Improving confiscation

Country report on the Netherlands

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1. Substantial aspects on confiscation

1.1. Confiscation

1.1.1. Criminal confiscation (covered by the Directive 42/2014/EU and by COM(2016) 819 final)

1. Does this type of confiscation exist in your domestic law?

There are three sanctions in Dutch criminal law that serve as a form of criminal confiscation as covered by the 2014 Directive and by COM(2016) 819 final. First of all, there is the 'withdrawal from circulation' of objects (*onttrekking aan het verkeer*, hereinafter: 'withdrawal'). This sanction is laid down in articles 36b until 36d of the Dutch Criminal Code (hereinafter: 'CC'). Secondly, there is the sanction of the 'forfeiture' of objects (*verbeurdverklaring*) as governed by the articles 33 until 34 CC. Thirdly, there is the sanction of deprivation of illegally obtained advantage (*maatregel ter ontneming van wederrechtelijk verkregen voordeel*, also: *ontnemingsmaatregel*), which I will hereinafter refer to as the 'confiscation order'. This sanctions is governed by article 36e CC. All these three sanctions can target the proceeds of crime and are therefore part of the analysis in this country report. Although they show substantial overlap in their possible application, they do differ on some important aspects.

In one respect, the withdrawal and the forfeiture have a broader scope of application: they can also target the instrumentalities of criminal offences (including e.g. objects used to commit or prepare the offence)[1], whereas the confiscation order can solely aim at the proceeds of crime.

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[1] See articles 33a, paragraph 1 and 36c CC.

For this reason, I reserve the term 'confiscation order' for the *ontnemingsmaatregel* of article 36e CC.[2] Another important difference is that the withdrawal and forfeiture are regarded as object-based confiscation; they target specific objects. This is different for the confiscation order, which can be characterized as a type of value based confiscation.[3] It aims at taking away the financial advantage that the defendant has obtained as a result of criminal activity. It thus serves a restorative aim.[4] As a result, the payment obligation can only relate to financial advantage that the defendant has, in the specific circumstances of the case, actually obtained.[5] This sanction is not aimed at specific objects. This means that if the financial advantage is embodied by a specific object, the judge has to determine the value thereof, and the defendant is in principle given the opportunity to pay this amount and keep the object (if it is not already withdrawn on the ground of its 'dangerousness').[6] The characterization as 'value-based' also means that if the defendant at the time of the imposition of the sanction no longer possesses the object he has gained as a result of criminal activity, the confiscation order can still be imposed. The defendant is held accountable for the financial advantage he has, at a certain point in time, obtained. Therefore it is not at odds with the character of the confiscation order if the defendant fulfills his payment obligation to the State by means of property that has no relation with the criminal acts whatsoever. There are more differences in applicability between the three mentioned sanctions. They will be explained under 1.1.3 below.

[2] It must be admitted that my choice to translate the *verbeurdverklaring* to 'forfeiture' and the *ontnemingsmaatregel* to 'confiscation order' is somewhat arbitrary. In Dutch criminal law, there is a distinction between 'penalties' (such as the *verbeurdverklaring*) and 'measures' (such as the *ontnemingsmaatregel*). The first type of sanction is thought to be of a punitive nature, whereas the measure is not intended to punish the offender. Since this distinction provides no guidance in the application of these types of sanctions, I do not pay any attention to it in this country report. See M.J. Borgers, *De ontnemingsmaatregel* (diss. Tilburg), The Hague: Boom juridisch 2001, p. 77-83.

[3] See T. Kooijmans in his annotation under Hoge Raad (Netherlands Supreme Court, hereinafter: HR) 29 May 2018, ECLI:NL:HR:2018:783, *Nederlandse Jurisprudentie* (hereinafter: *NJ*) 2018/312, point 2 and *Kamerstukken II* (Parliamentary Papers of the Lower House) 2018/19, 29911, 31477, no. 221, p. 7.

[4] *Kamerstukken II*, 1989/90, 21504, no. 3, p. 3, 8, 55, 78, 81 and extensively Borgers 2001, p. 41-49, 77-83, 264 and W.S. de Zanger, *De ontnemingsmaatregel toegepast* (diss. Utrecht), The Hague: Boom juridisch 2018a, p. 45-55.

[5] HR 1 July 1997, ECLI:NL:HR:1997:AB7714, *NJ* 1998/242.

[6] See De Zanger 2018a, p. 98-100.

2. Which legal nature is connected to such different types of confiscation (criminal, administrative, civil, other kinds)?

All three confiscation sanctions are ascribed a criminal nature. They are sanctions that can be imposed by a *criminal* judge and they are all laid down in the Dutch Criminal Code.[7] The confiscation order is imposed in a procedure that is separated from the 'regular' criminal trial (see 1.1.3 below), but this procedure is characterized as a criminal procedure. In this procedure, a public prosecutor demands the imposition of the sanction from a criminal judge.[8]

3. In which conditions is it applicable?

The conditions in which the three confiscation sanctions can be applied, differ. The *withdrawal* of article 36b can be imposed after a conviction for a criminal offence. The judge then imposes this sanction as a part of the general sanctioning in the criminal trial. Imposition is also possible if the defendant is acquitted or when the criminal charge is dismissed, but the judge nevertheless rules that a criminal offence has been committed. It is also possible that the public prosecutor orders the withdrawal in a separate procedure (art. 36b, paragraph 1, sub 1, 3 and 4 CC). The sanction of withdrawal can relate to objects that are the proceeds of crime, but also objects in relation to which the offence was committed (*corpora delicti*), objects that have been used to commit or prepare the offence (*instrumenta delicti*), objects used to obstruct the investigation of the offence or that have been manufactured or intended for committing the offence (art. 36c, sub 1 until 5 CC).

[7] Confiscation can also take place out of court, by means of a so-called consensual 'transaction' preventing prosecution (art. 74 CC), a sanction imposed by the public prosecutor (*strafbeschikking*, art. 257a-257h Code of Criminal Procedure, hereinafter: CCP) or a consensual settlement relating to the confiscation only (art. 511c CCP). These forms of out-of-court settlement fall outside of the scope of this country report.

[8] Currently, there is a legislative proposal to amend the law in such a manner, that confiscation orders will as rule be imposed in the regular criminal procedure. Under the proposed law, only in 'difficult' cases a separate procedure will be followed. See W.S. de Zanger, 'Gemoderniseerde voordeelsontneming', *Tijdschrift voor Bijzonder Strafrecht & Handhaving* 2018b, p. 229-240.

A general requirement for the withdrawal is that it can only see to objects of which the uncontrolled possession is in breach of the law or contrary to the public interest. It is therefore a sanction that aims at removing dangerous objects from society.[9] The Dutch Supreme Court has ruled that money, as a lawful currency, cannot satisfy this requirement, regardless of its origin, destination or its owner.[10] This sanction can therefore only be used to confiscate the proceeds of crime if these proceeds concern illegal *objects*, for instance when the defendant receives illegal substances or a weapon in exchange for his criminal activities.

The sanction of *forfeiture* of article 33 CC can only be imposed when the judge convicts the defendant. It is imposed as a part of the regular sanctioning in the criminal trial. It can aim at the same objects as the withdrawal (see *supra*) and any rights *in rem* and rights *in personam* pertaining to these objects (art. 33a, paragraph 1, sub a until f CC).[11] It thus concerns both the proceeds of crime, the *corpora delicti* and *instrumenta delicti*. These objects can be real estate, objects subject to registration (e.g. boats), claims on a third party or shares.

Both the withdrawal and the forfeiture target specific objects. As seen under, 1.1.1, they are forms of object-based confiscation. If the object to be subjected to a forfeiture is seized prior to the judgment in the criminal trial, its ownership automatically transfers to the State with the passing of the verdict by the judge. But if the object is not seized, the public prosecutor can order its surrender. This is governed by article 34 CC. The judge then has to make an estimation of the value of the object. The defendant subsequently has the choice to either surrender the object or to pay its estimated value. If he does not do either of those things, the estimated amount can be executed as a criminal fine, including the potential use of imprisonment for non-payment (see article 24c CC).

[9] T. Kooijmans, *Op maat geregeld? Een onderzoek naar de grondslag en de normering van de strafrechtelijke maatregel* (diss. Rotterdam), Deventer: Kluwer 2002, p. 41.
[10] HR 8 March 2005, ECLI:NL:HR:2005:AR7626, *NJ* 2007/437.
[11] There is one small difference, since the forfeiture cannot relate to objects that have helped to conceal the discovery of the crime or that are manufactured to commit the crime, if the criminal offence is a minor offence (*overtreding*). This limitation is not in place for the withdrawal.

The confiscation order of article 36e CC can solely aim at the proceeds of crime. *Corpora delicti* and *instrumenta delicti* cannot be subjected to this sanction. The confiscation order aims at restoring the legal situation prior to the criminal activities.[12] It is imposed by means of a separate judicial decision. Although the confiscation decision is formally taken in a separate procedure, the criminal trial and the confiscation procedure can take place simultaneously (see 2.2.1). In the confiscation procedure, the judge has to determine whether the defendant has obtained a financial advantage through criminal actions.

The confiscation order can only be imposed on a person who is convicted of a criminal offence. This does not mean that only offences for which the defendant has been convicted can give rise to confiscation. Besides from the proceeds of these offences, the proceeds of *other offences* of which a judge rules that there are 'sufficient indications' that the defendant has committed them can, under article 36e, paragraph 2 CC, be subject to confiscation. I will refer to this as the second 'type' of confiscation under article 36e CC. For the application thereof, it is not necessary that the offences for which the defendant has been committed themselves led to a financial gain. If the defendant has for instance been convicted of an assault or sexual offence, the judge in the confiscation procedure can rule that he has obtained a financial advantage with other offences.

Under the *third* type of confiscation, if it is 'plausible' that other offences have, in any way, led to a financial gain for the defendant, these proceeds can be confiscated under article 36e paragraph 3 CC. This is only possible if the defendant has been convicted of a criminal offence that is, by law, threatened with a fine of the fifth category. The fine categories are laid down in article 23 CC.[13] This requirement is designed to limit this type of confiscation to cases of

[12] See *Kamerstukken II* 1977/78, 15012, 1-3, p. 29, *Kamerstukken II* 1989/90, 21504, 3, p. 3, 8, 55, 78, 81, Borgers 2001, p. 41-49 and De Zanger 2018a, p. 45-55.
[13] The fifth category currently has a maximum of € 83.000.

(rather) serious crime. As we will see under 1.1.2, this third type of confiscation allows for 'extended confiscation' of assets.

Not only *direct* assets of crime can be confiscated. Both the confiscation order and the forfeiture can also relate to *subsequent* profit that the defendant has obtained using his initial profit. Articles 33a paragraph 1, under a, and 36e paragraph 2 CC allow the confiscation of advantage that the defendant has obtained 'from the proceeds of ' criminal offences. It can for instance concern interest that he has obtained by putting his illegally obtained assets on a bank account, or the return on investment of those assets.

Not only assets that the defendant has obtained, but also the *costs he did not make* as a result of criminal activity can (under article 36e paragraph 5 CC) qualify as an illegally obtained advantage. If a company for instance saves money by processing waist in an illegal manner, the money it has saved because of this omission can be subject to a confiscation.

