

## **NL non-paper on confiscation: a cooperative, information-led and future proof way forward**

The Netherlands welcomes the upcoming legislative proposals for the revision of the Directive on freezing and confiscation<sup>1</sup> of criminal assets (2014/42/EU) and the Council Decision on Asset Recovery Offices (2007/845/JHA), and thanks the Commission for the amount of work and achievements so far. In order to tackle organised crime effectively, it is important to frustrate criminal businesses and (financial) facilitators and to disrupt criminal (financial) networks<sup>2</sup>. After all, organised crime is in almost all cases profit driven and criminal investments facilitate new criminal activities, infiltrate the legal economy and disrupt society and its rule of law as a whole. Cooperation in (cross-border) freezing and confiscation matters is indispensable as we are facing an unequal battle.

As the Commission has mentioned in its report<sup>3</sup>, overall results in terms of assets confiscated are not satisfactory and the confiscation rates in the EU compared to estimated criminal assets remain low. There are many instruments available for freezing and confiscation, however identifying and subsequently tracing criminal assets remain a stumbling block. We need more overview and more in depth analysis of criminal financial flows. On top of that, speed of action and recognition of the combined added value of varying modalities in the approach of Member States warrant our efforts. In the general revision of the legal framework we would like to stress the importance of putting operational gains and effectiveness first. The Netherlands considers that correct implementation and compliance with the existing legislation by Member States is essential. Furthermore, we propose to focus on the following three priorities to increase the effectiveness of EU action: 1) strengthening the cooperation between Member States, 2) increasing social reuse of confiscated proceeds and instrumentalities of crime, and 3) improving the EU's effectiveness in countering criminals' use of virtual assets for illicit purposes.

### **1. Strengthening the cooperation between Member States**

The EU Council Conclusions on enhancing financial investigations to fight serious and organised crime<sup>4</sup> should expressly guide the planned proposals from the Commission. We endorse the following four notions from these Council Conclusions in particular. Primarily, we encourage enhancing multidisciplinary cooperation and synergy in conducting financial investigations and exchanging finances related information between Financial Intelligence Units (FIU's), Asset Recovery Offices (ARO's), customs authorities, tax authorities and law enforcement authorities. Secondly, we welcome next steps to accelerate the exchange of financial information available in the national bank account registries to facilitate cross-border cooperation between competent authorities and their European counterparts, but in our opinion the first step in this area should be expanding the national bank account registries with information on balance and transactions. There is a need for the ability to perform a quick balance query, e.g. via judicial ARO's or a hit-no-hit query via ARO's, in order to determine whether it is worthwhile to prepare and send an European Investigation Order (EIO). Thirdly, we support strengthening of the legal framework on the management of property frozen with a view to possible subsequent confiscation. Fourthly, enhancing cooperation with third countries in conducting financial investigations would in our view increase effectiveness of EU policies.

#### *Mutual recognition of out-of-court confiscation agreements*

Mutual recognition of out-of-court confiscation agreements is pivotal to an effective European strategy for freezing and confiscation. In this vein, requests for freezing of property with the explicit goal of restitution or compensation of victims - and the subsequent allocation of this property to the victims in the context of the execution of irrevocable decisions - would broaden the possibilities for cross-border seizure within the EU. This should be pursued at EU-level and followed by effective procedures for the return of objects to beneficiaries, as well as EU legislation for the enforcement of compensation measures for victims of criminal offences. The Netherlands endorses in that regard the recently adopted Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders, which inter alia aims at improving the protection of victim's rights. Furthermore, the possibility to exchange information to enable effective enforcement of (out-of-court) confiscation orders should be more extensive than it is now, both on case by case level as well as on strategic level with regard to the experiences and effectiveness of the instruments used.

#### *Strengthening (operational) cooperation*

Ultimately, operational cooperation is key for achieving actual results on the basis of legislation and policies. It is crucial for officials responsible for freezing and confiscation to communicate effectively with their counterparts in other Member States so that combined knowledge and use of existing and upcoming

<sup>1</sup> For the purpose of this non-paper we will use the definition of freezing and confiscation as used in Article 2 of Directive 2014/42/EU.

