

*RECOVER (GA101091375)**The subject matter of the Regulation (EU) 2018/1805. National confiscation models**Reform proposals: the Netherlands***A) Proposal for NCBC procedure**

Directive 2014/42/EU has been implemented in the Netherlands by already existing law. In general, it can be stated that there is no actual need for reform of Dutch law to better implement Directive 2014/42/EU. However, under the current legislation, there are some cases in which it is harder or impossible to confiscate illegally gained assets. The main reason for this is that in The Netherlands currently only conviction-based confiscation is possible. For instance, in the case of death or serious illness¹ of the suspected or accused person it is currently not possible to prosecute the suspect/accused and therefore confiscation is also not possible. In the case of absconding of the suspected or accused person it is possible to prosecute the person in absentia. However, when both the summons and the judgment have not been served in person, the judgement does not become irrevocable and therefore it is not possible to execute the judgement in such a case.

Also, despite all existing possibilities and authorisations it appears that confiscation is not always feasible with the current range of instruments. The current legal framework for seizing illegal assets no

¹ when the person, because of the illness permanently is unable to stand trial. F.i. in case of dementia or because of a serious stroke. In case of death, it is in some circumstances possible to start proceedings against the heirs of the deceased suspect, however, that is not a solution

in all cases

longer complies with the demands that should be set for this with a view to an effective fight against organised crime that undermines society. In the context of the national agenda on serious organised crime a proposal for non-conviction-based confiscation (NCBC) has been brought into procedure. The new NCBC law will make confiscation possible in situations in which in or outside the context of a criminal investigation objects are found in respect of which it is plausible that they are unlawfully obtained gains, without the necessity to prove that a suspect has committed a specific criminal offence from the proceeds of which the object was obtained. These goods can either have an apparent criminal origin or be the result of reinvestment of proceeds of crimes. This NCBC procedure shall also make it possible to confiscate unlawfully obtained gains in cases of death, illness or absconding of the suspected or accused person.

Seasoned criminals hardly have any property registered in their own 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 of 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.

This new NCBC procedure is positioned outside criminal law. The proposed law 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 use. 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) Tracing, identifying and freezing assets for the purpose of victim compensation.

Directive 2014/42/EU states that where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure, that confiscation measure should not prevent those victims from seeking compensation for their claims. Although it is stated in the recitals of the new directive that, in the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence, the actual text of the new directive does not go any further on this subject than directive 2014/42/EU. There is no proposal for reform on this subject.

Currently however, in cross border situations, it is actually in the benefit of victims if a procedure for a confiscation measure is initiated. Article 29 of the Regulation 2018/1805 offers the possibility to return frozen objects to the victim and article 30 of the Regulation 2018/1805 gives priority to give confiscated property back to the victim or to compensate the victim in the phase of disposal of confiscated property. In this case there must be a relation between the crime – the object and the victim.

Since under Regulation 2018/1805 a freezing order is only possible for the purpose of confiscation, and not for the purpose of victim compensation, in cross border cases victims nowadays are actually worse off if judicial authorities decide not to start a confiscation

procedure. In those cases, victims can be left empty handed. With all instruments for cross border cooperation judicial authorities are in

a better position to early on trace and freeze assets of a suspected or accused person abroad than victims.

A growing number of member states have – in some form – possibilities for freezing of assets with a view to, and restitution to and/or compensation of victims in their national law. In the Netherlands, it is possible to freeze assets for the purpose of the recovery of a victim compensation 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 the possibility to freeze assets for the purpose of victim compensation at an early stage. This way, any compensation measure to be imposed can be effectively enforced. In legislation in the Netherlands, the compensation measure is a different instrument than the forfeiture (O) or value confiscation order (W).

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 victim compensation measure is not a topic of discussion on an international scale.

In our opinion the new directive should go further than just including a recital stating that in the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence. Since the national systems in the EU on victim compensation still differ a lot harmonization would be the best way to come to a better cross border cooperation for the benefit of victims.

