taken to establish an interest in the controlled property; and (iii) payments of any rates, land tax, municipal or statutory charges imposed under any law pertaining to the controlled property, except out of the rents or profits that had accrued from the controlled property.

Further, the Act makes provisions for the relevant organization, under the direction of the Attorney-General of the Federation, to initiate proceedings in a foreign country for the recovery of forfeited property and also allows the relevant organization, under the direction of the Attorney-General of the Federation, to apply for the assets or property of a convicted person in a foreign country to be forfeited to the Federal Government of Nigeria, subject to any treaty or arrangement with the foreign country.

Section 3(b)(i)-(vi) of the Act authorizes the establishment of the Proceeds of Crime Management Directorate (PCMD/the Directorate), which in some common law jurisdictions may be called the Asset Recovery Office. The Act enables each relevant organization to issue guidelines relating to the exercise of the duties, functions and powers of the PCMD. Furthermore, the Attorney-General of the Federation may, in consultation with the relevant organization(s), make regulations relating to a 'standardized automated asset forfeiture management system expedient for the efficient implementation of the provisions of this Act'.

Non-conviction-based recovery

The Act provides for non-conviction-based recovery for the proceeds of crime as it is a procedure that provides for the seizure and forfeiture of stolen assets without the need for a criminal conviction.

The Act in section 82 (the definition section) defines 'non-conviction-based confiscation' as confiscation through judicial procedure related to a criminal offence for which criminal conviction is not required. It requires the relevant organization to commence civil proceedings for the recovery and forfeiture of the proceeds of crime, abandoned properties or unclaimed properties reasonably suspected to be proceeds of unlawful activity, without conviction.

Two orders (as stipulated in the Act) which the relevant organization may seek from the court in recovering proceeds of crime are a 'preservation order' and a 'forfeiture order'. The relevant organization may, by way of an

ex parte application, apply for a preservation order to restrain a person from dealing with the property in any manner. *Prima facie*, a preservation order will last for 60 days, but may be renewed upon an application by the relevant organization to the court. It is pertinent to mention that in granting a preservation order, the court will *inter alia* consider whether the property concerned represents the proceeds of unlawful activity and it is immaterial that the said property has been passed to another person. In fact, it is specifically provided in section 9(5) of the Act that, where the said property has been amalgamated with other property, the courts are empowered to make preservation orders on the portion of the property resulting from unlawful activity. The writer opines that, in practice, there seem to be abuses especially in physical properties where the property sought to be preserved or forfeited had been acquired prior to the period of the commission of the crime. The recovery of illegally obtained assets first entails tracing the asset even when commingled with other untainted assets that are not proceeds or instrumentalities of the said crime committed. Even where the investigation reveals that certain properties were acquired before the commission of the crime, more often than not, the investigative officers/the relevant authorities fail to distinguish the legality of the assets thereby allowing the abuse of the assets to persist at the detriment of a *bona fide* owner of the said asset(s). The writer is of the opinion that the Act ought to specifically state that assets acquired only after the commission of the unlawful activity, that is the subject matter of the proceedings, are subject to preservative or forfeiture orders to curb possible abuses by officers of the relevant authority in respect of the said assets.

The Act provides that a court ‘may’ direct the relevant organization to publish the preservation order within 14 days of its issue to notify persons who may have an interest in the affected property. Although the Act appears to leave publication to the discretion of the court, it nevertheless provides that persons affected by a preservation order may challenge such an order within 14 days of its publication.

With respect to the forfeiture order, pursuant to section 17(1) of the Act, the relevant organization may, before the expiration of a preservation order, apply to the court for a forfeiture order against all or any part of the property that is subject to the preservation order. Once a forfeiture order has been made, the relevant organization will promptly hand over the forfeited property to the Directorate.

The Act stipulates that the validity of forfeiture will not be affected ‘by the outcome of criminal proceedings or of an investigation with a view to

instituting criminal proceeding, in respect of an offence with which the property concerned may be associated’.

