

Evert van der Steeg

□ Judge at Criminal Court

□ Dutch Public Prosecution Service
Criminal Assets Depreavation Bureau

B

O

O

M

□ Ministry of Justice

International Legal Assistance

Department

Montenegro 15-16 May 2007

1

Sketch of the Dutch confiscation law

A value-based confiscation.
Imposing a confiscation order
creates an obligation for the
convicted person to pay a sum of
money to the State (A measure)

B

O

O

M

The Confiscation order is not used
to confiscate the proceeds from the
offence, but the profits obtained
from them.

B

O

O

M

All the assets belonging to the suspect can be seized before judgment, with a view to the enforcement of the confiscation order to be imposed. Even if these

B assets were obtained legally.

O No limitation concerning the type of assets that can be seized.

The possibilities are created for a prejudgment seizure of object which belong to another person

1. the object must originate directly or indirectly from the crime as a result of which the fine or deprivation measure can be imposed (origin requirement) and

B

O

O

M

2. There must be sufficient indications that the object became the property of the other person with the aim to obstruct or prevent its exploitation (recovery frustration requirement) and
- 3) The other person knew or could reasonably suspect that the object originated from a crime (knowledge requirement)

B

O

O

M

The Court can also impose the penalty of
'forfeiture' .
Objects which are connected in any way
with the offence (instrumentalities/direct
proceeds from the offence).

The mayor player in the field of
asset confiscation is the public
prosecutor.

For the use of certain powers of
investigation the permission of the
examining magistrate is required.

The Criminal Financial Investigation

- there must be a suspicion of a criminal offence subject to a fine of the fifth category
- there must be a suspicion that the criminal offence resulted in a significant illegally obtained advantage

B A CFI is initiated under the supervision of a Public Prosecutor following authority from the Examining Magistrate



The Criminal Financial Investigation 2.

- Each investigator with a CFI authority is entitled, upon production of that authority, to order anybody to provide statements, allow access to and seize written documents
- During the CFI, the Public Prosecutor is entitled without further judicial authority to order the prejudgment seizure of object within the scope of the deprivation measure

B

O

O

M

Asset Confiscation runs by way of
criminal law.
A possibility for confiscation under
civil law – similar to the Irish and
English civil confiscation – is
lacking in Dutch law.

Penal Code article 36^E

1) Upon the application of the Public Prosecutions Department any person who has been convicted of a criminal offence may be ordered in a separate court judgment to pay a sum of money to the state in order to deprive him of illegally obtained advantage.

B

O

O

M

Penal Code article 36^E

To obtain a conviction in the criminal proceeding ‘legal and convincing’ evidence must be available.

Penal Code article 36^E

2) Such a order may be imposed on a person as referred to in paragraph 1 who has obtained advantage by means of or from the gains of the said criminal offence or similar offences for which a fifth category fine may be imposed, in connection with which there is sufficient evidence that they were committed by him.

B

O

O

M

Penal Code article 36^E

- Similar offences: protecting the same legal interest as the proven offences.
- Offences for which a fine of the fifth category may be imposed: These don't need to be similar offences.
- **Sufficient indications**: less stringent than the one required for legal proof. It has to be “reasonably certain” that he committed that crime.

B

O

O

M

Penal Code article 36^E

- Similar offences: protecting the same legal interest as the proven offences.
- Offences for which a fine of the fifth category may be imposed: These don't need to be similar offences.
- **Sufficient indications**: less stringent than the one required for legal proof. It has to be “reasonably certain” that he committed that crime.

B

O

O

M

Penal Code article 36^E

3) Upon the application of the Public Prosecutions Department any person who has been found guilty of an indictable offence on account of which a fifth category fine may be imposed and against whom, in connection with his being suspected of that offence, a criminal financial investigation has been instituted may be ordered in a separate court judgment to pay a sum of money to the state in order to deprive him of illegally obtained advantage if, having regard to that investigation, **it is likely** that other indictable offences led in any other way to the sentenced person obtaining illegal advantage.

B

O

O

M

Penal Code article 36^E

4) The Judge shall determine the amount which the Illegally obtained advantage is estimated to represent. Advantage shall be taken to include cost savings. The value of goods which the court deems to form part of the illegally obtained advantage may be reference to the yield to be obtained through public auction if the amount must be recovered. The court may set the amount to be paid at less than the estimated advantage.

B

O

O

M

Penal Code article 36^E

Conflict with article 6 paragraph 2 ECHR?

Penal Code article 36^E

The Dutch Supreme Court stated that (in line with the jurisprudence of the European Court of Human Rights) that, first and foremost, two requirements have to be met:

1. A reasoned asset comparison must be involved, based on legal evidence (for example a report made by a person qualified to do so within the framework of a criminal investigation)

Penal Code article 36^E

2. The accused must be offered the opportunity to make it plausible – if necessary substantiated by documents – to the court that and why the increase in his assets determined by the asset comparison-method does not, or does not fully originate from criminal acts.

B

O

O

M

Penal Code article 36^E

If the court is of the opinion that the person involved not succeeded in doing so, it may be assumed that the increase in assets is based on a illegal origin.

This is indicated as a reasonable division of the burden of proof, and not as a reversal of the burden of proof.

B **O** **O** **M**

Penal Code article 36^E

5) Property shall be taken to mean all object and
all property rights

Penal Code article 36^E

6) In determining the amount which the illegally obtained advantage is estimated to represent legal claims from disadvantaged third parties shall be deduct.

Penal Code article 36^E

7) In imposing the measure account shall be taken of orders to pay a sum of money by way of deprivation of illegally obtained advantage imposed as part of previous judgements.

Penal Code article 36^E

8) A maximum committal of three years for non-compliance with a judicial order, which is considered a non-punitive order, may be ordered by the judge whilst applying article 577c of the Code of Criminal Procedure.

B

O

O

M

Penal Code article 36^E

- 8) A maximum committal of three years for non-compliance with a judicial order, which is considered a non-punitive order, may be ordered by the judge whilst applying article 577c of the Code of Criminal Procedure.

B

O

O

M

**Bureau Ontnemingswetgeving
Openbaar Ministerie (BOOM)**

**P.O. box 837
8901 BP Leeuwarden
The Netherlands**

 **+31(0)58 234 1174**

 **+31(0)58 234 1170**

e.van.der.steeg@om.nl

B

O

O

M