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Banking confidentiality and state control of currency transactions and related criminal activities

- (p. 2) ad art. 192 Sr
According to art. 192 Sr a bank violates the criminal law when summoned as a witness or as an expert, it refuses to perform its legal duties in that capacity. The legal obligations of witnesses and experts are the following:
- to appear in court at the right time
- to give evidence
- to undertake the required research activities
- to write an expert opinion
- to take a vow or make a pledge to tell the truth

- (p. 5) ad art. 272 Sr
In art. 272 Sr the circumstances are elaborated in which it is a crime to divulge secrets to people not entitled to that information. One of the main elements in question is the situation where someone is by way of statutory obligation bound to keep the secret. It should be noted, however, that the provision in art. 11 WPR does not create the kind of legal obligation required for the applicability of art. 272 Sr on indiscrete behaviour by banks.

- (p.6) ad inbeslagneming
Of course, financial institutions - including banks - are also subject to the ordinary powers of seasure. Art. 94 Sv spells out that goods may be seized when they can be usefull for attaining the truth in the fact finding process or when they can be forfeited by the court. The details of this arrangement (which officials have this power, the conditions for exercising the power, etc.) are stated in artt. 95 -114 Sv and in special sections of the Code such as art. 539p Sv. For present purposes, suffice it to mention only art. 105 Sv (the examining magistrate can order anyone who is reasonably expected to be the keeper of goods that can be seized, to hand them over or to deposit them at the court) and art. 107 Sv (limiting the power of art. 105 Sv in as much letters and other documents can only be ordered to be handed over if they belong to the suspect, are adressed to the suspect, and when these papers have been the object or the instrument of the crime).

- (p. 7) ad invoering 23008 en 23009
This new legislation was designed to take effect at january 1st, 1994. Due to some slight delay in the latter stages of the legislative process, both bills in the end got the force of law starting februari 1st, 1994.

- (p. 8) ad indicatoren voor 6 maanden
The limitation for a period of six months is intended to keep the system a flexible one. Since the techniques employed by money launderers are likely to change frequently, the latest developments will continually have to be met by appropriate

countermeasures on the part of the government.

- (p. 10) ad functie Meldpunt
The job of this unit is to collect all the reports and then to analyse and interpret all the information that comes in. The objective is to look for clues which can be used in either solving past crimes or preventing new crimes to occur. In both instances, the unit will supply the relevant material to the competent investigative authorities and/or to the public prosecutor.
It is expected that unit will pass on information elicited from the reports in three categories of cases:
a. data which are sufficient for a 'probable cause' that a crime has been committed;
b. data which are by their very nature suitable for incorporation in a so-called CID-registration (this is a data-base of the criminal intelligence service);
c. data which are relevant for the detection or prevention of crime, with special emphasis on possible future crime posing a weighty threat to the legal order because of the seriousness of the crime, the frquency thereof, or the fact that the violations are committed within the framework of an organisation (see MvT p. 13-14 and D.R. Doorenbos DD 1993, p. 773).
The central unit thus serves in the capacity of a buffer between those who have the obligation to report unusual transactions on the one side and the agents of the criminal justice system on the other. The idea underlying this arrangement is that processing of information and evaluating the results thereof in terms of criminal conduct, is not a matter that should be left to ordinary citizens.

- (p. 11) Aanpassing strafwetgeving c.a.

In the introduction to the present section of our paper, we mentioned the EC-directive 91/308 on moneylaundering. We have already explained that the requirements of this directive have chiefly been met by the introduction of two new bills in february 1994 (MOT & Wif '94). There is, however, a third and most important vehicle for combatting moneylaundering, consisting of several provisions concerning handling of and profiting from criminally obtained property. Basically, the relevant articles of the Criminal Code read as follows.

Art. 416 Sr deals with <u>intentional</u> conduct:
"A person shall be guilty of knowingly handling stolen property and liable to imprisonment for a term not exceeding for years or to a fine of the fifth category where:
- he acquires, possesses or transmits property, or asserts or transmits a personal or proprietary right in property, and, at the time of acquisition or possession of the property or of the assertion of the right, he knows that the property was stolen;
- where, intentionally and with a view to profit, he possesses or transfers stolen property or transfers a personal or proprietary right in stolen property.
The same liability shall be incurred by a person who intentionally profits from the fruits of sale of stolen

property."

