

The Mutual recognition and execution of freezing and confiscation orders

Contribution by the Netherlands delegation¹

Introduction

First of all I would like to thank the Presidency and the Italian Ministry of Justice for organizing this conference and raising this important matter.

Ladies and gentlemen, we have gathered here to discuss effective ways to confiscate these proceeds of crime. We know that criminal money is the principal motivation to commit crime. Therefore we cannot overestimate the importance of a fierce fight against the proceeds. Proceeds provide criminals the necessary capital to invest in yet other criminal acts. And last but not least, the lucrative image of criminal businesses will attract youngsters and other people to adopt a criminal lifestyle. This latter situation, the so-called multiplier effect, was again pointed out by a recent study in the Netherlands. Conclusion is that combatting any sort of crime effectively – be it trafficking in human beings – be it drug trafficking or be it fraud, it all demands for effective confiscation.

Yesterday, we've heard about experiences with confiscation of criminal proceeds. And we have heard about the challenges we are confronted with on a daily basis. Listening to different experiences, a basic question comes into your mind; is the current EU- legal framework sufficient? Actually, we believe it is not.

Of course, we have a new Directive on freezing and confiscation. This gives reason for satisfaction. Why? Because it *addresses* some important issues in the field of freezing and confiscation. These issues have remained problematic for a long time.

Unfortunately there are also a few problems which were not yet addressed. I will get back to these problems later.

First I would like to give you some insight in the Dutch situation and some problems we encounter. In the Netherlands we have an effective system of – primarily – value based confiscation in place. We have some elements that are more or less original and in our view crucial in order to make confiscation work. I will give you some examples. We have coercive measures and special investigation measures in place to execute and enforce a value based confiscation order. Also there are supporting investigations into missing assets and supporting financial investigations. These investigations may even be conducted years after the confiscation order was pronounced. Another example is the freezing of assets that formally belong to third parties. These assets are frozen if these third parties are used as a decoy in order to avoid confiscation.

These national elements are effective, but often encounter misunderstanding, astonishment or even rejection. The council framework decisions of 2005 and 2006 are not able to prevent these problems. I can give you some examples of problems we encounter.

¹ Contribution of the Netherlands delegation to the Seminar on 'Mutual recognition of judicial decisions and confiscation 15 years after Tampere: an additional tool for depriving criminals of their illicit assets all over the Union', prepared by Mr. Maurice Kempen, legal advisor at the Legislation Department of the Ministry of Security and Justice (m.a.h.kempen@minvenj.nl) and dr. Pieter Verrest, counselor at the Legislation Department of the Ministry of Security and Justice (p.verrest@minvenj.nl).

Freezing of proceeds is often only possible against the actual perpetrator. And the third party freezing is not yet a widespread legal concept. The actual endorsement of a freezing order in another MS therefore is sometimes problematic. Another example is the execution of a so called *extended-confiscation* order in another MS. The MS have different perceptions of 'extended confiscation'. As a result, the execution of an extended confiscation order is refused. In other cases it demands for extra and time-consuming clarification.

Ladies and Gentlemen, how can we tackle the kinds of problems that our law enforcement agencies encounter when they try to trace, freeze and confiscate criminal proceeds in other MS?

We have analyzed these problems and they prove to be largely the result from differences in national legal systems. Another reason may well be that there is still a lack of priority given to confiscation.

We think it is important to tackle these problems that result from differences between MS. We feel there is an important role to play for the EU legislator. International cooperation should further be enhanced, especially in the field of freezing and confiscation. Because it goes without saying that an adequate law-enforcement reaction should be possible at all times. In order for this reaction to be effective, it should be swift and aimed directly at the revenues of crime. Let us be real: transferring proceeds to another member state is a quite simple act for anyone, also for criminals. We feel it would be unacceptable if borders would hinder the law enforcement.

That we find new solutions within the European Union is also important because of the poor ratification of the Council of Europe Warsaw Convention of 2005. This is disappointing. This convention bears interesting solutions and it calls for a broader ratification. Unfortunately most MS have not or not yet been able to ratify it.

A way to enhance the international cooperation would in our view be a *generous* participation of MS in an instrument based on the principle of mutual recognition and execution. We feel the solution can not be found in further harmonization. This is illustrated best by the new Directive. Some elements that were part of the Commission proposal for the Directive but in the end, did not gather enough support. In particular dealing with the possible introduction of Non Conviction Based Confiscation proved to be a hard nut to crack. In that perspective the discussions on the Directive at a working party level, but also during the trilogue with the European Parliament, again pointed out the differences between the confiscation systems in place in the MS. We concluded that further harmonization of national systems in the fields of confiscation for this moment would not be realistic. We could however find common ground. Both Council and Parliament were of the opinion that a new instrument, based on the principle of mutual recognition and execution, would be a good way forward.

Of course, in the past, we've already adopted in the European Union several framework decisions that provide for mutual recognition in the fields of freezing (2003/577/JHA) and in the field of confiscation (2006/783/JHA). Another instrument endorses the mutual recognition of *special* confiscation orders (2005/212/JHA). These instruments however, do not explicitly oblige MS to address some standard situations where it should be possible to freeze and confiscate criminal assets. This constitutes an obstacle to the actual endorsement of the principle of mutual recognition.