The confiscation order of article 36e CC thus has a broad scope of application and far-going possibilities to target the proceeds of crime. Therefore, it is the instrument most used to confiscate the proceeds of crime. The forfeiture of article 33b CC however has some advantages over the confiscation order. It is imposed in the regular criminal trial, so the judge does not need to pass a separate judgment[14] or, like in the separate confiscation procedure (see art. 511f CCP, see 2.3.3), substantiate the calculation of the proceeds with evidence. There are hence efficiency arguments to use the forfeiture of article 33b CC.

Furthermore, since the forfeiture can also relate to objects that have been the subject of crime, it is possible to confiscate assets that have been laundered by the defendant. This is somewhat more difficult using the confiscation order of article 36e CC, since that sanction only aims at taking away the financial advantage that the *defendant* has obtained. If this defendant has been convicted of money laundering (art. 420bis until 420quater.1 CC) the assets that he has

[14] As seen in footnote 8, a current legislative proposal aims to make a separate confiscation procedure optional.

laundered do not necessarily represent *his* financial advantage. His earnings could just as well be the reward he receives for laundering someone else's assets. In that case, those laundered assets cannot be subject to a confiscation order imposed on this defendant.[15] Because the forfeiture of article 33b CC is also applicable on *corpora delicti*, it allows for the confiscation or objects that have been the subject to money laundering, irrespective of whether these objects represent financial advantage for this defendant.

An important restriction to the forfeiture is that it targets specific objects (or their value), whereas the confiscation order can also relate to assets that are no longer in the possession of the defendant. The judge can therefore establish the advantage that the defendant has obtained *at any point* in time, and then impose a confiscation order for that amount, irrespective of whether the defendant still holds the illegally obtained assets.

4. Is their imposition mandatory or facultative?

As a rule, the imposition of sanctions is never mandatory in Dutch criminal law. Article 9a CC provides the judge the power to refrain from imposing a criminal sanction where he deems this advisable, by reason of the lack of gravity of the offence, the character of the offender, or the circumstances attendant upon the commission of the offence or thereafter. This is also visible in the articles regulating the imposition of the three sanctions: they all stipulate that the sanctions 'can' be imposed. The imposition of all of the confiscation sanctions is therefore facultative.[16] In the context of the confiscation order, it is established in the law that even when the judge establishes that an illegal profit was obtained, he can decide not to impose a confiscation order. Article 36e paragraph 5 CC provides him with a discretionary power to do so.[17]

[15] HR 19 February 2013, ECLI:NL:HR:2013:BY5217, *NJ* 2013/293, annotated by J.M. Reijntjes. See De Zanger 2018a, p. 133-134, 287-288, with further references.
[16] See for the confiscation order: Borgers 2001, p. 103-104. See also article 511e, paragraph 1 sub a CCP.
[17] See HR 8 April 2014, ECLI:NL:HR:2014:860, *NJ* 2014/363, annotated by M.J. Borgers.

5. For which crimes are they applicable and under which conditions? (answer in light of the scope of application of the directive, of the third-party confiscation in the directive, and of the framework decision still applicable)

All three sanctions can be imposed as a reaction to practically all types of criminal offences. There is one exception in place: the confiscation order of article 36e CC cannot be imposed when the illegal profit has been obtained by fiscal offences or customs offences. This is stipulated in article 74 State Taxes Act (*Algemene Wet inzake Rijksbelastingen*) and article 10:14 General Customs Act (*Algemene Douanewet*). The State is given specific powers to collect payment obligations that are the result of the commitment of offences in these laws. Therefore, the confiscation order does not have to be used to collect these financial obligations. A combination of a confiscation order and a fiscal or customs payment obligation could, furthermore, result in a 'double' financial sanctioning for the same financial advantage. To prevent this, article 36e CC cannot apply to tax or customs offences.[18] This exception is not in place for the withdrawal and the forfeiture.

As seen under 1.1.1.3, proceeds that are obtained through offences of which the defendant has not been convicted can also be confiscated. It can concern offences with which the defendant was not charged, of which the prosecution is time-barred[19], or of which the prosecution is discharged.[20] However, if the defendant is *acquitted* of a criminal offence, the proceeds that the defendant has – allegedly – obtained with that offence can no longer be subject to a confiscation order. This is the result of the ruling of the European Court of Human Rights in the case of

[18] *Kamerstukken II* 1989/90, 21504, 3, p. 49 and HR 2 May, ECLI:NL:HR:1995:ZD0174, *NJ* 1995/613.
[19] HR 7 July 2009, ECLI:NL:HR:2008: BI2307, *NJ* 2009/422.
[20] HR 26 November 2013, ECLI:NL:HR:2013:1433, *NJ* 2014/52.

Geerings against The Netherlands.[21] Before this ruling, such confiscation was deemed admissible by the Dutch Supreme Court.[22]

6. Which assets can be confiscated? Are there any qualitative or quantitative limits?

When the confiscation order is executed, there are no qualitative or quantitative limits relating to the assets that can be confiscated. As seen, the payment obligation is maximized by the financial advantage that the defendant has, in the particular circumstances of the case, actually obtained.[23] The law however does not provide any maximum amount. The financial capacity of the defendant is not a 'hard' limit to the amount that is confiscated under him. The judge can mitigate the confiscation order due to the defendant's lack of ability to pay, but he is not obliged to do so.[24] This is different for the forfeiture. For this sanction, the judge is obliged to take the defendant's ability to pay into account (art. 33, paragraph 2 in conjunction with 24 CC).

There is one quantitative limit in place, which occurs when the public prosecutor summons the transfer of the defendant's income from a third person (e.g. the employer of the defendant) for the purpose of executing the confiscation order. In that case, the third party is in principle obliged to obey, but only insofar as the defendant's income exceeds the 'protected earnings level' (*beslagvrije voet*). This is stipulated in article 576, paragraph 5 in conjunction with articles 476b and 476c of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). This way, the defendant is defended from being brought below the social minimum level.

[21] ECHR 1 March 2007, appl.no. 30810/03. See HR 9 September 2008, ECLI:NL:HR:2008:BF0090, *NJ* 2008/497.
[22] HR 13 April 1999, ECLI:NL:HR:1999:ZD1173, *NJ* 1999/483.
[23] HR 1 July 1997, ECLI:NL:HR:1997:AB7714, *NJ* 1998/242.
[24] See W.S. de Zanger, 'The role of financial capacity in Dutch confiscation law: changes in legislation and an alternative approach', in: F. de Jong et al (eds.), *Overarching views of delinquency and deviancy. Rethinking the legacy of the Utrecht School*, The Hague: Eleven International Publishing 2015, p. 311 - 331.

There are no other limits to the assets that can be confiscated by means of a confiscation order, a withdrawal or a forfeiture sanction, other than those that have been discussed under 1.1.1.3, *supra*.

1.1.2. Extended confiscation (covered by the Directive 42/2014/EU and by COM(2016) 819 final)

As seen under 1.1.1.3, article 36e paragraph 3 CC stipulates that if it is plausible that other offences have in any way led to a financial gain for the defendant, and the defendant has been convicted of an offence of a certain severity, this financial gain can be confiscated. Because of the wording 'in any way', it is not necessary that the defendant himself has committed these offences. In fact, the judge does not need to substantiate which specific offence(s) it concerns.[25] This opens the door to the possibility of an 'abstract calculation' of the proceeds: if the public prosecutor shows that the defendant has in a certain period obtained property and the defendant is unable to show a legitimate source for this property, and the case file does not contain any indications for such a source, the judge can deem it illegally obtained profit that can be subject of a confiscation order. Under current law, no additional indications that it concerns *criminally obtained* profits are necessary.[26] In this way, an illegal origin of assets found on the defendant can be determined without the determination of a direct causal link between the advantage and specific criminal offences.[27] In this manner, article 36e, paragraph 3 enables extended confiscation. This type of confiscation has been introduced in article 36e CC in 1993.[28]

[25] *Kamerstukken II* 1989/90, 21504, B, p. 18, *Kamerstukken II* 1991/92, 21504, 8, p. 9, *Kamerstukken II* 1991/92, 21504, 20, p. 1, *Kamerstukken I* 1992/93, 21504 and 22083, 53a, p. 5. See HR 4 april 2006, ECLI:NL:HR:2006: AV0397, *NJ* 2006/247.
[26] See De Zanger 2018a, p. 212-213.
[27] See Borgers 2001, p. 128-134, 293-306, 337-358, Kooijmans 2010, p. 227-228, HR 28 May 2002, ECLI:NL:HR:2002:AE1182, *NJ* 2003/96, HR 17 September 2002, ECLI:NL:HR:2002:AE3569 and De Zanger 2018a, p. 66-71, 203-216.
[28] *Staatsblad* 1993, 11.

Therefore, when Directive 42/2014/EU was adopted, the Dutch government deemed it unnecessary to make any adjustments to Dutch confiscation law.[29]

1.1.3. Non-conviction based confiscation in the framework of criminal proceedings: in case of illness or absconding of the suspected person (covered by the Directive 42/2014/EU and by COM(2016) 819 final)

The confiscation order of article 36e CC and the forfeiture of article 33 CC can only be imposed on someone who has been convicted of a criminal offence. In case the defendant suffers from illness or has absconded and he is, as a result, unable to stand trial, the rules concerning *trial in absentia* make it possible for the judge to nevertheless pass a judgment in both the criminal trial and in the confiscation procedure. Article 280 CCP allows for the continuation of the case when the defendant does not appear at the court hearing, and the court finds no reasons to declare the summons void or to issue an order to bring the defendant to court. In that case, the defendant can be convicted and both criminal sanctions can be imposed.[30] In a strict sense this is not 'non-conviction based confiscation', since the defendant is convicted (*in absentia*).

The withdrawal of objects *can* be imposed in case the defendant is not convicted, but the court judges that (notwithstanding the acquittal or the dismissal of the criminal charges) a criminal offence has been committed. This is due to aim the aim of this sanction, which is to take dangerous objects out of circulation (see 1.1.1.3). That objective also needs to be achieved if the defendant is not found guilty of any criminal offence.

1.1.4. Non-conviction based confiscation in criminal matters: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be

[29] *Staatscourant* 2015, no. 11370, p. 3.
[30] Because of this possibility of *in absentia* conviction, the Dutch government decided not to amend the law after the adoption of the Directive 42/2014/EU, see *Staatscourant* 2015, no. 11370, p. 3.

identified and other cases when a criminal court has decided that asset is the proceeds of crime (covered only by COM(2016) 819 final)

Non-conviction based confiscation in criminal matters is not possible under the application of the sanctions of forfeiture and the confiscation order. Both sanctions require a criminal conviction of the person on whom it is imposed.[31] As seen under 1.1.1.3, the confiscation order of article 36e CC can target proceeds that are obtained through offences of which the defendant has not been convicted, but this is not non-conviction based confiscation, since a criminal conviction for another offence is still a prerequisite. In 1993, the minister of Justice proposed an amendment of the law to make non-conviction based confiscation possible.[32] This legislative attempt was however withdrawn after it spurred criticism from several political parties in the parliament.[33]

Only the sanction of withdrawal is possible if the defendant has not been convicted of any criminal offence. In that case, the court must establish that, notwithstanding the acquittal or dismissal of the criminal charges, a criminal offence has been committed. An important limitation to this sanction is that it cannot target money, since that is not an object of which the uncontrolled possession is in breach of the law or contrary to the public interest (see 1.1.1.3, *supra*).