Art. 417 Sr covers the question of multiple offences:
"A person who is repeatedly found guilty of knowingly handling stolen property shall be liable to imprisonment for a term not exceeding six years or to a fine of the fifth category".

And, finally, art. 417bis Sr criminalizes the unintentional variety, based on negligence:
"A person shall be guilty of handling stolen property and liable to imprisonment for a term not exceeding one year or to a fine of the fifth category where:
- he acquires, possessesor transmits property or asserts or transmits a personal or proprietary right in property and, at the time of acquisition or possession of the property or of the assertion of the right, he could reasonably have expected that the property was stolen;
-where, with a view to profit, he possesses or transfers stolen property or transfers a personal or proprietary right in stolen property and could reasonably have expected that it was stolen."[1]

These - rather broad - provisions got their current wording in 1989. They were the end product of an innovation intended to have a firmer repression of property crime. It was reasoned that this type of crime will be effectively discouraged when it is made more difficult to get rid of illegally obtained property. In the official explanation of the objectives of the new wording of these articles, the Minister of Justice stated that this also met the international desire to take action against the laundering of money acquired by drug trafficking. Ever since, the government has held the opinion that it is not necessary - nor desirable - to introduce a separate section of the Criminal Code specifically dealing with the phenomenon of money laundering.[2]

As is evident in the quoted contents of art. 416 Sr, handling stolen goods (identical with money laundering in so far as the illegal property consists of money) is punishable when the perpetrator acts intentionally (question 3.1.4.).
The element of intent first has to be centered on the act of handling itself. Secondly, the intention should extent to the fact that the property was stolen or otherwise obtained by means of criminal behaviour. The handler does not necessarily have to know by which specific crime the property was acquired; however, conviction is only possible if the judge can give

[1]Vide art. 437 Sr imposing an obligation on certain branches of trade to keep a register of the merchandise in order to be able to distinguish between bona fide and mala fide businesses.

[2]These remarks answer points 3.1.1. and 3.1.2. of the questionnaire. See on this matter also, C.D. Schaap, Witwassen van geld strafbaar als plegen van heling, Tijdschrift voor de politie 1993, p. 141-142.

these details in his verdict.
The Dutch case-law has given a wide interpretation to the concept of intent. Consequently, it not only covers situations in which the offender acts deliberately with the proscribed objective. Under the label of 'conditional intent' the Supreme Court of the Netherlands extended this concept to cases in which the accused consciously accepted a substantial chance that the property was in fact stolen.[3] This formula in which a certain risk-taking is essential, is also applicable when the words of the criminal law require (or: seem to require) positive knowledge on the part of the perpetrator (as in art. 416 Sr: "he knows that the property was stolen").[4]
If the perpetrator had to presume the illicit origin of the assets or if he acted recklessly in this respect, he falls under the scope of art. 417bis Sr. The difference with the construction of 'conditional intent' is that art. 417bis Sr deals with situations in which the offender had not consciously accepted the risk that the property was illegally obtained. The core of his fault here is that he should have thought (and should have made inquiries as to the origin of the property) were he actually didn't.

The Dutch law punishes the crime of handling stolen goods/money laundering in case the offence is committed abroad, depending primarily on the nationality of the perpetrator (question 3.1.5.). If the offender is a Dutch citizen and the offence is also punishable according to the law of the nation where the act took place, then the Dutch criminal law can be applied (see art. 5 section 1 sub 2 Sr). The same holds true for the foreigner who begets the Dutch nationality after having committed the crime elswhere.[5]
Then there is the case of the so-called derived or subsidiary jurisdiction, mentioned in art. 4a Sr. This principle applies when the Dutch government takes over the prosecution of an offender from the country on whose territory the crime was committed, on the basis of treaty establishing the competence to do so. The procedure - and the conditions for granting or refusing a request to take over the prosecution from another country - is described in art. 552x Sv ff.

The provisions of administrative law for combatting money laundering are limited in number as well as in scope and importance (question 3.2.1.). Currency imports and exports are covered by the 'Wet financiële betrekkingen buitenland' (the law on financial relations with foreigners and foreign coun-

[3]Vide the famous decision by the Supreme Court on november 9th 1954, published in Nederlandse Jurisprudentie 1955, no. 55.