In the ideal situation the EU would come with rules for harmonization for victim compensation procedures within the context of criminal proceedings. However, even if the EU omits to come with rules for harmonization on this subject, an EU instrument creating a legal basis for issuing freezing orders with the purpose of victim compensation – for at

least those member states that have such a freezing possibility in their national law – would already be a revolutionary step forward. For instance,

by extending the application of the freezing order under Regulation 2018/1805 also for the purpose of restitution to and compensation of the victims.

ii.

In addition, we would propose to extend – via the new directive – the mandate of the Asset Recovery Offices (ARO's) to also trace and identify assets for the purpose of freezing with a view to restitution to and compensation of the victims.

C) Freezing of assets after final conviction.

Regulation 2018/1805 can also be used for freezing orders issued by a competent national authority after final conviction. Some member states already make use of this possibility. Since in many member states the convicted person will be informed during the procedure for recognition and enforcement of a confiscation order it is important to have the possibility to request the freezing of assets that not have been frozen yet, prior to recognition of the confiscation order.

In the Netherlands it is not the public prosecutor, but the Minister of Justice and Security who is competent to issue a national order to freeze assets after a final conviction. Since the Minister of Justice and Security is not a judicial authority, the minister is not able to make use of the Regulation 2018/1805 to transmit a freezing order to another member state. Currently the Criminal Procedural Code is being revised in The Netherlands. Included in this proposal for revision of the CPC is a proposal for a procedure under which the Minister of Justice and Security can request the public prosecutor to transmit a freezing order together or prior to transmitting the final confiscation order.

ii.

Article 18 (5) of the Regulation 2018/1805 states: *Where the issuing authority has issued a confiscation order but has not issued a freezing order, the executing authority may, as part of the measures provided for in paragraph 1, decide to freeze the property concerned of its own motion in accordance with its national law with a view to subsequent execution of the confiscation order.(...)*

Already in the Dutch implementation² law of Framework Decision 2006/783/JHA a competence was foreseen for the public prosecutor to freeze assets with a view to the confiscation thereof on his own motion prior to recognizing a confiscation order transmitted by another member state.

Condition for this competence to freeze assets is that there must be reasonable grounds to believe that a confiscation order (from another member state) will be executed in the Netherlands in the short term.

It is not necessary that a confiscation certificate is already transmitted by the other member state. It is already enough if the other member state has announced that it is planning to transmit a confiscation certificate.

After entry into force of the Regulation 2018/1805 the possibility for the public prosecutor to freeze assets with a view to the confiscation thereof on his own motion prior to recognizing a confiscation order transmitted by another member state was also regulated for confiscation orders under Regulation 2018/1805.³

We would propose to amend article 18 (5) of Regulation 2018/1805 in such a way that member states would be obliged to be able to freeze assets on its own initiative with a view to subsequent execution of the confiscation order after receiving a confiscation order. It would be more efficient that the transfer of a confiscation order would be enough basis to freeze assets – even prior to recognition. Instead of requiring that in such a situation the issuing state would be requested to draft, translate and transmit two certificates and demanding the executing state to initiate two procedures for recognition.

² article 30 Wet wederzijdse erkenning en tenuitvoerlegging van geldelijke sancties en beslissingen tot confiscatie (WWETGC).

³ article 38 WWETGC

D) Use of standard forms in communication about the procedure for executing freezing orders under Regulation 2018/1805.

The use of standardized forms has proven its value with the use of the standard confirmation of receipt under Directive 2014/41 and the non-binding forms for the procedure for enforcement of cross-border financial penalties under Framework Decision 2005/214.

We believe that the use of standard forms for at least some of the communication between Member States that is prescribed by Regulation 2018/1805 would be very valuable in practice too. The most important of which would be – based on article 7, paragraph 2, of the Regulation – the report on the execution of the freezing order, including a description of the property frozen and, where available, an estimate of its value.

In practice we notice that we do not always receive such a report from the executing authority. In other cases it is just the opposite, we receive so many documents (in the language of the executing state) that it is costly to have all documents translated and even then it can be hard to determine what property exactly is frozen and what its value is. Having a standard form with a brief summary of the property frozen and, where available, an estimate of its value, would be very useful.

