



Fiscal Information and Investigation
Service of the Netherlands
Tax and Customs Administration

Indirect Method of Proof

Providing Evidence in stand-alone money laundering investigations

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Introduction

"The original saying that evidence needs to point out that the object originates from a specific offence [...] is no longer viable. Keeping in mind the purpose of the legal provision and its history means that it is no longer necessary to point out who, when and where the predicate offence was committed" – Dutch Supreme Court, 2004

Dutch money laundering cases of the last decade have shown that it is possible to fairly convict suspects of money laundering without proving a predicate offence. It is sufficient that proof is provided which points out the object doesn't originate from a legal source. The 'all crimes approach' of the Dutch money laundering provisions opens doors for law enforcement where they otherwise may remain closed.

The main aim of this report is to point out how, in a Dutch criminal investigation and prosecution, sufficient evidence can be produced in a stand-alone money laundering case. Secondly, and most importantly, it aims to claim that other countries with an 'all crimes approach' can do the same in their fight against money laundering. Other countries could take notice of the advantages to change their money laundering provisions from a so called 'listed approach' towards an 'all crimes approach'¹.

A European directive ([2018/1673](#)) on further harmonization of the criminalization of money laundering was adopted on 23 October 2018. The directive entered into force on December 2, 2018 and must be transposed into national regulation by December 3, 2020. In the notes to the directive is stated under 12: "In order for criminal law measures to be effective against money laundering, a conviction should be possible without it being necessary to establish precisely which criminal activity generated the property, or for there to be a prior or simultaneous conviction for that criminal activity, while taking into account all relevant circumstances and evidence. It should be possible for Member States, in line with their national legal systems, to ensure this by means other than legislation." This notion is made specific in article 3 of the directive.

A step-by-step plan as laid down by the Dutch Supreme Court in 2013 enables a successful prosecution for money laundering without proof of a predicate offence and to prosecute cases where the prosecution of the predicate offence itself is time barred. As Dutch jurisprudence points out, stand-alone money laundering cases can now be investigated not only more successfully but also more efficiently. At the same time, essential (human) rights such as the right to remain silent, the right against self-incrimination and the presumption of innocence are upheld.

1 FATF Recommendation 3 states that countries 'should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.' In the interpretative note it says that "when proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence." This last remark in the Interpretive note seems not to be in line with Recommendation 3 and the 'listed approach' many countries still have. For Recommendation 3 to be effective, allowing investigation and prosecution to use the exclusion method, AML provisions should be formulated as an 'all crimes approach'.

Stand-alone money laundering cases refer to (preliminary) investigation where there is no concrete sight or evidence regarding the true source of origin of an object or a specific predicate offence.

In stand-alone money laundering investigations the purpose is to find the truth about the money laundering offence and the offenders when there is no (direct) evidence of the underlying criminal source of origin. Investigating a possible predicate offence as such is *not the purpose* of a stand-alone money laundering investigation. When illicit proceeds surface after many years in the form of an unknown offshore bank account, a money laundering case can be successful but a successful investigation of the original crime, e.g. a drugs transaction in 1995, will be highly unlikely. This also makes it a second chance for law enforcement in situations where the predicate offence went by unnoticed.

Investigating stand-alone money laundering cases is relevant because of four main reasons:

- 1) A money laundering investigation can be started without having sight on a previous predicate offence.
- 2) A conviction can be reached in a money laundering case although there is no (or not enough) evidence for the predicate offence.
- 3) It is possible to confiscate proceeds of crime from a previous offence through a conviction for money laundering without jeopardizing the *ne bis in idem* principle. It could be for instance that a person is convicted for the predicate offence and years later for a money laundering offence.
- 4) It is possible to investigate and convict the facilitator or a person who was not involved directly in the crime but is accountable anyway (e.g. a money mule, bitcoin trader, partner of a criminal).

For the completeness of this report a short explanation of the Dutch decision-making framework that judges need to follow in any type of criminal case is given. Also, the money laundering provisions in the Dutch Penal Code will be presented and analysed. Important to keep in mind is that the element 'originates from any crime' is the most essential one. This 'all crimes' approach is determinative for the possibilities set out in this report. Differences between the Dutch provisions and those of other countries on other elements are just minor and have no consequences for the meaning of this report. In chapter 3, the framework of stand-alone money laundering investigations will be explained. Chapter 4 will analyse the individual six steps in the step-by-step plan by presenting noteworthy examples of Dutch jurisprudence.

2 The Dutch legal system regarding money laundering

2.1 **The general decision-making framework**

Before analysing the Dutch decision-making in stand-alone money laundering cases specifically, a short overview of the decision-making framework itself will be provided. The Dutch Criminal Procedural Code requires the judge to answer a couple of questions in a certain order before he can come to a verdict. Articles 348 and 350 CCP are considered to be at the core of Dutch criminal procedure as it ensures that the judge does not skip crucial aspects of a case or breach the right to a fair trial. Article 348 and 350 CCP oblige the Court to deliberate and decide on the facts as laid down in the indictment and as presented during the Court hearing. The Court is furthermore bound by the indictment and may only judge on the facts in this indictment.