[4]D.R. Doorenbos, Het criminaliseren van money laundering als communautaire verplichting, Delikt en Delinkwent 1993, p. 353. The opposite judgement by the Appelate Court of Den Bosch d.d. april 14th 1992, NJ 1992, 432 was overturned by the Supreme Court in ...

[5]See Hazewinkel-Suringa-Remmelink, p. 493.

tries)[6] The main point of reference is to leave as much freedom of action to the people as is possible. In this so-called 'positive system' any cross border transfer of currency is allowed unless it is specifically prohibited by law. The restrictive measures which can be imposed by monetary authorities are strictly governed by two objectives: protection of the domestic capital market and domestic restictions of credit. Art. 4 of the law aims to protect de Dutch capital market in case of disturbances caused by excessive demand by foreigners. Articles 5, 6 and 8 provide measures to protect the monetary policies of the government. Art. 7 allows for restrictions in the transfer of currency when this is necessary to preserve monetary reserves. Articles 7 and 8 have so far never been used.[7]

The infringement of the exchange and criminal provisions can lead to very serious sanctions inflicted upon the bank itself (question 3.2.2.).
Violation of the just mentioned administrative provisions is classified as an economic crime. The Wet Economische Delicten (Economic Crime Bill) contains a catalogue of special sanctions (articles 5-10). Of course, a legal person could never be sentenced to prison; hence monetary sanctions are exclusive. According to art. 7 sub c the bank can be closed - either completely or partly. Art. 8 opens the possibility of putting a trustee in charge of the bank. We do like to add immediately, however, that these far reaching sanctions are very unlikely to be levied in cases of money laundering. From a practical point of view, they therefore constitute merely hypothetical options for the judge. More realistic are the measures of forfeiture, confiscation and withdrawal from circulation (art. 8).
The earlier mentioned obligations in the Wet inzake Spaarbewijzen, the Wet MOT and the Wif 1994 are also enforced by classifying violations as economic crimes.
In the Netherlands there is also a general criminal liability for legal persons (art. 51 Sr). In case of conviction for violating rules on handling stolen property/money laundering (articles 416 and 417bis Sr, discussed above), the maximum penalty the bank could face is Dfl 1.000.000 (see art. 23 sections 3 and 7 Sr).

The question of profiting from the proceeds of a tax crime, particularly of tax fraud, leads us to point out a basic problem in the Dutch criminal law (question 3.3.1.). If someone fails to report income to the tax authorities, he will commit the crime foreseen in art. 68 AWR or art. 225 Sr. His financial position will be better than it would have been had he

[6] This law was adopted on May 28th, 1980, Stb. 321 and went into force on May 1st, 1981.

[7] 'De Nederlandse Bank' (the Central Bank of the Netherlands) has issued a number of general administrative provisions concerning the data and information which must be supplied to the Bank in the event of transnational currency transactions (sources: AAV 1989/1; UV 1986/1; and UV 1986/2).

fulfilled his legal obligations. But it is hard to say that the amount of money he would have had to pay in taxes is now acquired by crime. Instead, the perpetrator had the money in his possession previous to the fraud, so it can be argued persuasively that the provisions on handling stolen goods/money laundering are not applicable.
The situation is different when the fraud leads the tax authorities to pay an undeserved sum of money to the offender. In that case a third party obtaining the proceeds while knowing its origin, falls under the scope of article 416 Sr.

In the preparatory documents leading up to the Wet MOT, the government asserted the desirability of financial institutions which in the course of their business come accross criminal acts, make a full report to the police. Of course this may be desirable, but in the Netherlands there is no general duty to report crimes to the officials in the criminal justice system. An exeption to this rule is laid down in art. 162 Sv: in certain circumstances civil servants are required to report crime. The obligation concerns crime outside the scope of their competence to investigate, but which they nevertheless encounter while fulfilling their duties. On the other hand there is an article in de fiscal law containing an obligation to secrecy for the authorities with regard to the information they receive when enforcing the fiscal law (art. 67 AWR). The reasoning behind this, is that the citizen who is under so many obligations to supply all sorts of documents, should be able to be confident that the information he delivered will not get out of the system of fiscal law enforcement. In what way are the conflicting rules of art. 162 Sv and art. 67 AWR balanced? The solution is that the fiscal inspector is only allowed to report a crime he has come across, when this is permitted by the so-called 'Instruction on supplying information': art. 48 of this instruction demands an evaluation of the case by the director of tax collection before any report can be filed.[8]

