The Financial Execution Inquiry: A Bridge too Far?

A critical analysis of a new Belgian initiative

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

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CITATION SUGGESTION

F. Desterbeck, "The Financial Execution Inquiry: A Bridge too Far?", 2013, Vol. 8(2), eucrim, pp55–64. DOI: https://doi.org/10.30709/eucrim-2013-007

Published in
2013, Vol. 8(2) eucrim pp 55 – 64
ISSN: 1862-6947
https://eucrim.eu

I. The Financial Execution Inquiry

As already stated, the FEI is conducted by the Belgian Prosecution Service after a confiscation order has become peremptory. We will examine the purpose of and the reason for establishment of the investigation, and we will examine the role of the actors who take part in the investigation.

1. Purpose and Reason for Establishment

a) Purpose

The aim of the FEI is to inquire into the assets of convicted criminals who have been sentenced to the confiscation of, in principle, a sum of money that cannot be recovered by means of civil law. Besides confiscated sums of money, unpaid fines and legal costs can also be collected by a FEI. The purpose of the FEI is thus to seize and to capitalize the property of convicted criminals in order to recover confiscated sums of money, fines, and legal costs.

b) Reason for Establishment

In Belgium, a lot of authorities intervene where the execution of confiscation orders is concerned. The decision to grant a confiscation order is made by the trial judge. It is important now to already underline that, according to Belgian law, confiscation is always considered a punishment.[1] This is a fundamental distinction from Dutch law. Dutch law makes a distinction between a measure of confiscation, which is a punishment, and deprivation, which is not a punishment but merely a measure *sui generis* to reinstate the convicted criminal in the *status ante quem*. We will analyze this difference more deeply later.

The confiscation order is thus granted by the judge, the initiative for execution of the order lies in the hands of the Public Prosecution Service. The execution itself is the task of the Ministry of Finance, officially the Belgian Federal Public Service for Finance. When a sum of money is confiscated, which had not been seized during the criminal investigation, or when a value-based confiscation[2] is pronounced, the confiscation is considered a debt that has to be recovered according to the rules of civil law. Fines and legal costs are also recovered by the Federal Public Service for Finance according to the rules of civil law. In spite of the lack of precise statistics, practice has shown that the recovery of confiscated money does not pass off efficiently.[3] This causes a sense of impunity, which is of course detrimental to the maintenance of law and order in general.

It is generally accepted that the means of civil law, which are at the disposal of the tax collector of the Ministry of Finance, are not sufficiently effective to take action against a convicted person who organizes his own insolvency. In practice, the hands of the collector are especially tied when a convicted person sublets his property to a third party, or hides it behind company structures, or transfers it to a foreign country. By means of the FEI, the profits of the convicted criminal, obtained as a result of his having committed criminal offences, are traced and seized when he wants to back out of his sentence. The FEI ends when the confiscated sum of money has been completely paid or recovered, when the confiscated object is found – in the, presumably, rather rare case that such an object could remain hidden during the investigation –, and in case of preclusion of proceedings, e.g., by prescription.

2. Participants in the Inquiry

The FEI is conducted by the public prosecutor. The Asset Recovery Office can also be involved. When coercive measures are necessary, or in case of dispute, the "judge in charge of the administration of sentences"[4] is the competent person for dealing with the case.

a) The public prosecutor

The FEI is conducted by an organ of the Public Prosecution Service responsible for the enforcement of the confiscation order: the public prosecutor at the criminal court or at the Labour Court or the Prosecutor General at the Court of Appeal. According to Belgian law, the members of the Public Prosecution Service are magistrates of the judiciary, even though they are sometimes tasked with administrative assignments. As magistrates of the judiciary, they conduct criminal investigations and they prosecute the defendants. If coercive measures are necessary within the framework of a criminal investigation, they are ordered and enforced by an investigating judge.[5] However, the competences of the Public Prosecution Service to conduct criminal investigations and to prosecute come to an end when criminal proceedings become final and conclusive. A specific legal basis is necessary for investigations conducted after a final judgment that are within the scope of the enforcement of the judgment.