Article 348 lays down formal 'pre-questions': questions that relate to formal aspects of a trial. These four questions are as follows:

- a) Is the summoning valid?
- b) Is the judge competent?
- c) Is the prosecutor admissible?
- d) Are there grounds for suspension of the prosecution?

These questions need to be answered in this specific order at all times. If the outcome of one of the questions is not answered positively, the judge will not be able to continue to the next question and the trial will be ended.

When all four questions are answered positively, the judge moves on to the questions in article 350 CCP. In chronological order they are laid down as follows:

- a) Has the indictment been proven?
- b) Do the proven facts lead to a criminal offence?
- c) Is the perpetrator punishable?
- d) What sanction should be imposed?

2.2 **Money laundering provisions in the Dutch Penal Code**

Until December 14th 2001, money laundering cases were prosecuted according to the provisions of art. 416 (fencing) of the Dutch Penal Code. However, jurisprudence hindered the prosecution of criminals who laundered their own criminal profits which therefore called for an independent money laundering offence in the Penal Code.

As of December 14th 2001, the Netherlands upholds an independent money laundering offence in the Penal Code. As of 2015, some adjustments in the penal provisions were made that concern aggravation and the criminalization of money laundering in a profession or business.

Money laundering is laid down in the following articles of the Dutch Penal Code:

Section 420bis: Intentional money laundering

1. *Anyone who:*
 - a) *Hides or conceals the true nature, the origin, the place where it was found, the disposal or the relocation of an object, or hides or conceals who the person holding title to the object is or who has it in his possession, whereas he knows that the object originates – directly or indirectly – from a criminal offence;*
 - b) *Acquires, possesses, passes on or sells an object, or makes use of an object, whereas he knows that the object originates – directly or indirectly – from a criminal offence;*

Shall be guilty of money laundering and liable to a term of imprisonment not exceeding six years or a money fine of the fifth category.
2. *Objects include any items of property and any property rights.*

Intentional money laundering appears when the suspect knew or knowingly exposed him/herself to the reasonable chance that the object originated from any crime.

Article 420bis. 1 Basic (intentional) money laundering (date of entry 01-01-2017)

Money laundering that only consists of the acquisition or possession of an object that immediately originates from any of his own crimes, will be punished as basic money laundering with imprisonment not exceeding six months or a fine of the fourth category.

This new offence fills the gap in the criminalisation that has developed in jurisprudence, when someone launders proceeds that directly originate from his own predicate offences by only acquiring or possessing them. The new provision prevents impunity at the time when conviction for the predicate offence is not possible and no proceedings have been carried out that are actually intended to conceal and disguise the criminal origin. In such a case one can be convicted of basic money laundering.

Section 420ter: Habitual money laundering

1. *Anyone who makes a habit of committing money laundering is liable to a term of imprisonment not exceeding eight years or a money fine of the fifth category.*
2. *The same punishment applies to anyone who commits money laundering in the pursuance of his profession or the operation of his business.*

This is a more aggravated variant of intentional money laundering for habitual money laundering and money laundering in a profession or business.

Section 420quater: Negligent money laundering

- a) *Hides or conceals the true nature, the origin, the place where it was found, the disposal or the relocation of an object, or hides or conceals who the person holding title to the object is or who has it in his possession, whereas he should reasonably*

suspect that the object originates – directly or indirectly – from a criminal offence;

b) Acquires, possesses, passes on or sells an object, or makes use of an object, whereas he should reasonably suspect that the object originates – directly or indirectly – from a criminal offence.

2) Objects include all items of property and all property rights.

This is a variant that appears when the suspect should have reasonably suspected that the object originated from any crime.

Article 420quater. 1 Basic negligent money laundering (date of entry 01-01-2017)

Negligent money laundering that only consists of the acquisition or possession of an object that immediately originates from any crime, will be punished as basic negligent money laundering with imprisonment not exceeding three months or a fine of the fourth category.

This new offence fills the gap in the criminalisation that has developed in jurisprudence (the exclusion ground). See the explanation for basic intentional money laundering.

2.3 Characteristics of the Dutch money laundering provisions

Any Property

Object means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets;

Any Act

Any physical act or material elements are covered within the three articles.

Any Crime (all crimes approach)

Any previous crime suffices as a source of origin of an object, so does the tax offence. This means that every crime can serve as a money laundering predicate offence. This all-crimes approach has major benefits for the effectiveness of the money laundering provisions:

- There is no need to be able to prove from the available evidence, that the object in question is derived from a precisely indicated crime. There is no need to be able to prove by whom, when and where the crime was actually committed.
- For obtaining a conviction, it is required to establish that the object originates from any crime. This requirement is met on the ground that it cannot be otherwise than that the object - directly or indirectly - comes from a crime.

Furthermore the step by step plan set out by the Supreme Court makes it possible to investigate money laundering more efficiently.