Recovery of cash

The Act authorizes a designated officer⁷ to seize and detain any cash in the process of being moved within or outside Nigeria, if the designated officer has reasonable grounds for suspecting that the cash represents proceeds of unlawful activity, is intended to be an instrumentality of an offence, or exceeds the prescribed amount under the law and has not been declared to the appropriate authorities. The Act defines ‘cash’ to include ‘jewelries and gold’, thus extending the application of the Money Laundering Act 2022, under which the requirement to declare relates only to cash and negotiable instruments.

With respect to timeframes for detention, cash may be detained for a period of seven days (excluding Saturdays and Sundays or any public holiday) to enable the designated officer to apply to the court for an order to detain the cash.⁸ The court may extend the timeframe, provided it does not exceed three months from the date the order of extension was made. Subsequent orders for continued detention are not to exceed a cumulative period of 12 months from the date of the first order. The court may also direct a release of the whole or part of the detained funds upon an application by the person from whom the cash is seized, provided the applicant can satisfy the court that the detained funds or part were not unlawfully obtained.

Confiscation of proceeds of crime: conviction-based recovery

Section 33 of the Act provides for the confiscation of the proceeds of the criminal activity of a convicted person through confiscation proceedings against the convicted person. In this regard, the Act seeks to ensure that a convicted person is not allowed to benefit from the proceeds of their criminal activity, by providing an effective process for the calculation and confiscation of the total benefits of a convicted person’s criminal activity. Further to this, the Act provides for the issuance by the court of a restraint order(s) and a confiscation order(s). The purport of a restraint order is to prevent the

⁷ Section 26(2)(b) of the Act defines designated officer as an officer of Nigeria Customs Service, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission, Nigeria Police Force, Nigeria Immigration Service and officers of other relevant organizations.

⁸ The court is expected to adopt procedures similar to those of summary proceedings, as provided for in the High Court (Civil Procedure) Rules 2019. See section 26(5) of the Act.

defendant from dealing with realizable assets held under their custody or control. The application is to be made by the relevant organization by way of a motion *ex parte*, as prescribed by section 36 of the Act.

Confiscation orders pursuant to section 52(2) of the Act aim to secure payment of a sum of money up to the amount that a convicted person has acquired from the offences for which the person was convicted. A confiscation order against a person may be enforced as if it were an order made in civil proceedings instituted by the relevant organization against a person to recover a debt due by that person to the Federal Government of Nigeria.

The relevant courts within the jurisdiction to entertain matters and proceedings arising under the Act are the Federal High Court, High Court of the Federal Capital Territory and State High Courts; and the Heads of these courts are equally empowered by virtue of section 73(1) of the Act to designate special courts to hear and determine all cases under the Act.

Further, section 68 of the Act establishes a designated account to be known as the Confiscated and Forfeited Properties Account (the Account) to be maintained at the Central Bank of Nigeria and managed by the head of the relevant organization who shall be responsible for providing reports to the Minister of Finance.⁹

[C] A CRITIQUE

It does appear that the intention of the persons drafting the Act, from the analysis of the Act, is to encourage actions *in rem* against the property sought—including cash or jewellery. In other words, bringing an action *in rem* against the property or assets of such illegality gives the said assets a juristic personality, especially when the owners of the assets are unknown. Section 10 of the Act, having provided 14 days' notice of the preservative order to be published by the relevant organization in order to notify any persons having interest in the subject property, creates a window of opportunity to challenge the preservative order so as to afford the supposed owner of the subject assets reasonable time to prove the legality of those assets. Section 74 of the Act places the burden of proof on the defendant. In essence, the defendant in any proceeding under the

⁹ The categories of payments to be made into the Account include money realized from the proceeds of sale, management or other form of disposal of forfeited assets under this Act and other relevant laws; proceeds of any forfeited property acquired in abuse or corruption of office further to section 23(2)(c) of the Code of Conduct Bureau and Tribunal Act 1989; money paid to Nigeria by a foreign country; and money paid to the relevant organization on behalf of the Federal Government in settlement of proceedings connected with this Act and other relevant laws.

