

# Netherlands

Daan Folgering and Niels van der Laan

Legal Experience Advocaten and De Roos & Pen

## Civil asset recovery

### 1 Legislation

**What are the key pieces of legislation in your jurisdiction to consider in a private investigation?**

When conducting a private investigation the most relevant legislation is to be found in the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP). In addition, the Dutch Constitution (DC) and international treaties such as the ECHR provide for merely general rules regarding the fundamental rights of persons under investigation; for instance, articles 10, 12 and 13 of the DC and article 8 of the ECHR contain provisions protecting the privacy of individuals. Dutch legislation does not provide for extensive rules and possibilities when it comes to discovery. A very useful provision is article 843a DCCP. For more detailed information on this provision see question 9. Additional legislation that may have to be observed, depending on the merits of the case, in a private investigation includes, among others:

- the Personal Data Protection Act;
- the Privacy Protection Act;
- the Dutch Criminal Code, eg, articles 139f and 441b; and
- the Computer Crime Act.

The nemo tenetur principle is highly valued in the Netherlands, but this principle applies only to evidence that incriminates an individual. In civil matters any debtor is in principle obliged to provide information regarding its income and assets in order to enable a creditor to seek and find reimbursement.

### 2 Parallel proceedings

**Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?**

There is no restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. However, it is to be noted that when criminal proceedings are pending a party seeking recovery of assets may to decide to join a claim for civil damages in criminal proceedings. The public prosecutor will then seek a criminal conviction together with an award on behalf of the defrauded party for compensation of the latter's damage or loss. The advantage is clearly that a civil party benefits – from a practical and cost-reduction point of view – from the prosecutor's investigation and more extensive possibilities to obtain evidence for possible additional civil proceedings.

### 3 Forum

**In which court should proceedings be brought?**

All civil matters in which claims are filed that exceed €25,000 are to be brought in the District Courts. After a recent reorganisation there are 11 District Courts in the Netherlands. The most common rule for competence of the relevant District Court is the place of residence of the defendant. Any final judgment of the District Court can be appealed in one of the four Courts of Appeal, within three months after the date of the judgment rendered by the District Court. Judgments of the Court of Appeal may subsequently be challenged before the Supreme Court.

### 4 Limitation

**What are the time limits for starting civil court proceedings?**

Time limits for starting civil proceedings are to be found in the DCC. The time limits depend on the legal basis of the claim filed. Most claims become time-barred after five years (articles 3:310 et seq DCC), such as:

- claims that result from a breach of contract;
- claims for damages that result from any tortious act;
- claims to collect a financial penalty; and
- the right to dissolve an agreement after a default.

It is to be noted that some claims become time-barred after less than five years. For instance, any right that can be derived from the nonconformity of goods purchased will lapse after two years.

The period of limitation commences only after the aggrieved party becomes aware of the loss or damage and the identity of the party liable for the damage or loss. All claims – except for special matters such as with asbestos or that result from pollution – become time-barred after 20 years after the loss-causing occurrence. Any limitation period can be interrupted, after which it will apply as before the interruption.

### 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?**

The District Courts have jurisdiction in all national matters and this jurisdiction cannot be challenged. In the event a claimant has filed a claim not properly taking into account the rules on geographical competence, the matter will simply be referred to the competent District Court, which will subsequently review the matter and render its judgment. In international matters the jurisdiction of the Dutch courts will need to be carefully assessed taking into account all relevant multi- and bilateral treaties, such as the Brussels I Regulation and EVEX Convention. In the event private international law provides for competence of any foreign court, the competence of the Dutch courts can be successfully challenged.

### 6 Admissibility of evidence

**What rules apply to the admissibility of evidence in civil proceedings?**

Under Dutch law the rule on admissibility of evidence in civil matters is rather simple: evidence can be produced through all means, unless the law states the contrary. In practice this means that nearly all evidence is admissible. For instance, secretly recorded telephone conversations or photos and film taken when the subject was unaware are admissible, unless these provide information that is to be labelled as an invasion of privacy. The level of intimacy of the evidence will determine whether the court will admit evidence. Recordings of, for instance, telephone conversations that relate to 'business' are admissible. Recordings of conversations on private matters – health, sexual preference, religion – are not.