Self-laundering

A legal entity and an individual who is not involved in the predicate offence falls within the scope of the money laundering provisions. In addition, the self-launderer falls within the scope, any legal entity or individual that launders funds originating from its own crime.

Limitation on self-laundering

A person cannot be found guilty of money laundering by the mere acquisition of an object from its own crime. A thief cannot be convicted for money laundering of an object at the moment he/she has stolen it. This trend has developed in jurisprudence and is known as the exclusion ground. The exclusion ground was repaired when the articles 420bis.1 and 420quater.1 came into effect on January 1st 2017. This type of money laundering is now punishable as basic money laundering with a maximum sentence of respectively 6 and 3 months of imprisonment.

Continuous offence

Limitation of the predicate offence does not affect the criminal liability for money laundering as long as it falls within the prosecutable time of the money laundering offence. This also applies to objects that come from crimes committed before the implementation of the money laundering provisions and still exist.

3 The framework for proving stand-alone money laundering investigations

3.1 The indirect method of proof

"In order to reach a conviction for money laundering it has to be proven that the object originates from any crime [...], a specific established predicate offence does not need to be proven" – Dutch Supreme Court, 2005

This quote from the Supreme Court can be considered as the essence of stand-alone money laundering investigations. The predicate offence needs not to be proven, sufficient is to prove that the object 'originates from any crime'. This means that if an object is not from a legal source it has to be from an illegal source. This indirect method of proof can be used in cases where there are no direct leads of a predicate offence in relation to the object. This may be because of the absence of a paper trail between an offence and the object; data (facts and circumstances) about a predicate offence may be lost at the time or because of the long period of time or because of the disguising and concealing nature of the money laundering.

The indirect method of proof is about excluding a legal source of origin and reaching the conclusion and the conviction that "it cannot be otherwise than that the object originates from any crime".

Excluding a legal origin adheres to the following steps:

- starting point: there is no direct link between the object and the profit from any predicate offence;
- excluding a legal source of origin of the object (exclusion method);
- establishing the relationship (e.g. receiver, owner, seller, user etc.) between the object and the suspect.

The exclusion method adheres to the 'follow the money' principle: from known legal sources, no visible connection can be found with the object (forward tracking). And, vice versa, from the object the money trail doesn't lead back to a legal source of origin (backward tracking, specific item funding).

Example:

When a person has no legal means of existence (salary, wealth), how is it possible that he can acquire an expensive car? The money trail from his bank account doesn't show any cash withdrawal or bank transfers to the previous owner/seller at that time. The administration of the seller shows a cash deposit, a lead which cannot be traced back to a (legal) source of origin.

The legitimacy of stand-alone money laundering investigations lies in the following aspects and Court rulings:

a) The suspect's statement

Court Decision: ECLI:NL:GHAMS:2014:1835

The court decided that it first needs to be determined whether or not the facts and circumstances as brought forward during the investigation are of such a nature that a money laundering suspicion can be confirmed. If this is the case it may be expected from the suspect to give an explanation regarding the source of origin of the money or the object.

In the case of the expensive car the only person who can shed some light on the matter is de suspect.

Court decision: ECLI:NL:GHDHA:2013BZ0631

From the case file it had become clear to the Court that a car was bought for €24.500 in cash by the suspect. The suspect however, had not enjoyed a benefit or income through salary in the relevant period when the car was bought. It is known that he had a debt of €6,917 to the tax authorities as well. The purchase of the car in such a financial situation therefore justifies, in the opinion of the Court, that in principle the car was purchased with money derived from crime. It is required of the suspect to explain the legal origin of the money that was used to buy the car with plausible explanations.

Legitimacy given by the suspect by providing a statement is an important aspect in stand-alone money laundering investigations. Within the indirect method of proof the statement of the suspect plays an important role. When there is a suspicion of money laundering and when the statement is unreliable with respect to a legal source of origin of an object then it cannot be otherwise than that the object originates from an illicit source. Refuting a statement is therefore tantamount to providing evidence. A statement can be made at any time during the investigation.

b) The right to remain silent

When a suspect refuses to provide a statement it can never contribute directly as evidence. This concerns the right against self-incrimination which forbids the government from compelling any person to give testimonial evidence that would likely incriminate him during a criminal case.

Even though the suspect has the right to remain silent from the moment a criminal charge has been set, this does not mean the suspect can easily get away with it. If a suspect does not give an explanation for a piece of evidence that points out suspicious circumstances, then the judge may involve this in his considerations. Such a circumstance must 'scream for a suspect's explanation'². Also, it has to be evident that when a suspect does not provide such a statement, the facts and circumstances will be completely unfathomable.

² Court of Appeal, 11-03-2010, LJN:BL7392

Court decision: ECLI:NL:GHARN:2010:BM7167

The Court of Appeal found that “even though the given circumstances create a situation that screams for a further explanation by the suspect, the suspect has remained silent throughout the preparatory investigation and has given evasive answers to questions about the loan and the current situation.” This contributed to the judge’s consideration and eventually the suspect was convicted for money laundering.

