

Summary of report to

Department of Justice
Research and Documentation Centre
The Hague

Regarding

Evaluation of criminal assets deprivation

English Summary

Commissioned by the Wetenschappelijk Onderzoeks- en Documentatie Centrum [*Research and Documentation Centre of the Dutch Ministry of Justice*] (hereinafter: WODC), SBV forensic business experts & investigators (hereinafter: SBV) investigated the factors of failure and success related to the enforcement of criminal confiscation legislation in major investigations. This was in response to questions in the Lower House of the Dutch Parliament put to the then Minister of Justice, mr. Korthals. The direct reason for asking those questions was the progress in the confiscation case against Charles Z.

The setup of the investigation comprises the examination of four major confiscation cases, one of which was the Charles Z. case. We included smaller confiscation cases for representative purposes and to obtain some comparative material. The cases to be investigated were selected in cooperation with staff of the Bureau Ontneming van het Public Prosecutions Department [*Prosecution Service Criminal Assets Deprivation Bureau*] (hereinafter: BOOM). The distinction between a major case on the one hand and a minor one on the other, is the amount of the assets to be confiscated as stated in the demand for a confiscation order from the Public Prosecutions Department (hereinafter: OM), specifically for € 4.5 million. We explicitly note that the investigation we conducted does not concern legal bottlenecks in criminal confiscation legislation, but pertains exclusively to its practical effect.

To further reinforce the representative element of the results of the investigation, we used various investigative methods:

- literature search;
- two expert meetings with attorneys, investigative officers, public prosecutors and judges;
- practical research of the form of eight dossier investigations and interviews with officers involved in those investigations;
- process analysis.

In all three of these investigations, we identified and documented what are known as factors of failure and success which are influenced, for example, by the completion time of confiscation cases. With regard to the factors of failure and success referred to in professional literature, we have established that (1) the emphasis there is on the factors of failure and (2) that the factors of success referred to in older literature are both referred to in more recent literature and confirmed by the expert meetings and the practical research.

We used a theoretical model that had been used before for the evaluation of the effectiveness of government policy, making a distinction into three main groups, namely:

- knowledge;
- ability;
- will.

We divided each of these main groups into subgroups, on the basis of which we established specific factors of failure and success. For example, the main group 'knowledge' was divided into expertise, supervision and the transfer of knowledge. The main group 'ability' was divided into organisational setup, preservation of the organisation, process design and process management. Finally, the main group 'will' was divided into culture, willingness, acceptance and collaboration.

Expertise

Based on the literature, we can conclude that the financial expertise in the investigative team charged with the underlying offences leaves a lot to be desired. Viewed from the practical research, this position is only partly substantiated by the practical research. This might be explained by the fact that the practical research focussed exclusively on confiscation cases, with the selection and execution of which the BOOM was involved. In view of the financial objective in confiscation cases, financial expertise is, after all, evident.

On the other hand, during the practical research it was discovered with regard to a number of matters that financial expertise had already been applied during the investigation of the underlying offence. But this application seems to be more a result of the specific background of the coordinators charged with the investigation of the underlying offence and confiscation, than a structural choice with regard to the method to be used for such investigations.

When financial experts were available within an investigative team charged with a confiscation case, it turned out in practice that the expertise was insufficient, for example for investigative activities and/or assessing the quality of the confiscation report. The problem presented is exacerbated by the frequent change of positions or personnel turnaround within the investigate body resulting in the loss of expertise gained, such as knowledge and experience.

The career paths that are customary within the Public Prosecutions Department entail a problem similar to the one stated above with regard to the public prosecutors. The result is that the management of confiscation cases is inadequate. In addition, as a result of the fact that, on average, public prosecutors have relatively little to do with confiscation cases, the accrual of essential knowledge is a relatively slow process. The same conclusion can be drawn with regard to the judiciary. We can say, however, that the presence of specialised public prosecutors at the BOOM resulted in a significant improvement.

Supervision

The practical research revealed that, in a number of cases, financial investigators were involved in managing investigations. This helped to improve the quality of investigative activities. Because of insufficient knowledge on the part of the tactical team leader and/or the public prosecutor in charge of the case, the financial investigators could not receive much management and supervision in the performance of the duties with which they were charged.