## 7 Publicly available information

### What sources of information about assets are publicly available?

In the Netherlands the following databases are publicly available:

- the Trade Register at the Chamber of Commerce;
- the Land Registry Office; and
- IP databases (trademarks, designs, patents, breeders right and domain names) provided by national and international intellectual property offices such as Octrooiencentrum NL, WIPO, BOIP, OHIM, EPO, sidn.nl, etc.

Information held by the RDW Centre for Vehicle Technology and Information is not publicly available. The same applies to information in the municipal personal records database (the GBA). Information from RDW and GBA can in particular circumstances be obtained by certain officials and attorneys.

The Government Information (Public Access) Act enables civil parties to request documents and information from all governmental authorities pertaining to their actions, performance and knowledge. Certain governmental actions or knowledge are, of course, deemed not to be disclosed to the public, but clearly such confidentiality is an exemption and not the rule.

## 8 Cooperation with law enforcement agencies

### Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Other than the Government Information (Public Access) Act – see question 7 – there is no statutory obligation for law enforcement and regulatory agencies to provide documents or information – to civil parties – for use in civil proceedings. In certain matters it may nevertheless be expedient to file a written and reasoned request with the relevant agency; however, as these agencies are to a large extent legally bound to confidentiality, it is unlikely that documents and information will be easily provided upon request. In the case of criminal proceedings against a fraudulent party, it can be sensible to join a civil claim in the criminal matter in order to obtain a judgment for compensation of loss or damages and – if not – to obtain access to the file of the public prosecutor. See also question 2. Of course, public information – see question 7 – will be provided at the first request and upon payment of an administrative fee.

## 9 Third-party disclosure

### How can information be obtained from third parties not suspected of wrongdoing?

As mentioned above, Dutch legislation does not provide for extensive possibilities for discovery. However, article 843a of the DCCP provides for the possibility to obtain information from either an opposing or third party. In addition, the Netherlands has a rather liberal system when it comes to attachments and seizures. This liberal system entails the possibility to, inter alia, seize evidence. The criteria that need to be met under article 843a DCCP and for seizing evidence are to a large extent similar.

Under article 843a DCCP any party that has a 'rightful interest' may claim copies of clearly specified documents or electronic data, but only in the event that these documents or data relate to any legal relationship – including that originating from tortious actions – to which the claimant is a party. If the claimant has reasonable doubts that documents or data will be made unavailable by the opposing or a third party, it may file a request to seize the documents or data. The request for this seizure will be granted *ex parte*. The seized documents and data will be placed under the custody of an appointed expert and will only be made available to the claimant when the court has granted additional leave to review the content of documents or data seized.

## 10 Interim relief

### What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

See question 9.

## 11 Right to silence

### Do defendants in civil proceedings have a right to silence?

Under article 21 of the DCCP all parties in civil proceedings are obliged to present all relevant facts in full and truthfully. If either party does not comply with this stipulation, the court may draw any conclusion it deems appropriate. As a consequence a party may choose not to provide information or produce evidence if it demonstrates that the interest in secrecy outweighs the obligation to inform the court. Such a refusal will affect, inter alia, the burden of proof and appraisal of evidence. As said, the *nemo tenetur* principle is highly valued in the Netherlands. Certain confidants such as attorneys, clergymen or medical doctors are entitled to privilege in respect of information that relates to their occupation.

## 12 Non-compliance with court orders

### How do courts punish failure to comply with court orders?

If the court awards a claim to act, to refrain from acting or to tolerate any action it may impose an order subject to a financial penalty for non-compliance (article 611 et seq DCCP). An award to settle a financial claim cannot be subjected to the same. The financial penalty is a stimulus to honour the award and does not function as compensation for damages or costs incurred. The amount of the financial penalty will be determined by the court in anticipation of the stimulus required in the particular matter.

Article 3:299 DCC provides for the possibility to request that the court authorises the claimant to rightfully undertake all necessary actions to fulfil the counterparty's obligation, while article 3:300 DCC allows the court to order that its judgment replaces one or more relevant authentic documents required by the claimant.

As *ultimum remedium* the court may grant leave to commit a party for failure to comply with a judicial order.