The development in Dutch jurisprudence has shown that it is possible to request the suspect to make a statement at a very early stage of the investigation. The courts have even set mandatory standards which the suspect’s statement must fulfil.

Nevertheless this development, it is a priority that remaining silent does not directly form part of the evidence³.

c) Standards of a suspect’s statement

Besides the right to remain silent, the suspect cannot be demanded to declare the truth. Nevertheless, the judge has made clear certain standards that the statement must adhere to. It has to be concrete, verifiable and not highly unlikely beforehand. Furthermore, it has to be in line with the story told in other statements made⁴, not be contradictory on its own and be sufficiently supported by (original) documents or (reliable) third-party statements. Once the evidence for money laundering increases and gets more and more substantiated, the suspect is required to provide more explanations⁵. The judge sets these standards *after* the public prosecutor has delivered a certain amount of evidence and persuasion. If a suspect refuses or is not able to give such an explanation, the court reaches the conclusion that “it cannot be otherwise than that the object originates from any crime”.

d) Legitimate documents

Documents such as invoices, income statements, (borrowed money) agreements, contracts, statements of reliable witnesses etc. can provide legitimacy during an investigation. These documents are (with some exceptions) to be considered as a statement given which play an important part in indirect methods of proof. When the documents that must point out a legal origin are falsified in further investigation, it will become clear that the object must originate from an illicit source. Refuting a statement such as a falsified document will be equivalent to delivering relevant evidence on the element ‘from any crime’.

e) Supporting evidence

With the indirect method of proof, additional supporting evidence on the element ‘from any crime’ will be considered. Examples include:

- a criminal background of the suspect;
- leads of a predicate offence (a ‘scent’ of an offence);
- indicators of Money Laundering;
- money laundering typologies;
- facts of common knowledge regarding money laundering.
- no statements given by the suspect when expected.

3 Supreme Court, 15-06-2004, nr. 2619.03

4 Court of Appeal, 27-10-2011, LJN: BU2943

5 Court of Utrecht, 27-02-2012, LJN: BV7114

3.2 **Only steps away from a conviction (or acquittal)**

In 2010, the framework for proving stand-alone money laundering investigations was laid down⁶. In it the Supreme Court agreed with previous reasoning by the court that evidence clearly points out that a criminal origin can be considered as the only acceptable explanation of the money. The Court had reasoned as follows:

- i. The investigation in this case has yielded no direct proof that the money originates from any crime.
- ii. The facts and circumstances as set out by the Court are of such a nature that a suspicion of money laundering can be safely assumed.
- iii. Taking these circumstances into account, it may be expected of the suspect to give an explanation for the origin of the money.
- iv. The suspect has done this.
- v. The suspect has given a concrete, more or less verifiable and not highly unlikely explanation regarding the origin of the money.
- vi. In the absence of direct proof for 'originating from any crime' and when the suspect gives a verifiable statement regarding the origin of the money, it is up to the public prosecutor's office to investigate if the suspect (the main lender) had interests in cambio-enterprises, "which the Court may consider to be an alternative origin".
- vii. Such research has not been carried out, or at least the Court has not found such results in the file.
- viii. Therefore a sufficient degree of certainty cannot be accredited to the given that the money has a legal origin and a criminal origin cannot be considered as the only acceptable explanation of the observed facts and circumstances. The charges against the suspect have thus not been proven convincingly.

This type of reasoning closely resembles the current step-by-step plan. Step iv and vii are no longer exact steps to be proven but are combined with other steps. In 2013 the Court in the 'steps-case'⁷ laid down the framework for a conviction of money laundering without a known underlying offence. It therefore represents a noteworthy moment in the development of Dutch money laundering jurisprudence.

The six steps were laid down and can be summarized as follows:

Step 1: No direct evidence of a specific predicate offence

The specific predicate offence is unknown or cannot be proven. The fact that (e.g.) there is a criminal record is no direct indication for the fact that the object originates from this predicate offence.

Step 2: A suspicion of money laundering

The trial judge should take the following steps during the review. First, it needs to be determined whether the alleged facts and circumstances are indeed contributing to a suspicion of money laundering. To come to this suspicion, money laundering indicators (such as general knowledge and money laundering typologies) can be used.

⁶ Supreme Court, ECLI:NL:HR:2010:BM0787

⁷ Court of Appeal 11 -01-2013, ECLI NL:GHAMS 2013:BY8481

Step 3: Statement by the suspect

If there is a suspicion of money laundering the suspect can be expected to make a statement about the origin of the object that is suspected to originate from money laundering. The facts and/or circumstances 'call for an explanation'. If a suspect refuses to make a statement this may also be taken into consideration in the conclusion that an object originates from crime.

Step 4: Requirements for a suspect's statement

Such a statement needs to be concrete, more or less verifiable and not be considered highly unlikely beforehand. In addition, the court determined that, apart from the possible legal source, the flows of money must also be set out clearly.

Step 5: Decision on investigation of suspect's statements

If the statement meets these criteria, it is the public prosecutor's task to investigate the alternative origin of the assets as stated by the suspect.

