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## RECOVER

### III RESEARCH QUESTIONNAIRE - III WORKPACKAGE – Grant Agreement No. 101091375

## Assessing the possibility to apply the REG to legal persons and enterprises *December 2023 - March 2024*

For each question it is important to answer considering the scholars' opinion and the evolution of the jurisprudence/case law (Constitutional Court, Supreme Court, etc.).

### Section I - The models of confiscation against legal persons: harmonisation

1. How was the **Directive 2014/42/EU transposed in Your national legal order** and how did this affect national law in relation **to legal persons**?

On 20 April 2015, the Minister of Security and Justice announced that 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 through existing regulations. With effect from 4 October 2019, the day by which Directive 2014/42/EU must be implemented, the directive became effective in the Dutch legal order through existing regulations in the manner indicated in the transposition table annexed to the communication from the Minister of Security and Justice.

The implementation of this directive has not affected national law relating to legal persons.

2. Which models of confiscation applicable against natural persons, **can indirectly affect the assets of legal persons? E.g. If the proceeds are got by the legal persons or when the confiscation involves the share in legal entity held by the convicted person.**

For forms of confiscation also applicable to natural persons, you may refer to the answers to the previous questionnaire, highlighting particular issues related to the application of confiscation to legal persons.

All forms of confiscation mentioned in the country report also apply to / are also possible in the case of legal persons.

If one or more shares in a legal person are confiscated in a case against another (legal) person, that/those share(s) will accrue to the State. This does not affect the equity position of the legal person that issued the shares.

The following applies with respect to confiscation from a third party:

An object or amount of money that does not belong to the party attached can also be forfeited. This is one of the forms of third-party confiscation available in the Dutch system. This is possible if the party entitled knew of or could reasonably suspect the existence of that relationship between the object and an offence, and if it cannot be determined to whom the object or amount of money belongs (Section 33A(21) of the Dutch Penal Code (DPC)).

So under certain circumstances, an object belonging to a legal person can be forfeited in a case against a party other than the legal person itself.

Another form of third-party confiscation in the Netherlands is prejudgment third-party attachment. The background to this form of attachment is that the defendant/convicted person has channelled some of its assets to the other person to prevent recourse to those assets. The legislator thus assumes that the assets concerned are in fact assets of the defendant/convicted person and not assets of the other person.

'Other person' includes both natural and legal persons.

The country report includes more information on forfeiture (in various sections of the report) and third-party confiscation (p. 47 ff).

3. **Which models of confiscation can be applied directly against legal persons?** Please, provide us with **the related legislative provisions**. Does your country provide for **criminal liability of legal persons**?

In addition to natural persons, legal persons can be considered perpetrators of an offence, under Section 51 DPC (Annex 1). This provision applies to legal persons under private law, partnerships equivalent to such legal persons, and legal persons under public law. Culpability of a legal person is assumed if certain conditions are met. Intent and gross negligence on the part of the legal person are determined in an entirely separate way. In principle, a legal person can participate in offences committed by others, and can invoke grounds for immunity from criminal liability. The term 'offence' indicates that the criminal liability of legal persons is not limited to serious crimes (*misdrijven*), but also extends to minor offences (*overtredingen*).

Legal persons participating in offences committed by others, as perpetrators (Section 47 DPC) or as accomplices (Section 48 DPC), are criminally liable. There is no difference between the way legal persons participate in offences and the way natural persons do so.

### **Forms of confiscation**

The previously prepared country report describes the various confiscation models available in the Netherlands. See Chapter 1 for an overview of those models. The report distinguishes between court-ordered confiscation orders, on the one hand, and forms of confiscation in which the court was not involved, on the other. All these forms of confiscation are also possible in relation to legal persons.

On the model involving a fine (confiscating illegal gains, *afroombgeldboete*), the following can additionally be observed.

Fine (confiscating illegal gains)

As mentioned in the country report (p. 6 ff), the court may impose a fine. Offences are linked to categories of fines, and each category has a maximum fine. The amounts involved are redetermined every two years.

On 1 January 2024, the maximum amounts of the six categories of fines were increased:

- the first category, €515;
- the second category, €5,150;
- the third category, €10,300;
- the fourth category, €25,750;
- the fifth category, €103,000;
- the sixth category, €1,030,000.

