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RECOVER PROJECT

Country report the Netherlands

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0. Abbreviations

(E) extended confiscation

NCBC Non conviction based confiscation

(O) object confiscation / direct confiscation

(Sr) Criminal Code of the Netherlands

(Sv) Code of Criminal Procedure of the Netherlands

(W) value confiscation

1. Different models of forfeiture/confiscation in the Netherlands

Criminal law of the Netherlands has models of direct / object confiscation (O) (to be referred to hereinafter as: direct confiscation) and value confiscation (W). It is important to note that Dutch law also has two models of confiscation of criminal assets, which may be imposed simultaneously. These are the freezing, which includes seizure intended for direct confiscation, and freezing for the purpose of value confiscation, which may be imposed for the value confiscation order, compensation measure and fine. Both these models of confiscation are set out in further detail in Appendix I.

Paragraph 1.1. provides a description of confiscation as may be ordered by the court. Only the withdrawal from circulation is possible without a conviction for the criminal offence and even in the event of an acquittal (NCBC). Paragraph 1.2. provides the models of confiscation that are possible without the court's involvement. Extended models of confiscation (E) are possible in the Netherlands within the scope of the value confiscation order. It is also possible to impose third-party seizure in the Netherlands - both in case of forfeiture as well as (due to the options when imposing confiscation) in case of value confiscation orders.

1.1. Confiscation as a decision from the court

In the Netherlands, the following models of confiscation orders may be imposed by the court, which will be addressed hereinbelow.

I. Forfeiture with seizure (O)

II. Forfeiture without seizure (O/W)

III. Withdrawal from circulation (O)

IV. Value confiscation order (W)

V. Fine (confiscating illegal gains) (W)

VI. Compensation measure (W)

VII. Suspended sentence with compensation as a special condition (W)

1.1.I. Forfeiture with seizure

Forfeiture (Section 33 et seq. Sr) is a form of direct confiscation. In the Dutch system, the forfeiture is an additional punishment. Its imposition seeks to impact the convicted person's assets. This is without prejudice to the fact that an object of little value may also by forfeited. In order for an object or an amount of money to be forfeited, there must be a specific relationship between the object or the money and the criminal offence (see the cases referred to in Section 33a Sr). This may include tools used to commit a burglary, the vehicle from which was dealt, but also money or goods in laundering.

Section 33a Sr phrases which objects may be forfeited:

The following shall be liable to forfeiture:

a) objects belonging to the convicted person or objects he can use in whole or in part for his own benefit and that have been obtained entirely or largely by means of the proceeds of the criminal offence;

b) objects in relation to which the offence was committed;

c) objects used to commit or prepare the offence;

d) objects used to obstruct the investigation of the serious offence;

e) objects manufactured or intended for committing the serious offence;

f) rights in rem and rights in personam pertaining to objects specified in a through e.

As a result of forfeiture, the State becomes the owner of the object (Section 6:1:12 (2) Sv). The imposition of a forfeiture, does not require the objects to be seized. An object that has not been seized may also be subjected to a forfeiture order by the criminal court if that object still belongs to the defendant (see below: forfeiture without seizure, Section 34 Sr).

An object or amount of money not owned by the party whose assets were seized may also be subjected to forfeiture. This is one of the forms of third-party seizure in the Dutch system. Such confiscation should be possible if the entitled party knew or reasonably should have known that there was a relationship between the object and a criminal offence, and if it cannot be established who the object or the amount of money belongs to (Section 33a, subsection 2 Sr).

The phrase 'belongs to' indicates a legal relationship according to which an object (a good) belongs to the assets of a person. As the entitled party, the person the object belongs to may exercise rights to the object. Belonging to also comprises the cases in which the party in question:

- effectively has such control over and interest in the object and
- where, to that extent, said party's relation to that object may be considered equivalent to that of the owner (Supreme Court of the Netherlands 20 January 1998, Dutch Case Law in Business Legislation 1999, 46 and Supreme Court of the Netherlands 28 September 1999, Dutch Law Reports 1999, 803)

The forfeiture must be proportional: the value of the forfeited objects must be in proportion to the gravity of the offence and as such in proportion to the expected punishment to be imposed (Section 33 in conjunction with Section 24 Sr). If the defendant or another party are impacted disproportionately, the court may order the reimbursement of the difference (Section 33c Sr).

Forfeiture may only be pronounced upon conviction pertaining to a criminal offence and therefore not in case of an acquittal or in case of a dismissal of all criminal charges. Forfeiture may be imposed both separately and in combination with the principal judgment and other additional punishments (Section 9 subsection 5 Sr).

Objects that have not been subjected to freezing, but only to prejudgment seizure may also be subjected to forfeiture. (ECLI:NL:Supreme Court of the Netherlands:2015:3689).

1.1.II. Forfeiture without seizure

Seizure is not a requirement for forfeiture. Upon forfeiture, the court may impose the surrender of objects that were not seized.

In principle, Section 34 Sr provides grounds to that effect. This legal provision offers the defendant the option to surrender forfeited objects or to pay the value estimated by the court in its judgment, after which the Section 24c, 25, 6:4:2 and 6:4:7 Sr shall apply mutatis mutandis: the court shall order the enforcement of detention as a substitute penalty in the event that neither surrender nor full recovery of the amount outstanding follows.

The imposition of an order to forfeit an object that has not been seized requires the convicted person to have control over that object to the extent that under criminal law, the object still belongs to said convicted person.

Direct confiscation still applies when the convicted person surrenders the forfeited object. The phrase value confiscation applies when the convicted person, rather than surrendering the object, pays its estimated value.

1.1.III. Withdrawal from circulation[1]

Withdrawal from circulation is a measure to protect society against dangerous objects. Withdrawal from circulation is only possible if the object is of such a nature that its uncontrolled possession is in conflict with the law or with public interest Section 36c Sr). These may concern narcotics, prohibited weapons, a dangerous animal, a knife that was used to make threats.

Liable to withdrawal from circulation are all objects:

[1] Instruction of seizure (Section 94 Sv) https://wetten.overheid.nl/BWBR0029019/2014-07-01

1. obtained entirely from or through the means of proceeds from the offence;
2. pertaining to which the offence was committed;
3. used to aid in committing or preparing the offence;
4. used to aid in the obstruction of the investigation of the offence;
5. manufactured or intended to commit the offence.

In principle, this measure is imposed at the final judgment in the principal action. In the event that this is not possible, Section 552f Sv provides the basis for the measure to be imposed by means of a separate judicial decision, on the public prosecutor's demand. When the defendant is not known, an object may also be withdrawn from circulation through proceedings in chambers.

In case the defendant is acquitted, a withdrawal from circulation may still be ordered as a safety measure (Section 36b subsection 1, 3° Sr).

The withdrawal from circulation is therefore both possible as conviction-based confiscation and as non-conviction-based confiscation.

1.1.IV. Value confiscation order

During the investigation, sufficient clues may emerge that the defendant, from offences he is suspected of / convicted of or from any other criminal offence, obtained gains of a considerable interest that can be expressed in monetary terms. For this reason, following from the criminal case, proceedings may also be launched against the aforementioned defendant in order to confiscate unlawfully obtained gains.

This (value) confiscation procedure is a separate part of the criminal investigation in which the party convicted of a criminal offence may be ordered by means of a separate judicial decision to pay a monetary amount to the State for the purpose of confiscating unlawfully obtained gains. These proceedings seek to confiscate unlawful gains obtained from criminal offences or by committing same. With these proceedings, a perpetrator of a criminal offence will be placed back in the position he would have been in if he had not committed the criminal offence.

A condition for imposing a value confiscation order is that the defendant is (ultimately) irrevocably convicted by the criminal court.

With a view to the recovery in the confiscation procedure, a freezing for the purpose of value confiscation (see appendix 1) may be imposed based on Section 94a Sv. Since prejudgment seizure may also be imposed on subjects of a third party under a third-party seizure or freezing for the purpose of value confiscation, there may be an extended confiscation (E) within the scope of the confiscation procedure. Extended confiscation will be addressed hereinafter (2.a.IV).

Subject to conditions, it is also possible to confiscate objects that belong to another party. This form of confiscation from a third party (third-party seizure) is addressed in appendix 1 (seizure pertaining to criminal procedure, prejudgement seizure on objects of a third party (third-party seizure) from p. 48).

1.1.V. (Fine) confiscating illegal gains

If the court imposes a fine, the convicted person must pay the determined amount to the State of the Netherlands within a term specified by the Minister of Justice and Security. Based on Section 23 subsection 2 Sr, a fine will be no less than € 3.00. The maximum fine that may be imposed for criminal offence depends on the criminal offence that is committed (Section 23 subsection 3 Sr). Criminal offences are linked to fine categories and each fine category has a maximum amount of the fine. The amounts are redetermined every two years. As per 1 January 2022, the maximum amounts per fine category are as follows:

- the first category, € 450;
- the second category, € 4,500;
- the third category, € 9,000;

- the fourth category, € 22,500;
- the fifth category, € 90,000;
- the sixth category, € 900,000.

If the convicted person fails to pay in full and full recovery is not possible, detention as a substitute penalty may be enforced (Section 6.4.3 Sv). In the judgment where a fine is imposed, this detention as a substitute penalty is determined by the court Section 24c Sr). If the convicted person is a legal entity, detention as a substitute penalty may not be imposed. The detention as a substitute penalty amounts to no less than one day and no more than one year. For every € 25.00 of the fine a maximum not exceeding one day will be imposed (Section 24c Sr).

In imposing a fine, the court will regard the capacity of the defendant to the extent necessary in view of an appropriate punishment of the defendant without said defendant being disproportionately impacted in terms of income and assets (Section 24 Sr).

In addition to the "ordinary" fine, the criminal court may also impose a so-called fine confiscating illegal gains. It is accepted that the extent of a fine is also based on the unlawfully obtained gain. Such a fine is therefore also intended to fully or partially confiscate this gain obtained by the party in question. A fine confiscating illegal gains may not be exclusively imposed to confiscate unlawfully obtained gains.

The law lacks a legal framework for sanctioning with regard to the fine confiscating illegal gains. The only legal boundary is formed by the minimum and maximum amounts of the fine to be imposed and the ability-to-pay principle and principle of proportionality included in Section 24 Sr. As such, the implementation of the fine confiscating illegal gains and the responsibilities under discussion are left to the court decisions.

1.1.VI Compensation measure

If the criminal offence caused damage to an injured party, based on Section 36f Sr, the court may impose a compensation measure. In that case, the convicted person will be obliged to pay a sum of money to the State, for the benefit of the victim or the victim's surviving relatives. In its turn, the State will pay the amount received to the victim or the victim's surviving relatives. This way, the party suffering damage will not be required to recover the sum of money by itself.

As such, a significant difference with awarding a claim to the injured party is that the State ensures the recovery. Another significant difference is that in case of failure to pay the compensation and the absence of recovery, the convicted person may be detained for failure to comply with a judicial order (Section 36 subsection 8 Sr). This detention for failure to comply with a judicial order does not release the convicted person from his obligation to pay (Section 36f subsection 8 Sr). It is also important that the public prosecutor, following authorisation to that effect from the examining magistrate and with a view to the collection of the compensation measure, may impose a prejudgment seizure on assets of the defendant (Section 94a Sv).

The court may award different forms of compensation. This may involve immaterial damage and material damage. Within the scope of confiscation, material damage may be divided in damage that did not result in capital appreciation of the convicted person (for example damage caused in a burglary) and damage that did result in capital appreciation (for example the exclusive watch that was stolen in the burglary).

In the framework of confiscation it is particularly important that the convicted person compensates the material damage that led to the capital appreciation of the convicted person (in the above example, he must compensate the value of the stolen watch). This results in financial restoration of rights (value confiscation). As soon as the convicted person has compensated the material damage, the extent of the unlawfully obtained gains will be reduced. In that case the value confiscation order will be lower.

1.1.VII.Suspended sentence with compensation as a special condition

In imposing the punishment, the court may decide that (part of) the judgment will not be enforced. This is referred to as a so-called suspended sentence. Section 14a Sr stipulates when a suspended sentence may be imposed:

1. In case of a prison sentence not exceeding two years, to detention, not including detention as a substitute penalty, to community punishment or to a fine, the court may determine that the punishment or part thereof will not be enforced.

2. In case of a prison sentence in excess of two years and no more than four years, the court may determine that part of the punishment of up to no more than two years, will not be enforced.

The convicted person will be required to comply with specific conditions during a operational period to be determined by the court. The operational period will be no more than 3 years (Section 14b Sr). In any case, there will be a general condition: the convicted person may not commit a criminal offence before the end of the operational period (Section 14c Sr). In addition to this, the court may impose special conditions, such as full or partial payment of the damage caused by the criminal offence (Section 14c Sr).

Within the scope of confiscation it is particularly important that the convicted person compensates the material damage that resulted in the capital appreciation of the convicted person. This results in financial restoration of rights (value confiscation).

If the convicted person fails to comply with the special condition, the public prosecutor may demand that the court decides that (part of) the operational period of the punishment that was imposed is as yet enforced (Section 6:6:1 Sv).

1.2. Confiscation without the involvement of the court

The Dutch system has the following forms of confiscation, where the court is not involved. These will be addressed below.

VIII. Relinquishing seized objects for forfeiture or for withdrawal from circulation (O).

IX. Conditional dismissal with special conditions:

- relinquishing seized objects for forfeiture or for withdrawal from circulation (O);
- full or partial compensation of damage caused by the criminal offence (W).

X. Out-of-court settlement to avoid prosecution subject to the conditions:

- relinquishing seized objects for forfeiture or for withdrawal from circulation (O);
- surrendering or payment to the State of the estimated value, of objects eligible for forfeiture (O/W);
- payment to the State of an amount of money or transfer of seized objects for the purpose of full or partial confiscation of unlawfully obtained gains (O/W);
- full or partial compensation of the damage caused by the criminal offence (W).

XI. Punishment order with the following measure or instruction:

- the obligation to pay the State a sum of money for the benefit of the victim (W);
- relinquishing objects that have been seized and are eligible for forfeiture or withdrawal from circulation (O);
- surrendering or payment to the State of the estimated value, of objects eligible for forfeiture (O/W);
- payment to the State of an amount of money or transfer of seized objects for the purpose of full or partial confiscation of unlawfully obtained gains (that are eligible for confiscation) (O/W).