The Dutch legislator recently created probative facilities and a de facto reversement of the burden of evidence in order to allow the authorities to order the confiscation of the assets which are suspected to be of criminal origin (question 5.3.). These measures are part of a larger scheme to combat various forms of lucrative crime. The features of this scheme are as follows.
On december 10th 1992 the dutch parliament approved Bill 21504 concerning the measure for the confiscation of the profits of crime (confiscation order). The bill went into effect on april 1st 1993. The object of the bill is to modify the dutch penal code and the code of criminal procedure in order to deal effectively with highly profitable crime such as drugsdealing and fraud (especially E.C.-fraud). The general idea is to hit the criminal where it hurts most, that is in his finances. To achieve this goal the legal possibilities for the seizure and confiscation of ill-gained assets are widened.
The measure of confiscation is borrowed from the financial

[8]See Vakstudies, art. 67 AWR, p. 41.

penal legislation and was introduced in the penal code in 1983. The measure means that a judge can order a convicted person to pay a sum of money to the state which has the effect of taking away the estimated financial rewards he has obtained from the crime he has committed. This measure can be imposed in conjunction with penalties (for example imprisonment) and other measures. The failure to pay the amount owed will result in the imposition of default detention (for a maximum period of 6 years).The Bill of december 10th 1992 modifies the existing measure in the following respects:

- The confiscation order is now separated from the ordinary criminal proceedings. There is a mandatory provision to the effect that the confiscation order must be made in a separate proceeding upon a specific application by the public prosecutor. As a result, extraordinary procedural rules can apply for the confiscation order. The investigation of the volume of the unlawfully acquired property will be primarily financial and technical in nature, and it has been recommended that it be led by a specialized section of court. The establishment of a separate procedure has the further advantage that the financial investigation, which is by definition a complex matter, need no longer unnecessarily delay the investigation and prosecution of the offence itself.
- A confiscation order may be made not only of the offence for which the accused is being prosecuted but also for "comparable offenses", where there is adequate evidence that the person concerned actually committed them (article 36e, section 2 Sr).[9]
- According to the third section of article 36e Sr, where an accused is sentenced to a fine of the fifth category, a decision may be taken to deprive him of such assets as may have been acquired by any unlawful means. A confiscation order in this context does not have to be based on a causal relationship between the offence of which the accused is convicted and the specific assets. Any property that can be shown to have been acquired directly or indirectly by any unlawful means qualifies for withdrawal under the amended third section of article 36e Sr.
- In the code of criminal procedure a new form of pretrial investigation is introduced. This so called ’criminal financial investigation’ is secret in nature and is meant to establish what illegal gains the suspect has made. The public prosecutor is in charge of the criminal financial investigation. This is a remarkable change to the standard pretrial stage where the investigating judge is usually the dominant authority. In the criminal financial investigation the role of the pretrial judge is limited to allowing the investigation to commence and to deciding on the application of a number of coercive measures. Compared to the preliminary judicial investigation the rights of the defence are restricted in the criminal financial investigation.
- A second change in the code of criminal procedure is the

[9]See re the notion of ’comparable offences’: J. Wöretshofer, Pluk ze - Nieuwe mogelijkheden tot ontneming van crimineel vermogen, in: P.C. van Duyne a.o. (eds.), Misdaadgeld, Arnhem 1993, p. 36 ff.

introduction of interim seizure measures to guarantee the execution of confiscation orders. There are also rules for the seizure of real estate, other registrated property and registrated shares and securities.
Up untill this moment (the end of 1993) the results of the new legislation are not encouraging. Only an amount of approximately Dfl 11.000.000,- has been confiscated since april 1st. This may be caused by either a lack of manpower and/or ignorance of the new legal provisions.

The scheme to fight the more lucrative areas of crime also has an international dimension. [...]