1.1.5. Other types of confiscation present in your legal order (just an overview)

Besides from the mentioned forms of confiscation in criminal law, there are other instruments that can be used to recover the profits from crime. In criminal law, a punitive fine can also (partially) be used with this aim.[34] A compensation order with the aim of compensating victims

[31] If the confiscation order of article 36e CC is already imposed, its execution is *not* barred by the death of the defendant. Article 75 CC thereto makes an exception to the general rule.
[32] *Kamerstukken II* 1993/94, 23704, 1-3.
[33] *Kamerstukken II* 1994/95, 23704, 4-5.
[34] HR 18 May 1999, ECLI:NL:HR:1999:ZD1333, *NJ* 2000/105.

of crime (art. 36f CC), can in practice also take away the profits of the offender. Outside of criminal law, administrative bodies can reclaim payments that were distributed unjustly, and the Central Tax Authority (*Belastingdienst*) can impose an additional tax assessment.

1.2. Third-Party confiscation

Please refer to the same points under 1.1.1.1-1.1.1.6.

1. Does this type of confiscation exist in your domestic law?

Confiscation orders of article 36e CC can only be imposed on people that have been convicted of a criminal offence (see 1.1.4). In that sense, imposition of a confiscation order on a third party is not possible. Freezing of assets under a *mala fide* third party however *is* possible. The objects frozen under this person can subsequently be sold in order to execute the confiscation order imposed on the convicted person. For the particularities of this freezing of assets under a third party, see part 2.2.

The sanction of forfeiture can also target objects under a third party. Article 33a paragraph 2 CC allows for the forfeiture of assets that do not belong to the defendant, in case the third person they belong to knew, or could reasonably suspect about the link with criminal activities. Hence, for this sanction it is also required that it concerns a *mala fide* third party.

The sanction of the withdrawal does not require the object to be in the possession of the defendant. This sanction can therefore also be applied to objects that belong to a third party.

2. Which legal nature is connected to such different types of confiscation (criminal, administrative, civil, other kinds)?

On this point there are no peculiarities: these forms of third-party confiscation are also considered to be of a criminal nature, since they are specific forms of application of the three criminal sanctions.

3. In which conditions is it applicable?

For application of the confiscation order and the forfeiture sanction under a third party, it is required that it concerns a *mala fide* person. For the forfeiture, this is expressed by the requirement that the person the object belongs to, knew or could reasonably suspect that the object was obtained by means of criminal activity (art. 33a paragraph 2, under a CC). For the freezing of assets under a third party with the aim of fulfilling the payment obligation from the confiscation order of article 36e CC, article 94 paragraph 4 CCP lays down the relevant requirements. Since these aspects relate to freezing, they will be discussed further under 2.2.

4. Is their imposition mandatory or facultative?

On this issue there are no peculiarities: the imposition of these forms of third-party confiscation are not mandatory.

5. For which crimes are they applicable and under which conditions? (answer in light of the scope of application of the directive, of the third-party confiscation in the directive, and of the framework decision still applicable)

On this issue there are no peculiarities: these forms of third-party confiscation are applicable for the same offences as a regular confiscation order, forfeiture sanction or withdrawal.

6. Which assets can be confiscated? Are there any qualitative or quantitative limits?

On this issue there are no peculiarities: the same assets can be confiscated.

2. Procedural aspects

2.1. Freezing

2.1.1. Which provisions regulate the freezing proceedings?

In the phase before a criminal sanction is imposed, objects can be frozen with a view to the successful execution of the forfeiture of article 33 CC, the withdrawal of article 36b CC or of the confiscation order of article 36e CC. Article 94, paragraph 2 CCP governs the freezing with the aim of securing the execution of the first two sanctions. The law does not stipulate any specific requirements for this form of freezing, other than that the objects can be subject to forfeiture or withdrawal. If he court then imposes one of these two sanctions, the ownership of the objects will transfer to the State. Dangerous objects will subsequently be destroyed.

Article 94a, paragraphs 2 until 6 CCP govern the freezing with the aim of securing the execution of the confiscation order.[35] This is *value* freezing: since the defendant can be held accountable with his entire belongings (also the property that he has obtained legally), the object that is frozen does not have to relate to any criminal offence.[36] The purpose of this freezing is to secure the execution of a confiscation order. This possibility has been introduced by the legislation aiming to enhance the execution of confiscation orders.[37] The objects to be frozen do not need to be physical objects; debts of a third party and shares can also be subject to a freezing.

When a confiscation order is imposed and becomes final, the frozen objects can, without further interference of a judge, be used to execute the confiscation order. This is made possible by article 574 CCP, which allows the State to sell frozen objects in order to execute the payment obligation stemming from the confiscation order. The defendant is however first given the opportunity to fulfil his payment obligation by paying (art. 573 CCP).

Objects can also be frozen in the execution phase. Article 575 CCP offers the possibility to freeze objects that have not (on the basis of article 94a CCP) been frozen before the confiscation order has become final. This freezing serves to execute the imposed confiscation order. For this

[35] It is also possible to freeze assets that can be used to bring the truth to light, or to show the existence of illegally obtained profits, e.g. bank receipts. This is governed by paragraph 1 of article 94 CCP.
[36] *Kamerstukken II* 1989/90, 21504, 3, p. 10, 13.
[37] *Staatsblad*. 1993, 11.

freezing, a writ of execution by the public prosecutor is necessary, which is then executed as a judgement by a civil court.

No writ of execution is necessary if the confiscation order is executed by means of article 576 CCP, which offers the possibility to seize specific assets to which the defendant has a right. It can concern the defendant's income, pensions, redundancy payments, and credit he holds on a bank account. By summoning the third party (employer, bank etc.) to pay the relevant sums of money, the public prosecutor can execute the payment obligation.

2.1.2. Which authorities can request the imposition of a freezing order? Is such a request always needed?

2.1.3. Which authorities can impose a freezing order?

The public prosecutor is competent to freeze objects with the aim of confiscation, but he must have a written authorization to do so by the examining magistrate (*rechter-commissaris*). This authorization can be provided orally if it concerns a situation in which the offence is discovered in its commission (art. 103 CCP).

The authorization to freeze objects is simpler in the context of a 'criminal financial investigation' (*Strafrechtelijk financieel onderzoek*). This is a special investigative framework designed to precede the imposition of a confiscation order, which is laid down in a separate title of the code of criminal procedure (art. 126 until 126fa CCP).[38] In order to initiate such a financial investigation, an authorization by the examining judge is required. This general authorization provides the public prosecutor the power to freeze objects without a further, specific authorization.

[38] In the already mentioned plans to 'modernize' the Code of Criminal Procedure, it is proposed to abolish this specific context for financial investigations. According to the legislature, the regular criminal investigation should be used for financial investigation. See De Zanger 2018b, p. 233.

Whereas the public prosecutor is entitled to freeze objects, he can delegate this power to a police officer. In practice, assets are usually frozen by a police officer. Police officers are, furthermore, entitled to freeze objects with the aim of confiscating them when they exercise another specific investigative power, such as an arrest (art. 95, paragraph 1 CCP) or a search of a vehicle (art. 96b CCP). They do still need an authorization by the investigative magistrate to do so.[39]

In the execution phase of a criminal sanction (such as the confiscation order), a judge has already ruled on the case. Therefore, an authorization of an investigative magistrate is not necessary to freeze objects in this phase.

2.1.4. What are the procedural conditions of a freezing order?

Freezing assets with the aim of securing the execution of a confiscation order is only possible if the defendant is suspected of having committed a criminal offence for which a fine of the fifth category can be imposed, or if he is convicted of such an offence (art. 94a, paragraph 2 CCP).[40] This requirement is not in place for freezing with the aim of executing a forfeiture or a withdrawal (art. 94, paragraph 2 CCP).

The manner in which the objects are frozen is, in principle, not governed by regulation. Articles 94b and 94c CCP however do contain some specific rules governing the freezing of objects, for instance when the object is a debt or a share. The investigating (police) officer produces a notification of the freezing and, if possible, sends an acknowledgement of receipt to the person under whom the object is frozen (art. 94, paragraph 3 CCP).

Freezing with the aim of executing the confiscation order is, furthermore, only possible if there is at least a reasonable expectation that a confiscation order of a certain amount will be imposed.

[39] This requirement of an authorization is not needed if the freezing aims at securing evidence, see article 103 CCP.

[40] This is a much-used mechanism in Dutch criminal law to ensure that certain measures can only be used for offence of a certain severity. The categories are defined in article 23, paragraph 4 CC. The fifth category currently has a maximum of € 83.000.

Some proportionality between the value of the frozen assets and the expected payment obligation is therefore necessary.[41]

In the past, the public prosecutor's office had laid down in its policy that such freezing was only applied if the amount of estimated illegal advantage was at least € 5.000. The public prosecutor could deviate from this policy if cash money of a certain amount was found, or if the freezing was part of an approach targeting a specific problematic type of crime.[42] This rule is no longer present in the policy documents.[43]

2.1.5. Which time limit is there for the issuing of the freezing order by the authorities under (3) after a request by an authority under (2)? Is this limit respected in the reality? Is there any proof, or at least complaint, of an unreasonable duration of this kind of proceeding?

The investigating magistrate that has the power to authorize the public prosecutor to freeze assets, is not legally bound by a time limit to respond to the public prosecutor's request.

2.1.6. Is there a maximal duration of a freezing order? Which is it?

There is no legal maximum duration of a freezing order.

2.1.7. Which are the rights and guarantees of the person addressed by the order? What legal remedies are there against a freezing order?

The person whose objects are frozen can lodge a written complaint to a court relating to *inter alia* the freezing, the usage of the frozen asset and the non-return of the object. This is governed by article 552a CCP. The complaint procedure is, in principle, held publicly. If it concerns

[41] *Kamerstukken II* 2001/02, 28079, 6, p. 15.
[42] Aanwijzing afpakken, *Staatscourant* 2013, 35782, p. 3.
[43] Aanwijzing afpakken, *Staatscourant* 2016, 68526 and 72371.

freezing with the aim of executing the confiscation order, the complaint can succeed if the court finds that there is no suspicion or conviction for an offence for which a fine of the fifth category can be imposed, or if it is 'highly improbable' that the court will later impose a confiscation order.[44] This is a limited review, since the judge has to anticipate the outcome of the subsequent confiscation procedure. Although the court is not obliged to do so, it can also test the proportionality and the subsidiarity of the freezing. Under the proportionality test, it can be relevant to investigate the relationship between the claim of the public prosecutor and the value of the frozen assets.[45] Under the subsidiarity test, alternatives for the freezing can be observed. It can for instance be relevant that other objects whose freezing is less burdensome for the defendant can also serve as security for the execution of the payment obligation, or that the defendant offers a financial security for the value of the frozen objects.[46]

If the freezing takes place in the execution phase a complaint can also be lodged to a court. This is laid down in article 575, paragraph 3 CCP and is also possible if the public prosecutor executes the confiscation order by claiming money from a third person, for instance by claiming the salary of the defendant from his employer (art. 576, paragraph 6 CCP, see 2.1.1). In these procedures, the defendant can for instance claim that executing the confiscation order by means of selling his property is disproportionate, since this selling costs the defendant money. He has to do so within seven days after the freezing of the object, and before the object is sold.

