'Strip-Them' Legislation in the Netherlands: Measures Concerning Confiscation of Illegally Obtained Profit in the Dutch Law

1. INTRODUCTION

Article 36e of the Dutch Criminal Code (WSr), the so-called 'Strip-them legislation', has significantly amplified the use of the legislative enactment of confiscation. At present, Article 36e WSr enables the application of statutory measures that provide for the confiscation of illegally obtained benefits:

1. as part of the charges in the main case for which the concerned person is convicted, or
2. following conviction on similar charges, or
3. in relation to charges for which a fine within the fifth category (Hfl.100,000,-) can be imposed and for which there are sufficient indications that the convicted person committed them.

On the basis of Article 36e section 3 WSr, the measure of confiscation can even be imposed as a result of other criminal offences, if it is plausible that these in any way resulted in the convicted person obtaining certain benefits unlawfully.

The conviction should then be related to the main offence; in other words, the offence in the main case for which it must also be possible to impose a fine of the fifth category.

Furthermore, in the circumstances mentioned in Article 36e section 3 WSr, a Criminal Financial Investigation (as described in Article 126 of the Dutch Code of Criminal Procedure [CCP]) should be undertaken. For the application of both sections 2 and 3 of Article 36e WSr it is necessary that the respective offences which have led to the profit are plausible; they do not need to be proven according to the Dutch Criminal Code.

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3. We like to thank Drs. A.M. van Kalmthout (Katholieke Universiteit Brabant, Tilburg, The Netherlands) for his valuable comments.
2. OBJECTIVE OF THE STRIP-THEM LEGISLATION

The primary objective of the Strip-them legislation is by means of various material and formal criminal instruments to provide an efficient way to prevent the increased number of organized and lucrative forms of (especially) international crime, such as drug trafficking, (international) fraud and environmental offences.

The main accent in the Strip-them legislation is upon the obtaining, or rather the creaming-off of unlawfully obtained property and all related objects of it, such as: houses, cars, race horses, including all profits obtained by the latter, such as rental money and profits gained from race horses.

3. SEPARATE FORMAL CRIMINAL PROCEDURE

In title III B Article 511 b-i CCP the new law adopts a separate procedure, with respect to the measure of confiscation of unlawfully obtained profits.

To begin with the confiscation procedure is separated from the criminal procedure of the main case. The confiscation procedure does not relate directly to the penalty that may be imposed on the basis of the behaviour and guilt of the person charged. The one and only question in the confiscation procedure is: 'Has the suspected person obtained any profit in an unlawful way,' and if that is the case, 'up to what amount of money can this profit be taken from him?'

From a financial perspective this corrects the situation by confiscating that amount of profit to which he is not entitled.

This separated procedure is intended to apply to those more complicated cases, e.g., if a criminal financial investigation is necessary. The reason for this is to prevent the trial of the main case being slowed down by investigations that normally take up considerable time. Exceptions to this rule can be made in situations in which the criminal financial investigation requires only minimal additional time to that of the investigation in the trial of the main case. In such a situation, the confiscation procedure and the main case can be dealt with in the same trial.

If a judge reaches the verdict that confiscation measures should follow, this verdict will be given separately from his verdict in the main case. This means that confiscation measures must be viewed as separate sanctions that do not form part of the sanctions of the main case.

As mentioned above, this does not mean that the trial on confiscation must be considered separately from the trial of the main case. The guiding rule, however, is that the main procedure must not be delayed in any way by the criminal financial investigation. The latter focuses primarily on unlawfully obtained property. This means that the confiscation procedure is not a secondary procedure relating to the same facts (this would concur with the ne-bis-in-idem principle) but just a branch of the tree of the procedure in the main case. Thus, the confiscation procedure is entirely dedicated to the questions whether or not there are any unlawfully obtained profits and if so, what are the size of them.