b) The Asset Recovery Office

The public prosecutor can delegate its competences to the Belgian Asset Recovery Office, the Central Office for Seizure and Confiscation (COSC).[6] The COSC is an organ of the Public Prosecution Service that is especially in charge of giving advice and rendering assistance to the judicial authorities in the execution of confiscation orders. A specific assignment of the office is also to maintain relations with the Federal Public Service for Finance for the same purpose. The office consists of about 30 staff members, among them four magistrates of the Public Prosecution Service. Delegation of competences to the COSC is seen by the legislator as an absolute added value. Apart from this, the COSC already has the competence to conduct an investigation into the solvency of convicted persons. In practice, however, not much use is made of that competence. This aspect will be examined in greater detail later.

c) The judge in charge of the administration of sentences

The authorization to carry out coercive measures, if necessary for conducting a FEI, must be rendered by the judge in charge of the administration of sentences.[7] This judge is the president of the tribunal that is responsible for the supervision of imprisonments. The intervention of the judge in charge of the administration of sentences is seen as necessary, especially for the protection of the rights of third persons who are hiding crime-related proceeds but who are not convicted by the criminal judge. The power of the judge in charge of the administration of sentences to control the intended coercive measure is very limited. The original text of the preliminary bill limited the competence of the judge in charge of the administration of sentences to an opinion about the legality and the proportionality of the measure intended. The expediency or the subsidiarity, thus the question of whether a certain measure should or should not be replaced by another, or the question of whether the measure was perhaps premature, may not be answered by the judge, according to the original text of the preliminary bill.

The Belgian Council of State had to give advice about the preliminary bill and asked itself whether it was appropriate to apply all coercive measures that are possible in the course of a criminal investigation to the new FEI.[8] The Council of State also criticized the limited competences of the judge in charge of the administration of sentences. Within the framework of the control of proportionality, it should be possible, according to the Council, to examine the possibility to replace an intended measure, which affects fundamental rights,

by another, which affects those rights less. This makes a certain form of control of expediency inevitable. As a result of this remark, the original text was adapted. According to the definitive text, the judge cannot only control the legality and proportionality but also the subsidiarity of the intended coercive measure.

The judge in charge of the administration of sentences is also the instance that has to decide on the legal remedies of persons who consider their rights to be prejudiced by an investigation measure (in practice, by a measure of seizure). The powers of the judge in charge of the administration of sentences is also limited to the legality and the proportionality of the disputed measure on this point. The control of the lawfulness of observations is tested *a posteriori* by the indictment division of the court of appeal. This is the same course of events as the control of observations during criminal investigations.

II. The Dutch Example

1. In General

The Belgian Financial Execution Inquiry is inspired by a Dutch investigation measure with practically the same name,[9] which was introduced into the Dutch Code of Criminal Procedure on the 31 March 2011.[10] The Dutch FEI cannot be seen as being separate from the specific action of depriving the criminal from his crime-related proceeds. In criminal cases, this action is carried out in parallel but not necessarily simultaneously with the legal action concerning the facts of the case.

The procedure of deprivation is enshrined in Art. 36e, al. 3 of the Dutch Penal Code. A deprivation action is only possible for serious crimes, for which fines of the fifth category are possible.[11] Furthermore, it has to be accepted that the offender has obtained criminal gains by his acts. The deprivation case is investigated and tried in parallel, but again not simultaneously with the legal action, concerning the facts. In practice, the deprivation case is usually tried after the judgment about the facts became peremptory.

For the calculation of the criminal gains, the investigation can go back in time for six years but this term can also be shortened under certain conditions. Not only can the facts, which are the subject of the criminal case, be used in this calculation but also other criminal offences, for which there are sufficient indications that they were committed by the convicted person. In practice, a comparison of assets is made for the fixed period of six years or less. Legally obtained income and assets are compared with income and assets, the legal origin of which cannot be proven. The difference between these two terms is the amount for which there is a presumption that it had been obtained by illegal gains. Otherwise, the burden of proof is divided: the public prosecutor adduces certain facts and circumstances that have to be refuted by the accused person.