If the objects have been frozen before the confiscation order became final and the public prosecutor wants to sell them in the execution phase in order to execute the confiscation order, the defendant can only complain about this intention to a civil court. On the basis of article 438

[44] HR 28 September 2010, ECLI:NL:HR:2010:BL2823, *NJ* 2010/654.
[45] HR 15 January 2008, ECLI:NL:HR:2008:BB9890, *NJ* 2008/63, HR 7 January 2014, ECLI:NL:HR:2014:38, *NJ* 2014/66 and HR 10 January 2010, ECLI:NL:HR:2010:30.
[46] HR 1 October 2013, ECLI:NL:HR:2013:833, *NJ* 2014/278, HR 7 January 2014, ECLI:NL:HR:2014:38, *NJ* 2014/66, HR 18 November 2014, ECLI:NL:HR:2014:3311 and HR 29 September 2015, ECLI:NL:HR:2015:2881.

Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) all execution actions can be challenged to a civil court.

2.1.8. Is there the possibility to claim damages suffered by a wrongful freezing order? How is this possibility regulated?

If after the freezing no confiscation order is imposed (for instance when the defendant is acquitted of all charges), the civil procedure is also the only possibility for the person involved to claim damages. It is however very difficult for him to successfully do so.[47] Damages that result from investigative powers exercised by the police or the public prosecutor upon a suspect are, *prima facie* regarded to be justified. This legal justification ground lapses only if in the civil case, it becomes clear that the suspect was in fact innocent or that the proven acts do no qualify as a criminal offence. A mere acquittal is in principle not sufficient for such a judgement.[48] Therefore, a large burden of proof lies on the former suspect. This is severely criticized in academic literature.[49]

2.2. Freezing of third-parties' assets

Please refer to the same points under 2.1.1-2.1.8, but only in relation to third-parties, where there are peculiarities, especially for the rights and guarantees in the proceeding and the legal remedies available against the order.

2.2.1.-2.2.6.

As seen under 1.2, assets under third parties can be frozen with the aim of fulfilling the confiscation payment obligation of the defendant. This form of third-party freezing is regulated

[47] See E. Engelhard et al, 'Let's Think Twice before We Revise! 'Égalité' as the Foundation of Liability for Lawful Public Sector Acts', *Utrecht Law Review* 2014, p. 64-70.
[48] HR 26 January 1990, ECLI:NL:HR:1990:AD1019, *NJ* 1990/794, HR 23 November 1990, ECLI:NL:HR:1990:ZC0055, *NJ* 1991/92 and HR 13 October 2006, ECLI:NL:HR:2006:AV6956, *NJ* 2007/432.
[49] Engelhard et al 2014 and S.A.M. Stolwijk, *Onschuld, vrijspraak en de praesumptio innocentiae*, Amsterdam: Universiteit van Amsterdam 2007, p. 26-27.

by article 94a paragraphs 4-5 CCP. If a confiscation order is imposed subsequently, the frozen assets can be executed in order to fulfil the payment obligation of the defendant, as if it concerned assets that are frozen under him.[50]

If freezing under a third party takes place in the execution phase of the confiscation order, it is governed by article 575, paragraph 1 CCP. This option has been introduced in 2011, in order to increase the freezing possibilities and hence improve the execution of confiscation orders.[51] As for the competent authorities, procedural conditions, time limits, and duration of the freezing there are no peculiarities compared to freezing of assets under the defendant.

There is an additional substantial condition. Freezing of objects under a third party is only allowed if there are sufficient indications that the objects were transferred to the third party with the 'apparent aim' of frustrating the execution, and the third party knew or could reasonably suspect these malicious intentions of the defendant (art. 94a, paragraph 4 CCP).[52] In this case, other object belonging to such a *mala fide* third party can also be frozen, to a maximum value of the object that was transferred to him with the aim of frustrating the execution (art. 94a, paragraph 5 CCP). This is for instance possible if these other objects are easier to execute than the specific objects that were transferred from the defendant.[53] Since this is also possible for objects which the third party has obtained lawfully and that have no link to a criminal offence, the possibilities to freeze objects under a third party are rather far-reaching.

2.2.7. Which are the rights and guarantees of the person addressed by the order? What legal remedies are there against a freezing order?

[50] *Kamerstukken II* 2001/02, 28079, A, p. 9.
[51] *Kamerstukken II* 2009/10, 32194, 7, *Staatsblad* 2011, 171.
[52] *Kamerstukken II* 2010/11, 32194, C, p. 10-11. In the past, there was a third requirement for freezing assets under a third party: the objects had to be, directly or indirectly, obtained by means of a criminal offence. See *Kamerstukken II* 2009/10, 32194, 3, p. 11-12. Before this was amended in 2011 (*Staatsblad* 2011, 171), the knowledge or suspicion of the third party had to relate to this illegal origin of the object.
[53] *Kamerstukken II* 2001/02, 28079, 3, p. 20-21.

The person under whom the assets are frozen has the opportunity to challenge the freezing and the non-return of the object before a court (see 2.1.7). When this person is a third-party, he can claim that the requirements of third-party freezing are not met, i.e. that he did not know or could have reasonably suspect that the objects were transferred to him with the aim of frustrating the execution of the confiscation order. If the court judges that this claim holds true, and that the third party is in fact the lawful owner of the object, it will be returned to him.

If the defendant has filed a complaint against the freezing, the third party whose objects are frozen is notified of this complaint and of his right to file a complaint himself.

If the freezing takes place in the execution phase of the confiscation order, the third party can only file a complaint about the manner of execution to a civil court on the basis of the Code of Civil Procedure (art. 574, paragraph 3 and 575, paragraph 4 CCP). In case the execution takes place by claiming money from a third party such as an employer, the specific criminal complaint procedure *is* open to the third party (art. 576, paragraph 6 CCP).

Third parties whose objects have been subjected to a forfeiture or withdrawal that was imposed on the defendant, can file a complaint to a court about the imposition of these sanctions. This complaint must be filed within three weeks after the sanction has become final. If the court finds that the complaint is justified, it will revoke the sanction of forfeiture or withdrawal and order the return of the object to the third party (art. 552b CCP).

2.2.8. Is there the possibility to claim damages suffered by a wrongful freezing order? How is this possibility regulated?

Just as for defendants under whom objects are frozen, third parties who claim that the freezing was wrongful need to resort to a civil liability procedure.

2.3. Confiscation

2.3.1. Which provisions regulate the confiscation proceedings?

The sanctions of withdrawal and forfeiture are regulated by the regular provisions of the criminal trial. It goes beyond the scope of this country report to explain them in detail. The court that imposes these sanctions is, on the basis of articles 358 and 359 CCP, obliged to provide the grounds that justify this imposition.

The confiscation order of article 36e CC can only be imposed in a procedure that is separated from the regular criminal trial in which a judge rules on the indictment. This procedure is laid down in a specific title in the Code of Criminal Procedure. The articles 511b until 511i CCP regulate this procedure. In this separate procedure, the judge only rules on the confiscation claim by the public prosecutor. The public prosecutor claims to the court that a confiscation order of a certain amount should be imposed. The court is in no way obliged to adhere to this claim. It can, also when it is established that the defendant has gained a criminal profit, decide not to impose a confiscation order (see 1.1.1.4, *supra*). It can, on the basis of article 36e, paragraph 5, CC also decide to impose a payment obligation of a lower amount than the amount of illegally obtained profits.

This procedure is qualified as 'criminal' in nature. In this procedure, the confiscation judge is bound by the decisions of the judge in the regular criminal trial. Because the confiscation order can, as seen under 1.1.1.3, relate to financial gains that are gained through offences that were not included in the indictment, this confiscation procedure can however also concern the question whether the defendant had committed a criminal offence. The confiscation judge then has to establish whether there are 'sufficient indications' that the defendant has committed other offences than those of which he was convicted.

This division in procedures was introduced by the legislature in 1993, when the possibilities to apply the confiscation order were drastically broadened. The minister provided several arguments for this breach with the so-called 'concentration principle', which states that the

same judge should, on the basis of the investigation during trial, rule on all of the decisions of the case, including the sanctioning decision. Most of these arguments relate to the possibility that the confiscation order would be of a complex, financial nature. The regular criminal trial should not be delayed by such financial investigations. Furthermore, by separating the confiscation decision from the criminal trial, the minister enabled the transfer of proceedings to a foreign State for only the confiscation case and the introduction of particularities in the confiscation procedure (such as the exchange of written documents, see article 511d, par. 1 CCP). Another argument related to the introduction of a consensual mechanism that only settles the confiscation case (art. 511c CCP, see footnote 7).[54]

These arguments are hence of a mainly practical nature. The only argument that seems to be of a more fundamental nature was that, according to the minister, the confiscation order was not to be regarded as a part of the total arsenal of sanctions available to the judge. It is however argued that the possibility to coordinate the confiscation order with other sanctions, is essential for the restorative aim and should be left open.[55] Since this is nowadays also acknowledged by the minister, the public prosecutor's office and the Dutch Supreme Court alike, this argument has to be disregarded.[56]

The legislature expressly stated that although the confiscation procedure and the regular criminal procedure cannot be merged, they *can* take place simultaneously and parallelly. In that case, the same judge(s) can investigate both the criminal and the confiscation case.[57] In practice, this often occurs. Even though the same judge then rules on both cases, he always has to take two separate decisions.

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[54] *Kamerstukken II* 1989/90, 21504, 3, p. 10-11, 30, 35-36, 38, 66, *Kamerstukken II* 1990/91, 21504, 5, p. 19 and *Kamerstukken II* 1991/92, 21504, 8, p. 7-8, 16-18.
[55] Borgers 2001, p. 104-106.
[56] Aanwijzing afpakken, *Staatscourant* 2016, 72371, p. 1-2, *Kamerstukken II* 2003/04, 26268, 6, p. 11, *Aanhangsel der Handelingen II* 2008/09, 948, p. 1985, and HR 17 mei 2016, ECLI:NL:HR:2016:874, *NJ* 2016/283, m.nt. Reijntjes. See W.S. de Zanger, 'De schakelbepalingen van de ontnemingsprocedure: de kunst van het weglaten', *Ars Aequi* 2017, p. 960 en De Zanger 2018a, p. 291.
[57] *Kamerstukken II* 1989/90, 21504, 3, p. 10, 35, *Kamerstukken I* 1992/93, 21504, 22083, 53a, p. 2.

Since there are only good arguments to separate the procedures in difficult confiscation cases, it has been argued that the division of procedures should be optional. In an upcoming legislative attempt to modernize the code of criminal procedure, it is accordingly proposed to abolish this obligatory separation of procedures. According to the current plans (which are not definite), the two will only be separated if it concerns a difficult case. It will be at the discretion of the public prosecutor to decide whether this is the case. In all other cases, the confiscation order will be dealt with in the regular criminal trial.[58]

2.3.2. Which authorities can request the imposition of a confiscation? Is such a request always needed?

A public prosecutor has to order a confiscation order from the judge. The sanctions of withdrawal and forfeiture do not need to be requested; the judge can impose them on his own initiative. In practice, the public prosecutor usually demands the imposition of these sanctions.