Step 6: Court decision

"From the results of such an investigation it will need to be proven that it can be excluded with sufficient certainty that the sums of money and goods to which the suspicion relates, have a legal origin and therefore that a criminal origin has to be considered as the only acceptable explanation.

In the next chapter these six steps will be analysed using relevant jurisprudence.

4 Analysing the six steps

Court of Appeal 11 -01-2013, ECLI:NL:GHAMS:2013:BY8481

In this particular case the suspect was on trial for money laundering with regard to the purchasing of a number of cars with money from an illicit source of origin. There was found to be no direct evidence to prove the predicate offence. According to the Court the suspect was unable to fulfil the criteria for the required statements as he remained silent during the largest part of the investigation and gave an unsatisfactory explanation with regard to the purchasing and sale of the cars.

The suspect therefore failed to provide evidence for the legal funding of the cars. Together with the lack of any type of rental agreement or consistent statements of the supposed car users, the Court came to the conclusion that the origin of the assets used for the car purchasing/sale cannot possibly be from a legal origin. By following the step-by-step plan the Court was able to reach a conviction for money laundering without having concrete proof on the predicate offence.

Step 1: no direct evidence of a specific predicate offence

There is no need to first investigate the predicate offence to find possible evidence. When there is no direct link or evidence the indirect method can be used right away. When there is the possibility of investigation the predicate offence the indirect method can still be used however it raises the question what the most effective route is. When there is direct evidence for a predicate offence which relates to the object, it is not necessary to use the step-by-step plan. When there is a direct link between the predicate offence, the illegal money derived from it and the object, it can be easier to just further investigate the predicate offence. When there is a lack of evidence regarding a specific predicate offence the way to prove that an object is derived from a crime is with the indirect method of proof.

Step 2: suspicion of money laundering

After gathering (additional) intelligence from open and closed sources, analysis could lead to a reasonable suspicion of a money laundering offence. A reasonable suspicion can be based upon (a combination of) the following arguments:

- the fact that the source origin of the funds is not clear;
- the fact that the identities of the parties are not clear;
- the transaction does not fit the person's background or legal income;
- the fact that there is no economic or logical explanation for the transaction;
- a criminal background of the suspect;
- leads (or a 'scent') of a predicate or money generating offence;
- no statements were given (that met the statement criteria) to supervisory bodies / bank institutions when asked for;
- the presence of indicators of money laundering;
- the presence of money laundering typologies;
- the presence of facts of common knowledge regarding money laundering.

Next to (international) literature⁸ typologies and facts of common knowledge can be found in Dutch jurisprudence and in a publication of Dutch FIU.

Typologies

Typologies are objective experience-based characteristics that have indicated money laundering in the past. Known typologies in the Netherlands are⁹:

- The absence of a legal economic explanation for the currencies exchanged and the frequency of the exchanges.
- The absence of a legal economic explanation for the exchange of large monetary amounts.
- The absence of a legal economic explanation for the exchange of foreign currency.
- The transactions are not proportionate to the income.
- The cash exchange in a money-laundering cycle is often made to interrupt the "paper trail".
- Large amounts of cash in several currencies: it is generally known that various forms of crime involve large amounts of cash in various currencies.
- Physical transportation of large amounts of cash: the physical transportation of large cash amounts carries considerable security risks.
- The fact that the suspect has no known economic activity in connection with the countries with which transactions were conducted.
- The fact that several exchange transactions were carried out at different exchange offices or banks or at different branches on one day.
- The fact that the money was provided uncounted a number of times.
- The fact that money in small denominations was exchanged for large denominations a number of times.
- The fact that drug trafficking yields a lot of money in small denominations.
- The fact that drug trafficking yields a lot of cash in various currencies.
- The fact that the suspect had (has) many contacts with persons with a criminal record.
- The way in which the money was transported and/or offered.
- The fact that the suspect refuses to state anything about the origin of the money.
- The fact that it was obviously the intention to evade the reporting threshold;
- The fact that the suspect received a reward for the exchange transactions carried out by him/her.
- The fact that frequently making money transfers from the Netherlands to various persons in the Caribbean is often connected with the smuggle of cocaine from the Caribbean to the Netherlands.

8 E.g. indicators: the Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors, OECD 2009, www.oecd.org; money laundering typologies: FATF various reports, www.fatf-gafi.org.

9 <https://www.fiu-nederland.nl/en/general-legislation/money-laundering-typologies>

- Frequent use of money transfers (it is a fact that it is considerably more expensive to remit money abroad through money transfers than through bank transfers).
- The fact that Dutch nationals abroad have money in bank accounts opened there in order to keep it out of the sight of the Dutch authorities and/or Dutch investigation services.
- The fact that previous investigations have shown that exchanging British and Scottish pounds into smaller denominations outside the United Kingdom can often be linked to drug trafficking.
- Substantial monetary amounts in cash that cannot be found back in official records and cannot be justified by documents of regular commercial activities.
- Having large amounts of cash at one's disposal without a need for it on the basis of one's business or occupation.
- Unusual way of transport (hiding cash). For instance, hiding liquid assets in materials that are not intended for the transportation of money, such as: suitcase handles or drawbars, packs of diapers, shampoo bottles, wrapped in tights and hidden under clothes, hidden in the body.

