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Engelstalige samenvatting: Nulmeting wetswijziging bestrijding financieel-economische criminaliteit

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Summary

Background

In past decades financial economic crime has increasingly become an important issue. This type of crime is perceived as being extremely lucrative, and with that, very attractive. The attraction lies in a combination of high profits, a small chance of being caught and relatively low penalties that might result from engaging in this type of activity.[1] In order to change this alleged attractiveness, the serving minister for Justice and Security drafted a bill that would strengthen the means available for investigating, prosecuting and punishing financial economic crime.[2] The bill aims to improve the means for fighting financial economic crime on one hand, and to facilitate higher penalties regarding (certain types of) financial economic crime on the other.

After the bill had passed through parliament the *Wet verruiming mogelijkheden bestrijding financieel-economische criminaliteit*[3], or Law for the expansion of means in combatting financial economic crime (hereafter: the law), came into effect on January 1st of 2015.

The law effectively makes ten alterations to the statutes of criminal law.[4] These ten alterations can be clustered around three categories:

- Procedural alterations (such as time limits for procedures regarding legal professional privilege);
- An increase in (maximum) penalties (such as higher maximum prison sentences or fines);
- Expansion of criminalisation to include new offences or specify new categories (for example money laundering through, or during the execution of, a profession or a company).

[1] Tweede Kamer 2012-13, 33685 nr. 3.
[2] Tweede Kamer 2012-13, 33685 nr. 3.
[3] Full title: Wet van 19 november 2014 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en de Wet op de economische delicten met het oog op het vergroten van de mogelijkheden tot opsporing, vervolging, alsmede het voorkomen van financieel-economische criminaliteit (verruiming mogelijkheden bestrijding financieel-economische criminaliteit) (Staatsblad 2014, 445 dd. 27-11-2014 en 513 dd. 17-12-2014).
[4] Not included in this study are the possibly relevant changes to the Uitleveringswet, Wet inkomstenbelasting en de Aanbestedingswet.

During the parliamentary discussion of the bill, member of parliament Berndsen (of D66) submitted a motion securing the evaluation of the law. It was intended this evaluation would focus on the feasibility, results and effectiveness of the changes the law makes.
In order to adequately evaluate the law in 2020, the WODC has contracted APE Public Economics bv to conduct a baseline measurement of the situation before the law came into effect.

Research questions

The problem at the root of this study can be defined along the following three themes:

1. What was the situation in 2014 with regards to the subcategories of investigation, prosecution and penalisation of financial economic crime that are altered by the law coming into effect?
2. In what way are the alterations to existing laws expected to contribute to the investigation, prosecution and penalisation of financial economic crime?
3. What necessary data is currently unavailable for the evaluation of the law in 2020 on the different aspects of feasibility, results and effectiveness, and should thus be registered to this effect?

The aforementioned themes have led to the following research questions.

Theory

1. What is the theory behind each of the alterations the law encompasses? How is each alteration expected to contribute practically to the objective of the law? What other effects might the law have?
2. What other factors influence the objectives or intended effect of the law in practice?
3. What disadvantages, risks, and possible bottle necks resulting from the alterations were mentioned before or with the coming into effect of the law? What consequences does this have for the expected feasibility, results and effectiveness of the law?
4. What indicators can be formulated for each of the alterations to criminal law, that can provide an indication on the state of affairs regarding combatting financial economic crime in terms of feasibility, results and effectiveness?

Practice

5. What data is available to the creation of an image of the situation in 2014?

6. What was the state of affairs regarding combatting financial economic crime in 2014?
7. What data is not currently available, but is necessary in order to adequately evaluate the law in terms of feasibility, results and effectiveness?
8. In what way and by whom should this missing data be registered to benefit the future evaluation?

Objective of the baseline measurement

Measuring the baseline, the situation before the law of 2015, serves the adequate evaluation of the law in 2020. The evaluation in 2020 is likewise to focus on the feasibility, results and effectiveness of those aspects altered in the system of criminal justice regarding financial economic crime.

Firstly, this baseline measurement aims to clarify how the different alterations are expected to contribute to the improvement of the system of criminal justice in place to combat financial economic crime. These suppositions are then to be operationalised in a set of indicators. Aim of this baseline measurement is thus not primarily to test the utility or necessity of the law.

Secondly, the baseline measurement is focused on data. The objective is to provide values matching the formulated indicators, to the extent that a clear image of the state of affairs regarding the combat of financial economic crime before the law emerges, simultaneously illuminating missing data.