## 13 Obtaining evidence from other jurisdictions

### How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Dutch legislation obviously does not provide for any power to compel courts in other jurisdictions to assist in any way. Nevertheless, the Netherlands is party to several multi- or bilateral treaties and is bound by regulations that provide for opportunities to request foreign courts to assist. In the event that Dutch courts need assistance from a court in another EU member state for the taking of evidence, EC Regulation No. 1206/2001 applies. Making use of the appropriate forms the Dutch courts may lodge a request directly with the relevant foreign court, which is to deal with the request in an expedient manner. If the Dutch courts seek assistance for the taking of evidence outside the EU, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is the most relevant instrument.

## 14 Assisting courts in other jurisdictions

### What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

As indicated in question 13, the Netherlands is a member of the EU and as such the Dutch courts are bound by the rules EC Regulation No. 1206/2001. In the case of a foreign request for the taking of evidence in the Netherlands, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters applies for signatory states.

The most used international instrument on recognition and enforcement of foreign civil judgments is EC Regulation No. 44/2001 (Brussels I). Its articles 32 to 65 provide for rules regarding the recognition and enforcement of judgments rendered by courts in another member state. Regulation 44/2001 will be replaced from 10 January 2015 by Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Further international instruments regarding recognition and enforcement of foreign judgments are:

- the Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention);
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims;

- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Payment Order Procedure;
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; and
- the most used international instrument regarding recognition and enforcement of foreign arbitral awards is the 1958 New York Convention.

The DCCP is applicable in the absence of an international treaty, convention or regulation. Article 94 DC states that domestic statutory regulations will not be applied when such application is in conflict with international provisions of treaties. It is for this reason that in most cases the DCCP is not applicable. When applied it is mostly used to fill in deficiencies in existing international regulations.

## 15 Causes of action

### What are the main causes of action in civil asset recovery cases and do they include proprietary claims?

The main causes of action in civil asset recovery cases are breach of contract and a large variety of tortious conduct.

## 16 Remedies

### What remedies are available in a civil recovery action?

The Dutch legal system is designed to allow a party to seek remedies in order to bring it in the same position as if the loss-causing event had not occurred. As such only claims for compensation of damage actually suffered or loss in fact incurred may be awarded. Claims that have a punitive nature are ruled out. A defrauded party may claim – among other things – reimbursement of damage, loss and costs, interest, restitution of property and a fee for compensation of extrajudicial and judicial costs.

## 17 Judgment without full trial

### Can a victim obtain a judgment without the need for a full trial?

In case of default of the defendant the Dutch courts will award the plaintiff's claims, unless the court deems these claims to be ill-founded at face value. Default judgments will be rendered only after close examination of whether the defendant was served properly and within sufficient time to prepare its defence. The statutory time limit is seven days.

In urgent matters a defrauded party may seek preliminary injunctions in summary proceedings. Such injunctions may not be a declaratory decision nor a constitutive judgment. A claim in summary proceedings for financial compensation will only be awarded when it is beyond reasonable doubt that the court will award the same claim in proceedings on the merits and lacking any substantial recovery risk on behalf of the defendant.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

Both pre- and post-judgment Dutch legislation provides for extensive possibilities for a claimant to attach and seize assets of its counterparty. Attachments can be levied not only on assets that are under the control of the counterparty, but also on assets that are with third parties. In accordance with article 3:296 DCC any debtor is liable to the full extent of one's property. The power to enforce judicial awards is reserved to bailiffs. It is up to the bailiffs to levy executory attachments on the debtor's property, which includes real estate, moveable property, bank accounts and claims of the debtor on third parties.

## 19 Enforcement

### What methods of enforcement are available?

See question 17.

## 20 Funding and costs

### What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

There are limited restrictions pertaining to the arrangements that can be put in place for the funding of litigation, based on the principle that Dutch attorneys are bound by strict rules of conduct and have to remain independent. As a result a Dutch attorney is not permitted to enter into an agreement with their client under which the client agrees to pay the attorney a percentage of the sums recovered in a claim. However, there are several other alternative funding models available to Dutch attorneys and their clients, such as success fees, blended fees, fixed fees, etc.