2. The Aids: The Criminal Financial Investigation and the Financial Execution Inquiry

Concerning a deprivation case, two forms of investigation are possible: the Criminal Financial Investigation[12] and the Financial Execution Inquiry. The Criminal Financial Investigation can be conducted to determine the amount of the crime-related proceeds and to get an idea of the possessions of the defendant or the convicted person. Within the framework of this Criminal Financial Investigation, more intrusive methods of investigation can be applied than in the classical criminal investigation, which remains possible, also in deprivation cases. The Criminal Financial Investigation is applied in cases where the crime-related proceeds are considerable (more than €12,000). It can be launched following an action brought by the public prosecutor, under the authority of the examining judge,[13] or the judge who deals with the deprivation case. The judge can order the investigation in order to throw some light on the calculation of the level of the ill-

gotten capital gains. The Dutch Financial Execution Inquiry is conducted in the phase of the execution of the judgment of deprivation and can follow the Criminal Financial Investigation. The Dutch FEI is conducted when full payment of the amount imposed by the court in the deprivation case fails to occur within the deadline set by the public prosecutor, and there are indications that the convicted person has the means to pay at his disposal. The inquiry must reveal the property of the convicted person.

Just like the Criminal Financial Investigation, the Dutch FEI is the result of an action brought by the public prosecutor, under the authority of the examining judge, when, as a result of the deprivation verdict, considerable amounts of money have to be paid and there are indications that the convicted person has still possessions at his disposal. In this way, the Dutch Financial Execution Inquiry served as a model for the Belgian FEI.

III. The Existing Forms of Financial Investigation in Belgium

The Belgian legislator has also developed specific kinds of financial investigations to recover criminal proceedings. The "special financial investigation"[14] is the counterpart to the Dutch "deprivation investigation." In addition, the Belgian Asset Recovery Office has the competence to investigate the solvency of persons who have been sentenced. The most striking characteristic of both procedures is that they are not applied in practice. There is not enough specialized manpower to conduct the investigations, and there is also a lack of motivation on the part of the magistrates of the Prosecution Service to institute the existing procedures.

1. The Special Financial Investigation

This counterpart to the Dutch "deprivation investigation" was enshrined in Belgian legislation by law on 19 December 2002.[15] When the new law went into force, the preparatory works made explicit references to the already existing Dutch "deprivation investigation."[16]

a) Procedure

The procedure is enshrined in Arts. 43*quater* of the Belgian Penal Code and in 524*bis* of the Belgian Code of Criminal Proceedings. The procedure is only possible for a number of serious crimes, exhaustively enumerated in the law. These are, amongst others, corruption, money laundering, terrorist crimes, crimes committed within the framework of a criminal organization, and serious tax fraud. The investigation is conducted after the judge has pronounced a sentence on the guilt of the defendant and determined all penalties, except the confiscation itself. Because confiscation is a punishment in Belgian law, this means that an exception is made on the principle that, in criminal matters, the verdict on guilt and punishment must be laid down in one judgment. Before the introduction of the special financial investigation in Belgian law, the only exception on that principle had been included in the procedure before the Assize Court. The procedure before the Assize Court is reserved for the most serious crimes and is the only procedure in Belgium that involves a jury. At the end of the procedure before the Assize Court, a decision about the guilt of the defendant is rendered first and, in a later stage, a verdict on his punishment.

The special financial investigation is optional and can only be conducted when the public prosecutor proves that the convicted person, as mentioned before, obtained crime-related proceeds of a certain magnitude as a result of the crimes. The investigation is conducted by an order of the court that decided on the guilt of the defendant, under the direction and on the authority of the public prosecutor. Except for seizure, no coercive measures are possible. For the appointment of an expert, house searches, and telephone taps, the authoriza-

tion of the court that ordered the investigation is necessary. For the execution of a telephone tap, an investigating judge is appointed.