Research method

The research questions are answered with a mixed-method approach, using both qualitative and quantitative methods. Adopting a mixed-methods approach increases the reliability of results. We use a combination of desk research, interviews and data collection and analysis.

Desk research
On one hand, the purpose of the desk research is to reconstruct the theory behind the policy (or in this case law), simultaneously taking into account context, other factors and disadvantages, risks and possible bottle necks (to answer research question 1 to 3). On the other hand its objective is to find starting points in the formulation of indicators (research question 4).

Interviews
In interviews with representatives of the ministry of Justice and Security and with actors from the criminal justice system (police, FIOD, Rijksrecherche, FIU, judiciary, legal professionals, public prosecution offices, DNB, BFT) the policy theory was deepened and tested. In these talks the perceived problem to which the law is thought to pose a solution were discussed. In addition the interviews were utilised for taking inventory of the available data and testing relevant indicators on their explanatory strength, reliability and validity. The interviews were not held with the idea of gathering experiences representative of the entire justice system regarding financial economic crime, but rather to gain insight in the supposed effectiveness of the different alterations made by the law. In total 23 interviews were held.

Data collection
In order to answer research questions 5 and 6 the available data was collected and presented. The main source for data was the Fact Factory, the department of the public prosecution office that registers and analyses data.

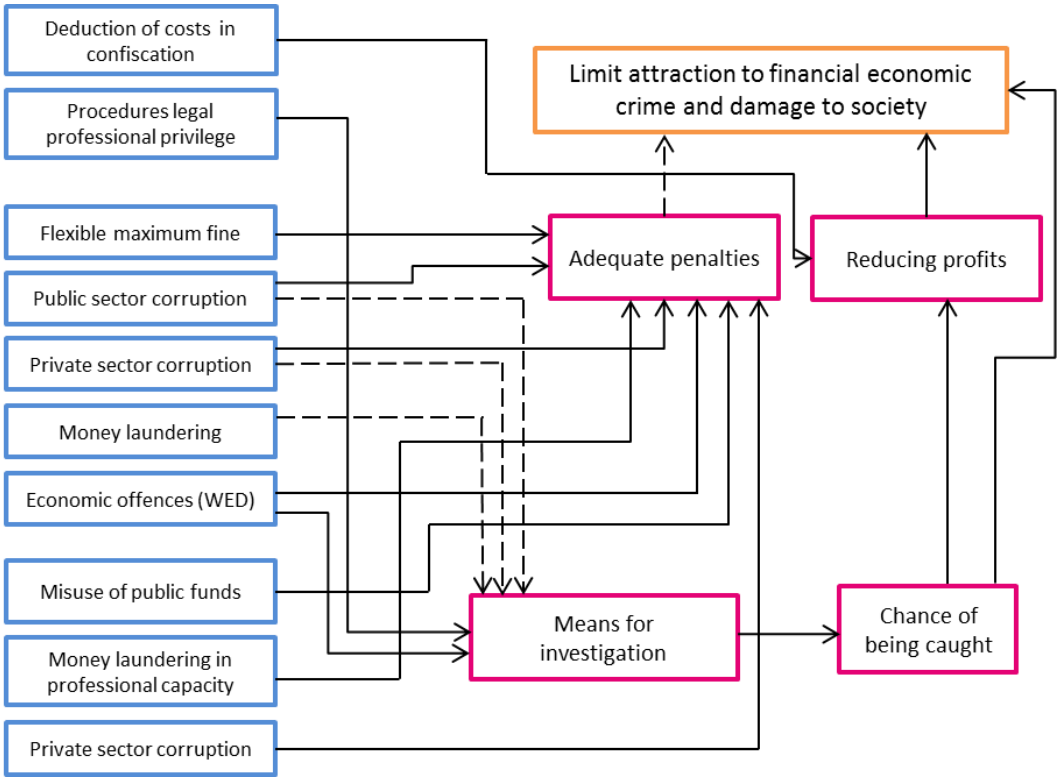
Primary findings

Chapter 2 of the report is dedicated to research questions 1, 2 and 3. Chapter 3 focuses on research question 4 and chapter 4 on questions 5 and 6. The last chapter, 5, regards questions 7 and 8.

Chapter 2: Background and intended effects of the law
Chapter 2 contains the reconstruction of the policy theory behind the law, including the motivation and suppositions on the workings of the law (research question 1), as well as the discussion on the validity of these suppositions. The discussion in turn includes contextual factors of importance and disadvantages, risks and possible bottle necks (research question 3). More generally, the discussion regards the extent to which the supposed workings of the law are logical and consistent.