2.3.3. Which authorities can impose a confiscation?

The sanctions of withdrawal and forfeiture and the confiscation order are imposed by a criminal court. This can be either a judge ruling alone, or a multi-judge division of the court.[59] The three mentioned criminal sanctions can also be part of an out-of-court settlement, either consensual or imposed by the public prosecutor. As seen under, 1.1.1, these forms of out-of-court settlement are not elaborated on in this country report.

2.3.4. Which standard of proof is needed in order to impose a confiscation?

There is no specific standard of proof needed for the imposition of the sanctions of forfeiture and withdrawal. The decision to impose a certain criminal sanction does not, as a rule, need to

[58] See De Zanger 2018b, p. 231-233, 239-240 with further references.
[59] See article 21 CCP.

be substantiated with evidence. The judge merely has to give reasons for this decision (art. 359, paragraph 5 CCP). This is different for the imposition of the confiscation order of article 36e CC. Since the legislature wanted to prevent calculations of the illegally obtained profits that are made with too much discretion, he stipulated that the judge is obliged to underpin the calculation with lawful evidence (art. 511f CCP).[60]

The court however still has much discretion in calculating the obtained profit. Since it must make an 'estimation' of the profit and the legislature has expressed that a 'reasonable and fair division of the burden of proof' is allowed[61], much can be expected from the defendant in the confiscation procedure. As seen under 1.1.2, if the defendant has been convicted of an offence of a certain severity and the public prosecutor shows that he has obtained property, it is up to the defendant to substantiate his statement that it *does not* concern illegally obtained profits.

Besides, the court can apply evidentiary presumptions and general rules in its calculation. It can for instance assume that narcotics are sold for a specific price or that stolen products are sold on the illegal market for a specific percentage of their legal value, even when there is no evidence in the specific case before him supporting this assumption. In that case, it is up to defendant to substantiate his statement that he has obtained less advantage.[62]

Another often-used mechanism is that of 'extrapolation', whereby a court uses information concerning a specific circumstance, and then assumes it holds true for another, similar circumstance. For instance, if evidence shows that a person has sold narcotics for 10 weeks, and the only evidence relating to the specifics of this trade provides information concerning one of these 10 weeks, the court can multiply those circumstance by ten in order to calculate the total amount of illegal profit. When doing so, the Dutch Supreme Court does not demand

[60] *Kamerstukken II* 1977/78, 15012, 3, p. 29, 53.
[61] *Kamerstukken II* 1989/90, 21504, 3, p. 15, 58, 63 and *Kamerstukken II* 1990/91, 21504, 5, p. 2, 37.
[62] See for instance: HR 14 February 2006, ECLI:NL:HR:2006:AU9127, *NJ* 2006/163. See De Zanger 2018a, p. 182-188.

any evidence of the representativity of the extrapolated circumstance. On the contrary, it is up to the defendant to produce evidence or at least cast doubt on the calculation.[63]

As indicated under 1.1.3, the second and third type of the confiscation order of article 36e CC do not aim at confiscating the proceeds of the offence for which the defendant has been convicted. Instead, they target the profits that are gained through other offences for which there are 'sufficient indications' that the defendant has committed them (art. 36e, par. 2 CC), or that result from offences of which it is 'plausible' that they have in any way let to a financial gain (art. 36e, par 3 CC).

At first sight, there therefore seems to exist a different standard of proof compared to the criminal trial, in which the judge can only convict someone if he is, on the basis of the evidence, 'convinced' of the guilt of the defendant (art. 338 CCP). The question whether 'sufficient indications' and 'plausible' indeed implicate lower thresholds to come to a decision, is however debated. The minister has on some occasions referred to the civil standard of a 'balancing of probabilities'[64], but he has also denied the suggestion in parliament that there has been a reversal of the burden of proof. The Supreme Court has not clarified this issue as of yet. In academic literature, it is argued that due to the possibly far-reaching consequences of a confiscation order and due to the fact that the confiscation judge also rules on the possible commission of offences, the same standard of proof should apply. The desired mitigation of the evidential rules can, in this view, be found in the non-applicability of the minimum evidential rules (see 2.3.6).[65]

2.3.5. Which time limit is there for the issuing of the confiscation order by the authorities under (3) after a request by an authority under (2)? Is this limit respected in the reality?

[63] HR 25 March 1997, ECLI:NL:HR:1997:AK1364. See Borgers 2001, p. 276-277 and De Zanger 2018a, p. 188-194.
[64] *Kamerstukken II* 1989/90, 21504, 3 p. 63. See Kooijmans 2010.
[65] Borgers 2001, p. 280-286 and De Zanger 2018a, p. 172-175, with further references.

Is there any proof, or at least complaint, of an unreasonable duration of this kind of proceeding?

The sanctions of forfeiture and withdrawal are imposed in the regular criminal procedure. There is no specific time limit in which they must be imposed, other than the standard rule that the court must pass its judgement within two weeks after the closing of the examination in court (art. 345, paragraph 3 CCP). Article 6 ECHR furthermore dictates that the criminal procedure must be finalized 'within a reasonable time'.

The specific procedure leading to imposition of the confiscation order must be initiated within two years at the latest after the criminal procedure has, in first instance, led to a conviction (art. 511b, paragraph 2 CCP). After the confiscation procedure is opened, there is no time limit in which the court must impose a confiscation order. The only 'hard' time limit is that the court must do so within six weeks after the closing of the examination in court (art. 511e, paragraph 1, sub b CCP). In practice, confiscation procedures can take a long time, and it occasionally occurs that confiscation orders are imposed years after the commitment of the criminal offence. As the rights of article 6, paragraph 1 ECHR apply in the confiscation procedure, the confiscation order must be imposed within a reasonable time. If the court fails to meet this time limit, the amount of the confiscation order must be mitigated[66], unless it is compensated in the sanctioning in the related criminal procedure.[67]

2.3.6. Which are the rights and guarantees of the person addressed by the order? What legal remedies are there against a confiscation order?

As regards the sanctions of forfeiture and withdrawal, the regular rights and guarantees of the criminal procedure apply. It goes beyond the scope of this country report to explain them in depth.

[66] See HR 11 February 2014, ECLI:NL:HR:2014:296, *NJ* 2014/135.
[67] HR 17 November 2015, ECLI:NL:HR:2015:3321.

As seen under 2.3.1, the confiscation order of article 36e CC can only be imposed in a separate, but possibly parallel confiscation procedure. The framework of this confiscation procedure is modelled after that of the regular criminal trial. Thereto, most of the regular provisions are declared applicable in the confiscation procedure.[68] As a result, the defendant enjoys most of the same guarantees he has in the criminal trial. He can, for instance, not be forced to make a statement: he enjoys the right not to incriminate himself. He can also adduce evidence and request the summoning and hearing of witnesses and experts.

By making some explicit exceptions in the law and by *not* declaring some provisions to be applicable, the legislature has however also created some differences between the two procedures.[69] The judge can for instance pass his verdict six weeks after the closing of the investigation on trial. In regular criminal trials this is two weeks.[70] The judge also has more discretion to deviate from the claim of the public prosecutor. Whereas in the regular criminal trial he is in principle bound by the selection of offences in the indictment, this is not the case in the confiscation procedure.[71]

More fundamentally, the provisions concerning the use of evidence in criminal cases do not fully apply in confiscation procedures. Several limitations are therefore not applicable. Written evidence cannot only be used 'in relationship to other evidence'. The rules regulating the admissibility of anonymous witness statements do not apply fully either, although the *Hoge Raad* has mitigated this difference by introducing similar guarantees.[72] Most importantly, the minimum evidential rules play no role in confiscation procedures. Therefore, the judge can base his calculation of the illegally obtained profit on a single witness statement or a statement of

[68] See articles 511b, paragraph 4, 511d, paragraph 1, 511e, paragraph 1 and 511g, paragraph 2 CCP.
[69] See De Zanger 2017.
[70] See articles 345, paragraph 3 and 511e, paragraph 1 sub b CCP.
[71] Surprise decisions should however be prevented, see HR 15 May 2007, ECLI:NL:HR:2007:BA0487, *NJ* 2007/506, m.nt. Reijntjes and HR 26 September 2017, ECLI:NL:HR:2017:247, *NJ* 2018/132, m.nt. Vellinga-Schootstra. This means that the judge has to give the defendant the opportunity to respond to a possible change in offences giving rise to a confiscation order.
[72] HR 22 January 2008, ECLI:NL:HR:2008:BA7648, *NJ* 2008/406, m.nt. Borgers.

the defendant. This is not allowed in the regular criminal trial. As the confiscation procedure can also deal with the question whether (there are sufficient indications that) the defendant has committed criminal offences, this is not unproblematic. On this point, the defendant enjoys fewer safeguards.

Furthermore, the *Hoge Raad* has added to these differences. Even though the same provisions apply relating to the possibility to hear and summon witnesses and experts (see art. 511b, paragraph 4 and 260-263 CCP), it has ruled that courts in the confiscation procedure can apply a stricter criterion in ruling on requests by the defendant.[73] Furthermore, the rules concerning witnesses that have not been heard by the defendant[74], do not apply in confiscation procedures.[75] These *Hoge Raad* justifies these differences by pointing out that confiscation procedures are of a different nature than regular criminal trials. By ruling in this manner, the *Hoge Raad* has however contributed to this different nature.[76]

The defendant can file an appeal against the confiscation judgement of the court. If he finds that the subsequent judgement by the appellate court (*gerechtshof*) is ill-motivated or errs in law, he can appeal to the *Hoge Raad*. Practically the same rules apply as in regular criminal procedures (art. 511g and 511h CCP).

2.4. Third-party confiscation

Please refer to the same points under 2.3.1.-2.3.6, but only in relation to third-parties, where there are peculiarities, especially for the standard of proof, the rights and guarantees in the proceeding and the legal remedies available against the order.

[73] HR 25 June 2002, ECLI:NL:HR:2002:AD8950, *NJ* 2003/97, m.nt. Mevis.
[74] These rules result from several ECtHR rulings, see ECtHR 10 July 2012, appl.no. 29353/06 (Vidgen/The Netherlands).
[75] HR 2 March 2010, ECLI:NL:HR:2010:BK3424, *NJ* 2011/100, m.nt. Borgers and HR 7 April 2015, ECLI:NL:HR:2015:898.
[76] See De Zanger 2018a, p. 227-236.

There are no peculiarities on these issues. As seen under 1.2, third-party application of the confiscation order is made possible by means of freezing assets of a (*mala fide*) third party. The confiscation procedure that precedes the imposition of the confiscation order does not alter if objects are frozen under such a third party.

3. Mutual recognition aspects

3.1 Freezing

3.1.1. Is there a specific legal framework for the mutual recognition of freezing orders?

The mutual recognition of foreign freezing orders is governed by the articles 5.5.1 until 5.5.8 CCP. These provisions only govern the mutual recognition of freezing orders within the context of the European Union, so in that sense there is a specific legal framework. These provisions were (in different articles) introduced in 2005[77], in order to implement Council Framework Decision 2003/577/JHA.[78] In July 2018, they were (without modification) transposed to the current articles.[79]

3.1.2. Which authorities (in the executing State) are in charge of deciding on the request of freezing orders?

The public prosecutor is qualified to decide on the request of the freezing order (art. 5.5.3 CCP).

