

#18: What is the profit of money laundering?

In [Lawlunch #09](#) we gave a brief overview of the relevant jurisprudence regarding the crime of money laundering. Furthermore we stipulated that money laundering is a beloved 'catch all' charge of the Dutch Public prosecution. It is often used as a safety net to get an easy conviction. Since 1 January 2017 of this year new legislation on 'simple money laundering' has come to force and created even more opportunities for the prosecution. Another reason for the public prosecution to charge someone with money laundering is that they believe that it is an easy way to recover illicit assets. Recent jurisprudence however shows that the prosecution service has to step up it's game in order to achieve that goal which might not be as easy as the prosecution would like it to be. Articles 33a and 36e of the Dutch Penal Code are the basis of the confiscation of proceeds of a crime. The provisional measures to seize these proceeds are set out in articles 94 and 94a of the Criminal Procedure Code. Confiscation measures pursuant to article 33a and 36e are both conviction based. While confiscation under article 33a must take place in relation to specific types of property or assets – which may also include instrumentalities – confiscation measures under article 36e are value based and can only be applied to proceeds.

The scope of article 36e goes beyond that of article 33a as the latter only covers proceeds or instrumentalities of the crime for which the criminal conviction was obtained. However, article 36e provides for confiscation not only of proceeds of the crime the conviction is based on, but also of offenses that are likely to have been committed in the course of the sanctioned act.

If a conviction is based on money laundering the question is whether the money that has been laundered can be confiscated. Or in other words can the money that has been laundered be regarded as proceeds of this crime?

The Dutch Supreme Court judged on [29 November 2016](#) with reference to its jurisprudence in 2013 that a Court should motivate why the proceeds derive from the crime itself, in this case money laundering. A fairly recent judgement of the [Court of Amsterdam](#) applied this jurisprudence of the Supreme Court clearly.

In this case the suspect was convicted in an earlier judgement to 18 months of imprisonment for habitual money laundering with tax fraud as predicate offence. The conviction for tax fraud was based on the fact that the suspect intentionally did not declare his income which was based in Luxembourg in his tax return. The convicted person laundered this money by making financial expenses using a credit card and cash withdrawals. The claim of the public prosecution to confiscate the proceeds of the crime was based on the crime of money laundering. The reason that the claim is not based on the predicate offence of tax fraud is because article 74 of the States Taxes Act states that proceeds of tax fraud cannot be confiscated by the public prosecution since these proceeds should be recovered by the tax inspector by imposing a(n additional) tax assessment.

The Court of Amsterdam refers to the jurisprudence of the Supreme Court of 29 November 2016 and states that the public prosecution should make clear what the profits have been of the crime of money laundering. The public prosecution stated that by laundering the money the convict was able to use the proceeds of his crime. However, this was not enough for the Court. The convict did not receive this money through the act of money laundering. The Court states that if the public prosecution wants to confiscate proceeds of money laundering it should make clear what proceeds have been generated by the

financial expanses made since this was the act of money laundering. For instance, if the convict bought a house with this money the increase in value could be regarded as proceeds of the crime of money laundering. Since the public prosecution did not provide any arguments which proceeds the convicted had generated the claim was dismissed by the Court.

As lawyers we need to stay on our toes and make clear distinction between proceeds of the crime of money laundering and the predicate offence in order to inform the judge(s) on this in every specific case.

Do you have any questions about this subject, are you struggling with a related issue or would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.