The cabinet's main goal is to decrease the damage caused by financial economic crime to society as a whole, by limiting the attractiveness of this type of criminal activity. The explanatory memorandum states that the large profits, low chance of being caught and relatively low penalties for this type of crime need to be addressed. Apart from limiting the pull of financial economic crime, the possibility of higher penalties for financial and economic crime is also a goal in itself. To achieve these goals ten alterations to criminal law have been made. Figure 0-1 provides an overview of these alterations and to which goals they relate. The figure shows how the primary objective (orange), the aforementioned specific objectives (pink) and the ten alterations (blue) relate to each other.

Figure 0-1 Alterations and their relation to the main objective of the law



Adequate penalties

The majority of the changes the law makes, are to ensure the possibility of higher penalties and are thus meant to provide adequate or more fitting punishment. Often more severe penalties are the goal in itself. The policy theory behind increasing penalties also supposes that it can have a deterring effect. In this way increasing penalties could contribute to the prevention of financial economic crime. The legislator explicitly mentions this as an objective in the creation of a flexible maximum fine for legal entities.

Desk research and the interviews indicate that the need for higher maximum penalties is not generally subscribed to. The maximum penalties that were in place before 2015 were already perceived as adequate. This is predominantly substantiated by referring to the fact that the maximum penalty for financial economic crimes was hardly ever imposed. Furthermore, because of the possibility of taking into consideration all offences committed and their maximum penalty separately in sentencing, it was nearly always possible to exceed the maximum penalty for the primary offence already.

According to the prosecution office the exception in this regard are fines for legal entities. The prosecution office deemed the means at its disposal for fining legal entities as insufficient, especially when compared to the extent of fines and possibilities in other countries. It therefore greatly supported changing this maximum to a flexible limit depending on a corporation's revenues.

The legislator aims to send a signal to the judiciary in writing the law, to encourage them to increase the penalties they impose at sentencing. Interviews have shown judges to have different views on this matter. Some are of the opinion that the maximum penalty for an offence is a criteria in determining the severity of the penalty. Others emphasize that a great many other factors are at play in making this decision and that the maximum penalties up to 2015 were in no way limiting. The judges could not confirm that increasing the maximum penalties will indeed lead to a structural increase in the severity of sentences.

Lastly, the legislator supposed a deterring effect would result from increasing maximum penalties, which would contribute to preventing financial and economic crime. This supposition is not supported by desk research or in the interviews. The judiciary simply states that criminals do not look up the maximum height of the penalty they face before committing a crime. Research supports the idea that higher penalties do not necessarily have a deterring effect. [5] The deterring effect of this type of alteration will therefore likely be very limited. The respondents expect greater effects from prosecuting and sentencing perpetrators that are well known in their own field of business, or pursuing large cases with national impact. Research has not been able to indicate clearly the deterring effect of penalties on crime levels.[6] Many factors influence the amount of crime and is not possible as yet to effectively exclude all other factors to prove a causal relationship between legislation or penalisation and crime levels.

Reducing profits

Two alterations serve to reduce the profitability of financial economic crime. The first by limiting the costs eligible for reduction in the confiscation of unlawfully acquired funds; the second by making it possible to sentence legal entities to higher fines. Additionally, it is reasoned that by increasing the chance of being caught, the profitability of financial and economic crime is simultaneously decreased. Catching perpetrators is, naturally, a prerequisite for confiscating unlawfully acquired profit.

[5] Wingerde van, C.G. (2012). *De Afschrikking voorbij*: *Een empirische studie naar afschrikking, generale preventie en regelnaleving in de Nederlandse afvalbranche* (proefschrift). Nijmegen: Wolf Legal Publishers.

[6] Ibid.

Furthermore, better and more extensive means for investigating and research on criminal revenues which result from the law also contribute to limiting profitability.

Improving means for detection and increasing the chance of being caught

The legislator concludes that the chances of being caught in financial economic crime were low. Simultaneously, the chance of being caught is seen as the most important means of deterrence and therefore as essential to the combat of this type of crime.

Two of the alterations are explicitly aimed at improving the means for investigating financial economic crime. The first by introducing time limits for procedures regarding legal professional privilege and the second by officially categorising making a habit of committing offences under the Law on Economic Offences (WED), which is to be threatened by a higher penalty. The latter increases the means available in investigating such offences. Analysis of the academic literature and the interviews show that the increased maximum penalty for corruption (by civil servants and in the private sector) and money laundering can lead to a similar expansion of the means that investigative teams have to their disposal.