3.1.3. Are there grounds for non-recognition and non-execution of freezing orders? Are there judicial cases in which these grounds have been used?

[77] *Staatsblad* 2005, 310.
[78] See *Kamerstukken II* 2004/05, 29845, 3.
[79] *Staatsblad* 2017, 247, which entered into force on 1 July 2018.

Article 5.5.3 CCP (paragraphs 2-3) lays down the (non-mandatory) grounds for non-recognition and non-execution of the freezing order. The public prosecutor can decide to refuse the recognition and the execution, in case:

a. the certificate (mandatory on the basis of article 5.5.2 CCP) was not submitted, was incomplete or at odds with the content of the order, and the public prosecutor has given the foreign authority the opportunity to remedy this within a certain period (see article 5.5.2, paragraph 4 CCP), but this did not happen within the set time limit;

b. the recognition and execution of the freezing order would be at odds with a privilege or immunity under Dutch law;

c. the execution of the accompanying request for mutual legal assistance concerning the transfer or confiscation of the objects[80] would be at odds with the principle of *ne bis in idem*, as laid down in articles 68 CC and 255 CCP;

d. the order relates to a criminal offence which, if it were committed in the Netherlands, is not punishable under Dutch criminal law, *unless* it concerns an offence which has been identified in an order in council (*Algemene maatregel van bestuur*) and that is threatened with a maximum prison sentence of at least three years in the issuing State;

e. it is clear from the outset that a request for mutual legal assistance concerning the transfer or confiscation of the objects cannot be complied with.

3.1.4. Is it possible, and under which circumstances, to postpone the execution of the freezing order?

Postponement of the freezing order is governed by article 5.5.4 CCP. The public prosecutor can decide to do so, in case:

a. the execution would be at odds with an on-going criminal investigation;

[80] The freezing orders must, on the basis of article 5.5.2 CCP, be accompanied by such a request.

b. another freezing decision has, in a criminal investigation, already been taken in relation to the object;

c. a freezing decision has already been taken in relation to the object, which has priority over the freezing in a criminal investigation.

The public prosecutor promptly informs the foreign authorities of his decision to postpone the execution of the freezing decision. He specifies these grounds and the expected duration of the postponement. As soon as the grounds for postponement have ceased, the freezing decision is executed. The foreign authorities also receive a notification thereof. If any restrictive measures are taken in relation to the objects, the public prosecutor also informs the foreign authority thereof.

3.1.5. Which time limit is there for the execution of the freezing order from the communication of the foreign decision? Are there any sanction in case of non-compliance? Is there any proof, or at least complaint, of an unreasonable duration of this kind of proceeding?

Under article 5.5.3, paragraph 4 CCP, the public prosecutor decides on the order promptly and if possible within 24 hours after he has received the order. He informs the foreign authorities promptly and in a written manner of his decision. In case the public prosecutor refuses the recognition and execution of the order, he must specify his reasons for that decision. The law does not sanction the potential non-compliance with the mentioned time-limit.

3.1.6. Which are the rights and guarantees of the person addressed by the foreign order in the execution phase? What legal remedies are there against a freezing order in the executing State?

The person addressed by the foreign freezing can, just as in a national case, file a complaint about the freezing of his assets. On the basis of article 5.5.6 CCP, the procedure that is laid down in article 552a CCP is also open to him.[81] The court can however not investigate the ground for the freezing order. In order to challenge this ground, the defendant should complain to the issuing authority or the court in the issuing country. To enable this, the foreign authority is obliged to specify the legal remedies open to the defendant in the certificate that accompanies the freezing order. The public prosecutor must inform the defendant of this information.

The public prosecutor is, on the basis of article 5.5.6, paragraph 2 CCP, obliged to inform the foreign authority of the complaint and its grounds, and of the judgement of the court.

3.2. Freezing of third-parties' assets

Please refer to the same points under 3.1.1-3.1.6, but only in relation to third-parties, where there are peculiarities.

There are no peculiarities on this issue.

3.3. Confiscation

3.3.1. Is there a specific legal framework for the mutual recognition of confiscation orders?

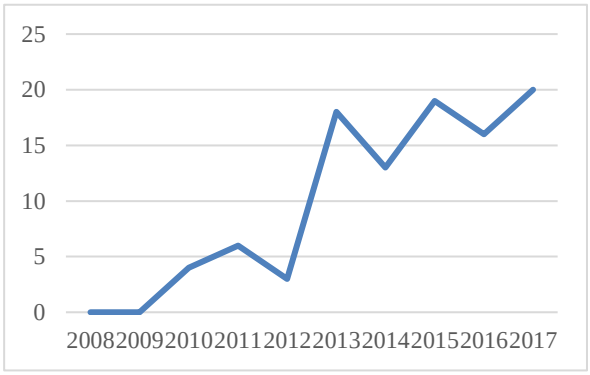
The mutual recognition of confiscation orders in the context of the European Union is governed by the Financial Penalties and Confiscation Orders Mutual Recognition and Enforcement Act (*Wet wederzijdse erkenning en tenuitvoerlegging geldelijke sancties en beslissingen tot confiscatie*, hereinafter: WWETGC). This law was first introduced to implement the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. Accordingly, it initially only governed the mutual recognition and

[81] See on this procedure: 2.1.7 of this country report.

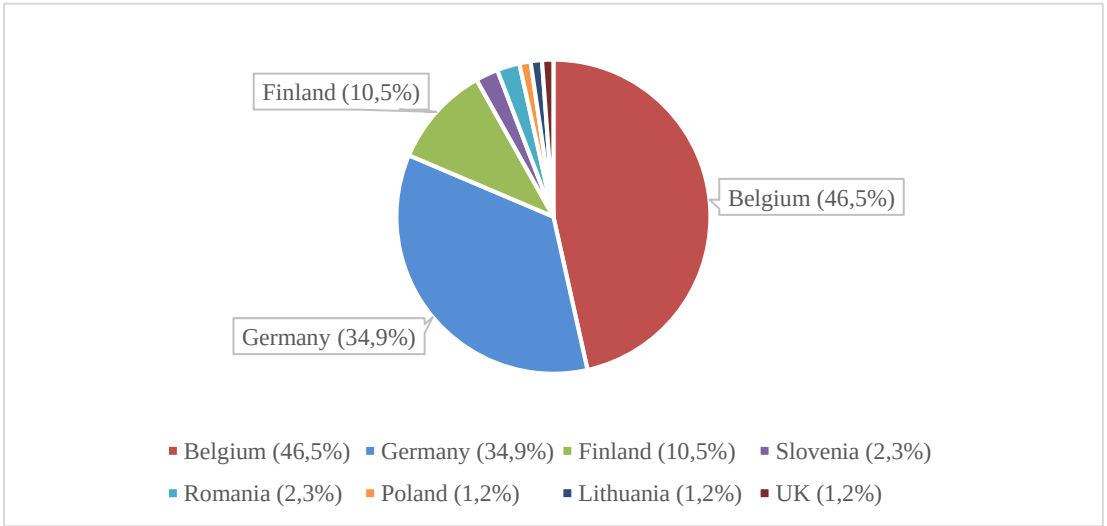
execution of such financial sanctions.[82] After the adoption of the Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, the WWETGC was amended to implement this new European legislation. The adjustments came into force on 1 June 2009.[83] Since then, it is also applicable to confiscation orders.

Since the Netherlands have implemented Council Framework Decision 2006/783/JHA, the following amount of confiscation decisions were sent to the Netherlands until 2017 on the basis of this European instrument[84]:

2009	0
2010	4
2011	6
2012	3
2013	18
2014	13
2015	19
2016	16
2017	20
Total	99



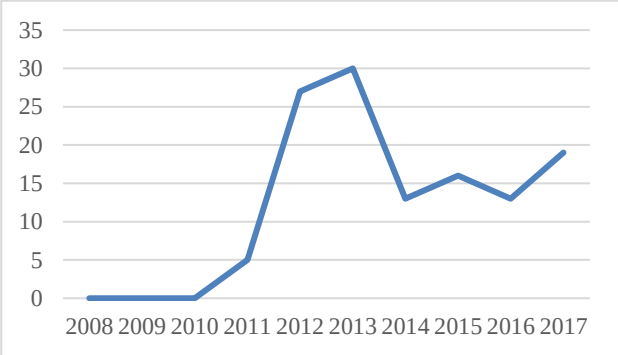
They were sent in from the following issuing countries:



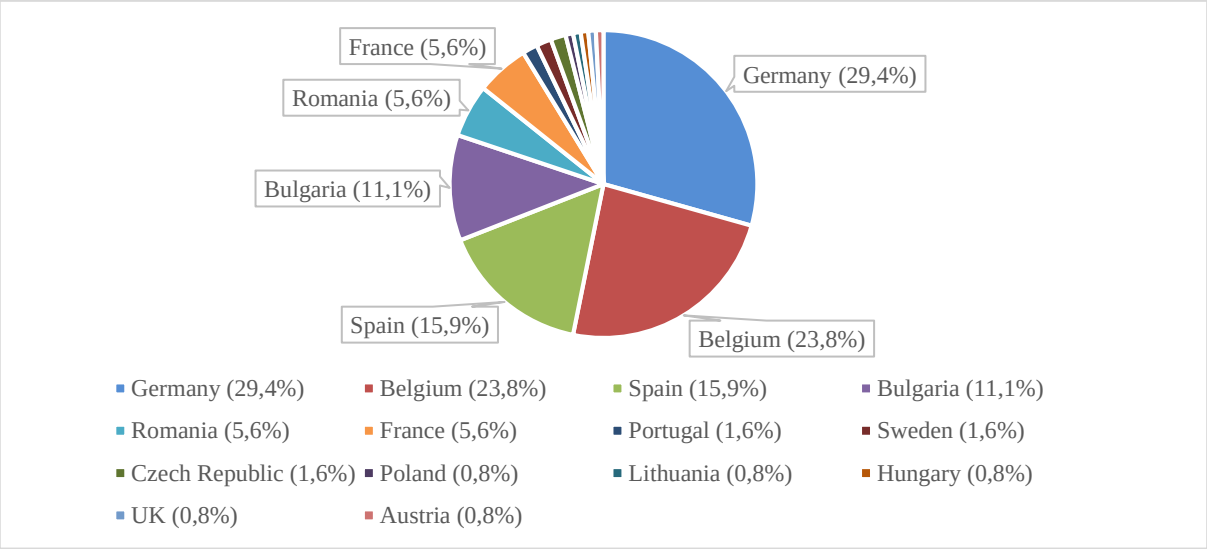
[82] *Staatsblad* 2007, 354 and 432.
[83] *Staatsblad* 2009, 124 and 224. See *Kamerstukken II* 2007/08, 31555, 3.
[84] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.

The Netherlands has sent out the following amount of confiscation decisions to other European countries[85]:

2009	0
2010	0
2011	5
2012	27
2013	30
2014	13
2015	16
2016	13
2017	19
Total	123



They were sent to the following countries:



Approximately 10% of these confiscation decisions were not recognized and executed by the foreign authorities. As a reason for this not-recognition, they provided that the assets were not found, the judgement was too old, the person was not found or was deceased.