Third-party funding and after-the-event insurance are available. In a letter to Parliament dated 26 June 2012 the Dutch Minister of Justice extensively elaborated on third-party funding, especially focusing on class actions. The method of funding litigation is not to affect the outcome of the proceedings. Under Dutch law the party losing civil litigation will bear its own costs and in addition is to reimburse the winning party's costs as determined by the court. The court will determine the legal costs of the winning party on the basis of a graduated rate. This rate will as a rule not cover the winning party's entire costs. Only in proceedings regarding intellectual property rights will the winning party be awarded compensation for its entire costs, including full legal counsel's fees.

## Criminal asset recovery

### 21 Interim measures

#### Describe the legal framework in relation to interim measures in your jurisdiction.

There are two different kinds of interim measures concerning the seizure of goods.

The first deals with the seizure of goods for evidentiary reasons or for reasons relating to the public interest (such as firearms and drugs and goods that can be related to the crime). This type of seizure is described in article 94 of the Dutch Code of Criminal Procedures.

The second type of interim measure is the seizure or freezing order for the confiscation of goods and proceeds of criminal offences as described in article 94a of the Dutch Code of Criminal Procedures, which is used in order to safeguard the enforcement of the payment of a fine or the confiscation of goods following a conviction by the court.

#### Article 94 seizure

Article 94 (et seq) of the Dutch Code of Criminal Procedures sets the conditions for confiscating proceeds and instruments of crimes for two purposes:

- the use of evidence in a criminal trial; and
- to get control over the goods in order to remove them from society or to declare them forfeit to the state, on the grounds that they are:
  - considered to be dangerous, and can be confiscated on the grounds that they pose a threat to society;
  - considered to be goods or assets related to the crime. This is the case with goods or assets that have been used in relation to the crime or have been obtained by means of the crime.

The decision regarding the seizing or freezing of goods on the basis of article 94 of the Dutch Code of Criminal Procedures rests solely in the hands of the prosecutor.

#### Article 94a seizure

Article 94a of the Dutch Code of Criminal Procedures entails the conditions for the possibility to confiscate goods on the basis of an interlocutory seizure or freezing order. This article makes it possible to seize or freeze objects and funds to secure:

- the payment of a fine in the case of a criminal conviction;
- the fulfilment of a measure in accordance with article 36e of the Dutch Criminal Code, to confiscate the proceeds of crime. A suspect can be convicted for such a measure in a separate proceeding; or
- the payment for damage incurred by the victim of a crime in accordance with article 36f of the Dutch Criminal Code.

The following conditions must be fulfilled in order to execute an interlocutory seizure or freezing order:

- there has to be a suspect of a felony;
- that felony must be punishable by a fine of (at least) the fifth category (which means a fine of at least €78,000); and
- there must be a reasonable expectation that the suspect will in fact be sentenced to the payment of a fine and/or that further criminal proceedings will lead to confiscation of criminal proceeds as set out in article 36e of the Dutch Criminal Code.

Or:

- there has to be a suspect of a felony;
- that felony must be punishable by a fine of (at least) the fourth category (which means a fine of at least €19,500); and
- there must be a reasonable expectation that the suspect will in fact be sentenced to reimbursement of the damage incurred by the victim.

For the interlocutory seizure or freezing of suspected proceeds of crime in accordance with article 94a of the Dutch Code of Criminal Procedures the authorisation of the investigating judge is a precondition. However, in accordance with article 103 in combination with article 126, section 3 and article 126b of the Dutch Code of Criminal Procedures the authorisation of the investigating judge given to a prosecutor to open a Criminal Financial Investigation also entails the authorisation to issue freezing orders concerning the proceeds of criminal offences relating to that Criminal Financial Investigation.

## 22 Proceeds of serious crime

**Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?**

The investigation to identify, trace and freeze illicit proceeds is not automatically initiated. When a crime is detected the prosecutor may elect to initiate an investigation into the proceeds of the crime in addition to the investigation into the origins and the perpetrator of the crime. The decision whether to start such an investigation will to a large extent depend on whether there exists a reasonable expectation to find proceeds related to the crime and whether the expectation reasonably exists that in the case of a conviction the proceeds will be confiscated by the court.

However, there are specialised intelligence units that deal solely with tracing and investigating finance-based crimes such as money laundering and fraud. The Financial Intelligence Unit (FIU) is the organisation in the Netherlands where institutions that have a reporting obligation regarding unusual financial transactions (such as banks, auditors, lawyers, etc) can (or must) report these kinds of transactions, after which the FIU will investigate and analyse the information provided to see whether the transactions can be linked to criminal offences.