Conclusion

In the past decade there has been a growing awareness of the problems caused by the phenomenon of lucrative types of crime. One of the responses to the challenge posed by this development, has been to initiate changes of the criminal law in order to combat money laundering. Three innovations stand out. First, there is the new article in the Criminal Code on handling of stolen property (art. 416 Sr ff.). Secondly, parliament adopted the MOT (the Bill on reporting unusual financial transactions). And finally, the renovated Wif went into effect early 1994 (the Bill on checking identities while providing financial services).
The Dutch government is convinced that these key pieces of legislation comply with every basic requirement in the EC guidelines on money laundering ((91/308/EEG).[10] Hence there is no intention of further reviewing the system shortly (question 6.1.). Nevertheless, it is of course unclear at present how the judiciary will operate on the basis of all the new provisions. It is equally difficult to predict what direction the academic debate on these issues will take. Consequently, there is a chance that jurisprudential developments and/or academic reflexion will show major shortcomings in the present system which will then have to be remedied.

Adressing the question of criticism of the existing system (question 6.2.), we would first like to point out the inherent limitations of an approach relying so heavily on the articles on handling stolen goods (artt. 416 Sr ff.). We feel that it would be appropriate to add separate offences dealing with the specific phenomenon of money laundering. The following arguments may be invoked to support this position:
- the articles on handling stolen assets were primarily designed to discourage property crime; the explicit and preponderant objective was to diminish the incidence of theft, breaking and entering, and the like, money laundering only came in as a convenient afterthought.
- the articles under consideration are very broadly worded, thus carrying the risk of capricious application.
- a separate provision dealing with money laundering would be

[10] See the table in the parliamentary proceedings concerning the Wif ’94: 23008, no. 3, p. 11.

consistent with the popular view that this is a crime with a character different from that of handling stolen goods.
- introducing a new and specific article would also convey an important symbolic message to society that the legal community expressly condems money laundering; this could have a certain preventive effect.
- Last but not least: the money launderer cannot be tackled by the articles on handling stolen property if he himself also perpetrated the crimes which led to the illegally obtained proceeds.[11]

As far as the MOT is concerned, there are at least two critical areas of interest. The first one is the insoluble problem of the list of indicators to recognise 'unusual' transactions. Here we are faced with a dilemma. It is important - indeed vital - to have a flexible system. Hence the upgrading of the list of indicators at six months intervals. The backside of this arrangement, however, is that the administration is by definition always just a little late in pursuing the latest techniques employed by money launderers. And by publishing the list of indicators periodically, the criminals are given the opportunity to adjust their strategy accordingly.[12]
The second crucial question that can be raised is whether the reports of unusual transactions will in actual practice also lead to succesful criminal investigations.[13] This will depend, to a substantial degree, on the number of reports which will be filed. Experience elsewhere has shown that reports could become virtually useless if the central agency is flooded with to large a pile of unstructured data suggesting some possible wrongdoing.[14]

Criminal law intrinsically strikes a balance between the general interest of preserving the legal order on the one hand and the principle of individual liberty on the other.[15] It is undeniable that the measures taken in order to combat money laundering are almost exclusively designed from the former point of view. Because money laundering is systematically linked with the phenomenon of organised crime, the government feels justified in taking 'strong action'. This entails an almost non existent mitigating effect by the usally restraining

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[11]C.D. Schaap, J.M. Reijntjes, Witwassen van geld strafbaar als heling, in: P.C. van Duyne a.o. (eds.), Misdaadgeld, Arnhem 1993, p. 121-122.

[12]J.P. van Soest, Europees witwassen, in: P.C. van Duyne a.o. (eds.), op. cit., p. 158-159.

[13]J.M. Reijntjes, Met de dader ook de buit!, in: P.C. van Duyne a.o. (eds.), op. cit. p. 84-85.

[14]These observations on handling stolen property, MOT and Wif '94 also suffice to answer question 6.3.

[15]See the impressive account in A.C. 't Hart, R. Foqué, Instrumentaliteit en rechtsbescherming, Arnhem/Antwerpen 1990.

general legal principles, such as the presumption of innocence, the right to privacy, etc. (question 6.4.).[16] One can understand the pressing need to take appropriate action against those who strife by illegal financial means to gain undue power and influence in a civilised society. But one would also hope that the measures adopted to repress this, will not be of such a nature as to deteriorate the quality of the criminal justice system by abandoning its underlying values and standards.

[16] A.H.J. Kuus, De privacy in de verdrukking bij de bestrijding van witwassen, Computerrecht 1992, p. 152-155.