### **Higher fine in case of legal persons**

Pursuant to Section 23(7) DPC, when a legal person is convicted, the court can decide to move to the next higher category (paragraph 7):

‘Upon conviction of a legal person, if the fine category determined for the offence does not allow for appropriate punishment, a fine may be imposed up to the amount of the next higher category. If a fine of the sixth category can be imposed for the offence and that category of fine does not allow for appropriate punishment, a fine may be imposed up to ten per cent of the legal person's annual turnover in the financial year preceding the judgment or punitive order.’

The court can move the next higher category if the category determined for the offence does not allow for appropriate punishment. This criterion is not very distinctive and offers considerable latitude in determining the level of punishment.

If a legal person is dissolved after having been sentenced to a fine, the fine may be recovered, after the legal person is dissolved, in the same manner as any other of its debts.

### **Criminal liability of legal persons**

In the Netherlands, legal persons (if the legal person has committed an offence, the parties ordering the offence and those who have actual control of the prohibited conduct) can be held criminally liable. This is stipulated in Section 51 DPC (Annex 1).

### **Culpability of a legal person and actual control of a legal person**

For a legal person to be considered a perpetrator of an offence, the offence must be reasonably attributable to it. Whether that is the case depends on the circumstances of the case and the nature of the prohibited conduct.

Section 51 DPC is applicable under the following conditions:

- 1) there is a legal person within the meaning of Section 51 DPC.
- 2) the conduct that could qualify as a criminal offence can be imputed to the legal person. Legal person culpability is a form of vicarious criminal liability. Based on the circumstances of the case, it will be determined whether the conduct was carried out or occurred within the sphere of the legal person;

- 3) the legal person has acted with intent or gross negligence. Sometimes intent or gross negligence on the part of the legal person can be inferred directly from its decisions, the conduct of its business or the actual affairs within the organisation. In other cases, intent and gross negligence on the part of natural persons are imputed to the legal persons.

#### Re 1) Legal person

The following qualify as a legal person within the meaning of Section 51 DPC:

- legal persons under private law
- types of partnerships to be considered equivalent to a legal person under private law
- legal persons under public law (public bodies with legal personality).

Legal persons under public law usually derive their legal personality from civil law, but are not created by private individuals and are therefore treated separately. (For more details, also see the section on liability to prosecution of authorities below.)

#### Re 2) Culpability of the legal person

Culpability of a legal person is assumed if two conditions are broadly met:

- The legal person is an addressee of the standard whose compliance is promoted by the statutory description of the offence.
- The conduct can reasonably be attributed to the legal person if, based on certain circumstances, it can be assumed that it took place (or was carried out) within the sphere of the legal person.

The statutory description of an offence promotes compliance with a particular standard. It must first be established whether the legal person is intended to be an addressee of the standard. Does the standard whose compliance is being promoted address the legal person? If the court determines that it does, it can proceed to establishing culpability. For most offence descriptions, the legislator intends the legal person to be included within its scope.

A legal person is considered a perpetrator if the conduct can be attributed to it. No general rule can be given for this attribution. The criminal conduct is not often directly attributed to the legal person, for example because there is evidence that the board of management made a decision to commit an offence. In many cases the issue is whether the conduct of a natural person can reasonably be attributed to the legal person as the perpetrator, and the nature of the offence also plays a role. The conduct (act or omission) may consist of an act prohibited by law (commission offence) or an omission that is punishable because action should have been taken (omission offence).

According to the Supreme Court, for attribution it is crucial to establish whether the conduct (act or omission) took place within the sphere of the legal person. Conduct in that sphere may be presumed if one or more of the following circumstances have occurred:

- a) an act or omission has been committed by an individual working for the legal person under an employment contract or otherwise;
- b) the conduct was serviceable to the legal person's business;
- c) the conduct is consistent with the legal person's ordinary course of business;
- d) the criteria developed in the context of vicarious criminal liability, more specifically the so-called 'IJzerdraadcriteria', have been met.

In principle, culpability can be imputed on the basis of any of these circumstances.

#### Re a) Conduct

The conduct imputed to a legal person may be an act or an omission. For the way in which conduct is imputed to a legal person, it makes a difference whether the offence concerned is a commission offence or an omission offence.

In commission offences, an action is penalised. It must be established that the prohibited action took place, and that it can actually be imputed to the legal person.

In omission offences, an omission where action is warranted is penalised. The injunction may take the form of a legal duty of care. The duty of care is fulfilled if the necessary actions have been performed. If the duty of care rests on the legal person, it is the legal person who is responsible for ensuring that those actions take place. Here, no action is imputed to the legal person. Imputing, in this context, essentially means establishing that the necessary actions did not take place.

