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RECENT CASE LAW ON DUTCH CONFISCATION LAW

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This newsletter provides an overview of recent case law concerning confiscation of illegal assets in the Netherlands. Four recent rulings of the Dutch 'Hoge Raad' (the constitutional court) are discussed. They concern confiscation after a conviction for money laundering, confiscation under a defendant who is both a witness and a suspect (a crown witness), and freezing of assets under a *mala fide* third party.

Money laundering and confiscation

Under Dutch law, several instruments exist to combat profits that are obtained through crime. Two of the most important instruments are the criminalization of money laundering in articles 420bis and further of the Dutch Criminal Code (CC) and the criminal sanction of confiscation as laid down in article 36e CC (*ontnemingsmaatregel*). This sanction targets the profits a convicted person has obtained unlawfully. The cumulation of these two instruments however is not always easy. If someone has been convicted for money laundering, this does not automatically mean that the laundered assets constitute his illegal profits. After all, someone can launder money for someone else, and if he receives a fee for this illegal activities, only this fee represents the profits he has obtained. In that case, only that fee can be confiscated under article 36e CC. This is the result of case law of the Hoge Raad that has been in place since 2013 ⁽¹⁾ and has been confirmed many times after that ⁽²⁾.

These rulings concerned the confiscation order of article 36e CC, a legal instrument solely aiming at the proceeds of crime. It is however not the only criminal sanction that can be used to target such assets. Withdrawal (*onttrekking aan het verkeer*) and forfeiture (*verbeurdverklaring*) can also take away illegal proceeds. Lastly, the regular criminal fine (*geldboete*) can be used to confiscate the proceeds of crime. In the motivation of the amount of the fine the judge can refer to the amount of illegally obtained proceeds. This is referred to as a 'skimming fine' (*afroomboete*), which 'skims' the illegal proceeds from the offender. It is, as such, not regulated in criminal law or criminal procedural law: there are no specific provisions in the law governing criminal fines that aim to confiscate illegal proceeds.

In a judgement that was passed on 16 April 2019, the Dutch Hoge Raad has ruled that the mentioned rule (that prohibits the judge to automatically assume that assets that were the subject of money laundering represent criminal proceeds of the offender) also applies when the skimming fine is applied. Hence, after a conviction for money laundering, the amount of the criminal fine cannot automatically be based on the assets that were laundered. One option however still remains: the sanction of 'forfeiture' (*verbeurdverklaring*, articles 33-33a CC) cannot only target proceeds from crime, but also the objects 'in relation to which' the offence was committed. Therefore, it *can* be used to take away assets that were laundered by the offender.

⁽¹⁾ Hoge Raad 19 February 2013, ECLI:NL:HR:2013:BY5217, *Nederlandse Jurisprudentie (NJ)* 2013/293.

⁽²⁾ See most recently: Hoge Raad 2 April 2019, ECLI:NL:HR:2019:475.



Non - confiscation in the case of crown witness

A second recent development in case law concerns the possibility to refrain from requesting confiscation when it concerns a 'crown witness': someone who is both suspect and witness and who provides information in exchange for a more lenient demand by the public prosecutor. This instrument has been regulated in the Code of Criminal Procedure (CCP) since 2006 **(3)**.

Article 226g, paragraph 1 provides for the possibility of a lower penalty demand by the public prosecutor **(4)**.

A proposed agreement must be submitted to the investigative judge (rechter-commissaris), who rules on the lawfulness (including the proportionality and subsidiarity) of the proposed deal and the reliability of the witness. Agreements that concern other promises than those relating to a lower penalty, are governed by paragraph 4 of article 226g CCP. The public prosecutor is obliged to make an official report of these agreements, which he must include in the case file. They are not subject to approval of the investigative judge. In addition to the law, a policy document of the public prosecutor's office states that the public prosecutor can also promise a lower request for confiscation of up until 50% of the original request, in exchange for a statement **(5)**. Whether such an agreement must be submitted to the investigative judge, is not clear from the law and the policy document.