Act bears the burden of proving that they are the legitimate owner of the assets suspected to be proceeds of crime or derived from unlawful activity or that the assets are of legitimate origin and not proceeds of unlawful activity. This section is controversial and might be subjected to judicial interpretation especially when it seemingly contravenes the provisions of section 36(5) of the Constitution of Nigeria on presumption of innocence. Under the Act, the manner of proceedings presupposes that the interested person challenging the order must prove that the assets were acquired through legitimate means. Notwithstanding, whether criminal or civil, the burden of proof rests on the defendant, plaintiff or the prosecution, as the case may be. The evidential burden placed on the defendant under this Act runs contrary to the provisions of the Constitution which provide for the presumption of innocence. This would be a great subject of judicial interpretation in the event that this provision of the Act were to be tested.

Another notable section of the Act is the prohibition on ‘stay of proceedings’. The Act categorically prohibits the court from entertaining any application for stay of proceedings on whatever ground. Section 75 of the Act excluded the discretionary power of the court in granting stay of proceedings where the usual traditional legal practice might entertain such a notion. The writer opines that this provision of the Act is quite blanket and does not protect public confidence in the integrity of the court. Proceedings brought under this Act are usually initiated by *ex parte* applications which sometimes are taken to be oppressive. Therefore, there is a need for equity and fairness in the dispensation of justice to all parties. Chief of all, where a party is challenging the competence or jurisdiction of the court to entertain the non-conviction-based proceeding of the court, such a party challenging the jurisdiction ought to be entitled to be granted an order for stay of proceedings where there is an appeal arising out of the suit. It is trite law that, where issue of jurisdiction is involved in a pending appeal, a court is bound to grant an application of stay of proceeding pending the determination of the appeal.¹⁰

As previously stated, section 19(4) of the Act, controversially, provides that a forfeiture order, obtained in respect of an asset under the non-conviction-based proceeding, will not be invalid or affected by the outcome of criminal proceedings or of an investigation with a view to instituting criminal proceeding in respect of an offence with which the asset may be associated. Therefore, an accused or a suspect’s property could be

¹⁰ Therefore, before granting stay of proceedings on issues of jurisdiction, a court faced with an application for stay must be fully satisfied and convinced that there really is a genuine issue of jurisdiction involved in the matter sought to be stayed. See *Federal Republic of Nigeria v Abacha* (2007) per Sanusi JSC, at 13-15, para C.

subjected to forfeiture irrespective of the suspect being acquitted from charges brought against them or exoneration from criminal investigation. In effect, property alleged to be the proceeds of crime and seized through non-conviction-based proceedings will remain confiscated even if the accused person is acquitted of the offence by which the accused person is alleged to have acquired the property. The provision of section 44 of the Constitution is a potential flashpoint for judicial interpretation. The writer opines that the jurisprudential basis for this provision is to shut out any form of interference by a court of coordinate jurisdiction sitting in a criminal capacity discharging and acquitting an accused person whose assets have been confiscated under the non-conviction-based proceedings. The proceeds of crime, no matter how they are painted, come from criminal activity. A party being prosecuted on a charge of having taken part in such an activity and who is eventually discharged and acquitted on the said charge ought not to have their assets confiscated perpetually since the party has been found to be innocent, based on the discharge and acquittal. Therefore, on what basis is a confiscation on a non-conviction-based proceedings allowed to subsist? The writer further opines that these provisions allowing a confiscation order to subsist are simply oppressive and do not aim to achieve anything. Section 43 of the 1999 Constitution guarantees the right to property by stating 'subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria'. As provided earlier in the first part of this article, section 44(2)(k) only permits the *temporary taking possession of property for the purpose of any examination, investigation or inquiry*; 'temporary' being the key word. However, there are certain limitations to be followed. Although this is a guaranteed right, the 1999 Constitution states that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria *'except in the manner and for the purposes prescribed by a law'*. The section expounds that such property shall not be taken forcibly unless under the circumstances listed by a law of the National Assembly, or State House of Assembly; the Proceeds of Crime Act lacks any (reasonably) justifiable grounds for the perpetual detention or confiscation of the property belonging to an accused who has been acquitted of all charges. Obviously, this lacuna in the provisions of the Act amounts to a clear contravention of the constitutionally guaranteed right to property in Nigeria and as such ought to be expunged from the Act by the National Assembly, or suffer ridicule by the courts of law for being inconsistent with the provisions of the 1999 Constitution. It may be presumed that words are not used