XII. Written settlement:

- payment of an amount of money (W);
- transfer of objects to the State (O/W).

1.2.VIII. Relinquishing seizure

A party whose assets are seized may relinquish the seizure. As a result, he relinquishes his entitlement to a return. The party whose assets are seized relinquishes by signing a written statement.

If the party whose assets are seized declares that the object is owned by him, the ownership transfers to the State as a result of the relinquishment, unless a party other than the defendant is (co-) owner. When the party whose assets are seized is the only owner, following the relinquishment the Public Prosecution Service (PPS) will be authorised to settle the seizure under Section 116 subsection 2 of the Code of Criminal Procedure of the Netherland. The PPS may then order that the object be treated as if it were forfeited or withdrawn from circulation. The object may also be returned to the person who may be reasonably designated as entitled party.

If the party whose assets are seized does not relinquish or if a 'statement of ownership' is absent, the PPS cannot order the object to be treated as being forfeited or withdrawn from circulation. The forfeiture may then exclusively be imposed by the court in the judgment of a criminal case, the withdrawal from circulation either in this judgment or else in separate proceedings in chambers on demand from the PPS. The PPS may prepare the return to a third party who has more rights to the object than the party whose assets are seized; the return will be possible only after the party whose assets are seized has been given the opportunity to submit a notice of complaint against this (Section 116 subsection 3 Sv). Relinquishing the seizure will only settle the confiscation. The criminal case against the defendant (as such) will not have been settled by the relinquishment.

1.2.IX. Conditional dismissal[2]

The public prosecutor may settle *criminal cases* with a confiscation component without court intervention, by means of a conditional dismissal. The public prosecutor will then decide not to prosecute a defendant or not to continue prosecution, but to dismiss the case. Dismissal is understood to mean: the decision not to prosecute or not to continue prosecution.

In the dismissal of a criminal case there is a distinction between dismissals by reason of unlikelihood of conviction and discretionary dismissals.

If the conclusion may be drawn based on the investigation that it is not possible to prosecute or a conviction is unachievable, then the case will be dismissed by means of a 'dismissal by reason of unlikelihood of conviction'. Confiscation under criminal law is not possible under a dismissal by reason of unlikelihood of conviction.

If prosecution is (technically) possible, but is undesirable on the grounds of general interest, the case will be settled by means of a so-called 'discretionary dismissal'. In Section 167 subsection 2 Sv the PPS has been granted the authority not to prosecute on the grounds of general interest (discretionary principle). In case of involvement by the court, the PPS will also be authorised to decide not to continue the prosecution on the grounds of general interest, as long as the examination in court has not yet started (Section 242 subsection 2 Sv).

In principle, based on Section 167 subsection 2 Sv, the PPS may only subject to general conditions to be set postpone the decision whether prosecution should take place for a term to be set in said decision. In that case there will be conditional decision not to prosecute by means of a discretionary dismissal.

Within the scope of the confiscation, a condition that may be set in a discretionary dismissal is that the defendant relinquishes the seizure as being forfeited or withdrawn from circulation (direct confiscation). Also, in the scope of a discretionary dismissal the condition may be set that defendant (fully or partially compensates the damage caused by the criminal offence to the victim. With a view to confiscation, in case of compensation of damage to the victim, the compensation of material damage that leads to financial restoration of rights of the defendant is particularly important. The assets of the defendant will at least be reduced to the situation of defendant as it was prior to committing the criminal offence. (Example: the defendants compensates the value of the watch he stole to the victim, value confiscation).

1.2.X. Out-of-court settlement to avoid prosecution

The public prosecutor may settle *criminal cases* with a confiscation component without the intervention of the court, using an out-of-court settlement to avoid prosecution (Section 74 Sr).

[2] Instruction dismissal and grounds for dismissal used (2022A004)
https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/executie/aanwijzing-sepot-en-gebruik-sepotgronden-2022a004

Before the trial, the public prosecutor will then set one or more conditions for the defendant to comply with to avoid prosecution for serious offences for which a prison sentence not exceeding six years may be imposed and for minor offences.

The conditions that may be set by the public prosecutor are listed in the second subsection of Section 74 Sr. Within the scope of the confiscation, the following conditions are important:

- relinquishing objects that have been seized and are eligible for forfeiture or withdrawal from circulation;
- surrender, or payment to the State of the estimated value of objects that are eligible for forfeiture;
- payment to the State of an amount of money or transfer of seized objects for the purpose of full or partial confiscation of the unlawfully obtained gain;
- full or partial compensation of the damage caused by the criminal offence;

Only when the defendant complies with all conditions, will the out-of-court settlement be finalised and will the public prosecutor no longer be able to prosecute the defendant for that criminal offence.

Acceptance of the out-of-court settlement will bring both the criminal case and the confiscation case to an end. Therefore, after acceptance of the out-of-court settlement it will no longer be possible to conclude a separate written settlement (see XII).

If the defendant fails to comply with the conditions of the out-of-court settlement, the public prosecutor may decide to summon the defendant as yet. The initiative for a follow-up in case of failure to comply with the conditions is therefore vested in the public prosecutor.

1.2.XI. The punishment order

The public prosecutor may also settle *criminal cases* with a confiscation component without the intervention of the court, by means of a punishment order (Section 257a Sv).

A punishment order, similar to an out-of-court settlement, can be implemented in case of minor offences and serious offences liable to imprisonment not exceeding six years.

The issue of a punishment order authorises the public prosecutor to not only impose punishments and measures (Section 257a, second subsection Sv), but also to give the defendant instructions (Section 257a, third subsection Sv).

The punishment order may contain the following measure to be imposed:

- the obligation to pay the State a sum of money for the benefit of the victim.

The instructions that may be given by the public prosecutor may include[3]:

- relinquishing objects that were confiscated and are eligible for forfeiture or withdrawal from circulation;
- surrender or payment to the State of the estimated value of objects eligible for forfeiture.

The punishment order with an instruction may only be issued if the defendant during his/her questioning declared to be prepared to comply with the punishment or the instruction(Section 257c, first subsection Sv).

The defendant may file an objection against a punishment order (Section 257e Sv).

Significant differences between the out-of-court settlement and the punishment order are that the issue of a punishment order is an act of prosecution where the public prosecutor prior to the issue

[3] Section 257a Sv also contains the instruction: "payment to the State of a sum of money or transfer of confiscated objects for the purpose of confiscating the unlawfully obtained gain eligible for confiscation." Based on the punishment order issued by the public prosecutor (2022A003) of the Board of Procurators General, this instruction cannot be given yet.

of the punishment order establishes that the defendant is guilty of the criminal offence and that the initiative is vested in the defendant should he not accept the issued punishment order.

1.2.XII. The written settlement[4] [5]

The public prosecutor may settle confiscation cases without the intervention from the court by means of a written settlement (Section 511c Sv).

The purport of the settlement is to make prosecution for the criminal offences possible on the one hand, but that on the other hand the defendant / convicted person avoid the court proceedings of a demand to confiscate the unlawfully obtained gains by reaching an agreement with the public prosecutor about the amount to be paid and other conditions, also the term or terms in which payment must be fulfilled.

A settlement is possible in respect of the entire unlawfully obtained gains eligible for confiscation.

Contrary to the out-of-court settlement, a settlement may also be reached after the start of the court examination in the proceedings for value confiscation. As long as the examination is not closed, the PPS and the party against whom a lawsuit is brought may reach an agreement. The ultimate moment is when the court examination in the confiscation procedure. closes.

A settlement may entail either the payment of an amount of money or the transfer of objects to the State. These do not necessarily need to be confiscated objects. Other arrangements may also be made, such as (jointly) withdrawing an appeal that was filed in the criminal case.

If a defendant fails to comply with the settlement, the law dictates that the demand for a value confiscation order be brought before the court. In that case, the criminal court will deliver judgment in the confiscation proceedings.

It is possible that the irrevocably convicted person dies before his full compliance with the settlement. At that moment, the demand for a value confiscation order may no longer be brought before the court, because according to Section 69 Sr the right of criminal prosecution comes to an end through the death of the defendant. The Supreme Court of the Netherlands has ruled that Section 69 Sr must be taken to mean that through the death of the party involved, (also) the right to launch or continue proceedings against him for the confiscation of unlawfully obtained gains will lapse. An imposed punishment or measure also cannot be enforced if the convicted person dies. However, Section 6:1:21 Sv makes an exception for an imposed value confiscation order: "A punishment or measure is not enforced following the death of the convicted person, with the exception of the measure to confiscate unlawfully obtained gains." In order to enforce an imposed value confiscation order, both the judgment in the criminal case and in the confiscation case must be irrevocable. This means that in case of both an irrevocable criminal judgment and confiscation judgment, the latter may be enforced, even if the convicted person has died.

If the defendant dies before the settlement agreement has been complied with, this defendant cannot be prosecuted (further). However, there is an agreement with the State, in this case the PPS, signed by the party in question. The heirs may possibly be held to meet the obligations under this settlement. After all, they take the place of the deceased (acquisition under universal title). If necessary, a civil action must be instituted for performance in order to become entitled to enforcement against the heirs.

Another option is to prosecute the heirs for laundering. An heir may be guilty of laundering when he / she:

- accepts the inheritance, which means 'has possession' of assets obtained from serious offence, and
- is aware that this concerns an inheritance arising from crime.

[4] Instruction confiscation (2016A009) https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/afpakken-beslag/aanwijzing-afpakken-2016a009
[5] Instruction confiscation (2016I006) https://zoek.officielebekendmakingen.nl/blg-794560.pdf

1.3 Confiscation models of the Netherlands covered by Regulation 2018/1805

Strictly speaking, only the order for freezing with the goal of forfeiture and withdrawal from circulation and freezing for the benefit of the value confiscation order come under the concept 'freezing order' as mentioned in the Regulation (EU) 2018/1805. The concept 'confiscation order' from the Regulation (EU) 2018/1805 includes forfeiture, withdrawal from circulation and the decision to impose a value confiscation order.

However, in the Dutch system, the compensation measure and the suspended sentence with an order to pay compensation as a special condition are also indicated as forms of confiscation. Therefore, these are addressed here above. Within the framework of this report, only the forms of confiscation with a court decision that also fall within the scope of Regulation (EU) 2018/1805 will be specified in further detail, to wit:

I. Forfeiture with seizure (O)

II. Forfeiture without seizure (O/W)

III. Withdrawal from circulation (O)

IV. Value confiscation order (W)

2. Elaboration on the questions per confiscation model covered by the Regulation no. 2018/1805

2a) What is the object of the confiscation and its meaning/interpretation (proceeds, products of the crime, instruments of the crime, etc.)? Clarify if and in which case it is possible to confiscate the 'value equivalent'.

I. Forfeiture with seizure (Section 33 and Section 33a Sr)

The nature of forfeiture based on Section 33 Sr is an additional punishment. Section 33a Sr includes which objects are liable to forfeiture.

A condition for forfeiture is a link between the object and the criminal offence (proceeds / tool).

If the object is seized, it means that it is confiscated (O) based on Section 33 in conjunction with Section 33a Sr

Under Section 33a Sr it is not possible to confiscate the value equivalent. The forfeiture based on Section 34 Sr is incorporated to that effect in Dutch law.

1. Liable to forfeiture are the following, ex Section 33a Sr:

a. objects that belong to the convicted person or that he may wholly or partially for his own purposes and that he wholly or largely obtained by means of or from the proceeds of the criminal offence;

b. objects pertaining to which the offence was committed;

c. objects that were used to aid in committing or preparing the offence;

d. objects that were used to obstruct the investigation into the serious offence;

e. objects manufactured or intended to commit the serious offence;

f. rights in rem to or rights in personam pertaining to the objects referred to under a up to and including e.

2. Objects as referred to in the first paragraph under a up to and including e that do not belong to the convicted person may only be forfeited in the event that:

a. the party to whom these objects belong was aware or else should have reasonably suspected that these were obtained by means of the criminal offence or with the use or designation in connection therewith, or

b. it was not possible to establish to whom these belong.

3. Rights as referred to in the first paragraph under f, that are not vested in the convicted person may only be forfeited if the party to whom these rights belong was aware, or else should have reasonably suspected, that the objects on which or pertaining to which these rights exist were obtained by means of the criminal offence or with the use or the designation in connection therewith.

4. Objects are understood to mean all corporeal property and all property rights.

Refer to 1.1.I. above for further details.

II. Forfeiture without seizure (Section 34 Sr)

If not seized, an object that under Section 33a Sr does not qualify for forfeiture, may be forfeited under Section 34 Sr. The same conditions apply for this as the forfeiture based on Section 33 in conjunction with Section 33a Sr, with the exception of the condition that the object must be seized. The convicted person is still required to have the object at his disposal, so that it may be surrendered.

Similar to forfeiture based on Section 33 in conjunction with Section 33a Sr, the forfeiture based on Section 34 Sr is an additional punishment.

In the judgment in which the court orders the object forfeited based on Section 34 Sr, the court must also establish the estimated value of the object in question. The public prosecutor may also demand that in its judgment, the court imposes as an alternative punishment that the convicted person be remanded in custody if he does not execute the judgment.

When the court pronounces the forfeiture based on Section 34 Sr, then the convicted person will receive a demand to surrender the object (O). If the convicted person fails to comply with the demand to surrender, the alternative (estimated) value of the object may be confiscated from the convicted person (W). If the convicted person also fails to pay the alternative value, the detention as a substitute penalty may be enforced.

Section 34 Sr

1. Objects that have not been seized shall, upon forfeiture, be estimated at a specific amount of money in the judgment.

2. In such case, the objects must be surrendered or their estimated value paid.

3. The Sections 24c and 25 and the Sections 6:4:2 and 6:4:7 Sv shall apply mutatis mutandis.

Refer to 1.1.II above for further details.

III. Withdrawal from circulation

Section 36b Sr is a typical police measure or security measure. It pertains to the withdrawal of objects that are dangerous to society, that were seized through the course of the investigation into a criminal offence and of which the court assesses that these can no longer be returned to the party whose assets are seized.

Withdrawal from circulation is a measure.