This greater jurisdiction results directly from the higher maximum penalties the law introduces. These provide the jurisdiction to take suspects into custody and prolong the statute of limitations for these types of offences. This approach is greeted with enthusiasm in the interviews conducted. The shortening of procedures regarding legal professional privilege is received in a similar manner. Respondents working in investigation do nuance their expectations regarding the improvement of detecting financial economic crime and the chance of being caught. They state that the available manpower is a very important factor in the chances of catching perpetrators. Their expectations regarding an increase in the amount of cases of financial economic crime that are successfully investigated therefore remain limited.

Chapter 3: Indicators

In chapter 2 of this report the coherence between the objectives and the alterations and their supposed workings has been set out, fulfilling the first objective of the baseline measurement. The second objective is to provide an image of the situation before the law came into effect, for the purpose of evaluating the law in 2020. To that effect indicators are formulated in chapter 3 that have been deduced from the supposed workings of the law and its objectives. The indicators describe the situation and practice that the law has altered per 2015, with the intention of realising the aforementioned three main objectives. This chapter revolves around research question 4: *What indicators can be formulated for each of*

the alterations to criminal law, that can provide an indication on the state of affairs regarding combatting financial and economic crime in terms of feasibility, results and effectiveness?

Indicators have been formulated for each alteration the law makes. In certain cases the indicators relate specifically to the alterations of the law, for example, the duration of procedures regarding legal professional privilege or the costs deducted from unlawfully obtained funds in their confiscation. Most indicators, however, represent financial economic crime more generally, for instance in terms of the number of cases relating to financial economic crime handled by the different actors in the criminal justice system or the sentences pronounced for this type of crime.

Chapter 4: Available data

In chapter 4 we present the available data and for which indicators it is not possible to find the relevant data. In that the chapter answers research questions 5 and 6: *What data is available for the creation of an image of the situation in 2014?* and *What was the state of affairs regarding combatting financial economic crime in 2014?*

The following table presents the availability of data for each of the alterations made by the law:

Table 0-1 Availability of data per alteration

Alteration	Availability data	Remarks
Duration procedures regarding legal professional privilege	-/+	It is not possible to identify the cases regarding legal professional privilege and the release of privileged information that have passed through council chambers. It has been possible to identify the cases regarding privileged information that have come before the High Council (Hoge Raad) in cassation. For these cases the average duration has been determined. The average duration of the total investigation for this type of case has not been determined.
Limiting cost reduction in confiscating unlawfully acquired funds	-	Costs subtracted in the confiscation of unlawfully acquired funds are not administrated. We do present data on the average amount of confiscated funds.
Flexible maximum fine for legal persons	-/+	Apart from cases under investigation by the police and the sentence demanded by the prosecution office, data is available for the set indicators.
Public sector corruption, private sector corruption, money laundering and offences under the Law on Economic Offences (WED)	-/+	It has proven impossible to incorporate data on the use of coercive measures, investigations by the police and the sentence demanded by the prosecution office. Likewise, information on the average amount of the transactions conducted by the prosecution office is unavailable. The indicators regarding the number of cases handled by the prosecution office and the judiciary, the number of transactions and penalties conducted by the prosecution office, the cases handled by the prosecution that were brought to court and the sentence pronounced by the judiciary have been determined.
Misuse of public funds	-	Nor the CBS nor the Council for the Judiciary (Raad voor de Rechtspraak) have the data needed to identify cases regarding the misuse of public funds handled under administrative law. It is therefore not possible to present values for this indicator.

As the table demonstrates, not all sought after data is available. In conclusion, two main problems have been identified:

- Firstly, it has proven impossible to incorporate police data on investigations in this study. Police data cannot be linked to the data provided by the prosecu-

tion office, because both organisations use a different system of classification. The police use a more general, societal system and the prosecution uses a system based on sections of law. Therefore, we do not have the correct data on the use of coercive measures in police investigations, nor for FIOD or Rijksrecherche investigations.

- Secondly, it has become apparent that the sentence demanded by the prosecution office in its indictment is not registered in the prosecution offices' systems. It has therefore not been possible to collect data on this indicator.