At the start of the investigation, a relevant period is determined. This is a time span of five years, before the moment that the convicted person was considered to be a defendant until the date of the judgment. For this period, a property comparison is made on the basis of two terms. The first term consists of the possessions, proven to exist by the public prosecutor; the second term concerns the possessions for which the convicted person can prove that they do *not* originate from the fact for which he has been convicted or from identical facts. Just like in the Netherlands, there is a division of the burden of proof: the public prosecutor adduces certain proceeds or facts that have to be refuted by the convicted person. The results of the investigation are submitted to the court by the public prosecutor within two years, counting from the date of the judgment that made the investigation possible. The court that confiscates the assets can decide not to take into account a certain part of the relevant period of the revenues, assets, and values, in order to prevent the convicted person from being subjected to an unreasonably heavy punishment.

b) Similarities to and differences from the Dutch deprivation procedure

There are striking similarities between the Belgian special financial investigation to recover criminal proceedings and the Dutch deprivation action, whether or not a Criminal Financial Investigation has been conducted before. Both kinds of investigation are only possible for serious crimes. In both cases, a reference period is determined, the investigation is conducted by the public prosecutor with the intervention of an investigating judge, and there is a shifting of the burden of proof.

The fundamental difference between both procedures relates to the very nature of the Belgian concept of confiscation, which is different from the Dutch notion of deprivation. In Belgian law, the concept of deprivation is unknown. All forms of deprivation are heaped together under the notion “confiscation.” There is more than a terminological difference between “deprivation” and “confiscation;” the difference is fundamental. According to Belgian law, confiscation is a punishment. According to Dutch law, deprivation is not a punishment but a measure that aims to create for the convicted person the *status ante quem*. The purpose of a punishment is to add harm to the offender because of his behavior and his guilt. A measure, however, is not aimed at the addition of harm but at the protection of society and the reparation of a legitimate situation. In the case of a deprivation action, this legitimate situation is repaired by depriving the convicted person of what *de jure* does not belong to him. The convicted person is brought back into the situation he had been in before committing his offences. In the process, his financial capacities, in principle, play no role. It goes without saying that the introduction of the concept of deprivation into a legal system is so fundamental that it requires an initiative on the part of the legislator that clearly introduces and defines the measure. Such an initiative was never taken in Belgium.

2. The Investigation of the Solvency of a Convicted Person by the COSC

This procedure is to be found in a law of the 26 March 2003 that regulates the competences and the functioning of the COSC.[17] Art. 15*bis* of the law gives the office competence to request information from the agencies that have to report suspicious transactions to the Belgian FIU. This information relates to financial accounts and safe-deposit boxes of which the convicted person is holder, representative, or ultimate beneficial owner. Information can also be requested about financial transactions, carried out within a certain period, and about the identity of the persons who had access to the safe-deposit boxes.

As has already been said, the COSC is a body of the Public Prosecution Service. The competence to conduct an investigation regarding solvency lies in the hands of the magistrates of the COSC (four in number). When the investigation indicates that the convicted person possesses funds, the COSC has the power to freeze

these assets for a maximum delay of five working days. The freezing measure ends by voluntary payment of the amount due by the person concerned or from the moment the tax collector has taken the necessary precautionary measures to recover the due amount. The purpose of the freezing measure is, of course, to inform the tax collector of the existence of funds, so that he can take the necessary executive measures to recover the frozen assets. Those who have to execute the freezing action must maintain absolute secrecy about the measure. The removal of the assets, the object of the action, is punishable.

IV. Critical Remarks on the Belgian FEI

The Belgian FEI causes different problems, both practically and theoretically. Practically speaking, it has to be remarked that the COSC, which plays a crucial role in the FEI according to the legislator, consists of four magistrates. These magistrates are also in charge of the management of the office and have the ultimate responsibility for the execution of the other competences of the agency. The investigation of the solvency of convicted persons by means of a separate competence within the office was never carried out in practice in the past, due to capacity problems.

As already said, the special financial investigation was also not applied in practice in the past. Therefore, we ask ourselves whether the new FEI is not already doomed to failure, before it has even been introduced into the law. Until now in Belgian law, the judge in charge of the administration of sentences, who has to authorize coercive measures, is only competent for prison sentences and is now already overloaded with work. The competences concerning the new financial investigation are completely new. These new competences will cause capacity problems and, of course, the law on this point will have to be changed, too.