If the object is seized, the object will be confiscated (O) based on Section 36b in conjunction with Section 36c Sr

Section 36b Sr

1. Withdrawal from circulation of seized objects may be imposed:

    1°. by a judgment where a person is convicted of a criminal offence;

    2°. by a judgment where it is decided, in accordance with section 9a, that no punishment is to be imposed;

    3°. by a judgment where, acquittal or dismissal of the criminal charge(s) notwithstanding, it is established that a criminal offence has been committed;

    4°. by a separate decision given in chambers, on demand from the Public Prosecution Service;

    5°. by a punishment order.

2. The Sections 33b and 33c, second and third subsection, also Section 446 Sv, shall apply mutatis mutandis.

3. The measure may be imposed together with punishments and other measures.

Section 36c Sr

Liable to withdrawal from circulation are all objects:

    1°. obtained entirely or largely by means of or from the proceeds of the offence;

    2°. in relation to which the offence was committed;

    3°. used in order to commit or prepare the offence;

    4°. used in order to obstruct an investigation into the serious offence;

    5°. manufactured or intended for the commission of the serious offence;

all this in so far as these objects are of such nature that their uncontrolled possession is in conflict with the law or public interest.

Refer to 1.1.III.IV above for further details

IV. Value confiscation order (Section 36e Sr)

On demand from the PPS, a person who is convicted of a criminal offence may be ordered in a separate judicial decision to pay a sum of money to the State in order to deprive this person from unlawfully obtained gains.

This obligation may be imposed on the person who obtained gains by means of or from the proceeds of the criminal offence referred to there or from other criminal offences with regard to which there are sufficient indications that these offences were committed by the convicted person. "Sufficient indications" may not be accepted by the court if it is not possible to establish beyond reasonable doubt that the party involved committed other criminal offences (Supreme Court of the Netherlands 29 September 2020, ECLI:NL:Supreme Court of the Netherlands:2020:1523).

On demand from the PPS, any person who is convicted of a serious offence for which, according to the legal definition, a fine of the fifth category may imposed, may be ordered in a separate judicial decision to pay a sum of money to the State in order to deprive him of unlawfully obtained gains, if it is shown that either said serious offence or other serious offences resulted in one way or another in the convicted person obtaining unlawful gains. In that case it may also be presumed that:

a. any expenditure by the convicted person in a period of six years prior to the serious offence being committed was met from the unlawfully obtained gains, unless it is shown that this expenditure was met from a legal source of income; or

b. objects (all property and all property rights) which became the property of the convicted person in a period of six years prior to the serious offence being committed involved gains as referred to in the first subsection, unless it is shown that these objects were obtained from a legal source of origin.

The court may derogate from the period referred to of six years and consider a shorter period.

The court shall set the estimated amount of the unlawfully obtained gains. Such gains shall include the saving of costs. The value of the objects that in the opinion of the court constitute the unlawfully obtained gains, may be estimated at their market value at the time of the decision, or by reference to the proceeds the objects would fetch at a public sale, if recovery action has to be taken. The court may set the sum of money at an amount that is lower than the estimated gains. In the determination of the amount to be paid, the court may, on reasoned application of the defendant or of the convicted person, take into account the fact that the current and the reasonably to be expected future financial capacity of the defendant or of the convicted person shall be insufficient to pay the amount due. In the absence of such application, the court may exercise this power ex officio or on demand from the PPS.

In principle, the capacity must be addressed in the execution stage. In the confiscation proceedings, the capacity can only be successfully addressed when it is promptly clear that the party in question has no capacity at that moment and will not have it in the future (cf. Supreme Court of the Netherlands 27 March 2007, ECLI:NL:Supreme Court of the Netherlands: 2007:AZ7747, Dutch Law Reports 2007/195)

In determining the amount of the unlawfully obtained gains with regard to criminal offences committed by two or more persons, the court may determine that these persons shall be jointly and severally liable, or else for a part to be determined by the court, for the combined payment obligation.

In determining the extent of the gains, the court may reduce costs that are immediately connected with committing criminal offences, which costs reasonably qualify for reduction.

The imposition of a value confiscation order means the court has to take two decisions:

1. determining the amount estimated for unlawfully obtained gains (the gained amount);

2. determining the amount the convicted person must pay the State to confiscate the unlawfully obtained gains (the confiscation amount).

The basic premise is that the unlawfully obtained gains are confiscated, in other words, the confiscation amount should be equal to the gained amount. Section 36e, fifth subsection Sr, however, provides that the court may set a confiscation amount that is lower than the amount at which the gain is estimated.

For the calculation of the unlawfully obtained gains various methods can be distinguished:

1. *the tangible method:*
   This method is based on the result of the out-of-court settlement: for each out-of-court settlement or criminal offence for which judgment is passed, or for which there are sufficient indications, the proceeds minus the costs will be determined. The result will then be the unlawfully obtained gains. In this method there is always a causal relationship between the criminal offences and the unlawfully obtained gains arising from these.

2. *the abstract method:*
   This method is based on a calculation of the unlawfully obtained gains in a broader relation to the criminal offences for which judgment was passed.
   In general, these methods are based on a calculation of the unlawfully obtained gains in a specific period, where it is no longer possible to pinpoint an immediate causal link between the calculated unlawfully obtained gains and the punishable conduct (inexplicable wealth).

Examples of the abstract method are:

a. the overview of income (the so-called simple overview of income or the detailed overview of income): the unlawfully obtained gains are the difference between the total expenditures and the total cash receipts (taking into account the amounts of the opening and closing cash and possible bank balances.

b. the equity reconcilliation: in this method, the gain is determined to be the difference between the sum of the closing equity and the expenditures on the one hand and the sum of the initial capital and the legal income on the other.

For the purpose of recovery of a confiscation of which its imposition is to be ordered at a later time (Section 94, subsection 3, Sv), following an authorisation to that effect by the examining magistrate (Section 103 Sv or Section 126 Sv), a freezing for the purpose of value confiscation may be imposed. The following conditions must be complied with to impose a prejudgment seizure:

a. the defendant must be suspected of a serious offence. The defendant may also be convicted already. In that case this must concern a conviction of a serious offence;

b. this must concern a serious offence that is liable to a fine of the fifth category;

c. it must be reasonably expected that the value confiscation order will be imposed against the convicted person.

In derogation of the freezing it is not necessary for a (direct or indirect) relationship to exist between an object on which a freezing for the purpose of value confiscation is levied and the criminal offence. As a result, the objects of legal origin will also be liable to freezing for the purpose of value confiscation.

Subject to conditions, freezing for the purpose of value confiscation may also be levied on objects that belong to another party. This form of confiscation of objects of a third party (third-party seizure) is further specified in appendix 1 (Seizure pertaining to criminal procedure, freezing for the purpose of value confiscation of objects of another party (third-party seizure) starting from p. 48).

The court's decision is a decision for value confiscation. The court therefore does not decide on objects on which freezing for the purpose of value confiscation was levied.

Extended confiscation (E)
Within the context of value confiscation, the Netherlands also recognises extended confiscation. This should also be understood to mean the confiscation of assets that:

1. (possibly) were not obtained from the criminal offence or the criminal offences the party involved was convicted for, but from other criminal offences;

2. may be considered to be subsequent profit; or

3. may be considered to be other economic profit which the court may assume to be the result of criminal conduct.

Section 36e, second and third subsection Sr provides for these 'broader' options for confiscation.

Based on Section 36e, second subsection Sr, confiscation is also possible if the party who is convicted of a criminal offence:

1. obtained a profit by means of or from the proceeds of the proved criminal offence; or

2. obtained a profit by means of or from the proceeds from other criminal offences, for which sufficient indications exist that these were committed by the convicted person.

Based on Section 36e, third subsection Sr, by separate court decision to the person convicted of a serious offence, which pursuant to the legal definition is liable to a fine of the fifth category, a commitment may be imposed on this person for the payment of a sum of money to the State in order to confiscate unlawfully obtained gains, if it is plausible that the serious offence or other criminal offences in any way resulted in the convicted person obtaining unlawful gains. In that case it may also be suspected that:

a. the convicted person's expenses in a period of six years prior to this person committing that serious offence involve unlawfully obtained gains, unless it is plausible that these expenses were made from a legal source of income; or

b. objects that became the property of the convicted person in a period of six years prior to this person committing that serious offence involve unlawfully obtained gains as referred to in the first paragraph, unless it is plausible that these objects were obtained from a legal source.

Refer to 1.1.IV. above for further details

2b) Which is the scope of its introduction? (the fight against organised crime/money laundering/corruption/terrorism, etc., the application of the principle that crime doesn't pay, etc.)

I. Forfeiture with seizure (Section 33 and Section 33a Sr) and II. Forfeiture without seizure (Section 34 Sr)

The options to have objects forfeited were widened further in 1993. The reason for this was to improve the efficiency of State action against persons that own assets obtained from or owing to criminal activity.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)

Section 36b Sr is a typical police measure or security measure. It pertains to the withdrawal of objects that are dangerous to society, which were seized through the course of the investigation into a criminal offence and of which the court assesses that these can no longer be returned to the party whose assets are seized

This is particularly apparent from the following Section – Section 36c Sr – under which withdrawal from circulation is restricted to objects of which the uncontrolled possession is in conflict with the law or with public interest and in which – contrary to in the case of forfeiture – there is no mention of possession by anyone whatsoever.

IV. Value confiscation order (Section 36e Sr)

The possibility to impose the measure of confiscation of the unlawfully obtained gains is first mentioned in the laws of the Netherlands in an Economic Sanction Decree of 1941. By Decree

adjudication of economic offences, a form of confiscation of unlawfully obtained gains was introduced. This decree was replaced by the Economic Offences Act of the Netherlands in 1950. According to Section 8 sub c of the Economic Offences Act of the Netherlands, it was also possible to confiscate unlawfully obtained gains from similar criminal offences pertaining to which there are sufficient indications that these have been committed by the convicted person. This provision was rarely implemented in actual practice. When the Financial Penalties Act was introduced in the Netherlands in 1983, this opened the possibility for confiscation of the unlawfully obtained gains in general criminal law. In practice, this was unsatisfactory as well, at least it failed to live up to expectations. This was the reason to drastically widen the possibilities for confiscation in 1993. The objective of the widened legislation in 1993 was to provide a number of adequate instruments pertaining to criminal law and criminal procedure to fight crime more effectively. The pecuniary measure seeks to seize assets that the convicted person is not legally entitled to. The legislator has phrased the object clause differently as well: 'to effect that all material profits the convicted person obtained through serious offences are confiscated from him again.' The basic premise of this confiscation legislation is that crime should not pay. The confiscation legislation has been amended several times since 1993.

2c) Which are the elements to be realised and / or to be assessed for its application?

I. Forfeiture with seizure (Section 33 and Section 33a Sr)

There are three conditions to impose forfeiture:

a. forfeiture can only be pronounced upon conviction of a criminal offence; in case of dismissal from all criminal charges, it is therefore impossible to impose forfeiture (Supreme Court of the Netherlands 25 January 2005, Dutch Criminal-Law Newsletter 2005/51);

b. the objects must be liable to forfeiture: there must be a specific relationship between the criminal offence and the object;

c. there are further demands pertaining to the possession of the objects.

The judgment will need to reveal that the conditions for forfeiture have been complied with. Usually it will suffice to point out the relationship to the crime and the manner in which the requirement of possession has been met.

In some cases, the law dictates that the court is obliged to proceed with forfeiture. Section 214bis Sr contains a similar imperative provision for falsification of coins and banknotes. Section 13a of the Opium Act of the Netherlands compels the court to impose forfeiture or withdrawal from circulation of the substances as referred to in Section 2 and Section 3 of that act.

II. Forfeiture without seizure (Section 34 Sr)

Refer to *I. Forfeiture with seizure* for information on this. In case of forfeiture without seizure, in addition to the forfeiture, the court must als determine the estimated value of the forfeited object in its judgment. In addition, on the demand of the public prosecutor, in its judgment the court may also set detention as a substitute penalty.

The convicted person can comply with the judgment by delivery. If he fails to deliver, he will be obliged to pay the estimated value from the judgment as pronounced. In the scope of the collection of the estimated value, in accordance with the collection process, a payment term will be set for a fine under criminal law.[6] The delivery of the objects must be made in the place as dictated by the minister (Section 4:13 of the Decree on the enforcement of criminal law decisions of the Netherlands). Payment of the estimated value must be made by deposit or transfer of the amount due in a bank account to that effect of the minister (Section 4:2 subsection 1 of the Decree on the enforcement of criminal law decisions of the Netherlands) or to a person appointed for that purpose by the minister (Section 4:4 of the Decree on the enforcement of criminal law decisions of the Netherlands). If he fails to do so and also fails to comply with the further demands that are accompanied by an increase of the amount (Section 6:4:2 Sv), this will be followed by recovery (Section 6:4:3, Section 6:4:5 and Section 6:4:6 Sv) and detention, respectively (Section 24c Sr). A condition in this regard is that the detention as a substitute penalty will only be possible of the court has so ordered in its judgment.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)

A condition for withdrawal is that this concerns seized objects. Withdrawal from circulation of objects that have not been seized is not possible (Supreme Court of the Netherlands 2 March 1999, Dutch Law Reports 1999/328).

Section 36b Sr lists the various possibilities for the court or the public prosecutor to impose the withdrawal from circulation.

First, this is the case when a person is convicted of a criminal offence by a judgment from the court. The measure may also be imposed in a punishment order. In such case, the withdrawal may also be imposed in addition to other penalties or measures, according to subsection 3. Also when no conviction (to punish) follows and it is decided not to impose punishment (Section 9a Sr), withdrawal from circulation will be permitted. Furthermore, withdrawal is still possible even if there is an acquittal of the charge or a dismissal from prosecution has been granted, provided that the court has established that a criminal offence was committed.

The court decision declaring the objects withdrawn, in addition to within the scope of the normal proceedings ending with a final judgment, may also be given in chambers, by means of a separately elicited judicial decision on application by the PPS[7]. In this regard, it is also important that the provisions in Section 116 subsection 2 under c Sv in certain cases grants the public prosecutor the authority to treat seized objects as though they were withdrawn from circulation.

Withdrawal from circulation in case of an acquittal or dismissal from prosecution is possible, if the court establishes that a criminal offence has been committed (Supreme Court of the Netherlands 20 March 2007, Dutch Law Reports 2007/182). Merely establishing reasonable doubt that a criminal offence was committed with the object in question will not be sufficient, Supreme Court of the Netherlands 16 February 1982, Dutch Law Reports 1982/380.