In addition, there also exists an investigation unit called the FIOD, which is a specialised investigation unit for the Dutch Internal Revenue Services, which also deals mainly with crimes relating to fiscal fraud and further financial economic-related crimes such as money laundering, insider trading, pyramid schemes, etc. If these specialised agencies detect a crime, most of the time an investigation into the proceeds of the crime will be initiated.

## 23 Confiscation – legal framework

**Describe the legal framework in relation to confiscation of the proceeds and instrumentalities of crime.**

The instrumentalities and proceeds of crime are, as explained in question 21, subject to seizure or freezing orders made on the basis of article 94 of the Dutch Code of Criminal Procedures. In the case of a conviction the court can impose additional measures on the goods that have been subject to a seizure or freezing order on the basis of article 94 of the Dutch Criminal Code. In accordance with articles 33, 33a and 36a of the Dutch Criminal Code, in the case of a conviction the court can rule that the instrumentalities of crime (if seized) are to be removed from society or forfeited to the state.

The proceeds of crime can, as explained above, also be subject to seizure or freezing orders made on the basis of article 94a of the Dutch Code of Criminal Procedures. Confiscation of the proceeds of crime may take place in accordance with article 36e of the Dutch Criminal Code. This article makes it possible to confiscate proceeds of crime in cases where there has been a conviction.

## 24 Confiscation procedure

**Describe how confiscation works in practice.**

In the case of confiscation of the instrumentalities of crime the goods that have been subject to seizure or a freezing order on the basis of article 94 of the Dutch Code of Criminal Procedures may be confiscated by the court, either because they pose a threat to society or because they were used in, obtained by or made for use in the criminal offence. Consequently the goods that pose a threat to society will be destroyed, whereas other goods that contain any value will be made subject to forfeiture to the state.

If a suspect is convicted of a crime from which it is probable that he or she has obtained illegal proceeds the prosecutor may start additional proceedings with the sole purpose of confiscating these proceeds, as set out in article 36e of the Dutch Criminal Code.

In order to confiscate the goods and assets that were subject to an interlocutory seizure or freezing order under article 94a of the Dutch Code of Criminal Procedures, there has to be a conviction where:

- a fine has been imposed;
- in the case of a further confiscation procedure the conviction entails the confiscation of assets that have been obtained by a criminal offence; or
- the conviction also poses the obligation to reimburse the damages incurred by a victim within the meaning of article 36f of the Dutch Criminal Code.

In accordance with articles 577b and 574 of the Dutch Code of Criminal Procedures a verdict in an article 36e procedure may also serve as a writ of execution to capitalise any susceptible property. This capital in turn may be used for the above-mentioned three goals.

## 25 Agencies

**What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?**

The responsible agency for tracing and confiscating the proceeds of crime is the prosecutor's office in the district in which the investigation into the underlying criminal offences has taken place.

In addition, prosecutor's offices in the Netherlands have a specialised department called the Criminal Assets Deprivation Bureau of the Prosecution Service. The Public Prosecution Service seeks to deprive convicted criminals of illegal profit obtained as a result of committing offences.

## 26 Secondary proceeds

**Is confiscation of secondary proceeds possible?**

Under Dutch criminal law all possessions can be confiscated in order to safeguard the payment of a fine or in order to safeguard the deprivation of the illicit proceeds related to the crime for which a person was convicted or certain related crimes. Secondary proceeds fall within the scope of these provisions.

## 27 Third-party ownership

**Is it possible to confiscate property acquired by a third party or close relatives?**

Property of a third party can be subject to an interlocutory freezing order on the grounds of both articles 94 and 94a of the Dutch Code of Criminal Procedures.

Freezing of property of a third party on the basis of article 94 of the Dutch Code of Criminal Procedures is possible as long as the conditions set out in this article are met. Whether the subject of the freezing order belongs to the suspect or to a third party is irrelevant. Seizure is possible, as explained above (see question 21) because of the origins of the property.

In the case of a conviction that indicates the property of a third party as either instrumentalities of crime or proceeds of crime the property can be confiscated in accordance with articles 33, 33a and 36a of the Dutch Criminal Code.