#### *Working in employment or in another capacity*

The first circumstance on the basis of which it can be assumed that the conduct took place within the sphere of the legal person (and can therefore reasonably be attributed to it) is working on behalf of the legal person, i.e. working for it in employment or in another capacity. The criteria for being employed are not particularly strict.

Incidentally, the intention is not for all (normal) conduct of its employees to be imputed to the legal person, especially where employees act without authorisation. After Section 51 DPC came into force, the Supreme Court did not include the employment relationship in its considerations for a long time. Other circumstances may weigh more heavily, such as the circumstance that a particular conduct is consistent with the legal person's ordinary course of business.

#### Re b) Serviceability

The second circumstance on the basis of which it can be assumed that the conduct took place within the sphere of the legal person (and can therefore reasonably be attributed to it) is the serviceability of the conduct to the business conducted by the legal person. This is similar to the so-called benefit criterion.

As early as in 1948, the Supreme Court accepted that the circumstance that the legal person benefited from the conduct may contribute to establishing its culpability. It is assumed that the serviceability of the conduct to the legal person should not be made a decisive criterion. For example, the benefit criterion has hardly received any attention from the Supreme Court after the above-mentioned judgments.

Admittedly, a strong indication of a legal person's culpability can be found in its direct benefits from an action. However, this is not decisive, also because situations are conceivable in which conduct that does not directly benefit the legal person is nevertheless imputable to it.

#### Re c) Ordinary course of business

The third circumstance on the basis of which it can be assumed that the conduct took place within the sphere of the legal person (and can therefore reasonably be attributed to it) is whether the conduct is consistent with the legal person's ordinary course of business. This circumstance may be related to other circumstances, such as the so-called IJzerdraadcriteria and the answer to the question of whether the conduct was normally accepted.

It could be inferred from the description of the legal person's business in the Chamber of Commerce's Trade Register that a particular type of conduct is consistent with that legal person's ordinary course of business. It can also be inferred from a legal person's 'earnings model' whether the conduct was consistent with and serviceable to its ordinary course of business.

#### Re d) IJzerdraad criteria

The fourth circumstance on the basis of which it can be assumed that the conduct took place within the sphere of the legal person (and can therefore reasonably be attributed to it) is the applicability of the so-called IJzerdraad criteria. Briefly, these criteria imply that a person who had the power to decide on the occurrence of the conduct and who accepted or used to accept the conduct can be regarded as a perpetrator.

#### Re 3) Intent and gross negligence

Intent and gross negligence can be imputed to a legal person in the following way:

- a. Intent and gross negligence on the part of natural persons are imputed to the legal person;
- b. In certain cases, the legal person itself may be found to be culpable of intent and gross negligence. For more details, see: intent and gross negligence on the part of legal persons.

#### Re a) Imputation of intent and gross negligence of natural persons

Intent and gross negligence on the part of the legal person can be determined by reference to intent and gross negligence of natural persons. Intent and gross negligence can be imputed to the legal person.

In any case, intent by a body of the legal person is a strong indicator of intent on the part of that legal person. If the intent of the sole director of a private limited liability company is established, it is often imputed to the legal person.

#### Re b) Intent and gross negligence on the part of the legal person

Under certain circumstances, the intent or gross negligence of a legal person may be established independently, that is, without first establishing the presence of the required intent or gross negligence on the part of someone working for that legal person:

- Intent or gross negligence may be inherent in board decisions.

Intent or gross negligence may be inferred from the legal person's policy, or at least from the actual course of affairs within an organisation. It is contained in the conscious acceptance of conduct or the issuance of instructions, and is imputed to the legal person along those lines. Examples include policy (the conduct of policy), 'working climate', or 'corporate politics' (also 'psychological climate') in which illegitimate means are sanctified by the end.

#### *Conditional intent*

It is possible to assume a legal person's own conditional intent. Conditional intent for a particular consequence is present if the defendant has consciously accepted the substantial probability that that consequence will occur.

#### **Prosecution in the case of bankruptcy/conversion/dissolution**

The bankruptcy of a legal person does not preclude prosecution. Thus, a legal person that is declared bankrupt is not, by analogy with Section 69, considered 'deceased'.