The combination of an acquittal and establishing that a criminal offence has been committed is conceivable, for example, if the court decides to acquit because evidence was obtained unlawfully or if the charge does not properly reflect the crime that was committed. The acquittal, in such case, is very much compatible with the establishment that a criminal offence has indeed been committed.

[6] Section 6:5:1 subsection 1 in conjunction with Section 6:1:1 and Section 6:4:1 Sv.
[7] Section 552f Sv

If the withdrawal from circulation after acquittal is ordered by the court, an appeal by the defendant against this judgment is open to the court in cassation (Supreme Court of the Netherlands 14 December 2010, Dutch Law Reports 2011/19).

In addition to the withdrawal by a judgment in the criminal case, withdrawal from circulation is also possible by means of a separate demand from the PPS. Refer to Section 552f Sv. The Explanatory Memorandum states that this procedure is intended for cases where no judgment whatsoever is pronounced, for example because the perpetrator has died or is unknown or for some other reason is unable to stand trial. (Appendix Proceedings II 1954/55, 4034). This procedure can only be used if it is certain that the case itself will not be prosecuted (anymore) (Supreme Court of the Netherlands, 11 March 1986, Dutch Law Reports 1986/574). It means that withdrawal by separate order is not only possible when there is no trial of the principal action, but also in case of failure to reach a decision in the main proceedings with regard to seized objects that qualify for withdrawal (Supreme Court of the Netherlands 29 November 1994, Dutch Law Reports 1995/176). Also when the PPS in the main proceedings is barred or would have been barred, while a prosecution was initiated, this will make withdrawal from circulation possible. Refer to Supreme Court of the Netherlands 26 May 1998, Dutch Law Reports 1998/873.

If the defendant or the party to whom the object withdrawn from circulation belongs to would be disproportionately impacted by the withdrawal, the court will award compensation, as follows from Section 33c which applies mutatis mutandis. If the application of Section 33b is requested, the court shall provide an express decision (Supreme Court of the Netherlands 2 March 1999, Dutch Law Reports 1999/329). As noted above, the compensation may also be awarded if the reasonable term of Section 6 subsection 1 ECHR (Supreme Court of the Netherlands 8 July 1992, Dutch Law Reports 1992/817) is exceeded in the procedure for withdrawal from circulation.

Section 36c Sr includes further restrictions of which the Supreme Court of the Netherlands demands the court to determine (take in consideration) in its judgment, in any case which should be apparent from the decision. With the statement that the objects are (should be) of such nature, that uncontrolled possession thereof is in conflict with public interest, the legislator gave shape to the old idea that this concerns a police measure to withdraw relevant objects that are dangerous in nature from social and economic life. This should concern objects that are not only dangerous in the hands of the defendants, but also in the hands of the general public.

In the Supreme Court of the Netherlands 8 March 2005, Dutch Law Reports 2007, 437, the Supreme Court held that the condition for withdrawal from circulation, being that the objects in question should be of such nature that uncontrolled possession thereof would be in conflict with the law or public interest, means that this should concern objects of which the nature is relevant in the sense that uncontrolled possession, either or not in conjunction with the reasonable expectation of the use thereof, particularly in connection with that nature, is in conflict with the law or public interest.

It is important to note that the Supreme Court of the Netherlands is prepared to attach a broad interpretation to the term object, in the sense that in this interpretation it includes objects which make up certain equipment when put together. The functional danger of the whole then dominates the relative harmlessness of the separate objects.

The legislator established the link with criminal law by declaring the conditions subject to which forfeiture (see Section 33a Sr) is permitted to also apply here, albeit with two restrictions:

a. The legislator allows for the ownership requirement to cease to apply.

b. The legislator does not refer to a criminal offence, but to an 'offence'. Making a distinction between a serious offence and a minor offence was less useful in this regard, since a 'dangerous' object may also be found where a minor offence is committed.

IV. Value confiscation order (Section 36e Sr)

The following requirements apply for the value confiscation order:

a. there must be unlawfully obtained gains (refer to question 2a, under IV, value confiscation order);

b. there must be a conviction in the underlying criminal case. This should be at least a conviction pertaining to a criminal offence which allows for confiscation under Section 36e Sr. In order to be able to confiscate on the basis of Section 36e, third subsection Sr, there must be a conviction of a serious offence, which in its statutory provision is liable to a fine of the fifth category (in April 2023: € 90,000). A finding of guilt without the imposition of a punishment or measure (Section 9a Sr) is also a conviction and consequently may be a basis for a value confiscation order. Contrary thereto, in case of dismissal of criminal charges, no value confiscation order can be imposed.

2d) Can this form of confiscation be applied when the owner or the convicted person is dead?

I. Forfeiture with seizure (Section 33 and Section 33a Sr) and II. Forfeiture without seizure (Section 34 Sr)

No, based on Section 6.1.21 Sv, a punishment or measure is not enforced after the death of the convicted person, with the exception of the measure to confiscate unlawfully obtained gains.

The right to prosecute ceases to apply upon the death of the defendant (Section 69 Sr). It is therefore impossible to continue the criminal case after the death of the defendant. This also makes it impossible to order a forfeiture when the defendant is deceased.

If the defendant dies after the judgment becoming irrevocable, there will be no issue with enforcement. This is because a seized and forfeited object reverts to the State as soon as the forfeiture becomes irrevocable. If the defendant dies after the judgment is delivered, but prior to it becoming irrevocable, enforcement will pose a problem. In that case, for example, heirs may be approached with the request to relinquish ownership of the object of which the forfeiture was ordered by the court.

The above obviously does not apply to a situation where the court, based on Section 34 Sr, has pronounced the forfeiture of an object that was not confiscated. The forfeiture will then no longer be enforceable further after the death of the convicted person, if the forfeited object has not yet been surrendered and also the full alternative or estimated value has not been paid by the convicted person.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)

Section 36b Sr has no mention of the instance where prosecution ends in a bar to the PPS, since the law to prosecute does not exist (any longer). If that is the case, the withdrawal from circulation cannot be pronounced. The bar to the PPS means that no measure can be ordered

within that scope either. Examples are available in Supreme Court of the Netherlands 26 May 1998, Dutch Law Reports 1998/873 and Supreme Court of the Netherlands 6 November 2001, Dutch Law Reports 2002/173. In the first case the PPPS was time-barred, in the second case the defendant had died. As the Supreme Court of the Netherlands notes in both judgments, the fact that the bar to the PPS in these cases also includes the withdrawal from circulation, does not (subsequently) mean that a separate order for withdrawal is not possible either. In view of the objective of safety of the withdrawal from circulation, a separate order to withdraw is not an act of prosecution, so impediments in the way of prosecution do not apply there (Supreme Court of the Netherlands 3 September 1991, Dutch Law Reports 1992/233).

Besides the withdrawal upon judgment in the criminal case, withdrawal from circulation is also possible upon separate demand from the PPS. See Section 552f Sv. The Explanatory Memorandum states that this procedure was intended for cases where no judgment is pronounced whatsoever, for example because the defendant has died or is unknown or for some other reason cannot be brought to trial (Appendix Proceedings II 1954/55, 4034). This procedure can only be used if it is established that the case will not be prosecuted (any longer) (Supreme Court of the Netherlands 11 March 1986, Dutch Law Reports 1986/574). This means that withdrawal by separate order is not only possible when there is no trial in the principal case, but also in case of failure to take a decision in the principal proceedings pertaining to confiscated objects that qualify for withdrawal (Supreme Court of the Netherlands 29 November 1994, Dutch Law Reports 1995/176). Also in case the PPS is barred in the principal proceedings, or would have been barred, had criminal prosecution been initiated, withdrawal from circulation is hereby possible. See Supreme Court of the Netherlands 26 May 1998, Dutch Law Reports 1998/873.

IV. Value confiscation order (Section 36e Sr)

The death of the defendant has for a consequence that the right to criminal prosecution ceases to apply. According to the Supreme Court of the Netherlands (Supreme Court of the Netherlands 18 March 2008, Dutch Law Reports 2008, 181), Section 69 Sr should be interpreted in such manner that the death of the party involved causes the right to initiating or continuing proceedings against him to confiscate unlawfully obtained gains (also) ceases to apply. It means the PPS should be barred in its claim.

Based on Section 6.1.21 Sv a punishment or measure is not enforced following the death of the convicted person, with the exception of the measure to confiscate unlawfully obtained gains. If both the judgment from the court in the underlying criminal case and the judgment from the court in the confiscation proceedings are irrevocable, the value confiscation order can be enforced, also in case of the death of the convicted person.

2e) For the model of confiscation which demands the conviction for a crime: Can this model of confiscation be applied when the crime is statute-barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?

I. Forfeiture with seizure (Section 33 and Section 33a Sr) and II. Forfeiture without seizure (Section 34 Sr)

Forfeiture may only be pronounced in case of a conviction pertaining to a criminal offence. If the criminal offence has become statute-barred, the forfeiture cannot be pronounced.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)
See above (question 2c, withdrawal from circulation) for more information.

IV. value confiscation order (Section 36e Sr)
Imposing a value confiscation order requires compliance with the following:

a) there must be unlawfully obtained gains; *and*
b) there must be a conviction in the underlying criminal case.

The lack of a conviction in the criminal case, based on Section 511e, first subsection, in conjunction with Section 348 Sv, results in the PPS to be barred. If the offence has become statute-barred and a conviction is not possible, no value confiscation order can be imposed.

However, if the defendant is convicted (of a different offence), then confiscation will be possible with regard to the offence for which jurisdiction does not exist (any longer). "The opinion that in a value confiscation order as referred to in Section 36e, third subsection (old) Sr, no gains may be involved that were obtained from "other criminal offences" pertaining to which there is no jurisdiction in the Netherlands, is not supported by law. ", as the Supreme Court of the Netherlands noted in its proceedings of 11 June 2019 (ECLI:NL:Supreme Court of the Netherlands: 2019:909). Incidentally, the confiscation court will need to be of the opinion that there is "sufficient evidence" that defendant committed a criminal offence. Sufficient evidence cannot be accepted if it is not beyond reasonable doubt that the criminal offence was committed by the defendant (Supreme Court of the Netherlands 29 September 2020, ECLI:NL:Supreme Court of the Netherlands:2020:1523).

2f) Which is the legal nature

I. Forfeiture with seizure (Section 33 and Section 33a Sr) and II. Forfeiture without seizure (Section 34 Sr)
Forfeiture is an additional punishment. Forfeiture is a pecuniary penalty. It means that its imposition seeks to impact the convicted person's assets.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)
Withdrawal from circulation is a measure to protect society against dangerous objects. It concerns the disposal of objects that are dangerous to social and economic life, that were confiscated in the course of the investigation into a criminal offence and of which the court finds that they may not be returned to party whose assets are seized.

IV. Value confiscation order (Section 36e Sr)
The value confiscation order is not a punishment, but a measure seeking to recover the lawful situation from a financial perspective. Therefore, the measure is not intended to impose a punishment related to the gravity of the offence, the conduct and the culpability of the party involved. In other words, the perpetrator of a criminal offence must be brought back to the position he would have held if he had not committed the criminal offence.

3) In particular, in your national legal order is confiscation without conviction possible in cases of death, illness, absconding, prescription, amnesty, etc. and which are the relevant legal bases?

Withdrawal from circulation (Section 36b and Section 36c Sr)

The court decision where goods are ordered to be confiscated, in addition to within the scope of the normal procedure ending with a final judgment, may also be given in chambers, by means of a separately elicited judicial decision on application by the PPS (Section 552f Sv). In this regard, it is also important that the provisions in Section 116 subsection 2 under c Sv in certain cases grants the public prosecutor the authority to treat seized objects as though they were withdrawn from circulation.

Withdrawal from circulation in case of an acquittal or dismissal from prosecution is possible, if the court establishes that a criminal offence has been committed (Supreme Court of the Netherlands 20 March 2007, Dutch Law Reports 2007/182). Merely establishing reasonable doubt that a criminal offence was committed with the object in question will not be sufficient, Supreme Court of the Netherlands 16 February 1982, Dutch Law Reports 1982/380.

The combination of an acquittal and establishing that a criminal offence has been committed is conceivable, for example, if the court decides to acquit because evidence was obtained unlawfully or if the charge does not properly reflect the crime that was committed. The acquittal, in such case, is very much compatible with the establishment that a criminal offence has indeed been committed.

Confiscation without court involvement

It is stated above that in the Netherlands confiscation is possible without court involvement. In brief this refers to the following models:

VI. Relinquishing seized objects for the purpose of forfeiture or for the purpose of withdrawal from circulation (O).
VII. Conditional dismissal with special conditions:
VIII. Out-of-court settlement to avoid prosecution with the conditions:
IX. Punishment order with the measure or instruction:
X. Written settlement

In these cases, however, there is no 'typical' NCBC. If a conclusion is reached, based on the investigation, that prosecution will not be possible or a conviction will not be feasible, what follows will be a dismissal by reason of unlikelihood of conviction. Confiscation under criminal law is not possible in case of a dismissal by reason of unlikelihood of conviction. An out-of-court settlement may only be offered when the public prosecutor considers the case provable. This also applies to the issue of the punishment order. The case not only needs to be provable there, prior to issuing the punishment order it must also be established by the public prosecutor that the defendant is guilty of the criminal offence. In order to reach a written settlement, the defendant must (ultimately) be convicted irrevocably in the principal case. If circumstances are revealed, after the written settlement has been complied with, that would have excluded the applicability of the value confiscation order, the former defendant or convicted person may submit a request to the PPS for a refund of the amounts of money paid or a return of the surrendered objects (Section 6:4:18 Sv).

If the party whose assets are seized relinquishes the object seized, this also does not constitute an NCBC. Not every party whose assets are seized is considered a defendant. An example of this is the third party in good faith who found the object that was later confiscated and who relinquishes this object. Whether or not the object is relinquished is a unilateral decision by the party whose assets are seized. This decision is separate from any establishment of guilt and also cannot be enforced by an investigating officer, a public prosecutor or an examining magistrate.

If the party whose assets are seized relinquishes the object and declares that it belongs to him, it may be so ordered that the object be treated 'as if it were declared forfeited or withdrawn from circulation'. Strictly considered, therefore, the waiver is not a decision by the investigating officer, public prosecutor or examining magistrate and in this regard it is not an NCBC either.