The literature does state that the public prosecutors do not avail themselves of the expertise available within the BOOM. This postulation is not confirmed by the practical research, possibly because cases were selected in collaboration with the BOOM and it only concerned cases in which the BOOM was involved. It should be noted that in major confiscation cases, the involvement of the BOOM by investigative bodies and the Public Prosecutions Department is appreciated because of the support received, whereas in minor confiscation cases, the involvement is primarily seen as a sign of inability.

Transfer of knowledge

Although in practice, there are instances in which it is noted that the transfer of knowledge could be improved, the possibilities for transferring the necessary financial knowledge are generally used well. It must be noted that insufficient attention is given to the transfer of legal aspects that are important for decision-making with regard to the elements to be included in the demand for a confiscation order, as a result of which the risk arises that products provided to the public prosecutor by the investigative team do not satisfy the minimum requirements, thus necessitating changes after the fact.

Organisational set-up

There are signs within the investigative body that for now, the priority lies with the underlying offence. As a result, confiscation has not been given a clear position within the organisation.

With regard to the organisational set-up, we can state that the decreasing knowledge level, as a result of, among other things, the knowledge drain following job changes and personnel turnaround, is insufficiently compensated through training. In addition, additional efforts by employees to specialise in the financial field (for example, by receiving specific training), are currently insufficiently compensated by changing their primary or secondary conditions of employment.

The literature does state that the capacity available for the efficient handling of confiscation cases is inadequate both at the investigative bodies and the Public Prosecutions Department. The practical research revealed that any capacity available at the investigative bodies is moreover not always applied effectively since financial investigators are charged with duties that could just as easily be performed by tactical investigators.

Maintenance of the organisation

For the successful course of the confiscation process, it is important to safeguard the necessary preconditions. In practice, we observed that the attention team leaders give to confiscation decreases once the investigation of the underlying offence is completed. Team leaders disband the investigative team and install a new team to deal with a new criminal case. In doing so, it happens that the financial expertise is also disbanded in part and transferred to the new team, even if the confiscation investigation has not been completed.

If, in principle, the organisation is adequately equipped to deal with confiscation cases, its efficiency and effectiveness seem to be impeded by multiple job changes and personnel turnaround. Both within the investigative body and the Public Prosecutions Department, the transfer of cases leads to a loss of time and knowledge.

Process design

The practical research has shown that the decision to confiscate is often only taken during the investigation of the underlying offence. Therefore, the plan of approach devotes insufficient attention to the requirements imposed on the investigation from the perspective of the confiscation and possible international aspects. In practice, financial

investigators are often engaged too late. It should be noted in this respect that the chance of the successful execution can be influenced to a significant degree by taking the above into account during the investigation. Options for seizing asset components are currently insufficiently utilised.

Moreover, practical experience shows that the confiscation investigation is continued for an unnecessarily long period without a real chance of success, since the plan of approach also does not devote any attention to an interim evaluation in order to determine whether there is any point in carrying on the investigation on the basis of the findings, and whether a settlement should be sought or whether a demand for a confiscation order, that is properly substantiated, should be issued and handled.

As regards the judiciary, we can conclude from the investigation that the handling of the confiscation case takes longer than necessary in some cases. This seems to be primarily the result of a demand presented in a confiscation case is insufficiently clear, particularly with regard to the calculation method used and the fact that the illegally obtained advantages are not broken down according to the suspects. In practice, the plan of approach to be drawn up for the purposes of the confiscation order does not devote any attention to this.

Process management

The public prosecutor has ultimate responsibility for the investigation. The public prosecutor must not only supervise the activities pertaining to the underlying offence, but also the confiscation investigation. In practice, the necessary expertise and affinity is not always adequate, as a result of which management in the area of confiscation is insufficiently effective. In some instances, this is compensated by engaging the BOOM. Public prosecutors from the BOOM are currently only providing support during confiscation cases in which the gathering of evidentiary material related to the underlying offence has yet to commence or the case is otherwise in a premature stage. It should be borne in mind in this regard that the capacity available within the BOOM is limited.

The process analysis has shown that a serious delay can occur in the legal handling of the demand for a confiscation order during investigative activities, in particular the hearing of witnesses. Practical experience has shown that the terms imposed on the defence are not adequately monitored. In addition to that, possibilities for imposing sanctions on the overrun of these terms are lacking.