On the theoretical level, there are even more problems. A first problem concerns the cooperation with the tax collector. Can crime-related assets, seized in the course of a FEI, be transferred to the collector without further ado, or is seizure according to the rules of civil law necessary? Criminal seizure by the public prosecutor and civil seizure by the tax collector are two completely different procedures according to Belgian law. Can the tax collector appropriate funds on the basis of a measure of seizure by the public prosecutor, even if the funds were confiscated somewhere in the past? It is to be feared that the transition of assets, seized by the prosecutor and transferred to the tax collector, will cause severe problems, especially when third parties can assert their rights to the seized assets. A second problem arises when sums of money are seized that are in the hands of third persons who are not only holders of the money but are *prima facie* even proprietors in the legal sense of the word. The same problem, which caused the intervention of the judge in charge of the administration of sentences in the course of the investigation, arises here too. Can funds in the hands of third parties, be seized and transferred to the tax collector just like that, or are complicated judicial procedures ('*actio pauliana*') by the collector necessary to make him competent to transfer the funds to the Treasury?

A related problem is that of the protection of the rights of third parties who are affected by the new procedure. The rights of third parties are not regulated in the new bill. The new FEI makes it possible to execute a judgment of confiscation, confiscation being a punishment, possible on assets, which judicially belong to third parties, on the basis of an investigation, conducted by the public prosecutor, without intervention of any judge at all. Third parties are not judged, and their rights are not protected. A further problem is the international cooperation regarding the execution of the FEI, it being a procedure *sui generis*. The new procedure was especially introduced for those cases in which assets are transferred to foreign countries. The existing legal instruments are probably sufficient for the seizure of such assets, but insurmountable difficulties will most probably arise when those assets have to be transferred to Belgium.

The most fundamental objection against the new procedure, however, is that the new FEI to a large extent makes double use of already existing procedures. Hiding illegal assets is a crime as such, namely the crime of money laundering, which can be investigated and sanctioned by conventional methods, with respect of the rights of all parties concerned. Art. 505, § 1, 4° of the Belgian Penal Code punishes the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing or having to know from the outset that such property is derived from criminal activity or from an act of participation in such activity. This article not only makes punishable those who hide criminal assets but also punishes *self-laundering*, the act whereby the person who committed the predicate offence himself hides those assets.

According to Belgian law, confiscation of assets, the subject of the crime of money laundering, is compulsory. Moreover, there is no condition of ownership with regard to the criminal assets. This means that assets can be confiscated, even if they formally belong to third parties.[18] Also, a value-based confiscation is explicitly possible by law since 2007.[19] According to Belgian law, money laundering is an autonomous crime. A link with a precise predicate offence need not to be proven. The only circumstance that has to be proven as regards criminal prosecution and conviction for money laundering is that the judge can exclude, on the basis of the criminal file, every lawful origin of the criminal assets.[20] A conviction for hiding criminal assets can thus be incurred even if the predicate offence is the object of a previous condemnation.

V. Conclusion

The new Financial Execution Inquiry is a measure that will cause numerous problems when applied in practice. To a large extent, it makes double use of existing measures and procedures and, in fact, it is superfluous given the fact that the concealment of property, derived from criminal activity, is now already a crime on its own, which can be investigated and punished by the normal rules of criminal procedure that observe the rights of everyone implied in the case. As such, the new Financial Execution Inquiry does not solve the problems related to the execution of confiscations. Besides the practical obstacles, like problems of capacity on the part of the authorities charged with the investigations, fundamental problems arise concerning the protection of the rights of the persons whose possessions are to be investigated.

Unquestioningly adopting the Dutch example is not a good idea, considering the differences in judicial culture between Belgium and the Netherlands. The Dutch legislator focused on the aspect of deprivation of criminal assets and created a coherent legislation in this respect. The fight against money laundering was only really brought to the attention of the Dutch legislator at a later stage. In Belgium, the situation was exactly the opposite. In Belgium, the aspect of deprivation was neglected until the beginning of this century, and a lot of work remains to be done in the field of legislation. Unlike the Dutch legislator, the Belgian one had concentrated on the fight against money laundering from the start and, since the 90s, a preventive and repressive legislation was developed that acts as a model for other countries.