4. Elaboration on the questions per model of confiscation covered by the Regulation no. 2018/1805

4a) Which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.) specify the forms of freezing and seizure orders in your legal system and their prerequisites.

I. Forfeiture with seizure (Section 33 and Section 33a Sr) and II. Forfeiture without seizure (Section 34 Sr)

Forfeiture (Section 33 et seq. Sr) is an additional punishment. Its imposition seeks to impact the convicted person's assets. This is without prejudice to the fact that an object of little value can also be forfeited, which incidentally does not mean that such an object must be kept. In order for an object or an amount of money to be forfeited, there must be a specific relationship between the object or the money and the criminal offence (see the cases referred to in Section 33a Sr). This may include tools used to commit a burglary, the vehicle from which was dealt, but also money or goods in laundering.

An object or amount of money that does not belong to the party whose assets are seized may also be forfeited. This may be if the entitled party was aware or could reasonably defendant that this relationship between the object and criminal offence existed, and if it cannot be established to whom the object or the amount of money belongs.

The forfeiture must be proportional: the value of the forfeited objects must be in proportion to the gravity of the offence and as such in proportion to the expected punishment to be imposed. If the defendant or another party are impacted disproportionately by the forfeiture, the court may order the reimbursement of the difference.

Confiscation is not a requirement for forfeiture. Upon forfeiture, the court may order the surrender of objects that were not confiscated; the public prosecutor may demand the surrender upon forfeiture from the court.

Forfeiture may only be pronounced upon conviction pertaining to a criminal offence and therefore not in case of an acquittal or in case of a dismissal of all criminal charges. Forfeiture may be imposed both separately and in combination with the principal judgment and other additional punishments (Section 9 subsection 5 Sr).

III. Withdrawal from circulation (Section 36b Sr and Section 36c Sr)

Withdrawal from circulation is a measure to protect society against dangerous objects. Withdrawal from circulation is only possible if the object is of such a nature that its uncontrolled possession is in conflict with the law or with public interest Section 36c Sr). These may concern narcotics, prohibited weapons, a dangerous animal, a knife that was used to make threats.

In principle, this measure is imposed at the final judgment in the principal action. In the event that this is not possible, Section 552f Sv provides the basis for the measure to be imposed by means of a separate judicial decision, on the public prosecutor's demand. When the defendant is not known, an object may also be withdrawn from circulation (through proceedings in chambers).

IV. Value confiscation order (Section 36e Sr)

The value confiscation order here is meant to be: the proceedings before the court in which the demand for a confiscation order is heard.

The value confiscation proceedings are not an isolated event, but a supplement to criminal prosecution. The value confiscation proceedings should be regarded as a course of the proceedings that is separate from the initial criminal prosecution and not as a supplement thereto (Supreme Court of the Netherlands 26 October 1999, case law on confiscation legislation 1999, 70). As such, there are two proceedings – the criminal case and the confiscation case – that are closely related but will each result in their own judgment / decision.

The main characteristics of the confiscation proceedings are:

- the demand for a value confiscation order is handled in proceedings separate from the criminal case. However, it is possible to try the confiscation case at a hearing following the criminal case;
- the demand for a value confiscation order is brought before the court by the public prosecutor;
- the demand for a value confiscation order must be brought before the court within two years following the judgment at first instance of the underlying criminal case;
- the court may order a further financial investigation;
- upon request or in its official capacity, the court may order preparation in writing (also hear witnesses and experts);
- the judgment must be pronounced within six weeks after the examination in court has been concluded;
- the confiscation judgment is independently open to appeal and appeal in cassation.

Within the scope of the confiscation proceedings, a freezing for the purpose of value confiscation may be imposed with the authorisation of the examining magistrate (refer to Appendix 1, "Freezing for the purpose of value confiscation [Section 94a Sv]" for this).

4b) Which is the standard of the proof/is the reversal of the burden of the proof admitted?

I. and II. Forfeiture (Section 33, Section 33a and Section 34 Sr)

The court examines if the defendant has committed the charged offence.

The evidence is subject to specific demands. These are set out in the Sections 338 up to and including 344a Sv: "The court may find that there is evidence the defendant committed the offence as charged in the indictment only when the court through the hearing has become convinced thereof from legal means of evidence." The evidence must be produced by the PPS; there is no reversal of the burden of proof.

III. Withdrawal from circulation (Section 36b and Section 36c Sr)

To the extent possible, the withdrawal from circulation must be ordered simultaneously with the final judgment in the case where the objects were confiscated (Supreme Court of the Netherlands 10 January 1984, Dutch Law Reports 1984/684; Supreme Court of the Netherlands 28 January 1986, Dutch Law Reports 1986/551). In this regard, the burden of proof, similar as with forfeiture, lies with the PPS.

As indicated before, even in case of an acquittal, an object may be withdrawn from circulation. In that case, it must be determined by a decision of the court that a criminal offence — minor offence or serious offence — was committed. If the judgment or ruling does not include anything concerning the establishment of a criminal offence in an acquittal, then the withdrawal from circulation of confiscated objects is in conflict with Section 36b subsection 1 under 3° Sr.

Dangerous objects may be withdrawn from circulation by separate court order, in a substantiated demand to that effect from the public prosecutor. This decision for withdrawal from circulation will then be made in separate proceedings in chambers as referred to in Section 552f Sv. In the demand, the public prosecutor must state which criminal offence was committed. Furthermore, the court imposing the withdrawal from circulation by separate order as referred to under 4° must specify which committed criminal offence it has in mind and particularly also establish that the confiscated object is in relation to that criminal offence according to Section 36c or 36d. In these proceedings in chambers, the burden of proof also lies with the public prosecutor.

IV. Value confiscation order

Where it concerns the confiscation case, the rules for furnishing proof for the investigation of a criminal case in accordance with Section 511d, first subsection Sv shall apply mutatis mutandis. In addition to this, the party subjected to the value confiscation order will not be obliged to respond during the examination in court, regardless of whether he no longer has the status of a defendant but of a convicted person where the main charge is concerned.

As far as evidence is concerned, the law prescribes in Section 511f Sv that the court may only base the estimation of the gain capable of being expressed in monetary terms on the substance of legal means of evidence, as listed in Section 339, first subsection Sv. This means that the calculation of the gains must be established based on these means of evidence. Personal knowledge from judges cannot be considered equivalent to generally known facts, so to base the estimation of the gains on known facts from an official capacity has for a consequence that the estimation is not based on legal means of evidence. The personal knowledge may obviously be regarded as means of evidence on which the estimation of the gains is based, provided that it can also be construed as a generally known fact.

Minimum evidence requirements

For the value confiscation order, the special regulations of the evidentiary effect of the means of evidence, such as those that apply as evidence for the offence charged, shall not apply mutatis

mutandis. The rules of the minimum evidence requirements therefore do not apply for the value confiscation order (Supreme Court of the Netherlands 9 September 1997, case law on confiscation legislation 1998, 2, Dutch Law Reports 1998, 90; Supreme Court of the Netherlands 7 October 1997, case law on confiscation legislation 1998, 66 and Supreme Court of the Netherlands 6 October 1998, case law on confiscation legislation 1999, 14, Dutch Law Reports 1998, 914). This means that when the basis for the confiscation of gains has been established, and therefore the conviction of a criminal offence, the extent of the unlawfully obtained gains gebaseerd can be based on a single means of evidence (cf. Supreme Court of the Netherlands 9 September 1997, case law on confiscation legislation 1998, 2, Dutch Law Reports 1998, 90 and Supreme Court of the Netherlands 22 January 2008, Dutch Criminal-Law Newsletter 2008, 74). The consequence of the rules of evidentiary effect not applying mutatis mutandis, such as the link of other documents with other means of evidence (Section 344 subsection 1 sub 5 Sv), is that there are hardly any unlawful means of evidence left. It should be noted that if the means of evidence were obtained while powers were exceeded, the court must disregard this.

Allocation of the burden of proof

Another difference is the allocation of the burden of proof. If the principle for the demand for a value confiscation order has been judicially established, in the case in question the criminal offence from which or by means of which the gains was obtained, according to the Supreme Court of the Netherlands (Supreme Court of the Netherlands 28 May 2002, case law on confiscation legislation 2002, 23, Dutch Law Reports 2003, 96; Supreme Court of the Netherlands 25 June 2002, Dutch Law Reports 2003, 97 and Supreme Court of the Netherlands 17 September 2002, case law on confiscation legislation 2002, 43) there is nothing, Section 6 ECHR included, that bars the reasonable and fair allocation of the burden of proof between the PPS and the defendant/ convicted person. It does not emerge from parliamentary history and from case law that the court may never lay a burden of proof on the convicted person that goes beyond making a plausible case. (Conclusion A-G Vellinga at the Supreme Court of the Netherlands 27 January 2009, nr. S 07/12049 P). This allocation of the burden of proof has the effect of causing that the party involved should have argued specifically and with substantiation why the basic premise of the calculation is incorrect (Supreme Court of the Netherlands 18 March 2003, case law on confiscation legislation 2003, 14). As of 1 July 2011, this allocation of the burden of proof, has been further specified and even an evidentiary presumption has been laid down in Section 36e, third subsection Sr.

Sufficient indications

For the other criminal offences of Section 36e, second subsection Sr and (until 1 July 2011: the similar offences and the fines liable to fifth-category fines from Section 36e, second subsection (old) Sr), it applies that the gains from this can be confiscated if in the court's opinion, there are sufficient indications that the convicted person committed these offences. Therefore, the question is raised here: what are sufficient indications? The Supreme Court of the Netherlands, in its ruling of 29 September 2020, ECLI:NL:Supreme Court of the Netherlands:2020:1523 found that the court's opinion - there being sufficient indications that the party involved committed other criminal offences within the definition of Section 36e subsection 2 Sr - within its own frame for proof in the confiscation proceedings should be consistent with the presumption of innocence. The "sufficient indications" referred to in Section 36e subsection 2 Sr may therefore not be accepted by the court if it cannot be established beyond reasonable doubt that the party involved committed other criminal offences. Also, the party involved should be in the position to argue (or to have argued on his behalf) that and why there are insufficient indications that he has committed other offences.

Evidentiary presumption

As of 1 July 2011, the evidentiary presumption was introduced. In parliamentary history, this evidentiary presumption used to be referred to as the 'plausibility for the present'.

After a conviction for a serious offence liable to a fine of the fifth category, a value confiscation order may be imposed if it is plausible that either the serious offence or other criminal offences in any way resulted in the convicted person obtaining unlawful gains. In that case, according to the new Section 36e, third subsection Sr it may be suspected that these gains consist of:

- all expenditures of the convicted person in the six years prior to committing the serious offence, unless it is plausible that these expenditures originated from a legal source of income; or

- all objects that became the possession of the convicted person in the six years prior to committing the serious offence, unless it is plausible that obtaining these objects is based on a legal source.

In brief, if it is plausible that other criminal offences resulted in unlawfully obtained gains, the legal fiction may be applied, based on which all expenditures and objects not based on a legal source may be regarded as having been paid from unlawfully obtained gains.

The court may reduce this six-year term ex officio, on the demand from the PPS or at the request from the convicted person.

The evidentiary presumption of this six-year regulation means that the PPS is no longer required to substantiate the confiscation like before, with information where a more or less direct connection with a criminal offence must be proved. The result of this legal fiction is that it may be claimed earlier from the convicted person to make it plausible that he obtained the assets found in a legal manner (Parliamentary Papers II 2009/10, 32 194, nr. 3 [Explanatory Memorandum], p. 5). In other words, the person at who the expenditures or assets were found for which it does not appear that these have a legal source of origin at their base, will be granted the opportunity to make the legal source thereof plausible. According to the minister, this approach is a reasonable and fair allocation of the burden of proof. The minister also did not find this newly introduced evidentiary presumption to be in conflict with Section 6 ECHR (Parliamentary Papers II 2009/10, 32 194, nr. 3 [Explanatory Memorandum], p. 7, 8).

In the case law, the principle of the evidentiary presumption is applied by the court. For an example, refer to the ruling of the court of appeal of 's-Hertogenbosch of 23 January 2020 (ECLI:NL:GHSHE:2020:505), in which the court of appeal considered the following, among other things:

> "The court of appeal is of the opinion that in view of the evidentiary presumption laid down in Section 36e subsection 3 Sr, it is up to the defence, in light of the above finding, to indicate specifically and with substantiation why the opening balance of the simple overview of income, expenditure and cash withdrawals for private purposes is incorrect. The mere reference to the distrust towards banks rooted in the culture of the party involved is insufficient for this. The court of appeal disregards the position of the defence and furthermore sees no reason to derogate from the entry of the opening balance included there within.
>
> Also, with regard to the other entries included in the overview of income, expenditure and cash withdrawals for private purposes, in light of what is included in this regard in the report

the aforementioned overview and in light of the aforementioned evidentiary presumption, the defence gave no specific and substantiated challenge, as a result of which the court of appeal where these entries are concerned, proceeds from what is included in the aforementioned overview in this regard.

4c) Which are the safeguards (limitations *e.g.* proportionality clauses, relevant legal remedies)?

The following Directives from Europe have been implemented in the Netherlands and the rights arising from these apply to all confiscation procedures:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).
- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).
- Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are defendants or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for defendants and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

I., II., III. and IV.

Prosecution in the criminal case is only possible if the right to prosecute has not yet become barred by limitation. The forfeiture and withdrawal from circulation form part of the decisions to be taken in the criminal case. After the start of the criminal case in the first instance, the public prosecutor must announce the confiscation case within two years.

When objects have been confiscated, interested parties may file a notice of complaint against this.

Both in the criminal case (forfeiture and withdrawal) and in the confiscation case, appeal and appeal in cassation are open to the defendant.

Interested parties (not being the convicted person) may request for a forfeiture to be quashed.

The imposition of the measure to confiscate unlawfully obtained gains, apart from the normal criminal proceedings, is preceded by other separate proceedings. These proceedings in which the establishment of the extent of the obtained gains is a key element, is provided with all necessary safeguards.

If a decision is given on appeal or in cassation in the criminal case, which decision if given in the first instance would have prevented or eased the imposition of the value confiscation order, then the confiscation judgment, also when having become final and conclusive, may as yet be eased or undone on the grounds of Section 6:6:26 Sv or else by granting a pardon. If the amount of confiscation has already been paid or recovered, then on the claim from the PPS or upon written and substantiated request from the convicted person or an injured third party, the court may order full or partial payment to a third party it appoints (Section 6:6:26).