If the legal person is converted into, or continued by, another legal person, the latter may be prosecuted for offences committed by the former; the question of which legal person is prosecuted is not determined by the legal form under civil law but by societal reality. If the activities of a legal person are continued on the same footing by another legal person, the latter may be prosecuted for offences committed by its legal predecessor.

The reverse may also occur: a legal person running an enterprise in which an offence is committed may also be prosecuted in respect thereof if it is subsequently continued by another legal person.

A dissolved legal person can be prosecuted if the dissolution is not yet apparent to third parties at the start of the prosecution, for example because registration in the Trade Register has not yet taken place. If the Trade Register is inconclusive and the dissolution has not been disclosed to the Public Prosecutor before the start of prosecution, the latter shall only be obliged to investigate further if, at the time the prosecution was instituted, the documents give rise to a direct and serious suspicion that the legal person had previously been dissolved. However, this assumes that the legal person actually still exists, which may be evidenced by settlement of its estate or the presence of funds therein.

A fine imposed on a legal person may be executed after its dissolution.

Likewise, an action for confiscation of illegally obtained benefits may be brought against a dissolved legal person, provided that the prosecution (e.g. by summons, investigation by the examining magistrate or a criminal financial investigation) commenced before the dissolution became apparent to third parties; any lack of assets at the time of dissolution is irrelevant as regards admissibility.

### **Liability to prosecution of public authorities**

In principle, public authorities can also be subject to prosecution. After all, Section 51 DPC does not distinguish between legal persons under private law and legal persons under public law. Such a distinction does exist in case law. Based on legislative history, case law developed an extra-statutory ground for immunity from prosecution for certain public authorities.

The idea behind legislative history and case law is that, on the one hand, prosecution of bodies under public law for offences they have committed is not generally very opportune, because they can usually be corrected through administrative channels. On the other hand, however, it is not self-evident that the possibility of prosecuting and punishing legal persons under public law should be excluded outright. Indeed, it is conceivable that ‘it would be perceived as unfair, and in particular contrary to the principle of equality, if criminal activities of (undertakings of) bodies or institutions under public law were not to be prosecuted’.

Since public authorities come in all shapes and sizes, the conditions under which courts will allow a claim of immunity from prosecution depend on the position of the authority in question within the overall system of government:

1. The central government enjoys general immunity from prosecution.
2. Non-central authorities such as municipalities, provinces and other public bodies participating in society as legal persons under public law may invoke immunity from prosecution under specific conditions to be discussed.

#### Re 1) Central government

In a judgment on the merits, the Volkel Airbase Judgment, the Supreme Court explicitly states that the central government cannot be prosecuted for its actions in relation to an offence.

Only the State enjoys general immunity from prosecution, according to the Supreme Court. In the Volkel Airbase Judgment, the Supreme Court considered to this effect that actions by the State are deemed to serve the public interest (ground 6.1). Ministers and state secretaries are generally accountable to the States General for actions by the State. In addition, they can be criminally prosecuted and tried for malfeasance under Section 483 (old) et seq. DPC (ground 6.2). According to the Supreme Court, the assumption that the State itself can be held liable under criminal law for its actions (ground 6.3) would not be consistent with this system.

In its 3 March 1998 judgment, the Supreme Court apparently limited the immunity of legal persons governed by public law, including the State, to the domain of criminal law, so that the State (in this case the Ministry of Defence) would be subject to the Traffic Regulations (Administrative Enforcement) Act (*Wet administratiefrechtelijke handhaving verkeersvoorschriften*) on an equal footing with private individuals if a military refuse lorry (with a registration number registered in the name of the Purmerend Municipal Public Works Department) committed a traffic offence.

The European Court of Human Rights does not accept immunity from prosecution of a general nature for liability of the government in life-threatening disasters, under Article 2 ECHR

## Re 2) Non-central authorities

Non-central authorities are legal persons under public law such as provinces, municipalities and water boards. According to the Supreme Court's established case law, only public entities within the meaning of

Chapter 7 of the Constitution qualify for immunity from prosecution.

According to the Supreme Court's established case law, only legal persons under public law that are 'public entities within the meaning of Chapter 7 of the Constitution' can qualify for immunity from prosecution.

This means that, for example, a 'public institution of higher education' within the meaning of the University Education Act (*Wet op het wetenschappelijk onderwijs*), such as the University of Groningen, is not eligible for immunity. A municipality, on the other hand, is a public entity within the meaning of Chapter 7 of the Constitution.