We dare to suggest that the problem of the execution of confiscation orders in Belgium should preferably be solved by a more efficient application of existing legislation to the field of money laundering. In connection with this suggestion, it is hoped that Belgian authorities will consider the establishment of a Ministerial Committee and a College for the coordination of the fight against money laundering. In these institutions, all actors involved in the fight against money laundering would be brought together to coordinate the fight against money laundering in a more efficient way.

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1. E.g. Arts. 7, 42 and following, 43*quater* § 3, *in fine* and 505 Belgian Penal Code.↩
2. In Belgian law, a 'verbeurdverklaring bij equivalent' (Dutch) or a 'confiscation par equivalent' (French).↩

3. According to a recent press release of the Secretary of State, in charge of the fight against fraud, the Belgian FIU reported a sum of €2.2 billion presumably laundered money to the Public Prosecution Service in 2012. In the same year, €33 million in fines and confiscations were imposed. It is totally unclear which amount can actually be recovered.↩
4. In Dutch: 'strafuitvoeringsrechter;' in French: 'le juge de l'application des peines'.↩
5. According to Belgian law, the assignment of an investigating judge is broader than granting authorization to execute coercive measures. When, within the framework of a criminal investigation, an appeal is made to an investigating judge, he takes over the entire investigation from the public prosecutor.↩
6. In Dutch: 'Centraal Orgaan voor de Inbeslagneming en Verbeurdverklaring;' in French: 'l'Organe Central pour la Saisie et la Confiscation'.↩
7. Unlike the intervention of the investigating judge in a criminal investigation, the intervention of the judge in charge of the administration of sentences is limited to the issuing of an authorization. After the authorization, the investigation is continued by the public prosecutor.↩
8. The Council of State asked itself this question for methods of investigation that are subject to very strict conditions according to Belgian law, e.g., tapping a telephone line. Furthermore, the Council of State noted that investigative measures like telephone tapping are only possible for a limited number of very serious crimes, which are exhaustively accounted for in the Code of Criminal Procedure. This limitative enumeration cannot be found in the preliminary bill. Thus, we have to conclude that these very intrusive methods of investigation are also possible in a FEI concerning all types of crime but are subject to very strict conditions during criminal investigation, which seems to be discriminatory.↩
9. Strafrechtelijk Executie Onderzoek.↩
10. Arts. 577ba to 577 bg of the Dutch Code of Criminal Procedure, effective since 1 July 2011.↩
11. In Dutch criminal law, there are six categories of fines. A crime for which a fine of the fifth category can be imposed allows the judge to impose a maximum fine of €78,000.↩
12. Strafrechtelijk Financieel Onderzoek.↩
13. In Belgium: 'the investigating judge'.↩
14. In Dutch: 'bijzonder onderzoek naar vermogensvoordelen'.↩
15. Wet van 19 december 2002 houdende uitbreiding van de mogelijkheden tot inbeslagneming en verbeurdverklaring in strafzaken, *Belgian Official Journal*, 14 February 2003.↩
16. *Parlementary Documents*, Belgian Chamber of Deputies, Doc 50 1601/001, pp. 12 – 14, www.dekamer.be;↩
17. Modified by the law of 30 December 2009, *Belgian Official Journal*, 15 January 2010.↩
18. These third parties have the right to exert their rights to the confiscated assets before a judge; this statutory regulation is included in a Royal Decree of 9 August 1991, *Belgian Official Journal*, 17 October 1991.↩
19. In our opinion, a value-based seizure is also possible, but the fact that this is not explicitly foreseen by law causes some authors to consider this to be a legal vacuum; perhaps the law can be specified on this point in the future.↩
20. Inter alia Court of Cassation, 25 September 2001, *Arr. Cass.*, 2001, no. 493.↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union