Withdrawal from circulation is also possible as an independent decision from the court following proceedings in chambers. In such case, appeal and appeal in cassation will be open against the decision from the court.

Legal remedy for definitive settlement of the criminal case / confiscation case

Interested parties may submit a notice of complaint against the confiscation. Interested parties are:

1. those from whom the object was confiscated;
2. those who state to have a right in rem on the confiscated object;
3. those who based on an agreement qualify to (re)gain actual possession of the confiscated object.

This may be the person claiming to be the owner, those with limited rights in rem, persons with a right of retention, the insolvency practitioner, the director / sole shareholder of a private company with limited liability under which a confiscation is levied. The holder of a confiscated object and creditors are not considered interested parties.

Term

For (already) prosecuted cases, the notice of complaint may be submitted until no later than three months following the (irrevocable) conclusion of the prosecuted case. The prosecution ends, in any case, upon the final court decision that may pertain to the object complained about becoming irrevocable. If the case has not been prosecuted (yet) a term of two years after confiscation or inspection will apply. A notice of complaint submitted outside the legal term, will be inadmissable.

Grounds for complaints

The interested party may complain about:

- the confiscation (including the use of a confiscated object, the failure of an order to return a confiscated object materialising, etc., refer to Section 552a Sv);
- the decision to confiscate in an out-of-court settlement, punishment order or settlement (Section 552ab Sv);
- forfeiture or withdrawal from circulation (Section 552b Sv);
- a proposed decision based on Section 116 subsection 3 Sv.

The complainant will have no cause of action if complaining on any other grounds. A decision to apply Section 117 Sv[8] is no ground for the submission of a notice of complaint. The only remedy against this is to conduct interim relief proceedings under civil law.

[8] Objects of which custody is not or no longer required in the interest of establishing the truth, may be removed pursuant to Section 117 subsection 2 Sv if:
a)they are no longer suitable for storage; or
b)the custody costs in proportion to their value is disproportionate; or
c)they are replaceable and the equivalent value can be easily determined.

Legal remedies after conviction - Appeal / Cassation

Appeals may be lodged against judgments that concern serious offences, rendered by the court as final judgment or through the course of the examination in court, by the public prosecutor at the court rendering the judgment and by the defendant who was not acquitted of the entire charge (Section 404 subsection 1 Sv) .

Appeals in cassation may be lodged against rulings of the courts of appeal that concern serious offences, pronounced as judgments, by the PPS at the court of appeal rendering the judgment and by the defendant (Section 427 subsection 1 Sv).

Appeals in cassation may be lodged against decisions given in chambers (Section 552d subsection 2 Sv).

4d) Is the trial *in absentia* possible in your legal system in order to apply for the confiscation?

I., II., III. and IV.

A defendant is not obliged to appear at the hearing. He may leave his defence to an attorney, if the defendant has granted this attorney the authority to do so. The court must consent to this. In the Netherlands, this is not considered as trial in absentia, because the defence counsel has been expressly authorised by the defendant.

The court may hear the case in default of appearance. It will then hear the case without the presence of the defendant and without the defendant having authorised his attorney to that effect.

If default of appearance is declared, the court may render judgment and pronounce the forfeiture. If a judgment in default of appearance is given and the judgment is not served on the defendant in person after this, the judgment will then not become irrevocable. The judgment will not be enforceable and the convicted person will have the right to as yet lodge an appeal after the judgment is served on him or her in person.

It should be noted that there is a discussion underway in the Netherlands pertaining to the service of the judgment given in default of appearance. From messages on social media, for example, it may prove to be plausible that a situation occurred from which it follows that the day of the court hearing or further court hearing was known to the defendant beforehand. In that case, the appeal must be lodged within fourteen days after the judgment (Section 408 Sv).

The court may also impose a value confiscation order on a defendant who is in default of appearance (cf. Court of Appeal of ’s-Hertogenbosch, 1 June 2022, ECLI:NL:GHSHE:2022:1813).

4e) For the confiscation without conviction: can this form of confiscation be applied also in case of acquittal?

I. and II.

Not applicable.

III. Withdrawal from circulation

Withdrawal from circulation is also possible in case of acquittal. Only, it must then be determined by a decision from the court that a criminal offence — minor offence or serious offence — was committed.

IV. Value confiscation order

Confiscation of the gains obtained by means of or from the proceeds of a charged offence is not possible (anymore) if the party involved has been acquitted of that offence and if the gains effectively obtained were not found. (Geerings-case ECHR 1 March 2007, Dutch Law Reports 2007,349)

5. Elaboration on the questions per model of confiscation covered by the Regulation no. 2018/1805 – Applicable human rights and constitutional principles in criminal law of the Netherlands.

The proceedings for the forfeiture, withdrawal from circulation and the value confiscation order are all proceedings under criminal law that are subject to the following human rights and constitutional principles:

- legality, legal specificity of a statute & non-retroactivity of the /more severe/statute?

Article 16 of the Constitution of the Kingdom of the Netherlands:

No offence shall be punishable unless it was an offence under the law at the time it was committed.

Section 1 Sr:

1. No offence shall be punishable unless it was an offence under the law at the time it was committed.

2. Where a change has been made in the law subsequent to the time the offence was committed, the provisions of the law most favourable to the accused shall be applicable.

- the right to private property?

Article 14 of the Constitution of the Kingdom of the Netherlands

1. Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.
2. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for.
3. In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.

I. and II.

Since the purpose of the forfeiture is to impact the assets of the convicted person, it stands to reason that the basic premise is that only objects that belong to the convicted person may be

forfeited. In case of forfeiture it must be expressly established whether the forfeited object belonged to the defendant or to another person. In the latter case, forfeiture will only be possible if the requirements referred to in Section 33a subsection 2 Sr are met. This must become apparent from the substantiation of the forfeiture (Supreme Court of the Netherlands 12 October 2010, ECLI:NL:Supreme Court of the Netherlands:2010:BN4241).

The term 'belong to', according to the Explanatory Memorandum of this article (legislative history), points to a legal relationship according to which an object (item) belongs to the property of a person. As the entitled party, the person to whom the object belongs, may exercise rights to the object. The corporeal object belongs to the owner, the usufruct to the usufructuary and the claim to the creditor (Parliamentary Papers II 1989/90, 21504, 3, p. 18).

For an example where not ownership, but rather 'belonging to' is present, refer to Supreme Court of the Netherlands 28 September 1999, Dutch Law Reports 1999/803. This concerns a vessel that is owned by one of the legal entities of defendant. It may be deduced from the facts that defendant such control over — and interest in — this vessel, that his relation to the vessel can be considered equal to that of owner. had dat zijn betrekking tot dat schip met die van eigenaar kon worden gelijkgesteld. There are exceptions to the main rule that the forfeiture is intended to impact the assets of the convicted person.

- the proportionality?

Criminal-law proceedings of the Netherlands include various provisions for the court in its final judgment to keep proportionality of that judgment into account. Provisions pertaining to proportionality are also available with regard to the proceedings for forfeiture, withdrawal from circulation and the value confiscation order – Section 9a Sr (conviction without imposing punishment): (all forms, i, ii, iii and iv).

The court may determine in the judgment that no punishment or measure shall be imposed, where it deems this advisable, by reason of the lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter.

Regarding i and ii

Section 24 Sr (fine):

In determining the fine, the capacity of the offender will be taken into account to the extent necessary in order to reach an appropriate punishment for the defendant without impacting his income and assets disproportionately.

Section 33c Sr (forfeiture):

1. Upon forfeiture of objects the court may order that in case the proceeds of the forfeited objects were to exceed an amount determined in the judgment, the difference will be reimbursed.
2. The court will grant a reimbursement as referred to in the first subsection or a monetary compensation if such is necessary to avoid the defendant, or another party to whom the forfeited objects belonged, from being disproportionately impacted.
3. The court will determine to whom the amount of the reimbursement or the compensation is paid out, without prejudice to the right of any party to this amount.

The ability-to-pay principle from Section 24 Sr (fine) applies mutatis mutandis in Section 33 Sr (forfeiture). In imposing forfeiture, therefore, both the gravity of the offence and the capacity of the convicted person should be taken into account. If the forfeiture has too great of an impact, then compensation is possible based on Section 33c Sr.

In imposing forfeiture of valuable objects, further substantiation of the punishment will required, if the punishment arouses surprise when considering the gravity of the offence. An example of this is Supreme Court of the Netherlands 13 June 1989, Dutch Law Reports 1990/138 which concerned a conviction regarding a speeding violation and the forfeiture of a Mercedes with a value of 40,000 Dutch guilders (cf. also Supreme Court of the Netherlands 15 November 1988, Dutch Law Reports 1989/352).

Section 36b Sr (withdrawal from circulation):

In Section 36b, second subsection Sr, the second and third subsections of Section 33c Sr (reimbursement or monetary compensation) are declared applicable:

1. Withdrawal from circulation of confiscated objects can be imposed:
   1°.upon a court judgment where a person is convicted of a criminal offence;
   2°.upon a court judgment where pursuant to Section 9a it is determined that no punishment will be imposed;
   3°.upon a court judgment where, without prejudice to acquittal or dismissal of all criminal charges, it is established that a criminal offence was committed;
   4°.upon a separate judicial order on demand from the Public Prosecution Service;
   5°.upon a punishment order.
2. The Sections 33b and 33c, second and third subsection, also Section 446 Sv shall apply mutatis mutandis.
3. The measure may be imposed together with punishments and other measures.

Regarding iii

Section 36d Sr:

Liable to withdrawal from circulation, moreover, are the objects that belong to the perpetrator or the defendant that are of such a nature that the uncontrolled possession thereof is in conflict with the law or public interest, which were found through the course of the investigation into the offence he committed, or the offence he is suspected of, however only if the objects may serve the purpose of committing or preparing such offences, or to obstruct tracking them down.

Regarding iv

Section 36e Sr (value confiscation order):

5. The court determines the amount at which the unlawfully obtained gains are estimated. Gains will include savings on costs. The value of objects that are considered as unlawfully obtained gains by the court can be estimated at market value at the time of the decision or by reference to the proceeds to be yielded upon public auction if recovery is required. The court may set the amount to be paid to be lower than the estimated gains. When determining the amount to be paid, upon a substantiated request from the defendant or the convicted person, the court may, take into account the current and reasonably to be expected insufficient capacity of the defendant or convicted person, to pay the amount that is payable. In the absence of such a request the court may apply this authority in its official capacity or upon demand from the public prosecutor.

8. Upon determining the gained amount, the court may deduct costs that are directly in connection with committing criminal offences, as referred to in the first up to and including the third subsection and that within reason qualify for deduction.

9. Upon determining the amount at which the unlawfully obtained gains are estimated, for injured third parties, awarded actions at law and the obligation to pay the State a sum of money for the victim as referred to in Section 36f in so far as these were paid, will be deducted.

10. Upon imposing the measure, account will be taken of obligations to pay an amount of money to confiscate unlawfully obtained gains that were imposed pursuant to earlier decisions.

- the right to a fair trial?

Everyone against whom criminal charges are brought in the Netherlands has the right to a fair trial.

Article 17 of the Constitution of the Kingdom of the Netherlands

1. Everyone has the right to a fair trial within a reasonable time, before an independent and impartial court in establishing his rights and obligations or in determining whether any charge against him is well founded.
2. No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.

The Netherlands is also party to ECHR. Section 6 ECHR contains various procedural rights. Proceedings in which the forfeiture and in which the value confiscation order may be imposed comply with the requirements of Section 6 ECHR, because:

a) The hearing shall be held in public (Article 121 of the Constitution of the Kingdom of the Netherlands)

b) The judgment shall be pronounced in public (Article 121 of the Constitution of the Kingdom of the Netherlands)

c) The court shall be an independent court (Article 117 of the Constitution of the Kingdom of the Netherlands)

d) The court shall be an impartial court (Section 12 of the Judiciary Organisation Act of the Netherlands and Section 271 subsection 2 Sv)

e) The judgment shall be substantiated (Article 121 of the Constitution of the Kingdom of the Netherlands and Section 5 subsection 1 of the Judiciary Organisation Act of the Netherlands)

f) Both parties shall be heard

g) The trial will be held within a reasonable time frame

h) Justice is administered by professional judges

i) The right not to incriminate oneself (Section 29 Sv)

j) Defendant is informed of his rights in writing immediately following his arrest and in any case before his first interview (Section 27c Sv)

- the right to defence?

a) The right to defence and legal assistance (Article 18 of the Constitution of the Kingdom of the Netherlands, Section 28 et seq. Sv)

b) Right to interpretation and translation (Section 27, subsection 4, Sv)

c) Right to hear witnesses

The forfeiture and the withdrawal from circulation form an inextricable part of the proceedings pertaining to the criminal case, to which the Keskin ruling applies without prejudice regarding the right to hear witnesses.

The Supreme Court of the Netherlands has partially amended its administration of justice concerning the demands that apply in criminal cases with regard to the substantiation of requests from the defence to summon and hear witnesses, in its ruling of 20 April 2021, ECLI:NL:Supreme Court of the Netherlands:2021:576 with reference to the judgment from the European Court of Human Rights in the case of Keskin vs the Netherlands (ECHR 19 January 2021, nr. 2205/16). Briefly stated and in so far as important in this regard, that amendment entails that in cases when a witness has given a statement with an incriminating purport, the significance in summoning and hearing this witness must be presupposed, so that no further substantiation of this significance may be demanded from the defence. This amendment is also material in confiscation cases, but only if and in so far as the request to hear witnesses was made in connection with a decision to be made in the confiscation proceedings for the purpose of the party involved himself having committed a criminal offence that was specifically indicated (Supreme Court of the Netherlands (05 April 2022 ECLI:NL:Supreme Court of the Netherlands:2022:366).

With regard to the value confiscation procedure, the Keskin ruling applies for requests to hear witnesses in confiscation cases when it concerns witness statements that were heard in the investigation/by the PPS *and* that are used to show that party involved committed "other offences" which led to his gains.