## *Immunity dependent on conduct*

The scope of the government's current immunity from prosecution is entirely determined by Supreme Court case law. According to the Supreme Court's second Pikmeer judgment, the condition for assuming immunity is that:

'(...) by its nature and having regard to the legal system, the conduct in question cannot, in law, be carried out other than by administrative officials in the context of the performance of the administrative function entrusted to the public entity, so that to that extent third parties are excluded from participating in social and economic life on an equal footing with the public entity.'

In other cases, according to the Supreme Court, there is no reason to grant immunity to the public entity due to the equality to be observed here, nor does immunity apply to the persons referred to in Section 51(2)(2°) DPC.

The context of the conduct (the performance of an administrative function of a public entity) is important, but according to the second Pikmeer judgment, it is not the sole determining factor.

There are no grounds for granting immunity:

- a. only because there is a relationship between the conduct and the administrative function (see below: relationship between conduct and administrative function);
- b. if the conduct took place in the performance of an administrative function but was actually directed at something else.

The principle of equality played an important role in tightening the - initially broad - criteria for assuming immunity. Within the context of the performance of the administrative function outlined above, the



equality principle means that there is no reason to grant immunity if the conduct, by its nature and in view of the legal system, could also be carried out by third parties.

#### Re a) Relationship between conduct and administrative function

The mere existence of a relationship between the conduct and the administrative function is not in itself a ground for granting immunity. In the second Pikmeer judgment, the Supreme Court 'clarified' the existing jurisprudence - conduct in the performance of an exclusive administrative function task is not subject to prosecution. Immunity is limited because developments in the implementation of administrative functions had to be taken into account. Once, this was exclusive territory of the government. The law defines the administrative functions entrusted to public entities in an increasingly general way. The execution of the assigned tasks is partly in the hands of legal persons under private law in which the government has some degree of control through privatisation or public-private partnerships, for example where road maintenance is concerned.

#### Re b) Nature of the conduct

By conduct, the Supreme Court means actual conduct. This refers to the conduct described in the charge. It is to that conduct that the words from the second Pikmeer judgment refer, according to the Supreme Court.

There is no reason to grant a public entity immunity from prosecution if the nature of the conduct, which is manifestly not directed towards the performance of the administrative function, precludes it.

### **Equality principle**

According to the second Pikmeer judgment, immunity from prosecution is assumed only if the conduct could only have been carried out, to the exclusion of private parties, by administrative officials in the performance of the administrative duty entrusted to the public entity.

This is in line with the legislative history. In the Explanatory Memorandum to Section 51 DPC, the legislator indicated that - when prosecuting legal persons governed by public law - it should be considered whether the offence was committed within the general or specific administrative duty entrusted to that legal person. Or whether the offence was committed as part of a business activity that can also be carried out by private individuals.

It is not a matter of fact that public authorities, unlike legal persons governed by private law, cannot be prosecuted for criminal activities. One consideration is that if such activities by (companies of) public entities are not prosecuted, this will be perceived as unfair, especially since non-prosecution would violate the principle of equality. What is primarily at stake is the government's role as an entrepreneur, not its role as an administrator and bearer of public authority.

This tightening of conditions for assuming immunity was desirable, according to the Supreme Court, because political and public opinion widely supported the view that lower levels of government, which like every citizen should abide by the law, should, to a large extent, be able to be held liable under criminal law.

That leaves considerable room for prosecution. Except for actions such as the granting of a licence or an exemption that, by their nature and given the legal system, are difficult for the government to delegate, there are very few actions that can be carried out exclusively by an entity governed by public law. Actions such as the eradication of heron nests and the discharge of contaminated soil, for example, can be performed just as well by a private company as by municipal services. However, immunity from prosecution does accrue to a municipality that has granted a licence and fails to carry out a task associated with the granting of the licence, namely to enforce both the licence and the licence holder's compliance

with legal obligations in a broad administrative sense, for example because it tolerates non-compliance with statutory environmental regulations.

In general, it can be said that when it comes to licensing and enforcement, municipalities cannot be criminally prosecuted for offences committed in the performance of these duties. The same applies to the performance of duties under a statutory mandate to the municipality.

