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A decade of experience with the money laundering offence

On 14 December 2011, the tenth anniversary of the entry into force of specific money laundering prohibitions in the Dutch Criminal Code ("DCC") under article 420bis and further, was marked. Just two weeks before the conversion to the euro a new, broadly defined offence was implemented in the DCC to better facilitate law enforcement agencies in retrieving criminal cash proceeds that were expected to be forced to the surface in order to be exchanged into the new euro. The Dutch Government had long resisted international pressure to criminalise the act of money laundering on the grounds that any such activities were already within the scope of existing offences. However, subsequent case law indicates that the newly introduced articles have provided a much used tool for national and international law enforcement in the Netherlands.

What follows below is a brief historical overview of the introduction of these provisions and their subsequent evolution in case law.

A brief introduction

The money laundering prohibitions in the DCC find their origin in different international treaties to which the Netherlands are signatories. (Please refer to the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990, Trb. 1990, 172), but also to EC Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L166). The latter Directive was subsequently amended by Directive 2001/97/EC and more recently superseded by Directive 2005/60/EC (OJ L309/15)).**The Netherlands initially gave effect to these requirements by means of amending the provisions addressing the acquisition of stolen goods (fencing). This approach however was still prone to several practical limitations. The most important limitation was the rule that the person committing the predicate offence could not also be prosecuted for fencing (the "*heler–steler*-rule"). This rule was explicitly excluded from being applicable to the offence of money**

Key issues

- Over the past decade, prosecution of money laundering offences has intensified enormously
- Case law has broadened the possibilities for prosecution substantially and consistently
- The burden of proof has been eased for the prosecutor
- Compliance on money laundering has become highly demanding.

laundering, which has frequently been acknowledged by the courts (for instance: Supreme Court, 2 July 2007, NJ 2008, 16)**. So called 'self-laundering' has also been criminalised herewith. Just recently some limits have been defined by the Supreme Court to curtail prosecutions of this kind. Money laundering at the very minimum entails that the forbidden conduct has been committed with the aim of securing criminal proceeds and conceal the criminal nature of the goods** (Supreme Court, 26 October 2010, NbSr 2010, 359).

Additionally, the limited scope of the offence of fencing seriously hindered international cooperation in money laundering cases. It was held that separate money laundering provisions would to a large extent facilitate international cooperation between nations on the basis of international requests for legal assistance. Such separate provisions would provide a common ground for a wide diversity of economic and fraud related crimes as predicate offences.

The Government eventually concluded that the independent nature of the offence of money laundering and the pressing need to combat this phenomenon required a designated approach to money laundering. Therefore, specific provisions were introduced to address this.

Money laundering provisions in the Netherlands

The money laundering prohibition of the DCC sanctions: (a) hiding or obfuscating the true nature, the origin, the location, the transfer or the relocation of an object or its rightful owner or holder or (b) obtaining, holding, transferring, converting or using an object, both whilst being aware that the applicable object was obtained either directly or indirectly through a criminal offence. The provision essentially criminalizes all acts performed in relation to goods that are obtained through or are a result of a criminal offence.

Recent case law broadens the scope of the offence

Immediately after the introduction of the money laundering offence a flood of prosecutions has followed and consequently also a lot of case law has been developed, in effect mainly broadening the applicability of the offence of money laundering and making it a popular entry for a prosecution.

A few examples of this case law over the past years:

- Specific criminal activities linked to or having generated certain goods or proceeds do not have to be specifically identified and proven. Even a generic description of the criminal activities that underlie the relevant goods or proceeds and constitute a possible predicate offence may suffice to prove that an act of money laundering took place (Supreme Court, 27 September 2005, NJ 2006/473).
- Goods or proceeds do not necessarily have to be obtained from criminal activities in their entirety in order for them to come within the scope of the money laundering provisions. It suffices that assets have become mixed with proceeds of crime as was ruled by the Dutch Supreme Court in its decision of 23 November 2010 (NJ 2011, 22). In the interest of legal certainty the court did clarify that assets cannot endlessly be tainted by transactions involving illegal proceeds since this could undermine regular business transactions. Limitations may for example follow from the small proportion of the value of the goods or proceeds that is attributable to criminal activities, the passing of a significant amount of time or the number of successive changes of ownership since the occurrence of criminal activities.
- The statute of limitations as applicable to the predicate offence that yielded the goods or proceeds, does not affect the possibility to prosecute an act of money laundering. For instance, the mere possession of illicit goods and proceeds falls within the scope of the money laundering provisions in the DCC. It is possible that money laundering charges are successfully brought against persons merely holding criminal goods, regardless of the statute of limitation of the predicate offence (Supreme Court, 9 December 2008, LJN BF5557).
- Goods or proceeds may well be derived from criminal activities committed outside the Netherlands. Until now it remains undecided in case law if the predicate offence, if it can be identified as such, would need to be a criminal offence in both the country in which it was committed as well as in the Netherlands.
- The criminal activity through which goods or proceeds were obtained consists of fiscal fraud.

