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**ADDENDUM TO NOTE**

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from: General Secretariat  
to: Working Party on Substantive Criminal Law  
No. Cion prop.: 7641/12 DROIPEN 29 COPEN 57 CODEC 656  
Subject : Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of the proceeds of crime in the European Union  
- Compilation of replies to the questionnaire

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By note of 22 June 2012 <sup>1</sup>, the Presidency issued a questionnaire in order to obtain more extensive information on the current legal definitions and practical application of non-conviction based confiscation in the Member States.

Delegations find in Annex the replies to the questionnaire by The Netherlands.

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<sup>1</sup> 11771/12 DROIPEN 87 COPEN 151 CODEC 1752.

Questions:

1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?
2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).
3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?
4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).
5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?
6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:
  - whose system requires a link to criminal proceedings
  - whose system applies civil forfeiture procedures.

Answers:

*Questions 1 to 4*

The Dutch Criminal Code (DCC) and Code of Criminal Procedure (CCP) provide for confiscation proceedings that are in part (as regards special confiscation) separate from the main criminal proceedings. Special confiscation proceedings can take place simultaneously with the main criminal proceedings, but also at a later stage. The confiscation proceedings aim exclusively at an assessment of the value of the proceeds of crime for the purpose of subsequently imposing a confiscation order. These special confiscation proceedings thus allow for extended confiscation and do not require determining guilt of any additional or specific criminal offences. The applicable standard of proof in these special confiscation proceedings is ‘the balance of probabilities’. In this context also presumptive evidence regarding the (illegal) origin of assets / property of the convicted person is used.

The provisions that are in place for conducting an extensive financial investigation are also part of the CCP.

Besides the above mentioned ‘value based’ system for (special) confiscation, also an object based – normal – confiscation system is in place. Also there the conviction of a criminal offence is a prior condition to confiscation.

Dutch legislation does not entail additional provisions allowing for the confiscation of the proceeds of crime without a prior criminal conviction. The Dutch delegation notes in this perspective that neither the criminal proceedings, nor the confiscation proceedings are hampered by illness or flight from prosecution under Dutch law.

## *Questions 5 and 6*

As confiscation relates to criminal conduct, the point of departure should in the view of the NL be that confiscation is regarded as a sanction or measure that is imposed by a court, following criminal proceedings. As is set out above, the confiscation proceedings may be separated from the criminal proceedings with a view to an accurate and comprehensive assessment of the proceeds of crime.

In general it can be said that the existing systems in the NL are functioning effectively in most situations. The introduction of a NCB system would therefore only have limited added value. Lack of necessity would be a cogent and principal objection to the introduction of additional provisions. It could be at the expense of the existing conviction based system, thus even harming the objectives of the draft.

It is however conceivable that the introduction of an NCB confiscation system may have added value in some very specific situations. In the NL such could be the case when a defendant dies either during the criminal proceedings, the confiscation proceedings or in anticipation thereof during the criminal / financial investigation. If this happens, the proceedings have to come to an end. Confiscation, even the confiscation of assets that have been frozen, is then no longer possible in these proceedings. It is also conceivable that the introduction of a NCB-procedure would deliver benefits compared to the launch of money laundering proceedings against inheritors.

For the reasons cited above the NL delegation supports the envisaged Article 5 of the draft, provided that the scope remains limited to some of the exceptional situations mentioned in this Article.

With regard to question 6 the NL delegation notes that under Dutch law it is possible to recognise non-conviction based confiscation orders issued by another Member State.