3.3.2. Which authorities (in the executing State) are in charge of deciding on the request of confiscation orders?

[85] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.

According to article 4 WWETGC, the public prosecutor in the department of Leeuwarden is in charge of deciding on incoming requests for recognition and execution of (financial sanctions and) confiscation decisions. Due to a revision of the 'Judicial Map' of the Netherlands, this has become the department 'Noord-Nederland' (North Netherlands). The public prosecutor in this department is assisted by the Central Judicial Recovery Agency (*Centraal Justitieel Incassobureau*, hereinafter: CJIB), the central collection agency of the ministry of Justice and Security. It is appointed as the central authority as meant in article 3, paragraph 2 of the 2006 framework decision. It supports the public prosecutor in its legal tasks, by *inter alia* fulfilling a 'mailbox function' for the public prosecutor, checking the request for completeness, and (if necessary) requesting the foreign authorities for additional documents and information.[86]

In the past, practice was that the CJIB itself ruled on the recognition and execution of incoming confiscation decisions. It determined for instance whether there were grounds for refusal. The public prosecutor was informed of these decisions afterwards. In case there was doubt as to the recognisability of the request, the CJIB would pass the case on to the public prosecutor. Since the competent court has ruled that this practice was in violation of the WWETGC and the parliamentary history thereof, the public prosecutor's office has changed its policy.[87]

Due to a change in the law, the responsibility for the execution of criminal sanctions (in general) will in the future (when the law will enter into force) transfer from the public prosecutor's office to the Ministry of Justice and Security. The CJIB will no longer act under the responsibility of the public prosecutor's office, but under that of the minister. This law has passed the parliament and has been published in the 'Staatsblad', but its implementation date is yet to be determined.[88]

As a result of this law, the public prosecutor will remain the competent authority to decide on

[86] *Kamerstukken II* 2007/08, 31555, 3, p. 7 and Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging van geldelijke sancties en beslissingen tot confiscatie, *Staatsblad* 2007, 433, *Staatsblad* 2009, 190, *Staatsblad* 2011, 343 and *Staatsblad* 2012, 400.

[87] District Court of North Netherlands (*Rechtbank Noord-Nederland*) 23 January 2013, ECLI:NL:RBNNE:2013:BZ8760.

[88] *Staatsblad* 2017, 82.

the recognition of incoming confiscation decisions, but the Minister of Justice and Security will become the authority to execute such decisions. Article 4 WWETGC will be amended accordingly.

If a foreign confiscation order is recognized, it is executed according to Dutch law.[89] This means that if the defendant does not fulfil his payment obligation, the public prosecutor can request permission from the court to imprison the defendant for failure to comply with the confiscation order (see art. 22 WWETGC and art. 577c CCP). The European Court of Justice has recently (after a request for a preliminary ruling from the Rechtbank Noord-Nederland) ruled that such imprisonment is not odds with article 12 of the 2006 Framework Decision (2006/783/JHA). This is not different if the law of the issuing State also authorises possible recourse to a term of imprisonment for the non-execution of the confiscation order. Since this imprisonment does not replace the payment obligation, article 12 paragraph 4 of the Framework Decision does not require permission from the issuing State before the imprisonment.[90]

3.3.3. Are there grounds for non-recognition and non-execution of confiscation orders? Are there judicial cases in which these grounds have been used?

Articles 24, 24a and 25 WWETGC lay down the grounds for non-recognition and non-execution of foreign confiscation orders. Some of the optional grounds for refusal of the framework decision have become mandatory in Dutch law.[91] These mandatory grounds are laid down in articles 24 and 24a, whereas article 25 provides for optional grounds for refusal. Article 24 WWETGC states that the public prosecutor refuses the recognition and execution of confiscation orders in case:

- the foreign confiscation decision has been taken in response to an offence:

[89] Article 22 WWETGC.
[90] Court of Justice EU (First Chamber) 10 January 2019, C-97/18 (ECLI:EU:C:2019:7).
[91] See further *Kamerstukken II* 2007/08, 31555, 3, p. 14-17.

    - on which a Dutch court has already taken a final decision pertaining to this defendant (*ne bis in idem*);
    - for which another (foreign) court has already imposed a criminal sanction on the defendant, and this sanction has been executed (*ne bis in idem*);
    - which, if it were committed in the Netherlands, is not punishable under Dutch criminal law, *unless* it concerns an offence which has been identified in an order in council[92] and that is threatened with a maximum prison sentence of at least three years in the issuing State.
- the Netherlands would have had jurisdiction over the offence which has led to the criminal case which led to the confiscation decision, and that the legal time limit for execution for that offence would have lapsed.[93]
- the execution of the confiscation decision would be at odds with an immunity under Dutch law (such as in relationship to a diplomat).
- the execution of the confiscation decision would be at odds with the rights of interested parties, such as third parties.

If the public prosecutor considers refusing the recognition and execution of a confiscation decision on the mentioned *ne bis in idem* grounds, or on the ground of rights of interested third parties (unless a legal remedy under article 27 is invoked, see 3.3.6), he must first grant the issuing authority the opportunity to provide him with information concerning the relevant circumstances.

On the basis of article 24a WWETGC, the public prosecutor is also obliged to refuse the recognition and execution in case:

[92] This order in council (*Algemene maatregel van bestuur*) will contain the offences that are listed in article 6 of the framework decision.
[93] This period of limitation is laid down in article 76, paragraph 2 CC.

- the certificate shows that the person concerned did not appear at the investigation in court that led to the imposition of the confiscation order, *unless* it is laid down in the certificate that he was (in accordance with the rules of procedure of the issuing State):
    - summoned to appear in time and in person, or was otherwise informed of the date and place of the court investigation, in such a manner that he unambiguously knew about the court procedure in which a decision could be passed if he did not appear;
    - aware of the court investigation, but he chose to be represented by an attorney, and this attorney conducted his defence in the procedure;
    - he expressly did not contest or file an appeal against an imposed confiscation order within the prescribed term, even though he was informed of his right to do so.

If the public prosecutor wants to apply this ground of refusal, he is obliged to grant the issuing authority the possibility to provide him with information concerning the relevant circumstances.[94]

Article 25 provides for the optional grounds for refusal. The public prosecutor can decide not to recognize and execute the foreign decision, in case:

- the offence[95] that led to the imposition of the confiscation decision was (in whole or in part) committed:
    - within the territory of the Netherlands or on a Dutch ship or aircraft;
    - outside of the territory of the issuing State, while the Netherlands would not have jurisdiction over the offence if it were committed outside of Dutch territory.

[94] This ground for refusal was introduced to implement the Council Framework Decision 2009/299/JHA.
[95] If the confiscation is the response to both money laundering and another offence, the 'offence' in this ground for refusal relates to this other offence.

- it concerns extended confiscation, other than the forms of confiscation defined in article 3, paragraphs 1 and 2 of Council Framework Decision 2005/212/JHA.

These optional grounds for refusal can only be applied if the public prosecutor has granted the issuing authority the opportunity to provide him with information concerning the relevant circumstances. If the public prosecutor decides to refuse the recognition and execution, he will notify the issuing authority promptly and supported by reasons (see art. 29 WWETGC).

As seen under 3.3.1 *supra*, since the Netherlands has implemented Council Framework Decision 2006/783/JHA in June 2009, a total of 99 foreign confiscation decisions were sent to the Netherlands until 2017. All these 99 incoming confiscation decisions were recognized by the Dutch authorities. In the 12 published cases in which a defendant has, on the basis of article 27 WWETGC (see 3.3.6), challenged the decision to recognise and execute a foreign confiscation decision, the court has never squashed the decision of the public prosecutor on the basis that one of the above-mentioned grounds for refusal should have been applied.[96] Hence, until 2017 there have been no cases in which one of the grounds for refusal was used.

3.3.4. Is it possible, and under which circumstances, to postpone the execution of the confiscation order?

Article 26 WWETGC governs the possible postponement of the execution of foreign confiscation decisions. The public prosecutor can decide to do so, in case:

a. the confiscation decision concerns a sum of money and has been sent to several countries, where the public prosecutor rules that there is a risk the total receipt of the execution would exceed the amount laid down in the confiscation decision;
b. the procedure of article 27 WWETGC has been initiated (see 3.3.6);

[96] See for instance: District Court of North Netherlands (*Rechtbank Noord-Nederland*) 6 November 2013, ECLI:NL:RBNNE:2013:8370, 14 October 2015, ECLI:NL:RBNNE:2013:8370 and 20 April 2018, ECLI:NL:RBNNE:2018:1562.

c. the execution would be at odds with an on-going criminal investigation;
d. he deems translation of the confiscation decision necessary;
e. the confiscation decision relates to a specific object which is already the subject of a an on-going confiscation procedure.

The public prosecutor promptly informs the foreign authorities of his decision to postpone the execution of the confiscation decision. If this decision is based on one of grounds b-e, he specifies these grounds and the expected duration of the postponement. As soon as the grounds for postponement have ceased, the confiscation decision is executed. The foreign authorities also receive a notification thereof.

3.3.5. Which time limit is there for the execution of the confiscation order from the communication of the foreign decision? Are there any sanctions in case of non-compliance? Is this limit respected in the reality? What is the average duration?

There is no legal time limit in place for the execution of the foreign confiscation order. In practice, the period between the receipt of a foreign confiscation decision and its recognition strongly depends on the specific case and whether it is sent in containing all the necessary documents. If that is the case, the recognition can take place within 30 until 45 days.[97]

3.3.6. Which are the rights and guarantees of the person addressed by a foreign confiscation order in the execution phase? What legal remedies are there against a confiscation order in the executing State?

Article 27 of the WWETGC grants the defendant (and other interested parties) a legal remedy to challenge the decision of the public prosecutor to recognize and execute the confiscation decision. He can lodge an appeal to the District Court of North Netherlands (*Rechtbank Noord-*

[97] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.

Nederland) within seven days from the day he is informed of the public prosecutor's decision.[98] This appeal postpones the execution of the confiscation decision. The foreign authority is promptly informed of a lodged appeal. As seen under 3.3.3, published case-law does not demonstrate any successful application of this appeal procedure.

Article 22 WWETGC states that if the foreign confiscation decision is recognised, it is executed according to Dutch law. This means that the Dutch authorities can seize and sell assets belonging to the defendant in order to execute the payment obligation. This mechanism has been described under 2.1.1, *supra*. As seen under 2.1.7, *supra*, defendants can challenge such a freezing and selling of assets before a court.[99] On the basis of article 27, paragraph 4 and article 15 WWETGC, this possibility is also open to defendants whose confiscation decision is recognized and executed in the Netherlands. He can file a complaint before the district court of District Court of North Netherlands (*Rechtbank Noord-Nederland*). This complaint cannot challenge the payment obligation as such; it merely aims at the manner of execution thereof.

Dutch confiscation law offers defendants the possibility to request a mitigation or remittance of the payment obligation in the execution phase (art. 577b, paragraph 2 CCP[100]). Since this *does* affect the payment obligation, it is not applicable to foreign confiscation decisions that are executed in the Netherlands.[101] The defendant can however request to be granted a pardon on the basis of article 558 CCP, as this is expressly stated in article 37 WWETGC. In case the pardon is granted, the foreign authority is promptly informed of that decision.