<sup>2</sup> Serious and organized crime threat assessment (SOCTA) [Serious and Organised Crime Threat Assessment \(SOCTA\) | Activities & Services | Main Reports | Europol \(europa.eu\)](https://www.europol.europa.eu/activities-services/main-reports/serious-and-organized-crime-threat-assessment-socta)

<sup>3</sup> Asset Recovery and Confiscation: Ensuring that Crime does not pay [20200602\\_com-2020-217-commission-report\\_en.pdf \(europa.eu\)](https://ec.europa.eu/asset-recovery-and-confiscation-ensuring-that-crime-does-not-pay-20200602-com-2020-217-commission-report_en.pdf)

<sup>4</sup> <https://data.consilium.europa.eu/doc/document/ST-8927-2020-INIT/en/pdf>

legislation can be optimised for better freezing and confiscation results. For instance, setting up a digital platform for operational actors containing a toolbox on how to start freezing and confiscation procedures in another Member State could offer a practical improvement. Complemented with EU practitioner training, such a platform might yield an even more positive result. Establishment of central registries of frozen assets at Member States' level and an EU registry on cross-border freezing orders can likewise improve operational cooperation.

With regard to strengthening (the cooperation between) ARO's, current legislation should be fully implemented whereby judicial as well as police ARO's are functional in all Member States and work in a coherent way. The judicial ARO's should have the possibility to initiate interim or urgent freezing measures enabling judicial authorities to secure assets during the time needed to prepare, translate and send (and subsequently recognise) a freezing order. A precondition for improved (judicial) cooperation is the digitalisation of law enforcement and the judiciary, particularly in order to facilitate access to electronic evidence across borders on the basis of European Production and Preservation Orders. Additionally, for the purpose of exchange of information between the ARO's secure channels through which requests for the tracing and freezing of assets can be transmitted, such as e-CODEX and SIENA should be used. In light of increasingly complex criminal financial schemes it is of utmost importance that such requests can be transmitted directly from one specialised bureau to another so that virtually no time is lost.

The Netherlands would also like to stress the importance of correct and efficient management of frozen and confiscated property. For this purpose, specialized Asset Management Offices (AMO's) should be encouraged to be set up in each Member State, following the call in Article 10 of Directive 2014/42/EU. In the case of a confiscation order, the AMO should be responsible for the swift disposal or sale of the assets. Having designated AMO's in all Member States can accelerate, strengthen and thereby ease cross-border cooperation in the management, preservation and possible optimization of the value of frozen assets while awaiting a final confiscation decision. All the more, correct registration and timely extension of seizure and freezing is essential during the implementation phase of an order.

## **2. Increasing social reuse of the proceeds and instrumentalities of crime**

The Netherlands would like to draw the Commission's attention to the direct and indirect public and social reuse of confiscated assets. It is an instrument to strengthen social cohesion policies as well as a powerful counteraction to organised crime. The reuse of confiscated property will increase European awareness and sensitivity to organised crime's real impact on the life of individual citizens. The Netherlands would like the Commission to encourage national competent authorities to use this instrument and to facilitate the exchange of good practices and national legislative initiatives relating to the implementation of Article 10.3 of Directive 2014/42/EU via a network or platform. Due to differing national situations and the need for customised application of this principle, the particular purposes to which Member States socially reuse assets should always be determined nationally.

## **3. Improving the EU's effectiveness in countering criminals' use of virtual assets for illicit purposes**

The Netherlands supports further improvement of the legal framework for confiscating virtual assets. The nature of these assets makes it imperative that national agencies such as FIU's and ARO's have the possibility to swiftly take action when suspicious transactions involving virtual assets are registered.

We welcome stronger cooperation between Member States and providers of virtual assets exchange services and custodial wallets in the form of public-private partnerships, whereby the private sector, Member States, EU institutions and agencies can work together to limit the use of virtual assets for illicit purposes. In our view, there is a need for the possibility to directly question providers of virtual assets services in order to attain information on the holders, transactions and the worth of wallets, and to freeze wallets. For this purpose it would be beneficial to use a method analogous to what the Commission and the Council proposed in the context of E-evidence, where the provider of virtual asset services has the (international) legal obligation to designate a legal representative in an EU Member State which functions as a reliable and structurally designated point of contact for providing information and supports quick freezing or seizure of virtual assets. Authorities could, for example, issue a type of 'production order' to find out whether the wallet contains substantial assets. Subsequently, the seizure would have to be formalized via official channels by means of a European freezing order. This would simplify the process for the providers as well, as it would be able to state to whom the account holder can turn if he or she wishes to contest the (interim, informal) freezing order.

Thereafter, once a confiscation decision of virtual assets has been reached, possibilities for the execution of such decisions should be enlarged. Currently it is difficult for financial investigators to access confiscated virtual assets. EU legislation should equip national authorities with adequate instruments for countering financial crimes such as money laundering in a future proof way.