in a statute without a meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature is deemed not to waste its words or say anything in vain (*Daymond v South West Water Authority* 1976: 58). Therefore, the writer opines that the framers did intend the wordings of section 19(2) of the Act to have the effect of a forcible confiscation of property by the Government, without any reasonable grounds whatsoever, regardless of an acquittal of the accused, which amounts to an absurdity and is in conflict with the 1999 Constitution thereby defeating the guaranteed fundamental rights of the individual, and therefore the court will not lend its weight to such application of the Act. It goes without saying that the Government does not have the right to perpetually confiscate the property of any citizen in Nigeria contrary to the express provisions of section 44 of the 1999 Constitution.

The Act confers abysmal powers on the Proceeds of Crime Management Directorate created in the relevant organization, which include the doing of ‘anything it considers appropriate for facilitating, or which is incidental to the performance of its functions’. However, the writer opines that to avoid falling short of the requirements of the law with regards to jurisdiction of the relevant organization, such wider powers must be expressly provided to avoid ambiguity in its interpretation. The UNODC *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (UNODC 2012a) specifically recommends what powers an Asset Recovery Office¹¹ should have, which includes powers to access all relevant information; to coordinate and correlate all relevant information effectively at the national level; to access information using coercive means, where necessary; to share the information both nationally and internationally, where appropriate; to protect this information and impose conditions on both its use and further transmission, nationally and internationally; to issue a short-term administrative restraint order where funds that could be dissipated quickly are identified; and to conduct joint investigations internationally. From the foregoing, the goal should be to freeze the illicit assets, home and abroad, of the criminal offence as early as possible in the context of the larger organized crime investigation. The need to simultaneously investigate assets and the substantive crime means that states should, wherever possible, consider the possibility of establishing specialized asset-tracing or asset recovery units, perhaps in the form of an asset recovery office.

¹¹ Equivalent to the Proceeds of Crime Management Directorate, as provided for by section 3 of the Act, which the relevant organization, as set out in section 82, shall establish to enforce the provisions of the Act.

[D] CONCLUSION AND RECOMMENDATIONS

The non-conviction-based-confiscation seems to be an admirable approach employed by the Act to recover the proceeds and instrumentalities of crime without the burden of the weighty standard of proof in criminal proceedings. However, the jurisdiction to issue an order may be limited by the territorial jurisdiction of the court. In addition, it is not clear whether a non-conviction-based trial can be considered to be criminal proceedings for the purposes of mutual legal assistance¹² in criminal matters. On 15 February 2012, the Financial Action Task Force (FATF) updated its 40 Recommendations,¹³ including recommendation 38 (see below), by expanding the scope of the enforcement of foreign confiscation orders. Recommendation 38 reads:

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money-laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

Obtaining a confiscation order from a criminal court as opposed to a civil court may be considered too difficult in the light of the higher standard of evidence required for a criminal conviction or confiscation. Non-conviction-based confiscation, however, frequently relies upon a civil court's expectation of proof based on a balance of probabilities standard, depending on the jurisdiction.¹⁴ What is important here is that

¹² Equally, a mutual legal assistance request may be submitted and then enforced by authorities in the foreign jurisdiction by either directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or issuing a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement). In such a case, the *Manual on Mutual Legal Assistance and Extradition* (UNODC 2012b) should be used to facilitate the request. This will be accomplished through the mutual legal assistance process. It is also important to understand that in the mutual legal assistance scenario the property, especially if it is immovable, remains in the requested state, and asset management costs need to be evaluated.