Freezing of property belonging to a third party on the basis of article 94a of the Dutch Code of Criminal Procedures is possible if there are reasonable grounds to assume that the property seemingly belonging to a third party actually belongs to the suspect and the structure of ownership seemingly exists to frustrate confiscation of the property. In addition to this objective of concealment the third party needs to be aware that his or her ownership of the property exists for this reason only.

**28 Expenses****Can the costs of tracing and confiscating assets be recovered by a relevant state agency?**

There is no provision in the Dutch legal system concerning the recovery of costs made in order to trace and confiscate assets.

**29 Value-based confiscation****Is value-based confiscation allowed? If yes, how is the value assessment made?**

Value-based confiscation is possible on the basis of article 94a of the Dutch Code of Criminal Procedures. Value-based confiscation entails the confiscation of assets whose value is equivalent to the probable proceeds of the offence. It can be applied to any asset of the suspect, regardless of whether it is clear at the moment of confiscation that it has been obtained by means of crime.

**30 Burden of proof****On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?**

In the case of a conviction the court can, in accordance with articles 33 and 33a of the Dutch Criminal Code, declare forfeit to the state the proceeds of crime. In accordance with article 36e of the Dutch Criminal Code it can seize the proceeds of crime. In both cases the burden of proof is on the prosecutor to prove that the suspect is in fact guilty of committing a crime, that there have been illicit proceeds for the suspect of a crime and to what extent.

In addition, in accordance with article 36e, subsection 3, of the Dutch Criminal Code it is possible if there has been a conviction for a crime committed by the suspect to seize proceeds and assets that are obtained by means of other criminal offences. For 'other criminal offences' a conviction is not necessary but the burden of proof is on the prosecutor to provide sufficient indications that these other criminal offences have been committed and that the suspect has obtained proceeds by committing these offences.

In the case of confiscation on the basis of article 36e, subsection 3, the burden of proof will shift partially from the prosecutor to the convicted criminal as a presumption may be made by the court that expenses paid or assets obtained in a period leading up to six years prior to the committed crime were obtained through criminal offences. If such a presumption is made, it can only be rebutted by the suspect by means of making a legitimate origin of those assets or those expenses plausible.

**31 Using confiscated property to settle claims****May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?**

Under Dutch law it is possible, under certain restrictions, for the victim of a crime to accept the role of civil injured party in the criminal procedure and to claim compensation of his or her civil damages in the criminal proceedings. The basis for this claim can be found in article 51f of the Dutch Code of Criminal Procedures. If convicted, the court can force the defendant to pay for the damages incurred by the victim of the crime.

In accordance with article 94a, section 3, of the Dutch Code of Criminal Procedures it is possible for the prosecutor's office to seize or freeze property of a suspect of a crime in order to safeguard that, in the case of a conviction, the suspect will be able to pay for damage caused to the victim and imposed on him or her in accordance with article 36f of the Dutch Criminal Code. The freezing of property is possible during the investigation phase of a crime so as to ensure that the suspect is not able to cover up his or her assets, in order to ensure that the victim will obtain suitable compensation for the damage in the case of a conviction.

**32 Confiscation of profits****Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

Under Dutch law the secondary proceeds that are revenues obtained from the primary proceeds of the criminal offence are also considered to be proceeds illicitly obtained and are therefore also subject to seizure and confiscation.

**33 Non-conviction based forfeiture****Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.**

It is possible to confiscate goods without a conviction. There are several possibilities that render the same outcome.

Article 116 of the Dutch Code of Criminal Procedures presents the possibility for the prosecutor to decide on the proceeds of crime that are subject to a freezing order as set out in article 94 of the Dutch Code of Criminal Procedures. If the proceeds belong to a person who resigns his or her ownership to these goods, the prosecutor can forfeit or seize these goods on the basis of article 116, section 2, of the Dutch Code of Criminal Procedures.

In addition, the prosecutor can present the suspect of criminal offences a transaction offer. This offer can among other things entail that the suspect will waive his or her proprietary claim to the goods that are subject to a freezing order for the sake of not having the case brought to court. Such a transaction is made possible under article 74 of the Dutch Criminal Code.

Article 74, section 2, of the Dutch Criminal Code includes a limited list of conditions that can be imposed in the case of a transaction, one of which is the reimbursement by the suspect of the damage caused by the criminal offence.