Officials cannot invoke immunity when it comes to offences for which the legal person under public law enjoys immunity and cannot be prosecuted: Complainants had filed charges of various forms of discrimination, including occupational discrimination. They argued that individual officials of the Dutch Tax and Customs Administration committed a criminal offence by independently and deliberately manually entering ethnicity and (a second) nationality as fraud risk signals in the anti-fraud system of the Tax and Customs Administration, resulting in the wrongful termination and recovery of benefits. The Public Prosecutor had decided not to prosecute the defendants because individual officials of the Tax and Customs Administration were acting in the public interest when carrying out the administrative duties assigned to them and there was no evidence that they had acted for their own benefit or in their own interest. Defendants are therefore entitled to immunity from criminal prosecution in respect of their actions, even if it turns out that they acted independently outside frameworks or guidelines set by the Tax and Customs Administration. For this reason, they cannot be criminally prosecuted. However, the court ruled:

'If statute of limitations did not preclude prosecution of defendants, the question would arise whether individual officials were entitled to immunity from criminal prosecution in this case. *The court first of all states that it does not exclude a priori the possibility that individual officials may be guilty of offences, even if they did not act for personal gain.* Further investigation is needed to assess whether offences were committed by individual officials in this case. However, there are no concrete leads for conducting such an investigation (...).'

4. **Which is the object of the confiscation and its meaning/interpretation?** (proceeds - gross or net of expenses -, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the 'value equivalent'.

The country report describes under what conditions direct or object confiscation may occur and when confiscation of illegally obtained benefits may occur (country report p. 12 ff). The information in the report on this matter also applies to confiscation at the expense of legal persons.

5. **Which are the elements to be realised and/or to be assessed for its application?** e.g., conviction for a crime, property or availability of the confiscation object, link -between the crime and the proceeds/instruments/products, etc., disproportionality ("*the value of the property is disproportionate to the lawful income of the convicted person*"), illegal origin (suspects/presumption of illegal origin), temporal connection with the crime, the lack of a justification of the legal origin by the owner, etc.

The answers given in the country report (p. 33 ff) concerning natural persons are also applicable to cases involving legal persons.

### Natural persons

The culpability of the legal person by no means precludes that the person who actually fulfilled the statutory description of the offence is (also) prosecuted and convicted as a perpetrator.

If prosecution of the legal person is not or no longer possible, natural persons - except as perpetrators/participants - can still be prosecuted for commissioning/actually controlling offences committed by the legal person.

## **Actual control and attribution of illegally obtained benefits to another person**

The basic principle is that only benefits actually gained by the person concerned in the concrete circumstances of the case can be confiscated. This implies that, in principle, the unlawfully obtained benefit is taken from the convicted person who enjoyed that benefit.

Under certain circumstances, however, illegally obtained benefits of the legal person may be attributed to a natural person or to another legal person. This is subject to the condition that the natural person or the other legal person is convicted of actually controlling the offence or that there are sufficient indications that the convicted person actually controlled another offence committed by the legal person.

### *Actual control*

If an offence is committed by a legal person, criminal proceedings may (also) be brought against those who ordered the offence and actually controlled the prohibited action.

As described above, it should be assessed whether the conduct took place or was carried out in the sphere of the legal person. This may be the case, *inter alia*, if it concerns an act or omission of a person working for the legal person, whether in employment or on some other basis, if the conduct is part of the legal person's ordinary course of business, if the conduct was serviceable to the legal person, if the legal person had control over whether or not the conduct would take place or if, according to the actual course of events, the legal person accepted similar conduct. A finding of actual control of an offence committed by a legal person requires intent to perform the prohibited conduct, whether conditional or not.

To arrive at a proven finding of actual control, the finding that someone is the director of the legal person is insufficient. On the other hand, there is no requirement for someone to be the director of the legal person. Someone who is not employed by the legal person can also be considered the party that actually controlled an offence committed by that legal person. Actual control often consists of active and effective conduct that unmistakably falls within the ordinary meaning of the term. There may also be actual control if the prohibited conduct is the inevitable consequence of the general policy pursued by the defendant. It could also include making a contribution to and initiating a complex of behaviours that led to the prohibited conduct to such an extent that the defendant must be considered to have actually controlled that prohibited conduct. Even a more passive role can lead to the judgment that it promoted the prohibited conduct to such an extent that it can be considered actual control.

### *Attributing illegally obtained benefits of a legal person to a natural person*

Sometimes the illegally obtained benefit was obtained by a legal person (A), but that legal person no longer exists or there are limited means of recovery. In such a case, it may be desirable to apply the confiscation to the natural or legal person (B) responsible for the actions of legal person (A).