Chapter 5: Implications for the 2020 evaluation

Chapter 5 revolves around research questions 7 and 8: *What data is not currently available, but is necessary in order to adequately evaluate the law in terms of feasibility, results and effectiveness?* and *In what way and by whom should this missing data be registered to benefit the future evaluation?*

The extent to which statements can be made on the effect of the law with a level of certainty, is in part dependent on the completeness and reliability of the baseline measurement conducted in this study. We have to conclude that the data and/or indicators that can be used in the evaluation – which are available, have explanatory power, are valid and recent – are limited in certain areas. Suitable indicators include the duration of procedures regarding legal professional privilege at the High Council, the number of cases handled by the prosecution office and the judiciary and the severity of penalties. Other indicators cannot be measured against due to a lack of data or (consistent) registration by different actors in the justice system (for example duration of cases at lower courts, data on police investigations and the sentence demanded by the prosecution office). It is not the first time this conclusion has been drawn. The Netherlands Court of Audit (Algemene Rekenkamer) has already concluded that improvements are necessary in terms of reliability and completeness to the current practice of registration in the justice system. [7]

Investing in the registration of data relating to the indicators could increase the validity of the evaluation. A relatively small effort, with high returns, would be to register cases regarding legal professional privilege as such, making it possible to determine the duration of these cases. The added value of administrating for other indicators is less clear-cut.

[7] Algemene Rekenkamer, *Prestaties in de strafrechtketen*, Den Haag 2012. Algemene Rekenkamer, Vervolg op onderzoek "Prestaties in de strafrechtketen", brief aan Tweede Kamer d.d. 28 februari 2013.

The findings of this study lead us to the following considerations for the evaluation of 2020:

1. With the evaluation in 2020 the following two questions should be answered:
    a. *What* is the contribution of the law to the feasibility, results and effectiveness of policy aimed at fighting financial economic crime?
    b. *How* have the alterations to criminal law contributed to the effectiveness (including feasibility and results) of this policy?

    These questions can be answered by testing the policy theory (the practical effects of the law in 2020 versus the supposed workings of the law in 2014) and additionally by comparing the indicator values before and after the introduction of the law.
2. An evaluation based on the situation before and after the policy intervention is, when considering the characteristics of the subject under evaluation, the highest achievable and looks the most promising. This under the condition that a mixture of both quantitative and qualitative research methods is used.
3. *Quantitative research*
    a. Seeing the fluctuation in values attributed to the indicators in measuring the baseline, the relatively long duration of cases of financial economic crime, the delay in the availability of relevant cases and the relatively small number of cases, we advise to base the findings on a number of consecutive years in the evaluation in 2020, rather than over one year, just as was done in this study. This might mean, however, that the evaluation cannot be finalised in 2020.
    b. The set of quantitative indicators does show a number of gaps. Investments in quantitative indicators should be conducted with great thought, care and selectiveness. The relatively small amount of cases combined with elaborate contextual changes, in capacity available in the justice system and policy, will expectedly result in a limited impact of the alterations made by the law and limits the explanatory power of additional, improved and refined indicators. Even in an ideal (hypothetical) situation where consistent, reliable and recent values are available for a wide range of indicators that cover the entire justice system, there is still a need for other, more qualitative methods.
    c. In preparation of the evaluation in 2020, research could be conducted into the possibility of registering indicators regarding the duration of cases regarding legal professional privilege, the use of coercive measures that have become available as a result of the law, the registration of the demanded sentence by the

prosecution office and the registration of cost deduction in the confiscation of unlawfully acquired funds.

4. *Qualitative research*
    a. In addition to empirical data relating to the indicators, qualitative information is also needed for the 2020 evaluation. Possibilities for qualitative research methods include:
        i. Case studies at four large courts of justice or high courts (for example on the amounts of funds confiscated);
        ii. A survey among representatives of the public prosecution office or the judiciary;
        iii. In depth interviews with different actors in the justice system (Ministry of Justice and Safety, legal professionals, the judiciary, the public prosecution office, investigators etc.);
        iv. Desk research in order to take into account the relevant contextual changes after 2014. This study has shown that the effect of unrelated changes to criminal law in the coming (or current) years will need to be considered in evaluating the effect of the law of 2015.

    The qualitative methods focus both on answering the what-question (effect of the alterations) as well as the how (testing the policy theory). Is the policy theory plausible or did the supposed mechanisms result in different effects (the deterring mechanisms in relation to reputational damage, the influence of available capacity, prioritising the issue of financial economic crime and the influence of the law on the decision to prosecute or transpose cases etc.)?