Culture

We already indicated above that confiscation is not a priority: neither at the investigative bodies and Public Prosecutions Department nor in the judiciary. The emphasis is still on the underlying offence. This has various consequences for the confiscation process. For example, in practice, it seems that financial investigators are often not involved in the tactical discussions. The result is that the options for gathering evidenced by financial investigations are not or are insufficiently utilised; there is also a risk that the confiscation process is delayed unnecessarily.

Where we observe in practice that a (sometimes considerable) discrepancy exists between the amount calculated and claimed on the one hand and the amount awarded by the court on the other, this can lead to a reduction of the importance given to confiscation by the investigative officers: the perception is that this is not successful.

Closely connected to that is the negative appreciation for a settlement. This negative appreciation is caused on the one hand, by the long throughput time that may be involved and on the other, the idea that that results in the confiscation trajectory being 'cut off'. Although the negotiation process for a settlement can take quite some time, that means on the other hand, that the legal handling can be omitted or, if the proposal is made at an early stage, the investigative activities can be limited.

As regards the judiciary, we can note that judges have difficulty convicting a suspect not only in the criminal case (underlying offence) but also in the confiscation case. Granting the confiscation order is seen as a accumulation of punishment, which leads to reticence on the part of judges.

Willingness

Staff motivation naturally greatly affects the performance of processes, and the confiscation process is no exception. In practice, we note that affinity with confiscation is still limited. The considerable influence which individual willingness can have on the progress of the confiscation process is clearly visible in requests for legal assistance. The process analysis revealed that in general, a request for legal assistance leads to a huge delay. The practical research revealed, however, that a strong affinity with the confiscation case on the part of the staff member involved can considerably reduce the progress of a request for legal assistance.

The limited affinity with confiscation cases is partly caused by a lack of knowledge and experience: there is a certain timorousness. In addition to that, the activities to be performed for the confiscation, such as drawing up a comparison of assets, do not dovetail very well with the perception of the law enforcement duties of investigative officers.

Acceptance

The successful completion of the investigation of the underlying offence on the one hand and the confiscation investigation on the other, is possible if the other investigators accept specific expertise. In practice, this is usually the case. This acceptance needs time to evolve. Time during which the specialist can get accustomed to the culture of the working environment of the generalist and vice versa.

Possible slight acceptance of the product of the financial experts by the Public Prosecutions Department seems to be caused by the differences between, on the one hand, the calculation of the advantage and the demand for a confiscation order, as submitted by the public prosecutor, on the other. As a brief comment, we can also note that during the formulation of the objectives of the confiscation investigation or the interim direction by the public prosecutor, attention should be given to the feasibility of a demand. The discrepancy observed is thus more of a shortcoming in the process design and/or process management than a lack of acceptance.

Collaboration

With regard to the collaboration / willingness to collaborate, various types can be distinguished:

- Public-private collaboration;
- International collaboration;
- Collaboration between specialist and generalist;
- Collaboration between investigators of the underlying offence and investigators of the confiscation case.

We can note with regard to the public-private collaboration (in particular the collaboration between banking institutions and investigative bodies) that this is sometimes impeded, specifically by legislation.

International collaboration, in particular that ensuing from requests for mutual legal assistance, is generally time consuming. The practical research has shown that the creation of and maintenance of permanent points of contact, in combination with knowledge of the relevant country, can accelerate the exchange of information.

In principle, the specialist and generalist are willing to collaborate, in particular if a common interest can be created. Some adjustment time may be necessary to bridge cultural differences.

The collaboration between the investigators of the underlying offence on the one hand and the investigators of the confiscation case on the other, could be improved. If collaboration is improved, the harmonisation of the criminal case and the confiscation case can be improved, which can reduce the completion time of the confiscation process. This collaboration also has a positive effect on the process design.

The practical research has shown that in principle, there is a willingness to collaborate. It should be noted that the preconditions necessary for seamless collaboration have not been fleshed out as well as they could have been. The exchange of information in particular seems to be difficult in practice.

Proposals for improvement

We can derive a general direction for proposals for improvement from the findings of the investigation. In order to improve the effectiveness and efficiency of the confiscation process and thus reduce completion time, it is recommended to endeavour to realise the integration of the investigation of the underlying offence and confiscation at the investigative bodies and the Public Prosecutions Department on the one hand, and on the other, a differentiation within the judiciary with regard to the handling of criminal cases and confiscation cases.

Final conclusion

"We may 'know', we may be 'able', but we have to be 'willing' if we are to optimise the application of the confiscation order and allow financial expertise to flourish within the individual links of the criminal law chain".