In one of the largest trials in the history of Dutch criminal law, it was stated by the defence that confiscation had been part of an agreement with the crown witness. In this case it concerns, among other offences, multiple assassinations in the organized crime world of Amsterdam. During the trial, two crown witnesses have provided statements incriminating their fellow defendants. The public prosecutor decided not to request confiscation from them, even though he believed one of the witnesses had illegally obtained € 65.000. Both the court in first instance and the appellate court ruled that these decisions not to request confiscation were not in breach of the law. They based their decisions on the fact that the public prosecutor enjoys discretion to decide whether or not to request confiscation. The court attached relevance to the fact that the public prosecutor motivated his decision on the circumstance that one of the witnesses did not provide sufficient opportunity for recovery, and that (after the crown witnesses served a prison sentence) financial measures were to be taken as a part of a witness protection plan, which would mean that any confiscation sanction would amount to a mere shifting of funds. Since there had been no evidence of negotiations concerning the confiscation, the appellate court ruled that the fact that no confiscation was requested, was not part of an agreement with the crown witnesses.

The other defendants filed cassation complaints concerning, among other things, this non-requisition of confiscation. On 23 April 2019, the Hoge Raad has ruled on these cassation complaints **(6)**. According to the Hoge Raad, the judgement of the appellate court did not err in law. An agreement in the sense of article 226g CCP only exists if a promise is made in exchange for a witness statement. Given the reasons the public prosecutor has provided for not requesting confiscation, the judgement of the appellate court was not ill-motivated either. Furthermore, in order to provide clarity to the field, the Hoge Raad has formulated a rule that must be applied in case the public prosecutor agrees upon an out-of-court confiscation settlement on the basis of article 511c CC **(7)** while this settlement relates to one or more of the same criminal offences in relation to which a crown witness agreement was reached. In that case, a reasonable application of the law dictates that the public prosecutor is obliged to inform the investigative judge of the formation and content of the confiscation settlement. In this way, it will be known – as so to the defendant against whom a statement is provided – that a settlement has been reached. Hence, a form of judicial control must be applied in order to verify whether the confiscation settlement has any relationship to the crown witness agreement.

(3) Law of 12 May 2005, *Staatsblad* 2005, 254.

(4) Article 44a CC explicitly allows the judge to adhere to such demand. It concerns a mitigation of a prison sentence, community punishment or criminal fine with 50%, the conversion of maximum half of the said penalties into a suspended sentence, or conversion of one third of the prison sentence into a community punishment or a criminal fine.

(5) Instructions for promises to witnesses (*Aanwijzing toezeggingen aan getuigen in strafzaken*), *Staatscourant* 2006, 56 and *Staatcourant* 2012, 22031. This mitigation can also be materialized by means of a confiscation settlement between the public prosecutor and the defendant on the basis of article 511c CCP.

(6) Hoge Raad 23 April 2019, ECLI:NL:HR:2019:600, 601, 602, 603, 604 and 605.

(7) On the basis of this provision, the public prosecutor and the defendant can settle the confiscation case out-of-court.





Freezing of objects under a third party

The last development in recent case law of the Hoge Raad relates to the possibility of freezing of assets (*beslag*) under a third party. Such freezing is possible if it concerns assets that can serve to execute a criminal fine, a confiscation order or a compensation order. In order to freeze assets under a third party, article 94a paragraph 4 CCP stipulates that there need to be 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. On the basis of paragraph 5 of the same provision, other objects 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.

(8) HR 12 March 2019, ECLI:NL:HR:2019:244.

(9) HR 26 March 2019, ECLI:NL:HR:2019:436.

In two recent judgments, the Hoge Raad has emphasized that the required knowledge of the third party needs to be substantiated by the court deciding on questions of fact. In the first case, the decision to freeze the assets under the third party (a legal person) was based on the circumstance that a financial claim was transferred to him as a part of a restructuring project (8). The third party was one of the legal successors of the defendant on whom the confiscation order was imposed. In the second case, the court in first instance based its decision on the fact that the defendant on whom a confiscation order was imposed was one of the founders, shareholders and directors of the third party (a legal person), he had invested (part of) his illegally obtained money in the third party and that the knowledge of the defendant of the court decisions in the criminal and confiscation case against him, could be attributed to the third party (9). According to the Hoge Raad, the mentioned circumstances in both cases could not justify the finding that the requirements of 'sufficient indications' that the objects were transferred to the third party with the apparent aim of frustrating the execution, and that the third party knew or could reasonably suspect of the aim of the transfer, were met. With these judgements, the protection of *bona fide* third parties is underlined, since the facts of the case must show that it concerns a *mala fide* third party whose property can be frozen in order to execute the confiscation order imposed on the defendant



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