Typologies as a result of investigations into the purchase and sales of virtual payment methods:

1. In a relatively short period of time repeatedly withdrawing substantial amounts of cash from (a) bank account(s), wholly or in parts, without any obvious economic necessity and in combination with several times receiving scriptural money (which amounts, in the case of the trader in virtual currencies apparently originate from the sale of virtual currencies).

2. Purchasing virtual currencies by which at least two of the following features are met:

- a. the purchaser offers his services via demand and supply sites on the Internet;
- b. the purchaser does not establish the seller's identity;
- c. the purchaser protects his own identity;
- d. the purchaser pays in cash;
- e. the purchaser charges an exchange fee which is unusual high;
- f. the transaction is conducted in a (public) place where a lot of people are present, which decreases the safety risks of the purchaser;
- g. a legal economic explanation for the way the exchange was made is not likely;
- h. the scope of the purchased virtual currencies is unlikely in relation to the average private use;
- i. as an exchange institution, the purchaser is unknown to the Chamber of Commerce and the Netherlands Tax and Customs Administration.

3. The purchaser and/or seller make(s) use of a so-called mixer at the sale of virtual currencies.

Facts of common knowledge in Dutch jurisprudence

Facts of common knowledge are notorious facts: facts or conditions that can be generally known and do not necessitate research from publicly available sources. They can contribute to a reasonable suspicion of money laundering but often lack a high degree of probative value and therefore

need to be supported with facts and circumstances as well as the result of the investigation into the defence of the suspect. The following facts of common knowledge are a few of many examples:

- It is a fact of common knowledge that the narcotic drug trade generates income (ECLI:NL:RBAMS:2015:714).
- It is a fact of common knowledge that various forms of crime go hand in hand with large quantities of cash, while denominations of €500,- in regular payments are a rarity (ECLI:NL:RBMNE: 2015:1838).
- It is a fact of common knowledge that physically carrying large amounts of cash constitutes a significant security risk (ECLI:NL:GHSHE:2015:1181);
- It is a fact of common knowledge that private persons possessing large amount of cash money is highly unusual due to the risk of theft or fire (in which case the money is not insured). These risks are generally accepted when it concerns money generated from crime (ECLI:NL:RBUTR:2011:BV2694).
- It is a fact of common knowledge that ascribing the name of another person other than the true owner unto property is done to conceal the identity of the true owner (ECLI:NL:HR:2012:BU7335).
- Saving large amounts of cash in a wardrobe is highly unusual due to security risks. Dirty money appears to make this risk acceptable (ECLI:NL:RBOVE:2015:2282).

Step 3: statement by the suspect

As has become clear in the step-by-step plan, the first hearing can take place shortly after a reasonable suspicion has been formulated, if this fits the overall strategy of the case. When a reasonable money laundering suspicion can be pointed out, the suspect is required to clarify the origin of the money or object. At this point the efficiency of the step by step plan becomes apparent. No additional investigating activities before asking the suspect about the source of origin could be an effective strategy.

To increase the effectiveness of the questioning of the suspect it must be done by asking open questions, detailed questions, in several separate hearings. This way the justification concerning the origin of the object or money and other circumstances that may be part of the origin will be made clear for possible further verification. Furthermore, detailed questions and multiple hearings will create a difficult situation for the suspect to deliver concrete and consistent explanations without bringing forward inconsistencies in a story regarding the veracity of the origin.

In this third step it is only of importance whether or not the suspect can point out the legal origin of the object. Compared to other finance-related criminal cases, the hearing of the suspect takes place in a very early stage and may lead to a conclusion of money laundering right away. This does not mean that the suspect needs to confess. If the statement does not meet the criteria set out by the court, then a conviction is within reach. Although many questions remain unanswered.

Court decision: ECLI:NL:RBNHO:2014:4920

In a case in 2014 for example, the suspect made use of his right to remain silent with regard to the origin of a large amount of money that was carried at Schiphol airport. The FIOD investigation pointed out that the suspect carried €4.215 in a shoulder bag and 81.600 dollar in his suitcase. The Court reasoned according to money laundering typologies that it is a general fact that Schiphol Airport is used for the import, export or transit of objects that may originate directly or indirectly from any crime which justifies a money laundering suspicion. The Court also pointed out the fact that the physical transportation of large amounts in cash is not common and involves a security risk. In addition, the money transported by the suspect was particularly hidden in the side walls and draw bars of the suitcase. These facts result in a reasonable suspicion of money laundering (step 2). The suspect remained silent and the Court concluded in the absence of any indication or statement regarding the legal origin of the money and together with the typology as described above, that a criminal origin has to be considered as the only acceptable explanation.