Today, with the adoption of the new Directive, some of these standard situations are dealt with already. And as I said earlier, this is reason for satisfaction. Nevertheless, there are still sufficient grounds for additional legislative measures. Having established that a new instrument is necessary, the question arises what this new instrument should consist of? How can we make sure that, beyond any doubt, it will provide for a distinct added value to the instruments mentioned before? We can suggest some elements. For one thing, the new instrument should **mirror** the new Directive. In other words; the elements in the new Directive should also have a basis in an instrument based on the principle of mutual recognition and execution. Some elements that we feel are very important;

- a. *value based confiscation*; In the Directive it is left to MS discretion to define confiscation of *property of equivalent value* as subsidiary or alternative to direct confiscation, in accordance to national law (Article 4 par 1. and recital 14). We feel this is problematic. This may come across as a mere technicality, but the non-presence of a value based system in an executing MS, could easily hamper the recognition and enforcement of a confiscation order, issued in a MS with a value based system. We feel it is necessary to have provision that obliges MS to execute such an order nevertheless.
- b. Another element is the notion of *extended confiscation*. In the Directive we've managed to simplify the notion of extended confiscation significantly in comparison to the extended confiscation in Councils Framework Decision 2005/212/JHA. Also here I will try not enter into details too much. To put it short; FD 2005/212 accepts three different sets of minimum requirements that MS can choose from in order to apply extended confiscation. In FD 2006/783 on mutual recognition of these confiscation orders, there are grounds for refusal in case another MS has opted for another set of minimum requirements for extended confiscation. As a result the principle of mutual recognition cannot function to its fullest extent. In our view it would be a good thing if the new concept of extended confiscation would have an equivalent in the new instrument based on the principle of mutual recognition. And Ladies and Gentlemen, more in general; less is more in this context; grounds for refusal should be limited.
- c. A third element is the notion of *third party confiscation*. Also here MS may choose to define third party confiscation as subsidiary or alternative to direct confiscation. This may again lead to problems in the field of mutual recognition. A new instrument based on the principle of the mutual recognition should address this element as well.
- d. Furthermore it is important that this instrument is not limited to confiscation, but also entails detailed provisions on freezing. Freezing and confiscation are very closely linked concepts. Freezing is often a prerequisite for confiscation.

Fortunately the new Directive entails an obligation for MS to enable freezing. Also *third party freezing* is part of the new Directive. This should also be reflected in the instrument on the basis of the principle of mutual recognition.

The procedure for the enforcement of a freezing order could be close or even equivalent to the European investigation order and its certificate. In practice in a number of cases a request for freezing will coincide with the investigation into the criminal offences.

- e. And finally, ladies and gentlemen, never stop looking for proceeds! Conducting financial investigations and freezing even *after* the confiscation order is issued, is necessary in order to fully enforce confiscation-orders.

In our view, this is what article 9 of the new Directive demands from MS. It states that the confiscation has to be executed effectively. For the NL this is a basis to conduct further financial investigation, even after the confiscation is issued. Also in this phase proceeds may still be frozen, in order to properly execute the courts decision. The new instrument should in our view also provide for a basis for conducting these investigations and freeze object in other MS.

These elements are all elements that are already - or at least to some extent – part of the new Directive. Thus, the new instrument on the principle of the mutual recognition and the latest Directive should be two figures that form each other's mirror image. As was mentioned before, some elements in the new Directive were not harmonized to their fullest potential. Looking for example at Non Conviction Based Confiscation, there was no majority that could accept a Non Conviction Based instrument in 'a criminal environment'; we discussed the legal basis, or the lack thereof, extensively. We should however make this work, bearing in mind that legal systems are different. If we were to provide for a legal basis for the mutual recognition, we would still have to accept that in some MS freezing and confiscation are primarily regarded to be of non-penal-nature, that they are sometimes dealt with outside the criminal courts. It is sometimes even regarded to be a civil matter. The legal basis of a new instrument should reflect this reality; it is not only international cooperation in criminal matters, but also to be regarded as cooperation in civil matters. A broad legal basis would potentially bridge these differences in legal tradition. Furthermore, situations that are *not or only to some extent* covered by the new Directive, should be identified and dealt with in order to create added value to the new Directive. Why is this necessary? Let us start by looking at the scope of the new Directive; it is limited to the so-called Euro-Crimes. In order to be able to really produce a fierce fight against the proceeds of crime – of any crime – the scope of a new instrument cannot be limited to certain categories. Lastly, we should not close our eyes for possible incentives for cooperation. One idea might be to preserve the basis for asset-sharing that is now part of Councils FD 2006/783.

Let me summarize. We do feel there is need for an additional instrument on the basis of the principle of mutual recognition and execution. It should entail both freezing and confiscation. It should bridge existing differences between legal traditions and entail provisions on Non Conviction Based confiscation. Thus we hope to ensure full cooperation and an effective confiscation.

Thank you for your attention.