Subsequently determining the level of the unlawfully obtained gains (from convicted offences, from the other offences of which it is plausible that these were committed by the party involved or from any offence resulting in gains for the party involved) is not a criminal charge. The basic premise will then still remain the ruling by the Supreme Court of the Netherlands of 25 June 2002 (ECLI:NL:Supreme Court of the Netherlands:2002:AD8950) with regard to hearing witnesses in confiscation cases. In that ruling, the Supreme Court of the Netherlands determines that the question whether by not hearing the witness the party involved is not harmed in his defence in confiscation proceedings cannot be regarded separately from the specific character of such proceedings. Moreover, the rules of evidence that apply in the main proceedings do not apply to the estimation of the unlawfully obtained gains. It may be true that the estimate must be based on the substance of legal means of evidence, but for the determination of the ultimate amount the requirement of likelihood applies. With reference to this character and what the legislator envisions with regard to the position of the parties to the proceedings and the allocation of the burden of proof, the Supreme Court of the Netherlands notes that "it should be decided that the court faced with the question in confiscation proceedings whether by not hearing a witness requested by the defence he may reasonably be harmed in his defence, it should also include in its decision whether

the request in question of the defence, given the financial data placed at the base of his claim by the PPS has been sufficiently substantiated." This ruling was confirmed multiple times, in the Zwolsman-ruling, among others, of the Supreme Court of the Netherlands dated 24 April 2007 (ECLI:NL:2007:AZ4727) and the ruling of the Supreme Court of the Netherlands of 05 April 2022:

> "If the witness request was made in connection with another decision, such as the estimation of the unlawfully obtained gains, the distribution of those gains or the costs incurred, it applies without prejudice that the court, in the assessment of a request to hear a witness, also given the financial data placed at the base of his claim by the Public Prosecution Service has been substantiated to the extent that it is revealed why hearing that witness is significant for that decision (cf. Supreme Court of the Netherlands 30 November 2021, ECLI:NL:Supreme Court of the Netherlands:2021:1749.)""

- the presumption of innocence?

In Section 271 subsection 2 Sv, the criminal court is ordered not to reveal anything during a hearing, about his belief in the guilt or innocence of the defendant.

- the *ne bis in idem* principle?

Section 68 Sr - If a defendant is irrevocably acquitted, convicted or discharged from further prosecution by the criminal court, this provision will be in conflict with the same defendant being brought before the court and tried again for the same offence.

A multitude of minor administrative offences may als be qualified as criminal offences. In order to prevent a concurrence of punishment coordination between the administrative authority and the PPS is therefore obligatory in those cases where the administrative authority wishes to impose a punitive sanction. This una-via-system is laid down in the Section 5:44 subsection 1 of the General Administrative Law Act of the Netherlands and Section 243, subsection 2, Sv.

Section 74 of the State Taxes Act of the Netherlands provides a prohibition in case of tax fraud, to submit a demand for a value confiscation order. In such case, the PPS will be barred. The argument is that the tax authorities have their own range of instruments to come to a recovery of that which was not paid.

7. Elaboration on the questions per model of confiscation covered by the Regulation no. 2018/1805

7a) Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure?

The Netherlands only has the Supreme Court of the Netherlands for cassation and does not have a constitutional court.

7b) Are there European Court of Human Rights cases in relation to "your" model of confiscation?

IV. Value confiscation order

Confiscation of the gains obtained by means of or from the proceeds of a charged offence is not possible (anymore) if the party involved is acquitted for that offence and if the actually obtained gains were not found (Geerings-case ECHR 1 March 2007, Dutch Law Reports 2007,349).

7c) Is there any CJEU decision concerning "your" confiscation model?

Not to our knowledge. Some decisions are known in an interstate connection, such as the judgment of 10 January 2019 of the Court of Justice of the European Union (ECLI:EU:C:2019:7) in which the court ruled that:

1. Article 12, paragraphs 1 and 4 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to value confiscation orders must be interpreted to the extent that it is not contrary to the application of legal regulations of an executing State as the one relevant in the main proceedings, based on which, with a view to the execution of a decision to confiscate rendered in the issuing State, coercive detention may possibly be applied.

2. For the application of coercive detention in the executing State it makes no difference whether the legal regulations of the issuing State also permit a possible application of such a measure.

9. Elaboration on the questions per model of confiscation covered by the Regulation no. 2018/1805

9a) How was the Directive 2014/42/EU transposed in your national legal order and how did this affect national law?

On 20 April 2015, the Minister of Security and Justice communicated that the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ EU L127/39) had been fully implemented by means of existing regulations. As from 4 October 2019, the day on which Directive 2014/42/EU should be enforced, the Directive extended to the legal order of the Netherlands through existing regulations in the manner as stipulated in the table of concordance that was included as an attachment to the communication of the Minister of Security and Justice.[9]

[9] Communication of the implementation of the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ EU L 127/39 and OJ EU L 138/114 (rectification)) (https://zoek.officielebekendmakingen.nl/stcrt-2015-11370.html)

9b) Does the relevant confiscation procedure fall within the concept of "proceedings in criminal matters" which is provided for by the Regulation (EU) no. 2018/1805?

Yes, all the abovementioned models of confiscation fall within the concept of "proceedings in criminal matters" as referred to in the Regulation (EU) 2018/1805.

9c) In your opinion are the safeguards required by the Regulation enough for the protection of the defendants' rights? Is there any additional national legislation aimed at adjusting the national legal order to the provisions of Regulation or any relevant need thereof in order to make your national confiscation models more compliant with the safeguards required by the Regulation? Are there any lessons that we should learn from your national experience?

1. In your opinion are the safeguards required by the Regulation enough for the protection of the defendants' rights?

The requirement that it must concern confiscation in the context of proceedings in criminal matters, in our opinion provides for sufficient required safeguards to protect the rights of defendants.

In recital 18 the Regulation also reads: The procedural rights set out in the Directives 2010/64/EU ([6]), 2012/13/EU ([7]), 2013/48/EU ([8]), (EU) 2016/343 ([9]), (EU) 2016/800 ([10]) and (EU) 2016/1919 ([11]) of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives. In any case, the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation.

Which essential safeguards are meant may be deduced for example from C-60/12 and C-150/21 with regard to which elements proceedings in court should comply with in relation to the concept of 'a court having jurisdiction in particular in criminal matters' under the Framework Decision 2005/214/JHA.

For example C-150/21, legal ground 43:

> In the present case, as is apparent from the file submitted to the court, the subdistrict court, referred to in paragraph 39 of the present judgment, may rule on issues of law and fact and on the proportionality of the fine imposed in relation to the offence committed and the proceedings before that court are subject to procedural safeguards appropriate to criminal matters. In particular, those safeguards relate to the manner in which the documents relating to the case are brought to the attention of the person concerned, the hearing in open court to which that person is summoned, the possibility of being assisted or represented, the hearing of witnesses and experts and the use of an interpreter.

2. Is there any additional national legislation aimed at adjusting the national legal order to the provisions of Regulation or any relevant need thereof in order to make your national confiscation models more compliant with the safeguards required by the Regulation?

No. The confiscation models described under i, ii, iii and iv were already fully compliant with the safeguards required by the Regulation, prior to entry into force of the Regulation.

3. Are there any lessons that we should learn from your national experience?

A) In actual practice it emerges that the system of confiscation (especially the confiscation of unlawfully obtained gains) is very time-consuming. During this time, it is possible to lose sight of the assets of the defendant / convicted person. This ultimately is an impediment of the recovery and it is therefore important that authorisations allowing for confiscation are also available in the execution phase of the confiscation decision.

For the more 'serious cases' the option is now available as from 1 July 2011 to allow for an investigation into the extent of the convicted person's assets after the conviction in the confiscation case as well.

As from 1 July 2011, it is also possible to conduct a financial investigation (criminal execution investigation) in the phase of the enforcement of the confiscation judgment. This will create a continuous framework to conduct financial investigations. The criminal execution investigation seeks to strengthen the enforcement of the value confiscation order.

Conducting a criminal execution investigation is subject to two conditions:

1) the imposed value confiscation order is not fully paid within the term set to that effect;

2) there must be indications that the convicted person has capital available to be able to pay.

To be able to conduct a criminal execution investigation the public prosecutor must submit a demand to that effect to the examining magistrate, who may grant authority for conducting such a criminal execution investigation.

Authority will be granted for a period not exceeding six months and may, again upon a demand to that effect be extended by the examining magistrate, each time for an equal period. The maximum duration of the criminal execution investigation is two years.

After the criminal execution investigation is concluded, the 'normal' legal claim collection will continue for as long as payment has not been made in full.

Despite the possibilities and authorisations it appears confiscation is not always feasible with the current range of instruments. The current legal framework for seizing illegal assets no longer complies with the demands that should be set for this with a view to an effective fight against organised crime that undermines society. This concerns situations where inside or outside the framework of a criminal investigation objects are found of which it is plausible that these were obtained through a serious offence, without the possibility to provide evidence that a defendant committed a specific criminal offence using the proceeds the object was obtained from. These items may both originate from an apparent criminal source as well as be the result of a reinvestment of yields from serious offences. Seasoned criminals hardly have any property registered in their name and they do not keep their capital in the country where they reside, but transfer this elsewhere in or by way of the Netherlands. Often assisted by professional facilitators, such criminals create great legal distances between themselves and their belongings. They often use concealing ownership structures that can only be tackled with a great deal of perseverance

and investigative experts, who are in short supply. This is why it is presumed that the possessions of the greatest criminals in actual practice remain unimpaired.

There is a need for swift intervention regarding objects that come from crime and for which criminal law (which still is the ultimate remedy) is not necessarily the answer. The current options for seizing criminal assets, both within criminal law as well as outside it, do not provide for this need. A complementary instrument is required, to be deployed next to other enforcement possibilities. In addition to an offender-focused criminal investigation, the NCBC procedure starts with items of an allegedly criminal origin. In connection with this, the Minister of Justice and Security submitted a legislative proposal for an NCBC procedure. This legislative proposal adds a new method of disposal to the existing options: an NCBC procedure under civil law that may lead to an item that is connected to crime, without the need for a prior suspicion against and conviction of persons. The proposed regulation ties in with the legislative regulations in other Member States, adapted to the framework of the legal system of the Netherlands.

The proposed NCBC procedure may constitute an important addition to the range of instruments under criminal law in the fight against organised crime that undermines society. The proposed NCBC procedure is new to the Netherlands and the PPS will need to gain experience with the implementation of this regulation with a view to optimal implementation. However, in light of the amounts that are involved with the proceeds from organised, society-undermining crime, the expectation is justified in every respect that the proposed NCBC procedure may provide a significant contribution to raising the confiscation result.

B) As described earlier, in the Netherlands freezing for the purpose of value confiscation under criminal law may be levied for the recovery of a victim measure to be imposed by the criminal court as referred to in Section 36f Sr. This extension of powers pertaining to criminal procedure provided the police and judicial authorities more options to levy a freezing for the purpose of value confiscation at an early stage. This way, any compensation measure to be imposed can be effectively enforced.

Although internationally there are plenty of conventions, EU Framework Decisions, EU Directives and the EU Regulation based on which a request for seizure may be submitted for confiscation ultimately, the possibility to seize the assets of the defendant for the purpose of preserving the right of recovery in order to ultimately impose a competition measure is not a topic of discussion on an international scale. In legislation in the Netherlands, the compensation measure is a different instrument than the forfeiture (O) or value confiscation order (W).

Article 29 of the Regulation 2018/1805 offers the possibility to return frozen objects to the victim subject to conditions. However, this must concern an object as referred to in Article 2 of the Regulation. In brief, this should be an object that was obtained through the criminal offence, while the ownership right of the victim to the object is not disputed.

It is therefore not possible (as yet), with a view to the compensation measure, to levy a freezing for the purpose of value confiscation abroad on objects that belong to the defendant, that are unrelated to the criminal offence.

Appendix 1 – Seizure under criminal law

The PPS is responsible towards society for preserving law and order. Confiscation substantially contributes to effective crime fighting in various ways. In order to bring the truth to light, a prudent treatment of confiscated samples is essential; in order to powerfully discourage criminal livelihood, confiscation of criminal assets is essential; in order to protect citizens against dangerous objects to the extent possible, withdrawal from circulation is greatly important.

In the scope of confiscation it is important to seize objects in a timely manner. Criminal law of the Netherlands has to forms of confiscation: the so-called "freezing" (Section 94 Sv) on objects in the interest of (establishing the truth and) direct confiscation and the freezing for the purpose of value confiscation (Section 94a Sv) in the interest of value confiscation.

Originally, confiscation in criminal law of the Netherlands aims to establish the truth (pertaining to the criminal offence) or impeding the use of objects (Section 94 Sv). The introduction of the value confiscation order in 1993 has made it possible to also confiscate documents and other objects that may serve to demonstrate unlawfully obtained gains.

Since 1 March 1993 it is also possible to confiscate objects for the purpose of recovery of a fine or value confiscation order to be imposed at a later time (Section 94a Sv). The legislator wanted to prevent the defendant from withdrawing his possessions from future recovery before being convicted and in doing so frustrating the enforcement of hefty fines or the value confiscation order. Later on, the compensation measure was added to this.

Pursuant to Section 134 van het Code of Criminal Procedure of the Netherlands confiscation is understood to mean keeping or taking possession of an object in favour of prosecution. The implementation of this coercive measure is a breach of the civil rights of the entitled party or parties (to wit: the owners or the holder): the object is removed from the actual possession of said party or parties. Confiscation should be implemented prudently and proportionately.

Liable for confiscation are objects. This includes all (im)movable property, money, property rights (such as debts) and animals.

As indicated before, there are various forms of seizure that are important in view of confiscation:

- Freezing
- Freezing for the purpose of value confiscation

Freezing (Section 94 Sv) (among other things in connection with direct confiscation)

Section 94 Sv sums up the instances when objects can be confiscated. Based on Section 94 Sv objects may only be confiscated:

1. to bring the truth to light;
2. to demonstrate unlawfully obtained gains;
3. for forfeiture[10]; or
4. for withdrawal from circulation.

The basic premise that there will be no confiscation unless one of these grounds is present, also applies in the sense that the confiscation will be lifted as soon as the grounds for confiscation have

[10] An object or amount of money that does not belong to the party whose assets are seized may be forfeited. This is possible when the entitled party was aware or could reasonably suspect that the relationship between the object and a criminal offence existed, and if it cannot be established to whom an object or amount of money belongs (see country report under 1.1.I).

ceased to apply. The main rule then comes into play, that the object will be returned to whom it had been confiscated from. If the party whose assets are seized does not relinquish the confiscated object and the PPS wishes to return the object to the party who reasonably may be regarded as entitled party, or keep the object in custody on behalf of this entitled party, then the party whose assets are seized may submit a complaint to that effect to the court.