Step 4: requirements for a suspect's statements

In this step the content of the statement is of importance. Over the years a set of requirement for the suspect's statement have been developed by the courts. The statement needs to be concrete, more or less verifiable and not be considered highly unlikely beforehand. The suspect is also required to clearly set out the flows of money. To explain the meaning of these requirements five court rulings will be discussed. These are just a few examples. It is interesting to point out a few examples where the suspect *did* provide a satisfactory concrete, verifiable and not highly unlikely statement that turned out to have a positive consequence for the suspect.

Court of Appeal: ECLI:NL:GHSGR:2008:BC6500

In a case from 2008, the Court of Appeal found the suspect to deliver such a statement. First of all the Court found no proof for a predicate offence (step 1). Based on money laundering typologies, the Court then considered there was a justifiable ground for a money laundering suspicion as the suspect carried large amounts of cash money under questionable conditions (step 2). The suspect provided statements right from the beginning (step 3). The detailed facts given by the suspect in the statement that clarified the origin of the flows of money were checked but not disproved and therefore the Court concluded that the statements were concrete, verifiable and not highly unlikely (step 4). In this case the statements were therefore essential to prove the legal origin of the object and finally the Court did not convict the suspect for money laundering.

Court decision: ECLI:RBNHO:2014:4275

The suspect was being charged for money laundering as he carried €33.000,- at Schiphol airport. The suspect declared that he had borrowed the €33.000,- from family and friends which was later confirmed by three witnesses. Even though the statements made by the witnesses raised some questions, there was no reason to consider them to be highly unlikely (as is required for step 4). Also, a loan agreement between the suspect and the witness was made in writing after the suspect was

arrested and was therefore antedated. This did not form an obstacle for the statement to be concrete, verifiable and not highly unlikely. The Court therefore found there to be not enough evidence for money laundering.

Next, a few examples of statements that were *not* considered to be concrete, verifiable and unlikely:

Supreme Court: ECLI:NL:HR:2014:3687

In this case the Supreme Court analysed the suspect's statements and reached the following conclusion: part of the money found in the suspect's home originates from the coffee shop owned by the suspect. Another part of the money originates from family in Surinam who own several rice fields. Furthermore, the suspect is on the board of an organisation that is tasked with the exploitation of the rice fields. The suspect was unable to clarify what part of the money originates from where. Also, the suspect was unable to point out that the money originated from a legal origin. Therefore the statements "merely indicate the possible existence of a source of income. They do not make the flows of money transparent". The suspect's statement is therefore not concrete, not verifiable and unlikely.

Court decision: ECLI:NL:RBMNE:2014:2875

The suspect carried €3.000,- during his arrest and declared the money to originate from his work as a mechanic. However, the €3.000,- was split in sixty bills of €50,- each, the car the suspect was traveling in from Poland to the Netherlands carried narcotic drugs and the suspect was convicted for an opium crime in Germany. Therefore, the Court did not find his statement regarding the origin of the money to be concrete, verifiable and not highly unlikely.

Court decision: ECLI:NL:RBROT:2014:3504

With regard to an amount of money of €82.900,- that was supposedly generated through the trade in bitcoins, the suspect's statement proved to be insufficient. The Court argued that the origin of the money was not verifiable as it is impossible to prove the way the suspect got the bitcoins in the first place. The statement that the bitcoins were bought from various different persons in public places is not verifiable according to the Court. The Court therefore convicted the suspected for money laundering as it was deemed proven that the suspect tried to make it seem as if the money originated from a legal source (the trade in bitcoins). He therefore concealed and disguised the origin of the money.

Step 5: decision on investigation of suspect's statement

After a statement is given by the suspect that involves an explanation with regard to the origin of the money or object, it is the public prosecutor's task to decide whether he wants to investigate the presented alternative source origin of the object or not. He will look closely to the statements made by the suspect in relation to the criteria set out by the Court.

Additional investigation is essential in order to verify the statement when they meet the criteria. For example, often the suspect names other

persons that are involved in the origin of the money. Investigation needs to point out whether these persons are traceable or not.

If for example a suspect states that the origin of the object is legal and declared income, all fiscal information regarding the income of the suspect should be investigated. In such a case it is not up to the suspect to provide salary slips. The prosecutor can easily give order to investigate this. However when a suspect states he has a lot of undeclared income, it is a different scenario. This is not a concrete and verifiable statement without any further information from the suspect. In this case there is no obligation for an investigation into the statement. There are not enough leads to base the investigation on.

Court decision: ECLI:RBGEL:2014:4440

In this case the person that was mentioned in the statement of the suspect was non-traceable and therefore the statement itself was considered to lack verifiability. Important to take into account here is the fact that the suspect was unable to provide statements from business partners or other employees of companies or individuals with whom he was doing business. This would have made his statements more concrete and verifiable and perhaps would not have led to a money laundering conviction. An important aspect of step 5 is therefore the details from a statement. Giving as much additional information regarding the origin of an amount of money or an object that may point out certain professional relations or money transfers, can have a great impact on the final decision.