For the attribution of the entire benefit enjoyed by legal entity (A) to the natural or legal person concerned (B), the so-called Jacobs judgment is relevant. This judgment fleshed out the criteria relevant to such attribution.

In order to determine whether a natural or legal person (B) has benefited unlawfully from the actions of legal person (A), it must be established that:

- That natural or legal person (B) wholly or substantially controls that legal person (A);
- he/she *could* dispose of the assets of that legal person (A);
- the benefit obtained by legal person (A) could have benefited the natural or legal person (B).

In order to attribute illegally obtained benefits from legal person (A) to the natural or legal person (B), it is not necessary for legal person (A) to have been convicted of a criminal offence.

The fact that the legal person concerned (A) did not commit the offence alone need not prevent the court from attributing the illegally obtained benefits to one natural or legal person (B). Under certain circumstances, however, further justification may be required clarify that attribution.

**6. Which are the elements to demonstrate in order to apply the *freezing* order against the legal persons?**

Dutch criminal law makes no distinction between natural persons and legal persons as regards the possibility of attachment.

In the context of confiscation, it is important to attach objects in a timely manner. Dutch criminal law recognises two forms of attachment: attachment (*klassiek beslag*, in accordance with Section 94 DPC) of objects for the purpose of (establishing the truth and) direct confiscation, and prejudgment third-party attachment (*conservatoir beslag*, Section 94a DPC) for the purpose of the confiscation of valuables.

The conditions that must be met to impose attachment (also in connection with direct confiscation) or prejudgment third-party attachment (in connection with the confiscation of valuables) are described in the annex to the country report (p. 43 ff).

**7. 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?**

To impose direct confiscation or confiscation of valuables, it is necessary for the defendant to be convicted (eventually irrevocably) by a criminal court. Dutch criminal law recognises two exceptions to this rule:

1. withdrawal from circulation;
2. confiscation of valuables (in the sense of wider confiscation)

These exceptions are described in further detail in the country report (answer to question 2e, p. 22 ff). Dutch criminal law does not distinguish between natural and legal persons in this regard.

**8. Which is the legal nature of the confiscation against legal persons?** (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offence - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)

As described above, the legal person can be a perpetrator of an offence, as well as an instigator, co-perpetrator and accomplice. If the legal person is found guilty of committing the offence, it can be sentenced to the same penalties and orders as natural persons. These are described in the country report (p. 23 ff). In short, the penalties and orders are the following:

- I. Forfeiture with attachment > additional penalty
- II. Forfeiture without attachment > additional penalty
- III. Withdrawal from circulation > order
- IV. Confiscation measure > order
- V. Fine (confiscating illegal gains) > main sentence
- VI. Compensation order > order
- VII. Conditional sentence with > in this case, the condition is linked to compensation as a special condition a main sentence

As mentioned in the country report in relation to natural persons, legal persons can also be subjected to extra-judicial confiscation. This is subject to the same rules and considerations as described above and in the country report (p. 23 ff).

9. For each model of confiscation against legal persons:
- **Which is the procedure for its application?** (the qualification/nature, the competent authority, the different steps, etc.)
  - **Which is the standard of the proof/is the reversal of the burden of the proof admitted?**
  - **Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?**
  - **Is the trial in absentia possible in your legal system in order to apply the confiscation?**
  - **For the confiscation without conviction: can this form of confiscation be applied also in case of acquittal?**

The answers given in the country report (p. 25 ff) concerning natural persons are also applicable to cases involving legal persons.

10. For each model of confiscation against legal persons, **does it comply with the principles of:**
- **legality? legal specificity of a statute?**
  - **non-retroactivity of the /more severe/statute?**
  - **the right to private property?**
  - **the proportionality?**
  - **the right to a fair trial?**
  - **the right to defence?**
  - **the presumption of innocence?**
  - **the ne bis in idem principle?**
  - **and other relevant rights - what sort of?**

The answers given in the country report (p. 33 ff) concerning natural persons are also applicable to cases involving legal persons.

11. **For each model of confiscation:**

- **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 against legal persons?**

No. The Netherlands does not have a constitutional court.

**Is there any significant national case law of your Supreme Court on the application of freezing or confiscation measures against legal persons?**

No, not to our knowledge.

12. **Are there European Court of Human Rights cases in relation to "Your" model of confiscation against legal persons?** Please, explain the position of the ECHR about "Your" model of confiscation against legal persons.