The other possibility is that the prosecutor and the suspect reach a settlement as to the amount of the proceeds that could be confiscated by the prosecutor in order to keep the confiscation procedure from being brought to court. Such a settlement is made possible under article 511c of the Dutch Code of Criminal Procedures.

In both cases the prosecutor and the suspect reach an outcome without the interference of a criminal court. As stated, the agreement can also entail the confiscation of goods that are already subject to a freezing order.

**34 Management of assets****After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?**

The prosecutor's office is responsible for any goods that are subject to investigation. In principle the management of the confiscated goods is handled by the investigation team of the police, as long as the prosecutor's office has not taken a decision on the confiscated goods.

In the case of money that is subject to confiscation the investigation team retains this until the moment the prosecutor has made a decision to deposit the money. As from that moment the prosecutor appoints a specialised service department of the prosecutor's office as custodian.

In accordance with article 116, section 2, of the Dutch Code of Criminal Procedures it is also possible to appoint a third party with temporary custodianship. Custodianship of a third party, however, is only possible in the case of a seizure or freezing of goods on the basis of article 94 of the Dutch Criminal Code. The conditions by which a third-party custodian is bound are defined in a custodian agreement.

**35 Making requests for foreign legal assistance****Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.**

The Netherlands as a member state of the EU is bound by several framework and Council decisions concerning asset recovery. The EU is facilitating the direct execution of confiscation orders regarding proceeds of crime by establishing simplified procedures for recognition among EU countries and rules for dividing confiscated property between the country issuing the confiscation order and the one executing it. In accordance with EU Council Decision 2007/845/JBZ, special contact points for the recovery of criminal assets have to be established, in particular to exchange information and best practice more effectively. In the Netherlands, the Criminal Assets Deprivation Bureau has been designated as a contact point and an Asset Recovery Office (ARO) has been established for the purpose of asset tracking and the execution of freezing and confiscation orders. Requests for Mutual Legal Assistance can be submitted to the ARO and advice can be received on international aspects of cases. The ARO also executes incoming requests for the confiscation and recovery of criminal proceeds from abroad.

Requests for mutual legal assistance to foreign countries that are not EU member states are either governed by a bilateral treaty or, in the absence thereof, requests for mutual legal assistance are governed by article 552i (et seq) of the Dutch Code for Criminal Procedures.

### 36 Complying with requests for foreign legal assistance

**Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.**

See question 35.

### 37 Treaties

**To which international conventions with provisions on asset recovery is your state a signatory?**

The following treaties are applicable for asset recovery:

- the European Convention on Mutual Assistance in Criminal Matters 1959;
- the UN Convention against Transnational Organized Crime 2000;
- the UN Convention for the Suppression of the Financing of Terrorism 1999;
- the UN Convention against Corruption 2003;
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005;
- the European Criminal Law Convention on Corruption 1999; and
- the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

In addition, the Netherlands, as an EU member state, is bound to the following EU instruments that deal with asset recovery:

- the Convention on the Fight against Corruption Involving Officials of the European Community or Officials of the Member States of the European Union, Brussels, 26 May 1997;
- EU Framework Decision 2003/577/JHA on the Execution in the European Union of Orders Freezing Property or Evidence of 22 July 2003;
- EU Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders of 6 October 2006; and
- EU Council Decision 2007/845/JBZ concerning cooperation between Asset Recovery Offices of the Member States of 6 December 2007.

### 38 Private prosecutions

**Can criminal asset recovery powers be used by private prosecutors?**

The Dutch judicial system is not familiar with the concept of private prosecutors.



**LEGALEXPERIENCE**  
ATTORNEYS-AT-LAW

**Daan Folgering**

**daanfolgering@legalexperience.nl**

Pettelaarpark 107  
5216 PR 's-Hertogenbosch  
Netherlands

Tel: +31 73 700 36 00  
Fax: +31 73 700 36 01  
info@legalexperience.nl  
www.legalexperience.nl

**DE ROOS  
& PEN**

**Niels van der Laan**

**vanderlaan@deroosenpen.nl**

Keizersgracht 332  
1016 EZ Amsterdam  
Netherlands

Tel: +31 20 627 5411  
Fax: +31 20 622 6577  
info@deroosenpen.nl  
www.deroosenpen.nl