Step 6: court decision

If on the basis of the investigation referred to in step 5 it can be ruled out with a sufficient degree of certainty that the object the suspicion relates to has a legal origin, it can be concluded that it 'originates from crime'. After all, the only logical and likely explanation for the origin of the object is a criminal origin. If the suspect's statements are considered to be far from 'concrete, verifiable and not highly unlikely', the judge will rule that there is no legal origin and a criminal origin will be considered as the only acceptable explanation. As was described as an example, this is also the case if a suspect chooses to remain silent.

5 The ECHR on the indirect method of proof

On the second of May 2017 the ECHR ruled in a Belgian money laundering case: *Zschüschen v. Belgium*¹⁰. This ruling sheds light on questions about the infringement of suspect rights that come up when using an indirect method of proof in money laundering cases.

The Dutchman Zschüschen opens a bank account in Belgium in March 2003 and deposits a total amount of € 75.000 in 5 transactions within 2 months. Zschüschen has a history of drug trafficking and no income (in the Netherlands). A money laundering case is started against him in Belgium. Initially, he states that the money was earned with untaxed (undeclared) work during a four year period. He does not want to give the names of employers. During the entire proceedings he claims the right to remain silent. In 2006, Zschüschen is sentenced in Belgium (10 months' suspended sentence, a € 5.000 penalty and confiscation of the € 75.000).

Zschüschen first of all relies on article 6, par. 1 and 2 of the ECHR. More specifically on the breach of the right to a "fair trial", the presumption of innocence and the right to remain silent. The fact that the predicate offence is not specified during the proceedings, allegedly is a breach of his defence rights as well as a breach of the right to be informed promptly about the charges. In addition, article 6, par. 3 sub a ECHR is also relied on.

The vision of the ECHR

In summary, the conclusion of the ECHR is that Zschüschen loses the case on all counts.

Article 6, par. 1 and 2 (fair trial and presumption of innocence)

According to the ECHR, Zschüschen has given a vague and non-convincing explanation for the origin of the money and did not want to answer any further questions about this. The Belgian court took this refusal to provide an explanation about the origin of the money into consideration in the conclusion that the money originated from crime. According to the ECHR this is not contrary to the ECHR (right to remain silent and right not to incriminate oneself) now that there was also other proof in this case. This would only be different if the final assessment would be entirely or largely (*'exclusivement ou essentiellement'*) based on Zschüschen remaining silent.

In this case the facts and circumstances were such that his silence only confirmed the evidence that was already there. It was also taken into consideration that it should not be difficult for Zschüschen to substantiate his statement about the origin of the money. The conclusions drawn from his refusal to provide a statement are not unfair or unreasonable, but prompted by common sense.

Article 6, par. 3 letter a (prompt information about the charges)

The ECHR states that in line with Belgian legislation the suspect was informed adequately about the accusations against him, considering the clear and detailed description of the suspect transactions and the legal explanation regarding money laundering. As a result of this Zschüschen

¹⁰ [https://hudoc.echr.coe.int/eng#{"appno":\["23572/07"\]}](https://hudoc.echr.coe.int/eng#{), ruling only available in French, press release of 1-6-2017 in English.

knew what he had to defend himself against. The ECHR also states, and this is also relevant for the Dutch situation (and maybe also for other countries), that article 6, par, 3 letter a ECHR does not include the obligation to describe the specific predicate offence in the charges. After all, the predicate offence by means of which the money was obtained, is not the core of the accusations in the case of money laundering. In short, this ruling confirms that the Dutch tackling of money laundering cases, applying the step-by-step plan, is not contrary to the ECHR.

6 Final remarks

This report shows how, in a Dutch criminal investigation and prosecution, sufficient evidence can be produced in a stand-alone money laundering case. Other countries with an 'all crimes approach' can do the same in their fight against money laundering. It is known however that countries upholding an 'all crimes approach' often lack experience with bringing money laundering cases to court without providing evidence on the predicate offence as well. Money laundering is only being investigated as part of an ongoing investigation on a predicate offence. To a certain extent countries also seem to have reservations with starting or prosecuting stand-alone money laundering cases or even have policies implemented that require a predicate offence. This approach to money laundering cases is no longer viable given the in October adopted Directive ([2018/1673](#)) on further harmonization of the criminalization of money laundering. In order for criminal law measures to be effective against money laundering, a conviction should be possible without it being necessary to establish precisely which criminal activity generated the property, or for there to be a prior or simultaneous conviction for that criminal activity.

Countries maintaining a 'listed approach' are called upon to look at the benefits of stand-alone money laundering cases and change their money laundering provisions. When it is proven that the property originates from any crime, it should not be necessary to convict a person of a predicate offence. Furthermore, as this report and Dutch jurisprudence clearly points out, stand-alone money laundering investigations do not infringe the ne bis in idem principle or a suspect's rights. Stand-alone money laundering investigations make sure that those accountable (whether the person was directly involved in the crime or not) get investigated and prosecuted anyway.

The bottom line must be that no one knowingly can have access to proceeds of crime without the risk of being convicted for money laundering. There is still some work to do.