There is no known ECHR case law in relation to 'our' forms of confiscation specifically targeting legal persons. The ECHR Geerings case mentioned in the country report (p. 33) also applies in cases of confiscation from legal persons.

**13- Is there any CJEU decision concerning "Your" confiscation model against legal persons?**

No, not to our knowledge.

**14. In Your system of law are there other efficient measures to prevent the or react against the involvement of corporations in crime (and in particular in organised crime), in other words alternatives to freezing and confiscation (e.g. in Italy judicial administration or judicial control) for targeting the illegal assets of legal persons?**

The Public Prosecution Service has a civil-law role in the field of the law of legal persons. It can use this role to end directors' control over the assets of a legal person. There are various legal bases that can be used for this:

- The Public Prosecution Service can request the court to dissolve a legal person (Sections 2:20, 2:21, 2:74, 2:185 and 2:301 of the Dutch Civil Code (DCC), whether or not following a prohibition order (Section 2:20 DCC). During the dissolution procedure, directors can be suspended by the court (Section 223 of the Dutch Code of Civil Procedure), an administrator may be appointed over the legal person's assets (Section 2:22 DCC) and the authority to dispose of or encumber shares can be suspended (Section 2:22a DCC). After dissolution, the court appoints a neutral third party as liquidator (Section 2:23 DCC). After the conduct has been declared prohibited, the court may determine that the liquidation balance accrues to the State (Section 2:23b(1), third sentence DCC).
- With regard to foundations, the Public Prosecution Service has the power to apply to the court for the suspension and dismissal of directors in the event of dereliction of duty, for other serious reasons or due to a drastic change of circumstances on the basis of which the continuation of their directorship cannot reasonably be tolerated (Section 2:298 DCC).
- The Public Prosecution Service can request the Netherlands Enterprise Court at the Amsterdam Court of Appeal to conduct an investigation (a so-called inquiry) into the policy and course of affairs within a legal person (Section 2:345(2) DCC). During the proceedings, the Netherlands Enterprise Court may take immediate measures, including suspending the board and transferring the shares in the company to a nominee (Section 2:349a(2)(3) DCC).
- The Public Prosecution Service can file a bankruptcy petition for public interest reasons (Section 1(2) of the Dutch Bankruptcy Act (*Faillissementswet*)).

The new director, liquidator or receiver, who may be temporary or not, is then charged with the management of the legal person's assets. That person must do so in accordance with the law and the articles of association. In general terms, they are under an obligation to dispose of objects of criminal origin for the benefit of the State to prevent them from committing money laundering.

**15. Do you have statistical data on the application of confiscation measures against legal persons at national level? And could you compare them with those against natural persons?**

No statistics are kept in the Netherlands on the number of times legal persons and natural persons, respectively, are subjected to confiscation. The existing statistics concern totals of the number of confiscation proceedings against natural and legal persons combined. In the Dutch situation, not much information could be derived from separate statistics anyway.

## SECTION II. The application of the Regulation 1805/2018 for the mutual recognition of freezing and confiscation orders against the legal persons.

1. Can You give some **statistical data** about the application of the Regulation in case of freezing or confiscation orders in regard to legal persons (e.g.: how many cases, which models of confiscation)?

The first country report stated that no distinction is made by confiscation model in the statistics. This also applies to legal persons.

2. Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad) in cases of freezing orders and confiscation orders related to legal persons? And which are the **grounds for refusal** applied in the praxis in this sector?

As far as we know, the Netherlands does not experience any problems in the execution of (incoming and outgoing) freezing orders involving legal persons.

There are no known examples of refused freezing orders issued in relation to legal persons.

3. Do you have **any proposals of harmonisation of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders involving legal persons?**

No.

4. Could you give your inputs about **possible guidelines** on the practical implementation of the Regulation in relation to legal persons?

No.

5. Do you have any further **reform proposals**, at a national or international level, in this sector?

No.

6. Do you have any further **policy recommendations**, at a national or international level, in this sector?

No.



## **Annex 1:**

### Section 51 DPC (offences committed by legal persons)

1.

Offences can be committed by natural persons and legal persons.

2.

If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments and orders provided for by law, if eligible, may be imposed:

1° against that legal person, or

2° against those who ordered the offence, as well as against those who actually controlled the prohibited conduct, or

3° against those mentioned under 1° and 2° together.

3.

For the purposes of the previous paragraphs, the following shall be treated as legal persons: unincorporated companies, partnerships, shipping companies and special-purpose assets.