

## #33: Settlements and individual accountability

On [3 September 2018](#), ING Bank (further: ING) accepted and paid a settlement of € 775 million offered by the Dutch Public Prosecution Service (PPS) for violation of the Anti-Money Laundering and Counter Terrorism Financing Act and for culpable money laundering (Article 420quater of the Dutch Criminal Code. The largest transaction in history for the Netherlands. Not only the amount of the transaction makes this transaction memorable. Another remarkable fact is that no individual employees or managers will be prosecuted by the Dutch public prosecution service. What is the reason for this?

The Dutch Fiscal Information and Investigation Service (*'Fiscale inlichtingen- en opsporingsdienst'*, further: FIOD) started an investigation when several criminal investigations by the FIOD into corruption and money laundering revealed that suspect persons and legal entities held bank accounts with ING. This gave rise to the suspicion that ING had violated several articles of the Anti-Money Laundering and Counter Terrorism Financing Act (*'Wet ter voorkoming van witwassen en financieren van terrorisme'*, further: Wwft) and was guilty of culpable money laundering (Article 420quater of the Dutch Criminal Code). For some insights in the crime money laundering I refer to Lawlunch #09.

The FIOD started a criminal investigation into ING, under the name 'Houston'. As part of this investigation, multiple search and seizures were carried out at ING. In addition, various data provision requests were issued to third parties.

Not long after the start of the criminal investigation, ING indicated that they were willing to cooperate with the investigation. ING provided relevant documents and information to the PPS. ING also conducted its own internal

investigations.

The investigation led to the conclusion that several compliance checks have not been met. These structural shortcomings were the result of various underlying organizational causes, mainly inadequate internal controls and fragmentation, a lack of attention and a 'business over compliance' attitude.

These investigative findings eventually led to the following criminal allegations: violation of a number of provisions of the Wwft, on multiple occasions, on a habitual basis. In addition, ING was guilty of culpably money laundering on several occasions during a period from 2010 up to 2016.

ING should have reasonably suspected that some of the cash flows through its clients' bank accounts originated from some form of crime. ING received several signals about specific clients that should have resulted in a suspicion of money laundering. Due to the way in which ING did not comply with the applicable laws, it often missed signals of money laundering, stand did not report those

The criminal investigation revealed that responsibility for compliance lay with three different divisions of ING. None of these units felt responsible for and oversaw the entire picture. Many were jointly responsible for part of the culpable behavior. Based on this, the OM qualifies the conduct as illegal acts carried out by a legal entity.

The investigation showed that several individual employees and managers made mistakes. However, the public prosecution is of the opinion that there is no sufficient evidence to make criminal accusations against these individuals. Instead, the offenses are attributed to the organization as a whole.

It seems that if an organization is fragmented in several divisions no specific person can be held accountable for the mistakes. For this reason no private individuals will be

prosecuted an only a settlement was offered to the public prosecution.

What was the reason for the public prosecutor to offer a settlement?

Based on article 74, paragraph 1, of the Dutch Criminal Code, the public prosecutor has the power to make out-of-court settlements. A transaction is a financial out-of-court settlement. In cases of high settlements like this case, the Designation Order for High Settlements and Special Settlements applies (*'Aanwijzing hoge transacties en bijzondere transacties'*). This designation includes the basic principle not to settle in such cases, unless there is a very good reason for doing so.

The PPS sets out the following good reasons for settling with ING:

- ING publicly acknowledges and regrets the mistakes made, in the form of [a press release issued by ING](#);
- ING cooperated in the criminal investigation by making relevant documents available and making efforts to make witnesses available for questioning on short notice. ING also investigated the matter internally and reported the outcomes of this internal investigation to the OM;
- ING will allow the Public Prosecutor to investigate possible criminal offenses arising from shortcomings to which the settlement relates;
- ING has developed and implemented a long-term remediation plan to tackle the shortcomings in an expedient and sustainable manner and to remedy them permanently for the future. The development, carrying out and progress will be supervised and monitored by the Dutch Central Bank (DNB).

As part of this settlement, ING is taking responsibility for

criminal offenses committed over a period of several years. The amount paid by ING consists of a fine of € 675 million and of the confiscation of unlawfully obtained gains amounting to € 100 million. Transparency and cooperation were thus the two key elements for this settlement. However, we think it is questionable that if the criminal offences cannot be attributed to one single individual that a legal entity is culpable of a criminal offence. We do not think that the sum of neglected behavior of different divisions of a legal entity lead to the accountability of criminal behavior of a legal entity.

If you have any questions about the possibility to settle a case with the public prosecution please feel free to contact us via [boezelman@hertoghsadvocaten.nl](mailto:boezelman@hertoghsadvocaten.nl) and [boer@hertoghsadvocaten.nl](mailto:boer@hertoghsadvocaten.nl).