In a landmark case of the Supreme Court of 7 October 2008, NJ 2009/94 it was accepted that the defendant should have known that the monies originated from crime, because the defendant stated she thought it was 'black money', which was not declared for tax purposes. The Supreme Court ruled that this doesn't matter, because also in that case the monies could be considered to be derived from a crime. Although this verdict provides some guidance of the relevance of fiscal offences in view of money laundering charges, a lot of questions remain, for instance:

- to what degree a fiscal offence has to be proven;
- should it be determined if the relevant tax offences have already been committed, such as a false tax return;
- can all tax offences qualify as predicate offences; and
- should the amount of tax evaded with the tax offence be substantial compared to the goods and proceeds the offence of money laundering is targeted at?

Burden of proof

In the Parliamentary discussions regarding the introduction of the offence of money laundering, an essential part involved the desire to lighten the burden of proof for the prosecutor. Although some of the wording initially proposed by the Government for achieving this goal was not accepted in Parliament, in effect case law has achieved this in the same way.

If it can be proven, based on the facts and circumstances of the case, that there is no other possibility than that the goods or proceeds have been obtained by a crime, no direct relationship with such a crime as such has to be proven (Supreme Court, 13 July 2010, NJ 2010, 456). In this context it is also allowed for the courts to use facts of common knowledge and that some conduct or circumstance falls within the characteristics of money laundering as defined by the Financial Action Task Force (FATF).

Furthermore, it is expected from a defendant that he provides a specific, more or less verifiable and not prima facie completely improbable explanation of the legitimate origin of the goods (Court of Appeal of The Hague, 25 January 2010, LJN BL0571). Often used in money laundering cases as supporting evidence is the lack of any explanation by the accused of certain very incriminating circumstances which can be held against the accused.

Proof of the criminal origin of goods or proceeds should be well distinguished from proof of the criminal intent, although this could be closely connected. Accepting money from well known criminals will usually be enough to prove criminal intent, but this circumstance as such will not suffice to prove the money has also been gained with other offences (For a very clear example, please refer to the District Court of Dordrecht, 18 August 2011, NbSR 2011/288).

Criminal intent should entail the conduct constituting money laundering (for example hiding or concealing the criminal origin of an object) as well as the criminal origin of the object itself. It is possible that only some time after the goods have been acquired, knowledge of the criminal origin has been obtained. In that case this would still constitute the offence of money laundering from the moment such reprehensible knowledge was received if the goods are nevertheless retained (Supreme Court, 5 September 2006, LJN AU6712).

Implications for compliance procedures

The flood of case law following the relatively recent introduction of specific money laundering provisions in Dutch legislation proves that these provisions have provided a useful tool for law enforcement agencies in their fight against money laundering. Where the newly introduced provisions did not by their nature and design instantly resolve the previously existing difficulties in this fight, courts have proven more than willing to accommodate law enforcement by broadly interpreting these provisions. The scope of these provisions has thus expanded beyond their literal wording and has even come to encompass activities that fall outside the typical framework of reference for money laundering.

Setting up and maintaining a comprehensive compliance system to prevent being involved in money laundering schemes and fulfil one's duty to report any unusual transaction because of a suspicion of money laundering, is already a big challenge.

With the broadening of the scope of the offence of money laundering, especially the curtailing of the applicability of the statute of limitations and the fact also fiscal offences could be relevant as predicate offence, it is even more important to check and amend one's compliance system to keep the same pace as law enforcers and the criminal courts.

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