Only if a relation with a specific criminal offence may be suspected or if it can be demonstrated with regard to a criminal offence with or on the object that there are unlawfully obtained gains, may an object be confiscated based on Section 94 Sv. From the moment when it becomes apparent that the object is not in relation to a criminal offence liable to prosecution, the interest pertaining to criminal procedure will cease and the confiscation needs to be lifted. The basic premise will then be that the confiscated object will be returned to the party whose assets are seized.

Authority to confiscate

The investigating officer and the (assistant) public prosecutor have the authority to confiscate, subject to specific conditions. These conditions are laid down in the Sections 56, 95, 96, 96a, 96b and 551 Sv where it concerns the investigating officer and in the Sections 56, 96c, 97 and 100 Sv where I concerns the (assistant) public prosecutor.

Some special statutes provide a broader authority, such as Section 18 of the Economic Offences Act of the Netherlands, Section 9 subsection 3 of the Opium Act of the Netherlands and Section 52 subsection 1 of the Weapons and Ammunitions Act of the Netherlands.

It should be noted that the Examining Magistrate (Sections 104, 105, 110, 195 and 114 Sv) and also everyone else (Section 95 Sv) in specific situations will be authorised to confiscate.

Notification of confiscation

The investigating officer links the confiscation into the case file, in the form of an official report. The investigating officer will also draw up a notice of seizure of the confiscation (Section 94, third subsection, Sv) in favour of the PPS, also if the confiscation took place on orders from and under the responsibility of the public prosecutor or the examining magistrate. The notice of seizure is not an official report. The investigating authority does not provide the party whose assets are seized with a proof of receipt.

The notice of seizure and the proof of receipt are always drawn up as soon as possible. The investigating officer asks the party whose assets are seized whether he wishes to relinquish his right to a return (in writing), unless it is clear that the object can be returned to the party whose assets are seized.

The notice of seizure describes the confiscated object and contains all relevant information for the decision for seizure. It is possible to list multiple objects on one notice of seizure when these concern similar types of objects and the confiscation is settled similarly. In any case, a separate notice of seizure must be drawn up for each party whose assets are seized.

Assessment of confiscation by assistant public prosecutor

After the notice of seizure is drawn up, the confiscation will be presented to the assistant public prosecutor, who will assess wither the notice of seizure has been filled in completely and contains all relevant information, if necessary will order the notice of seizure to be amended and subsequently decide on the enforcement of the confiscation.

The assistant public prosecutor will settle the confiscation independently in the following cases:

- if the continuation of the confiscation is not necessary, the assistant public prosecutor will decide on the return of the object to the party whose assets are seized (Section 116 subsection 1 Sv);
- if the party whose assets are seized has relinquished (Section 116 subsection 2 Sv),

then, provided that:

- there is unequivocal ownership, and
- there is no (more) fact-finding confiscation,

the assistant public prosecutor may

a. have the object returned to the party who may reasonably be regarded as the entitled party;
b. order custody of the object to be retained in favour of the entitled party, in case a return to the entitled party is not yet possible (for example because it is not known who that is);
c. in case the party whose assets are seized declares that the object belongs to him, order that this is handled as if the object was forfeited or withdrawn from circulation.

Prosecution

Confiscation is a coercive measure that may only be implemented within the scope of criminal prosecution in case of a suspicion. This entails that de decision on confiscation forms part of the decision on prosecution in the criminal case. A confiscation will be decided on as soon as possible.

Relation to a criminal offence

If a relation to a specific criminal offence can be suspected or if with regard to a specific criminal offence with or on the object it can be demonstrated that there are unlawfully obtained gains, only then will it be possible to confiscate an object based on Section 94 Sv. From the moment it becomes apparent that the object is not in relation to a prosecutable criminal offence, the interest pertaining to criminal procedure to the confiscation will cease and then the confiscation must be lifted.

Main rule: return to the party whose assets are seized

When the interest pertaining to criminal procedure no longer opposes a return, in principle the return must be effected to the party from whom the object was confiscated (Section 116 subsection 1 Sv), the party whose assets are seized. There are four exceptions to this rule:

3. the case where the party whose assets are seized has relinquished (Section 116 subsection 2 Sv), either or not in the scope of a discretionary dismissal, an out-of-court settlement or a punishment order;
4. the situation where a party other than the party whose assets are seized may reasonably be regarded as entitled party (Section 116 subsection 2 and 3 Sv);
5. when the object is subject to a (civil or fiscal) third-party seizure (Section 119 subsection 4 Sv);
6. the case where the party whose assets are seized is on the consolidated sanctions list of the European Commission for suspicion of terrorist activities; this sanctions list must be consulted online to ensure its most current version.

Relinquishment and ownership

When the party whose assets are seized relinquishes, he surrenders his entitlement to a return. The party whose assets are seized relinquishes by signing a written statement. The refusal to relinquish of the party whose assets are seized will be recorded in writing.

In confiscation for crimes committed by minors, restraint is called for where relinquishment is concerned. Relinquishment will only be effected after consulting with the legal representative of the minor, who will consent to the relinquishment in writing by (co-)signing statement for relinquishment. Persons under the age of twelve years are not capable of relinquishment by themselves; only their legal representative in civil cases will be able to do that (Section 487 subsection 2 Sv).

If the party whose assets are seized declares to be the owner of the object, the ownership will revert to the State by the relinquishment, unless a party other than the defendant is (co-)owner. If the party whose assets are seized is the sole owner, the PPS will be authorised after the relinquishment to definitively settle the confiscation under Section 116 subsection 2 Sv.

If the party whose assets are seized does not relinquish or if a 'statement of possession' is absent, the PPS may not order the object to be treated is if it were forfeited or withdrawn from circulation. The forfeiture may then solely be imposed by the court in the judgment over the criminal case, the withdrawal from circulation either in this judgment or in separate proceedings in chambers on demand from the PPS. The Prosecution may start make preparations to return to another party who has more rights to the object than the party whose assets are seized; however, the return will only be possible until after the party whose assets are seized has been given the opportunity to submit a letter of complaint against it (Section 116 subsection 3 and Section 116 subsection 4 Sv).

Freezing for the purpose of value confiscation (Section 94a Sv)

Freezing for the purpose of value confiscation may be levied to secure the right to recovery of a fine to be imposed (seizure to secure payment of a fine, Section 94a subsection 1 Sv) and / or a value confiscation order to be imposed (seizure for the confiscation of the proceeds of crime, Section 94a subsection 2 Sv) and / or a compensation measure to be imposed in favour of the victim (seizure on behalf of victims, Section 94a subsection 3 Sv).

In order to levy a freezing for the purpose of value confiscation, in all cases a separate authorisation from the examining magistrate is required (Section 103 Sv); if based on an authorisation from the examining magistrate a criminal financial investigation is conducted, that authorisation also serves as a general authorisation to levy an order for freezing for the purpose of value confiscation (Section 103 respectively 126 subsection 3 in conjunction with Section 126b Sv).

For a seizure to confiscate the proceeds of crime and a seizure to secure payment of a fine it applies that freezing for the purpose of value confiscation is possible upon suspicion or a conviction of a serious offence which is liable to a fine of the fifth category; for seizure on behalf of victims an offence liable to a fine of the fourth category will suffice. Freezing for the purpose of value confiscation is possible for minors in case of a suspicion, respectively a conviction of a serious offence liable to a fine of the fourth category (Section 488a Sv).

In derogation of the freezing it is <u>not</u> necessary for a (direct or indirect) relation to exist between the object of a freezing for the purpose of value confiscation and a criminal offence.

Forms of freezing for the purpose of value confiscation
In criminal law, the levy of a freezing for the purpose of value confiscation, concerns a seizure for the recovery of property. It is a measure to secure the recovery of an imposed fine, value confiscation order or compensation measure.

There are different forms of freezing for the purpose of value confiscation:

1. freezing for the purpose of value confiscation under the defendant / convicted person

2. freezing for the purpose of value confiscation under a third party

3. freezing for the purpose of value confiscation on objects of another party (third-party seizure)

Re 1) freezing for the purpose of value confiscation under the defendant / convicted person
Since Section 134 Sv provides that confiscation means taking or holding possession of an object in favour of the criminal prosecution, the freezing for the purpose of value confiscation is levied under the defendant / convicted person by effectively taking away the object. This is not a requirement. If the object is not taken away and the party involved is appointed as custodian, the confiscation will also be deemed completed.

If the confiscated object is an immovable property subject to registration, Section 94d sub 3 Sv provides that the bailiff takes this object in freezing for the purpose of value confiscation following an order to that effect from the public prosecutor.

Re 2) third-party freezing for the purpose of value confiscation
Third-party seizure means that under a third party, an object that belongs to the assets of the defendant is secured for future recovery from the fine, value confiscation order or compensation measure to be imposed. This object may be a claim or a movable property. After all, for third-party seizure it is required that there is a legal relation between the debtor (the defendant / convicted person) and the third party (in this case the person who is in debt to the defendant / convicted person or who holds one or more of his assets.)

Objects that may be confiscated under a third party are:

a. claims the defendant / convicted person has over a third party (for example, the defendant who has money in a bank account);
b. claims the defendant / convicted person will have over third parties provided that these are based on legal relationships that already existed at the time of the confiscation (for example future rent from a rental agreement);
c. movable property not subject to registration that belongs to the defendant, but is held by or will be held by a third party (for example, the vehicle defendant / convicted person lent out to the third party).

Seizure under the State is a special form of third-party seizure. This concerns objects that in the scope of a criminal investigation have already been confiscated (and are already 'under the State') after which in connection with the recovery in another case, freezing for the purpose of value confiscation is imposed on the object.

Re 3) freezing for the purpose of value confiscation on objects of another party (third-party seizure) (third-party confiscation)
As of 1 September 2003 an extension of the freezing for the purpose of value confiscation pertaining to criminal procedure is included in the Code of Criminal Procedure of the Netherlands. As of that date, the so-called 'third-party seizure' was introduced. By third-party seizure, objects that belong to another party can be confiscated to secure recovery from the defendant / convicted person. With the proceeds from the confiscated objects the debt of the convicted person to the State will be settled.

The background of this form of seizure is that the defendant / convicted person has channelled part of his assets to another party to frustrate its recovery. The legislator therefore assumes that this in fact concerns assets from the defendant / convicted person and not the other.

By 'another' both natural persons and legal entities are meant.

As of 1 July 2011 the conditions for levying third-party seizure have been amended. The conditions that apply from that day on, subject to which the confiscation is possible are:

1. there must be sufficient indications that the object wholly or partially came to belong to the other party with the evident aim to complicate or obstruct the seizure and execution thereof (requirement of frustrating recovery); and
2. the other knew or should have reasonable suspected that the object came to belong to him to frustrate recovery (requirement of knowledge).

In actual practice, in the first place this will concern objects that came to belong to the other party, meaning objects that were transferred. It is sufficient that the objects came to belong to the other party with the evident aim to frustrate the recovery from the provider and that the other party was aware of this or should have suspected this. This means that also objects that were secured to serve to recover, prior to the serious offence or the criminal offences based on which confiscation takes place being committed, may be confiscated under the other party in freezing for the purpose of value confiscation.

Third-party seizure on immovable property is possible (Supreme Court of the Netherlands, 13 June 2006, Dutch Law Reports 2006, 344).

Section 94a, fourth subsection Sv provides that not only the object that came to belong to the other with the evident aim to frustrate the recovery, but also assets of the other party may serve to recover and consequently may be confiscated in freezing for the purpose of value confiscation.

This will then be possible against no more than the value of the object that came to belong to the other party.

Obviously, it will be preferred to confiscate the original object that came to belong to the other party and that (or else the purchase amount) must originate from the defendant. However, if that original object is no longer available, for example if it has been caused to disappear, but also if the confiscation of the original object is impossible or difficult to realise, then objects that belong to the other party may serve as recovery object. The entire capital of the other party then becomes – without any relation to the object in connection with the serious offence, but related to the value of the originally transferred object – recovery object for the debt of the defendant / convicted person to the State. In principle, this is at the Public Prosecution Service's discretion.

Judicial purpose versus management

Confiscation always requires two decisions: one on the judicial purpose and one on the actual management.

- The decision on the judicial purpose is an assessment of the ground(s) for confiscation and the decision demanded by the PPS determines whether the confiscation must be settled by the court.
- The decision on management is an assessment of the requirement to keep physical custody of the object until the confiscation has settled legally (often through a decision from the court).

The difference between the judicial purpose and the management is expressed in the terms of the decision. Withdrawal from circulation is a judicial purpose, destruction is a form of management; forfeiture is a judicial purpose, disposal is a form of management.

The management decision, does not settle the confiscation in a judicial sense, except when the confiscated object is relinquished. In case of relinquishment, the decisions on the judicial purpose and the actual management will coincide.

Swift settlement of confiscation / management

For an efficient and cost-effective settlement of the confiscation it is important that the PPS takes a decision on management as soon as possible. The decision on the judicial purpose does not impede a swift decision on management. The PPS must always consider the possibility of a return. If a return is not possible, the basic premise will be that the object is not kept in custody, unless a continuation of the confiscation is necessary in the interest of establishing the truth or personal value of objects, such as jewellery or a painting.

Objects that do not need to be kept in custody (any longer) in the interest of establishing the truth may be removed pursuant to Section 117 subsection 2 Sv if:

a) they are not fit for storage; or
b) the costs of keeping them in custody is not in a reasonable proportion to their value; or
c) they are replaceable and the equivalent value can be easily determined.

Article 10 Seized Objects (Safekeeping) Decree prescribes which categories of objects in any case are included in these categories.

For cost considerations and to prevent a decrease in value of the confiscation, the Public Prosecution Service will grant the authority pursuant to Section 117 Sv as soon as possible after the confiscation. The authority must be granted for each separate object or batch in a specific criminal case.

Objects with an economic value, after authority has been obtained pursuant to Section 117 Sv, will be disposed by the custodian for a consideration (sold). The confiscation will continue to rest on the acquired proceeds after this (Section 117 subsection 4 Sv).