¹³ [FATF Recommendations](#).

¹⁴ See *Abdullah v Suleiman* (2011), where it was held by the Supreme Court of Nigeria *per* Ogubiyi JSC (at 22-23, para E) that: 'The concept of balance of probability necessitates an imaginary scale as it is predicated on perception. This is not dependent on the number of witnesses needed in proof of an assertion. In other words, proof on balance of probability is not a game of numbers that should count.'

there is no requirement for criminal charges to have been instituted or a conviction obtained to undertake non-conviction-based confiscation. The procedure allows for a confiscation application in cases where the offender is unavailable for any number of reasons, such as being deceased, being a fugitive from criminal justice or claiming prosecution immunity. However, the application may still result in an order that may not be enforceable using the mutual legal assistance provisions. If that is the case, the effectiveness of this approach can be limited whenever a criminal uses national borders to frustrate law enforcement and judicial authorities.

The writer recommends that to enhance the administration and the conduct of non-conviction-based proceedings under the Act, the Evidence Act 2011, and the Constitution of the Federal Republic of Nigeria 1999 (as amended) are to be amended, with respect to the shift in the burden of proof to the defendant and the presumption of innocence of an accused respectively, to accommodate non-conviction-based proceedings. And further, section 75 of the Act, on prohibition of stay of proceedings, ought to be amended to capture that where the application for stay involves the issue of jurisdiction, the application ought to be granted.

About the author

Tochukwu Onyiuke is a Legal Practitioner with over two decades of experience, specifically on insolvency. Having completed a Master's degree in financial management from Middlesex University Business School, London (in 2005), he joined Punuka Attorneys & Solicitors under the distinguished leadership of Anthony Ikemefuna Idigbe, SAN, in 2006. In 2011, he left Punuka to set up a partnership, Accendo-law, and has since been in private practice to date and heads the dispute resolution division of the firm.

Email: tochukwu@accendo-law.com.

References

Black, Henry L (1991) *Black's Law Dictionary* 6th edn Saint Paul MN: West Group.

Choudhury, Tapash Gan (1979) *Legal and Commercial Dictionary* 6th edn Kolkata: Eastern Law House.

Home Office (2019) '[Asset Recovery Action Plan \(Accessible Version\)](#)' London: Home Office.

United Nations Office on Drugs and Crime (UNODC) (2012a) *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* New York: United Nations.

United Nations Office on Drugs and Crime (UNODC) (2012b) *Manual on Mutual Legal Assistance and Extradition* New York: United Nations.

Cases

Abdullah v Suleiman & Ors (2011) LPELR-9219 (CA)

Dangabar v FRN (2012) LPELR-19732 (CA)

Daymond v South West Water Authority (1976) AC 609, (1976) 1 All ER 39

Dr M N Dasanna v State of AP (1973) 2 SCC 378; (1973) 1 SCWR 932

Federal Republic of Nigeria & Ors v Abacha & Ors (2007) LPELR-8177 (CA)

Nwude v FRN & Ors (2015) LPELR-25858 (CA)

Legislation, Regulations and Rules

Code of Conduct Bureau and Tribunal Act 1989

Constitution of the Federal Republic of Nigeria 1999 (as amended)

Economic and Financial Crimes Commission Act 2004

Evidence Act 2011

High Court (Civil Procedure) Rules 2019

Money Laundering Act 2022

Proceeds of Crime (Recovery and Management) Act 2022

United Nations Convention against Transnational Organized Crime