E) Mutual recognition of out of court confiscation decisions

In the Netherlands, criminal and value compensation cases can be settled without the involvement of a judge. The Public Prosecution Service then disposes of the case itself. This form of disposal may (also) involve confiscation. For Dutch criminal law practice, disposing of cases without judicial involvement is an effective and important method of disposal.

Confiscation/criminal proceedings in the Netherlands can take many years to finalize (especially if both an appeal and an appeal in cassation are lodged). These proceedings also demand a lot from the

courts' limited session capacity. Out-of-court settlement therefore increases the capacity of the Public Prosecution Service in terms of the number of (confiscation) cases that can be completed each year. Out-of-court settlement is a good way

- with the cooperation of a suspect - to settle cases faster. This also has the advantage for the suspect that he/she can rehabilitate more quickly and get on with his/her life.

The regulation 2018/1805 defines "confiscation order" as "a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person".

Although confiscation takes place, a confiscation order cannot be issued after an out-of-court settlement under the Regulation 2018/1805. There is no decision of a court, but a decision of another judicial authority. As a result, after a freezing abroad in the case of an out-of-court settlement, a confiscation order cannot be sent to the executing state.

In current practice, the prosecution depends on the cooperation of the person concerned (suspect) in the execution of the out-of-court settlement. Enforcement of an out-of-court settlement that - partly - involves frozen objects in another Member State is currently possible only through the following steps:

1. The public prosecutor lifts the freezing abroad, e.g. by revoking the freezing order.
2. the person/suspect concerned is himself responsible for the extradition of the object, and/or the sale of the object and the surrender of the proceeds of that sale, to the Public Prosecution Service in the Netherlands.

This practice has at least the following drawbacks:

1. There is a risk that after the freezing is lifted, the affected/accused still fails to fulfil his/her part of the settlement and keeps the object or the proceeds of the object

for himself/herself and 'looses' it;

2. Unlike cooperation under Regulation 2018/1805, there is no basis for asset sharing with

the Member State where the object is located.

The only alternative at present is that cases that lend themselves to out-of-court settlement will, as a result, still have to be submitted to court in order to obtain a verdict of the court and a confiscation order. However, this has a negative effect on the capacity of the Public Prosecutor's Office and the courts and on the processing time of cases.

For Dutch criminal law practice, it is desirable that out-of-court confiscation orders (confiscation orders issued by other judicial authorities) are also brought under the scope of the Regulation 2018/1805. Then confiscation orders could also be issued after an out-of-court settlement by the Public Prosecution Service and these orders could be recognized and executed in the Member State where a previous freezing order was executed.

Further reform proposals in light of the EU Directive 2024/1260

The new EU Directive 2024/1260 on asset recovery and confiscation was published on 2 May 2024. The Directive needs to be implemented in national laws, regulations and/or administrative provisions by 23 November 2026.

In the Netherlands it is currently being discussed what actions are necessary to implement the provisions of the Directive. The expectation is that at the end of 2024 the draft legislation for the implementation of the Directive will be published for consultation. At this moment there is no concept proposal available yet.

This means that for now the texts of the reports for the Netherlands are still up to date.

The first development we can mention in relation to the adoption of the new Directive is that the law proposal for introduction of a civil NCBC procedure has been withdrawn and will be replaced by a law proposal for introduction of a NCBC procedure within criminal law.

At least articles 6 (access to and sharing of tax information) 11 (immediate action), 15 and 16 (NCBC procedure, including legal remedies of art. 24), 21 and 23 (notification and hearing interlocutory sales) 24 (legal remedy interlocutory sale) will be implemented via new

legislation.

With regards to articles 4, 5, 6, 9, 10, 20-21, 23, 24, 25, 27 and 28 it is under review in what way – e.g. via policy guidelines – The Netherlands can best comply with the obligations of the Directive.

Other provisions, like the freezing orders of article 11, the confiscation measures of articles 12 and 13, 14, articles 17, 18, 22 can most likely be ‘implemented’ by referring to existing national law, regulations and/or administrative provisions.