3.4. Third-party confiscation

[98] *Kamerstukken II* 2008/09, 31555, 6.
[99] Article 575, paragraph 3 CCP.
[100] See De Zanger 2018a, p. 333-373 concerning this procedure.
[101] District Court of North Netherlands (*Rechtbank Noord-Nederland*) 13 November 2005, ECLI:NL:RBNNE:2015:6359

Please refer to the same points under 3.3.1.-3.3.6, but only in relation to third-parties, where there are peculiarities.

In case the Netherlands has received a request to recognize a foreign confiscation decision (see 3.3), the public prosecutor can freeze and sell assets in order to execute the confiscation sanction. It can concern either specific objects pointed out in the request or other objects that can serve to execute the confiscation decision. The general rules concerning the freezing and subsequent selling of assets in order to execute national confiscation orders apply.[102] This means that assets under a *mala fide* third party can be seized and sold in order to execute a foreign confiscation decision that is executed in the Netherlands (see 1.2 *supra*). If a third party claims to have ownership of objects that have been frozen on the basis of the WWETGC, he can use the provisions of the Civil Code of Procedure to challenge the execution (art. 27, paragraph 2 WWETGC).

Article 30 WWETGC furthermore allows for the freezing of assets during the period in which the confiscation decision is reviewed for recognition, or when the execution thereof is postponed. Such freezing is only possible if there are valid reasons to expect that the confiscation decision will shortly be executed in the Netherlands.

4. Management and disposal aspects

4.1. Freezing

4.1.1. Which are the authorities responsible for the management of frozen assets?

Frozen assets are managed under the responsibility of the public prosecutor. With this aim, a 'national freezing authority' (*Landelijke Beslag Autoriteit*, LBA) has been introduced, which is part of the National Office for Serious Fraud, Environmental Crime and Asset Confiscation of the public prosecutor's office. It coordinates all the seizures and freezing of assets, and serves

[102] Art. 22 WWETGC refers to art. 577b, paragraph 1 CCP, which governs the execution of confiscation orders.

as a centralised office in the sense of article 10 of Directive 2014/42/EU.[103] It thus has a supervising role, in which it *inter alia* advices public prosecutors and manages the freezing and disposal of assets abroad.

The actual remand in custody (*bewaring*) is done by several custodian authorities. Which authority is competent depends on the nature of the seized assets. When it concerns movable property, this is as a rule done by the State Property Service (*Domeinen Roerende Zaken*, DRZ), which is a part of the Ministry of Finance. If the frozen asset concerns cash money, it is managed by the National Service Centre for the Public Prosecution Service (*Dienstverleningsorganisatie OM, DVOM, afdeling landelijk beheer inbeslaggenomen gelden*). [104] These custodian authorities store, value and sell or destroy the assets in accordance with the judgement of a public prosecutor.

4.1.2. Which activities can be made on/with the frozen assets (custody, sale or transfer, restitution without guaranty, restitution with guaranty, destruction, use)?

Frozen assets can be given back (without a guaranty) to the person under whom they were frozen or a third party who is the entitled party to the asset (art. 116 CCP). If it concerns assets that are not suited for storage (e.g. drugs, car wrecks, fireworks *et cetera*), of which the costs of storing are disproportionate to their value, or that are exchangeable and which value can be easily determined, the public prosecutor can authorize the selling, destruction, abandonment to the custodian authority. If the public prosecutor does not respond to a request for such an authorization within six weeks, the custodian authority can decide to sell, destruct or abandon the assets without an explicit authorization. Before doing so, the value of the objects is

[103] *Staatscourant* 2015, no. 11370, p. 5.
[104] Other authorities are responsible for the management of specific assets, such as firearms, falsified documents and counterfeit money. See article 1 of the Besluit Inbeslagneming Voorwerpen, *Staatsblad* 1995, 699 and 2012, 615.

estimated by an expert.[105] If frozen assets are sold, the proceeds of the selling are subsequently frozen with the aim of executing the confiscation order (art. 117 CCP).

After the assets have been frozen for two years, the custodian authority can (also if it does not concern assets as described above) decide to sell, destruct or abandon the frozen assets, unless the public prosecutor objects thereto within two weeks after he is given notice of the custodian authority's intention (art. 118 CCP).

Frozen assets can also be returned to its owner with a financial guaranty. The guaranty can also be fulfilled by a third party (art. 118a CCP).

4.1.3. How are the costs of the management of the assets covered in the different stages of the proceeding? How are used the earnings of the asset management?

The public prosecutor's office bears the costs of managing the frozen assets. In the execution phase, the costs of freezing the assets and subsequently selling them in order to execute the confiscation order are however borne by the defendant (see 4.3.2).

4.1.4. Is there the possibility to claim damages suffered by a wrongful management of frozen assets? How is this possibility regulated?

If the manner in which the object is managed is wrongful, for instance when the object is damaged, the person concerned can initiate a civil liability procedure against the State. The minister deemed it unnecessary to design a specific procedure for such claims.[106]

4.1.5. Which peculiarities are there when the assets are to be managed abroad in consequence of a mutual recognition request? Please refer to relevant national practises.

[105] Article 14 of the Besluit inbeslaggenomen voorwerpen, *Staatsblad* 2012, 168.
[106] *Kamerstukken II* 1989/90, 21504, 3, p. 28-29.

If the Dutch public prosecutor issues the mutual recognition of a freezing order abroad, the articles 5.5.9 until 5.5.13 CCP apply. The public prosecutor can formulate procedural requirements which the executing authorities must obey as much as possible in the execution. Interested parties can, on the basis of articles 552a and 552c CCP, file a complaint against the issuing of the order at the court of the district to which the issuing public prosecutor is assigned.

4.1.6. Which peculiarities are there if the assets are to be managed on the basis of the decision of a foreign authority? Please refer to case-law.

If assets are managed in the Netherlands on the basis of the decision of a foreign authority, some peculiarities occur. The custodian authority can only decide (on the basis of article 117 CCP, see 4.1.2) to sell, destruct or abandon the assets, if the public prosecutor has consulted the foreign authority (art. 5.5.5, paragraph 5 CCP). The public prosecutor can furthermore, after consulting with the foreign authority, set conditions in order to limit the duration of the freezing. If he ends the freezing in conformity with these conditions, he promptly informs the foreign authority (art. 5.5.7, paragraph 3 CCP).

4.2. Freezing of third-parties' assets

Please refer to the same points under 4.1.1-4.1.7, but only in relation to third-parties, where there are peculiarities.

There are no peculiarities on this issue. Article 5.5.5, paragraph 1 CCP states that the regular legal provisions concerning freezing are applicable to the execution of a foreign freezing order. This means that the provisions that govern the freezing of assets under a *mala fide* third party (art. 94a paragraphs 4-5 CCP, see 2.2 *supra*) also apply.

4.3. Confiscation

4.3.1. Which are the authorities responsible for the disposal of confiscated assets?

The disposal of confiscated assets is as a rule done by the custodian authorities mentioned under 4.1.1, *supra*. As seen, for movable assets this is the State Property Service (*Domeinen Roerende Zaken*). Assets that have been frozen can also be disposed of with the aim of executing the confiscation order by a bailiff (*deurwaarder*), who operates in accordance with the Code of Civil Procedure.[107] The execution of criminal sanctions falls under the responsibility of the public prosecutor, so the disposal of confiscated assets is his responsibility.

4.3.2. Which are modalities of the disposal?

Apart from the specific rules governing the disposal of assets in order to execute the confiscation order (see 2.1.1), the disposal is governed by the rules of the Code of Civil Procedure.[108] This means that the assets are disposed of by means of a selling by public auction. The costs of selling the assets with the aim of executing the confiscation order are borne by the defendant. It concerns costs a bailiff makes for corresponding with the defendant and for freezing and selling the assets. The proceeds of selling the assets are firstly employed to satisfy the costs, so the payment obligation of the defendant is only mitigated with the amount that remains after that.[109]

4.3.3. Which are the uses of the confiscated assets? To which purposes? Who are the beneficiaries (victim, ...)?

If assets are confiscated, their value as a rule flows into the State treasury. If the execution consists of payments by the defendant, these are added to the budget of the State. The same goes for the value of objects that are frozen and subsequently sold. After the turnover from the

[107] *Kamerstukken II* 1994/95, 23692, 5, p. 9.
[108] *Kamerstukken II* 1989/90, 21504, 3, p. 43.
[109] De Zanger 2018a, p. 318-324.

sell is used to pay for any costs of the selling process (e.g. bailiff costs), the rest becomes property of the State. As a rule, the proceeds are not 'earmarked' for specific goals, but they contribute to the general budget. In recent years however, there have been examples of cases in which specific investments by the Ministry of Justice – e.g. in specific confiscation teams of regional parts of the public prosecutor's office – are monitored and reinvested for the same purpose.

Objects that have been subject to a withdrawal are as a rule destroyed, since it concerns objects of which the uncontrolled possession is in breach of the law or contrary to the public interest, i.e. dangerous objects (see 1.1.1.3).

If there are victims involved in the case, they will be compensated first, if they have a civil claim on the defendant or if the judge has ordered a criminal compensation order on the ground of article 36f CC. In that case, the payments by the defendant and the yield of the frozen assets will first be used to fulfil these payment obligations.[110]

The Netherlands has practically no tradition of social reuse of confiscated assets. In April 2015, the Minister stated that he did not, at that moment, see reason to reserve the income from confiscation for specific purposes.[111] Recently however, there has been a first experiment in this direction when a boat that was allegedly used to transport drugs was frozen in a money laundering case. Instead of selling it, the boat has been donated by the public prosecutor's office to a maritime and transport educational organization. Because of the specifics of the ship, it was expected that a public auction would enable criminals to buy the ship and use it for drug trafficking purposes (again). Furthermore, the symbolic effect of this donation is emphasized. The public prosecutor's office intends to increase such initiatives to reuse of criminal assets and instrumentalities.[112]

[110] Article 36f, paragraph 6 CC.
[111] *Staatscourant* 2015, no. 11370, p. 5.
[112] See https://www.om.nl/@101163/voormalige-drugsboot/ (5 April 2019).

4.3.4. Which peculiarities are there when the assets are to be managed abroad in consequence of a mutual recognition request? Please refer to relevant national practises.

There are no peculiarities on this issue.

4.3.5. Which peculiarities are there if the assets are to be managed on the basis of the decision of a foreign authority? Please refer to case-law.

If assets are to be managed in the Netherlands on the basis of a confiscation decision of a foreign authority, they are managed and disposed of as if it concerns assets that serve to execute a Dutch confiscation decision. If the Netherlands has recognized a foreign confiscation order (see 3.3) and the amount of money that results from the execution is higher than € 10.000, the half of the received amount is transferred to the issuing State. If the execution yields € 10.000 or less, it flows to the Dutch State. If the confiscation concerns specific objects, they can either be sold (after which the yield is divided between states), transferred to the issuing State or destroyed.[113] The minister of Justice can however agree with the foreign State to make an alternative division of the yields of execution (art. 28 WWETGC).

4.4. Third-Party Confiscation

Please refer to the same points under 4.4.1.-4.4.5, but only in relation to third-parties, where there are peculiarities.

There are no peculiarities on this issue.

[113] Objects that concern Dutch cultural heritage are not sold or transferred to the foreign State.